



Neutral Citation Number: [2024] EWHC 1311 (Ch D)

Case No: BL-2022-000204

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**BUSINESS LIST (Ch)**

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 10 June 2024

**Before :**

**Tom Smith KC**

**(Sitting as a Deputy Judge of the High Court)**

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**Between:**

**(1) RAEL HODES**

**(2) CALEO CAPITAL (PTY) LIMITED**

**Claimants**

**- and -**

**(1) JACK FRANKEL**

**(2) JACOB DREYFUSS**

**(3) EDGEWATER (HAMPSHIRE) LIMITED**

**Defendants**

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**Ali Reza Sinai (instructed by BBS Law) for the Claimants**

**Duncan Heath** (instructed by Clarke Mairs) for the **Defendants**

Hearing dates: 8-10 and 13 May 2024

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**JUDGMENT**

**Tom Smith KC:**

**A. Introduction**

1. This is the trial of a Part 7 claim made by claim form dated 3 February 2022 by Rael Hodes (“**Mr Hodes**”) and Caleo Capital (Pty) Ltd (“**Caleo**”) against Jack Frankel (“**Mr Frankel**”), Jacob Dreyfuss (“**Mr Dreyfuss**”) and Edgewater (Hampshire) Limited (“**Edgewater**”). The claim is principally for the repayment of monies advanced under a loan agreement dated 17 February 2017 (“**the PLA**”), together with interest and costs.
2. It is accepted by the Defendants that the PLA was entered into as a valid and binding contract and that the relevant monies were duly advanced by Mr Hodes. However, the Defendants say that the repayment obligation under the PLA has been discharged by payment or by conduct or, alternatively, that Mr Hodes is now estopped from claiming repayment of the loan from Mr Frankel and Mr Dreyfuss under the PLA.
3. The trial took place from 8 May 2024 to 13 May 2024. I heard evidence from five witnesses of fact: Garth Wellman, Mr Hodes, Jack Silver, Mr Dreyfuss, and Mr Frankel. Another three witnesses, Zalman Roth, Leslie Frankel and Sam Marks, gave evidence by witness statement but were not cross-examined on those statements.

**B. The Facts**

The Initial Investment

4. Mr Hodes is a high net worth individual who was resident at the times material to this claim in South Africa. Caleo is a financial services business which, amongst other things, provides wealth and asset management services. Mr Hodes had a portfolio of investments which were managed by Caleo.
5. Mr Frankel and Mr Dreyfuss carry on property investment activities, more recently under the trading name “The Edgewater Group”. They seek to acquire properties which are under-valued and to refurbish, convert and develop those properties. In the context

of seeking funding for these activities, in around December 2016 Mr Frankel was introduced to Caleo.

6. By this time, Mr Frankel and Mr Dreyfuss had identified an investment opportunity for a site on an office park in Hook, Hampshire: 1-3 Bartley Way, Hook, RG27 9XA (“**the Property**”). The Property was occupied by Hewlett Packard as tenant. The Company was incorporated in order to purchase the Property and a purchase price was agreed with the seller.
7. Following its incorporation on 5 December 2016, the Company had an issued share capital of 100 shares. These shares were held by Waterpeak Limited (“**Waterpeak**”). Waterpeak is owned by Mr Frankel and Mr Dreyfuss’ wife, Rivka Dreyfuss, and controlled by Mr Frankel and Mr Dreyfuss as its directors.
8. The financing for the purchase price for the Property was to be partly by way of bank lending and partly way of investment from investors. The bank lending was to be provided by Mizrahi Tefahot Bank (“**Mizrahi Bank**”). The other investors were Batsheva Frankel, who is Mr Frankel’s cousin, Michael Yattah, through his company Dynamic 101 Limited (“**Dynamic 101**”), and Evan Hoff. In addition, Mr Frankel, Mr Dreyfuss and Mr Frankel’s father, Leslie Frankel, were also investing.
9. It was in these circumstances that Mr Frankel and Zalman Roth travelled to South Africa in December 2016 and January 2017. During the visit, they met Caleo and offered the prospect of investing in the Property.
10. Caleo indicated that one of their clients, Mr Hodes, would be potentially interested in the opportunity. Mr Frankel and Mr Roth made a presentation to Mr Hodes and following this Caleo told Mr Frankel that Mr Hodes had agreed to participate and would invest £650,000 which was required. There then followed some exchanges between Caleo and Mr Frankel in which Caleo sought documentation and information in order to enable it to carry out due diligence.

11. On 25 January 2017, Mr Silver emailed Lloyd Priestman of Caleo with certain information. He explained that the investment was to be £650,000, which represented 26% of the total cash required for the transaction. This was to be split as £1,560 in respect of shares to be held by Caleo in Edgewater and £648,440 in respect of a loan to be advanced by Caleo to Edgewater. It was envisaged that the parties would enter into a shareholders agreement, a loan agreement and a waterfall agreement to document the investment. Mr Silver enclosed copies of “standard” agreements in this respect. In relation to the shareholdings, it was said that Caleo would hold 1,560 shares out of a total issued share capital of 10,000 ordinary shares, thus providing Caleo with a 15.6% stake in Edgewater.

#### The Purchase of the Property

12. The Property was purchased by Edgewater on 25 January 2017 for a purchase price of £4.75 million excluding VAT. Part of the purchase price was advanced by Mizrahi Bank secured by (inter alia) a debenture and a rent charge (both also dated 25 January 2017).

#### Leslie Frankel/Jeap Investments

13. So far as Leslie Frankel is concerned, it was originally intended that he would hold his interest through a 40% shareholding in Edgewater. Indeed, Mizrahi Bank was provided with a structure chart on 16 January 2017, certified to show the true position, which showed Leslie Frankel, through his company, having a 40% shareholding in Edgewater, with Waterpeak holding 53% and Dynamic 101 the remaining 7%. However, it then transpired that Leslie Frankel required his interest to be held directly in the Property, through his company, Jeap Investments Ltd (“**Jeap**”). This was apparently in order that he could utilise losses which were held in that company.
14. On 26 January 2017 a trust deed was entered into between Edgewater and Jeap under which Edgewater declared that it held 40% of the Property on trust for Jeap (there is an error in the wording of the First Schedule to the trust deed but it is clear that the intention

was that the trust would relate to 40% of the Property) (“**the Jeap Trust Deed**”). Under the terms of the Jeap Trust Deed, Edgewater held 40% of the Property and the income, profits and proceeds of sale of that interest on trust for Jeap.

15. Despite this, it does not appear that Mizrahi Bank was informed of the updated position. The structure chart which was provided to Mizrahi Bank on 16 January 2017 was also accompanied by share certificates which purported to show that Waterpeak had been issued with 5,300 shares of £1 each in Edgewater, Jeap had been issued with 4,000 shares and Dynamic had been issued with 700 shares. As with the structure chart, each share certificate was certified. However, it is clear that no such shares had in fact been issued, since the issue share capital of Edgewater was at all material times only 100 shares, all of which were held by Waterpeak. Moreover, the arrangements with Jeap were that it was to have a direct 40% beneficial interest in the Property, rather than a shareholding in Edgewater. Mr Heath for the Defendants accepted that the share certificates did not reflect the actual position and were invalid.
16. It reflects poorly on Mr Silver, who arranged for and provided the purported certified share certificates to the bank, that they did not in fact reflect the true position. This is particularly so given that he was responding to a specific request from Mizrahi Bank to be provided with such certificates, presumably so that it could verify the position. It suggests that Mr Silver was simply prepared to provide, as a matter of expedience, whatever documentation was required irrespective of what the true position was.
17. There was subsequently some debate between Edgewater and Leslie Frankel’s adviser as to whether his beneficial interest in the Property was 40% or 37.5%. It appears to have been agreed that the interest was 37.5% and distributions of income from the Property appear to have been made subsequently on this basis. However, a revised declaration of trust was not ever entered into.

