BL-2020-000768

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUST AND PROBATE LIST

27 June 2023

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

ENSIGN HOUSE LIMITED **Claimant**

- and –

(1) ENSIGN HOUSE (FEC) LIMITED **Defendants**
(2) FEC DEVELOPMENT MANAGEMENT LIMITED
(3) JOHN CONNOLLY
(4) TERENCE ALFORD

- -

MS JOANNE WICKS KC and **MR LEE JIA WEI** (instructed by **Spector Constant & Williams Ltd**) appeared on behalf of the Claimant.

MR JONATHAN SEITLER KC, MR BENJAMIN FAULKNER and **MS FRANCESCA MITCHELL** (instructed by **DLA Piper UK LLP**) appeared on behalf of the Defendant.

Hearing dates: 7-10, 14-18, 21-25, 28-30 November 2022
1, 12-14 December 2022, 10 May 2023

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APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30 am on 27 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Leech:

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I. Introduction

A. The Parties

1. The Claimant is Ensign House Ltd ("**EHL**") and on 8 December 2014 it was incorporated in Jersey under company registration no. 117286. Its sole shareholder was JTC Corporate Services Ltd ("**JTC**") and it was incorporated or acquired by Mr John Downer as a special purpose vehicle for the purchase of Ensign House, 17 Admiral's Way, Canary Wharf, London E14 9XQ ("**Ensign House**"). Its original directors were Mr Downer, Mr Stephen Whale, Ms Donna McCrorie and Mr Robert Monticelli (whose alternate was Mr Paul Weir). On 10 August 2015 Mr Darren English was appointed to be a director and on 1 September 2016 Ms Linda Garnier was also appointed as a director. On 17 September 2019 Mr Downer resigned and on 8 July 2019 all of the remaining directors were removed (apart from Mr English who had already resigned). The current directors of EHL are Mr Roger Lal, an accountant, and Ms Caron Ann Bennett.

2. Mr Downer described himself in evidence as a property developer with over 25 years' experience in property acquisition and development. He is (and was) the founder, beneficial owner and chief executive of a number of companies operating under the name "**Investin**" or "**Investin PLC**" although Investin has no formal group structure or parent company. In practice, Mr Downer formed a new company for each of his projects and the shares were either held by him or by JTC on his behalf. Mr Downer was resident in Monaco for most (if not all) of the time during which the events giving rise to this claim took place. He gave evidence that he was the beneficial owner of EHL and that he controlled the company.

3. Mr Downer also used the services of a company called Countrywide Project Management Ltd ("**Countrywide**") to provide legal, financial and other management services. Mr Lal and Ms Bennett (above) were both directors of Countrywide and Mr Jon Burgwin (who was a close colleague and acted as a director of a number of Investin companies) was also a director. On 15 December 2017 Ms Lisa McGinn, who was formerly employed as a solicitor at Browne Jacobson LLP ("**Browne Jacobson**"), also became the legal director of Countrywide. In this judgment I will use the umbrella term "**Investin**" to refer to all of Mr Downer's Investin companies or to their management (including Countrywide) unless it is necessary for me to identify the actions taken by a specific

Investin company or the knowledge or state of mind to be attributed to it.

4. In 2012 Mr Downer was introduced to the Fourth Defendant, Mr Terence Alford, who was a property agent and introducer. Mr Alford was closely involved in the acquisition of a neighbouring property, Quay House, 2 Admiral's Way London E14 9XG ("**Quay House**") and in negotiations to take an option or options over the various interests in Ensign House. There were a number of important issues between the parties about the nature and scope of Mr Alford's retainer, when or whether it came to an end and whether it imposed fiduciary duties upon him. But Mr Alford himself, who is now resident in Vietnam, played no part in the trial and did not give evidence. On 28 March 2022 Deputy Master Rhys made an unless order against Mr Alford in relation to the disclosure of certain bank statements, he failed to comply with that order and as a result his defence was struck out and he was debarred from defending the claim. In the event, EHL obtained copies of his bank statements by making an application for third party disclosure.

5. The Far East Consortium ("**FEC**") is an international group of property development companies owned or controlled by the Far East Consortium International Ltd ("**FEC International**") of which Mr David Chiu is the Chairman and Chief Executive. The Second Defendant, FEC Development Management Ltd ("**FEC UK**"), was incorporated in England and Wales on 20 February 2014 and it also forms part of the FEC group. The Third Defendant, Mr John Connolly, was the head of UK development and a director of FEC UK. On 10 October 2019 FEC UK formed the First Defendant, Ensign House (FEC) Ltd ("**EHFL**"), and Mr Connolly became a director of that company too. In about 2014 FEC separated its hotel arm from its development arm and incorporated Dorsett Hospitality International Ltd ("**Dorsett**") to hold its hotel business. FEC International was listed on the Hong Kong Stock Exchange between 2010 and 2015. I will use the umbrella term "**FEC**" to refer to the group or its management (including FEC UK, EHFL and Dorsett) unless it is necessary for me to identify the actions taken by a specific FEC company or the knowledge or state of mind to be attributed to it.

6. On 19 January 2019 EHL and FEC UK entered into a non-disclosure agreement. I was taken to a number of non-disclosure agreements in the course of the trial and I will refer to such an agreement by the generic term "**NDA**". Where I refer to "**the NDA**" in this judgment I intend to refer to the agreement dated 19 January 2019 (unless the context dictates otherwise). I will have to consider the construction and effect of the NDA in

some detail but, for present purposes, it is enough to record that EHL's claims in this action arise out of the alleged misuse of confidential information and the alleged misconduct of Mr Alford. EHFL also made a counterclaim against EHL in relation to the registration of a restriction under Rule 93 of the Land Registration Rules 2003 which was compromised during the trial.

7. Ms Joanne Wicks KC and Mr Lee Jia Wei appeared for EHL at trial instructed by Spector Constant & Williams Ltd ("**SCW**"). Mr Jonathan Seitler KC, Mr Benjamin Faulkner and Ms Francesca Mitchell appeared for the three Defendants (apart from Mr Alford) instructed by DLA Piper UK LLP ("**DLA**"). Ms Wicks presented the case for EHL and Mr Seitler presented the factual case for EHFL, FEC UK and Mr Connolly. Mr Faulkner presented their case on the valuation issues and made closing submissions on remedies.

8. I am grateful to counsel and their instructing solicitors for the quality of their written and oral submissions and the assistance which they gave the Court. I should record that this trial was noticeable for the good humour and co-operation on both sides, which can often be lacking in long trials where serious allegations are made and much is at stake. Where I refer to counsel's submissions below, I do so as shorthand and recognising that those submissions were the product of a great deal of hard work by their entire teams. I also use the shorthand "**Defendants**" to refer to EHFL, FEC UK and Mr Connolly (unless I specifically refer to Mr Alford) because they were the only active Defendants.

B. Ensign House

9. Ensign House is a six storey office building and during the period with which this judgment is concerned it contained 18 separate office units to which the parties referred (and I will refer) as "**Suites**". I will also refer to their owners as "**Suiteholders**". The property is located immediately adjacent to Quay House and both form part of the Waterside estate (the "**Waterside Estate**") in the London Borough of Tower Hamlets ("**Tower Hamlets LBC**"), which was the relevant planning authority.

10. In 2014 the Waterside Estate consisted of a four acre site overlooking Canary Wharf and Marsh Wall within the Isle of Dogs and included a number of other buildings (one of which was called Beaufort Court). The Docklands Light Railway lies immediately to the west of Quay House and wraps around Ensign House. As it does so, it crosses over land which falls within the freehold and long leasehold titles to Ensign House and passes over

a car park which roughly forms the shape of a wellington boot. In this judgment I refer to it (as did the parties) as the "**Boot**".

11. In 2014 Investin acquired Quay House through another Jersey company, Investin Quay House Ltd ("**QHL**"), which was incorporated on 31 January 2014. It was common ground that common ownership of Quay House and Ensign House or Quay House and the Boot would have improved the development prospects of Quay House and Mr Downer's efforts to achieve common ownership of both properties form part of the background to the claim. In 2018 QHL sold Quay House to Rockwell Properties Ltd ("**Rockwell**"), a development company founded by Mr Donal Mulryan.

12. Between 2014 and 2020 the title structure of Ensign House was a complex one. In order to make the narrative which follows intelligible it is necessary for me to explain that title structure in some detail.

(1) The Freehold

13. On 30 January 1996 Ensign House Freehold Ltd ("**Freeco**") was registered as the freehold proprietor of Ensign House together with part of Admirals Way under title no. EGL 343350. By a lease dated 31 March 1987 and made between South Dock Developments Ltd (1), Wiggins Waterside Ltd ("**Wiggins**"), (2) and Wiggins PLC (3) the then freehold owner demised Ensign House to Wiggins for a term of 200 years from 24 June 1984. On 23 February 2015 the Treasury Solicitor disclaimed this lease and on 10 January 2018 it was vested in Ensign House Management (Waterside) Ltd ("**Manco**") and registered under title no. AGL 434829. For practical if not legal purposes, it was merged in the Head Lease (below). I will refer to the disclaimed head lease as the "**Wiggins Lease**" (as did the parties).

(2) The Headlease

14. By a lease dated 24 May 1989 (the "**Headlease**") and made between Wiggins (1) and Manco (2) Wiggins demised Ensign House to Manco for a term of 200 years from 24 June 1984 less 3 days at a rent of £1 and the Headlease was registered under title no. EGL 246427. By 2014 Mr Paul Holliday, Mr Andrew Bolaji Ranson (known as "Bola" Ranson) and Mr Paul Boughtwood (all of whom owned or were interested in individual Suites in Ensign House) were the directors of Manco.

(3) Thames Haven Management

15. By 2014 the long leases of the common parts of the Waterside Estate (including the parts of Admirals Way which ran through it) were registered in the name of a company called Thames Haven (Waterside) Ltd ("**Thames Haven**") which was controlled by the owners and occupiers of the various buildings which formed the Waterside Estate. It was common ground that they had also formed a management company (or operated under the name) "**Thames Haven Management**". Mr Holliday was also a director of Thames Haven and Thames Haven Management.

(4) Suites 1 to 3

16. The owner of Suites 1 to 3 was Ensign Properties Portfolio Ltd ("**EPPL**") and Mr Boughtwood represented the company and probably owned or controlled it (although there was no direct evidence to that effect). By an underlease dated 12 August 1987 and made between Wiggins (1), Thames Haven (2), Manco (3) and Adrian Hibbert (4), Wiggins demised Suite 1 to Mr Hibbert for a term of 200 years less 7 days from 24 June 1984 at a rent of £1. On 9 September 2016 EPPL was registered as the proprietor of the underlease under title no. EGL 203978. Suite 3 had also been let on a long underlease for 200 years less 7 days and on 9 September 2016 EPPL was also registered as the proprietor of that lease under title no. EGL 203979.

17. The title structure of Suite 2 was slightly different and more complex. By a long lease dated 22 November 1987 and made between Wiggins (1), Thames Haven (2), Manco (3) and Stephen Paul Hayklan and John Gordon Bews (4), Wiggins demised Suite 2 to the original tenants, Mr Hayklan and Mr Bews, for a term of 200 years less 7 days from 24 June 1984 at a rent of £1 and they were registered as proprietors of the long lease under title no. EGL 211187. However, by a second lease dated 8 September 1999 and made between Mr Hayklan and Mr Bews (1) and Mokum Change Management Ltd ("**Mokum**") (2), the original tenants demised Suite 2 to Mokum for a term of 200 years less 10 days and this sub-underlease lease was registered under title no. EGL 395341.

18. On 9 September 2016 EPPL was registered as the proprietor of the sub-underlease of Suite 2 in the register of title no. EGL 395341 but it did not acquire the benefit of the underlease and was never registered as its proprietor in the register of title no. EGL 211187. As a consequence the original tenants, Mr Hayklan and Mr Bews retained a three

day reversionary interest in Suite 2 which presented problems for any potential developer. This problem was not limited to Suite 2 but extended to a number of Suites. Mr Seitler suggested that the grant of a reversionary lease or a sub-underlease was probably a tax saving scheme. There was some evidence to this effect (below) and I accept that this provides the most likely explanation. The parties referred to each reversionary lease as a "**Superior Lease**" and I adopt the same term. I therefore refer to the underlease granted by Wiggins to the original tenants of Suite 2, Mr Hayklan and Mr Bews, as the Superior Lease of Suite 2.

(5) Suite 4

19. By an underlease dated 17 September 1987 Wiggins demised Suite 4 to RJ Langman Insurance Brokers Ltd ("**RJLIB**") for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and it was registered as the proprietor under title no. EGL 206018. Between 2014 and 2020 RJLIB was still the registered proprietor of Suite 4 and Mr Roy Langman represented the company. As its name implies, RJLIB's business was as an insurance broker and it played a part in obtaining quotes for title insurance in respect of a number of the Superior Leases as I explain (below).

(6) Suite 5

20. By an underlease dated 31 December 1987 Wiggins demised Suite 5 to Mr and Mrs John Horne for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and they were registered as the proprietors under title no. EGL 210158. On 6 October 2004 Mr Adam Wu was registered as the proprietor of Suite 5 and he remained the registered proprietor between 2014 and 2020.

(7) Suites 6 and 11

21. By an underlease dated 31 December 1987 Wiggins demised Suite 6 to Churchill Financial Services Ltd ("**Churchill**") for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and they were registered as the proprietors under title no. EGL 210619. On 3 January 2008 Mr Ranson was registered as the proprietor of Suite 6 and he remained the registered proprietor between 2014 and 2020.

22. By an underlease dated 8 January 1988 Wiggins demised Suite 11 to Mr George James

Stuart Walker for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and he was registered as the proprietor of the underlease under title no. EGL 232639. I will refer to this as the Superior Lease of Suite 11 and by a sub-underlease dated 24 August 2004 Mr Walker then demised Suite 11 to ISC Guarding Ltd for a term of 200 years less 10 days from 24 June 1984. On 11 December 2007 Mr Ranson was registered as the proprietor of the sub-underlease. However, he did not acquire the Superior Lease from Mr Walker until 2020 (as I explain below).

