Neutral Citation Number: [2023] EWHC 2971 (Ch)

Claim No: BL-2021-001800

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

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

Date: 01/12/2023

Before:

HH JUDGE KLEIN SITTING AS A HIGH COURT JUDGE

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Between:

FLORESTCO LIMITED	**Claimant**
- and -	
(1) THE HILLVIEW GROUP LIMITED	
(2) HILLVIEW REAL ESTATE LIMITED	
(3) HILLVIEW ALFA HOLDINGS LIMITED	
(4) NADAV LIVNI	
(5) HILLVIEW ADVISORS LIMITED	**Defendants**

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James Stuart (instructed by **Spencer West LLP**) for the **Claimant**
Nicholas Trompeter KC (instructed by **Addleshaw Goddard LLP**) for the **First, Second, Fourth and Fifth Defendants**

Hearing dates: 20-23, 26-29 June, 17 August, 20 September, 11-12 October 2023

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Approved Judgment

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

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HH JUDGE KLEIN

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 a.m. on 1 December 2023.

HH Judge Klein:

1. This is my decision following a twelve day trial of a claim about a failed property investment, brought by a dissatisfied investor, the Claimant ("Florestco"), against those who devised and/or managed the project or who are said to have done, the Defendants.

2. The property in question is Elm Park Court, which is at Tilgate Business Park in Crawley ("the property"). As marketed in an investment memorandum dated June 2014 ("the Investment Memorandum") by the Second Defendant ("Real Estate"), the investment proposal was broadly as follows. A special purpose vehicle, Hillview Crawley Ltd. ("Crawley"), would buy the property, which would be Crawley's only asset. At the time of purchase, the property was wholly, or partly, let and it was proposed that, following termination of the lease(s), and with remaining funds from initial investments, rent, settlement sums paid by the tenant(s) for dilapidations and a bank loan, the property would be refurbished (possibly with the internal lettable area being increased) and then re-let on commercial terms. The property would then be sold at a profit with a return to investors, or further financing would then be obtained so that there could be a partial return to investors. As the business plan in the Investment Memorandum explained:

> "Upon completion engage with head-tenant to commence dilapidations/reverse premium negotiations in advance of their lease expiry. Commence parallel negotiations with sub-tenants regarding lease extension terms. Upon conclusion of these negotiations and if appropriate, commence professional work to increase floor areas for rentalisation. Facilitate a liquidity / exit event upon conclusion of the above asset management by either debt re-financing or asset sale. Offer investors the opportunity to exit at this juncture or remain invested for the long-term."

There were intended to be eight investment units each of £500,000 and the proposal was that each investor would subscribe for (at least) one investment unit. Florestco subscribed for one investment unit. As I have said, the investment failed and Florestco and the other investors (in that capacity) lost the whole of their investments. In August 2020, Real Estate circulated a note ("the August 2020 note") to investors in which it said:

> "…This investment has not worked out as had been intended for either the investors or the manager. We would like to provide some insight into the investment and the regrettable outcome.
>
> …Whereas the demand from occupiers was strong when the property was acquired in 2014 and thereafter during the period when the refurbishment works were carried out, a major change in sentiment occurred in 2016, with the United Kingdom voting to exit the European Union ("Brexit"). Brexit had a severe negative effect on sentiment for prospective occupiers to sign new leases…Ironically, in January 2020 the local market sentiment turned positive following the strong election results

> in December 2019 and we had several serious lease enquiries. Unfortunately, this positive sentiment was extremely short lived, with the rampant spread and impact of Covid-19. The local and surrounding markets suffered significantly…
>
> During this time the manager actively explored a wide range of alternative uses for the property…Unfortunately, none of these resulted in an economically viable investment plan. Santander Bank which throughout this period has supported our investment thesis is not prepared to extend its loan any longer due to the change in market circumstances.
>
> At this stage, in our opinion, we do not see the prospects of the area improving significantly to justify holding the property any longer or investing in further capex. Our analysis (confirmed by a new independent appraisal) shows that there is potentially more downside risk to holding the property. We therefore instructed multiple agents to seek the best price for the property. We have received three serious offers from developers ranging from £2.1 million to £2.5 million. The highest offer we obtained is not based on any consent being first obtained for conversion to residential. In our discussions with the other prospective residential developers we explored forming a joint venture with them, but cannot support a credible strategy to achieve a higher exit value.
>
> Based on a sale price of £2.5 million and associated costs of sale, regrettably there will be no return of any equity to investors. From the proceeds received, we will repay the existing loan with Santander and a portion of the funding provided by Hillview Group to support the holding costs.
>
> However, the balance of the Hillview Group funding will be written off. The manager will also write off accrued asset management fees, as well as its equity investment in the company.
>
> We deeply regret having to write this note and to report this outcome to you. This project has been undermined by a combination of the Brexit referendum and the Covid-19 pandemic. The effect of these events has been devastating to the local area, businesses, employees, residents and ourselves. We are extremely sorry at such an outcome and are available to discuss further."

This note not only disappointed Florestco, it also caused it concern because it revealed, for the first time according to Florestco, that the "Hillview Group" (in fact, the Defendants say, the Third Defendant ("Alfa")) had lent money to Crawley and, more troublingly from Florestco's perspective, that the Hillview group (Alfa) would be receiving some of the net sale proceeds,[1] whereas third party investors, such as

[1] As, according to the Defendants, it in fact did, in the sum of £674,895.

Florestco, would not. In short, Florestco felt cheated (or felt, at least, that the project managers (the Hillview group) were preferring themselves), and so began this claim in due course.

3. What was, at a basic level, a straightforward investment proposal, was complicated by the structuring of the investment, the structure of the companies involved in the promotion and management of the project, the nature of the investors and the sources of investment funding. The complications which I have in mind were almost an inevitability where, as here, the investment proposal was marketed to offshore high net worth individuals by what is, in effect, a boutique investment promoter behind which stands a largely offshore corporate structure.

4. Added to this complexity must be the way Florestco puts its case. At the heart of its case is a claim that its £500,000 investment was induced by fraudulent misrepresentation and a further claim that the truth was then hidden from it by an unlawful means conspiracy to which some or all of the First to Fourth Defendants were party. It is a rare case where a fraudster leaves an unambiguous paper trail or some other smoking gun. This case is not one of those rare cases. Rather, this is a case where the claim depends, in part at least, on inference.

5. Understandably, therefore, Florestco's pleaded case is a broad one (for example, with a single paragraph pleading the falsity of the alleged representations running to three and a half A4 pages), and it hoped, I have concluded (in part in the light of two extempore judgments I delivered during the course of the trial, and as demonstrated by Mr Stuart's written closing submissions), that, if its case which has been particularised was not established at trial, nevertheless something might come out in cross-examination on which it could hang its broad case. For the reasons I gave in particular in my extempore judgment on the first day of trial, and by reference in particular also to *Three Rivers DC v. Bank of England (No.3)* [2003] 2 AC 1, whilst Florestco's approach is understandable, it is not acceptable. I had hoped that this would be clear to the parties following my two extempore judgments but, as I have indicated, Mr Stuart's written closing submissions advanced an unpleaded case, which, notably, so far as it relates to what I refer to below as the Pattern Payment (e.g. at paragraph 41 of the submissions), was the case which I found, in my first extempore judgment, had not been pleaded and which, in the second extempore judgment, I did not permit Florestco to advance save to a very limited extent. As it seems that the correct approach to pleading which I set out in the two extempore judgments needs to be repeated, I will cite again two authorities I referred to then; namely:

   i) *UK Learning Academy Ltd. v. Secretary of State for Education* [2020] EWCA Civ 370, where David Richards LJ said, at [47], in part:

      "…the statements of case ought at the very least to identify the issues to be determined…"; and,

   ii) *Three Rivers*, where Lord Millett said, at [186]:

      "…At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer

> dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty…"

To be clear, I have determined this case on the basis of the parties' statements of case. There are no exceptional circumstances which justify a departure from that approach in this case (save to a minor extent I refer to in footnote 3 below).

6. The principal purpose of a judgment is to explain to the parties why a particular decision has been made. I have considered (and re-considered) carefully Florestco's Re-amended Particulars of Claim and the way its witnesses presented its case in their evidence. On this material, it is clear to me why, in truth, Florestco contends that it was misled into making, and then retaining, its investment. In particular, it is clear to me why Florestco, in truth, believes that what it alleges was represented to it before it made its investment was false. It is possible to formulate the representations which Florestco must establish were made as the basis for its principal fraudulent misrepresentation claim by considering as a whole the falsity allegations Florestco makes. It may be said that this looks at the fraudulent misrepresentation claim from the wrong end of the telescope but, in the particular circumstances of this case, any other course would be positively unhelpful to the parties, leading to an overly long and unnecessarily complicated judgment which considers matters which I am satisfied do not affect the outcome of the case. I offer two justifications for this approach if needed. First, a fair reading of the whole of the Re-amended Particulars of Claim clearly establishes what Florestco is really complaining about. Secondly, taking into account the Re-amended Particulars of Claim and the evidence of Florestco's witnesses (in particular, Mr Ragimov), it is clear to me that, if statements which I do not expressly consider in this judgment were made and were in fact false then they were false in non-material respects (that is, they were false only on matters of unimportant detail) and so are not actionable (see, for example, *Raiffeisen Zentralbank Osterreich v. The Royal Bank of Scotland* [2010] EWHC 1392 (Comm) at [149]).

7. What this means in short is that, in this judgment, I do not set out verbatim Florestco's case on the alleged representations. Nor does this judgment consider every way any representations which Florestco establishes might have been false. Rather, I consider Florestco's misrepresentation case in more or less broad, but nevertheless accurate, terms, and, when considering the principal misrepresentation claim, this judgment focuses on Florestco's particularised case (reinforced by its witness evidence) about how any representations were materially false. That is not to say that, in reaching my decision, I have not considered all the evidence I heard or to which I was referred, or all of the parties' submissions. To the contrary, I have considered (and re-considered) all the material put before me. It is simply that, for this judgment to explain my decision to the parties, it focuses on that decision and the reasons for it.

8. Florestco was represented at trial by James Stuart of counsel and the participating Defendants were represented by Nicholas Trompeter KC. I am grateful to both of them for their significant help throughout the trial.

9. I must begin with some explanation about the parties.

<u>The parties</u>

10. Florestco is a Cyprus-registered company. Mr Eliusha Ragimov is an Israeli high net worth individual who has become wealthy from international property, and other business, investments. He has been heavily involved in some very complex and, by his own account, "huge" projects including the taking public of the Russian subsidiary of one of the biggest Israeli public companies (during which project he met the Fourth Defendant ("Mr Livni")). Florestco is effectively the vehicle through which Mr Ragimov's wealth is managed. Mr Ragimov owns 90% of Florestco's shares. The remaining 10% are owned by Mr Igor Solomon, whom Mr Ragimov describes as his "business partner and an executive in [his] private company [(that is, Florestco)]". The clear picture which both Mr Ragimov and Mr Solomon painted is that Mr Ragimov makes the strategic decisions about how Florestco's funds are to be deployed, sometimes in consultation with Mr Solomon, whose judgment and advice Mr Ragimov values, leaving Mr Solomon, as the "executive", to practically implement Mr Ragimov's decisions and to advise and update Mr Ragimov about matters he discovers in the process of implementing those decisions.

11. The corporate structure of the Hillview group of companies is complex. Although I discuss that corporate structure mainly in the present tense, technically I set that out as I understand it to have been at key times in the chronology of events.

12. In a January 2011 brochure, the Hillview group described itself thus:

> "The Hillview Group is an independent, privately owned Merchant Bank which specialises in providing institutions with strategic advice, growth capital and innovative financial solutions, and private investors with tailored co-investment opportunities and dedicated investment management expertise
>
> Since forming in 2006 THG has conducted over $2.5 billion of principal investments and strategic capital market transactions in several continents and industry sectors
>
> Investment activities are focused on core sectors where THG has deep insight, management expertise and established proprietary transaction origination networks
>
> THG are principal investors as well as trusted advisors, employing a relationship-driven business model, founded on aligned interests through co-investment and management collaborations
>
> Leveraging its Merchant Banking and Wealth Management activities enables THG to provide institutions with commercial advice and private investors with innovative co-investment opportunities that are conceived, structured and managed in-house
>
> THG actively supports successful management teams with compelling business operations by providing capital and management expertise to achieve value creation

> THG develops and invests in tailored real estate and fixed income products for its own investment requirements and invite our qualified partners to co-invest at the same terms
>
> THG's investments are structured to be transparent, provide regular reporting, adhere to the highest standards of corporate governance and provide multiple exit options for maximum liquidity."

Worth noting is the emphasis, in this brochure, on the Hillview group's own role as an investor and on its co-investment model. Also worth noting is the reference to its reporting practices. The brochure also described Mr Livni as the founder of the group.

13. The ultimate parent company in the group since 2016 has been Hillview Group Holdings Ltd. ("Holdings"), a Guernsey-registered company. The ultimate beneficial owner of Holdings is the Pegasus Trust, Mr Livni's family trust (which may be an offshore trust, although nothing turns on this). Mr Livni is a director of Holdings, along with two Guernsey-based directors.

14. The First Defendant ("Group") is a wholly-owned UK-registered subsidiary of Holdings, of which Mr Livni is the sole director. Before Holdings' incorporation in 2016, Mr Livni was Group's sole shareholder (perhaps through a trust and via a Cyprus-based holding company (perhaps with a board which included two Cyprus-based directors, but under his control), according to evidence he gave in cross-examination). Real Estate is a wholly-owned UK-registered subsidiary of Group. The Fifth Defendant ("Advisors") is another UK-registered subsidiary of Group. 30% of the shares in Advisors are owned by Group and 70% of the shares in Advisors are owned by Mr Livni. Advisors is regulated by the Financial Conduct Authority ("the FCA"), as is Mr Livni.

15. Hillview Capital Ltd. ("Capital") is a Guernsey-registered wholly-owned subsidiary of Holdings. (Whilst it was suggested, in submissions, that Capital was not incorporated before 2016, that is inconsistent with the contemporaneous documentary evidence and is not supported by any admissible evidence.) Mr Livni is a director of Capital (along with two other Guernsey-based directors (who were also the directors of Alfa and Crawley)). Alfa is a Guernsey-registered subsidiary of Capital. Alfa has (or, rather, had (as to which, see further below)) two Guernsey-based corporate directors at the material times (as I have just mentioned). 10% of Alfa's shares are owned by Capital. 90% are owned by what has been described by Mr Livni as a "passive financial investor" (which I take to mean, an investor who is not involved in any way in the company's decision-making), which is apparently Landmead International Ltd. ("Landmead"). Crawley is a Guernsey-registered subsidiary of Alfa and has the same directors as Alfa.

16. Whilst it is correct to describe Crawley as Alfa's subsidiary, that is only because of the way the project came to fruition. As I have explained, Florestco subscribed for one of the eight investment units on offer. That subscription was formally given effect to by the allocation to it of 12.4% of Crawley's shares by way of a share purchase agreement between it and Alfa. Other third party investors which had subscribed for about two investment units were allocated 23.6% of Crawley's shares, presumably in a similar way. Perhaps because no further third party investors could be persuaded to

subscribe for investment units, Alfa obtained, or retained, the remaining 64% shareholding in Crawley, which equates to the remaining approximately five investment units available. In return for what contribution to the project Alfa (or, more generally, the Hillview group) obtained, or retained, that shareholding is at the heart of the dispute.

17. Although Mr Andre de la Mare, a representative of Crawley's Guernsey-based directors who gave evidence for the Defendants, was keen to suggest that any decisions Crawley's directors made were independent decisions made in the company's best interests, and although Mr Livni keenly supported that suggestion, both in relation to Crawley and more generally I understood, on the Defendants' own case the reality has been more nuanced.

18. On their case, the directors of both Crawley and Alfa, being corporate directors based in Guernsey, did not manage those companies on a day to day basis. The directors depended for their decisions on "recommendations" which were received from Mr Livni or his team. Those recommendations were, from the examples I was referred to, no more than instructions with the barest of supporting information and, even if there were recommendations any more detailed than that, the directors' decisions depended entirely on what information Mr Livni or his team provided to them. Mr Livni's team provided the information to support the more mundane, day to day, recommendations but, on Mr Livni's own evidence, he was ultimately responsible for the more strategic recommendations, which is entirely consistent with his control of the Hillview group.

19. As it happens, this description of the way Crawley's directors carried out their functions is too neutral. I discuss below, in detail, what I refer to as the Pattern Payment. As I comment then, the reality is probably that they acted merely on the instructions of the Hillview group and did not exercise any independent judgment, and that Mr Livni's control of the group was almost total.

20. Before concluding this section of the judgment, I should say something more about Alfa. Alfa was not represented at the trial. About 6 weeks before trial, Alfa's directors resigned, and Addleshaw Goddard, who had previously acted for Alfa and who continue to act for the other Defendants, ceased to act for Alfa. No steps were taken before trial by Capital or Landmead to appoint replacement directors. When the trial began, the position was that Alfa was liable to be struck off the Guernsey register of companies, but that that was not expected to happen before the conclusion of the proceedings. On 27 July 2023, during the first period when the trial was adjourned part-heard, Alfa was in fact struck off the register and was dissolved in consequence. On 16 August 2023, again during the first period when the trial was adjourned part-heard, Alfa was restored to the register. I am not aware that Alfa has since been struck off the register a second time, although, if it has, nothing really turns on that for the purposes of this judgment. Mr Livni has said that Alfa has no assets (which may explain why, in practice, Florestco pursues its unlawful means conspiracy claim in addition to its breach of contract claim (which is only brought against Alfa)).

The claim

21. Florestco's first claim is for fraudulent misrepresentation ("the 2014 misrepresentation claim"), as I have said.

22. It claims that misrepresentations were made in the Investment Memorandum and/or (so far as is relevant for this judgment) by Mr Livni, principally in telephone calls on 26 June 2014 and 3 July 2014.

23. Florestco claims that there were representations which were to the effect that:

    i) the Hillview group intended that its participation as an investor in the project would be on the same terms as third party investors, in particular Florestco (so that, to the extent of the group's participation, it would truly be a "co-investor" with Florestco), and, in particular, that the Hillview group's participation as an investor would not be by way of a loan ("the Loan Representation");

    ii) the Hillview group intended that the amount of any loan for capital expenditure, in particular, for refurbishment of the property, "would be reported clearly and accurately to the investors."[2]

24. On a fair reading of the Re-amended Particulars of Claim, Florestco claims that, induced by the Loan Representation, it subscribed for one investment unit and, in return for its £500,000 payment, was allotted 12.4% of the shares in Crawley pursuant to the share purchase agreement, dated 19 August 2014, between it and Alfa ("the SPA").[3]

25. Florestco claims that the Hillview group did not intend to invest in accordance with the Loan Representation immediately before Florestco entered into the SPA, so that the representation was false and fraudulently made. Florestco contends that I should infer the Hillview group's absence of intention from the following facts and matters it alleges:

    i) Alfa's participation in the project as an investor was by way of an interest-bearing loan to Crawley; in particular, pursuant to a written loan facility agreement, dated 17 September 2014 (but which Florestco now accepts was executed (or to use the language of Mr Stuart's written closing submissions,

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[2] This alleged representation does not take Florestco's case anywhere, because, despite what is pleaded elsewhere in the Re-amended Particulars of Claim, Florestco's case, pleaded at paragraph 19 of the Re-amended Particulars of Claim, is that, because loan funding was not properly reported, all that happened in response was that it did not try to get back its investment from the Hillview group as it claims it would have done if it had been told the truth. This alleged representation takes Florestco's case nowhere because the relevant counterfactual on the question of inducement is not what a representee might have done if it had been told the truth but, rather, what it would have done had the representation in question not been made (see e.g. per Foxton J in *SK Shipping Europe plc v. Capital VLCC 3 Corpn.* [2020] EWHC 3448 (Comm) at [185]-[188] and per Cockerill J in *Leeds City Council v. Barclays Bank plc* [2021] QB 1027 at [139]). It is Florestco's pleaded case that, but for the Loan Representation (rather than this second alleged representation), it would not have subscribed for an investment unit, as I now mention.

[3] Strictly, the Re-amended Particulars of Claim do not plead what Florestco would have done had the Loan Representation not been made. However, bearing in mind all of what David Richards LJ said in *UK Learning Academy Ltd.* at [47], I think it is appropriate to read the Re-amended Particulars of Claim as I have in this section of the judgment. As I have indicated, however, I am satisfied that, even on a benevolent reading of the Re-amended Particulars of Claim, Florestco's case in relation to the second (alleged) representation must be approached as I have explained in footnote 2.

"concocted")[4] in 2015), between Crawley as the borrower and Alfa as the lender ("the Alfa Loan") which recited:

> "The Lender wishes to make available to the Borrower a facility in the principal sum up to £2,079,952 (the "Loan") on the terms and conditions of this agreement in order to finance the exchange and completion monies required in the acquisition of [the property]."

The Alfa Loan also provided as follows:

> "2 The Borrower must repay the Loan (to the extent that it has been drawn down) in full after receipt of a repayment notice demand in writing signed by the Lender…
>
> 3 The principal amount of the Loan outstanding from time to time will carry up to 8% interest per annum ("Interest") and Interest will accrue on a daily basis on the principal amount of the Loan outstanding, shall be compounded monthly and shall be payable quarterly in arrears (or capitalized, if there is insufficient free cash flow) to the Lender to such account as shall be nominated by the Lender from time to time…
>
> 6 If the Borrower fails to pay any sum (or part thereof) due under this agreement on its due date then the Borrower will pay interest on it (or the unpaid portion, as applicable) at a rate of 12% per annum above the base rate of Barclays Bank plc…until it is paid."