### The Personal Loan Agreement

18. On 31 January 2017 Caleo and Mr Frankel signed a non-binding term sheet. On 1 February 2017 Mr Frankel emailed Nic Liebmann of Caleo asking for an update on the transfer of funds and stating that he was being pressured to close the deal. On 2 February 2017 he emailed again asking to know as a matter of urgency when funds would be sent. I understand from Mr Frankel's evidence that another company in the Edgewater Group had loaned the £650,000 to Edgewater in order to complete the purchase, and that the funds from Caleo were required in order to repay that temporary loan.
19. However, by this time the documentation for the investment had not been agreed between Caleo and Edgewater. Around this time Caleo instructed solicitors in London, Fladgate LLP ("**Fladgate**"), to negotiate the written agreements for the investment. On 7 February 2017 Sam Tye of Fladgate emailed Caleo stating that they had carried out an initial review of the documentation provided by Edgewater in connection with the proposed investment and that they considered that the draft documents did not adequately protect Caleo's position as an investor. The email further stated:

*"We understand that both Edgewater and yourself are keen to progress matters. You would, accordingly, be open to advancing funds before the documentation referred to above is entered into but that if you were to do so you would not want to put the funds into Edgewater until the documentation is entered into. We suggest that this could be achieved by way of a loan from you/Caleo Capital to either Jack Frankel or Jacob Dreyfuss personally. If this approach is acceptable to the parties we will prepare the personal loan agreement."*

20. This was the genesis of what became the PLA. It is to be noted that Fladgate's view was that the amount loaned under the PLA could then be used in order to make investment in Edgewater under the proposed company loan and subscription for shares since the email stated that: *"Assuming documentation was entered into in this period of time the loan would be used to meet your obligations to make the investment."* It was common ground between the parties that this was the intention.

21. Following this, Fladgate drafted the PLA which, following some negotiation as to the terms, was entered into 17 February 2017.
22. Under the terms of the PLA, Mr Hodes as the Lender agreed to advance to Mr Frankel and Mr Dreyfuss as Borrowers a loan of £650,000 for the sole purpose of repaying loans made to Edgewater by Waterpeak. The loan monies were paid into the account of a company called Clockwork Estates Limited (“**Clockwork**”), which was stated to be the managing agent of Edgewater.
23. The PLA defined a “Condition” which was in the following terms:

*“the occurrence of all of the following:*

*(a) a loan agreement being entered into between the Lender and [Edgewater];*

*(b) a supplemental waterfall agreement being entered into between the Lender and [Edgewater]; and*

*(c) a shareholders’ agreement being entered into between, amongst others, the Lender, [Waterpeak] and [Edgewater].”*

24. This therefore envisaged three further agreements being entered into: a loan agreement between Caleo and Edgewater (the company loan agreement or “**the CLA**”), a waterfall agreement (“**the Waterfall Agreement**”), and a shareholders agreement in relation to Edgewater (“**the Shareholders Agreement**”).
25. Clause 3.2 of the PLA then provided that, if the Condition was not satisfied on or before the date falling 14 days after the date of the PLA, then the loan or any part of it as was



outstanding (together with any accrued but unpaid Interest) would become due and payable to Mr Hodes by Mr Frankel and Mr Dreyfuss in accordance with Clause 5. Clause 4.2 also provided for interest to run from this date.

26. Clause 5.1 provided for the loan to be repayable 14 days after the date of the PLA if the Condition had not been satisfied by that date (as per clause 3.2), but also on occurrence of any event of default or on satisfaction of the Condition. The last point reflected what was clearly the commercial intention of the parties, namely, that, once the Condition had been satisfied, the loan advanced under the PLA would then be used for the purposes of satisfying Mr Hodes'/Caleo's commitment to provide the loan under the CLA and to subscribe for the share subscription. This was the clear intention of the parties, as also shown by quote from the Fladgate email referred to in paragraph 20. above.
27. There is no express term in the PLA to the effect that these steps would discharge the loan under the PLA. Edgewater itself was not a party to the PLA (and indeed neither is Caleo). Mr Frankel and Mr Dreyfuss, the directors of Edgewater, were however parties to the PLA, and Caleo was acting on behalf of Mr Hodes. In the circumstances, I would accept that there was an implied agreement between Mr Hodes, Caleo, Mr Frankel, Mr Dreyfuss and Edgewater that, in the event that the Condition was satisfied, the loan advanced by Mr Hodes under the PLA would be treated as discharged, and that Caleo (on behalf of Mr Hodes) would be treated as a lender to Edgewater under the CLA in the amount of £648,440 and as having paid the subscription price of £1,560 for 1,560 shares in Edgewater representing 15.6% of its issued share capital.
28. It is common ground that the sum of £650,000 (in fact, £660,000 as a result of an error) was duly advanced by Mr Hodes under the PLA, that the Condition (as defined in the PLA) was not satisfied by the date 14 days after entry into the PLA (and indeed has never been satisfied), and that the sum of £650,000 has not been repaid to Mr Hodes. These facts form the essential basis of the Claimants' claim in the present proceedings.
29. The Claimants sought to argue before me that the funds advanced under the PLA were used by Edgewater and Mr Frankel for purposes other than allowed under the terms of

the PLA. They referred to information which indicated that the funds, once received by Clockwork, were transferred to an entity called Clockwise. Mr Frankel's evidence was somewhat vague on this point, but I accept his account that the monies were used to repay a loan for the same amount which had been advanced by another entity within the Edgewater Group in order to enable completion of the purchase of the Property to take place. I therefore reject the suggestion that the loan monies were somehow misused or misapplied by the Defendants.

### The Investment Agreements

30. Following the entry into the PLA, Fladgate proceeded to seek to finalise the drafts of the CLA, the Shareholders Agreement, and the Waterfall Agreement which they had prepared. On 28 March 2017 Fladgate emailed Mr Frankel with what were said to be final drafts of the three agreements.
31. The terms of the Shareholders Agreement, amongst other things, provided for the issues of shares in Edgewater to the shareholders as follows:
  - a. Caleo: 1,560 shares representing 15.60% of the entire issued share capital;
  - b. DF (Hampshire) Limited ("**DF Hampshire**") (a company owned and controlled by Mr Frankel and Mr Dreyfuss): 6,880 shares representing 68.80% of the entire issued share capital;
  - c. Dynamic 101: 650 shares representing 6.5% of the entire issued share capital;
  - d. Batsheva Frankel: 260 shares representing 2.6% of the entire issued share capital;
  - e. Evan Hoff: 650 shares representing 6.5% of the entire issued share capital.

32. In addition, the Shareholders Agreement provided for various matters commonly dealt with in such agreements including the appointment of directors to Edgewater, the conduct of the company's affairs including reserved shareholder matters, and the raising of finance, dividend policy, transfers of shares and pre-emption rights.
33. The draft Shareholders Agreement also envisaged that a business plan would be annexed to it. However, no such plan was ever produced or agreed.
34. The Waterfall Agreement provided for the distribution of monies received by Edgewater (to be received into a Collection Account) by a prescribed waterfall including for the distribution of Excess Cash Flow (as defined) arising by way of income to the shareholders as dividends. Excess Cash Flow arising on a refinancing or disposal was to be used to repay the shareholder loans as to both principal and interest and then to be distributed by way of dividend.
35. In the meantime, Caleo had on behalf of Mr Hodes instructed professional trustees called Schindlers Trust Mauritius Limited ("**Schindlers**"), based in Port Louis, Mauritius, to assist with the structuring of the investment, particularly for tax purposes. The outline proposal was to set up an offshore trust and an offshore company. It was subsequently decided to use a Seychelles company for these purposes, called Coastal Living Limited ("**Coastal Living**"). Caleo also instructed a tax accountant, Ian Chambers, to assist with the structuring.
36. Following Fladgate's email of 28 March 2017, there were further exchanges between Fladgate and principally Mr Silver and Mr Roth regarding information required in order to complete the agreements. On 15 May 2017 Mr Tye sent execution versions of the agreements to Edgewater and Caleo. The email pointed out that the Shareholders Agreement and the Waterfall Agreement were required to be executed by the other shareholders, namely, DF Hampshire, Dynamic 101, Evan Hoff and Batsheva Frankel.
37. On 7 June 2017 Mr Roth then returned versions of the agreements signed and executed by Edgewater and DF Hampshire and a side letter executed by Mr Frankel and Mr

Dreyfuss. On 3 July 2017 Mr Tye confirmed that Caleo had signed the agreements and asked whether the other parties had signed. He also asked for a copy of the business plan which was to be appended to the Shareholders Agreement.