(8) Suite 7

23. By an underlease dated 19 May 1987 Wiggins demised Suite 7 to Professor Peter George Whiteman QC for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and he was registered as the proprietor under title no. EGL 206442. In 2014 he was still the registered proprietor and he remained the proprietor until 2020.

(9) Suites 8 to 10 and 16

24. By an underlease dated 12 August 1987 Wiggins demised Suite 8 to Hansom Property Co Ltd for the usual term of 200 years less 7 days at a rent of £1 and they were registered as the proprietors under title no. EGL 210619. On 28 November 2013 Tower Pension Trustees Ltd ("**Tower Pension Trustees**") was registered as the proprietor and it was represented by Mr Simon Plant, who with Mr Daniel Plant, also owned Suites 9, 10 and 16. Although I was not taken to any documentary evidence to this effect, the assumption which I have made is that Tower Pension Trustees held the underlease of Suite 8 on trust for both Simon and Daniel Plant as part of the assets of their private pension fund.

25. By an underlease dated 9 May 1988 Wiggins demised Suite 9 to Churchill for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and it was registered as the proprietor of the underlease under title no. EGL 221882. I will refer to this as the Superior Lease of Suite 9 and by a sub-underlease dated 8 November 2005 a company called Investrealm Ltd ("**Investrealm**") (which must have acquired the Superior Lease in the meantime) demised Suite 9 to Simon and Daniel Plant for a term of 200 years less 14 days from 24 June 1984. On 13 December 2005 they were registered as the proprietors of the sub-underlease. Investrealm granted an option to the Plant brothers and on 7 December 2017 they were also registered as the proprietors of the Superior Lease. By that date, therefore, they owned both the Superior Lease and the occupational lease of

Suite 9.

26. By an underlease dated 8 January 1988 Wiggins demised Suite 10 to Mr Walker for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and he was registered as the proprietor of the underlease under title no. EGL 232646. I will refer to this as the Superior Lease of Suite 10 and by a sub-underlease dated 30 August 2006 he then demised Suite 10 to Simon and Daniel Plant for a term of 200 years less 10 days from 24 June 1984.

27. By an option and pre-emption agreement dated 30 August 2006 Mr Walker also granted Simon and Daniel Plant an option to purchase the Superior Lease of Suite 10 from 6 April 2020 until 17 June 2184 (together with a right of pre-emption from the date of the agreement). Simon and Daniel Plant had not exercised the option when they sold Suite 10 to FEC UK (as I explain below) and FEC UK had still been unable to complete the transfer by 15 June 2022 because Mr Walker had recently died. Simon and Daniel Plant were the only Suiteholders to negotiate options to acquire any of the Superior Leases of their Suites and I will refer to the two options which they held over Suites 9 and 10 as the "**Suite 9 Option**" and the "**Suite 10 Option**" respectively.

28. On 2 April 1987 Wiggins granted a Superior Lease of Suite 16 to Hambros Bank Executor and Trustee Co Ltd ("**Hambros**") for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and it was registered as the proprietor under title no. EGL 233993. Then, by a sub-underlease dated 23 December 2005 Hambros demised Suite 16 to Mr Michael Dalloz for a term of 200 years less 10 days from 24 June 1984. On 23 February 2010 Simon and Daniel Plant acquired Suite 16 and on 17 March 2010 they were registered as the proprietors under title no. EGL 499456.

29. By a transfer dated 1 September 2020 Hambros transferred the Superior Lease of Suite 16 to Simon and Daniel Plant and on 8 September 2020 they were registered as the proprietors. On 1 September 2020 Hambros also transferred the Superior Leases of Suite 17 and Suite 18 to the Suiteholders of those Suites. I deal with the context in which Hambros transferred these Superior Leases to the Suiteholders in greater detail below because of their relevance to the valuation issues.

(10) Suite 12

30. By an underlease dated 8 January 1988 Wiggins demised Suite 12 to Mr Walker for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and he was registered as the proprietor of the underlease. I will refer to it as the Superior Lease of Suite 12 and by a sub-underlease dated 6 January 2006 Mr Walker then demised Suite 12 to Craig East and Frank Inzani for 200 years less 10 days from 24 June 1984. On 26 January 2006 they were registered as the proprietors of the occupational sub-underlease under title no. EGL 498653. In 2020 Mr Ranson also acquired the Superior Lease of Suite 12 from Mr Walker at the same as he acquired the Superior Lease of Suite 11.

(11) Suite 13

31. By an underlease dated 30 September 1987 Wiggins demised Suite 13 to Meyer Joseph Sopher for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and he was registered as the proprietor of the underlease under title no. EGL 204433. On 11 October 2012 Victor Sopher, Joseph Derek Sopher and St Andrews Trustees Ltd were registered as the proprietors of Suite 13 and I will refer to them collectively as the "**Sopher Trust**" and they still owned Suite 13 in 2020. Mr Joseph Sopher generally represented the trust.

(12) Suite 14

32. By an underlease dated 31 July 1987 Wiggins demised Suite 14 to Lama Petroleum Ltd ("**Lama**") for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and it was registered as the proprietor of the underlease under title no. EGL 203110. Awad Ammora owned or controlled Lama and had formerly been a director of the company. However, in the events which I describe below Eyad Ammora (his son) generally represented Lama.

33. On 28 July 2009 the Serious Fraud Office (the "**SFO**") applied without notice to the Commercial Court for an order under the Criminal Justice Act 1988 to restrain Mr Awad Ammora from removing any of his assets from England and Wales up to a maximum sum of US $4,396,000 and Mr Justice Stadlen (as he then was) made the Order. I will refer to it as the "**Restraint Order**". By letter dated 28 June 2011 the SFO wrote to Mr Awad Ammora stating its position that Suite 14 was subject to the Restraint Order (but also indicating that it was prepared to agree to vary the order without the necessity of a hearing).

34. On 5 November 2015 Lama applied to vary the Restraint Order. Counsel's Skeleton Argument dated 4 November 2015 (the "**Lama Skeleton Argument**") stated that the SFO's consistent position had been that Mr Awad Ammora was the sole beneficial owner of Suite 14 and that, although it did not object to Lama entering into an option agreement, it objected to the release of 50% of the sale proceeds to his wife (or former wife). It also explained that Mr and Mrs Ammora had transferred the shares in Lama to a BVI company called Ridgebrook Investments Ltd and that their ultimate beneficial owner was the Ammora Family Jersey Settlement Trust. On 5 November 2015 Mr Justice King (as he then was) dismissed the application with costs. As I explain below, his order was provided to EHL but with no reasons for his decision. I will refer to the order as the "**King Order**".

(13) Suite 15

35. By an underlease dated 1 December 1987 Wiggins demised Suite 15 to Howard James Stephen Hughes for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and on 14 December 1987 he was registered as the proprietor of the underlease under title no. EGL 208279. In 2020 Mr Hughes remained the owner of Suite 15.

(14) Suite 17

36. By an underlease dated 2 April 1987 Wiggins demised Suite 17 to Hambros for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and it was registered as the proprietor of the underlease under title no. EGL 403121. I will refer to it as the Superior Lease of Suite 17 and by a sub-underlease dated 25 May 2004 Hambros then demised Suite 17 to South Quay Investments Ltd for 200 years less 10 days from 24 June 1984. On 21 December 2015 GNN Services LLP ("**GNN**") was registered as the proprietor of this sub-underlease under title no. EGL 488891. On 1 September 2020 GNN also acquired the Superior Lease of Suite 17 and on 8 September 2020 it was registered as the proprietor under title no. EGL 403121 in place of Hambros. Mr Holliday represented GNN.

(15) Suite 18

37. By an underlease dated 2 April 1987 Wiggins also demised Suite 18 to Hambros for the usual term of 200 years less 7 days from 24 June 1984 at a rent of £1 and it was registered

as the proprietor of the underlease under title no. EGL 197138. I will refer to it as the Superior Lease of Suite 18 and by a sub-underlease dated 23 December 1999 Hambros then demised Suite 18 to Monomind Ltd for 200 years less 10 days from 24 June 1984. On 5 January 2011 SRC Engineering Systems Ltd ("**SRC**") was registered as the proprietor of the occupational sub-underlease under title no. EGL 408451. On 1 September 2020 SRC also acquired the Superior Lease of Suite 18 and on 8 September 2020 it was registered as the proprietor under title no. EGL 197138 in place of Hambros. Mr Ashley Butterworth and Mr Pat Keegan represented SRC.

(16) Short Occupational Leases

38. The position is made even more complex by the fact that between 2014 and 2020 the Suiteholders had granted shorter occupational leases of Suites 1 to 4, 6, 7, 13, 15 and 18 to sub-sub-tenants (or sub-sub-sub tenants). This presented particular difficulties for any purchaser of options over those Suites because the relevant Suiteholders would need to obtain vacant possession (if the options were exercised) but did not want to lose rent (if they were not). For example, Mr Hughes had granted a five year lease from 1 September 2014 to a company called Acucure Ltd (which was noted on the register of his title).

(17) Site Assembly

39. To assemble a development site at Ensign House in 2014, a potential developer had to first reach agreement to acquire the long underleases of all 18 Suites. They were held by individuals, commercial entities and trusts and the individuals who represented them were very different and had different demands on their time. By way of illustration, Mr Simon Plant was an insolvency practitioner, Mr Holliday was an accountant and company director, Professor Whiteman was a distinguished tax silk and academic, Mr Ranson was a property developer himself and Mr Wu was an international businessman. Suite 14 was also subject to the Restraint Order which had to be varied before a developer could acquire it.

40. A potential developer would also have to acquire the freehold from the Freeco, the Headlease (together with the Wiggins Lease) from Manco and ensure that it acquired any necessary rights of access and development from Thames Haven. It also had to acquire the Superior Leases of eight Suites, which had no economic value apart from their ability to prevent development. Moreover, the Superior Leases were not held by the Suiteholders

themselves and they had no rights to acquire them (with the exception of Suites 9 and 10). The Superior Lease of Suite 2 was registered in the name of Mr Hayklan and Mr Bews, Suite 9 was registered in the name of Investrealm, the Superior Leases of Suites 11 and 12 was registered in the name of Mr Walker and the Superior Leases of Suites 16 to 18 were registered in the name of Hambros.

41. Finally, a developer also had to obtain vacant possession of the individual Suites from the occupiers of 9 Suites. If a developer wanted to take options over those Suites rather than buy them outright, it had to ensure that the Suiteholders terminated the existing tenancies if it obtained planning permission and then exercised the options. Unsurprisingly, a number of the Suiteholders required compensation or guarantees for any rent which they lost if a developer chose not to exercise the options at all.

II. The Witnesses

C. Witnesses of Fact

42. The principal witnesses in this trial spoke to each other only once during the six years which were the subject matter of this litigation. Moreover, there was not a great deal between them about what was said during that one call. This is not a case, therefore, where the Court has to decide between two rival accounts and make findings based on a comparison between their oral evidence. Nevertheless, Mr Downer gave evidence for seven days and Mr Connolly gave evidence for three days. Mr Seitler challenged much of Mr Downer's evidence on the basis that his reconstruction of events was false and misleading and Ms Wicks challenged Mr Connolly's evidence on the basis that he was a party to a conspiracy with Mr Alford which was hatched on 3 April 2019.

43. This is a case, therefore, where I was dependent on the documents to test the reliability of these two principal witnesses. Moreover, given that they never met and spoke only once, I found it particularly useful to compare what each witness said in evidence with the documents behind their own "curtain". Both communicated almost daily with Mr Alford for long periods (and also when there was little overlap). Both also communicated with their solicitors and other professionals and Mr Connolly communicated with his principals in Hong Kong. In deciding whether they were telling the truth, I placed significant weight on those documents on the basis that a witness is likely to be candid with his or her colleagues and associates.

(1) Mr Downer

44. Mr Downer is a wealthy and successful businessman and I have no doubt that he is a tough and astute negotiator. He was very well-prepared to give evidence and very familiar with the documents. He had clearly anticipated a number of lines of cross-examination and he was ready to deal with them. However, I am satisfied that in much of his evidence he was trying to put a spin or slant on the documents rather than providing his actual recollections (however imperfect) of what was taking place at the time. To take a simple example, he relied on a series of meetings with Thames Haven Management to claim credit for the introduction to Ensign House and to play down Mr Alford's importance. However, he produced no minutes of any meetings and it was clear from the documents when properly analysed that Mr Alford introduced him to the opportunity to buy Ensign House and that these meetings took place much later.

45. The principal issue with which Mr Downer had to deal was whether he had lost interest in the site assembly of Ensign House by the end of 2018 when he had been unsuccessfully trying to obtain options over the Suites for four years. This was directly relevant to my assessment of what he would have done if, amongst other things, FEC UK had complied with the NDA. I found Mr Downer's evidence on this key issue unconvincing. It was inconsistent with the contemporaneous documents and when faced with an email which contradicted what he had just said, Mr Downer either took refuge in the explanation that it was "banter" or a negotiating tactic or designed to cajole or encourage his own team. I found none of these explanations plausible. In Section III I have set out in detail my individual findings on these issues.

46. I am prepared to accept that Mr Downer did not deliberately mislead the Court. When he had made a misleading statement which went beyond a "mere puff" or permitted one to be made on his behalf (as he did from time to time in negotiations with third parties), he admitted it frankly. Moreover, I was not prepared to accept that he attempted to mislead QHL's creditors or Mr Alford by falsifying the costs and expenses which it had incurred in relation to Quay House. Although he elected to take advantage of the privilege against self-incrimination and declined to answer Mr Seitler's questions, I was not prepared to draw an adverse inference from his failure to do so.

47. Nevertheless, I am satisfied that his evidence was strongly coloured by hindsight and by

the knowledge that FEC had been able to acquire Ensign House where he had failed to do so. It is not unusual for witnesses who have to give evidence about what they would have done (rather than about what they did), to convince themselves that they would have taken a particular course of action in different circumstances. My assessment of Mr Downer's evidence is that based on reading and re-reading the documents, he had convinced himself that he was still interested in actively pursuing the negotiations with the Suiteholders and would have done so if Mr Alford had remained loyal to him.