The features of the Alfa Loan on which Florestco relies are:

a) its date. (It needs to be noted that, in an early draft of the Alfa Loan, the date 17 September 2014 is highlighted in yellow, as are square brackets in which the amount of the loan needed to be entered);

b) the description of its purpose;

c) that £2.079 million represents about 80% of the sum which has been treated by the Hillview group as having been invested by it in the project at the outset;

d) that it (the Alfa Loan) was not revealed to Florestco until about August 2020;

ii) Alfa lent Crawley money for capital expenditure on the property (including for the property's refurbishment) (and/or for holding costs) which was kept secret

[4] Similarly, in opening, Mr Stuart explained to me that the Defendants: "created this document [(i.e. the Alfa Loan)] to make it look as though they had loaned £2 million to Hillview (Crawley) Limited, so that when they caused the Guernsey directors of Hillview (Crawley) Limited to pay the entire net proceeds of some actual refinancing (Santander), they had a document which they could use to evidence the purpose of the payment". In his oral closing submissions, Mr Stuart spoke of the Alfa Loan as being kept in "a back pocket" in case the project resulted in a loss.

> from Florestco. This lending may have been by way of the Alfa Loan or, as pleaded by Florestco, by way of some other loan arrangement, although a fair reading of the Re-amended Particulars of Claim suggests that Florestco may be relying only on the Alfa Loan (so that this matter merely repeats the point at sub-paragraph (d) immediately above). (The Defendants aver that Crawley drew down £808,070 under the Alfa Loan between 2016 and 2019 to defray some of the refurbishment costs, holding costs, and Real Estate's management fee.)

26. Florestco therefore seeks rescission of the SPA and principally the return of its £500,000 investment or compensation in an equivalent amount.[5]

27. Florestco's second claim ("the breach of contract claim") is against Alfa only for alleged breaches of the SPA;[6] in particular of clauses 4.4.2 ("clause 4.4.2") and 4.4.3 ("clause 4.4.3") of the SPA which provide:

> "4.4 [Alfa] acknowledges and undertakes that it will:…
>
> 4.4.2 maintain [Crawley's] investment in the property in accordance with the Investment Memorandum, where any material deviations from the Investment Memorandum will require the consent of all of the Shareholders of [Crawley];
>
> 4.4.3 procure that…Real Estate arrange for [Crawley's quarterly statements and annual audited accounts] to be produced and circulated to the shareholders of [Crawley] on a timely basis…"

Florestco also contends that, to give clause 4.4.3 business efficacy, there was implied into the SPA a term that Crawley's quarterly statements would be reasonably accurate and honest ("the Implied Term"). Strictly, Florestco's case, it seems, is that Alfa warranted that Crawley's quarterly statements would be reasonably accurate and honest but, most favourably to Florestco, I will proceed on the basis that it also contends that Alfa promised that it would procure Real Estate to arrange for Crawley's quarterly statements to be reasonably accurate and honest.

28. Florestco claims that Alfa breached the SPA in the following ways:

i) if it is the case, as Florestco alleges, that Alfa's participation in the project as an investor was by way of the Alfa Loan, Alfa thereby did not maintain Crawley's investment in the property in accordance with the Investment Memorandum;

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[5] It is convenient to record here that there is no pleaded, or other, foundation for Florestco's plea, at paragraph 23.1 of the Re-amended Particulars of Claim, that the Defendants, other than Alfa, had a contractual duty throughout the life of the project, to correct the second alleged representation when it is said to have become false. Any contractual liability that Alfa might have had could only arise, on the available material, under the SPA, as, in fact, Florestco pleads. The only pleading of breaches of the SPA can be found in the breach of contract claim to which I now turn.

[6] I understood Mr Stuart to accept in opening that, although Alfa did not participate in the trial, nevertheless Florestco had to prove this claim in the usual way to support its conspiracy claim.

ii) it did not maintain Crawley's investment in the property in accordance with the Investment Memorandum because the Hillview group lent money to Crawley (in particular, the approximately £808,000 the Defendants aver Alfa lent to Crawley under the Alfa Loan);

iii) "the Defendants/[Crawley]" did not "account" to investors for income received "from the property", so that a "failure to pass on to [Crawley] (and thus…the investors including [Florestco]) the income…would not be in accordance with the terms…in the Investment Memorandum", by which, it was helpfully explained during oral closing submissions, is apparently meant that Alfa failed to cause Crawley to distribute correctly the proceeds of the October 2020 sale of the property by failing to cause Crawley to take into account income Florestco claims Crawley had at the time;

iv) very substantial costs beyond those referred to in the Investment Memorandum were apparently incurred, including £259,450 "acquisition costs",[7] £481,883 "landlord holding costs" and £37,764 alleged by the Defendants to be "reserves for wind-down expenses";[8]

v) asset management fees (totalling £124,250) were incurred and for the Defendants to be entitled to claim such fees would not be in accordance with the Investment Memorandum because the management of the project was "incompetent and dishonest". Quite what is the incompetence and dishonesty Florestco alleges in this context is entirely unclear from the Re-amended Particulars of Claim;

vi) Crawley's quarterly statements were "wholly inaccurate and misleading" because:

a) they did not disclose that Alfa had lent money to Crawley;

b) they did not disclose that Crawley had incurred landlord holding costs in excess of £170,000;

c) they did not disclose what the acquisition costs were;

d) they stated that Florestco's participation in the project (its £500,000 subscription) was "safe and available for distribution to [Florestco] and…that a substantial investment profit would be achieved";

e) they did not disclose the true value of the property in 2015 or 2017 (because the Defendants did not disclose two property valuations which had been obtained, one in each of those years);

vii) it caused Crawley to pay £1.35m to the Pattern family office (i.e. to make the Pattern Payment);[9]

[7] Because this is the sum specified, in the Investment Memorandum, for acquisition costs, I think what Florestco is complaining about is that the Defendants cannot justify fees of that amount.

[8] Florestco has not explained how these wind down reserves correlate to the distribution of the completion monies following the October 2020 sale of the property I set out below.

[9] I explain in detail below what this allegation refers to. Under the terms of the Santander Loan, had this sum not been paid out, it would have had to be retained, pending the refurbishment of the property, in a Santander bank

viii) Crawley's quarterly statements and two investment management updates (provided in July and October 2015) concealed that payment and so were "wholly inaccurate and misleading".

29. Florestco claims that, had Crawley's reports been complete and accurate (and so, presumably, had Alfa not breached the SPA by failing to procure Real Estate to arrange for Crawley's quarterly statements to be reasonably accurate and honest), Florestco "would have exited [the] investment [before 2020]" and would either have made a profit on its £500,000 subscription by selling its shares in Crawley (i.e. effectively its investment unit) or would have received back £500,000 by demanding the return of that sum from the Defendants which demand the Defendants would have met.

30. This claim patently relates to alleged breaches of the Implied Term. Florestco does not plead that any breach of clause 4.4.2 was causative of any loss and nothing in Mr Stuart's skeleton argument, in his opening submissions, or in his written and oral closing submissions sheds any light on how Florestco might have suffered any financial loss as a result of any breach of clause 4.4.2. In fact, in his written closing submissions, Mr Stuart said:

> "Alternatively in respect of the breach of contract claim…– the breaches caused loss and damage to Florestco equivalent to either [i] (in respect of the making of the Pattern payment and the consequential steps taken by Ds eventually causing the project to fail) the Claimant's entire £500k lost (+ interest) or [ii] in respect of the false quarterly reporting and investment updates for 2015, the true value of its investment at the date when the material concealment took place – i.e. in 2015 or 2016 or 2017 or 2018 or 2019 or 2020."

Apart from Florestco's complaint that the making of the Pattern Payment was a breach of clause 4.4.2, it is difficult to discern which, if any, of the other breaches of clause 4.4.2 alleged continue to be relied on by Florestco, or, to put it another way, it is difficult to discern which of those breaches is alleged by Florestco to be consequential on the Pattern Payment.

31. Florestco's third claim is against all the Defendants and is said to be "in deceit/fraudulent misrepresentation" ("the 2020 misrepresentation claim"). The claim appears to be based primarily on the fact that the August 2020 note showed that the "Hillview Group additional funding for project" was £1,206,206 but, as now averred by the Defendants, only about £808,000 was lent by Alfa to Crawley under the Alfa Loan, which the note (in reference to the figure of £1.206m) also explained was "provided by Hillview Group to support holding costs". Florestco's case is actually a conditional one, and is expressed to have been brought "if and insofar as the Defendants have in fact deliberately mis-stated (exaggerated) the extent of any unrepaid "holding cost" loan funding which [Alfa] in fact made to [Crawley] by [the August 2020 note] [and subsequently]". It is difficult to discern from the Re-amended

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account (known as the rent account). A separate Santander bank account (known as the blocked deposit account) accrued interest on any credit balance at Santander's usual three month deposit rate from time to time. I was not taken to any evidence which establishes that interest was payable on any credit balance in the rent account or what the rate of that interest might be.

Particulars of Claim what are the (alleged) primary facts from which Florestco invites the court to infer that the Defendants deliberately exaggerated the amount Alfa lent to Crawley (or might have done), but, most favourably to Florestco, I will assume that they are that:

i) in fact Alfa lent less money to Crawley (as the Defendants have averred) or no, or only a minimal, amount;

ii) the Defendants led Florestco to understand that Crawley had only borrowed money from Santander UK plc ("Santander") (from which the Defendants contend Crawley borrowed the net sum of £1,871,956) ("the Santander Loan");

iii) Alfa's participation in the project as an investor was by way of an interest-bearing loan to Crawley;

iv) Alfa lent Crawley substantial amounts for capital expenditure on the property (including for the property's refurbishment) (and/or for holding costs);[10]

v) "the Defendants/[Crawley]" did not "account" to investors for income received "from the property";

vi) asset management fees (totalling £124,250) were incurred;

vii) the Defendants stated that Florestco's participation in the project (its £500,000 subscription) was "safe and available for distribution to [Florestco] and…that a substantial investment profit would be achieved";

viii) perhaps, the Alfa Loan was expressed to be "to finance the exchange and completion monies required in the acquisition of [the property]" and not to support holding costs.

32. Quite where these allegations take Florestco is not clear to me at all, because Florestco does not plead that any representation in the August 2020 note or any representation made later induced it to do anything or not do something. Florestco does plead that, had Alfa not lent money to Crawley, the project would have been profitable, but how this is connected to what is said to have been the Defendants' "deceit" in the August 2020 note (or later) is unexplained. Florestco also pleads that, if Alfa was paid, out of the proceeds of the sale of the property contemplated in the August 2020 note (which in fact completed on 1 October 2020), more than in fact it was entitled to, Florestco has lost the share of that overpayment it was "entitled to".

33. Florestco's fourth claim is for damages for what it claims was an unlawful means conspiracy between the First to Fourth Defendants and/or for dishonest assistance ("the conspiracy claim").[11]

[10] I have already commented briefly about the broad way in which Florestco has pleaded its case. In relation to this claim, Florestco relies cross-referentially on other pleas in the Re-amended Particulars of Claim, including a plea of this primary fact. This plea highlights the risks of a broad pleading. I cannot see how that Alfa lent Crawley substantial amounts for capital expenditure and/or for holding costs (the primary fact alleged) can be the basis for an inference that it was fraudulently misrepresented that Alfa had lent Crawley a particular sum of money.

34. Florestco claims that "from 2014 to 2020 the First to Fourth Defendants reached an agreement or understanding that they would, with an intention to cause loss to [Florestco], use unlawful means to procure breaches of duty by the First to Fourth Defendants". Florestco claims that the conspiracy was implemented by (that is, that the unlawful acts pursuant to the alleged combination as a means of injuring it, were):

    i) the alleged misrepresentations which are the basis of the 2014 misrepresentation claim;

    ii) the contractual breaches (of the SPA) Florestco claims Alfa committed and which I have set out;

    iii) overstating, in the August 2020 note, the amount of Alfa's loan to Crawley.

    Although Florestco does not particularise (i) how it claims the First to Fourth Defendants combined together or (ii) how it claims they intended to injure it, it does allege that it has in fact suffered loss; namely by:

    iv) subscribing for an investment unit and entering into the SPA and, presumably, then losing the whole of the value of that investment;

    v) losing the opportunity to sell its shareholding in Crawley (that is, in effect, by disposing of its investment unit) for a profit;

    vi) not enjoying a share of the profit from the project had it been profitable and not failed;

    vii) if Alfa was overpaid out of the sale proceeds, its share of that overpayment.

35. Apart from asserting that the First to Fourth Defendants committed acts of dishonest assistance, no more is said about that claim in the Re-amended Particulars of Claim and it was a point which was not mentioned at all at trial.

The Defendants' response

36. The Defendants deny the claim on the whole; including that Alfa's participation in the project as an investor was by way of loan. Amongst other assertions they make in the Re-amended Defence are the following.

37. The Investment Memorandum concludes with the following text, which the Defendants rely on in their defence of the 2014 misrepresentation claim:

> "This document relates to the services of [Real Estate]. It has been approved for distribution by [Advisors]…This communication does not constitute investment advice or a personal recommendation…The information in this communication has been prepared in good faith, however, no representation or warranty, expressed or implied, is or will be

[11] Mr Stuart accepted, in his written closing submissions, that, for the cause of action to be complete, the victim of a conspiracy must have suffered damage and, similarly, he accepted in his oral closing submissions that, if the only outcome in Florestco's favour of the other claims is an award of nominal damages against Alfa, the conspiracy claim must be dismissed.

> made and no responsibility or liability is or will be accepted by [Real Estate] or its officers, employees or agents in relation to the accuracy, completeness or fitness for any purpose of this communication…The simulated future performance numbers should not be taken as a reliable indicator of future performance. The information stated, opinions expressed and estimates given are subject to change without prior notice."

("the Disclaimer").[12]

38. Although the Alfa Loan is dated 17 September 2014, it was not agreed or executed until April 2015 (and funds were not drawn down under it until June 2016), and the purpose of the loan was incorrectly described on the face of the document. The true purpose of the loan was to provide working capital to Crawley as and when required. It was intended that the Alfa Loan would be a back-up facility, just in case Crawley needed working capital whilst the property was vacant and so not income-generating. Crawley drew down about £808,000 under the Alfa Loan to cover some costs of refurbishing the property and for holding costs (including interest on the Santander Loan, Real Estate's management fee, insurance and business rates).

39. There was no market for Florestco's shareholding in Crawley (or, to put it another way, there was no secondary market for Florestco's investment unit). In any event, under article 9.3 of Crawley's articles of association, Crawley's board had a complete discretion about whether it registered a buyer of Florestco's shares, which discretion it would have exercised if not satisfied about the buyer's suitability as an investor.

40. The Defendants admit that Real Estate did not "specify to Florestco the specific amount of" the Alfa Loan, but they aver that Florestco always knew that the Hillview group had made finance available to Crawley.

41. They contend that Florestco has lost any right to rescind the SPA for any misrepresentation because, knowing the truth, it concurred in the sale of the property, it sought to enforce its rights under the SPA and it delayed for over a year in taking steps to rescind. Further, they contend that restitutio in integrum is now impossible because Crawley is in liquidation and its shares are worthless.

42. They pleaded a limitation defence to the breach of contract claim but that was not pursued with any vigour at trial; rightly in my view because the SPA is a deed and no limitation period could have expired yet.

43. They made the following further allegations.

44. Any material deviations from the Investment Memorandum were consented to by the shareholders, because, in the case of Florestco, it was kept fully informed about the holding costs for the property.

45. The payment of £1.35m to the Pattern family office (i.e. the Pattern Payment) benefited Hillview Group International Ltd. ("International"), which was responsible for causing this payment to be made.

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[12] The Defendants pleaded a defence based on an Entire Agreement clause in the SPA, but that defence was abandoned, sensibly in my view, by Mr Trompeter in his oral closing submissions.

46. Of the about £808,000 the Defendants aver was drawn down under the Alfa Loan, in fact about £659,000 had been made available to Alfa (for the purposes of the loan) by Capital and another company in the Hillview group, Hillview Partners Property Fund Ltd., which transferred those funds directly to Crawley.

Documentary evidence

47. This is a convenient place to refer chronologically (or almost chronologically in the case of documents the creation of which is disputed, or where it makes more sense to depart from the chronology) to some of the contemporaneous documents mentioned at trial, which either support or undermine the case of one of the parties and which help to contextualise the dispute and the witness evidence.

48. The Investment Memorandum, each page of which is headed with a reference to Real Estate (and which is expressed to offer Real Estate's investors the opportunity to subscribe for (at least) one investment unit), mainly comprises a number of boxes, some of which I have already referred to, including the following:

> **"Asset**
>
> Freehold office investment
>
> **Structure**
>
> | | |
> |---|---|
> | Ownership vehicle | New SPV |
> | Domicile | Guernsey |
> | Investment period | 5 years |
> | Leverage | 0% |
> | Investment units | £500,000 |
> | Reporting | Quarterly |
> | Auditing | Price Bailey |
> | Administration | The Heritage Group |
>
> **Economics**
>
> | | |
> |---|---|
> | Total equity | £4,029,450 |
> | Total net profit | £3,014,672 |
> | ROE (conservative) | 74% |
> | Profit share / hurdle | 25% over 10% |
> | IRR (conservative) | 15% |
>
> **Rationale**

This is a quality asset, originally let on a 25 year lease, in an excellent location. The short term income profile is mitigated by strong occupational demand / limited supply, plus the fact that the building is sub-let to 4 tenants. The head-tenant's dilapidations liability is substantial, and the floor space can be increased by c. 2,400 sq ft via in-fills of 2 x central atriums (successfully completed in an identical building opposite).

Management

Asset	The Hillview Group
Investment	The Hillview Group
Property	Jones Lang LaSalle
Legal	Wedlake Bell LLP
AM fee	1% of GAV

Tenure

Freehold

Business plan

Upon completion engage with head-tenant to commence dilapidations / reverse premium negotiations in advance of their lease expiry. Commence parallel negotiations with sub-tenants regarding lease extension terms. Upon conclusion of these negotiations and if appropriate, commence professional work to increase floor areas for rentalisation. Facilitate a liquidity / exit event upon conclusion of the above asset management by either debt re-financing or asset sale. Offer investors the opportunity to exit at this juncture or remain invested for the long-term.

Funding

Purchase price	£3,550,000
Acquisition costs / fees	£259,450
Capex	£1,243,540
Total	**£5,052,990**

Funded by:

Debt / retained earnings	£1,023,540
Equity funding	£4,029,450
Total	**£5,052,990**

Assumptions	
Acquisition	**£3,550,000**
Net initial yield	11.64%
Entry capital value	£122 psf
Passing rent	£15.07 psf
Refurbishment	
Capex cost	£35.00 psf
Capex capital cost	£1,211,910
Exit	
Exit yield	7.50%
Exit capital value	£248 psf
Exit rent	£20.00 psf
Debt finance (senior)	
Debt provider	n/a
Loan term	n/a
LTV	n/a
Interest rate	n/a
Amortisation	n/a
Arrangement fee	n/a
ICR	n/a
DCR	n/a”

The Investment Memorandum contained details of the head-lease and the sub-leases of the property which were expressed to expire in September 2015. It also contained the following financial data tables which featured heavily in cross-examination at the trial:

Cash flow

Income and expenditure	Totals / year	1	2	3	4	5
Income	**8,721,291**	**328,875**	**97,709**	**290,000**	**507,500**	**7,497,207**
Asset/investment management	150,875	26,625	35,500	35,500	35,500	17,750
Administration	7,544	1,331	1,775	1,775	1,775	887
Accounting	7,544	1,331	1,775	1,775	1,775	887
Valuation	7,544	1,331	1,775	1,775	1,775	887
Empty rates	76,262	0	50,841	25,421	0	0
Service charge voids / shortfalls	0	0	0	0	0	0
Letting fees / marketing costs	57,850	0	14,350	43,500	0	0
Total expenditure	**307,618**	**30,619**	**106,016**	**109,746**	**40,825**	**20,412**
Debt finance	1,034,967	0				1,034,967
Total cash flow before debt finance	**7,378,706**	**298,256**	**8,307**	**180,254**	**466,675**	**6,441,828**

Equity finance	Totals / year	1	2	3	4	5
Acquisition	3,550,000	3,550,000				
Acquisition costs	209,450	209,450				
Structuring	50,000	50,000				
Senior debt arrangement fee	0	0				
Mezz loan arrangement / exit fees	0	0				
Other debt arrangement / exit fees	0	0				
Equity reserve for capex loan interest	220,000	220,000				
Cash flow shortfalls	0	0			0	0
Total equity cash flow available for distribution	**3,349,271**	**3,731,193**	**8,305**	**180,257**	**466,679**	**6,441,833**
Net balance of shareholder loan / total profit		**3,731,193**	**3,739,498**	**3,559,240**	**3,092,561**	**3,349,271**
Gross annualised IRR	**18%**					
Gross ROE	**83%**					

Finally, as I have already mentioned, the Investment Memorandum contained the Disclaimer.

49. Mr Sheldon Reed, Real Estate's asset manager, sent a copy of the Investment Memorandum to Mr Solomon under cover of an email dated 26 June 2014 (the first of the dates when Florestco claims oral misrepresentations were made). The email said:

> "It was good to see you on Tuesday.
>
> As discussed, please find attached…
>
> - [the] IM…
> - HRE Exec summary (for background).
>
> We look forward to hearing your thoughts, and would also be happy to join you in conversation / speak directly to investors in these regards."

50. Mr Solomon replied (copying in Mr Ragimov) on 29 June 2014, saying:

> "We carefully looked into the Crawley investment opportunity and will communicate to you our allocation request as agreed during our latest conference call."

Mr Solomon also sought clarification of certain matters, including:

> "Do we understand well that all positive cashflow will be distributed, meaning there will be distribution from rental income in the years 3 and 4?"[13]

51. Mr Solomon continued to seek clarification of practical matters thereafter.

52. Louis Ditz, the Hillview group's in-house lawyer, emailed Mr Solomon and Mr Ragimov Crawley's corporate documents on 22 July 2014 and explained:

> "The issued share capital will be increased at the time of subscription to 4,032,000 from the originally issued amount of 100."

53. Contracts for Crawley's purchase of the property were exchanged on 18 August 2014.

54. As I have already also mentioned, the SPA was entered into on 19 August 2014. I have already set out some of its terms. In the definitions and interpretation clause (clause 1), Real Estate was described as "the Asset Manager of the property whose responsibilities include the arrangement, oversight and circulation of the Financial Reports to the shareholders of the Company".