### The Other Shareholders

38. Dynamic 101 entered into its own shareholders agreement with Edgewater and Waterpeak. It appears from the documents that this was entered into in around the end of March 2017, although the signed agreement is back-dated to 26 January 2017. This agreement was in a similar form to the draft shareholders agreement which had been sent by Mr Silver to Caleo on 25 January, but subject to some amendments agreed with Mr Yattah. Under the terms of the agreement, Dynamic 101 was to receive 700 shares in Edgewater (out of 10,000 issued shares), with the remaining 9,300 held by Waterpeak. Mr Wellman's evidence (which I accept) was that Caleo did not know about Dynamic 101's shareholders agreement until it was disclosed in these proceedings.
39. I also note that Mr Silver had earlier provided Mr Yattah and Dynamic 101 with a share certificate for 700 shares in Edgewater, although no such shares were ever in fact issued.
40. In addition, Dynamic 101 may also have entered into a loan agreement and a waterfall agreement. Drafts of these agreements signed by Edgewater were sent to Mr Yattah for signature on 1 February 2017. However, versions signed by Dynamic 101 do not appear in the trial bundle. Mr Frankel's evidence was that he thought that Mr Yattah signed the waterfall agreement. In any event, it does not appear that either Dynamic 101 or Mr Yattah signed the versions of the Shareholders and Waterfall Agreements which had been prepared by Fladgate.
41. So far as Mr Hoff is concerned, the position is unclear. There was some discussion between Mr Hoff and Caleo in February 2017 regarding the documents, but in June 2017 Mr Hoff emailed Mr Liebmann stating that he had not received any paperwork. On 30 June 2017 Mr Roth then sent Mr Hoff the agreements which Edgewater had signed and invited Mr Hoff to come into Edgewater's office to sign them. Mr Marks' evidence was

that he recalled Mr Hoff and his brother coming into the office in connection with the signing the agreement. However, there is no evidence that they were in fact signed by Mr Hoff, and Mr Roth's evidence was that he has not been able to find copies signed by Mr Hoff. To the extent that it is necessary to make a finding on the point, I find that on the balance of probabilities the Shareholders and Waterfall Agreements were not signed by Mr Hoff.

42. In relation to Batsheva Frankel, on 11 August 2017 Mr Roth emailed Mr Silver asking whether a copy of the documents had been provided to her. However, Mr Roth and Mr Silver then decided to send Mrs Frankel the version of the shareholders agreement that had been signed by Dynamic 101/Mr Yattah rather than the version which had been prepared by Fladgate and signed by Caleo (and DF Hampshire and Edgewater). There was no real explanation forthcoming as to why this was done.
43. Mr Frankel's evidence was that Mrs Frankel or her son were asked to sign the Shareholders Agreement which had been prepared by Fladgate and he suggested that the signed version might have been lost. However, I think that this evidence was more reconstruction than recollection ("*he could have come into the office and signed*") and Mr Frankel accepted that he did not have a clear recollection of receiving a version of the Fladgate Shareholders Agreement signed by Mrs Frankel or by her son. In the absence of documentary evidence to the contrary, I consider that it is most likely that Mrs Frankel was never provided with, or asked to execute, the Shareholders Agreement and Waterfall Agreement prepared by Fladgate and signed by Caleo.
44. There was then something of a hiatus. On 11 September 2017 Mr Tye of Fladgate emailed Mr Liebmann of Caleo stating that:

*"We have chased Edgewater on several occasions for copies of the documentation signed by the other shareholders but so far we have not seen these copies. We are happy to chase again but perhaps you may want to chase them up direct to see if you can gain some traction with them on this."*

45. It does not appear, however, that Mr Liebmann followed up on this. As such, the matter was left in abeyance by both Edgewater and Caleo. The Defendants say that Mr Liebmann must have known from this email that the Shareholders Agreement had not been signed by all the parties and had not come into effect.

#### Subsequent events

46. Caleo was however continuing to take steps to try and finalise the structure through which Mr Hodes' investment was to be held. On 6 September 2017 Clara Kwizera of Caleo emailed Mr Frankel seeking responses for certain due diligence requests which had been made by Schindlers. Mr Roth responded to this on 25 November 2017. The questions and responses including the following:

*“iv. Would the UK company enter into a shareholder agreements? **We already have one. Attached.***

*v. the share certificate from the UK Company issued in favour of Coastal Living Ltd; and **Currently it is in the name of Caleo.**”*

47. The Claimants criticised these responses as being incorrect and misleading. The first response might have been interpreted as meaning that the Shareholders Agreement had come into effect, but it did not in fact say that in terms. By its terms, it merely stated that there was a Shareholders' Agreement which was strictly correct, albeit it was the case that the agreement had not been signed by all the parties and had not yet come into effect. The second response was, however, clearly incorrect since no shares had been issued to Caleo and no share certificate issued. In his evidence, Mr Frankel accepted that this statement was incorrect.

#### First and Second Distributions

48. In November 2017, the first distribution was made by Edgewater to the investors. This was described as being “*by way of dividend*”. On 11 November 2017 Mr Silver emailed the investors in Edgewater informing them of the proposed distribution.

49. In February 2018 a second distribution was made on the same basis and described in the same way. The Defendants rely heavily on the fact that these (and subsequent) distributions were described as being “*by way of dividend*” and were received and accepted by Caleo (including on behalf of Mr Hodes) on this basis.
50. I accept that the distributions were described in this way, and were received and accepted by Caleo and Mr Hodes on this basis. However, it is clear that Caleo was not in fact a shareholder in Edgewater at this time since no shares had been issued to it. The shareholder in Edgewater was Waterpeak which held all of the 100 issued shares. It follows that the distribution cannot have been, as a matter of law, a dividend paid by Edgewater to Caleo as one of its shareholders. I return to this below.

Continuing attempts to implement the investment structure

51. In around February 2018, Glen Scorgie of Caleo became involved. Ms Kwizera had forwarded to him some of the documentation she had been sent by Mr Roth in November 2017. He emailed Ms Kwizera on 16 February 2018 in response, referring to the “*half signed*” Shareholders Agreement. This exchange was prompted by Mr Hodes himself having emailed Caleo asking for confirmation that his share of the Property was 13%. Ms Kwizera responded to Mr Hodes providing the Shareholders Agreement which it was said showed Caleo as having a 15.6% share which divided as to 13% for Mr Hodes and 2.6% for Caleo itself.
52. On 20 March 2018 Julien Beneteau of Schindlers then emailed Mr Frankel directly. He asked for confirmation whether or not Mr Hodes was a shareholder in Edgewater. He added that, if this was not the case, he would need Caleo to advise if any of the 15.6% shares they owned in Edgewater were for their own benefit or as nominee for and on behalf of Coastal Living. Mr Beneteau was thus under the (incorrect) impression that the 15.6% shareholding Edgewater had been issued to, and was held in the name of, Caleo.
53. On 12 April 2018 Mr Frankel responded stating he would “*clarify the shareholding for Rael/Caleo, hopefully, this week*” and “[p]ls note, the shares were in the format/holding

*that was originally requested*". However, this latter remark was incorrect as the shares in Edgewater were in fact all held by Waterpeak.

54. In April 2018 a further distribution of income was made to the investors "*by way of dividend*".
55. On 3 June 2018 Mr Silver then emailed Mr Scorgie noting that Caleo wanted to transfer the relevant 13% shareholding from Caleo to Coastal Living. He asked to be provided with the deed of trust showing that Caleo was holding those shares in trust for Coastal Living. He said that, upon receipt of the trust, he would arrange for the share transfer and new documentation. Again, this was proceeding on the basis that the shares were already held in the name of Caleo, although this was not the case as Mr Silver would presumably have known.
56. At this point, Mr Tye of Fladgate became involved again when he was contacted by Mr Scorgie to assist with amending the Shareholders Agreement to split the 15.6% shareholding envisaged for Caleo between Caleo and Coastal Living. It is noteworthy that by this point it appears to have been assumed that the Shareholders Agreement was in force. Mr Tye then had occasion to look at the Companies House records for Edgewater which recorded Waterpeak as the sole shareholder in Edgewater with 100 shares. Mr Scorgie responded to Ms Kwizera: "*Please can you check with Jack Silver if any shares wre [sic] ever issued to Caleo. I suspect not.*"
57. It was at this point, on 31 July 2018, in response to a question from Ms Kwizera, that Mr Silver confirmed for the first time that no shares in Edgewater had been issued to Caleo. It is to be noted that this confirmation was only given as a result of Mr Tye of Fladgate having checked the position at Companies House. There followed some further communications sent to Mr Silver with a view to the arrangements being amended so that Coastal Living would become a shareholder in Edgewater. Then on 29 August 2018 Mr Silver replied saying, for the first time, that there could be an issue with registering the shares in the name of Caleo without the consent of the bank.