48. However, I was not prepared to accept Mr Seitler's case that Mr Downer had completely lost interest in Ensign House that he would have taken no action at all if presented with a valuable commercial opportunity. He was astute enough to insist that FEC UK entered into an NDA when Mr Alford introduced Mr Connolly to him in January 2019 and, in my judgment, what he was looking for was a potential purchaser who would buy Investin's position and take a "turn" at the site assembly of Ensign House. He hoped to persuade such a purchaser to enter into a joint venture and give him a profit share but he was prepared to accept a substantial payment which compensated him for his time and effort and enabled him to recoup his costs.

(2) Ms McGinn

49. I found Ms McGinn to be an honest witness doing her best to assist the Court. She was only able to give limited assistance in relation to the key issues and Mr Seitler did not challenge most of her evidence. However, he challenged the accuracy of some of the statements which she made in correspondence and if I had made adverse findings about her evidence, these could have been quite serious. But I am satisfied that she did not mislead Rockwell or any other parties during the negotiations and that she did not mislead the Court.

(3) Mr Connolly

50. Mr Connolly presented a different problem. For the most part, I found him to be an engaging and helpful witness. He answered Ms Wicks' question in a straightforward manner and almost all of his evidence made commercial sense, was inherently probable and consistent with the documents. He also accepted without any prevarication that Mr Downer did not mislead him in January 2019 and that it was effectively his own fault that he signed up to the NDA with minimal due diligence.

51. However, I rejected his evidence in its entirety in relation to the payments which Mr Alford made to him, his family and associates and I am satisfied that he had secretly agreed with Mr Alford to share the fee of £1 million (later reduced to £970,000) which Mr Chiu and Mr Hoong had agreed to pay to Mr Alford for introducing Ensign House. I was bound to conclude, therefore, that Mr Connolly had deliberately fabricated part of his witness statement and then lied to the Court. In the light of this evidence I had to decide whether to accept Mr Connolly's evidence in relation to two key issues.

52. First, I had to decide whether Mr Connolly conspired with Mr Alford to acquire options over Ensign House for FEC from 3 April 2019. Secondly, I had to decide whether he knew or turned a blind eye to the fact that Mr Alford was retained by EHL or that there was a fiduciary relationship between them. On the first issue, the documentary evidence did not support the case which Ms Wicks put to Mr Connolly and pointed clearly to the "turning point" being 31 May 2019 when Mr Connolly and his principals took the decision to try and purchase the individual Suites outright. In relation to the second issue, I reminded myself of the *Lucas* direction and after some reflection, I accepted Mr Connolly's evidence for the reasons which I have set out in detail (below).

53. In particular, I directed myself that I had to decide what Mr Connolly actually knew or suspected and not what inferences a High Court judge might have drawn with the benefit of hindsight. It is of some significance that there was no evidence of a retainer between EHL and Mr Alford apart from a single email to which Mr Downer did not see fit to reply. Indeed, the issues which I have found most difficult to resolve in this action are whether Mr Alford was a fiduciary and whether he remained so after January 2019. It is clear that in July 2019 both Mr Connolly and Mr Alford were concerned by the risk that Mr Downer might take steps to enforce the NDA. But in my judgment, it is reading too much into two or three isolated emails and holding Mr Connolly to too high a standard to conclude that he knew that Mr Alford was bound by obligations to EHL or that he turned a blind eye to this fact.

D. The Expert Witnesses

(1) Ms Seal

54. Ms Victoria Seal is a chartered surveyor and Deputy Head of London Development and Planning at BNP Paribas Real Estate. She was an experienced witness and had given

evidence before. Mr Faulkner, who cross-examined her on behalf of the Defendants, and dealt with the expert evidence in closing submissions, submitted that she was partisan and arguing EHL's case. I accept that sometimes she had a tendency to give discursive answers rather than answer his questions directly. But her evidence often contained useful insight and I am fully satisfied that she was expressing her opinions honestly and carefully to the Court.

(2) Mr Johnston

55. Mr Johnston is a partner in Knight Frank. I also found him to be an impressive witness. He gave evidence carefully and thoughtfully and he only became upset or animated when Ms Wicks challenged his professional integrity and suggested to him that he had a conflict of interest. Mr Johnston's evidence was that he had agreed to give evidence as a favour to FEC and that he was particularly reluctant to do so because of the heavy commitment which it involved. I accept that evidence and I find that Mr Johnston was also expressing his opinions honestly and carefully to the Court.

56. Many of the issues on which the experts disagreed were within the range of reasonable disagreement between two experienced valuers, as I observed both in evidence and during closing submissions. Nevertheless, I had to resolve those issues and choose the evidence of one expert rather than the other to arrive at a value for Ensign House. I have done so for the detailed reasons which I set out below. I have decided some points in favour of Ms Seal and some in favour of Mr Johnston. But the fact that I have found against one or the other does not mean that I did not consider the opinion of the other to be honestly and reasonably held.

III. The Facts

57. The parties agreed a statement of facts and in the normal course I would have reproduced it with gratitude. However, by the end of the trial so much of the factual narrative was in issue that I could see little purpose in setting out the agreed facts and then going over the same ground setting out my findings of fact. In this section, therefore, I set out the agreed facts, the facts in issue, the evidence on those issues and my principal findings of fact before considering each cause of action separately.

E. The Development Opportunities

(1) Mr Alford

58. It is common ground that Mr Downer met Mr Alford through a mutual friend and another property agent, Mr Stephen Sheehan. It is also common ground that in either 2012 or 2013 Mr Alford introduced Mr Downer to Quay House and that Mr Downer and Mr Alford agreed that Mr Alford would act for him in relation to the Quay House transaction. It was Mr Downer's evidence (which the Defendants did not challenge) that Mr Alford asked him to provide an Investin email account (terence.alford@investinplc.com) and that he did so.

59. By September 2013 Mr Alford was using his Investin email address and the examples to which the parties referred showed that beneath his signature Mr Alford gave Investin's website and used the legend "INVESTINPLC". His email footers also contained standard form confidentiality wording and I accept Ms Wicks' submission that Mr Downer permitted Mr Alford not only to have an Investin email address but to use its name and brand. Mr Downer also accepted in answer to questions from Mr Seitler that he understood from the standard wording which he and Mr Alford used that it was a breach of confidence for him to read private emails which were not intended for his eyes. I explain the relevance of this below.

(2) Quay House

60. On 28 February 2014 QHL completed the purchase of Quay House. Mr Downer accepted in evidence that a company called Investin Bankside originally purchased the property for £9m but transferred it on to QHL for £11m. He also gave evidence that he funded the purchase personally although he initially required bridging finance for £4.2m. Mr Downer accepted that he instructed Mr Ed De Jonge of Savills plc ("**Savills**") and Mr George Kyriacou, the managing director of CIT Developments LLP ("**CIT**"), to find a purchaser for Quay House even before the purchase had been completed. Indeed, on 4 December 2013 Mr De Jonge and Mr Kyriacou met Mr Connolly to discuss a potential sale to FEC. Although FEC was prepared to offer up to £28m for Quay House, Mr Downer was not prepared to accept that offer.

61. Although Mr Downer was initially prepared to consider selling Quay House on to a new

purchaser, QHL applied for planning permission to redevelop it once completion of the purchase had taken place and Mr Downer instructed CIT to act as QHL's planning consultants. Mr Downer accepted that Mr Alford was also retained in relation to Quay House but gave evidence that his relationship with Investin went wider than that and that his role was to develop other opportunities. Mr Seitler accepted this but submitted that by 28 February 2014 Mr Alford was primarily retained as a development manager, whose function was to manage the process by which QHL obtained planning permission and then to assist it to sell the property with the benefit of planning permission. It is probably unnecessary for me to decide this issue but if it is necessary, I accept Mr Seitler's submission.

(3) Ensign House

62. It is common ground that in September 2014 the relevant planning officer at Tower Hamlets recommended the refusal of QHL's application for planning permission because of overdevelopment and insufficient amenity space. On 25 September 2014 the Strategic Development Committee, to whom the application had been submitted, deferred a decision to make a site visit. On 6 November 2014 the committee resolved to refuse permission and on 26 November 2014 Tower Hamlets issued its formal decision.

63. Ensign House is located next to Quay House and it was common ground that ownership of Ensign House had the potential to unlock planning permission for Quay House because the Boot could be used to create public amenity space. There was an issue between the parties whether Mr Alford introduced Ensign House to Mr Downer. But I find that Mr Alford introduced Ensign House to Mr Downer for the following reasons:

    (1) By email dated 29 January 2013 Mr Alford wrote to Mr Downer enclosing agents particulars of three Suites which had been sent to him by Mr Colin Leslie of Cherryman, a firm of local agents located in Beaufort House. Mr Downer did not suggest that he had any interest in Ensign House before that date or that he followed up.

    (2) By email dated 9 September 2013 Mr Alford wrote to Mr Downer stating that he had spoken to Mr Holliday whom he described as "Chair of Thames Haven". He also informed Mr Downer that he had obtained copies of a master plan prepared by BUJ Architects LLP ("**BUJ**") and on 18 September 2013 Mr Alford sent him a

copy. There is no documentary evidence to suggest that Mr Downer took an interest in Ensign House before either of these emails either.

(3) Mr Downer resisted the suggestion that Mr Alford introduced Ensign House to him. He gave evidence that he first met Mr Holliday at meetings of Thames Haven or Thames Haven Management, realised the significance of Ensign House and gave instructions to Mr Alford thereafter. I do not accept that evidence. It was based solely on his own recollection and unsupported by the minutes of any meetings.

(4) Moreover, when Mr Seitler returned to this issue, Mr Downer accepted that he had attended meetings in 2014 and after QHL had bought the property. I am satisfied that this evidence was more accurate. There was no reason why Mr Downer would have attended Thames Haven meetings before completion in February 2014 (and at a time when he was contemplating selling Quay House on).

(5) In their closing submissions Ms Wicks and Mr Lee relied on the following sentence in Mr Alford's email dated 9 September 2013 as evidence that Mr Downer must have instructed him to investigate Ensign House before that date: "John, you mentioned option agreements which could be the preferred route in the short term to controlling the other interests." I do not accept that submission. All it shows is that Mr Alford and Mr Downer may have had a brief discussions before Mr Alford reported in detail and it is clear from the email as a whole that Mr Downer had never met Mr Holliday and knew very little about the development possibilities for Ensign House.

(6) In an email to Mr Downer dated 22 November 2017 Mr Alford stated as follows (referring to Mr Holliday): "He and I first agreed the Option deal back in June 2013." Mr Downer did not disagree or object to this statement. This email was relevant to the terms of Mr Alford's retainer and I consider it again in that context below. But given that context, I would have expected Mr Downer to object to it, if this statement had been inaccurate.

64. There was also an issue between the parties whether Mr Downer was ever interested in purchasing Ensign House as an independent development opportunity rather than to sell it on. I accept Mr Downer's evidence that in 2014 he was genuinely interested in developing Ensign House and probably in partnership with a third party such as

Rockwell. His evidence is supported by the contemporaneous documents and, in particular, the following:

(1) By email dated 10 November 2014 (and immediately after the Strategic Development Committee had refused planning permission for Quay House) Mr Kyriacou wrote to Mr Laurence Goodman at Bridgebank Capital Ltd (Mr Downer's funder) stating as follows:

> "We are also discussing acquiring the adjacent site at Ensign House and have a further meeting with the owners on 20/11/14 to progress this. This not only provides Investin with a second development opportunity, but also provides additional space between the two sites to create a landscaped public realm area. We are arguing that in any event, the GLA, as the ultimate planning authority, have control over the space to be landscaped between the two buildings and as a consequence there is only a timing issue in creating the additional public realm that they are after."

(2) By email dated 14 November 2014 Mr Kyriacou wrote to Mr Trevor Goode, a partner of Ashurst LLP, stating that: "We are trying to option Ensign House for a 2nd phase of development. This also includes the 'boot' (current Ensign car park) which provides the necessary public realm/landscape for QH to get GLA support."

(3) By email dated 4 December 2014 Mr Kyriacou wrote to Mr Whale in Jersey describing Ensign House as a second phase of development: "As you know EH is the building directly South East of Quay House (QH). It has the potential to be the next building to be developed as a second phase after QH."

65. However, I also accept that during the first phase of the negotiations the primary reason why Mr Downer wished to acquire Ensign House was because of its importance to the success of any application for planning permission for Quay House. Again, this conclusion is supported by the contemporaneous documents:

(1) By August 2014 Mr Downer had been advised by Mr Kyriacou that planning permission for Quay House was likely to be refused and that the appropriate procedure was to apply to "recover" the scheme through the Greater London Assembly ("**GLA**"). By email dated 21 August 2014 Mr Kyriacou wrote to Sir Edward Lister, who was then the Deputy Mayor for Policy and Planning, stating as follows:

> "The next piece of the jigsaw is probably going to be Ensign House (coloured beige on the plan). I can tell you that, and whilst this must remain confidential, we are close to finalising terms to acquire Ensign House and we are currently in lawyers' hands."

(2) By email dated 12 November 2014 Mr Kyriacou wrote to Mr Downer reporting on a meeting with Sir Edward Lister. He expressed the view that: "Clearly, getting hold of Ensign is of paramount importance."

(3) By email also dated 12 November 2014 Mr Alford wrote to Mr Downer stating as follows: "Thinking about this, the key to unlock QH consent is now the 'bull nose' area [the Boot] of Ensign". Further, in reply to a later email in the chain from Mr Kyriacou Mr Downer stated: "Agree with you George, don't think there is a lot to add, just urgent we tie up Ensign!"

66. Moreover, I am satisfied that there was no inconsistency between the two objectives. Mr Downer wanted to acquire Ensign House to release the planning potential of Quay House. But he would not have been willing to pay £21m for Ensign House (which is what he initially offered) just to acquire the Boot and if Ensign House could not also be developed at the same time. In my judgment, the real issue which I have to determine is what Mr Downer's true objective was once he had decided to sell Quay House and I consider this issue in detail (below).