55. Also on 19 August 2014, according to Crawley's share register, First Green Ltd. (as Alfa's nominee) was recorded as the proprietor of 2.582 million shares in Crawley, having been registered as a shareholder on Crawley's incorporation on 16 July 2014, of 50 of the 100 shares initially allotted. Second Green Ltd., the holder of the other 50 shares initially allotted (apparently also as Alfa's nominee), ceased to be a shareholder in Crawley on 19 August 2014 as well, according to the share register.

56. As I have mentioned, the Alfa Loan is dated 17 September 2014, but, until the parties' closing submissions, there was a dispute about when it was actually entered into (and, indeed, about when it was created).

57. On the same date, 17 September 2014, International made a SWIFT transfer of £1.26 million to the client account of Wedlake Bell LLP ("Wedlake") which was expressed to be for the acquisition of the property.

58. Crawley's purchase of the property completed on 19 September 2014.

59. Santander made a loan facility offer, and provided heads of terms, to the Hillview Group, by which Crawley was expressed to be the intended borrower, on 25 January 2015.

60. Crawley issued a share certificate (certificate number 9) to HG Nominees 1 Ltd. (as Alfa's nominee) for 2.457 million shares on 27 January 2015. These shares were those which had previously been hold by First Green Ltd. (save for the remainder of First Green Ltd.'s original holding which had been syndicated to a third party, Capricorn Crown Holdings Ltd. ("Capricorn")).

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[13] Documents internal to Florestco reveal that Mr Solomon had understood that such distributions would not be made. However, Mr Avi Barzilay (an investor with whom Mr Ragimov and Mr Solomon had business dealings) suggested to Mr Solomon that the Investment Memorandum suggested that there would be such distributions. Mr Barzilay reached that conclusion because, in the second "Cash Flow" table in the Investment Memorandum "equity cash flow available for distribution" was shown in years 3 and 4.

61. In March 2015, Ms Zwarich apparently prepared a loan amortisation schedule relating to the Alfa Loan which calculated interest on the Alfa Loan arrangement from 17 September 2014 to May 2015 on the whole of the contemplated facility (£2.079 million). The schedule appears in Crawley's 2015 ledger which was last modified in August 2015 in a sheet marked "NA – Shareholder Loan". The ledger contains another sheet, labelled "Shareholder balance" which has an entry "(Shares HC) – loan" which apparently refers to a sum of about £1.26 million and a separate entry, apparently relating to the same amount, which is attributed to "[Alfa] ([Landmead] loan)".

62. On 13 April 2015, Mr Ditz emailed Trina Zwarich, the Hillview Group's finance manager, apparently attaching a loan agreement:

> "This is the proposed [Alfa Loan] agreement – can you please assist with the loan amount?..."

63. On 21 April 2015, Mr Ditz sent a draft of the Alfa Loan to Wedlake. The Hillview group's solicitor at Wedlake, Matthew Lindsay, then circulated the draft documents to Alfa's and Crawley's directors.

64. The minutes of a meeting on 22 April 2015 of Crawley's board record that the following draft documents were produced at the meeting: a Santander Loan agreement, (what is said, by the Defendants, to be) the Alfa Loan, a subordination deed relating to (what is said, by the Defendants, to be) the Alfa Loan and a draw down notice in relation to it. The minutes also record that the board approved a proposal to enter into the Santander Loan agreement and into (what is said, by the Defendants, to be) the Alfa Loan, as well as into the other documents produced.

65. The documents were then circulated, by Crawley's directors to Santander's solicitors amongst others.

66. The Santander Loan agreement is dated 23 April 2015. It records that the parties were Crawley and Santander, as I have indicated, and that Santander was thereby providing Crawley a term loan facility of £1,901,325. The purpose of the facility was expressed to be "towards refinancing the purchase of the property, certain refurbishment costs and associated costs and expenses". Crawley had to draw down the funds in a single tranche within 14 days from and including 23 April 2015. Loan repayments of £41,500 were payable each quarter from the second anniversary of drawdown date. Interest accrued on the loan at 2.5% pa above LIBOR and was payable quarterly after the drawdown date. By the loan agreement, Crawley was required to keep £450,000 initially in a Blocked Deposit bank account, effectively as security for any payment default under the loan agreement. A fee of £19,013.25 was payable by Crawley to Santander as an arrangement fee for the loan facility. By clause 18.8 of the loan agreement, Crawley undertook (for present purposes) that it would not enter any loan, without Santander's prior written consent, other than "Subordinated Loans"; that is, pre-existing loan arrangements with Alfa.

67. By the subordination deed also dated 23 April 2015, between Alfa, Crawley and Santander, Alfa agreed to subordinate all its loans to Crawley to the Santander Loan ("the Subordination Deed"). The Subordination Deed defined "Subordinated Documents" as:

> "…the documents evidencing or recording the terms of the Subordinated Debt, including, without limitation, the loan agreement dated on or about the date of this Deed between the Borrower and the Subordinated Creditor in respect of a principal sum of up to GBP 2,166,667."

68. Crawley's cash register ("the cash register"), which was maintained by Ms Zwarich, records that Crawley received in its current account £1,859,757.56 on 18 May 2015 from Wedlake, one of Crawley's directors having completed a drawdown notice on 23 April 2015. The sum represented the funds drawn down by Crawley under the Santander Loan agreement net of bank fees, charges and Wedlake's fee. The cash register also shows that the Pattern Payment, of £1,354,590, was made on 3 June 2015.

69. Even though the Santander Loan agreement had been entered into in April 2015 and the funds drawn down, Ms Zwarich emailed Mr Ragimov and Mr Solomon on 17 July 2015 saying that: "we are proceeding well with a bank finance facility and anticipate this will be completed in Q3." Apparently attached to that email was at least part of the cash register which had the following entries (which I partially set out), amongst others:

28/07/2014	Subscription Ragimov Eliusha	500,000
13/08/2014	Investment and completion of acquisition Hillview Capital	22,800
22/08/2014	Investment Funds for completion [Alfa] re Landmead	1,200,000
15/09/2014	Money to assist completion [Mr Livni/Mr Reed] (Hillview Capital)	60,540
17/09/2014	Pattern loan Completion money – [the Hillview group]	1,260,000
21/10/2014	Return of funds to Santander [Crawley] account	220,000

70. To similar effect, on 30 October 2015, Ms Zwarich distributed a memorandum prepared by Real Estate that day, which said:

> "We have made excellent progress in arranging a development facility and are expecting to have this facility in place by the end of the year. We will provide further update on this in the next few weeks."

An attached shareholder statement also suggested that no loan interest (of about £14,500 per quarter) was payable before 29 September 2015.

71. That memorandum also explained that:

i) refurbishment of the property was scheduled to begin in Quarter 4 2015 and conclude in August 2016;

ii) a principal contractor had been engaged to complete the refurbishment;

iii) a decision had been made to fully refurbish the property and increase the lettable floor area. This was the most extensive of the refurbishment options which had been considered. The memorandum provided an illustrative cost for this refurbishment of £2.324 million (so almost double what the Investment Memorandum apparently showed).

72. In March 2016, Mr Reed prepared an Excel workbook, which shows the following information:

i) in the "Summary" tab:

Capital structure						
	At acquisition		*For capex*		*After refi*	
Debt	*0*	*0%*	*1,700,000*	*100%*	*1,901,325*	*47%*
Equity	*4,034,775*	*100%*	*0*	*0%*	*2,133,450*	*53%*
Total	*4,034,775*	*100%*	*1,700,000*	*100%*	*4,034,775*	*100%*

ii) in the "A Cash Flow" tab, "Senior Debt Finance" was shown as £1.877 million (which is only slightly more than Wedlake received into its client account when the Santander Loan was drawn down), and the tab suggests that that sum had been received by September 2015. The tab also suggested that "Mezz/capex/other" debt finance of £1.691 million would be received by September 2016. Finally, the tab shows "Equity finance" of £3.55 million having been received by September 2014. £3.55 million is the price Crawley paid for the property on purchase;

iii) in the "Q Cash Flow" tab, the "Senior Debt finance" is shown as having been received in the quarter ending March 2015 and the "Mezz/capex/other" finance is shown as being received in the quarter ending September 2016.

73. The cash register records that Crawley received into its bank account £1.504 million on 28 June 2016. It is the Defendants' case that this sum comprised the repayment of the (June 2015) Pattern Payment and the first drawdown (of £149,410 (the balance of the £1.504 million received)) under the Alfa Loan.

74. Crawley's audited accounts for the period ending 31 March 2015, which were prepared on 7 September 2016, record that 4.032 million £1 shares were allotted, called up and fully paid.

75. The Quarter 3 (September) 2017 shareholder statement which Florestco saw showed that, at that stage, £1.805 million had been spent on refurbishing the property. By then, the refurbishment of the property had apparently been completed.

76. A letter, dated 23 June 2020, from Santander to Crawley recorded an agreed variation of the Santander Loan agreement by which the final date for repayment of the Santander Loan was fixed as 31 August 2020.

77. The August 2020 note was then circulated, as I have said. The note made clear that a sale of the property was intended and in progress.

78. A sale had apparently been contemplated for some time. On 24 December 2019, Ms Zwarich had emailed Florestco:

> "Asset management update for Crawley
>
> The property is marketed both for rent (either to a single tenant or multi-tenants) and/or sale of the Freehold. During the year we commissioned several large mail-shots targeting over 3,000 businesses around the greater Crawley/Gatwick/South-East London market. Our team has also called over 300 prospective tenants who may be interested to re-locate to the area. We are pro-actively seeking ways to differentiate the property with amenities and flexibility.
>
> We are also exploring options to sub-divide floor space into smaller units due to interest from occupants and possibly serviced office facilities with flexibility to different sectors – technology/education/medical offices.
>
> The property will be recirculated to the market in January when the investment market traditionally picks up again."

79. On 19 February 2020, heads of terms for the sale of the property at the price of £3.76 million had been agreed with Mountview Group Ltd.

80. In the minutes of a meeting of Crawley's board on 2 March 2020, it was recorded that three offers to buy the property had apparently been made ranging from £3 million to £3.76 million (the offer from Mountview Group Ltd.). The lowest of the three offers had been made by a commercial property company. The other two offers, including the offer from Mountview Group Ltd., had been made by residential developers. The minutes also recorded that "in November 2019 marketing in relation to [the property] to limited parties [began] and then [the Hillview group] undertook a full marketing campaign from January 2020".

81. The minutes of a meeting of Crawley's board on 18 June 2020 recorded:

> "The Chairperson reminded the meeting that [Crawley] entered into heads of terms on Mountley Group's [offer] to purchase the property. It was noted that Mountley Group made an application under permitted development rights to convert the property to residential. This was rejected on the grounds that

> noise from the surrounding buildings could disturb residents of the converted property.
>
> It was further noted that planning advice had been taken on this and [the Hillview group] have been informed that the council are against residential properties in this area and are considering an Article 4 notice which would prevent conversion of offices under Permitted Development. They therefore used the acoustic argument to reject the request. However, the advice states that it is possible to prove the acoustic levels will not cause undue disturbance by instructing an acoustic survey.
>
> It is proposed that the permitted development application is re-submitted accompanies by an acoustic survey. As the current interest in the property is from residential developers, this will ensure that the property has the right to be converted into residential before an Article 4 notice is introduced that will prevent this. Furthermore, the current rejected application somewhat taints the property and is limiting the ability to attract new purchasers. This is therefore required to protect the value of the property and ensure that a sale can be achieved."

82. On 20 August 2020, possibly as a response to Florestco's letter to which I am about to refer, ADS Real Estate Advisors wrote to Mr Livni, as the director of Real Estate:

> "We were initially instructed to undertake an exploratory marketing campaign for the property in July 2019.
>
> The intention of this campaign was to assess whether a Permitted Development buyer would be interested in acquiring the property.
>
> This process did not yield any material interest from parties and no bids were received…
>
> In Quarter 4 of 2019 it was decided that the asset should be offered to market on a full basis and we were instructed to undertake a wide marketing campaign. This campaign sought to target both office investors and Permitted Development buyers…
>
> As part of this process we advised that Hanover Green should be brought in to provide specialist office occupational advice to prospective purchasers in addition to wider market coverage, such as potential interest from owner occupiers.
>
> The wide campaign and bespoke presentation of the asset was designed to try and engage as wide an audience as possible. It was hoped that a Permitted Development buyer may pay in

excess of an office buyer and failing that help build competitive tension to secure the best price possible.

This campaign was then widened in January 2020, where we launched a mailout to c.550 parties. This encompassed both active office specialist and more general investment agents.

The start of 2020 was showing improved market sentiment and activity compared to Q4 2019 where both Brexit and the General Election had been weighing on the investment market.

Despite continued engagement with a range of parties there was very limited demand for the property…

Coronavirus pandemic has had a significant impact on the real estate market which resulted in a pause across the majority of the investment market in Quarter 1 2020.

An initial offer (Offer 1) was received from a well established Permitted Development buyer at c.£3.76 million. Our marketing campaign at the time of this offer had not yielded sufficient interest to support a better party or offer to pursue.

The evaluation of this offer resulted in the recommendation to accept this proposal. While the offer was not subject to gaining Permitted Development certification the buyer would be likely to delay exchange until he had obtained this. The buyer subsequently submitted a Permitted Development certification as anticipated, and this application was in due course rejected by the local council.

It became clear that this purchaser did not have funds available to transact, reportedly due to a failed sale of another residential property within their portfolio. The buyer stated that the proceeds of this sale were to be used for the purchase of Atrium Court.

After allowance of a generous time period to this buyer to try and raise funds (which accounted for the pandemic environment being faced) it was decided to explore an alternative sale structure in an attempt to re-engage the buyer.

This comprised the evaluation of an asset-swap. It was concluded that the price required for the asset in question was too high and that its liquidity was potentially limited. There were also concerns whether the scheme had been built to a required quality and the potential difficulties in confirming this, which could expose Hillview to undue risk.

It was decided to explore a sale to other potential parties alongside continued negotiations with the under offer party as the purchaser showed no ability to be able to transact.

Continued discussions with alternative parties demonstrated that interested parties were reducing their levels of pricing. It has become clear that flat buyers have reacted to the pandemic showing less appetite for small units, particularly where lacking outside space. The proposed conversion of [the property] to residential would deliver both small units and no dedicated outside space to the apartments.

One party submitted a proposal at £3.25 million (Offer 2). This was subject to drawn out timescales, and a condition that Permitted Development certification must be obtained.

Offer 2 refused to agree to an exchange of contracts with market standard deposit at that point. The proposed buyer was insistent that they would only enter into an option agreement at a cost of c.£5,000 which would bind Hillview to this party with an inability to treat with other parties.

It was considered that this was not a palatable offer as Hillview would have no commitment from the party that they would actually transact or a clear timescale for this process.

It also became apparent through the marketing process that the local authority wish to apply an Article 4 Direction to Tilgate Forest Business Park. If this was applied it would remove the ability to secure Permitted Development rights, which was the reason for purchase for both Offer 1 and Offer 2. This created a further risk to the potential liquidity of the asset.

A third party submitted an offer at £2.5 million (Offer 3). This offer was not subject to Permitted Development certification being obtained and through negotiation was not subject to any survey conditions either. The party provided proof of funds and offered the most attractive timetable to exchange compared to the other parties. 10% deposit has been offered on exchange of contracts as well.

This Offer 3 has presented the most transactable proposal of any of the parties. It also offers the most certainty, removes the risk of a failed permitted development consent and significantly mitigates the risk of an Article 4 direction being applied to the site before a contractual sale is agreed with a party.

Following engagement with lawyers in respect of Offer 3, another offer was received for the subject property at a best and final level of £2.4 million (Offer 4). Conditionality of the offer is akin to that of Offer 3 however at lower pricing.

> There was other verbal interest from alternative prospective parties however these did not formalise and were not indicating levels to compete with the above…
>
> Finally, please note that consideration has been given both prior to and during the sales process to other potential uses for the site. This included industrial and self storage uses both of which would attract planning risk. Neither has been deemed to be feasible…"

83. Having circulated the August 2020 note, Mr Livni wrote to Florestco, as Real Estate's director, on 17 August 2020, in response to a letter from Florestco which had complained that it had been assured that its investment was safe and objecting to the proposal referred to in the August 2020 note to discharge part of the Alfa Loan from the proceeds of the property's sale:

> "…As the manager, [Real Estate] has always sought the lowest-cost funding from third party sources. In this instance, once the refurbishment works were completed, HRE secured lower cost debt funding (below proposals from external lenders) from Hillview Group whilst the property was vacant but ready for occupation. Based on advice from letting agents and interest from prospective tenants Hillview Group had strong conviction that this property would be occupied imminently. This capital structure was intended purely to avoid any further equity capital calls from investors and any dilution for investors of their equity stakes. Hillview Group will now lose c.50% of its loan to this project (in addition to its equity investment and asset management fee accrued). This should illustrate not only the strong conviction that [Real Estate] had in the project, but also the alignment of interest and "pain" that Hillview Group shares in the anticipated outcome of the Project."

84. Completion of the sale of the property by Crawley for £2.5 million took place in October 2020, contracts having been exchanged on 21 August 2020.

85. For completeness, I should mention that, with the completion monies from that sale, according to the Defendants, Crawley discharged its liabilities in the following way:

	£	£
Cash in Bank		136,805
Proceeds of sale of the Property	2,500,000	
VAT received	500,000	
Redemption of Santander Facility	(1,776,825)	
Surveyor's expenses	(1,350)	
Net proceeds of sale		1,221,825
VAT paid to HMRC (4 December 2020)	(489,849)	
Other trade payables, including disposal costs (net of refunds received) over the course of 26 October 2020 – 8 September 2021	(193,886)	
Part repayment of HAH Facility	(674,895)	
Net outgoing		(1,358,630)
Balance		0

The reference to the part payment of the HAH Facility is a reference to a part payment under the Alfa Loan.

86. By September 2020, it was discovered by the Hillview group that sums had been (allegedly) advanced under the Alfa Loan (which Florestco disputes) but without the service, by Crawley on Alfa, of drawdown notices. It is reasonable to suppose that, contracts for the sale of the property having been exchanged and because the net sale proceeds were likely to be available soon as the sole source for discharging some or all of Crawley's liabilities, the Hillview group wanted the paperwork to be in order. (Florestco suggests a more illegitimate purpose in the production of drawdown notices; namely, to create a paper trail to give an air of legitimacy to an illegitimate extraction by the Hillview group of part of the sale proceeds at the expense of Florestco amongst other third party investors.) Ms Zwarich compiled a schedule of drawdowns under the Alfa Loan (on the Hillview group's case) (together with calculations of interest at the rate of 8% pa) which supported drawdown notices which were created at the same time (but which were apparently backdated). The schedule of drawdowns ("the Drawdown Schedule") was as follows:

Date	£
28 June 2016	149,410
16 February 2017	200,000
8 June 2017	50,000
17 August 2017	73,000
18 June 2018	150,000
21 December 2018	75,000

2 May 2019	10,000
25 June 2019	20,000
2 July 2019	660
2 August 2019	40,000
1 November 2019	40,000

87. The Drawdown Schedule is not obviously consistent with the contemporaneous documents.

88. Relevant to the 28 June 2016 entry on the Drawdown Schedule, the cash register records, as I have already explained, a "Payment to Pattern" of £1,354,590 as being made on 3 June 2015 and "…Alfa finance" of £1.504 million as being received into Crawley's current account on 28 June 2016. The difference between these two sums is £149,410. Part of that sum, £143,235.40, was "reclassed" as being due to "other creditors", according to Ms Zwarich, on 31 March 2017 (not to "Beneficial Owners' Loan account", as to which see further immediately below, although the two columns are side by side in the cash register).[14]

89. Relevant to the 16 February 2017 entry on the Drawdown Schedule:

i) the cash register records an "equity contribution" from "Capital" of £200,000 as being made then, although that sum was then also attributed to "Beneficial Owners' Loan account" (which Ms Zwarich said relates to the Alfa Loan). An equivalent sum was "reclassed" as an "other creditor" liability of Crawley on 31 March 2018;

ii) a Crawley Santander bank statement records: "16/02/2017 From Hillview Capital Limited…Purchase of Shares…Credit…£200,000".

90. In relation to this £200,000 contribution from Capital, I also need to explain that, from about February 2017, Crawley's share register showed Capital as the holder of 200,000 shares. On 4 January 2019, Ms Zwarich wrote to Crawley's Guernsey administrators:

> "In order to finalize the accounts for March 31, 2018, can you please amend the treatment of £200,000 new capital issued to… Capital."

The administrators replied on 7 January 2019:

> "Before we complete the treatment of the £200k, can you please confirm we should note the effective dates as 16 February 2017, i.e. when the original £200k was issued in Crawley instead of Alpha?"

[14] As it happens, the drawdown notice which was created after the event and signed by a director of Crawley on 5 November 2020, but backdated to 23 June 2016, requests a draw down of £174,620.40.

In due course, Crawley's share register was updated to show that Capital was not the holder of any shares. In a minute of a meeting of Crawley's board on 24 September 2020, the following was recorded:

> "In the February 2017 minute, the Directors resolved to issue £200,000 shares to…Capital…for a price of £1.00. However the Chairperson confirmed to the meeting that this was recorded incorrectly, no shares were issued and that the £200,000 funds received on 16 February 2017 were in relation to a drawdown from the loan with…Alfa…"

91. Relevant to the 8 June 2017 entry on the Drawdown Schedule:

i) the cash register records a "drawdown on loan" from "Capital" of £50,000 as having been made on that date;

ii) the minute of a meeting of Crawley's board on 8 June 2017 recorded that:

> "…[Crawley] had requested a loan in the sum of £50,000.00 from…Capital...
>
> IT WAS NOTED that [Capital] is a shareholder of [Crawley] and the purpose of the loan is to cover expenses that are due by [Crawley].
>
> After due and careful consideration IT WAS RESOLVED to accept the loan of £50,000.00 from [Capital] and the terms of the loan be unsecured, interest free and repayable on demand";

iii) a Crawley Santander bank statement records: "08/06/2017…Receipt Ref Loan from…Hillview Capital…50,000.00 GBP".