58. It is not obvious why the consent of Mizrahi Bank was required in order to issue or transfer shares in Edgewater. Mizrahi Bank was a lender to Edgewater and had security over its assets, but that loan and security were not affected by changes in the shareholdings in Edgewater. The terms of the debenture given to Mizrahi Bank by Edgewater do not appear to grant Mizrahi Bank any rights to object to changes in the shareholdings in Edgewater. Mr Frankel's evidence was that the issue was related to the fact that Edgewater was the customer of Mizrahi Bank and that the bank therefore needed to be able to satisfy its "*know your customer*" (KYC) requirements in relation to Edgewater, which in turn required the bank to be satisfied who the shareholders were. As such, it is said that, as a practical matter, any transfer of the shares from Waterpeak to the investors would have required the approval of Mizrahi Bank's board in Israel. Mr Frankel says that he regarded the question of the transfer of the shares to the investors as "*a matter of detail*".

59. There was then some further delay from Mr Silver in response to chasing from Caleo before he responded on 3 October 2018 stating that "*[t]he lender has not been consented to a change of shareholding, hence those shares have not been formally registered at companies House*". There was then some repeated further chasing by Caleo of Mr Silver before Mr Frankel finally sent an email to Caleo on 4 December 2018. The email stated as follows:

*"The shares representing Rael's portion are not currently held in Caleo's name. All shares in this venture are held in Trust for the various parties.*

*The above is covered by a Trust Document.*

*If you require us to amend the Trust Document to show Coastal Living as opposed to Caleo, this can be done fairly simply. This would be the ideal way forward.*

*We are reluctant to approach the actually amend the actual shares at this stage.*

*Whilst this is not impossible, it is complex, and we prefer not to be at the mercy of the Bank.”*

60. Although this email referred to an existing trust document, no such document has been produced in these proceedings. Mr Silver in his evidence in his witness statement and in cross-examination suggested that such trust document or documents may have been produced so that Edgewater could justify to HMRC why monies were being distributed to the investors. However, his evidence on this point was vague and on a number of occasions during cross-examination he simply reverted to saying that he did not recall the position.
61. In his cross-examination, Mr Frankel accepted that the reference to a trust document could have been a mistake. This was in contrast to his witness statement (paragraph 83) where he expressly stated that the reference to a trust document was, to the best of his knowledge, correct. Mr Frankel accepted that any such document would likely have been produced by Mr Silver, but, as noted above, Mr Silver was unable to produce or identify such a document from his records. In my judgment, no such trust document in fact existed despite what was said in Mr Frankel’s email of 4 December 2018.
62. On the basis of what was represented in Mr Frankel’s email, Caleo were however prepared to go along with the proposed route of amending the supposedly existing trust document. It is however important to note that Mr Wellman’s agreement was subject to the structure being established with Schindlers now owning the shares correctly. Mr Scorgie responded to Mr Silver on 11 December 2018 asking him to proceed with amending the trust document in order to replace Caleo with Coastal Living.
63. In December 2018 a further distribution of income was made to the investors “*by way of dividend*”.

2019

64. At the end of January 2019, Caleo chased Mr Silver in relation to the trust deed amendment. At the start of February, Mr Silver said he would look into it over the next few days. On 17 March 2019 a draft deed of trust was sent to Caleo providing for the creation of a trust in favour of Coastal Living over 260 shares in Edgewater. This was erroneous, since the intention was that 260 shares were to be held for Caleo and 1,300 shares were to be held for Coastal Living. Mr Silver then provided a further draft dealing with the 1,300 shares to be held on trust for Coastal Living but did not correct the earlier trust deed to provide for the 260 shares to be held on trust for Caleo. It appears that nothing then happened until November 2019 when Mr Scorgie chased Mr Silver for signed versions of the trust deeds.
65. The same month a further distribution was made to Caleo.
66. On 4 December 2019, Mr Silver then provided copies of the signed trust deeds to Caleo. There were two trust deeds. The first stated that it was made by Waterpeak in favour of Caleo in relation to 260 shares in Edgewater. This purported to be made by Mr Frankel as a director of Waterpeak, but it was in fact executed by Mr Silver. It also contained an inconsistency in that it made reference to the trust being of both 260 shares and 1,300 shares in Edgewater. The second trust deed stated that it was made by Waterpeak in favour of Coastal Living in relation to 1,300 shares in Edgewater. This version was signed by Mr Frankel on behalf of Waterpeak. Both trust deeds were back-dated to 1 July 2017.
67. In fact, Waterpeak did not hold 1,560 shares in Edgewater, the issued share capital being at all times only 100 shares. Moreover, the trust deeds did not take into account the fact that Jeap held a 37.5% interest directly in the Property so that, in order to give Coastal Living/Caleo a 15.6% interest in the investment, their interest in the shareholding in Edgewater had to be correspondingly higher (in fact, 24.96%). Indeed, the cash

distributions which were actually paid to Mr Hodes and Caleo represented 24.96% of Edgewater's profits from the Property.

68. In relation to the back-dating of the trust deeds, Mr Silver sought to suggest that this was because the trust deeds were amendments of earlier documents existing from that time. I do not accept this. There is no evidence of any such earlier documents. Moreover, Mr Silver's own evidence was that any earlier trust documents would have pre-dated the purchase of the Property, which took place in January not July 2017. In my judgment, it is more likely that these documents were back-dated in recognition of the fact that these arrangements were intended to apply as from July 2017.

## 2020

69. Unhelpfully, it does not appear that the trust deeds were provided by Caleo to Schindlers until some time later in June 2020. As such, Schindlers continued to propose an agreement under which Caleo would act as nominee for Coastal Living in relation to the 13% shareholding, apparently in the mistaken belief that this shareholding was already registered in the name of Caleo. They also continued to seek further information. On 20 March 2020 Deidre van Niekerk of Caleo emailed Mr Frankel with some outstanding queries including a request for a copy of the current register of members for Edgewater and a declaration of trust. It seems that Caleo had itself overlooked the trust deeds which had been provided by Mr Silver in December 2019. This is reflective of the fact that Caleo's management of this investment was also poorly handled.
70. Mr Beneteau of Schindlers was by this stage becoming increasingly exasperated. Mr Frankel had declined to provide a copy of the register of members for Edgewater and appeared to have provided some incomplete documentation relating to the trusts of the shares. Mr Beneteau's frustration also appears to have resulted at least in part from the fact he had not been provided by Caleo with the December 2019 trust deeds. As a result, he was still under the impression that the shares had been issued to Caleo and was seeking documentation to establish that 13% of the shares were held by Caleo for

Coastal Living. Whatever the reason, it is clear that Schindlers were far from satisfied with the position.