F. Negotiations with the Suiteholders: First Phase

(1) Early Negotiations

67. In the early or middle part of 2014 Mr Alford began negotiating with the Suiteholders in earnest and he kept Mr Downer and Mr Kyriacou up to date on the progress of the negotiations. Most of his email updates between March and May 2014 were about Mr Holliday's attempts to set up a meeting between the Suiteholders. By email dated 20 May 2014 Mr Holliday set out the terms which the Suiteholders had agreed between themselves for a meeting with Mr Alford later that day. By email dated 21 May 2014 Mr Alford reported to Mr Downer and Mr Kyriacou on the negotiations as follows:

> "£675 psf for 32,000 f2 area of Ensign is circa £21.6m. At meeting we discussed £20m uncond for Option. And a planning overage taking Option to between £30 - £40m. Had a beer with Paul after meeting. Told him £20m for FH now as is, is too much - bearing in mind what we secured QH for,

> Asked him to think about how he can be incentivised to deliver right deal.
> I think we can secure for less than £20m and £40m. Speak later"

(2) The First Draft Option Agreement

68. On 24 June 2014 Mr Holliday sent Mr Alford a first draft of an option agreement and on the same day Mr Alford forwarded it to Mr Downer and Mr Kyriacou. It had been prepared by a firm of solicitors called Shepherd & Wedderburn LLP and its terms were fairly generic. Mr Seitler put to Mr Downer an email dated 13 May 2014 in which Mr Alford had informed him (and Mr Kyriacou) that: "JLL are trying to muscle in on punting Optioned Buildings, think Lerner doing same." "JLL" was a reference to Jones Lang LaSalle Inc ("**JLL**"), who later represented the Suiteholders, and "Lerner" was a reference to Mr Ian Lerner, who was on the board of Thames Haven and had an interest in another building in the Waterside Estate.

(3) Heads of Terms

69. Between June 2014 and October 2014 negotiations had sufficiently progressed to the point at which Investin was able to issue Heads of Terms to the Suiteholders and on 10 October 2014 Mr Kyriacou sent a first draft to Mr Holliday in which he proposed the following terms:

    (1) Freeco, Manco and the individual Suiteholders would grant an option to acquire their respective interests in Ensign House.

    (2) The option would be granted to a new special purpose vehicle to be incorporated by Investin.

    (3) The option would be for a three year period which was capable of being extended if at the end of that period planning permission had been sought but not yet granted or was subject to challenge.

    (4) The purchase price upon exercise of the option would be £21m together with an uplift depending on the size of the area which could be developed as private residential accommodation based on the planning consent obtained.

70. In the covering email which he copied to Mr Downer on the same day, Mr Kyriacou described Investin in the following terms: "We are an experienced developer and

understand the complexities and costs involved in tower construction, and therefore reiterate that our offer has been thought through and is deliverable."

71. On 1 December 2014 Mr Alford wrote to Mr Downer informing him that the Suiteholders had now instructed Mr Jeremy Gardner of JLL and that they had met together. He reported that a basic price of £21m was acceptable in principle. But he also reported that Mr Gardner was asking for Investin to provide funds or a guarantee:

> "SPV/funding entity needs to prove funds and provide a guarantee for £21m. George stressed this isn't credible and possible and lnvestin would not be comfortable in any guarantee however proving ability to fund planning and associated costs to circa £3m is possible and all that is really necessary at this stage."

72. Mr Downer's evidence was that in the middle of November 2014 he expected the option agreement to be completed by early 2015 and his evidence was consistent with the documents. On 5 December 2014 JLL provided a mark-up of the Heads of Terms and on 8 December 2014 EHL had been incorporated as the vehicle for the acquisition. By email dated 16 December 2014 Mr Gardner wrote to Mr Kyriacou stating as follows:

> "It went well from my point of view. Essentially 13 of the 18 suite holders were represented and PH thinks the non shows are content, I explained the terms we "shook hands on", what they meant, why they were better than where we started, and that they had a full J LL recommendation. After answering questions I was asked to leave, so I do not know what the final position is but I am expecting to be able to confirm the heads are agreed shortly. I have left messages for Paul."

73. On 18 December 2014 Mr Kyriacou circulated the final Heads to Terms (which he had now received from Mr Gardner) to Mr Downer, Mr Alford and Mr David Smith of Jones Day LLP ("**Jones Day**"), who had been instructed to act for EHL. DWF LLP ("**DWF**") had been instructed to act on behalf of the Suiteholders, Freeco and Manco and it is common ground that EHL undertook to cover their fees. On 20 January 2015 EHL also agreed to pay a fee of £50,000 (plus VAT) to JLL when the parties entered into the option agreement and a further £50,000 (plus VAT) on its exercise together with quarterly monitoring fees.

(4) Suites 6 and 11

74. In November and December 2014 discussions took place between Mr Sheehan on behalf

of Mr Downer and Mr Ranson and it is common ground that on 23 January 2015 the parties exchanged contracts for the grant of an option over Suites 6 and 11. It is also common ground that EHL did not exercise the option and that it expired on 31 December 2017. Mr Downer described the option as a "blocker" in the sense that he could use it to prevent another purchaser acquiring all of the Suites. But he was not prepared to put up any funds to secure the option. By email dated 22 December 2014 Mr Ranson wrote to Mr Sheehan asking Mr Downer to pay a premium for the option both to give him comfort and to demonstrate good faith. When he reviewed this email again on 8 May 2020 Mr Downer's comment was as follows: "All the suite owners were extremely greedy and all wanted side deals."

(5) The Second Draft Option Agreement

75. On 16 January 2015 Mr Smith sent a draft of an option agreement to Mr Whale copying in both Mr Downer and Mr Kyriacou. It extended to twelve of the Suiteholders in addition to Mr Ranson. By email dated 19 January 2015 Mr Alford wrote to Mr Downer and Mr Kyriacou reporting that he had told Mr Holliday that he needed have all of the Suiteholders signed up to the option agreement by the end of January. On the same day Mr Kyriacou replied stating that he had held discussions with the GLA and that Sir Edward Lister had assured him that the GLA would "recover" the scheme and grant planning permission for Quay House if it incorporated the Boot.

76. From January 2015 onwards Mr Holliday and Mr Simon Plant were the principal points of contact amongst the Suiteholders for Mr Alford. By email dated 23 January 2015 he wrote to Mr Downer and Mr Kyriacou stating that he had met DWF and Mr Plant and also spoken to Mr Holliday. He reported that DWF were now fully instructed, that Mr Whiteman was the only Suiteholder who had not agreed to EHL's terms and that the eleven other Suiteholders were happy with the "internal split" of the purchase price. By email dated 28 January 2015 Mr Alford was able to report that contact had been made with Mr Whiteman and that he had agreed to the terms.

77. Mr Frank Haddock was a director of both Freeco and Manco and he was representing Mr Whiteman in the negotiations. There was a short delay as he got up to speed. By email dated 18 February 2015 Mr Alford reported that execution of the option agreement was "looking good" for the following week:

> "Most certified docs are in place – PH expects all by end of week. The Shareholders agreement is nearly finalised, should be ready for signatures next Tues 24th – PH is intending to get all or as many as possible to sign on the day. DWF are bringing Tax specialist along and will hold a clinic post LH sign off meeting to run through next steps and iron out queries. Having all LH signed up may not happen on 24th however no reason for all not to be signed up within a week as each LH agreed on apportion of deal. PH pushing Master Plan and time being of the essence. PH thinks the Option agreement is nearly there and should be by Tuesday."

78. Despite this optimism, the terms of the proposed option agreement remained the subject of detailed negotiation between solicitors. By email dated 24 March 2015 Mr Alford wrote to Mr Kyriacou informing him that Mr Holliday and Mr Plant "have apparently put a rocket up DWF and told them OA has to be engrossed by end of week at latest." By 22 April 2015 Jones Day and DWF had still been unable to agree terms and Ms Fiona Bradley of DWF wrote to Mr Smith dealing with a number of outstanding points. In an email also dated 22 April 2015 Mr Downer wrote to Mr Alford and Mr Kyriacou recording his reaction:

> "I am fast running out of patience with this lot, its [sic] getting ridiculous and costing me a bloody fortune, (every month I pay £90k in interest costs alone, plus rates, service charge, insurance, professional fees), I am not a big company or an insurance fund and its real money to me, too be honest with everyone I'm at the point of just putting Quay House back on the market as is!"

79. Mr Seitler submitted (and I accept) that two issues arose during early 2015 which prevented the parties from entering into a binding option agreement and contributed to Mr Downer's frustration. First, by email dated 5 March 2015 Mr Eyad Ammora informed Mr Holliday about the Restraint Order. He also stated that his mother, Mrs Nihad Ammora, owned 50% of Suite 14, that they had been in contact with the SFO but that the SFO was not prepared to concede her entitlement. This prompted a tense exchange of emails between Mr Plant and Mr Ammora which Mr Holliday sought to smooth over. He did not, however, reveal the existence of the Restraint Order to Mr Alford or Mr Kyriacou.

80. Secondly, by the end of March 2015 both Jones Day and DWF had identified the Superior Leases and that a number of them were vested in the shareholders of Freeco. This made it difficult for either EHL or for the Suiteholders to obtain title insurance. By email dated 23 March 2015 Mr Kyriacou explained the difficulty to Mr Plant and Mr Holliday in the

following terms (original emphasis):

> "In the meantime, we have been talking with Willis, an insurance broker we have worked with before regarding the title insurance, which you will recollect was recommended by DWF as a way of overcoming the underlease situation. Clearly, we need to be certain that we can build apartments & sell them off. We will only be able to get title insurance if the insurers are comfortable that the affected landlords are unlikely to find out about the situation. However, following Willis's initial checks they have pointed out that **George Walker**, who owns 3 out of 8 of these Office Leases, is a director and shareholder of Ensign House Freehold Limited. Also one of the other parties, **Hayklan and Bewes** are shareholders. They reasonably ask the question - aren't they likely to find out what is going on via that route."

81. However, the prospect of QHL obtaining planning permission now seemed much greater. In a letter dated 13 April 2015 the GLA wrote to CIT giving a strong indication that the acquisition of the Boot would enable QHL to obtain planning permission for Quay House (and this provided an incentive to Mr Downer to continue the negotiations with the Suiteholders):

> "As set out in the Mayor's consultation report in relation to the previous planning application at Quay House, there is no in-principle objection to a tall building of 68-storeys on the Quay House site, and it is acknowledged that any future proposal for these sites would include development of a commensurate scale then that brought forward, and supported, on other sites within South Quay. The principal strategic concern for all sites in this area relates to the provision of high-quality public realm, residential quality, and infrastructure delivery. The emerging public realm proposals for Quay House and Ensign House do represent a significant shift towards addressing those priorities, and are strongly supported."

82. By letter dated 28 April 2015 Mr Julian Carter of GVA Grimley Ltd ("**GVA**") wrote to Mr Kyriacou providing a "high level view" of QHL's prospects of obtaining planning permission for Quay House. Mr Carter's views provided further optimism that the acquisition of the Boot would meet any planning objections. Mr Carter also recorded in his email that QHL had instructed Space Hub, a specialist landscape designer, to provide designs for the public open space to be provided on the Boot.

83. It is common ground that by 6 July 2015 the terms of the option agreement had been finalised and that all of the Suiteholders had signed it apart from four: the Sopher Trust (Suite 13), Lama (Suite 14), Mr Hughes (Suite 15), and SRC (Suite 18). By email dated

21 July 2015 Mr Alford informed Mr Downer and Mr Kyriacou that all four had confirmed that they had agreed terms and, in her email dated 7 August 2015 (below), Ms Bradley informed Jones Day that they had all signed apart from Mr Hughes and Lama.

84. In closing submissions the parties referred to a raft of correspondence between April and August 2015. Ms Wicks emphasised how minor the objections were, which individual Suiteholders had to the terms offered by EHL. Mr Seitler emphasised the expressions of frustration by Mr Downer and Mr Kyriacou to each other and the pressure which Mr Alford had to put on the Suiteholders to execute the agreement. I derived little assistance from this correspondence given that EHL had a clear incentive to continue to negotiate with the Suiteholders and that the process of trying to assemble the site and get agreement with all of the Suiteholders was obviously a frustrating one.

(6) Lama

85. Although Mr Plant and Mr Holliday had been aware of the Restraint Order since March 2015, they did not disclose its existence to EHL until August 2015. By email dated 7 August 2015 Ms Bradley disclosed the existence of the Restraint Order and proposed that EHL take options over all of the other Suites apart from Suite 14. In response EHL proposed that the signed options be held in escrow and released to EHL once the position of Lama had been resolved. By email dated 14 August 2015 Ms Bradley wrote to the Suiteholders giving the following advice and asking for their instructions (original emphasis):

> "I am pleased to confirm that we are very close to exchange on this Option Agreement. I am now holding an executed Option Agreement for 16 out of the 18 suites. In order to be in a position to exchange we need to hold the option agreement signed by all suiteholders. I know that one signature is on the way to me and that leaves only one outstanding. The outstanding suiteholder is Lama and the reason for the delay in obtaining a signature for Lama is due to certain structuring that needs to be finalised within Lama first.
>
> I have authority from Lama to disclose the delay that they are facing to you and I have also been authorised by Lama to disclose this to lnvestin. I have been discussing a way forward with lnvestin to deal with the issue so as not to further delay the binding of all parties to the option (including lnvestin but save Lama) whilst we await Lama issue to be resolved, and upon resolution Lama will also be bound.
>
> In order to move forward we have agreed in principal [sic] with lnvestin that all parties sign the Option Agreement and it is held in escrow and

> release unconditionally by all parties, including lnvestin and Lama on the basis that when the Lama position is resolved we can authorise Jones day to date the document. We will need to agree a period of time under which the Option Agreement will be held in escrow and lnvestin would like the longest possible period and so I would suggest 6 months. This will mean that all of the suiteholders will be bound by the terms of the Option Agreement from the date of the escrow arrangement unless the Lama issue is not resolved within that period whereupon the escrow arrangement would fall away and the Option Agreement would not be dated. For the avoidance of doubt no one would be able to withdraw save in the event of the six month period coming to an end with the Lama issuing outstanding. If the Lama issue is resolved during this period Lama will become bound automatically because we are being asked to have the Option Agreement signed by Lama as well but not dated until resolution on the basis that it is released by everyone including Lama pending only the outcome of the Lama position."