92. Relevant to the 17 August 2017 entry on the Drawdown Schedule:

i) the cash register records "capital proceeds" of £73,000 as having been received from "Capital" on that date;

ii) the minute of a meeting of Crawley's board on 17 August 2017 records:

> "The Chairman advised the meeting that [Crawley] had requested a loan in the sum of £73,000.00 from…Capital...
>
> IT WAS NOTED that [Capital] is a shareholder of [Crawley] and the purpose of the loan is to cover expenses that are due by [Crawley].
>
> After due and careful consideration IT WAS RESOLVED to accept the loan of £73,000.00 from [Crawley] and the terms of the loan be unsecured, interest free and repayable on demand";

iii) a Crawley Santander bank statement records: "17/08/2017…Receipt Ref Loan from…Hillview Capital…73,000.00 GBP".

93. Relevant to the 2 May 2019 and 25 June 2019 entries on the Drawdown Schedule:

i) the cash register records a "loan from…Capital" of £10,000 and of £20,000 as having been received on those respective dates;

ii) a Crawley Santander bank statement records: "02/05/2019…Receipt Ref Capital Loan from…Hillview Capital…10,000.00 GBP";

iii) a Crawley Santander bank statement records: "25/06/2019…Receipt Ref Capital Loan from…Hillview Capital…20,000.00 GBP".

94. Relevant to the 2 July 2019 entry on the Drawdown Schedule:

i) the cash register records that, on that date, £659.89 was received from "Capital" in relation to "unpaid share";

ii) a Crawley Santander bank statement records: "02/07/2019 Receipt Ref HV Cap Unpaid Shar from Hillview Capital…659.89 GBP".

95. Relevant to the 2 August 2019 and the 1 November 2019 entries on the Drawdown Schedule:

i) there are entries in the cash register showing that £40,000 loans from "Capital" were received into Crawley's bank account on each of those dates;[15]

ii) a Crawley Santander bank statement records: "02/08/2019…Receipt Ref Capital Loan from…Hillview Capital…40,000.00 GBP";

iii) a Crawley Santander bank statement records: "01/11/2019…Receipt Ref Drawdown Loan from…Hillview Capital…40,000.00 GBP".

96. The cash register only contained entries consistent with the Drawdown Schedule (that is, showing entries under the column "Beneficial Owners' Loan account" and not apparently referable to Capital) in relation to the following entries on the schedule: the 18 June 2018 and 21 December 2018 entries.[16]

97. In a minute of the 24 September 2020 board meeting, once the absence of drawdown notices was appreciated, it was recorded that:

> "In the June 2017 minute, the Directors resolved to accept the £50,000 loan from [Capital]. However the Chairperson confirmed to the meeting that this was recorded incorrectly and

[15] There is also, for example, an entry in the cash register, for 6 July 2015, so after the Defendants say the Alfa Loan was made but before the first entry on the Drawdown Schedule, as follows: "…Capital – shareholder loan…£19,224.11", which was "reclassed" as a "shareholder loan" on 31 March 2016 and then appeared in the "Beneficial Owners' Loan account" column.

[16] The column structure of the cash register (an Excel spreadsheet) was changed during the period with which I am concerned.

> that the funds should be treated as a drawdown from the Loan with [Alfa].
>
> In the August 2017 minute, the Directors resolved to accept the £73,000 loan from [Capital]. However the Chairperson confirmed to the meeting that this was recorded incorrectly and that the funds should be treated as a drawdown from the Loan with Alfa."

The Pattern Payment

98. I now need to explain the Pattern Payment in detail.

99. I have already explained that Alfa was the beneficial owner of 2.582 million (£1) shares in Crawley. Those shares were allotted to Alfa, according to Crawley's internal records, principally because of the following receipts into Wedlake's bank account:

Date	£
13 August 2014	22,800
22 August 2014	1.2 million
15 September 2014	60,540
17 September 2014	1.26 million

100. To contextualise these receipts, I should repeat that the Alfa Loan is dated 17 September 2014 and Crawley completed its purchase of the property on 19 September 2014.

101. As I have also mentioned, in part the cash register records, in the "Description" column, the following entries in relation to those receipts:

Date	£	Cash register entry
13 August 2014	22,800	Investment and completion of acquisition…Capital
22 August 2014	1.2 million	Investment Funds for completion [Alfa] re Landmead
15 September 2014	60,540	Money to assist completion [Mr Livni Mr Reed] (Hillview Capital)

17 Septembe r 2014	1.26 million	Completion money – [the Hillview Group][17]

102. Save in relation to the entry "Money to assist completion [Mr Livni Mr Reed] (Hillview Capital)", all the sums also appear in the "Equity" column of the "Shareholders Equity" section of the cash register, in the same way as the sums received from third party investors, such as Florestco, do. In the case of the "Mr Livni Mr Reed" entry, £49,200 is shown in the "Equity" column and the balance is shown in the "Fixed Asset" column. Similarly, the balance sheet in Crawley's 2015 ledger records that it had incurred no long term debt as at 12 May 2015.[18]

103. In the context of the cash register entries, I need to repeat three further points. First, Landmead is the majority shareholder in Alfa. Secondly, on 17 September 2014, International made a SWIFT transfer of £1.26 million to Wedlake's client account which was expressed to be for the acquisition of the property. Thirdly, Capital is Alfa's parent company.

104. The receipts add up to £2,543,340, £38,660 less than £2.582 million. That balance (£38,660) was credited to Crawley, Ms Zwarich explained, by Real Estate foregoing an equivalent sum which was due to it as part of the £50,000 structuring fee shown in the Investment Memorandum.

105. Before turning to Mr Livni's evidence, it is worth recalling to mind that the cash register records that Crawley received £1,859,757.56 on 18 May 2015 which was the net sum available under the Santander Loan agreement and that the Pattern Payment, of £1,354,590, was made on 3 June 2015, just over a fortnight later.

106. In his trial witness statement, Mr Livni said that, at the time, International was part of the Hillview group and the payment of £1.26 million "was treated as a payment from Capital on behalf of [Alfa]". He continued:

> "In the…cash register [there are references] to an entity called "Pattern". That was a family office based in the BVI from which the group obtained finance from time to time, including £1,260,000 borrowed by [International] for the purposes of Capital's investment in [Alfa]. The cash register also records [Crawley's] receipt of the capex loan advance from Santander in April 2015 of £1,871,956.31. Of that amount, £450,000 represented blocked funds under the terms of the Santander loan and which were transferred to be held on deposit. The remaining balance of the sum received from Santander was not all immediately required by [Crawley] for the purposes of the Project and £1,354,590 was paid out by [Crawley] to Pattern in June 2015 to repay the loan that had funded part of [Alfa's] investment in [Crawley].

[17] There is a sub-entry: "Pattern loan".
[18] In fact, a draw down under the Santander Loan facility of £1.877 million had been paid to Wedlake on 23 April 2015 as I have alluded, but the net balance was not received by Crawley until 18 May 2015.

> I accept now that [Crawley's] funds should not have been used to discharge another debt owed by a different group entity to Pattern and I regret that the payment was made from [Crawley's] account. However, the group had always intended that [Crawley's] funds would be returned to it so that they could be deployed on the Project and on 28.6.16 [Alfa] repaid the *(sic)* £1,504,000 to [Crawley], representing the £1,354,590 that had been paid to Pattern for its benefit together with a further sum of £149,410 which was the first draw down that [Crawley] made under the [Alfa Loan] to support the future cash requirements of [Crawley]."

107. In cross-examination, Mr Livni gave the following evidence.

108. He negotiated the loan from the Pattern family office ("Pattern") to International ("the Pattern loan"). He had a close relationship with Pattern.

109. He could not recall whether any documents ever existed in relation to the Pattern loan, which, if they did not, he conceded would have been unusual. He added that the Defendants could not ask Pattern or International to search for documents because they had both been wound up.

110. Early in his cross-examination, he could not recall whether interest was payable under the Pattern loan but he then said that "International would pay Pattern interest". That interest was payable under the Pattern loan is unsurprising because, according to Crawley's internal records, it received £1.26 million which originated from Pattern but paid to Pattern, as the Pattern Payment, £1.354 million about 9 months later, which equates to an annual interest rate of about 10% (assuming the difference between the sum received and the Pattern Payment is attributable wholly to interest).

111. The following exchange between me and Mr Livni then took place at the end of his oral evidence:

> "Q. Just three very quick questions. What was the rate of interest that Hillview International was paying Pattern on the Pattern loan?
>
> A. My Lord, I don't recall the exact amount. It was in the range of 8%."

112. When he began to explain the circumstances of the Pattern Payment, Mr Livni said that International had asked Capital to pay it £1.354 million which Alfa did from Crawley and that Alfa instructed Crawley to make the Pattern Payment. He then accepted that he personally controlled the making of the Pattern Payment, but continued:

> "The instructions did not come from me personally, they came to our directors at…Alfa who approved the transfer of the payment from…Crawley…"

He accepted the following day, when his cross-examination continued, that he "would have ultimately been involved" in the request to Crawley's directors for the Pattern Payment to be made and that, even if he had not personally asked the directors to make the payment, the request for the Pattern Payment would initially have come from him. He also explained that the request "in essence" was "pay from…Crawley… to Pattern". He could not say whether any documents accompanied that request. He then said that the Pattern Payment was made on his "instructions" (and later still that he "made the phone call", as I understood to Crawley's directors), which he sought to justify on the ground that "the money would be returned as soon as the funds were needed by Crawley". He sought to mitigate the circumstances of the Pattern Payment by saying that the Hillview group had a lot to lose if the Pattern Payment was not repaid to Crawley; presumably from which he wished me to infer that the repayment to Crawley of the Pattern Payment was always assured. He sought to further mitigate the Pattern Payment by claiming that the Hillview group has suffered reputational damage, but that was, by his own account, because the project failed and Crawley's investors lost their investments.

113. He remembered that the Pattern Payment did not come about because Pattern had demanded payment. Rather, he said, he decided that the Pattern loan should be repaid because Crawley happened to have funds drawn down under the Santander Loan agreement which it did not need immediately. In answer to a question from me at the end of his oral evidence, he confirmed that there was no commercial imperative for making the Pattern Payment.

114. He accepted that Crawley had no obligation to make the Pattern Payment and that Crawley should not have made the payment. Although he had acknowledged too in his witness statement that the Pattern Payment should not have been made, when I asked Mr Livni more than once whether he regarded the Pattern Payment as legitimate, although he later claimed that he was ashamed of the Pattern Payment, he did not give me a straightforward answer to this question.

115. He said that he intended to repay the Pattern Payment with interest. He appeared to have said that the £149,410 payment which has been characterised as the first drawdown under the Alfa Loan was in fact "interest" on the Pattern Payment, but he then almost immediately resiled from that suggestion and contended that that sum was a draw down under the Alfa Loan, although that might have been because that is what the cash register shows. On this issue, the following exchange took place between Mr Stuart and Mr Livni:

> "Q. But if you haven't paid the interest, then you have stolen, haven't you, or obtained by deception, you have obtained at least -- you have kept the benefit of the money and to the detriment of Crawley. They have ended up paying Santander interest on that money. If you haven't paid the interest to them, they've lost out to the tune of over £100,000.
>
> A. I accept that, my Lord. That's the way it would appear.
>
> Q. …Is that now your case that: we did not pay interest on the 1.35 million when we made that payment of 1.504 million, and,

> therefore, Hillview (Crawley) has lost out to the tune of all the interest?
>
> A. Yes, I believe that's what we disclosed in evidence."

116. One reading of this summary over a number of paragraphs of Mr Livni's oral evidence is that he was uncertain or confused about the terms of the Pattern loan and the circumstances of its repayment. However, that would not be a fair interpretation of his oral evidence, which was given over about 8 hours, and in which the Pattern loan and the Pattern Payment were raised from time to time, and, as subjects, were returned to.

117. My impression of Mr Livni as a witness in this context was that he did not give full and frank evidence with alacrity, but, rather, had to have the whole (or, at least, a comprehensive) picture prised from him, in part, at least, perhaps by attrition. This was an impression which was reinforced in my mind by his oral evidence on other subjects and is unambiguously supported by Mr Livni's evidence about whether interest was payable under the Pattern loan. There is no reason for him to have forgotten on the first day of his oral evidence that interest was payable, but then to remember on the second day that interest was payable at the rate of about 8%. I think it is much more likely that, because my question to him on the subject was asked without any context, he volunteered information which he had not volunteered earlier.

118. I have also formed the impression that Mr Livni has not accepted, or perhaps has been unwilling to accept, the illegitimacy of the Pattern Payment. As I have explained, whilst Mr Livni accepted that the Pattern Payment should not have been made (perhaps because he had to), he could not bring himself to accept that it was an illegitimate payment and he did not appear to appreciate that it is likely that it has caused reputational damage to the Hillview group, if only in the eyes of Mr Ragimov and Mr Solomon, and is likely to cause it further reputational damage as it becomes more widely known about.

119. Ultimately, the picture is clear, largely based on Mr Livni's admissions, but also on the contemporaneous documents and the inherent probabilities.

120. Crawley had no obligation to make the Pattern Payment. The Pattern Payment did not benefit Crawley. I consider below whether the £1.504 million repayment included a reimbursement of £149,410 interest on the Pattern Payment or whether that sum was a drawdown under the Alfa Loan, and so whether Crawley was positively damaged by the Pattern Payment by having to pay interest on the Santander Loan or by not benefiting from any interest otherwise payable on Crawley's funds used to make the Pattern Payment.

121. Crawley's funds were used, or, perhaps more accurately, misused, to make the Pattern Payment because they happened to be accessible to the Hillview group.[19] The Pattern Payment was made because it benefited the Hillview group (and so ultimately Mr Livni personally), because it brought to an end any liability the group had to pay interest of at least 8% on the Pattern loan.

[19] For completeness, I should note that there was insufficient evidence before me that the Pattern Payment was planned from the outset, but that may be because, by the two extempore judgments to which I have referred, I refused Florestco permission to contend that it might have been so planned.

122. The Pattern Payment was made by Crawley's directors on Mr Livni's instructions, following a telephone call by him to them; instructions which he could give because his control of the Hillview group was almost total.

123. No documents supported that instruction or, if there were any documents, they contained the barest of supporting information. As I have explained, the payment recommendations to Crawley's directors which I have seen contain the barest of supporting information and those recommendations, apparently unlike the instruction to make the Pattern Payment, were made in writing. Further, it is improbable that the instruction to make the Pattern Payment would have been supported by documents if the Pattern loan was itself not documented, and because the Pattern Payment did not benefit Crawley and any documents could only have made that clearer than it might otherwise have been to Crawley's directors. Further, if Crawley's directors merely did what they were instructed to do by the Hillview group, as I have concluded was the case on the material before me,[20] there would be no need for supporting documents to be supplied to them in support of the instruction to make the Pattern Payment.

124. That Crawley's directors merely acted on instructions from the Hillview group and did not exercise any independent judgment is corroborated by the limited information on which they generally acted as I have already mentioned, and by the minute of their 24 September 2020 board meeting to which I have referred. It appears that, on that occasion, they simply accepted, because they were told, that they had got it wrong in June 2017 and August 2017 that Crawley was taking interest free loans then from Capital. The 24 September 2020 board minute does not indicate that the directors considered any documentation which showed they had been in error in 2017. If they were in error in June 2017 and August 2017, that is likely to have been because they simply acted as the Hillview group instructed them to do and because they were not provided with any documentation to justify their decisions at the time. It is unusual for a company not to know from whom it has sought to borrow money or the terms of a loan, as must have been the case if Crawley's directors were in error in June 2017 and August 2017. The conclusion, established by these facts, that Crawley's directors merely acted on the instructions of the Hillview group, is itself corroborated by their co-operation in the making of the Pattern Payment.

Witness evidence – introduction

125. In the light of the conclusions I have reached in any event, in this judgment I can deal with the witness evidence relatively briefly.

Mr Ragimov

126. Mr Ragimov's oral evidence was memorable.

127. Although Mr Ragimov had suggested otherwise earlier in his cross-examination, when he suggested that all the information for the preparation of the litigation documents had come from him, it became apparent that, in truth and in breach of CPR

[20] Any criticism of Crawley's directors implicit in what I have said must be qualified because they are not on trial and they have not had an opportunity to make submissions. Had they had that opportunity, they might have been able to successfully paint a different picture. I have needed to comment on their management of Crawley, as I see it on the material before me, because it is part and parcel of determining the degree of Mr Livni's control of the Hillview group, which is a matter I have to comment on.

Practice Direction 57AC, his witness statement was not entirely his own recollection but, in certain respects, was effectively the work of a committee, the identity of the members of which he was not certain. In his witness statement, he had referred a dinner to which he attached a specific date; 29 February 2012. Mr Trompeter cross-examined him about that date, as follows:

> "Q: You mention a meeting you had on 29 February 2012 in Tel Aviv.
>
> A: Yes.
>
> Q: Just out of interest, how do you fix the date precisely to 29 February 2012?
>
> A: Because as I told about a few, I don't know about 15 minutes ago I'm not running my schedule…I do have a personal assistant you see. Very important things Mr Solomon is running for me as well. So this particular paragraph is based as a content on my memory and it is for me called, regarding the precise date and so on and so on, on the records that Mr Solomon has, Mr Solomon has.
>
> Q: Which records are they? Because I don't recall seeing any record of a meeting on 29 February 2012.
>
> A: My Lord, really I can't say which records. But for instance, for instance I'm an old fashioned. I have this diary, calendar where I write the --
>
> Q: You have a diary?
>
> A: Diary, yeah.
>
> Q: You write in it by hand.
>
> A: Yes.
>
> Q: You haven't disclosed that in these proceedings, have you?
>
> A: The diary from [2012]…I don't have it. I'm not keeping them. I'm changing them every year.
>
> Q: I just want to know what document you looked at to get the date.
>
> A: Yes. But I am saying that one of the instruments I have regarding the when and what is diaries, I'm using diaries. Not the memo office Microsoft and so on and so on. That is me… But at that time I had Mr Solomon, it was an important meeting for me…

Q: Sorry, Mr Ragimov, I'm not asking you about what happened at the meeting? I'm asking you which document you looked at to recall the precise date of the 29th?

A: I don't know, but the information been filled within my statement, been all from Mr Solomon, or Mr Solomon called Mr Barzilay. That is the instruments. No other ones.

Judge: So, in fact, you do not know whether the meeting in Tel Aviv in the Crown Plaza took place on 29 February or some other [date]?

…A: Before I made the statement, my Lord, I could not say the date. I, of course, remember it was a meeting. We have been there. Regarding putting the 29 February is based on the recall of…Mr Solomon, or Mr Barzilay or Chagit. Chagit is my personal…All the dates, all the dates, all of them within my statement, almost all of them, are based on the -- on the -- I remember it was – let's check when it was. It was at 20 -- year, I remember the year for instance. But the specific date was how do you say it in English, based on the searching within the information which is like emails or WhatsApp, WhatsApp messages…Before I signed the document, when I got it as a draft with the blanks I asked Mr Solomon to search. Listen, it was that and that. Fine for me this, the exact date. It was a phone call then and then. Fine for me. The exact, the exact date through the emails for instance.

…Judge: So you sent a WhatsApp to Mr Solomon, "Give me the date that we met Mr Livni at the Crown Plaza hotel".

A: Or it was within our phone conversations I don't remember, but it could be email, or WhatsApp message or call.

Judge: …What I am very interested in is how you found out the information about the date. You have told me that somebody told you the date. Did they tell you the date and send you the document that was created in 2012 that showed the date or did they just tell you the date?

A: I don't think it was not -- how you say, that it was with attachment on what the date had been told me was out of the blue, it was always -- for instance, we have an email exchange to set the meeting, for instance. Or it was an email exchange of -- yes.

…Judge: You have explained to me when the draft [statement] was first created, it did not have the words "29 February 20" --

A: Yeah, it was a blank.

> Judge: Are you saying that to find out the date you asked Mr Solomon or Chagit?
>
> A: I asked Mr Solomon to give me all the dates, including this matter of this meeting…Ask Mr Solomon. I don't remember. It was with Mr Solomon or Mr Barzilay.
>
> …Judge: Did they write to you and say, "Eli here is the date", or did they speak to you and say, "Eli, the date is 29 February"?
>
> A: I don't remember because might be. It was Mr Solomon writing to me or calling me or telling me verbally or Mr Barzilay. I don't really remember specific or it could be Chagit, the personal assistant who arranged the table at Crowne Plaza. I don't really remember."

128. Even giving full weight to the fact that Mr Ragimov's first language is not English and that it was difficult for him to express himself in English, and, sometimes, to fully understand what he was being asked, this exchange displays another notable feature of Mr Ragimov's oral evidence; namely, that it was difficult to get a straightforward answer from him and not, instead, get a long, almost speech-like, answer to a straightforward question. Another typical example of what I have in mind began with Mr Trompeter's question to Mr Ragimov about whether the Re-amended Particulars of Claim accurately reflected Florestco's case. After Mr Trompeter asked the question more than once not getting a straightforward answer to what was a straightforward question, Mr Ragimov responded as follows and then the following exchange took place:

> "A: My Lord, I think that all the documents -- I can't take each one separately except the documents I -- as my statement, but all those particulars, the amendment particulars, the processes been already passed as a Master Pester and so on, and so on, and so on, I'm pleased as of today about how they are prepared and how they been presented. Yes. The answer is, yes.
>
> Judge: Can I ask a question, please? You told Mr Trompeter that you read this document.
>
> A: (Nodded).
>
> Judge: Is your reading English good enough to understand what this document said?
>
> A: Yes, my English is good enough.
>
> Judge: When you read this document, did you think to yourself as you read it, this is right, or did you think to yourself, something in this document may be wrong?
>
> A: Each document we have here in this room was passing the following process. It was prepared by my counsel. It was sent by email to the remarks of my counsels clients, me for an

> example. Mr Solomon as my executive was going through it with his remarks. Sometimes it was re-mailed -- I don't know if that's the proper word -- to the counsel with the phrase "It's before Eli's remarks." That's the process it worked. At the end, at the end, it was finished and submitted after being issued, went through remarks first of all of Mr Solomon, then me watching Mr Solomon's remarks at one factor, meaning I pleased I'm not going to read all the document, because the remarks Mr Solomon is making are in a manner that they are on one hand touching a particular issue. On another -- on another hand easy for me not to went through each bullet, or something. And then we are two possibilities from here or I add in other remarks or the document was approved.
>
> Judge: So I'm not sure you've answered my question or Mr Trompeter's question. Can I have another go? Are you saying to me that because Mr Solomon is your partner, you did not think about each word in the document?
>
> A: Yes.
>
> Judge: Instead you looked at his comments and said to yourself, "Yes, they are right", or, "No, I want to change those comments"?
>
> A: Yes, exactly like that.
>
> …Mr Trompeter: During that interchange with my Lord, describing the process you went through, you said referencing Mr Solomon's notes that you were pleased you weren't going to read all the document. Can I take it from that that you did not in fact read through the whole of the Re-amended Particulars of Claim before they were finalised?
>
> A: No, you can't, because what I said was a general thing regarding any document. But I can't tell you that I went through this particular document reading each and every word. But I must add to this answer that I read it -- I don't know how to say it in English -- as in "diagonal", another word."