71. By May 2020 a further Caleo individual, Selwyn Blieden, had become involved. He sent an email to Mr Frankel and Mr Roth with a number of queries about the investment. Mr Blieden also approached Evan Hoff. On 30 May 2020 Mr Blieden emailed Mr Hoff following some communications Mr Hoff had had with Mr Frankel and Mr Roth. He said that he had not seen a declaration of trust, although he also noted that in principle a trust structure would be fine. He said that the only two documents on record as signed by Caleo were a loan agreement and a shareholders agreement, but that neither seemed consistent with the way things were actually working in Edgewater. On 3 June 2020 Mr Blieden emailed Mr Wellman noting Mr Hodes' original loan under the PLA and stating that there might be a basis for demand being under the PLA because the Condition had not been satisfied.
72. However, on 7 July 2020 Mr Blieden emailed Mr Frankel saying that they wanted to proceed with rectifying the deal documentation. On 9 July 2020 Mr Wellman emailed Mr Hodes acknowledging that the transaction administration had been a "*two way disaster*" in response to Mr Hodes' email stating that Mr Liebmann had messed up the administration relating to the transaction.
73. During this period, in June 2020 a further distribution of income was made to the investors "*by way of dividend*".
74. On 6 November 2020 Mr Blieden emailed Mr Frankel stating that the loan under the PLA was repayable on the basis that the Condition had not been satisfied. By a further email dated 10 November 2020 the amount claimed by way of repayment under the PLA was put at £751,689, credit being given for the "dividend" payments as payments under the loan. Following this, on 18 February 2021 solicitors then instructed by Mr Hodes made formal demand on Mr Frankel and Mr Dreyfuss for repayment under the PLA.

#### Transfer of the shares in Edgewater

75. Following this, on 21 February 2021 the shares in Edgewater were transferred from Waterpeak to Rivka Dreyfuss and Mr Frankel, who were the shareholders in Waterpeak. This was said to have been done because Edgewater wished to open a bank account with Starling Bank, which did not permit customers with corporate shareholders. (According to Mr Silver's email of 7 April 2021, this transfer was made on 21 February, although the confirmation statement lodged with Companies House appears to suggest that it was 12 February.)
76. The Claimants were highly critical of this transfer of the shares which was undertaken without any notice being given to Coastal Living and Caleo and without their consent. They said that it was not honest conduct on the part of Mr Frankel and Mr Silver and not something which an ordinary, honest commercial person would have done. The position in relation to the transfer is clearly unsatisfactory; if, as the Defendants themselves have asserted, part of the shares were being held on trust for Coastal Living and Caleo then their consent should have been sought in advance.
77. In his evidence, Mr Frankel admitted that this was an error. However, I do not consider that the transfer was dishonest conduct on the part of Mr Frankel or anyone else at Edgewater. I accept that it was done for the purposes of enabling the opening of a bank account for Edgewater with Starling Bank. There is no evidence, or indeed allegation, that Mr Frankel or anyone else obtained any gain from the transfer and I accept Mr Heath's submission that, if the relevant shares had been held on trust by Waterpeak for Coastal Living and Caleo, then Rivka Dreyfuss and Mr Frankel would likewise have held the relevant shares in Edgewater on the same trusts.
78. However, this episode is again symptomatic of what was undoubtedly a very loose approach to governance and documentation within Edgewater. It is another example of a transaction done or documentation being issued as a matter of expedience without proper regard to the necessary formalities and the rights of interested parties. In my judgment, the particular relevance of this episode for present purposes is that it demonstrates the unsatisfactory nature of the trust arrangements in relation to the shares supposedly put in

place by Edgewater in relation to the shares and demonstrates why it is unlikely that Caleo agreed to any such arrangement as being by itself sufficient to protect Mr Hodes' interests.

### Sale of the Property

79. The Property was then sold in 2023. Mr Wellman says that on 13 November 2023, the Defendants' solicitors informed Caleo that the Property had been sold, but that Caleo was not consulted about the sale nor its terms and were not aware that it had taken place. Caleo subsequently found out in March and April 2024 following a request for missing disclosure that the sale had concluded on 4 October 2023 for a net sale price of £4,427,029.80 plus VAT, resulting in a net payment in the amount of £2,422,263.58 being made to Edgewater.

### Caleo's Knowledge

80. The question of Caleo's knowledge is relevant to some of the issues which are required to be determined. One aspect of this is Caleo's knowledge as to the position in relation to the shares in Edgewater. As to this, it is clear that, prior to 31 July 2018, Caleo believed that it had been issued with 15.6% of the issued shares in Edgewater. Following this date, and having been told by Mr Silver that the shares had not been issued, Caleo knew that it had not been issued with the shares. As noted above, there then followed discussion about the shares being held in trust for it and Coastal Living by Waterpeak.

81. The position in relation to the Shareholders Agreement, the Waterfall Agreement and the CLA is less clear. There are some references in the documents from which it can be said that individuals within Caleo knew or ought to have known that these agreements had not come into effect; in particular, the email from Mr Tye of Fladgate to Mr Liebmann of 11 September 2017 and Mr Scorgie's email of 16 February 2018 referring to the "*half signed*" Shareholders Agreement. However, my overall impression is that, to the extent they applied their minds to the issue, the relevant individuals within Caleo simply assumed that the agreements were in force.

82. In relation to the email of 11 September 2017, there was no evidence that was followed up by Mr Liebmann. In the absence of any evidence from Mr Liebmann, it seems most likely that he either overlooked the email or did not appreciate its relevance. I also do not consider that much weight can be given to Mr Scorgie's email of 16 February 2018 since he was simply responding to the documents which he had been forwarded by Ms Kwizera and, in any event, his focus was on working out what documentation there was to confirm Mr Hodes' share of the investment. It is noteworthy that, when in June and July 2018 Mr Scorgie and Mr Tye of Fladgate considered the possibility of amendments being made to the Shareholders Agreement, it appears to have been assumed that the agreement was in force.
83. Mr Frankel's evidence was that the Shareholders Agreement, the Waterfall Agreement and the CLA had been in place from 3 July 2017 and that his own understanding was that everything which was needed in order for those agreements to be in place had been done. Mr Dreyfuss' evidence was also that he believed that the Shareholders Agreement and the Waterfall Agreement were in force. In my judgment, the understanding or assumption on the Caleo side was more or less the same.
84. In his evidence, Mr Wellman said that: "*We wrongly assumed that the agreements had been entered into even though Fladgate informed us that they could not get signed copies from the Defendants. Unfortunately, we fell behind with our record keeping, but in practice we were operating under a mistaken belief that the shareholders agreement had been entered into by all parties.*" I accept that as a correct statement of the position on the Caleo side of the transaction, at least until around mid-2020 when Mr Blieden became involved in looking more closely at the documentation.

### **C. The Witnesses**

85. I turn now to comment on the witnesses whom I heard give evidence.
86. Mr Wellman was, in my judgment, an honest witness and I accept his evidence as to his own knowledge and understanding at the time. The principal difficulty with his



evidence is that it is clear that he had a relatively high level role within Caleo, and that significant aspects of the management of the investment in relation to the Property were carried out by others including Nick Liebmann, Clara Kwizera and Glen Scorgie. Mr Wellman was understandably not really able to speak to the knowledge and understanding of these individuals and, for these purposes, it is necessary to have recourse to the contemporary documents.

87. Mr Hodes was also an honest witness, and I also accept his evidence. However, it is clear (and accepted by him) that he had very little involvement himself in the matters giving rise to this claim. Rather, those matters were dealt with on his behalf by Caleo.
88. Mr Frankel was cross-examined at length on his witness statement. I judged him to be a generally honest witness whose evidence I am for the most part able to accept. It is however clear that Mr Frankel was principally concerned with arranging transactions and dealing with investors, with the details and the paperwork very much left to Mr Silver and to Mr Roth. To a large extent, it appears that his approach was that what mattered were the cash returns paid to investors and, as long as these were made properly, the way the investments were held and documented was of much less importance (or, to use his words, a matter of detail). I am also unable to accept his evidence in his witness statement in relation to the 4 December 2018 email that a trust document or documents for the shares already existed at that time.
89. Mr Dreyfuss was also cross-examined on his witness statement. I accept his evidence, although it is clear that he had very little involvement with the matters which gave rise to the present proceedings. He did not seek to suggest otherwise.
90. Mr Silver was also cross-examined. His evidence was not entirely satisfactory. He was the person who was primarily responsible for the corporate documentation and record keeping on the Edgewater side of the transaction; as is apparent from the facts set out above, there were a number of issues with that documentation. Faced with these difficulties, on a number of occasions Mr Silver resorted to saying that he could not

remember or recall the position. I am also not able to accept Mr Silver's evidence that there was, prior to December 2018, already some trust documentation in existence providing for trusts in favour of the investors over the shares in Edgewater.

91. Mr Roth, Mr Leslie Frankel and Mr Marks were not cross-examined on their witness statements and I accept that evidence.