86. I have set out this email almost in full because it is obvious from a cursory read through that it contained legal advice. Nevertheless, on 14 August 2014 Mr Holliday forwarded this email to Mr Alford and he forwarded it on to Mr Downer (with a copy to Mr Kyriacou). This email is the first example of a particular feature of this case, namely, that Mr Holliday and Mr Plant were prepared to disclose to EHL communications from their solicitors which were jointly privileged. Ms Wicks did not suggest that Mr Holliday or Mr Plant had obtained the authority of the other clients for whom the solicitors were acting before making these disclosures and Mr Downer did not give evidence that he believed that they had done so.

87. By email dated 1 September 2015 Mr Holliday informed Mr Alford that an application had been made to vary the Restraint Order and Mr Alford relayed this information to Mr Downer who responded by stating that: "we still need to sign the 17 in escrow if this can be pushed". By email dated 2 September 2015 Mr Alford brought Mr Downer up to date with the position of the other Suiteholders. He stated that Mr Hughes and Mr Butterworth of SRC had not agreed to sign the option agreement and deliver it in escrow.

88. On 5 November 2015 King J dismissed the application to vary the Restraint Order. Under cover of emails dated 11 November 2015 and 16 November 2015 Mr Holliday sent Mr Alford copies of the Restraint Order itself and the King Order and Mr Alford forwarded them on to Mr Downer. Although there is no clear evidence that Mr Holliday provided the Lama Skeleton Argument to Mr Alford, Mr Downer sent a copy of it to a specialist solicitor, Mr Jim Crocker of Howell & Co, to give advice in relation to the Restraint

Order.

89. On 26 November 2015 Mr Alford wrote to Mr Holliday to set up a conference call with Mr Crocker which took place on the following day and which Mr Downer, Mr Burgwin, Mr Alford, Mr Ammora and Mr Holliday all attended. In the covering email, Mr Alford put "Investin Plc" next to his own name and the names of Mr Downer and Mr Burgwin. In the event, Mr Crocker was unable to recommend a way to resolve the issue and to persuade the SFO to release Suite 14 from the Restraint Order. However, he did exchange emails with Mr Eyad Ammora who supplied him with a number of other documents including an undated statement of evidence (the "**Lama Statement of Evidence**") which Ms McGinn sent to DLA on 30 January 2019 (below).

(7) Tiger Developments

90. Even before EHL had acquired options over Ensign House, Mr Downer was considering a potential sale of the property together with a sale of Quay House. By email dated 2 June 2015 Mr Kyriacou wrote to Mr Whale with a copy to Mr Downer stating that they had discussed a "hybrid" offer for Quay House and Ensign House and asking him to authorise the marketing process. It is common ground that Mr Sheehan made an approach to EHL on behalf of Tiger Developments Ltd ("**Tiger Developments**") and under cover of an email dated 16 October 2015 (which he copied to Mr Downer) Mr Kyriacou sent him the current draft of the option agreement. In the covering email he stated: "Here is the latest version of the OA for EH. We are still waiting for them to be ready to exchange it – but you can call it the "agreed OA"."

91. By letter dated 4 December 2015 Mr Graham Haydon White wrote to Mr Downer on behalf of Tiger Developments offering to purchase Quay House and the options over Ensign House for £31 million on the basis that the parties formed a joint venture to develop twin 55 story towers on each property and split the profits 50:50 either on the sale of the property with the benefit of planning permission or after their development. Mr Downer gave evidence that: "they wanted us to sort of hold of the properties and they would act as a development manager. I didn't need that, you know."

92. But whether or not Mr Downer turned down the offer for this reason (and it is unnecessary for me to decide this issue), EHL could never have accepted it in December 2015 if only because of the Restraint Order. Mr Downer was also pessimistic about

resolving this issue at this time. By email dated 11 December 2015 Mr Holliday wrote to Mr Alford and Mr Crocker stating that: "I am reluctant to tell Eyad the opportunity is over yet for political reasons. Although, I believe JD is leaning that way."[1]

(8) The Boot Offer

93. By email dated 10 December 2015 Mr Alford wrote to Mr Holliday (with a copy to Mr Downer) offering to buy 33 parking spaces on the Boot for £4,125,000. In his email Mr Alford stated as follows:

> "Whilst writing we are disappointed that after in excess of 12 months of negotiation and at considerable legal costs covered by Investin we could not agree terms with you under the option agreement. We are frustrated at the legal situation with Suite 14 Lama Petroleum and how and when we were made aware, as far as we are concerned this is regretfully not deliverable given Lamas involvement and we will not be pursuing it."

94. By email dated 16 December 2015 Mr Alford increased EHL's offer to £5,500,000 and by email dated 18 December 2015 he wrote to Mr Downer in detail setting out his tactics for persuading the Suiteholders to sell the parking spaces on the Boot:

> "As discussed, Paul meeting Jeremy Gardner/JLL Monday to get on board re the benefit of car park deal in planning terms as well as money. Paul is meeting Bola and Paul Baltwood today, he's confident they will be up for. That' s 10 LH with Plant and Paul of 14 needed for 75% if that' s the route they go. Paul will email all LH on Monday/Tues latest to confirm Option deal over - however there is a financially better salvage deal on car park and benefits etc if we act quicky. We then formerly pull out and contact DWF Tues. Paul will organise a meeting for relevant LH very early in Jan as tight for Christmas. Let see feedback early next week however Paul is well up for as is Plant, and ive told him he needs to be on this every day as you are sceptical and we are not hanging around and no sitting on hands. There is a small window to deliver this in Jan. I do think we can secure this we may need to go to £200k per space/ £6.6m, if we do we are back to £80m+ deal. I do appreciate what its costing to hold and im as frustrated as you but I am confident we will get this deal sorted."

95. By email dated 23 December 2015 Mr Gardner of JLL made a counter-offer of £7,500,000 subject to an obligation to develop Ensign House (which the original option

[1] In Appendix 1 to their written closing submissions Ms Wicks and Mr Lee suggested that Tiger Developments did not make an offer until December 2018 (i.e. three years later). I believe this to be a no more than a misreading of some of the emails. But if it is necessary to do so I find that the offer was made in December 2015.

agreement had contained). By email dated 7 January 2016 Mr Alford rejected this counter-offer and stated as follows:

> "Thank you for counter proposal below, to draw a line under this once and for all Investin are not going to commit time and resources to planning Ensign House not because we do not want to but because it is a fruitless exercise as the building cannot be taken forward i.e. developed with the present legal situation of suite 14 Lama Petroleum. To have an implementable planning consent you need an executed Section 1.06 agreement. Upon a resolution to grant planning permission you have circa 6- 12 months to execute Sl06 which if not signed the planning consent unravels and falls away. Lama legally cannot sign Sl06 agreement.
>
> No company or organisation would commit circa £2m cash in planning costs for a building which cannot be taken forward. I know Simon, Paul et al are of the belief Tower Hamlets would consider supporting a CPO for EH as a consented building however a CPO is also a very costly, time consuming and tenuous strategy with no guaranteed exit or timeframe. We investigated the CPO ourselves because of the Lama situation, and it's a complete nonstarter.
>
> We have had an independent forensic specialist solicitor go through the Lama/SFO case history, Ammora supplied the file in Dec. The legal advice was the situation is a mess and there is more to the case than meets the eye, the solicitor in question had never in 30 years' experience in dealing with the SFO encountered a 6 year old asset restraining order not being lifted or resolved.
>
> We are very disappointed, as are all copied in, that after 18 months of effort and circa £200k of legal fees above and beyond Investin own capital resource cost we are at this point. We are not in the business of wasting time and money."

(9) Withdrawal

96. By email dated 12 January 2016 Ms Victoria Camfield, who was a partner in Squire Patton Boggs (UK) LLP ("**Squire Patton Boggs**") and had acted for Mr Downer for many years, wrote to Ms Bradley of DWF on his instructions formally withdrawing from the transaction:

> "I have taken over from Jones Day conduct of the transaction for the grant of an option by your clients, the various leaseholders and other interested parties, of Ensign House, over that property to lnvestin Ensign House Limited. Having reviewed its position, and in particular the complications connected with the leaseholder of suite 14, our client has decided it is no longer able to proceed with the option and accordingly (although I have no physical papers to return) please treat this email as constituting the return

> of all papers which you have issued to Jones Day in this matter. Please advise your various clients accordingly."

(10) The First Phase: Findings

(i) Contact with the Suiteholders

97. Mr Downer refused to accept that Mr Alford initiated the first contact with the Suiteholders and that Mr Alford agreed terms with them alone (whether in 2013 or 2014). His evidence was that Mr Alford only ever acted on his direction. I do not accept Mr Downer's characterisation of the relationship between them. Moreover, there is no evidence that Mr Alford took detailed instructions from Mr Downer before the meeting on 20 May 2014 at which the Suiteholders had put forward their proposals.

98. Indeed, I am satisfied that throughout the first phase of negotiations Mr Downer had a much more passive role than he tried to portray at trial and I find that Mr Alford made the first contact with the Suiteholders acting on his own initiative. I also find that he conducted the initial negotiations with them without any instructions from Mr Downer (although he kept Mr Downer fully informed about them). Indeed, one of the features of the email correspondence between Mr Alford and Mr Downer throughout this and the other phases of the negotiations is that Mr Downer often did not reply to Mr Alford's emails at all or kept his observations to no more than a sentence.

99. Mr Seitler suggested to Mr Downer that during the first phase of the negotiations the Suiteholders were "reaching out" to other developers or that there was competition for Ensign House. He relied on the existence of a draft option agreement and the email dated 13 May 2014. On this point, I accept Mr Downer's evidence. Neither of those documents provides clear evidence that any other potential purchasers had actively approached the Suiteholders or that they had initiated approaches to potential purchasers themselves and there were no other contemporaneous documents to support either proposition. I therefore accept that by June 2014 Mr Alford had identified a unique development opportunity.

(ii) Mr Alford's Role

100. I have found that Mr Alford identified the development opportunity and initiated contact with the Suiteholders. Moreover, I am not satisfied that he was acting as Investin's agent during the very early stages of the negotiations. In particular, I regard it as significant

that Mr Alford used his gmail account both to communicate with the Suiteholders and with Mr Downer until about October 2015. I add that this was consistent with Mr Downer's evidence that Mr Alford's retainer was not agreed until the end of July 2015 (which I consider in more detail below).

101. However, I am satisfied that there was a change in the relationship at or about that time. I consider it significant that by November 2015 Mr Alford was both using his Investin email account for Ensign House emails as well as Quay House emails and he was also holding himself out as Investin's agent. In particular, he held himself out as Investin's agent to Mr Holliday and Mr Eyad Ammora on the conference call with Mr Crocker on 27 November 2015. I find, therefore, that Mr Alford was acting as Investin's agent from at least that date.

102. Further, Mr Seitler did not suggest either to Mr Downer or in closing submissions that Mr Alford introduced Ensign House to any third parties who might have been in competition with Investin. But in case there is any doubt I find that from November 2015 onwards Mr Alford acted exclusively for Investin and did not introduce Ensign House to any other potential purchasers. I consider (below) whether Mr Alford was bound to act exclusively for Investin and, if so, whether this imposed fiduciary duties upon him. But I find as a fact that he did act exclusively for Investin throughout the negotiations with the Suiteholders between 2015 and 2020.

(iii) Mr Downer's Attitude

103. Mr Downer's evidence was that his decision to instruct Ms Camfield to request the return of the papers on 12 January 2016 was no more than a negotiating tactic to wake up the Suiteholders and that he remained committed to buying Ensign House (as he had been since 2013). I do not accept that evidence and I find that he gave those instructions for the reason which she gave, namely, that he had decided not to proceed with acquiring any options over Ensign House. I have reached this conclusion because apart from the single email (below) it is consistent with all of the contemporaneous documents and, in particular, with the internal emails passing between Mr Alford, Mr Kyriacou and Mr Alford. I also attribute significant weight to the frustrations which Mr Downer expressed to both Mr Kyriacou and Mr Alford throughout the first phase of the negotiations.

104. Ms Wicks placed particular reliance upon an email dated 13 January 2016 in which Mr

Alford stated: "This should wake them up" when he forwarded on Ms Camfield's email (above). Mr Downer was cross-examined at some length about this email and Mr Seitler suggested to him that he wanted to wake the Suiteholders up to sell the parking spaces on the Boot to him:

> "Q. Then Mr Alford forwarded that to you at the top of the page saying: "For your information. "This should wake them up." A. Yes. Q. Because what's really happening here – and I understand, Mr Downer, if memory fails after all this time. What's really happening here is you were trying to wake them up to accept the offer for the car park, not for the option as a whole, isn't it? A. No, it was a dual strategy. Q. No, it wasn't and you've seen -- because you are right on top of these documents. We have seen that. But you've seen this expression, "This should wake them up," and you have seized on that and you thought, I can use that to show, even if you believe it, that we were trying to wake up the suite holders to the need to sell the whole of Ensign House, but, in fact, the true context at the time was that it was written in respect of the purchase of the car park only because that expression comes from Terry Alford's email forwarding on to you the email to the suite holders, two key suite holders, referring to the car park only. That's the real position, isn't it? A. No, it's not. So -- sorry. Q. The purchase as a whole was dead at this time because you didn't need the whole of Ensign House; your interest was, as you would expect, as a shrewd commercial operator, who is a realist, a realist -- your interest was only in the car park because that was all you needed for Quay House? A. No, that was never the case."

105. I do not accept that evidence either. It is inconsistent with Mr Alford's email dated 18 December 2015 (above) in which he stated that the intention was to formerly pull out of the negotiations and to write to DWF accordingly. If this was no more than a negotiating tactic, then I would have expected Mr Downer to communicate that intention to Mr Alford himself and for Mr Alford to express himself differently. Ms Wicks and Mr Lee sought to persuade me in their closing submissions that the strategy which Mr Alford articulated at the end of this email was the "dual strategy" to which Mr Downer referred. I do not accept this interpretation of the email. It is clear that Mr Alford was referring to the likely profit on Quay House if QHL was able to purchase the parking spaces for £6.6 million.

106. Moreover, there was little or nothing which the Suiteholders were able to do to obtain a release from the Restraint Order, as both Mr Alford and Mr Downer recognised at the time. Mr Downer suggested in evidence that the Suiteholders "really tried to revive negotiations" but he could identify only two communications to support his evidence.