This exchange did not provide a straightforward answer to Mr Trompeter's straightforward question. In fact, it raised a further question about the extent to which Mr Ragimov was aware of the content of the Re-amended Particulars of Claim.

129. Sometimes, Mr Ragimov's speech-like answers did not relate to the questions being asked but, rather, seemed to be points he felt he ought to, or had to, get across in support of Florestco's case. For example, in his witness statement he discussed that, in early 2014, "I was reassured that it would be safe to invest in Nadav's proposed projects, because not only was Nadav a trusted friend, but he explained to me expressly, and with emphasis, that Hillview Group will invest in the project on exactly the same terms as me." Mr Trompeter asked whether or not the reference to

"proposed projects" was a reference to projects generally or to specific projects, to which Mr Ragimov responded (to make the point he repeated at other times, that the investment in this case was an initial foray by Florestco into property investment in the UK):

> "I am telling you. Project -- look, my Lord, I am investing in a lot of parts on this globe. Project for me is another department. I have the United States, I have Israel, I have Romania. I had Russia. And project for me is now we have new project, guys. Britain. That's the meaning of this particular sentence, that I decided we are going to establish activity in Britain as well."

130. That Mr Ragimov had a narrative which he wanted to press on me can be shown in other ways. For example, in his witness statement he said:

> "It was only in February 2017 that we received another memo advising us of the completion of the refurbishing works. This got me even more worried as we earlier discussed with Nadav finishing the works by August 2016 and already starting the lettings in Q1 2017. We requested an urgent conference call, which took forever to arrange but we finally managed to arrange it for March 13."

I agree with Mr Trompeter that this evidence, reasonably understood, tends to suggest that the Hillview group resisted, or otherwise delayed, a conference call. The contemporaneous documents suggest otherwise. Mr Solomon asked for a conference call on 16 February 2017 in an email timed at 05:43. In that email he asked for updated cashflow projections, a timeframe for rental income and thoughts about exit opportunities. He also asked for Mr Livni's tentative availability in "March – April". Mr Livni replied the next day suggesting a conference call on 28 February, together with dates for a meeting in March and April 2017. In short, the narrative Mr Ragimov wanted to press on me was not, in this respect for example, an accurate history of what happened. Perhaps a more troubling example was Mr Ragimov's suggestion, in the same paragraph of his witness statement, that Mr Livni had deliberately misled him by not telling him the amount of the dilapidations compensation paid by the head tenant at the property (possibly during the March 2017 telephone conversation). In fact, the compensation amount was not agreed until the following year (and was much lower than anticipated because the head tenant had apparently carried out remedial work (and perhaps because of supersession)). It is not wholly accurate to suggest that Mr Livni deliberately misled Mr Ragimov if he did not explain to Mr Ragimov in 2018 that, in fact, the dilapidations compensation actually paid was lower than anticipated (noting too that the Investment Memorandum had said that it was the head tenant's dilapidations "liability" which was substantial).

131. Another example of what I have just demonstrated relates to Mr Ragimov's clear evidence in his witness statement that Mr Livni (and no-one else) took "us"[21] through the Investment Memorandum during the 26 June 2014 telephone call. The following exchange took place during Mr Ragimov's cross-examination:

[21] See paragraph 136 below.

"Q. Mr Solomon says: "As far as I recall, in the beginning of the call NL [that is Mr Livni] ran a brief introduction of everyone present and then handed over to ShR [that is Mr Reed]. [Mr Reed] then first ran us through the IM. He literally took us through every block of the IM..." And then he goes on to say: "NL was the one who took us through the Structure and the Management parts [and so forth] ..." So what we have are two different versions of events. You say Mr Livni took you through the IM. Mr Solomon says that Mr Reed took you through the IM and then Mr Livni took over from him. Do you understand that?

A. I understand very well what you say.

Q. Now, you can't both be right, do you agree with that?

A. We can.

Q. How can you both be right?

A. I will tell you why. Mr Livni speaks Hebrew very well. One of the aspects which was comfortable for me to enter this project called Britain was that Mr Livni speaks Hebrew. It is much, much, much convenient for me, even though I speak English, it is a poor one, but nevertheless, but it is much comfortable to me to be in partnership with a person who speaks Hebrew. And I remember those calls, those conversations, there is a mix between those two languages. And I will tell you a funny thing, each time when I am starting to talk with Mr Livni in Hebrew, while there are participating persons who don't speak Hebrew, I am saying, "Lawyer speak Hebrew?" He says, "No". I said, "Nobody is perfect" in a manner of joke. And there is a mix of those two languages, meaning we are very polite. We say, "Excuse me", and jumping from one language to another. And it is mostly what happened; that, for me, Livni was the person in these conversation, with all my respect to Mr Reed, I saw him once and I think I never talked with him. I mean -- So it is not contradiction. Sorry for the long answer.

Q. That is fine. I am still trying to understand how both of you can be right. Just tell me, who took you through the investment memorandum, was it Mr Livni or was it Mr Reed and Mr Livni?

A. I thought I answered that. I will answer that again. Mr Livni is the person for me, and when I say he took me through the investment memorandum, it means that Mr Livni took me through investment memorandum and then, as a help, as an executive who has participated in the conversation, Mr Reed

> went through all the documents, including the investment memorandum.
>
> …Q. If you look at page 365, paragraph 35 of your witness statement. You don't say that Mr Reed took you through the investment memorandum.
>
> A. Yes, because Mr Livni took me through the investment memorandum.
>
> …Judge: Was there any reason that Mr Livni went through the investment memorandum in Hebrew and then Mr Reed went through it again in English?
>
> …A. Because this conversation was not only about investment memorandum. It was going from to, back to investment memorandum, touching things, asking questions. It is not reading a document only. It is making analysis of the content of it.
>
> Judge: And after Mr Livni had done that job [of going through the Investment Memorandum] apparently, and Mr Reed started, were you surprised that Mr Livni did not say to Mr Reed, "Sheldon, you do not have to do that, because I have gone through the investment memorandum with Eli and Igor"?
>
> A. My Lord, this is -- this is precisely the moment. It is not going through investment memorandum, then going through the strategic and then go through that. It is always a mix of everything. Everything influences all in real estate projects. It is investment memorandum is a guideline, who gives you how the life of the project will be. But then you are going to the details."

132. I agree with Mr Trompeter also that the principal reason Mr Ragimov was not an accurate historian was because he regards this litigation emotionally and cannot be dispassionate about it. There was an unfortunate incident during Mr Livni's cross-examination when Mr Ragimov confronted him in the courtroom during a short break, which I am sure happened because Mr Ragimov was emotional. Another example of this is the content and nature of Mr Ragimov's non-response to Mr Trompeter's (straightforward) assertion that Mr Ragimov is not complaining, in this case, that Mr Livni misrepresented the capitalisation rate of the investment, to this effect:

> "Mr Trompeter, I am very sorry to be long, but not very long. You see the investment memorandum and the documents attached and these figures in volume 2, it is like you are entering a saloon and are choosing to buy a car and then you are searching for the car with the specific characteristics, how many horsepower it is and how much weight you can put on it, and that kind of things. It is quite similar with real estate project meaning you are getting a new asset, car, with the

> specific characteristics. That is what you buy from the seller, meaning that this is a car that is going to make that kind of output, if you do A, B, C, D. Very simple. But if you are taking a car and instead of doing A, B, C, D are loading on it the weight where it starts burning oil and goes with the smoke from exhaust -- I don't know, from exhaust, and instead of the car will generate you these IRRs and instead of asking from the market, the specific rates per square feet, which are logical, you are trying, you are forced, you are -- I will use the word, you are raped, to ask higher which market is not accepting, then you kill the car. That's the beginning of this, you are asking me now and what happened at the end. You can't keep the car. You want to rid of it, on any price. I am not adding, Mr Trompeter, additional things, that aspects, except the real estate project. That's what I told you, that I am an experienced investor, I know how to earn and I know how to lose. I will tell you more than that, my Lord. The last e-mail from Mr Livni, it said you lost everything. I am not quoting. And Santander and [the Alfa] facility will be and so on. If Mr Livni was not writing, "End [the Alfa] facility", I would not be here. I would be bitter, I would be angry, I would know deep end what happened. You know it happens. Livni is a bad manager. Livni is a bad real estate Britain running the project. I would stay in the emotional way. But my first red lamp, I don't know how to say that, attention started when it was the end [the Alfa] facility, it was not planned. It was not anywhere. I asked further question, "Mr Livni, what it is?" And then started all the ill behaviour, not answering, not disclosing documents and so on and so on and so on. And then, you know, it's miserable. The directors are resigning. I mean, come on, Mr Trompeter, come on. That's what I am telling you the person I am -- the questions you would ask me to defend your client. That's what I think. That's what happened. To take maybe a good team, maybe, I don't know these people, and instructing them to give false reports to corrupt them. Here the car died. Here you started to cover what you did, try to bury it in the grave. But, you know, even to make corrupt things, you must be smart, I mean, you know, because lies, they are born in the darkness, but they have that nature to grow up with other things that smell bad…I am very sorry, it was emotional. Please, please, excuse me."

133. For all these reasons, I must treat Mr Ragimov's evidence with caution, accepting it only where it is corroborated by other evidence or is otherwise probable, or is against his interests.

134. With this in mind, I turn to those parts of Mr Ragimov's evidence which have influenced my decision.

135. Mr Ragimov described himself as the decision-maker in Florestco, saying that significant decisions cannot be made without his approval. He accepted that,

sometimes, when making decisions he did not trouble himself with the details. For example in the context of the litigation, he approved the signing, by Mr Solomon, of the statement of truth on the Particulars of Claim even though he had not read the statement of case, because he had received an executive summary of it from Mr Solomon. He emphasised that he does business with people he trusts "not merely by reference to financial models".

136. Mr Ragimov said, in his witness statement, that he did not participate in any phone calls after May 2014. Rather, it was Mr Solomon, he said, who participated in those phone calls. That is contrary to the Re-amended Particulars of Claim which assert that Mr Ragimov took part in the 26 June 2014 phone call. Later in his witness statement, Mr Ragimov did say that "we" had a long phone call with Mr Livni on 26 June 2014, his version of which he then set out.[22] Mr Ragimov said, in his witness statement, that, following the phone calls in which he did not participate, Mr Solomon reported to him by way of "a sort of executive summary and [they] discussed each proposal". (I was not referred to any of these executive summaries.)

137. He said, in relation to an earlier investment proposal relating to a property adjacent to the property, that what was "most important [was] identical investment terms for us and his Hillview group."

138. He said, in his witness statement, that, had he been told the truth during the course of the project, he would either have demanded that Mr Livni reimbursed Florestco its initial investment or Florestco would have begun a claim. He did not suggest that Florestco's investment unit might have been sold to a third party. He accepted in cross-examination that he had not identified any potential third party purchaser.

139. He confirmed that he read the Disclaimer by 26 June 2014 and continued in cross-examination that he fully understood the words of the Disclaimer: "The information in this communication has been prepared in good faith, however, no representation or warranty express or implied, is or will be made and no responsibility or liability is or will be accepted by [Real Estate] or its officers, employees or agents in relation to the accuracy, completeness or fitness for any purpose of this communication." He confirmed that he understood that the Investment Memorandum did not contain a representation or warranty in relation to the accuracy, completeness, or fitness for any purpose of the Investment Memorandum and continued:

> "Any document in the business world is formed in the manner that you must make your own research as well, including this one. But still the research, you must make by your own reliance on the method that this document been prepared in as written in the small letters…"

Mr Solomon

140. Mr Solomon said this, in the section of his witness statement, headed "What Florestco would have done if it knew about the Defendants' misrepresentations":

[22] The emails Mr Ragimov apparently used to establish that there was a telephone call on 26 June 2014 are addressed to Mr Solomon and are consistent with Mr Solomon alone having been a participant in a telephone call at about this time.

> "To be clear, had we known of the existence of the intention for THG to loan money to the project we would definitely not have entered into the deal in the first place. We only wanted to invest in this deal because NL said that THG was investing in parity with us in every way and had no hidden motivation. We were told of the promote as a transparent success fee for sourcing and successfully managing the deal. But if we had known that there was any possibility of THG earning money from interest payments throughout the course of the project we would not have invested.
>
> Secondly, had we known about the [Alfa] loan drawdowns (or any form of THG group company loan funding the deal) as it was happening (i.e. according to the Defendants' case from 2015 onwards) then we would immediately have got out of the investment. We would have objected to this kind of dealing had we known about it…Had we known about secret dealings, we would have demanded board meetings. If it would not work in a gentlemanly and friendly fashion, we would employ lawyers and take it to the legal procedure including injunctions or recovery of our money.
>
> At the time of the Romeo investment, NL offered to buy us out and he did. I am sure that if we had become aware of the secret [Alfa] loan funding and had challenged NL about his deceit then he would have immediately accepted to buy us out (as with Romeo)…As I say, if he had not offered to buy us out then we would have forced him to do so by going the legal route.
>
> The loss or damage to us is obviously the money value of the principal and interest arising from this transaction. There is also the lost opportunity of the use of the investment money that could have been invested elsewhere."

141. In cross-examination, Mr Solomon explained that the key 2014 telephone call was the 26 June call.

142. During his cross-examination on the Investment Memorandum, Mr Solomon gave the following answers:

> "A. …Because all the projects that were presented to us by Nadav, their fundamental feature, before the promote, before equity or debt or leverage or whatever there is before the IRR was that we, the Hillview Group, invest and you invest on parity with us.
>
> Q. I understand that's your mantra in these proceedings.
>
> A. That's not a mantra. That's the truth."

He continued, later on in his cross-examination:

> "…It was the fundamental premise of every investment that they invest as on parity with us. How many units, what sum, I don't care…"

Later still in his cross-examination, this exchange took place with Mr Trompeter:

> "Q. …You probably heard some evidence from Mr Ragimov, I think it was yesterday morning at the beginning of the day, and he gave evidence…that…when Mr Ragimov is negotiating a deal, you, Mr Solomon, are aware of his really important commercial points?
>
> A. Yes.
>
> …Q: …[D]id he tell you or did he identify what the really key points were?
>
> A. Yes.
>
> Q. And what were the key points that he mentioned to you on the discussions, if you could list them one by one, please.
>
> A. Reporting…Horizon of exit…Capital structure…And that we invest together.
>
> Q. Can you just explain to me what do you mean by capital structure?...
>
> A. …[G]oing in all equity and financing refurbishment work with capex loan…No leverage.
>
> Q. …[S]o no leverage at entry?
>
> A. Yes.
>
> …Q: …So no leverage at entry, use of capex loan for refurb. Anything else?
>
> A. No.
>
> Q. …Horizon of exit, does that just mean you need to have a clear idea as to when the exit is going to take place?
>
> A. No, no, not exactly. It was not to have a clear idea when the exit was planned but how we can ensure that we can exit the investment at year 5 as planned.
>
> Q. …[R]eporting…Presumably what he wanted, just periodical reports, is that what he wanted?
>
> A. Not only periodical reports, but full, comprehensive reports…That reflect the actual dealings at the company or

> position.
>
> Q. Yes. And in terms of the investing together point, did he explain to you what he meant by that, and what did he mean by it?
>
> A. That every investor has parity of status.
>
> Q. And so these four points, were they the deal-breaker points?
>
> A. You can say that, yes."

143. Mr Solomon too read the Disclaimer, in which respect he gave the following oral evidence. He read it with great interest and he understood it. He continued:

> "This small print, as in any investment memorandum on this earth, its purpose is to cover possible liability in the future. That's what it is…"

He then acknowledged that the purpose of the Disclaimer was to protect the person who prepared the Investment Memorandum from liability. He accepted that, at the time he read the Investment Memorandum, he appreciated that it could not be relied on, save for the representation that it had been prepared in good faith.

144. He explained that the decision to participate in the project was Mr Ragimov's alone.

Mr Livni

145. I have already said that Mr Livni did not give full and frank evidence with alacrity with respect to the Pattern Payment, but, rather, had to have the whole (or, at least, a comprehensive) picture prised from him, in part, at least, perhaps by attrition. I have also already explained that I reject Mr Livni's claim that Crawley's directors acted independently and that Crawley was not, in fact, under Mr Livni's control. I have also suggested that, on other occasions, Mr Livni's oral evidence was not full or frank, or given with alacrity but, rather, that, in those instances too, he had to be pressed to reveal the whole truth. I demonstrate this in this section of the judgment as I consider his evidence generally.

146. In his witness statement, Mr Livni explained that it was likely that he did explain how the Hillview group intended to invest as follows:

> "I am sure that I had a number of conversations with Mr Ragimov and Mr Solomon in 2014, including in relation to the Investment Opportunity. The conversations in 2014 are likely to have taken place by telephone because neither was generally in the UK: Mr Ragimov was usually in either France, Israel or Russia and Mr Solomon was usually in France…
>
> As to the eleven matters that Mr Reed and I are alleged to have "explained in detail" to Mr Ragimov and Mr Solomon, I emphasise that I cannot recall a specific conversation in which I (or Mr Reed) said any of the matters set out in [paragraph 18.1

> of the Re-amended Particulars of Claim]. However, I address them in turn…, so far as I am able to do so.
>
> …I am likely to have said that all investors would be investing equity in the Project on the same, pari passu basis and that the acquisition of the Property was being funded entirely from equity."

147. In cross-examination (which was as memorable as Mr Ragimov's), Mr Livni explained how come the sums invested in Crawley were as I have set them out and why those sums were invested when they were:

> "Q.: …[Y]ou personally, and Mr Reed put in on behalf of Hillview Capital, on 15 September, so two days before completion of the property, you put in 60,000. And then on 17 September, as I understand your evidence, you raised a loan from Pattern, you borrowed money from Pattern, and that £1.26 million that goes in on 17 September is your, Hillview Capital's, £1.25 million.
>
> A. My Lord, that is correct. The reason for the date is no coincidence. We needed to make sure we backfilled down to the penny the exact amount that was required, and that's why that money came in at that date, that is correct.
>
> …Q: What I understand to be your case, Mr Livni, is this: that, as we can see on this little table, Landmead has put in its roughly half, 1.2 million, already on 22 August.
>
> A. Yes, my Lord.
>
> Q. That's the Landmead half of the 2.5 million. But your part, your side, that is Hillview Capital, your part of [Alfa], has not put in its money yet, it puts it in small amounts on 13 August, then 15 September, another small amount, but then its real chunk goes in on 17 September.
>
> A. That is correct, my Lord. Hillview Capital's portion came in on that date to make sure that the exact amount of the completion monies were in place."

148. I have already explained that the sums paid which are, or are said to be, referable to Alfa's investment in Crawley amount to £2,543,340, £38,660 less than £2.582 million (which I have also explained is the par value of Alfa's shares in Crawley in September 2014). As I have also said, Ms Zwarich explained that that balance (£38,660) was credited to Crawley by Real Estate foregoing an equivalent sum which was due to it as part of the £50,000 structuring fee shown in the Investment Memorandum.

149. In his witness statement, Mr Livni gave the following evidence about the Hillview group's investment in Crawley:

> "In August and September 2014 payments on behalf of [Alfa] totalling £2,543,340 were made to the conveyancing solicitors acting for [Crawley] (Wedlake Bell LLP) in order to facilitate Crawley's acquisition of the property. Part of my role at the time was to ensure that all of the money was available from Group funds and paid to Wedlake Bell so that completion could take place, so I am familiar with the detail of the transfers.
>
> In paragraphs 20 and 31 of its Particulars of Claim, Florestco alleges that [Alfa] loaned the Acquisition Funds to [Crawley].
>
> The Acquisition Funds were not loans to [Crawley]; they were equity investments by [Alfa]. The Group had designated [Alfa] as the vehicle through which it would invest in [Crawley] (and therefore the Investment Opportunity). The payment made from Group funds to Wedlake Bell were treated in the first place as payments to [Alfa] by the Group's shareholder in [Alfa], Hillview Capital Limited ("Capital"), which [Alfa] was then treated as paying on to Wedlake Bell as its equity investment in [Crawley], in return for which [Alfa] received shares."

150. Mr Livni was asked about the SPA and responded, at one point:

> "…I can see what's in the contract that [Alfa] agreed to, which I cannot speak on **their** behalf…" (emphasis added).

On all the evidence, I believe that Mr Livni responded this way because he has never been a director of Alfa. However, in the light of what I have already said, this answer does not give the full picture of Mr Livni's control over the Hillview group and creates the inaccurate impression that, somehow, Alfa has been detached from the rest of the Hillview group.