**D. The Legal Position in relation to the Shares**

92. It is convenient at this point to deal with a number of legal issues in relation to the shares in Edgewater.

Ownership of the shares in Edgewater

93. Edgewater itself has only ever had an issued share capital of 100 shares. Prior to the transfers of shares made to Rivka Dreyfuss and Mr Frankel in February 2021, these were at all times held in the name of Waterpeak. None of Caleo, Coastal Living or Mr Hodes have ever been registered shareholders in Edgewater.

94. The real question is as to the beneficial ownership of the relevant shares in Edgewater. In closing, the Defendants' case was that Waterpeak held 24.96% of the shares in Edgewater on trust for Mr Hodes and Caleo. For these purposes, the Defendants say that the necessary intention on the part of Waterpeak to create such a trust can be seen from:

- a. the distribution of dividends to Mr Hodes and Caleo;
- b. Mr Frankel's email of 4 December 2018;
- c. the agreement to "amend" the supposedly existing trust documentation and the production of the new deeds of trust in March 2019 and December 2019 with the signed versions.

95. Mr Heath said that he did not need to rely on the express deeds of trust provided in December 2019 as themselves having established the relevant trusts. However, he did rely on them as being evidence of a previous intention to create a trust.
96. However, the Defendants' approach ignores the fact that the position in relation to the shares was only one aspect of the intended arrangements between the parties. As explained above, at the centre of these arrangements was the agreement by which Mr Hodes' loan under the PLA would be converted into a subscription for the shares and the loan from Caleo to Edgewater under the CLA. It is therefore clear that any grant of a beneficial interest in the relevant shares in Edgewater to Coastal Living and Caleo was dependent upon Mr Hodes' personal loan having been extinguished and replaced by the entitlement to the shares and the rights in respect of the loan under the CLA. It was the Defendants' own position (with which I agree) that Mr Hodes could not at the same time have a claim under the PLA, and Caleo have a claim under the CLA and Mr Hodes/Caleo be entitled to the relevant shares.
97. As explained above, under the terms of the PLA, Mr Hodes' loan under the PLA would only be discharged and replaced by the other entitlements upon satisfaction of the Condition (as defined). The critical question is whether the parties in the present case agreed to vary that part of the arrangements. I address that question below. So far as the grant of a beneficial interest in the relevant shares in favour of Caleo and Mr Hodes is concerned, in my judgment, the grant of any such interest was necessarily contingent on the satisfaction of the Condition, or any varied Condition, such that, inter alia, the personal loan under the PLA had been discharged.

### Dividends

98. I turn next to the status of the distributions made from Edgewater to the investors. As noted above, these were described by Mr Silver at the time as being made "*by way of dividend*". A total of £93,600 was distributed to Mr Hodes and £18,720 to Caleo.

99. It is common ground that there is no evidence of any resolutions of Edgewater's directors resolving to declare dividends. Mr Silver's evidence was that he received instructions from the board to make the distributions. He said that these instructions were based on his advice as of the amount of funds, if any, available to be distributed.
100. The provisions of Edgewater's articles of association provide that the directors may decide to pay interim dividends but that final dividends are to be decided by the company by ordinary resolution based on the recommendation of the directors. It does not appear that this procedure was followed in relation to final dividends, although it is right to note that the sole shareholder in Edgewater was Waterpeak which had the same directors. It might therefore be said that Edgewater's sole shareholder consented to and/or ratified the payments as final dividends. In any event, the payments may have been made as interim dividends.
101. So far as the accounts are concerned, Edgewater's management accounts for the period from its incorporation to 3 March 2020 show dividends of £18,720 paid to Caleo and £93,600 paid to Mr Hodes. Edgewater's statutory accounts filed with Companies House were in short form and contained only a balance sheet and no profit and loss account. They therefore do not expressly disclose any dividend payments made during the relevant years. (Although certain longer-form accounting material was apparently disclosed by the Defendants during the course of the trial, Mr Heath did not seek to rely on this and I was not provided with copies.) Mr Silver's evidence was the payment of the dividends was included within the movements in total shareholders funds between the successive financial years. I accept this evidence. It is supported by the fact that the total shareholders funds figure in the 3 March 2020 management accounts (£174,755.82), and which is clearly calculated after payment of dividends, is broadly in line with the shareholders funds figure of £187,039 seen in the 31 March 2020 statutory accounts.
102. So far as the legal position is concerned, I would accept that the distributions may have been interim dividends as far as the shareholder in Edgewater, Waterpeak, was

concerned. However, the real question is as to the basis on which these payments were allowed by Waterpeak to be made to Mr Hodes and Caleo.

103. As to this, in my judgment, the legal position in relation to these payments reflected that in relation to the shares themselves. In other words, the entitlement of Mr Hodes and Caleo to these payments was necessarily contingent on the satisfaction of the Condition, or any varied Condition, such that, inter alia, the personal loan advanced by Mr Hodes under the PLA had been discharged and replaced by the loan from Caleo to Edgewater under the CLA and the entitlement to the shares. In circumstances where Waterpeak permitted the payments to be made to Mr Hodes and Caleo prior to the Condition, or any varied Condition, being satisfied then such payments were in my judgment in effect received by Mr Hodes and Caleo on account pending the satisfaction of the Condition, and would be liable to be returned to Waterpeak if the Condition, or any varied Condition, was not satisfied.

**E. Agreement to vary the Condition**

104. A core part of the Defendants' case in resisting the claim made by the Claimants under the PLA is therefore that there was, in effect, an agreement made through conduct to vary the original terms of the arrangements. In particular, rather than requiring satisfaction of the Condition as expressed in the PLA, it is said that it was in effect agreed (by conduct) that the Claimants would accept a beneficial interest under a trust of the relevant shares and that the loan under the PLA would be discharged in return for the grant of this interest together with Caleo's rights as lender under a loan on the same terms as the CLA.

105. So far as the law on formalities is concerned, I accept the Defendants' submissions that no particular formality is required in order to form an agreement, including as to vary an existing agreement. Moreover, even if the parties originally intended for their agreement to be documented in a written agreement, those intentions may change. Further, the PLA does not contain any provision requiring that any amendment or variation to take any

particular form e.g. to be in writing. Thus, the lack of a formal agreement varying the terms of the PLA is clearly not itself fatal to the Defendants' case.

106. However, in my judgment, it is important to be clear what exactly this variation would have involved. Under the arrangements agreed in the PLA:

- a. Caleo was to be the registered holder of 15.6% of the shares in Edgewater (which, it was understood, held 100% of the Property);
- b. There were to be written Shareholders and Waterfall Agreements entered into by all the shareholders in Edgewater;
- c. There was to be a written CLA between Caleo and Edgewater.

107. By contrast, under what are said to be the varied arrangements agreed to by conduct:

- a. Caleo and Mr Hodes/Coastal were to have the beneficial interest in 24.69% of the shares in Edgewater held in trust for them by Waterpeak under an undocumented trust arrangement;
- b. Edgewater was to hold 62.5% of the Property, not 100%;
- c. There were to be no written Shareholders and Waterfall Agreements entered into by all the shareholders in Edgewater;
- d. Caleo would be a lender to Edgewater on the same terms as the CLA, but there would be no written loan agreement.

108. The question is whether Caleo (on behalf of itself and Mr Hodes) agreed by conduct to these revised arrangements.

109. At the outset, it might be thought that it is implausible that it would have done so. The absence of written documentation means that there would have been a lack of formality and thus lack of certainty as to the arrangements. This is particularly so in relation to the trust of the shares – the foreseeable difficulties which this might give rise to are exemplified by the transfer of shares which took place in February 2021 without any prior notice being given to Caleo or Mr Hodes. Moreover, the absence of a shareholders agreement and a waterfall agreement, as well as the absence of any agreement with Jeap, might also have been reasonably expected to give rise to difficulties in due course. It also has to be borne in mind that, for the most part, Caleo was entering into these arrangements for Mr Hodes as its client so would have had to account and explain to him in respect of any difficulties which arose.