Neither of those communications justifies the conclusion that negotiations were ongoing and I find that the first phase of the negotiations came to an end on 12 January 2016. I do so for the following reasons:

(1) The first communication upon which Mr Downer relied was an email dated 11 February 2016 in which Mr Kyriacou reported to him that he had received a call from Mr Plant and asked Mr Downer whether he should respond. There is no evidence that Mr Downer instructed Mr Kyriacou to respond to Mr Plant and I find that he did not give those instructions. If negotiations had been ongoing, he would have done so.

(2) The second communication was an email dated 31 May 2016 in which Mr Ammora expressed the view that it might be possible to persuade the SFO to release the Restraint Order and that "the deal may still be salvageable". On the same day Mr Alford forwarded this email on to Mr Downer. If he had been trying to salvage the deal, I would have expected him to reply immediately to Mr Alford instructing him to pursue this further.

(3) Ms Wicks and Mr Lee suggested that Mr Downer's evidence was that this email followed several conversations between Mr Alford and Mr Holliday. But Mr Downer did not go that far in his evidence and apart from these two emails (neither of which merited a response from Mr Downer) there is no evidence of any negotiations between January and June 2016.

(4) Moreover, in the Planning Letter (as I define it below) Ms McGinn clearly stated that Investin had recommenced discussions with the Suiteholders in June 2016. She would not have said this if negotiations had genuinely been continuing between January and June.

G. Negotiations with the Suiteholders: the Second Phase

(1) The Verum Victum Offer

107. It is common ground that in March 2016 Verum Victum Holdings Ltd ("**Verum Victum**"), a Maltese company, offered to purchase Quay House. By letter dated 27 January 2017 Verum Victum wrote to Mr Douglas Hall of Hall Kemp LLP, a firm of

London agents, recording that it had put forward an offer to buy Quay House subject to planning permission for a 60 storey mixed use Tower, that in April 2016 this offer had been accepted and that it had paid a non-refundable deposit of £500,000. Mr Downer confirmed these details in his evidence. By email dated 7 July 2016 Mr Alford wrote to Mr Roy Kenny, the chief executive of Verum Victum, explaining the background and relevance of Ensign House:

> "Ensign House comprises 18 Leasehold commercial units /12 multiple owners. The Option deal with EH is STPP. We secure the FH of EH and control their car park area to incorporate into QH consent – creating amenity land on to Marsh Wall from QH. Incorporating car park allows QH scheme to be circa 60 storeys. Upon consent for QH we pay EH £21m – Stage 1. We own the FH and have Stage 2 of the Option being; Once certain leasehold issues are cleaned up, there are 5 to resolve, we project manage and fund planning application for EH. Looking at another 60 storey building."

(2) Instructions to Solicitors

108. In June 2016 Mr Downer instructed Ms McGinn, who was then a solicitor at Browne Jacobson, to act for EHL in place of Jones Day and then Squire Patton Boggs. On 27 June 2016 Mr Downer flew to London to attend a meeting in person with the Suiteholders and at the end of July 2016 they appointed Mark Johnstone and Chirag Rao of Howard Kennedy LLP ("**Howard Kennedy**") to act for them against EHL's undertaking to meet their costs. By 19 October 2016, however, Howard Kennedy had not completed their "**KYC**" checks and on 18 November 2016 Mr Rao wrote to Ms McGinn requesting an additional £30,000 in addition to the £8,000 which EHL had already agreed to pay. On 19 November 2016 Mr Downer's reaction was as follows:

> "They are taking the piss because we are paying, I will call you Monday to discuss possible responses, I think if we do agree it's conditional on a deadline, it's farcical, they are just creating work! The suite holders don't care as they ain't paying!"

109. By email dated 28 September 2016 Mr Downer also wrote to Ms McGinn asking her to prepare an NDA stating: "We are talking to several interested parties, can you urgently send us an NDA that picks up Quay, Ballymore and Ensign and stops anybody speaking to the planners about the site." On the same day Ms McGinn sent him a draft covering Quay House, Ensign House and any interest in Thames Haven. Ms McGinn accepted, in

answer to my questions, that this was an unusual situation because Investin was a potential buyer and that she had not come across a situation in which third parties (as opposed to a potential purchaser) were asked to enter into an NDA.

110. Mr Seitler picked up the reference in Mr Downer's email to "several parties" and asked him to identify the party for whom he wanted an NDA. He also suggested to Mr Downer that he had asked a number of parties to sign NDAs in the same form and that he was concealing this fact from the Court:

> "Why are you asking for an NDA if you haven't got an interested buyer? This is a very important email, Mr Downer. You are saying, on 28 September: "We are talking to several interested parties ..." And you urgently want an NDA for all three properties. A. Yes. Q. Who for? A. Do you mind if I just read the -- just to remind myself. (Pause) Yes, it was the NDA for ... (Pause) This related to Verum Victum, the NDA for Verum Victum. Q. Only Verum Victum? You see, you were past NDA territory with Verum Victum. They had already paid you £500,000, and according to your evidence 20 minutes ago, Verum Victum went with the market plunge that happened immediately after 23 June 2016. This is the end of September and it talks about several parties. Please try: who else did you A. We weren't -- at this stage, we were only dealing with Verum Victum. Q. Why is it several then? A. It's just an expression. It's a figure of speech. I said -- I was just saying to Lisa -- you know, Lisa had just come on the scene and people -- I get phone calls all the time."
>
> "Q. Yes. This is a true and accurate email to Lisa McGinn, isn't it? You are telling the truth to her, as you say you always tell the truth to your solicitors, when you told her you were talking to several interested parties? A. It's a figure of speech -- Q. A figure of speech for what, Mr Downer? A. Having someone in contract, as we had Mr Roy Kenny in contract, and other people that we are talking to. Q. If you had Mr Kenny in contract, that would have included duties of confidentiality. You wouldn't need an NDA. An NDA, as you well know, Mr Downer, is for a situation where you are not in contract with a party yet. So Verum Victum is not the answer to this. You were talking to other interested parties? A. No, it's not -- Q. And now you are trying to conceal that from this court? A. Not at all. It's the NDA so he didn't speak to the planners, because it was a sensitive situation, especially given the refusal. Q. What work is the word "several" doing there? A. As I said, people ring me all the time, "Oh, I'm interested in buying your building." It happens every day, you know, and you talk to them. Q. If this is about Verum Victum, how come it's urgent when they have been on the scene since April? A. Because he is going to pay me £23 million quickly. So I want the £23 million, that's what makes it urgent. MR JUSTICE LEECH: Did Verum Victum sign an NDA in September or October? A. I honestly, my Lord, I don't recall whether they signed it. I know they didn't buy the site because I know what happened next."

111. After Mr Downer had completed his evidence, EHL disclosed an NDA made between QHL, EHL and Grainmarket Asset Management LLP and dated 29 September 2016. EHL also disclosed an NDA made between QHL, EHL and Mitheridge Capital Management LLP dated 30 September 2016. Both of these agreements were in the same or substantially the same terms as the draft prepared by Ms McGinn on 28 September 2016 and the NDA which FEC executed (below).

(3) The Meeting on 2 December 2016

112. On 2 December 2016 a second meeting took place at Ensign House between Investin and the Suiteholders. By this time the Brexit vote had taken place, the market had softened and in an exchange of emails dated 2 October 2016 Mr Downer discussed the value of Ensign House with Mr Alford. He expressed the view that £21m was probably too much to pay for it, that it was not the time to sell Quay House because Ensign House had the potential to add significant value to it and that Quay House with planning permission for a 60 storey building would be worth about £80m.

113. On 19 October 2016 Mr Holliday forwarded on to Mr Alford a detailed email from Mr Rao to the Suiteholders with detailed comments and advice on the terms of the Option Agreement. Mr Rao also attached to this email a report dated 7 May 2015 which DWF had prepared on the option agreement which stated that it was addressed solely to Freeco, Manco and the Suiteholders. He also attached a detailed information paper which stated on the outside that it was prepared for the Suiteholders and contained detailed title information, an undated paper containing a timeline of the negotiations commenting on the Heads of Terms and the current draft of the Option Agreement. Mr Alford was fully aware that these documents were confidential when he forwarded them on to Mr Downer because he stated in the covering email: “See attached and below. Progress at last. We obviously shouldn't have sight of this so need to be discreet...”.

114. Mr Seitler did not suggest to Mr Downer that he made specific use of any of these documents either in negotiations with the Suiteholders or with FEC. But I am satisfied that they contained valuable insights about the Suiteholders’ thinking and the advice which they were receiving. For example, in the information paper DWF had given the following explanation about a condition to be imposed in relation to the Superior Leases:

> "This condition relates to the long leasehold interests sitting above suites 2, 9, 1 0, 11, 12, 16, 17 and 18. The Buyer will procure a title indemnity insurance policy to cover any risk relating to the transaction and proposed development or that the Buyer has an option to acquire these interests (again so that the Buyer has full control of the Property).
>
> If the Buyer (having used all reasonable endeavours) to obtain a title indemnity policy informs the Seller in writing that it does not think that it will be able to obtain one, EHRL and the relevant suiteholder shall approach each of the relevant superior landlords and shall use all reasonable endeavours to buy or obtain an option to buy each of the superior leases on terms which the Buyer agrees would be satisfactory to the Buyer (including in the case of an option allowing such to be assigned to the Buyer and at all times acting reasonably in relation to the terms the Buyer will accept). EHRL and the relevant suiteholder shall only approach the superior landlords in accordance with a strategy to be agreed with the Buyer (which shall be agreed without delay and at all times acting reasonably). Any monies payable to a superior landlord shall be deducted from the monies payable to relevant suiteholder subject to that superior interest. There are specific provisions relating to separate provisions relating to suites 9 and 10 which are already subject to an option."

115. In the event, no further progress was made at the meeting on 2 December 2016 because the Suiteholders attempted to renegotiate the deal and obtain a greater commitment from Investin. But Mr Downer was not prepared to agree to this as Ms McGinn accepted in cross-examination:

> "Q. Right, and the meeting took place on 2 December, the suite holders tried to renegotiate the deal to get more commitment from Investin. That wasn't negotiable for Investin, terms weren't agreed and Ensign House Limited never did give the suite holders substantial money up front in an open way, did it? A. No, the terms of the deal we had been negotiating for the next two years were always in relation to an option."

(4) The Planning Letter

116. In the letter dated 27 January 2017 (above) Verum Victum made a revised offer of £18.5 million for Quay House on the basis that a 60 storey tower was not achievable without incorporating the Boot. By email dated 24 February 2018 Mr Downer also informed Ms McGinn that he was now looking to agree a lower price for Ensign House and that in the meantime Investin was working up an alternative scheme for 320 serviced apartments and 17,000 square feet of office space.

117. In the meantime, on 31 January 2017 Mr Alford forwarded on to Ms McGinn (with a

copy to Mr Downer) a request to explain the steps which Investin had taken to acquire the Boot and why it had not been possible. On the same day Ms McGinn prepared a draft of a letter addressed to "whom it may concern" in which she confirmed that Browne Jacobson were instructed by Investin and then stated as follows:

> "Investin recommenced discussions with the Ensign Owners in June this year and had been negotiating with them until December 2016 when a meeting culminated in the Ensign Owners trying to renegotiate the deal. Given the number of interests involved it became apparent that getting all parties to reach agreement was impossible. This is despite the fact that whilst Investin was negotiating with a number of the Ensign Owners it had not been possible to track down all of them and therefore without securing all interests it has been unable to obtain control of Ensign. Even if Investin had been negotiating with all parties, the issue regarding Lama Petroleum Limited also needed to be resolved and after spending over 2 years and incurring a significant amount of cost it will not be possible to secure Ensign for the foreseeable future."

118. On 27 April 2017 Ms McGinn produced a revised version of the letter (to which I will refer as the "**Planning Letter**") and the extract which I have set out immediately above was in substantially the same form. She produced the letter on Browne Jacobson note-paper, dated it and signed it on behalf of the firm. She then sent it on Mr Downer's instructions to QHL's planning consultants. On 12 January 2018 Ms McGinn prepared and circulated a revised draft of the Planning Letter in which she stated that after spending four years and incurring significant costs the prospect of being able to secure Ensign House was "remote" and that "it will not be practicable for Investin to be dependent on securing control of Ensign as a condition precedent to redeveloping Quay House".

119. Ms McGinn accepted in cross-examination that the first draft of the Planning Letter contained a fair reflection of her views at the time when she prepared it and she explained the reasons why:

> "So it was your view, wasn't it, that it was impossible at this point to get all the suite holders to reach agreement? A. Yes, at that point, it had been impossible to get them all to agree. Q. Yes. Yes. And that was a fair reflection of your view at the time. At that time, you thought there was no hope of getting the deal done, didn't you? A. At that time, yes. Q. Yes, and one of the reasons for that was you hadn't even been able to contact all the suite holders yet, had you? A. In what respect? Q. Well, I'm reading from the letter. You said -- in the letter, in the last paragraph: "This is despite the fact that while Investin was negotiating with a number of the Ensign Owners it had not been possible to track down all of them ..." So you are

> missing some people? A. Yes, Lama Petroleum. Q. Well, it's not just Lama Petroleum, is it, it's the superior leaseholders too? A. Yes, that's correct. Q. So when you say it had not been possible to track down all of them, you may be talking about Lama but you are also talking about the superior leaseholders because you hadn't contacted them at this time, had you? A. No. Q. And there was a very good reason why you hadn't contacted them, because you knew that it could cause issues with insurers if you contact them? A. Yes, the instructions at the time were not to try and contact them."

120. However, when Mr Seitler put the first draft of the Planning Letter to him, Mr Downer tried to distance himself from the views which Ms McGinn had expressed and to suggest that she was only expressing her own views:

> "Q. Are the statements in the last paragraph true or are they not? A. Do you mind if I just read it? Q. Mm-hm. A. Yes. (Pause) I don't believe it was impossible. Q. So why is Lisa McGinn drafting a letter which says it is impossible? A. That was her view. She is a lawyer, not a property developer. Q. With respect, Mr Downer, that's not a complete answer. We will obviously ask her about all this. A. Of course, yes. Q. But she is a lawyer who gets her information from her client, and that's you. She doesn't know the position first hand, especially as she has not been on the scene for that long. This is a draft which reflects her understanding of her instructions, doesn't it? A. No, I think a lot of people's view would be it's impossible, but it was never my view. Q. So you are saying this doesn't reflect your thinking but it just reflects Lisa McGinn's thinking and she is out on a limb -- A. I'm saying that particular line and the word "impossible", that's what Lisa wrote. That's maybe what Lisa thought. You will have to ask her when you cross-examine her, but it wasn't impossible to me."