151. Mr Livni was asked about Ms Zwarich's 17 July 2015 email which said: "we are proceeding well with a bank finance facility and anticipate this will be completed in Q3", and he gave the following evidence:

> "Q. …That was untrue, wasn't it, on your now version of events?
>
> A. My Lord, I can see that. I don't know why it was stated this way.
>
> Judge: So you agree that what is said there is untrue?
>
> A. It's not accurate, that's correct.
>
> Judge: It's either true or not true.
>
> A. My Lord?
>
> Judge: Is it true or not true?

A. It is not true."

(Ms Zwarich gave evidence later that Mr Livni, amongst others, advised on the wording of the email.)

152. He was also asked about the 30 October 2015 memorandum prepared by Real Estate, which said: "We have made excellent progress in arranging a development facility and are expecting to have this facility in place by the end of the year. We will provide further update on this in the next few weeks". He gave the following evidence:

> "Q. …"We have made excellent progress in arranging a development facility and are expecting to have this facility in place by the end of the year. We will provide further update on this in the next few weeks." That too was false, wasn't it?
>
> A. That is correct, my Lord. It's not accurate.
>
> Q. It's more than inaccurate, isn't it? It's a lie.
>
> A. My Lord, I don't remember the context, as it's stated here, it is not correct.
>
> Judge: And just to be clear, you drafted this?
>
> A. This would be the whole team. I can't put a specific author to this. Ultimately, I'm the team leader and responsibility is with me.
>
> Judge: And you would have approved this?
>
> A. I would have, my Lord, yes."

Having accepted that the text he was cross-examined on was false, as it clearly was, it is notable that he did not accept that it was lie, but, instead, sought to suggest that there might have been some context which might not justify that description.

153. Mr Livni was then cross-examined about the genesis of the Alfa Loan, and he gave the following evidence:

> "Q. …Questions were asked of this agreement in 2020. Your solicitors said that the terms of the agreement were negotiated at arm's length by which everyone understands to mean between Hillview (Crawley) Limited, the borrower, and Hillview Alfa Holdings, the lender, the two parties were acting at arm's length and negotiated these terms. Was that true or untrue to say that?
>
> A. It was true, my Lord…"

There was then some confusion about the point Mr Stuart was exploring, and Mr Livni's evidence continued, in answer to questions from me:

"Judge: …You're not actually answering Mr Stuart's question. Who were the people who negotiated this loan agreement on the Hillview Alfa side?

A. So the negotiation would have been for Hillview to show or Hillview Alfa to show the directors how they arrive at the interest rate charged.

Q. …[Y]ou're not answering my question. Which individuals on behalf of Hillview Alfa Holdings were the negotiators of the terms of this loan?

A. It would have been myself, my Lord.

Q. And who on behalf of Crawley were the people who would have been involved in the negotiation of this loan?

A. The directors, my Lord…The Guernsey directors of Crawley. We would have provided them evidence to support where we felt the interest rates were --

Q. …I'm not interested in the interest rates. I'm interested in the actual wording of the document.

A. This would have been presented to the Guernsey directors of Crawley for their consideration.

Q. And this would have come with a recommendation, would it?

A. That's correct, my Lord.

Q. And the recommendation ultimately would have come from you?

A. Yes, that's correct, my Lord.

Q. So what your solicitors have described as an arm's length loan is a loan that you have driven on behalf of Hillview Alfa Holdings and have recommended to the Guernsey directors on behalf of Hillview (Crawley)? Is that a fair assessment?

A. That is correct, but we offered them the loan if required. We did not push the money on them. We did not want to lend this money. I should make it clear all along.

Q. [Is it] your evidence that the Guernsey directors of Hillview (Crawley), instigated this loan?

A. The directors of Hillview (Crawley), as I believe we heard evidence from the director yesterday, understood that the property was standing vacant and needed funding.

…Q: And in answer to my question, are you telling me that it was the Guernsey directors who instigated this loan or did this ultimately originate from you?

A. This is a loan that Hillview Alfa put in place, being aware that at the point that the Santander facility came in, Santander needed to be aware that if further funding was needed, it could only come through unsecured lending ranking behind them.

Q. Now, I understand that, but would you do me the courtesy, please, of answering my question. I think it's a simple yes/no answer. If you don't understand the question, I'll try again. Are you saying that it was the Guernsey directors of Crawley who instigated the Hillview Alfa loan?

A. I believe it would have been a mutual discussion, being at the point of, if further funding is required, how would it be? And we would have said: here is a loan for you to consider. So I believe it would have been mutual.

Q. And a mutual discussion has to begin with somebody…I accept it's a theoretical possibility that a mutual discussion takes place coincidentally when two people mention it at exactly the same time, but who began the discussion, you or the directors of Hillview (Crawley)?

A. It would have been us.

Q. You? You or somebody else at Hillview?

A. Again, I'm the team leader, it would have been me.

…Q. The rate of interest says "up to 8%"; yes? Who was to determine what the rate of interest was that was actually going to be charged?

A. So, my Lord, we would have had to show evidence to the directors of Crawley as to where the interest rate would be up to 8%.

Q: And that would have come with a recommendation from you to the directors of Crawley?

A. That's correct, my Lord.

Q. So the interest rate would have been determined in this way: Hillview Alfa would have worked out what interest it wants to charge. [Y]ou, on behalf of Crawley, would have made a recommendation to the Guernsey directors and then they would have, on your case, either accepted the recommendation or rejected it?

A. Correct, my Lord."

154. I am afraid that this whole exchange, which would not have been necessary had Mr Livni given a truthful answer to Mr Stuart's straightforward question, reflects poorly on Mr Livni. A loan, such as the Alfa Loan, which does not fix the rate of interest, but which, on its face, allows the lender to have a measure of control over the rate of interest after the event, is unlikely to be the product of an arm's length negotiation between two commercial parties and I struggle to understand how Mr Livni could maintain that the transaction was an arm's length one in light of the fact that Alfa's and Crawley's directors were the same. Quite how he could maintain that the Alfa Loan was an arm's length transaction when he also knew that, in reality, he had control over both sides of the negotiation for it, and when he also knew that, in reality, he could control the interest rate payable under it (up to 8%) is beyond me. (As it happens, in a different context, Mr Livni said that the Alfa Loan was not intended to be "a hard facility".)

155. This whole exchange reinforces the view I have formed in any event, and which I have already set out, about Mr Livni as a witness.

Ms Zwarich

156. Ms Zwarich is an accountant. She began to work for the Hillview group in September 2014, initially on a part-time basis and to carry out accounting activities for Real Estate. She carried out a bookkeeping function for the whole of the group from 2015 and she began to work full-time in 2018.

157. She said, in her witness statement, in relation to the entry in Crawley's 2015 ledger, in the sheet labelled "Shareholder balance", of the entry "(Shares HC) – loan" and of the entry "[Alfa] ([Landmead] loan)", that they relate to a loan taken by Alfa to fund its investment in Crawley.

158. She continued:

> "NA-Shareholder Loan: this is a template loan amortisation tab initially imported from another project's reporting documents and which appears to have been populated with dates running from the date the Property was purchased and the same figure as was referable to [Alfa's] facility with [Crawley] (which I explain below). I had marked it "NA" in the 2015 Ledger because it was "not applicable" to the Project at the time the 2015 Ledger was created, [Crawley] having taken no loan from any of its shareholders at this stage. It was removed from later versions of the company ledger."

159. She explained that there is a reason why a shareholder might lend money to a company it has invested in, as follows:

> "The benefit of a loan provided by a shareholder in the propco borrower is that the interest payable under the loan terms is deductible against the tax otherwise payable on any income (such as rent) received by the borrower."

160. She said in cross-examination that Mr Livni probably told her at the time of the Pattern Payment that it was the repayment of a loan by Pattern.

161. She explained how the figure as the facility sum which was shown in the Alfa Loan (£2.079 million) was calculated:

> "…The calculation was specifically to put an amount within the agreement based on previous experience and tax advice that if a loan was ever to be used then we would look at circa 80 per cent…"

162. She added that the Alfa Loan was "required under the Santander facility".

163. She was asked who compiled the Drawdown Schedule and responded, as follows:

> "Q. …Was that entirely your creation or did you have input from Mr Livni in relation to what was to go into that list of that drawdowns?
>
> A. That schedule would have been prepared from the records of Crawley, so the drawdown amounts would reflect the amounts that had been transferred from the bank statements.
>
> Q. That is not really my question, Ms Zwarich. I accept that you say you have taken the amounts that you insert into them from the records. But someone has to choose what to list as drawdowns under this [Alfa] loan facility. My question is, did you draft that drawdown schedule alone or did you do it in collaboration with Mr Livni?
>
> A. I did it alone. I did it based on my knowledge of the company's records."

164. Later, however, in answer to questions from me, Ms Zwarich painted a different picture. She explained that she included the following payments as drawdowns in the Drawdown Schedule because Mr Livni told her to do so, probably in September 2020:

Date	£
8 June 2017	50,000
17 August 2017	73,000
2 May 2019	10,000
25 June 2019	20,000
2 July 2019	660
2 August 2019	40,000
1 November	40,000

2019	

These are all payments where the cash register does not show entries in the column "Beneficial Owners' Loan account", but which, rather, are apparently referable to Capital.

165. Ms Zwarich suggested that she "booked" the sum of £149,410, which in due course, was shown as the first drawdown in the Drawdown Schedule, as an "additional drawdown". As I explained earlier, that appears not to be true. She then said that the sum was not "described as such" in Crawley's cash register but was "interpreted as such". She continued:

> "The schedule does not provide adequate description to indicate that it was a first drawdown on the loan. The money went out and the money came back in and the funds that came back in were higher than what went out, so the way it was interpreted is that that was additional funding under the loan drawdown."

She did not say who interpreted the surplus funds as "additional funding".

166. She was asked about her 17 July 2015 email which said that: "we are proceeding well with a bank finance facility and anticipate this will be completed in Q3":

> "Q. …You were keeping secret…the existence of the Santander loan drawdown, were you not?
>
> A. No, I don't believe so. The timing-- there could have been a cut-off on the timing of the report because I know there was an issue regarding the time periods that were picked up in, for example, Q1 or Q2. It was always off a quarter because of the rent date. So it might have been that based on the cash flow recorded in that statement so that it was not picked up. I am not-- I cannot recall now.
>
> Q. No. Look at your wording, Ms Zwarich: "…and anticipate this will be completed in…". That was knowingly false, was it not, because it had been completed on 23 April 2015, three months before this email. There is no getting round that fact and, to be fair to him, Mr Livni accepted all of this, but you are denying it.
>
> A. It appears incorrect but I was trying to figure out whether there is an alternate explanation and perhaps there is not.
>
> Judge: Sorry, how can there be an alternate explanation for the accuracy of the statement that you anticipate the banking finance facility be completed at some point in Q3?
>
> A. Sorry, that statement is incorrect. I was referring, when I am looking at some of the expenses, they might have been picked

> up in different categories. The date of some of the reports wasn't quite matching the Excel, but in total it agreed.
>
> Q. …Is it likely that by July, 17 July, so some three months later, you would have forgotten about the existence of a Santander loan facility?
>
> A. No.
>
> Q. So is Mr Stuart right when he suggests to you that you knew your statement that the banking facility will be completed in Q3 2015 was untrue when you sent out this email?
>
> A. I don't recall my thoughts around then at the time that the email was sent but, looking at it now, it appears that it is incorrect.
>
> Q. But the point Mr Stuart is making is do you accept that when you sent out the email you knew it was incorrect or are you saying you cannot remember what you thought when you sent out the email?
>
> A. I can't remember what I thought when I sent the email which would have been advised on in terms of wording.
>
> Q. By whom? Mr Livni?
>
> A. By the time. Everybody on copy.
>
> …Mr Stuart: That is Mr Livni, Mr Reed and Mr Ditz?
>
> A: Yes."

167. I have explained that, in the cash register, the receipts relating to Alfa's investment add up to £2,543,340, £38,660 less than £2.582 million (the par value of the 2.582 million shares of which Alfa has been the beneficial owner). I have also explained that that balance (£38,660) was credited to Crawley (and so treated as an investment by Alfa), Ms Zwarich explained, by Real Estate foregoing an equivalent sum which was due to it as part of the £50,000 structuring fee shown in the Investment Memorandum. In re-examination, shortly before she gave this evidence, when Ms Zwarich was first asked how contributions to the project attributed to Alfa were reconciled with the shareholding, she said:

> "It was reconciled by going back through the Wedlake Bell bank statement and it was determined that the shares were paid for… [I]t was reconciled and…they were fully paid up."

The full picture only emerged, in Ms Zwarich's re-examination, because, very fairly, Mr Trompeter asked open questions to elicit that full picture.

168. Ms Zwarich's initial oral evidence about the provenance of the Drawdown Schedule was not wholly truthful. Nor was her initial oral evidence about how the £149,410

sum came to be treated as a drawdown under the Alfa Loan. I cannot be sure whether, in these instances, Ms Zwarich consciously did not tell me the whole truth, whether her focus was on advocating the Defendants' case, or whether she was just speculating. Her initial explanation about how come the £38,660 sum was treated as a payment by Alfa for shares in Crawley also probably falls into one of these three categories. Ms Zwarich's defence of the 17 July 2015 email may have been a further instance of her advocating the Defendants' case or of her speculating. She did acknowledge, during her oral evidence, that answers she gave in cross-examination were speculation even though she had been warned previously not to speculate.

169. As in the case of Mr Ragimov, so in this case, I can only accept Ms Zwarich's evidence where it is corroborated by other evidence or is otherwise probable, or, in this case, is against the Defendants' interests.

Mr Ditz

170. Mr Ditz could not remember the project in detail. As it has turned out, his evidence has not assisted me to determine the claim.

Mr de la Mare

171. I have already addressed Mr de la Mare's evidence above, to the extent I need to do so.

Mr Livni's conduct

172. A question I have to consider is whether I should infer that, when Mr Livni claimed that Alfa did not invest in the project differently to other (third party) investors, he was covering up the truth (that is, that it invested by way of loan) because of (i) the Pattern Payment, (ii) his involvement in the misreporting of the management of the project and/or (iii) his performance as a witness.

173. I do not need to say much more about the Pattern Payment itself. It is enough for me to repeat that I have already found that Crawley was not obliged to make the payment and that the payment did not benefit Crawley. The payment was, in other words, illegitimate. More importantly, for present purposes, the payment was an illegitimate one behind which, I have found, Mr Livni was the driving force.

174. Nor do I need to say much more about Mr Livni's evidence about the Pattern Payment. I have already said, more than once, that he did not give full and frank evidence on this subject with alacrity.

175. Mr Livni's involvement in the misreporting of the management of the project requires some further comment.

176. I have already pointed out that Ms Zwarich's 17 July 2015 email, in which she claimed that the Santander Loan had not yet been obtained but was anticipated to be obtained in Quarter 3 2015, was untrue. I have also already pointed out that the Real Estate 30 October 2015 memorandum, which claimed that the Santander Loan was expected to be in place by the end of 2015, was also untrue.

177. Ms Zwarich gave evidence that Mr Livni, amongst others, advised on the wording of her email. I accept that evidence, at least so far as it relates to Mr Livni. At the time of the email, she was a part-time bookkeeper. Her principal role was not the manage the project. Mr Livni, on the other hand, had almost complete control of the Hillview group and so the project.

178. Mr Livni accepted that the claim in the 30 October 2015 memorandum was false and that he approved the memorandum.

179. No-one has suggested an innocent explanation for the false statements and I am satisfied that Mr Livni could not have forgotten about the existence of the Santander Loan in July 2015 or October 2015, particularly when the Pattern Payment was made in June 2015. I have concluded, therefore, that the false statements were known by him at the time to be untrue.

180. In the present context, my concern is not only that Mr Livni was intimately involved in the misreporting of the Santander Loan but also that he sought, in cross-examination, to explain away the memorandum.

181. I also need to have in mind that Mr Livni's claim in the 17 August 2020 letter he wrote on behalf of Real Estate, that the Alfa Loan was entered into after the refurbishment of the property was complete in 2017, and not at least two years earlier in 2015, was untrue.

182. I must also consider the Drawdown Schedule.

183. Ms Zwarich explained that Mr Livni directed her to include, in the Drawdown Schedule, a number of items which the contemporaneous documents record were loans from Capital and not Alfa. She also explained that Mr Livni directed her to include the £660 item shown in the Drawdown Schedule. I accept Ms Zwarich's evidence that Mr Livni did so direct her, for the same reasons that I accept her evidence in relation to the 17 July 2015 email.

184. I am satisfied that the Drawdown Schedule was an after-the-event, and inaccurate, reconstruction, most probably to justify the recovery, bv the Hillview group, of proceeds of the property's sale, in the case of many of the items on the schedule under the guise of the Alfa Loan, and, importantly, for present purposes, at Mr Livni's direction, as I have said. It is incredible, in relation to a high value property development, when the sums under consideration always were at least many thousands of pounds, that Crawley would have drawn down £660 for the purposes of the project. Further, it is improbable that the £149,410 item was a sum drawn down for any project-related purpose. No-one has provided an explanation, let alone a sufficiently convincing explanation, about why that particular (not round) sum was needed by Crawley in June 2016 when any refurbishment work had only just begun and when the Pattern Payment had been repaid, at the same time, to Crawley. Further, the treatment of £149,410 as a drawdown under the Alfa Loan is notably inconsistent with the contemporaneous records. More generally, the contemporaneous records are not obviously consistent with the Drawdown Schedule.

185. As a result, I have concluded, as I have said, that the Drawdown Schedule was an after-the-event reconstruction and I have also concluded that the items on the

Drawdown Schedule which are shown in the contemporaneous records as loans by Capital to Crawley were such loans, in particular because there is no reason to call into question the accuracy of those records and because, in the cash register, Capital was treated as an "other creditor" rather than a "beneficial owner".

186. Finally, I must consider in the present context Mr Livni's evidence about the genesis of the Alfa Loan. As I have shown, Mr Livni's evidence that it was the product of an arm's length negotiation was not true.

187. I have reminded myself about the circumstances in which lies are told as Ramsey J explained in *BskyB Ltd. v. HP Enterprise Services UK Ltd.* [2010] EWHC 86 (TCC) at [191]ff, including:

> "I was also referred to the familiar Lucas direction in criminal cases and what Lord Taylor said in *R v. Goodway* [1993] 4 All ER 894 that a jury "must be satisfied that there is no innocent motive for the lie and [they] should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour.""

188. Although I have been highly critical of Mr Livni, I am not satisfied that I should conclude, from the matters I have just considered, that Mr Livni was covering up the truth when he claimed that Alfa did not invest in the project differently to other (third party) investors.

189. All of the matters I have commented on, save for the drafting of the Drawdown Schedule, represent attempts to cover up the Pattern Payment or the fact that it was illegitimate and was directed by Mr Livni, or to cover up that attempts were made, during the life of the project, to cover up the Pattern Payment. Take for example, the 17 July 2015 email and the 30 October 2015 memorandum. I am satisfied that they were not truthful because Mr Livni did not want to risk third party investors enquiring too deeply about the Santander Loan (or a capital expenditure facility more generally). Read together, they demonstrate an attempt to put off revealing the existence of a facility until the Pattern Payment had been repaid to Crawley. Take too Mr Livni's evidence about the genesis of the Alfa Loan. I have concluded that Mr Livni's motive in giving that evidence in the way he did was to disguise the degree of his control of the Hillview group; a degree of control that allowed him to direct the Pattern Payment.

190. As to the Drawdown Schedule, I have already explained why it was drafted as it was.

191. Because my criticisms of Mr Livni relate to two distinct matters in issue, I am not satisfied that I can reach a more general conclusion that he was covering up the truth about the way Alfa invested in Crawley.

192. I need to make two further points.

193. First, I accept that it is possible that the untrue statement in the 17 August 2020 letter about when the Alfa Loan was entered into could have been an innocent error. However, I have concluded that the more likely explanation is that Mr Livni

consciously wrote what he did because he wanted to avoid too careful scrutiny of the management of the project which might have inadvertently revealed the Pattern Payment. Such a conclusion is most consistent with Mr Livni's prior conduct and the conclusion I have reached about why Mr Livni conducted himself as he did.

194. Secondly, having concluded that the £149,410 item was not a draw down under the Alfa Loan, I think it is most probable that it was a sum intended to make Crawley's funds whole and to cover up the Pattern Payment; that is, it was a sum intended to reimburse Crawley for being kept out of its funds – the sums drawn down under the Santander Loan – for a year, £149,410 having been paid to Crawley as part and parcel of the £1.504 million payment which was a reimbursement of the Pattern Payment.

The 2014 misrepresentation claim

195. When considering the 2014 misrepresentation claim, it has been necessary for me to keep in mind (i) the point that it is Florestco which must establish that a fraudulent misrepresentation was made, (ii) the standard Florestco must meet to prove its claim and (iii) how the claim might be proved. These points are covered by what Bryan J said in *National Bank Trust v. Yurov and ors* [2020] EWHC 100 (Comm). At [50], the Judge said:

> "The burden and standard of proof: In relation to a claim raising allegations of fraud, the burden of proof is upon the claimant as in an ordinary civil claim, and the fact that fraud is alleged does not change the standard from being on the balance of probability – see *In Re B (Children)* [2009] 1 AC 11 at [13] per Lord Hoffmann. As was said by Lord Hoffman in *In Re H (Minors)* [1996] AC 563, 586E-G:
>
> > "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence…Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
> >
> > Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

> In *In Re B (Children)* the House of Lords emphatically re-iterated that there is only one civil standard emphasising that any logical or necessary connection between the seriousness of an allegation and its inherent probability is to be rejected; inherent probabilities are simply something to be taken into account as a matter of common sense in deciding where the truth lies (see Lord Hoffmann at [13] to [15]).
>
> Inherent probabilities: In applying the civil burden of proof on the balance of probabilities, inherent probabilities can be weighed alongside or against specific evidence from a particular case. But care must be taken in working out what in a particular case is inherently probable or improbable. It is generally correct that, absent other information, the more serious the wrongdoing, the less likely it is that it was carried out, because most people are not serious wrongdoers. The standard of proof remains the same, but more cogent evidence is required to prove fraud than to prove negligence or innocence because the evidence has to outweigh the countervailing inherent improbability…"

196. Against that background, I have concluded that the 2014 misrepresentation claim fails, principally because, whilst the Loan Representation was made, I am satisfied that it was probably true, and not false, because I have concluded that Alfa invested in Crawley as an investor not by way of loan (in particular, not by way of any agreement to which the Alfa Loan related) and, so, it probably invested on the same terms as third party investors, so that it is probable that that is what was always intended. There are further reasons why the 2014 misrepresentation claim fails in whole or in part against one or more of the Defendants. I begin by considering some of those further reasons and then I will explain why I have concluded that Alfa did not invest in Crawley by way of loan.