110. Moreover, it is clear in my judgment that it was a necessary requirement on Caleo's side that any arrangements would satisfy Schindlers. Much of the time and energy spent on the Caleo side of the transaction was spent in seeking to ensure that the arrangements would be satisfactory to Schindlers so as to secure the necessary tax advantages for Mr Hodes. In my judgment, it is clear from documentation contained in the bundle evidencing Schindlers' approach (in particular, that of Mr Beneteau) that the arrangements summarised in paragraph 107. would not have satisfied them.

111. Nevertheless, I accept the Defendants' argument that the question of whether revised arrangements were agreed is a matter to be determined objectively by reference to (in this case) the relevant conduct of the Claimants which is relied upon for these purposes.

112. As to this, the Defendants principally rely on the "dividend" payments which it said were made to Mr Hodes and Caleo, and which were received by them. The Defendants say that the Claimants must have understood that these were dividends, and referable to a beneficial entitlement to the relevant shares in Edgewater, and that there was no other basis on which the Claimants could lawfully have received the monies. Indeed, Mr Hodes' evidence was that he thought that the monies he was receiving were by way of dividend.

113. However, in relation to the payments made prior to July 2018, the position can simply be explained on the basis that Caleo mistakenly thought that it was the registered holder of 15.6% of the shares in Edgewater (with 13% of the shares being held by Caleo for Mr Hodes). As such, I do not see that these payments assist the Defendants. The receipt of these payments is consistent with Caleo thinking that the original arrangements as provided for by the definition of “Condition” in the PLA were either in place or were in the process of being put in place.

114. That leaves the further payments made in December 2018, November 2019 and June 2020. These were paid at a time after Caleo had been told that the shares had not been issued to it, but were being held for its benefit pursuant to existing trust documentation. Subsequently, in December 2019 Mr Silver produced the signed purported trust deeds in respect of the shares supposedly held on trust for Coastal Living and Caleo. Caleo then attempted to finalise the position with Schindlers until, from about mid 2020, it was concluded that further steps to try and agree the necessary documentation should be abandoned.

115. In my judgment, it is not possible to spell out of this an agreement on the part of Caleo to vary the arrangements along the lines set out in paragraph 107. above. The receipt of these payments is consistent with Caleo’s acceptance of the principle of a trust arrangement for the shares, but there is no evidence of any agreement as to the other necessary aspects of the varied arrangements. Indeed, it appears that for at least some of this time Caleo may have still incorrectly believed that the Shareholders Agreement was in force, and it does not appear to have been aware of Jeap’s beneficial interest in the Property. It also clear that the Defendants were aware that Caleo was still seeking to finalise matters with Schindlers in relation to the structuring of the investment. Overall, it seems to me that the payments made in 2018, 2019 and 2020 to Mr Hodes and Caleo are best characterised, objectively, as payments made in anticipation of the finalisation of the revised arrangements.

116. The Defendants also rely on the fact that the Claimants indicated agreement to the trust arrangements in respect of the shares. In this respect, the Defendants rely, for example,



on Mr Scorgie's 18 March 2019 email in response to Mr Silver where he suggested certain amendments to the draft trust documents (thereby, it is said, showing agreement in principle to the concept of a trust) and his email of 25 November 2019 where he chased Mr Silver for a deed of trust for Caleo's shares. I agree that these emails do show agreement in principle on the part of Caleo to having the shares held on trust rather than Caleo and/or Coastal Living being the registered shareholder.

117. However, it is not in my judgment possible to draw from this an agreement on the part of Caleo to the revised arrangements as a whole. So far as the Shareholders Agreement is concerned, it appears that Caleo may have wrongly believed that the existing agreement was in force but, in any event, it is not possible to conclude that it was agreeing to proceed without any written shareholders or waterfall agreement between all the shareholders being in place. Similarly, in relation to the trust of the shares, Caleo was provided with the purported signed declarations of trust in December 2019, but those were clearly defective. The Defendants' case is that the trust was in effect established by conduct, but it is not possible in my judgment to conclude that Caleo was agreeing that it would be sufficient for its interests and those of Mr Hodes to be held under such an informal, undocumented arrangement.

118. For all these reasons, it is not possible in my judgment to conclude that there was an agreement to vary the original Condition, as specified in the PLA.

#### **F. Discharge by Payment, Consent and/or Conduct**

119. In terms of legal analysis, the Defendants' principal case was advanced on the basis that the loan advanced by Mr Hodes under the PLA was discharged by payment, consent or conduct. There was no dispute as to the applicable law, as to which I accept the Defendants' submissions. In particular, I accept that the loan advanced by Mr Hodes under the PLA could in principle have been discharged by one or more of these methods.

120. However, on the facts of this case, each of these arguments raises the same central question, namely, whether Mr Hodes (through Caleo) did agree by conduct to vary the

Condition specified in the PLA such that the loan advanced under the PLA would be discharged simply by a receipt of a beneficial interest in 24.69% of the shares in Edgewater, without a shareholders agreement or waterfall agreement being in place, and Caleo's rights as lender under an unwritten loan agreement on the same terms as the draft CLA produced by Fladgate. For the reasons explained above, there was in my judgment no such agreement.

121. As such, the defences of discharge by payment, consent and/or conduct all fail.

### **G. Estoppel**

122. In the alternative, the Defendants contend that the Claimants are estopped from denying that the sums due and owing under the PLA have been repaid. For these purposes, the Defendants rely, firstly, on an alleged estoppel by representation and, secondly, on an alleged estoppel by convention.

#### Estoppel by representation

123. For the purposes of estoppel by representation, both sides relied on the summary of principles given by Carr J (as she then was) in *Spliethoff's Bevrashingskantoor BV v Bank of China Limited* [2016] 1 All ER (Comm) 1034 at [155]:

*“The legal requirements of an estoppel by representation of fact are well known:*

- (i) a representation which is in law deemed a representation of fact,*
- (ii) that the precise representation was in fact made,*
- (iii) that the later position taken contradicts in substance the original representation,*
- (iv) that the original representation was of a nature to induce and was made with the intention and result of inducing the party raising the*

- estoppel to alter his position on the faith of it and to his detriment, and*
- (iv) *that the original representation was made by the party sought to be estopped and was made to the party setting up the estoppels.*

124. In addition, the representation must be clear or unequivocal, or precise and unambiguous: *ibid.*

125. Mr Heath also relied on the proposition that an estoppel may also arise where a party has remained silent in the face of a duty to speak. In particular if, in the light of circumstances known to the parties, a reasonable person in the position of the person seeking to rely upon the estoppel would expect the other party, acting honestly and reasonably, to take steps to make his position plain: *Ted Baker Plc v Axa Insurance UK Plc* [2017] EWCA Civ 4097 at [72]-[77].

126. The Defendants' primary argument in relation to estoppel is that, by virtue of a number of "Confirmatory Acts", Caleo represented that the personal loan under the PLA had been repaid and treated as an investment in Edgewater. It is accepted that Caleo made no express representation in this respect, but rather it is said that such a representation was made by Caleo's conduct. In this regard, the Defendants rely, in particular, on Caleo's receipt of the "dividend" payments and its request to exchange counterparts of the CLA and the assertion of rights with respect to the calculation of interest under the CLA.

127. I have already dealt above with the "dividend" payments. As explained there, I do not see that the earlier payments assist the Defendants since they were made at a time when the Claimants appeared to have believed (incorrectly) that Caleo was a shareholder in Edgewater. The later payments are consistent with the Claimants being prepared to accept a trust structure in relation to the shareholding in Edgewater, but it cannot be taken from that they were representing that they were also content with the position in relation to the other outstanding matters, including foregoing a written trust document, and written Shareholders and Waterfall Agreements and a written CLA. In the circumstances, the receipt of these payments by Mr Hodes and Caleo does not amount to

a clear or unequivocal, or precise and unambiguous, representation by them that the personal loan under the PLA had been repaid and would be treated as an investment in Edgewater.

128. In my judgment, the same is true of the request to exchange counterparts of the CLA. It is difficult to see how this could amount to a representation that the loan under the PLA had been repaid, particularly in circumstances where the counterparts of the CLA were never in fact exchanged. Rather, it appears more consistent with the Claimants seeking to implement the arrangement as it was originally provided for in the PLA rather than agreeing to any variation of that arrangement.