(5) The Third Draft of the Option Agreement

121. By email dated 20 June 2017 Mr Alford reported to Ms McGinn (with a copy to Mr Downer) that he had been negotiating with Mr Plant for several months and that 10 of the 12 Suiteholders had now agreed to enter into the option agreement and that the remaining two were Mr Wu and Mr Hughes. On 3 July 2017 Ms McGinn sent Mr Johnstone of Howard Kennedy a new draft of the option agreement based on the version agreed between Jones Day and DWF together with draft Heads of Terms.

122. On 22 September 2017 Mr Johnstone sent out a detailed email of advice to the Suiteholders summarising the terms and attaching the current draft of the option agreement, replies to inquiries and a price allocation schedule showing the specific prices

which the individual Suiteholders were to receive (the "**Price Allocation Schedule**"). It set out a price for each Suite based on its area per square foot out of a total of 32,913 square feet. For example, the price payable for Mr Holliday's Suite 17 was £1,140,239.23. I add that the total of 32,913 included 1,420 square feet for Suite 14 but no price was allocated to that Suite on the basis that Lama was not a party to the option agreement.

123. In his covering email Mr Johnstone stated that the option price was £25,288,420.87 (on the basis that a nominal price of £1 would be paid on the grant of the option), the option period was three years with a longstop date of 3.5 years, no deposit was payable upon the exercise of the option but each Suiteholder could elect to take a leaseback for a term of up to six months' rent free. On 22 September 2017 Mr Holliday forwarded on Mr Johnstone's email of advice with the attached documents to Mr Alford from an email address at lma-associates@zen.co.uk.

124. By email dated 12 October 2017 Ms McGinn chased Mr Johnstone placing a time limit of 12 November 2017 for execution of the option agreement. However, on 1 November 2017 Mr Plant wrote to Mr Alford enclosing a table setting out the current position. As Mr Seitler pointed out, it showed that: (a) KYC had not been completed for 5 Suites; (b) Howard Kennedy had not even been instructed in respect of 8 suites; (c) signed engagement letters had not been received in respect of 12 suites; (d) replies to preliminary inquiries had not been received in respect of 8 suites; and (e) Howard Kennedy had only obtained one occupational sub-lease (Suite 13).

125. On 9 November 2017 Mr Plant also forwarded on to Mr Alford a copy of an email which he had sent to Mr Rao of Howard Kennedy setting out the concerns of the individual Suiteholders. For present purposes, it is enough to draw attention to an email dated 25 November 2017 which Mr Wu sent to Howard Kennedy. This email was disclosed by EHL and I draw the inference that either Mr Holliday or Mr Plant disclosed it to Mr Alford (who then forwarded it on to Mr Downer) and in it, Mr Wu made the following comments on two clauses in the draft option agreement (which are set out in the first two paragraphs below):

> "3.1 the buyer is under no obligation to commence any appeal opp proceedings in relation there to.

> 7. the developer is under no obligation to exercise the option even if the planning permission is granted. Therefore you must consider this arrangement as binding on you for a period of 42 months and your ability to assign or charge your lease or to grant subleases will be restricted/controlled during that period
>
> this is truly like a guy says to a girl I have no commitment to marry you however you can not see anyone else for 42 months i.e. three and half year by then the market may come to another downturn and we all would have missed out.
>
> I understand Simon and Paul are eager to get the deal tied up however I understand Simon was going to get the Investin to COMMIT, if they do not agree they can NOT oblige us consider this arrangement as binding on you for a period of 42 months and your ability to assign or charge your lease or to grant subleases will be restricted/controlled during that period
>
> Well, I said to Simon I am equally keen on selling it on however, I am truly not prepare [sic] to be bullied in such a way however they may use a big total tempting us like a millionaire or billionaire trying to dominate any girl. Well, even Lady Thatcher said "lady is not for turning"!"

126. The second phase of the negotiations came to an end therefore with Investin and the Suiteholders no closer to agreement and in an email dated 30 January 2018 Mr Downer expressed his frustration to Mr Alford about Mr Holliday and the Suiteholders more generally: "I have had enough of him and im [sic] sure you have, these fuckers need to sign this or we all move on."

(6) The Second Phase: Findings

(i) The Verum Victum Offer

127. There was an issue between the parties whether the Verum Victum offer was the catalyst for the revival of the negotiations between EHL and the Suiteholders. I find that it was the proposed sale to Verum Victum which revived the negotiations and in cross-examination Mr Downer accepted that in order to maximise the value of Quay House, it was necessary to acquire the Boot. But whether or not the catalyst was the Verum Victum offer, I also find that from June 2016 onwards Mr Downer was interested again in taking options over the Suites themselves (although he decided to leave Suite 14 for the time being). This is clear from the email from Mr Alford to Mr Kenny (above). It is also clear from the other contemporaneous correspondence.

(ii) The NDAs

128. Ms McGinn accepted that it was unusual for one potential purchaser of a property to ask a competing purchaser to enter into an NDA. I accept that evidence and I find that it was unusual for a purchaser to be asked to sign an NDA. I am also satisfied that Mr Downer must have been aware of the two NDAs dated 29 and 30 September 2016 when he gave evidence and that he gave the evasive answers which I have set out above because he did not want the Court to appreciate the extent to which he made use of NDAs and also that he made use of them to protect his position as a purchaser and when he had nothing to sell.

(iii) Mr Downer's Attitude

129. I do not accept Mr Downer's evidence in relation to the Planning Letter and I find that the various versions of it represented his own views. In January 2017 Ms McGinn sent the draft to him and on 25 April 2017 she also sent the updated version to him. On 26 April 2017 his instructions to her and to Mr Alford were to send the letter to the planning consultants. Finally, on 12 January 2018 she sent the revised version to Mr Downer and instead of objecting that it was inaccurate his instructions were to "bounce this draft off the team".

130. Given that I have found that the Planning Letter reflected Mr Downer's views on 12 January 2018, I also find that he had come to believe by that date that the chances of being able to secure Ensign House were remote and that it was not practicable for Investin to be dependent on securing control of Ensign House in order to redevelop Quay House. Indeed, this explains why he was prepared to sell Quay House to Rockwell. It is also consistent with his email dated 30 January 2018. I find that this email was a genuine expression of Mr Downer's views at the time and that he had lost patience with the Suiteholders by the end of the second phase of the negotiations.

H. Negotiations with the Suiteholders: the Third Phase

131. From February 2018 onwards Mr Alford worked to salvage the situation and by early October 2018 he had been able to agree the option terms with all of the Suiteholders apart from Mr Hughes and Lama. I derive little assistance from a detailed analysis of the very protracted negotiations between Mr Alford and the individual Suiteholders during the third phase and I adopt the device which Ms Wicks and Mr Lee used in Appendix 1 to their closing submissions and I set out below the position on a Suite by Suite or interest

by interest basis as it stood at the beginning of October 2018.

132. A number of the Suiteholders (including Mr Plant and Mr Holliday) had negotiated what the parties described throughout the trial as "**Side Deals**" and I will use the same term. It was never very clear how far they had disclosed these Side Deals to each other or the extent to which Howard Kennedy were themselves aware of these agreements. By October 2018 not all of them had executed binding supplemental agreements. But most of them had done so and the terms of the remaining Side Deals had all been agreed in principle. I also set out below the terms of any Side Deal which the parties had agreed.

(1) The Wiggins Lease

133. I have dealt with the Wiggins Lease in Section B. As Ms Wicks and Mr Lee pointed out, by 2018 Wiggins had been dissolved and it was necessary for Howard Kennedy to make an application for a vesting order in Manco. On 16 January 2018 the relevant order was sealed by the Court. It was, therefore, possible for Manco to grant an option to purchase both the Wiggins Lease and the Headlease.

(2) Suites 1 to 3

134. In the third phase of the negotiations EHL agreed to reduce the option period to 3 years. In 2016 EPPL leased Suites 1, 2 and 3 to an associated party for a term of five years. And as a consequence this lease would have prevented EPPL from transferring Suite 3 to EHL with vacant possession upon exercise of the option. EHL and EPPL agreed a Side Deal under which EHL gave its consent to a new five year lease of Suite 3 with a rolling break clause and on 2 July 2018 Howard Kennedy confirmed receipt of EPPL's signed option agreement.

(3) Suite 4

135. The position in relation to Suite 4 was complicated by the fact that Mr Langman wished to grant a new sublease to the sitting tenant. By email dated 11 May 2018 he informed Mr Johnstone that RJLIB was about to enter into a new lease contracted out of the Landlord and Tenant Act 1954. Nevertheless, on 12 July 2018 Howard Kennedy confirmed receipt of RJLIB's signed option agreement.

(4) Suite 5

136. Although Mr Wu's consistent complaint was that Investin was not prepared to make a financial commitment to the Suiteholders he agreed to enter into the option agreement on 25 May 2018 once Mr Ranson had made it clear that he was prepared to commit to a shorter option term of 27 months (below). On 4 July 2018 Mr Johnstone confirmed receipt of his signed option agreement, on 8 July 2018 he confirmed receipt of Mr Wu's statutory declaration and on 18 September 2018 Barclays Bank plc, which held a charge over Suite 5, gave its consent to the option agreement.

(5) Suites 6 and 11

137. On 31 December 2017 the option which EHL already held over Mr Ranson's two Suites had expired. Mr Ranson was a property developer or dealer himself and at various times he suggested that there might be other potential purchasers or threatened not to participate in the deal because of his dissatisfaction with the terms. For example, on 11 April 2018 he wrote to the other Suiteholders stating that: "Two separate new parties have been in contact and have made offers to buy Ensign House." He set out the principal terms of each offer (which were for £25m and £26m respectively) and he then continued as follows:

> "The reality is that all 3 offers, including Investin's require commitment from all 18 Suite owners. Investin have said that they may not need all of us to sign up to their Option agreement but the reality is that without commitment from all leaseholders, none of our buyers can do anything with the site and they will not buy. I believe that our top priority should be getting into a position where all 18 suites are committed to doing a deal. I will find out whether these other 2 parties will increase their offer so that we are sure that we are getting the best possible terms available. This will benefit us all as owners. If there are any additional questions at this stage, just let me know."

138. Mr Plant forwarded this email on to Mr Alford who assisted him to prepare a draft response to be sent the Suiteholders. On 18 April 2018 Mr Plant sent this draft to Mr Ranson who replied on the same day setting out his detailed responses to the points which Mr Plant had made. Mr Alford also made comments on the draft in which he emphasised the following points:

> "Salient points to add further to your note; Option Agreed- 12 months work time/cost- ready to be signed Lama is not part of deal ..... can of worms not to be opened now Investin will walk away if any more messing around.

> Investin are unique buyer due to marriage value- no third party would touch with titles issues as they stand - Lama /8 reversionary LH"

139. On 20 April 2018 Mr Plant sent out the final version to all of the Suiteholders and forwarded it on to Mr Alford and Mr Downer, who described it as a "good email". In the email, Mr Plant emphasised the importance of Ensign House to the development of Quay House:

> "Investin are interested in the offer as it relates to planning with Quay House (they need the car park area as amenity space which will enable them to make an application for a taller tower). As I understand it, a taller tower makes Ensign a more attractive purchase, since the higher the build for Quay the higher they may be able to build Ensign. The suiteholders that will be entering into the Option Agreement own [sic] the relevant carpark spaces which will then enable Investin to make a planning application for Quay House;…."

140. By email dated 21 April 2018 Mr Wu replied repeating the concern which he had expressed in his email dated 25 November 2017, namely, that Investin was not prepared to make an immediate financial commitment to Suiteholders:

> "Since Investin never wanted to commit we should negotiated with the alternatives in the meantime, being ready to enter into an agreement with one of them should Investin not progress anytime BUT not to wait for 3 years by then the current circle may well be over.
>
> If Investin is really serious instead just playing us and the authorities to get better planing for their current quay house then, then why don't they want to commit yet trying hard to prevent the leasehoders from entertaining other options?
>
> Furthermore, even if Lama and certain other suiteholders do not enter into the Option Agreement or another arrangement with Investin, HOW WILL Investin exercise the Option in order to obtain the benefit of the planning for Quay House;?"

141. Mr Seitler cross-examined Mr Downer at some length about this correspondence. He suggested to Mr Downer that the interest from the other purchasers was genuine and that Mr Downer was sufficiently concerned to consider another Suite as a "blocker". Mr Downer dismissed Mr Ranson's alternative proposals as "brinkmanship" (although one alternative purchaser came forward in February 2018: see below). Mr Seitler also suggested to Mr Downer that he was prepared to let Mr Plant misrepresent the position to the other Suiteholders. Mr Downer accepted that Mr Plant's email dated 20 April 2018 did not accurately reflect his intentions in the following exchanges:

> "Q. What about the second paragraph on page 3 -- the second bullet point: "Investin are interested in this offer as it relates to planning with Quay House ..." Is that paragraph true? Or is it just part of a negotiation? A. It's part of a negotiation. At this stage, on Quay House, we were running a planning application for circa 38/40 storeys that didn't include Quay House."
>
> "MR SEITLER: Right, does that first sentence reflect your actual true -- A. No. Q. Why not? How is it not true? A. Because by this stage we were progressing an application for Quay House without requiring the car parking land. Q. That's not true either, is it, Mr Downer, actually? You are about to sell it. A. We are in negotiations to sell it but we are also progressing the application at the same time, which wasn't -- we hadn't submitted the application but you have to spend a long time working these things up."
>
> "Then the third sentence: "The suite holders that will be entering into the Option Agreement own the relevant car park spaces which will then enable Investin to make a planning application for Quay House." Did that reflect your view -- A. No. Q. So the first and third sentences did not reflect your view? A. No. Q. They are statements about Investin, which are not consistent with the thinking of you? A. They didn't represent my personal view, no. Q. So are you actually saying that, by this time, Ensign House was of no relevance to Quay House? Is that what you are actuality saying now, after all this? A. Yes. To get 68 storeys. But we had given up on that. MR JUSTICE LEECH: You had got past that by this stage. A. Yes, my Lord, yes."