197. The Investor Memorandum was provided to Florestco by Mr Reed, who was employed by Real Estate, and against whom no claim is made. The Investor Memorandum was headed on each page with a reference to Real Estate. It offered Real Estate's investors the opportunity to subscribe for an investment unit. The Disclaimer begins by making clear that the Investment Memorandum related to Real Estate's services. The Disclaimer seeks to exclude Real Estate's liability and the liability of those who might act on its behalf. It is improbable therefore that the document was intended to be a broader Hillview group document, in respect of which exclusion of liability was intended to be limited principally to Real Estate, rather than a Real Estate document.

198. Mr Stuart explained in his oral closing that Group is a defendant to the 2014 misrepresentation claim because it has been Real Estate's parent. That intercompany relationship cannot, itself, make Group liable for any misrepresentation in the Investment Memorandum or in any telephone calls. Mr Stuart also explained that Advisors is a defendant to the claim because the Disclaimer says: "This document… has been approved for distribution by [Advisors]". Bearing in mind that Advisors is the FCA-regulated entity in the Hillview group, I am doubtful that that means anything more than Advisors was satisfied that the Investment Memorandum

complied with FCA requirements. It has not been suggested that the Investment Memorandum did not comply with such requirements and, if my interpretation of this part of the Disclaimer is right, I do not see how Advisors can be liable for any actionable misrepresentations in the Investment Memorandum. In any event, even if Advisors might be liable for any actionable misrepresentation in the Investment Memorandum, it does not follow from that alone that it might be liable for anything arising from any telephone call. Mr Stuart suggested in his oral closing submissions that Mr Livni and Mr Reed were selling the investment proposal on behalf of Advisors during the telephone calls. Mr Stuart did not develop that argument and it is not appropriate for me to speculate what the basis of the argument might be. In any event, on the material before me, I am afraid I do not see how the argument can be proved.

199. I have concluded, in any event, that, because of the Disclaimer, the Investment Memorandum does not contain any actionable misrepresentations. The Disclaimer in terms made clear that no representation was being made in the Investment Memorandum and the whole tenor of the Disclaimer is that no liability was being accepted for its contents by anyone who might otherwise be liable for those contents, so that it was intended that Florestco should not be able to rely on what was said in the Investment Memorandum as amounting to representations. In *Vald. Nielsen Holding A/S v. Baldorino* [2019] EWHC 1926 (Comm), Jacobs J explained:

> "The basic requirements
>
> 131. The tort of deceit requires the claimant to show that:…(iii) the defendants intended the claimants to rely on the representations;…(see e.g. *Hayward* at [58] per Lord Toulson JSC, and *Cassa* para.[210].
>
> Representation
>
> 132. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. Determining whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee...
>
> 138. It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In some cases, for example, the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only

> a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on."[23]

As I have said, the Disclaimer clearly qualified the Investment Memorandum. In so doing, it had the effect that a reasonable representee in the position of Mr Ragimov and Mr Solomon (that is, sophisticated investors) would have understood that it was not intended that what was said in the Investment Memorandum could be relied on by its recipients for the purpose of deciding how to proceed.[24] In fact, as I have noted, both Mr Ragimov and Mr Solomon read the Disclaimer. So far as I understood Mr Ragimov's evidence, he appears to have accepted that he appreciated that the contents of the Investment Memorandum were not intended to be relied on. Mr Solomon's evidence was clearer and was to the same effect.[25]

200. I now consider the principal ground on which the 2014 misrepresentation claim fails.

201. I have said that the Loan Representation was made. Mr Livni admitted that he is likely to have said to Mr Ragimov and Mr Solomon on a telephone call that "all investors would be investing equity in the Project on the same, pari passu basis and that the acquisition of the property was being funded entirely from equity". In *FoodCo UK LLP v. Henry Boot Developments Ltd.* [2010] EWHC 358 (Ch), Lewison J said, at [186]-[187]:

> "Normally, when the court is called upon to decide the meaning of an utterance, it determines that meaning objectively. The question is what meaning would the utterance convey to a reasonable person with the background knowledge of the audience to whom the utterance was addressed? However, where the issue is whether the utterance was fraudulently made, the question is a different one.
>
> In *Akerhielm v. de Mare* [1959] AC 789 Lord Jenkins said:
>
> > "The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made.""[26]

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[23] See also per Toulson J in *IFE Fund SA v. Goldman Sachs International Ltd.* [2006] 2 CLC 1043, particularly at [52], [54].

[24] As Cartwright: Misrepresentation, Mistake and non-Disclosure (6th ed) explains, at paragraph 5-19, what the court must consider is "the subjective state of mind on the part of the representor".

[25] If it is the case that Mr Ragimov did not participate in any phone calls after May 2014, it is difficult to see how Florestco can establish that the Loan Representation (to the extent it was made during a telephone call) induced it to do anything, Mr Ragimov being the decision-maker. The project was not apparently proposed to Florestco until late June 2014, so that any representation relating to it is unlikely to have been made before then. Although Mr Ragimov apparently received executive summaries from Mr Solomon of phone calls Mr Ragimov did not join, it is entirely unclear what form those executive summaries took or what their content was.

[26] See also *Baldorino* at [137].

202. Mr Livni is a sophisticated investor and financial advisor whose business was promoted as a "co-investor". However Mr Livni's evidence is interpreted, he effectively admitted that he made the Loan Representation. Florestco has therefore established that the Loan Representation was made.

203. As I have said, for the reasons I set out below, I have concluded that the Loan Representation was true, because Alfa invested in Crawley as an investor not by way of loan (in particular, not by way of any agreement to which the Alfa Loan related) and, so, probably on the same terms as third party investors, so that it is probable that that is what was always intended.

204. In concluding that Alfa invested in Crawley as an investor not by way of loan, key questions have been whether the Alfa Loan is evidence to the contrary and, if so, what weight I should attach to such contrary evidence. I consider these questions in more detail now. Before I do so, I can deal briefly with Mr Stuart's suggestion broadly that the Alfa Loan was concocted to make it look as if Alfa had lent money to Crawley when in fact it had not, in order that the documentation could be deployed to the Hillview group's benefit. That suggestion is inconsistent with Florestco's case because it is to the effect that Alfa did not lend any money to Crawley. As should be clear, Florestco's case depends on establishing that Alfa did lend money to Crawley at the beginning of the project.

205. Even though it is now not disputed that the Alfa Loan was executed in April 2015, it does not follow that its terms cannot support the 2014 misrepresentation claim. To the contrary, certain features of the Alfa Loan do support the claim.

206. No convincing explanation has been provided about why the Alfa Loan happened to be dated 17 September 2014, which was the same date that International transferred the final tranche of funds, £1.26 million, to Wedlake to complete the purchase, by Crawley, of the property and only two days before that purchase. It is unlikely to be coincidental that whoever first chose to backdate the Alfa Loan chose a date which was so close to the funding of Crawley and its purchase of the property.

207. The purpose of the Alfa Loan was, according to the document itself, to finance Crawley's purchase of the property. That is consistent with Alfa having lent money at the beginning of the project, and so is consistent with Florestco's case.

208. The amount of the facility under the Alfa Loan was £2.079 million, which is about 80% of the funds which the Hillview group invested in Crawley. Ms Zwarich explained that the amount of the facility was in fact calculated by reference to that investment. This calculation too is consistent with funds having been lent to Crawley at the beginning of the project and so is consistent with Florestco's case.

209. That the Alfa Loan was not revealed or its existence made clear to Florestco until August 2020 is also capable of supporting Florestco's case.

210. Ms Zwarich's March 2015 loan amortisation schedule which relates to the Alfa Loan but which pre-dates, by a few weeks, the Alfa Loan's execution, and which shows interest on the Alfa Loan arrangement running from 17 September 2014 on the whole of the £2.079 million facility, is also capable of supporting Florestco's case, but I attach hardly any weight to it. It is contained in Crawley's 2015 ledger (which Ms

Zwarich managed) in a sheet marked "NA – Shareholder Loan". Ms Zwarich explained that she deliberately marked the sheet "NA", meaning "not applicable", because, she said, in March 2015 Alfa had not lent money to Crawley. There is no suggestion that the "NA" marking was added after the sheet was first created in March 2015 or, more particularly, after the dispute between the parties first arose. That is unsurprising because the sheet was last modified in August 2015, before the possibility of any dispute was in contemplation. No reason has been proffered for why the marking might have been applied after March 2015. "NA" is a common abbreviation for "not applicable". I therefore accept Ms Zwarich's evidence that she marked the sheet "NA" in March 2015, because she was not aware then that Alfa might have invested in Crawley by way of loan.

211. The Shareholder balance sheet in Crawley's 2015 ledger which refers to a loan of about £1.26 million is equally consistent with the Defendants' case, that Pattern lent money to the Hillview group for its investment in Crawley, as it is with Florestco's case that Alfa invested in Crawley by way of loan. I get no assistance from this sheet.

212. Ms Zwarich said in evidence that the Alfa Loan was "required under the Santander facility". She might have meant that a pre-existing Alfa Loan arrangement was required to be documented at the time the Santander Loan was arranged, which would support Florestco's case. However, she might equally have meant that, if the Hillview group was going to put in place a loan facility to Crawley, it had to be put in place before the Santander Loan documents were completed, because, afterwards, Santander's consent to such a facility might be an obstacle, which does not support Florestco's case.

213. I do not get any assistance from the Santander Loan agreement. The purpose of the facility was expressed to include the "refinancing of the purchase of the property". The word "refinancing" is itself so vague as not to assist either Florestco's or the Defendants' case and I received no evidence which establishes sufficiently how that word came to be used or the context in which it was selected. Nor do the Santander Loan documents shed any light on when the Alfa Loan arrangement may have first been put in place or when the Hillview group first lent money to Crawley.

214. A further fact relied on by Florestco in support of the 2014 misrepresentation claim which is not probative of whether or not Alfa invested in Crawley by way of loan is that, on Florestco's pleaded case, Alfa lent money to Crawley for capital expenditure on the property.

215. More weighty than the matters which support Florestco's case are Crawley's ledgers, which are internal documents, which, save for the loan amortisation schedule, support the Defendants' case that Alfa did not invest in Crawley by way of loan, but on the same basis as third party investors. Save for about £10,000 of the investment attributed to Mr Livni and Mr Reed (a minimal amount in the present context), which is not treated as a loan but, oddly, as a fixed asset, all the investments in Crawley are treated in the same way in the cash register. They all appear in the "Equity" column in the "Shareholder Equity" section of the cash register. Save for the loan amortisation schedule (to which I have already said I attach hardly any weight), Crawley's ledgers do not treat the Hillview group investment in Crawley as a loan.

216. Of equal weight in my view is that the loan amortisation schedule was removed from Crawley's ledgers after August 2015.

217. It is true that there are certain entries in Crawley's ledgers which are not accurate; for example, in relation to the loan amortisation schedule and the entries which were reclassified. However, all those inaccuracies are apparent and are highlighted in the ledgers themselves, by the marking of the loan amortisation schedule "NA" and by the express reclassification of entries. It is true too that the balance sheet in Crawley's 2015 ledger did not record the Santander Loan facility on 12 May 2015, even though it had been fully drawn down on 23 April 2015. However, that inaccuracy (if it is an inaccuracy) is explicable because Crawley did not receive any of the funds until 18 May 2015. It is also true that information provided to the third party investors and to Crawley's Guernsey directors – the Drawdown Schedule – was untrue as I have shown. However, there is no basis for concluding that Crawley's ledgers, which are internal documents, as I have said, deliberately covered up, when the relevant entries were made, the true basis of Alfa's investment in Crawley by deliberately mis-recording the basis of that investment. Nor is there any basis for concluding that the ledgers have been altered for the purposes of the present dispute.

218. If Alfa (or the Hillview group more generally) had invested in Crawley by way of loan, rather than by investing capital, there would have been a reason for it to do so. Florestco has not suggested a credible reason. Ms Zwarich offered a reason why an investor might invest by way of loan. She explained that there were tax advantages in doing so, allowing tax on rental income to be offset. I was not referred to any evidence that any tax on rental income was offset in this case. It is likely that such evidence would have been available had Alfa's investment in Crawley been a loan. Further, the Hillview group would have no reason to think at the time that Florestco, or any other third party investor, might ever see its internal documents. I cannot think of any good reason why the Hillview group's internal records would not reveal the truth but, rather, would effectively cover up the truth from itself (if Alfa's investment was by way of loan). Much more likely is that those internal documents reveal the true position about that investment.

219. Considering all I have said, to which might be added the fact that Crawley's audited accounts for the period ending 31 March 2015 record that all its shares were fully paid up, I have concluded that Alfa did not invest in Crawley by way of loan but, rather, it invested in the same way as third party investors. That is what the internal contemporaneous documents support. If Alfa did not invest in Crawley by way of loan, no-one has suggested that it invested in any other way which was different to third party investors and I cannot conceive of what that other different way might be. It is likely therefore that the Loan Representation was true, so that the 2014 misrepresentation claim must be dismissed.

220. There are hints in the Re-amended Particulars of Claim that Florestco complains that the Hillview group contemplated in the summer of 2014 that the project was likely to need a loan, in addition to what became the Santander Loan, to fund the development of the property and holding costs, but that the Defendants misrepresented the position to Florestco to the effect that no such further loan would be needed. I am very doubtful that this complaint has been fully pleaded. In any event, this is not a complaint that I need to consider within the limits of this judgment as I set them out at

paragraph 6 above. Nevertheless, in case it is suggested that I should have considered the complaint in this judgment, I deal briefly with it now.

221. I have concluded that this complaint does not assist Florestco.

222. It depends almost entirely on the Alfa Loan. Considering the Re-amended Particulars of Claim most benevolently, as I have already noted when summarising the 2014 misrepresentation claim, Florestco may also intend to rely on the fact that Alfa (or, more generally, the Hillview group, as the evidence now suggests), lent money to Crawley from about 2017.

223. That the Hillview group lent money to Crawley during the lifetime of the project, and first about 2 years after Florestco made its investment, is not probative of what was in the Defendants' minds in the summer of 2014.

224. The only pleaded feature relating to the Alfa Loan which can support this complaint is that it is dated 17 September 2014. That fact is not particularly supportive of the complaint because, as Florestco now accepts, the Alfa Loan was backdated in about April 2015 to 17 September 2014.

225. It is improbable that, whatever else Florestco was told, the Defendants suggested that lending, other than by way of the Santander Loan, would definitely not be needed. It was impossible to be certain about the course of the project in the future, and all the individuals involved, who were sophisticated investors, would have known that.

226. It is improbable that it was fraudulently misrepresented to Florestco that a further loan to support the development of the property or holding costs was unlikely to be, or may not be, needed.

227. In the summer of 2014, the Hillview group was likely to have appreciated that it might need to become, at least in the short term but perhaps for a longer period of time, a major investor in the project, as it in fact became. As the evidence shows, it did not have the cash reserves itself to fund that major investment. Instead it had to borrow about half of what it needed from Pattern. It is unlikely therefore that it contemplated that it would be likely to be lending money to Crawley during the lifetime of the project.

228. If the Defendants contemplated, in the summer of 2014, that a further loan (other than the Santander Loan) was likely to be needed for the project to be successful, they are likely to have attempted to secure third party funding then and to have drawn the probability of a further loan to the attention of third party investors.

229. As a co-investor in the project, the Hillview group had an interest in structuring the project so that it was most likely to succeed. If it contemplated that a further loan was likely to be needed for the project to have the best prospect of success, it is likely, as I have just said, that it would have been trying to obtain a long term facility in the summer of 2014. There is no material which suggests that it was trying to obtain such a long term facility at the time (although there is evidence that it was trying to secure a short term bridging facility), and Florestco does not plead any such material.

230. It is important to remember too that, as well as being an investor, the promotion of similar investments was the business of the Hillview group, which could benefit from repeat business from third party investors (high net worth individuals). To misrepresent the profitability of the project (by not referring to likely further lending) could put the probability of repeat business and the Hillview group's reputation at risk, so that it is most likely that, had the Defendants contemplated, in the summer of 2014, that a further loan was required, they would have revealed that.

231. It follows that it is unlikely that the Defendants contemplated that such a loan was likely to be needed.

The breach of contract claim

232. As I have already said, Florestco does not plead that any breach of clause 4.4.2 was causative of any loss. It inevitably follows that whatever is the proper construction of clause 4.4.2 and whether or not the matters Florestco complains about are breaches of clause 4.4.2, Florestco cannot recover more than nominal damages against Alfa. As McGregor on Damages (21st ed) explains, in a similar context, at para.12-004:

> "Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss or other remediable consequence. In the present case the problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss."

233. I have reflected on whether, if any of the matters complained about by Florestco does amount to a breach of clause 4.4.2, even absent a plea of causation of loss, I should nevertheless do "my best" to calculate what Florestco's loss might be and award Florestco damages accordingly. I have concluded that it is not appropriate for me to do so.

234. In *Morris-Garner v. One Step (Support) Ltd.* [2019] AC 649, at [36]-[38], Lord Reed set out a number of principles applicable to the quantification of loss arising from breach of contract which I have found helpful:

> "…What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.
>
> The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments Ltd. v. Browallia Cal Ltd. (formerly Union Cal Ltd.)* [2010] EWCA Civ 486; [2011] QB 477, paragraph 22:

> "Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss.
>
> An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see Chitty on Contracts, 32nd ed (2015), paragraphs 26-172-26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in *Watson, Laidlaw* at pages 29-30 as "the exercise of a sound imagination and the practice of the broad axe".
>
> Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, paragraph 26-015, "[w]here it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence"…"

235. In this case, on the available material I would be doing no more than speculating if I was to award substantial damages for any breach of clause 4.4.2 which Florestco proves. This case is far from one where the difficulty I have faced is being wholly precise about Florestco's loss, when it might be appropriate to do the best I can or to wield a broad axe. I will try to demonstrate this by considering some of the complaints which Florestco makes. Before doing so, I need to consider what clause 4.4.2 means.

236. Clause 4.4.2 does not, in terms, require Alfa to manage the project. Rather, by the clause, Alfa was required to "maintain [Crawley's] investment in the property in accordance with the Investment Memorandum". The specific references to Crawley and its connection with the property can point to the conclusion that Alfa was required to make sure that Crawley's freehold interest in the property remained unencumbered, save perhaps for a secured capital expenditure loan. However, the clause continues: "where any material deviations from the Investment Memorandum will require the consent of all the Shareholders of [Crawley]". These additional words serve no purpose unless the clause is interpreted more broadly. These additional words refer to

the Investment Memorandum as a whole. I am inclined to think therefore that the clause was intended to require Alfa to use its majority shareholding in Crawley to ensure that the project was carried out without any material deviations from the Investment Memorandum. I will consider the alleged breaches of the clause on that basis.

237. I have summarised Florestco's complaints in this context in paragraph 28 above. I now consider some of those complaints.

238. *Paragraph 28(ii) (the Hillview group lent money to Crawley)*. Florestco did not explore in evidence, plead, or make submissions in relation to a counterfactual in which the project would have been profitable had the Hillview group not lent money to Crawley. If I was to consider a counterfactual, I would be doing no more than speculating and, for the reasons I have explained, it is not appropriate to award Florestco substantial damages for this complaint.

239. *Paragraph 28(iii) (there was no accounting to investors for income received from the property)*. Although it was suggested, in oral closing submissions, that this complaint was actually about a failure to properly distribute the October 2020 (capital) sale proceeds, that is strictly not what Florestco has pleaded. In any event, I am in the dark about what income Florestco claims Crawley retained in October 2020 and what evidence Florestco relies on to establish its claim.

240. *Paragraph 28(iv) (unjustified costs were incurred in the project)*. Incurring acquisition costs of £259,450 was not a deviation at all from the Investment Memorandum. Rather, as I have noted, that sum for acquisition costs was expressly provided for in the Investment Memorandum. There is no burden on the Defendants (and Alfa, in particular) to justify that sum for costs. The burden is on Florestco to establish that lower acquisition costs were incurred. Nor, if the acquisition costs were £259,450, do the Defendants have to justify the reasonableness of that expenditure.[27] That Florestco is effectively complaining that it did not get value for money is neither here nor there. Such a failure would not be a breach of the Investment Memorandum. I have already noted that it is not clear to me whether any part of the £37,764 reserve was spent on wind-down expenses. I do not understand how merely reserving that sum gives rise to a breach of the Investment Memorandum which has caused Florestco loss.

241. *Paragraph 28(v) (asset management fees were charged but the management of the project was "incompetent and dishonest")*. I do not understand it to be disputed that the fees charged were those which the Investment Memorandum contemplated. It does not follow that there may be criticisms of the management of the project that there has been a breach of the Investment Memorandum. In any event, as I have noted, the complaints of incompetence and dishonesty have not been particularised in the Re-amended Particulars of Claim.

242. *Paragraph 28 (vii) (the Pattern Payment)*. It was a material deviation from the Investment Memorandum, and so a breach of clause 4.4.2, to use Crawley's funds to make the Pattern Payment. The Investment Memorandum clearly contemplated that the project would be the sole source of expenditure of Crawley's funds (see, for

[27] As it happens, Schedule C to the Amended Defence, particularises £268,790 of acquisition costs, which appears to be derived from an apparently contemporaneous Acquisition costs document.

example, the Funding box). However, as I have explained in footnote 9 above, if the sums drawn down under the Santander Loan which were used to make the Pattern Payment had not been used in this way, they would have had to be retained in a Santander bank account, in respect of which there is no evidence that credit interest would have been payable or, if credit interest would have been payable, that it would have amounted to more than £149,410, which I have found was the additional sum which was paid to Crawley to make its funds whole again. It follows, therefore, that there is insufficient material to entitle Florestco to substantial damages for this breach.