129. As to the assertion of the right to interest under the CLA, it is correct that there are examples of Caleo requesting a breakdown of interest on the loan advanced by Caleo to Edgewater (see e.g. Caleo's emails of 16 March 2020 and 8 May 2020). However, these emails appear more consistent with Caleo making enquiries to try and understand what the position actually was, rather than representing that the loan under the PLA had been repaid and replaced by the investment in the shares and under the CLA. For example, the author of the 8 May 2020 email (Lloyd Priestman) appears unsure as to what the position was as between the PLA and CLA and was making enquiries of the Defendants in an attempt to clarify the position.

130. So far as the "duty to speak" is concerned, the question is whether a reasonable person in the position of the Defendants would expect Caleo, acting honestly and reasonably, to have taken steps to make its position plain that it was not content with revised arrangements as set out in paragraph 107. above. In my judgment, the answer to this that such a person would not have expected this. As is clear from the narrative above, there was no clarity at the time about what any alternative arrangements actually involved. For example, in relation to any trusts of the shares, the alternative arrangement would have differed from the actual trust deeds which were provided to Caleo. This is not therefore a case where it can be said that a clear alternative proposal was put to Caleo and that Caleo had a duty to speak up if it was not happy with that alternative

arrangement. On the facts of this case, I do not consider that the “duty to speak” supports the estoppel contended for by the Defendants.

131. Overall, I do not consider that the evidence shows that, by its conduct, Caleo made a clear or unequivocal, or precise and unambiguous, representation that the personal loan under the PLA had been repaid and treated as an investment in Edgewater.

132. In the circumstances, it is not necessary to deal with the Defendants’ case on the other necessary ingredients of the alleged estoppel by representation.

#### Estoppel by convention

133. The Defendants also rely on estoppel by convention. In particular, it is said that the parties proceeded on the basis of a convention, common assumption, and/or in accordance with representations made by the Claimants that Mr Hodes and/or his nominee was a creditor and shareholder of Edgewater and that no sums were due for payment by Mr Frankel or Mr Dreyfuss under the PLA (“**the Convention**”).

134. Again, there was no dispute between the parties as to the applicable legal principles.

135. Lord Steyn in *Republic of India v. India Steamship Co Ltd (No 2)* [1998] AC 878 at 913E-G said (at [42]) that:

*“It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: K Lokumal & Sons (London) Ltd v. Lotte Shipping Co Pte Ltd [1985] 2 Lloyd’s Rep 28 ; Norwegian American Cruises A/S v. Paul Mundy Ltd [1988] 2 Lloyd’s*

*Rep 343 ; Treitel, The Law of Contract, 9th ed. (1995) , pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.”*

136. Both parties also referred me to a summary of the principles set out in *Brierley v Otuo* [2022] EWHC 1530 (Ch):

- a. It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be shared between them. This may be inferred from words, or conduct, or even silence, but there must be a “crossing of the line”, sufficient to show an assent to the assumption.
- b. The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
- c. The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.
- d. That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
- e. Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

137. It is important to identify the nature of the convention or common assumption which is sought to be relied on. The Defendants say that the Convention was that Mr Hodes and/or his nominee was a creditor and shareholder of Edgewater and that no sums were due for payment by Mr Frankel or Mr Dreyfuss under the PLA. However, implicit within this is that it is also being said that there was a convention or common assumption that Caleo and Mr Hodes were content to proceed with the investment with revised arrangements in place as summarised in paragraph 107. above.

138. In my judgment, the evidence does not support there having been such a convention or common assumption. On both sides, there was a lack of clarity and understanding as to the existing position and, beyond the acceptance by Caleo that a trust arrangement for the shares might be satisfactory in principle, there was no real development or discussion about the nature of any alternative arrangements. In addition, the position with Schindlers clearly remained unresolved.

139. For these reasons, I do not consider that the evidence supports the estoppel by convention contended for by the Defendants.

## **H. Overall Justice**

140. The Defendants also appeal to the overall justice of the case. They say that the fault for any deficient documentation lies with both sides, and that the parties proceeded for a substantial period of time on the basis that the investment had happened. Mr Heath says that, given the chronology, it would be surprising if the legal position had not been altered by the parties' conduct. He also says that, if the boot was on the other foot, and the investment had turned out to be profitable, the Claimants would be saying that the Caleo and Coastal Living had become beneficial owners of the relevant shares in Edgewater so that they could share in those profits. It is thus said that the present claim made by the Claimants is opportunistic.

141. In my judgment, there is considerable force in a number of these points. I agree that, in relation to the documentation, Caleo does bear some responsibility for not following up

on a timely basis with the Defendants and there were clearly significant elements of confusion and poor administration within Caleo. In addition, some of the issues which arose clearly resulted from the need to try and satisfy the requirements of Schindlers for Mr Hodes' tax structuring, which was not something the Defendants were responsible for. I also agree that there is an element of opportunism in the bringing of this claim by the Claimants, and that the Claimants might well have taken a different position, if the investment had turned out differently.

142. However, none of these matters is by itself an answer to the legal claim based on the terms of the PLA and the loan advanced under it. Moreover, there are also countervailing factors which require to be taken into consideration.

143. The first is that it was the choice of Mr Frankel and Mr Dreyfuss to enter into the PLA personally. They did so because they did not want to wait in order to receive the funds from Mr Hodes. But, having done so, there was clearly always going to be some risk that they would be personally liable to repay the loan. They must have been aware of that risk at the time.

144. The second point is that the PLA was clearly deliberately devised by Fladgate in order to protect the interests of Mr Hodes. The clear intention was that, if the necessary documentation as specified in the Condition was not entered into, then Mr Hodes would have the protection of a claim under the PLA against Mr Frankel and Mr Dreyfuss personally. Thus, it can be said that the PLA, as originally conceived, was intended to apply in circumstances such as the present where the documentation as originally conceived was for, whatever reason, never finalised and entered into.

## **I. Alternative Claims**

145. The Claimants also make certain other claims against Mr Frankel and Mr Dreyfuss. These were not however developed by Mr Sinai in either his opening or closing



submissions. Mr Heath also criticised certain of the points which were put in the course of cross-examination as not having been pleaded.

146. Given my conclusions on the claim under the PLA, it is not necessary for me to deal with these alternative claims. However, for the avoidance of doubt, I make clear that I reject any allegations of dishonesty or intentional wrongdoing made against Mr Frankel or Mr Dreyfuss. In my judgment, the evidence does not support any such allegations. Further, I do not consider that Mr Frankel or Mr Dreyfuss are guilty of having made any misrepresentations to the Claimants. Finally, contrary to paragraph 79 of the Claimants' skeleton argument for trial, I do not agree that Mr Frankel and Mr Dreyfuss are liable for "*procuring the failure of the investment through their personal conduct*". It is clear that Mr Frankel and Mr Dreyfuss did not procure the failure of the investment; to the contrary, they wished for it to succeed.

147. Similarly, Caleo's alternative claim against Edgewater under the CLA does not arise since, on my findings, the CLA (or any loan from Caleo to Edgewater on the same terms) never came into effect.

#### **J. Sums received by the Claimants**

148. It follows that Mr Hodes is entitled to judgment on his claim for repayment of the loan advanced under the PLA. However, as is accepted, credit must be given for the sums actually received by Caleo and Mr Hodes from Edgewater. On my findings, those payments were interim dividends paid by Edgewater to Waterpeak as its shareholder which Waterpeak in turn permitted to be paid to Mr Hodes and Caleo in anticipation and expectation of the arrangements being finalised. These payments therefore, prima facie, fall to be returned to Waterpeak.

#### **K. Conclusion**

149. In conclusion:

- a. Mr Hodes is entitled to judgment against Mr Frankel and Mr Dreyfuss jointly and severally on his claim for repayment of the sum of £650,000 advanced by way of loan under the PLA;
- b. However, allowance must be made for the sums received by Mr Hodes and Caleo by way of distribution from Edgewater which prima facie are to be returned to Waterpeak;
- c. The relevant shares in Edgewater, namely, the 24.96% interest, are held legally and beneficially by Waterpeak and none of Caleo, Coastal Living or Mr Hodes have any interest in the same;
- d. I invite the parties to agree the position on interest and costs failing which I will receive submissions.