243. I must consider now whether Florestco has made out its case for the Implied Term. If it has not, its complaints about the misreporting of the project do not establish a breach of the SPA.

244. I do not understand the law about when a term will be implied into a contract on the grounds of business efficacy to be in dispute. Chitty on Contracts (34th ed) explains, at 16-012-16-013:

> "The Supreme Court in *Marks & Spencer* affirmed that it is not enough to show that the term is a reasonable one for it to be implied into the contract. **Reasonableness may be a necessary requirement before a term will be implied but it is not sufficient of itself to lead to the implication of a term into the contract**. **Thus a term will not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them**. Nor will a term be implied simply because it would improve the contract or make the carrying out of it more convenient. As it has been observed, "[t]he touchstone is always necessity and not merely reasonableness". **The test therefore remains one of necessity, albeit not "absolute necessity" but whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term "in order to make the contract work"**. In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract. Given the strict nature of the test established by the Supreme Court it is now no easy task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in *Marks & Spencer* and, on that basis, have declined to imply a term into the contract between the parties. If the contract does not expressly provide for what is to happen when a particular event occurs or in a particular situation, the most usual inference to be drawn is that nothing is to happen and no term is to be implied.

> A helpful summary of the principles now applied by the courts when considering whether or not to imply a term into a contract as a matter of fact was given by Lord Hughes, giving the judgment of the Privy Council in *Ali v. Petroleum Company of Trinidad and Tobago*, in the following terms:
>
> > "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."" (emphasis added).

245. I have concluded that the Implied Term was not implied into the SPA as Florestco contends, for the following reasons.

246. It was Crawley's obligation, clause 4.4.3 suggests, to produce quarterly statements. Real Estate's role, as the SPA expressly provided, was to manage the project. As part of that role, Real Estate was responsible, as the SPA also expressly provided, for the oversight of the quarterly statements and their circulation. Alfa, as a separate entity, was in hardly a better position to check the accuracy of the quarterly statements than third party investors and, in any event, that function was given to the project manager, Real Estate, as I have said. Further, Florestco's complaint in relation to the Romeo Project, when it had previously dealt with the Hillview group, was not that the reports it received were inaccurate but that it did not receive sufficient reports.

247. Against that background, the purpose of clause 4.4.3 is tolerably clear; namely, that Alfa should use its position to ensure that the quarterly statements which were contemplated were received by Florestco in a timely manner. The purpose of the clause was not to enhance the accuracy of those reports, because, at the time the SPA was made, there was no concern that the reports might be inaccurate and, in any event, because Alfa was not able to check the accuracy of those reports.

248. In those circumstances, the SPA, and clause 4.4.3 in particular, worked perfectly well without the implication of the Implied Term.

249. In the light of what I have said, I am compelled to award only nominal damages to Florestco for Alfa's breach of contract.

The 2020 misrepresentation claim

250. I can deal with the 2020 misrepresentation claim and the conspiracy claim briefly.

251. I have already mentioned that Florestco does not plead that it was induced to do anything or not do something because of the misrepresentations it alleges in this context.

252. I am afraid that, absent that plea, the 2020 misrepresentation claim has always been bound to fail.

253. Very fairly, in his oral closing submissions Mr Stuart took me to passages from Cartwright, including paragraph 5-23, which, in fact, confirm the point I have just made, as follows:

> "The representation must have been an inducement to the representee's action…The tort is not complete on proof of the defendant's fraud in making a false representation: it must also be acted upon by the representee. A causal link is therefore required between the representor's statement and the representee's decision to act in such a way as to cause the loss he claims…"[28]

The conspiracy claim

254. As I have noted, Mr Stuart accepted, in his written closing submissions, that, for the cause of action for conspiracy to be complete, the victim of a conspiracy must have suffered damage and, similarly, he accepted in his oral closing submissions that, if the only outcome in Florestco's favour in relation to the other claims is an award of nominal damages against Alfa, the conspiracy claim has to be dismissed.

255. Mr Stuart was right to take this approach, because proof of loss is a fundamental element of the tort of conspiracy. As Calver J noted in *ED&F Man Capital Markets Ltd. v. Come Harvest Holdings Ltd.* [2022] EWHC 229 (Comm) at [465]:

> "A succinct statement of the essential elements of unlawful means conspiracy was provided by Nourse LJ in *Kuwait Oil Tanker v. Al Bader & ors*:
>
> > "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as the result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

[28] See also fn.114 to that paragraph.

256. In the light of what Mr Stuart accepted, and in the light of the conclusions I have reached, the conspiracy claim must be dismissed.

257. I agree with Mr Trompeter that there is at least one further reason why the conspiracy claim must be dismissed, which I will deal with briefly.

258. In *ED&F Man*, Calver J continued, at [487]-[489]:

> "It follows that in *OBG*, Lords Hoffmann and Nicholls considered that it is necessary to distinguish between: (i) ends; (ii) means; and (iii) consequences. In summary:
>
> a) Ends: If harm to the claimant is the end sought by the defendant (e.g. because of some animus) then the requisite intention is made out. In such cases intention to injure the claimant will also almost always be the "predominant purpose" of the defendant (category 1).
>
> b) Means: If harm to the claimant is the means by which the defendant seeks to secure his/her end (usually to secure a benefit for himself/herself) then the requisite intention is made out (even if the defendant would have rather secured the end without causing loss to the claimant (i.e. without malice) (category 2).
>
> c) Consequences: If harm is neither the end nor the means but merely a foreseeable consequence, the requisite intention is not made out. This could, perhaps, also be conceptualised as a statement that "recklessness" will not suffice – a person is considered reckless in relation to a particular consequence of their conduct if they realise that their conduct may have a particular consequence (i.e. it is a "foreseeable consequence") but they go ahead anyway (category 3).
>
> So far as category 3 is concerned, in *OBG* at [167] Lord Nicholls added a further explanatory gloss:
>
> Other side of the coin: "I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

> In other words, if harm to the claimant was the necessary consequence (i.e. obverse side of the coin) of the defendant's actions and the defendant knew this then although the purpose of the defendant's action was not to harm the claimant, he/she will be considered as having intended to harm the claimant (category 4)."

259. In the present case, I have held that the Pattern Payment was a breach of the clause 4.4.2, but that finding does not help Florestco because Florestco has not established that that breach has caused it any loss. To the extent that there were any further breaches of clause 4.4.2, Florestco faces the same problem. It has not established that such breaches have caused it any loss.

260. I have held that the Loan Representation was not a misrepresentation and that the misreporting of the project was not a breach of the SPA, so that these complaints cannot support the conspiracy claim.

261. I have held that Florestco has not established that any 2020 misrepresentation induced it to do anything or not to do something; in which case, I cannot see how Florestco can have suffered loss or been harmed by any such misrepresentation.

262. Finally, although I have not had to decide whether the Defendants misrepresented that any capital expenditure loan "would be reported clearly and accurately to the investors", because I have held that it is unlikely that they contemplated in the summer of 2104 that a further loan was likely to be needed for the project to be successful and because there is nothing to suggest that they did not then expect the project to be successful, it is difficult to see how, in relation to this further alleged misrepresentation, the conspiracy claim can fall into any category other than Calver J's category 3.

263. When it is remembered also that Florestco does not plead how the Defendants intended to injure it, I cannot see how the conspiracy claim can succeed.

264. For all these reasons, the conspiracy claim must be dismissed.

Quantum / expert evidence

265. Because of the conclusions I have already reached, I do not need to consider the question of quantum, in respect of which I received expert evidence. Nevertheless, it might help for me to deal with some quantum issues briefly.

266. As far as I can tell, Florestco's case, that, had it been fully informed, it would have sold its investment unit to a third party, is a case it pleads in relation to the breach of contract claim and the conspiracy claim, although, looking at the final sentence of paragraph 41(b) of the Re-amended Particulars of Claim, this may be a point it advances in relation to the 2020 misrepresentation claim as well.

267. As I have demonstrated, the possibility of a third party sale was not apparently in the contemplation of either Mr Ragimov or Mr Solomon even by the time they made their trial witness statements. Their evidence is that, had they been fully informed,

Florestco would either have got back its investment from the Hillview group or it would have brought proceedings as it has done.

268. I received evidence from two company share valuation experts; Jessica Resch for Florestco and Gavin Pearson for the Defendants. They were asked to express an opinion about, amongst other matters, "the market (if any)…for [Florestco's] minority shareholding" and about whether a minority discount should be applied when valuing the shareholding.

269. The experts' opinions, on the existence of a secondary market (in which third party purchasers might buy Florestco's investment unit, in particular during the life of the project before its expected end date when an exit event was expected to take place) are helpfully summarised in the joint statement thus:

> "Ms Resch: The Company is one of a number of similar assets/investments marketed by the First Defendant. The Hillview Group promoted these investment, noting "maximum liquidity" (i.e., ability to sell an asset) and exit opportunities. The Hillview Group's (First Defendant) business is built around selling similar assets – packaging investment opportunities and selling equity interests in those investments to retail investors. The Hillview Group's January 2011 marketing presentation shows that the company had conducted (at that time) "over USD 2.5 billion of principal investments and strategic capital market transactions". I understand that the Claimant had made several other investments in the past through the Hillview Group in addition to the investment in the Company. These all suggest a market for the interest in the Company was available and known to the parties. Note, this is not an asset that has never been sold (such as an operating company that has always been family owned). It is an equity interest in an investment vehicle. The Claimant (and other investors) purchased the interests in the Company as an investment, just as a hypothetical purchaser could do in a market value transaction.
>
> …[T]he Investment Memorandum clearly mentioned an exit (as an alternative to a longer term commitment). Furthermore, the 2016 Business Plan suggested an exit opportunity in 2017. The Witness Statement of Igor Solomon notes an understanding that an exit through refinancing part way through the term was available…
>
> Mr Pearson: …based on his experience and discussion with Corporate Finance colleagues, GP considers that there would have been a limited market for the Claimant's shareholding at the relevant valuation dates. This is because it represented a minority shareholding in an illiquid property development. GP considers that whilst there is a ready market for minority shareholdings at the outset of a property development project when information memoranda are prepared and full marketing

> is undertaken for the project (and investors are effectively buying in on the basis of the anticipation of future profits), there is no obvious marketplace through which a shareholding would be sold once the development was underway, meaning that the price of any sale would reflect that lack of marketability…GP considers that it is clear from the "Investment Memorandum" prepared for the Company that the "Investment Period" was 5 years, as well as there being reference to exit either being following a "liquidity/exit event" or "remain invested for the long term". There is no reference to investors being able to sell their shareholdings or any process for doing so…GP is not aware of there being any specific "exit opportunities" during the period of this shareholding…"

270. Broadly, Ms Resch's opinion is that, because there was a primary market for the investment, for example when Florestco and other third party investors bought investment units when the project was initially promoted by the Hillview group, because the Hillview group has a track record of similar investments, and because an exit was contemplated in the Investment Memorandum for example, there must have been a secondary market. However, that conclusion does not logically follow from the matters on which it is based. In short, it does not follow from the fact that there was a primary market for the project that a secondary market has ever existed.

271. There is no evidence that, in fact, there has ever existed a secondary market for investments of the type in this case and Mr Ragimov acknowledged that Florestco has not identified any potential third party purchaser. It is right that Alfa syndicated 125,000 shares to Capricorn in January 2015, but that syndication should be seen as analogous to an initial offer to invest by the Hillview group as the promoter of the investment, much like the offer which Florestco accepted, and this syndication does not assist Florestco, because:

    i) the syndication was by Alfa, a promoter of the project;

    ii) it took place only shortly after the initial round of investment closed;

    iii) it is consistent with the continuation of the Hillview group's initial effort to attract third party investors. There is no evidence that the Hillview group wished to be a long-term investor in the project. In January 2015, it found itself as the major investor. It is probable, therefore, that it was still trying to recruit third party investors as it had done at the project's inception.

272. For all these reasons, Florestco has not established that a third party sale was in fact a possibility let alone probable, and any claim to recover a sum based on a third party sale would fail. Further, I prefer Mr Pearson's evidence on this question to Ms Resch's evidence. The logic of Ms Resch's evidence on this question is flawed, as I have shown, and Mr Pearson's evidence on this question more accords with reality.

273. On the question of whether a minority discount should be applied, the experts said as follows in their joint statement, amongst other things:

> "Ms Resch: JR concludes that there are no characteristics of the Claimant's investment in the Company that should require a substantive discount for lack of control or lack of marketability, above minimal transaction costs (approximately 5% per the Investment Memorandum) and any discounts already priced into the underlying asset…GP…is conflating "expectation of making significant future profits" from the refurbishment and sale (**which should be accounted for in the value of the investment if relevant**), with a minority interest discount. GP and JR have both assumed that the value of the Company should be based on net asset value, not an estimate of future expected profits of the investment strategy. **It is not appropriate to use a net asset valuation, and apply a discount related to the risk of future profits when those profits are not reflected in the valuation itself**. GP…is conflating the risk and expected return of the underlying investment with a discount related to a minority interest in the shareholding.
>
> Mr Pearson: …**GP also considers that an important distinction needs to be made between an investor in a private company buying in at a pro-rata value at the outset of a project on the expectation of making significant future profits when they achieve a capital exit a number of years in the future, to the assumption that an investor would buy-in mid project at the pro-rata value of the Company at that date** (and where the prospect of future profits might be much reduced due to the level of completion) at no discount to the value of the company at that date…" (emphasis added).

274. The experts agree that Florestco's investment unit should be valued, first, by valuing Crawley and that Crawley should be valued in the following way:

> "This valuation should be based on the Net Asset Value of the Company (as adjusted to take account of the market value of its assets and liabilities). Both the property value and the net debt position of the Company, as well as the extent to which other liabilities that might crystalise (for example selling costs and latent corporation tax) are factual matters to be determined by the Court."

275. It is unreal, however, to consider Florestco's investment purely in company terms (that is, as a minority shareholding). The evidence as a whole establishes that the parties did not view Florestco as a minority shareholder, but rather as an investor in a property investment owning one investment unit, which happened, strictly, to be comprised of a shareholding in Crawley. For this reason, I think that any third party purchaser of Florestco's investment unit (its shareholding in Crawley) would have viewed the purchase in the same way.

276. As it happens, Florestco's claim based on a third party sale of its investment unit assumes that the property had been refurbished.[29] With this in mind, it is important to remember the aim of the investment proposal, which was explained in the Investment Memorandum as follows:

> "Upon completion engage with head-tenant to commence dilapidations / reverse premium negotiations in advance of their lease expiry. Commence parallel negotiations with sub-tenants regarding lease extension terms. Upon conclusion of these negotiations and if appropriate, commence professional work to increase floor areas for rentalisation. Facilitate a liquidity / exit event upon conclusion of the above asset management by either debt re-financing or asset sale. Offer investors the opportunity to exit at this juncture or remain invested for the long-term."

In short, any profit which might be made from owning an investment unit would have been made by the time the property had been developed, an investor having bought an investment unit pre-development.

277. What this probably means is that, following the conclusion of the development, there would not have been any market for Florestco's investment unit, because a purchaser would not have had any prospect of making a profit if they bought the unit based on the market value of the property and Crawley's debts, which reinforces the conclusion I have already reached. In any event, in the present context, if a third party sale would have been made by reference to Crawley's net asset value (as assumed in this case), I believe that the purchaser would have insisted on a discount, so that their purchase might be profitable.

278. In fairness to Ms Resch and Mr Pearson, as the extract from their joint statement I have quoted demonstrates, they have both struggled with this issue, probably because they started from an assumption that Florestco's investment unit should be valued by reference to Crawley's net asset value. Their struggle is also reflected in this part of Ms Resch's cross-examination:

> "Q. …why would a hypothetical purchaser of a minority interest in a company be willing to assume the risk of a decrease in value of the net asset position without a corresponding discount or deduction in the purchase price for the shares?
>
> A. I'm sorry, but that's not what a minority interest discount is. If an investor is interested in exposure to commercial property as an asset class, they're going to be interested in the risk in return of the commercial property. And that is included in their net asset value of the property itself. The minority interest discount is really just the difference between the pro rata share of the company and the minority interest in the company… [T]he risk and return of the underlying assets is unrelated to [the minority discount]…

[29] See, in particular, paragraph 33 of the Re-amended Particulars of Claim.

> …Judge: What you are saying, Ms Resch, is…that a purchaser would buy at a discount because they feel they are taking on the risk of the investment failing, would apply whatever the percentage of the investment the purchaser was acquiring.
>
> A. Yes, I think that's right. And that risk that [Mr Trompeter is] talking about should be built into the net asset value, so it should be captured by the value of the property itself."

Whilst, from a theoretical economic perspective, Ms Resch's conclusion, that it is not appropriate to apply a discount to Crawley's net asset value to reflect future profitability, may be right, the distinction Mr Pearson makes between an investor at the outset and a mid-project purchaser in a secondary market is one which I believe must be made, as I think Ms Resch acknowledged in the part of her cross-examination I have quoted.

279. I also received evidence from Mr Eric Shapiro, a single joint expert valuer (who was cross-examined by Mr Trompeter). The Master's order permitted Mr Shapiro to give evidence about the market value of the property in August 2020. That evidence was intended to feed into the calculation of Crawley's net asset value and, in turn, the calculation of the quantum of Florestco's claim based on a third party sale of its investment unit.

280. Mr Shapiro reached the conclusion that the market value of the property at that time was £4.494 million. Broadly, he reached this conclusion by calculating the market rental value of the property, principally by reference to evidence from March 2019 and earlier and by reference to the rent per sq. ft. achieved for the property in April 2022. He said, in relation to that rent:

> "This letting took place after the end of the lock-down period and shortly after the invasion of Ukraine. Also after inflation began to take off. It is therefore logical to assume that the rent that was achievable in…2020 would have been higher."

He therefore adopted a higher rent per sq. ft. for the purpose of his analysis. Having reached a conclusion about the rent per sq. ft., he applied a yield to it, the best evidence for which, he concluded, was a sale of the property in January 2023, expressing the view that "the economic scene at that date was probably no worse than at August 2020".[30] On this basis, he concluded that the market value of the property in August 2020 as £4.494 million, as I have said.

281. After careful consideration, and conscious that Mr Shapiro is a senior and well-respected valuer, and that he gave his evidence very fairly (as I would expect of a valuer and expert witness of his standing), I am afraid that I cannot accept this evidence.

282. There was a notable omission from the analysis in Mr Shapiro's report; namely, a sale of the property on the open market was agreed in August 2020 for £2.5 million (and completed in October 2020). Although Mr Stuart asserted in his closing submissions

[30] In this part of his report, he does not consider expressly whether the economic situation in January 2023 may have been better than in August 2020.

that that sale of the property was a fire sale, there is no claim in this case that the property was not sold for the best price reasonably obtainable. Nor, more importantly, is there any evidence to call into question the marketing or sale of the property in 2019-2020. To the contrary, the material I have set out suggests an active and thoughtful marketing campaign. Indeed, having been taken to those documents in cross-examination, Mr Shapiro accepted that the 2019-2020 market of the property appeared to be "full and proper". Ultimately, as Mr Shapiro also accepted in cross-examination, a property is only worth what the market is prepared to pay for it subject to it having been properly marketed, and the contemporaneous evidence is that the market was prepared to pay £2.5 million for the property in August 2020 after proper marketing. It does not follow logically that, because the property may have been worth more in 2019 and in 2022-2023, that its market value in August 2020 was more than £2.5 million or that its sale then was not a proper one (which is the implication of Mr Stuart's submission). Nor does it follow logically that, because, in April 2022, the Ukraine war had begun and inflation had begun to rise, that rents in August 2020 would have been higher than in April 2022. Whilst the differences in value do raise a legitimate question for investigation about the sale process in 2019-2020, absent any claim that the property was not marketed properly, absent any evidence of that and in the light of the evidence that there is, the best and determinative evidence of the market value of the property in August 2020 is the price at which it was actually sold, £2.5 million. Indeed, as Mr Shapiro said in cross-examination, on the contemporaneous material before him relating to the 2019-2020 marketing of the property, "it would appear" that, in Mr Trompeter's words, "absolutely no-one in August 2020 was prepared to pay £4.5 million for this property on the open market".

283. I do not have to reach a conclusion about why the market valued the property in August 2020 at £2.5 million. Nevertheless, it may be relevant to note (i) that the property, which was vacant and so not income-generating, was located in Crawley, close to Gatwick airport, (ii) that, until about June 2020, there was a national Covid lockdown, (iii) that, in August 2020 there remained restrictions on travel, including air travel, and on gatherings, and (iv) that, by September 2020, restrictions became stricter. It would not be surprising therefore if the commercial property market, particularly around Gatwick airport, was turbulent. Indeed, as Mr Shapiro accepted in cross-examination, August 2020 was a time of great economic uncertainty and a period of turmoil, and, as he continued:

> "…we were in a period of…everybody being scared to do anything except at a give-away price, which is probably why it [(i.e. a sale at £2.5 million)] happened".

Outcome

284. For the reasons I have given, I award Florestco nominal damages of £1 against Alfa for Alfa's breach of contract. Otherwise, I am compelled to dismiss the claim.

Postscript – the FCA

285. The significant criticisms I have made of Mr Livni, both in his management and reporting of the project and as a witness, call into question whether he is fit and proper to be an FCA-approved person and, more generally, whether he is a fit and proper person to manage other people's money. I have concluded that, in the light of

what I have said, it is appropriate for a copy of this judgment to be provided to the FCA, for it to decide how, if at all, it ought to proceed having considered the judgment. I must record that Mr Trompeter told me, on instructions, that Mr Livni has already reported himself, or caused himself to be reported, to the FCA, albeit only during the first period when the trial was adjourned part-heard. I must also record that Mr Livni offered me an undertaking to provide a copy of this judgment to the FCA. I did not accept that offer. Instead, I will arrange for a copy of this judgment to be provided to the FCA as soon as possible.