142. But, in the event, Mr Sheehan, who was a close contact of Mr Ranson, persuaded him to enter into the option agreement by agreeing to a Side Deal under which Mr Ranson was to receive £62,500 upon exchange of supplemental agreements, a total additional premium of £1 million for his two Suites and the payment of his legal costs of £5,000. Mr Ranson also negotiated a reduction in the option period from 36 months to 27 months. On 24 May 2018 the terms of the supplemental agreement had been agreed and he circulated an email confirming that he now agreed to the terms of the option agreement. On 6 July 2018 Mr Johnstone confirmed receipt of his signed option agreement.

(6) Suite 7

143. Mr Whiteman QC was very ill at the time when the option agreement was being negotiated and it was difficult to get in touch with him. On or about 22 June 2018 Howard Kennedy finally managed to make contact with him on and secured authority from him for his wife to ensure that the option was signed and witnessed. On 2 July 2018 Mr Johnstone went to see Mr Whiteman at his home in Dulwich and obtained his signature

on the option agreement and on the same day he confirmed this to Ms McGinn.

(7) Suites 8 to 10 and 16

144. By email dated 4 October 2017 Mr Plant wrote to Mr Alford asking for a Side Deal under which his brother and he would be paid an additional premium of £1 million. Over the next ten months there were protracted negotiations over the terms of their Side Deal but on 7 July 2018 Mr Johnstone confirmed that he held a signed option agreement and statutory declarations in relation to Suites 9, 10 and 16. Under cover of an email dated 10 August 2018 Mr Plant's solicitor, Tom Marshall of Trethowans LLP, sent an executed copy of the supplemental agreement recording Mr Plant's Side Deal. It provided for the payment of an additional premium of £1.3 million to be guaranteed by Mr Downer.

(8) Suite 12

145. On 29 May 2018 Mr East confirmed that he and Mr Inzani were happy to proceed on the basis of the reduced option period and on 12 July 2018 Mr Johnstone confirmed that he held their signed option agreement. Although Mr East and Mr Inzani expressed concerns about the lack of commitment by EHL, they never asked for or obtained a Side Deal.

(9) Suite 13

146. The Sopher Trust were represented by Charles Russell Speechly LLP ("**CRS**"), who were concerned that the terms of the principal option agreement did not permit individual Suiteholders to enter into separate Side Deals. This issue was resolved by EHL agreeing to enter into a separate option agreement with the Sopher Trust which mirrored the terms of the option agreement signed by the other Suiteholders. By 8 March 2018 Mr Alford had also agreed a Side Deal with Mr Joseph Sopher under which EHL entered into an agreement for lease to pay an additional premium of £125,000 on the sale of Ensign House and to take a lease of Suite 13 at a rent of £42,750 if the current tenant did not renew the existing lease. By email dated 26 October 2018 Mr Will Harwood of CRS wrote to Ms McGinn stating that he already held one of his four signed parts of the option agreement and agreement for lease.

(10) Suite 17

147. Again, there were protracted negotiations over Suite 17 which were complicated by a

difference of view between Mr Downer and Mr Holliday over an external dispute involving Thames Haven. By email dated 10 August 2018, however, Mr Holliday's solicitor, Mr Peter Sanders of Sanders Solicitors, wrote to Ms McGinn enclosing a supplemental agreement which had been executed pending completion of the option agreement. This agreement contained Mr Holliday's Side Deal and provided for EHL to pay an additional £75,000 to a company called Widson Ltd ("**Widson**") on exchange of contracts, a further £150,000 on the sale of Ensign House and a further £80,000 if the option was exercised before 30 September 2019. By email dated 8 October 2018 Mr Alford wrote to Ms McGinn confirming that Mr Holliday would be signing the option agreement that day.

(11) Suite 18

148. Mr Butterworth of SRC had also expressed concerns about the length of the option period but once EHL had agreed with Mr Ranson to reduce the option period to 27 months, he was prepared to negotiate and by email dated 5 May 2018 Mr Alford expressed the view to Mr Downer: "Wu and Butterworth will sign certainly now 27 months – and will feel excluded from deal". By email dated 2 July 2018 Mr Johnstone confirmed that he held a signed option agreement and statutory declaration for Suite 18. Mr Alford had also negotiated a Side Deal under which EHL agreed to guarantee SRC's rental income of £65,000 subject to Investin having the right to sublet the Suite (and the parties sharing any profit rental equally). By email dated 15 June 2018 Mr Butterworth confirmed his agreement to the Side Deal (subject to contract).

(12) Suite 15

149. Apart from Suite 14, Suite 15 was the remaining problem. It was another of the Suites which had been sublet and Mr Hughes was understandably concerned to ensure that he did not lose any rental income if it was exercised during the option period. EHL agreed in principle to compensate him and on 11 January 2018 Ms McGinn sent his solicitor, Ms Ruth Boulton, a partner in Debenhams Ottaway LLP ("**Debenhams**"), a draft supplemental agreement. However, despite protracted correspondence terms were never finally agreed. By 10 August 2018 Mr Hughes' stated position was that he required a returnable rent deposit and a personal guarantee. By email dated 24 August 2018 Mr Hughes wrote to Mr Alford summarising the negotiations as follows:

> "I have been looking back over our communications, and I think the key point here is that our original agreement was looking at what happens at the end of the then current lease. It was agreed that you would take over the lease - please see emails below. Well, unfortunately, my tenant used insolvency to get out of the lease, and it has subsequently been agreed with Investin that they will cover the costs going forward and accepted the position. So, why now are you saying you will not enter into a lease, and insist on an agreement to lease? We have already agreed to do this in principle. The trigger has happened! Ruth has provided two options. We are prepared to wait a couple of weeks. I will then sign the option."

150. By October 2018 Mr Hughes had still not provided a signed copy of the option agreement to Mr Johnstone and a further issue had arisen. Although the parties had agreed the terms of a lease, a rent deposit of £20,000 and a personal guarantee to be given by Mr Downer limited to £150,000, Mr Alford wrote to Ms McGinn and Mr Downer on 29 October 2018 stating that Mr Holliday had told him that Manco had been advised that it was a breach of the Headlease and that consent to the grant of the lease would be refused.

(13) Authority

151. By email dated 25 September 2018 Mr Johnstone asked for the irrevocable authority of the Suiteholders to exchange contracts by 3 October 2018. By email dated 10 October 2018, however, he wrote to Ms McGinn informing her that he had not received authority from Mr Hughes (as expected) or from Mr Ranson and Mr Holliday. He also stated that SRC had given its authority but had then withdrawn it and then had countermanded its later instructions. In the event, Mr Butterworth sent an email on 3 October 2018 to Mr Johnstone confirming that Howard Kennedy had authority to exchange until 6 pm that day (when the other authorities expired).

(14) Jigsaw

152. In February 2018 Mr Downer was approached by Mr Ryan McGarry of Jigsaw Assets Ltd ("**Jigsaw**"), a property developer and investor, who told him that he had been offered Ensign House by an agent called Lee Smith. Mr Downer drew the inference that he was acting for Mr Ranson as he explained in an email dated 9 February 2018 to Mr Alford. By email also dated 9 February 2018 Mr Downer represented to Mr Ryan McGarry that: "We have options over part of it" (referring to Ensign House). When this representation was put to Mr Downer in cross-examination, he accepted that it was a lie:

> "You answer: "We have options over it, it's extremely complicated in addition there is about 20 individuals and entities to deal with, we are the only buyer because of our relationship to it on the Estate, out of interest what price you being quoted?" Yes? A. Yes. Q. Which parts did you have options over on 9 February 2018? A. None. Q. Right, so that's a total lie, isn't it? A. I was throwing him off the scent. Q. No, but it's a total lie, isn't it? A. It's a lie, yes. Q. You see, only ten minutes ago I said to you, you are the type of person that would come along and say anything that you needed to, as you perceived it, in order to serve your interests, and you denied that vehemently, but here you are telling a total lie to a person who you trust, as far as you can in this business, and you described as a friend of your -- a total lie. Correct? A. That part's a lie for the reasons I've just given. I was protecting the deal. I've got lots of friends in this business, my Lord, but they will go behind you in a heartbeat because of the numbers involved. Q. Yes, there was no basis for saying that you had options over part of it, was there? A. No, I was just throwing him off the scent. Q. You are lying to him for your own advantage, just like you are lying in relation to this transaction in this evidence? A. Not at all, I was just throwing him off the scent. Q. Yes. You say it's extremely complicated -- well, you are not throwing him off the scent, you are telling him a bald-faced lie. We know the purpose but it's still a bare-faced lie. It really is, isn't it? A. I'm throwing him off the scent."

(15) Findings

153. I find that by October 2018 Mr Alford had agreed terms with all of the Suiteholders apart from Mr Hughes and Lama and that each of those Suiteholders (or their representatives) had either signed the option agreement or, in the case of the Sopher Trust, an agreement on the same terms. Although they only gave limited authority to Howard Kennedy to exchange contracts and that authority soon expired, I also find that by October 2018 and before they became aware of the sale of Quay House, ten of the Suiteholders had made a firm decision to grant an option over Ensign House to EHL. Finally, I find that those Suiteholders who had executed the option agreement but had also agreed Side Deals would have been willing to enter into supplemental agreements to give effect to their Side Deals.

154. Ms Wicks submitted (and I accept) that the reason for Mr Ranson's delay in giving authority to exchange was that he was seeking to re-mortgage Suites 6 and 11 and wanted to delay the registration of the option until the new mortgage was completed. By 5 October 2018 Ms McGinn and Mr Johnstone had agreed a variation to the terms of the option agreement which would have enabled Mr Ranson to exchange contracts. But by this time Mr Johnstone's authority from the other Suiteholders had lapsed. Moreover, it

is not clear from the correspondence whether Mr Johnstone and Ms McGinn had considered whether it was necessary to obtain their consent to the proposed variation.

155. Ms Wicks also submitted (and I also accept) that Mr Holliday was not prepared to authorise exchange of contracts until the payment mechanism in the supplemental agreement with Widson had been put into effect and the sum of £75,000 had been paid into his solicitor's client account. By email dated 10 October 2018 he wrote to Ms McGinn confirming that he was looking forward to exchange once this payment had been made. But again by the time Mr Holliday made this clear, Mr Johnstone's authority from the other Suiteholders had lapsed.

I. The Sale of Quay House

(1) The Rockwell NDA

156. In or around February 2018 Mr Nicholas Mee, the Head of Acquisitions at Rockwell, approached Mr Downer with an offer to purchase Quay House. Mr Downer then met Rockwell's founder, Mr Mulryan, and their negotiations resulted in a sale of the property in July 2018. Ms Lorraine Reader of DWF acted on behalf of Rockwell and by email dated 11 April 2018 she wrote to Ms McGinn as follows:

> "I am instructed on behalf of Rockwell Property in connection with the proposed acquisition of the site for a price of £26,000,000. Can you please confirm that you have been similarly instructed and let me know when you will be in a position to let me have a title pack and contract. I understand that there is an option agreement in relation to a neighbouring site which is also to be disclosed and should be grateful if you could provide further information in relation to that as well."

157. It is common ground that Rockwell was required to sign an NDA which covered both Quay House and Ensign House and that it was in a similar form to the NDA signed by Mr Connolly on behalf of FEC UK (below). Mr Downer described this in his witness statement as "standard procedure". By email dated 11 April 2018 Ms McGinn replied to Ms Reader asking her to get her client to complete and return the NDA and on 13 April 2018 Ms Reader returned it with some minor amendments. She also stated:

> "I am keen to see a copy of the option agreement as well as soon as possible. Can you just confirm if there is one option agreement being signed up to by all of the long leaseholders or whether separate agreements are being entered into with all of them."

158. On 16 April 2018 Ms Reader sent a pdf of the signed NDA to Ms McGinn and on 19 April 2018 she repeated her request for a copy of the option agreement (although she also said that she appreciated that it had not yet been completed). By email dated 23 April 2018 Ms McGinn replied that: "I am still waiting for the finalised option agreement and will send this once received." By email dated 25 April 2018 Ms Reader responded to this information by stating that her clients were insistent on seeing the current draft and asking for a copy as soon as possible.

159. On 25 April 2018 Ms McGinn took instructions from Mr Downer and those instructions were to: "push back on the option and say it's not quite there but very close and they will have it as soon as, (when do you expect it to be finalized?)". By email dated 26 April 2018 Ms McGinn wrote back to Ms Reader stating as follows:

> "Lorraine – please confirm what the corporate matters are so I can discuss with my client as John is on holiday in the States at the minute. In relation to the option, a finalised version is expected imminently but please note that is not part of this transaction and commercial terms for that still need to be discussed and agreed."

160. On 9 May 2018 Ms McGinn finally sent Ms Reader the current draft of the option agreement and in the covering email she stated that: "It will hopefully be engrossed before the end of the week". Mr Downer accepted in cross-examination that he had told Rockwell that there was an option agreement before it had entered into the NDA and that it only became clear that contracts had not been exchanged once it had done so and was bound by its terms:

> "Q. I need to understand this. You say to Rockwell, pre-NDA -- you say, "There is an option agreement with a neighbouring property." And that reflects what Ms Reader understands; yes? A. Yes. Q. Do you say anything about its status at all apart from that? A. No. Q. And then they enter into an NDA and then, of course, the status comes out, which is that there is a draft but it has not been exchanged; correct? A. Yes."

161. In fairness to Mr Downer I pointed out that Ms Reader's email dated 13 April 2018 referred to the option agreement "*being* signed up to" and separate agreements "*being* entered into" (my emphasis) which strongly suggested that Ms Reader understood that the documents had not yet been executed. The following exchanges then took place:

> "MR SEITLER: Remind me who is signing up at this stage. Who actually is presently, in the present tense, on April, signing up? Because we saw on 20 April you said it was a good email when Mr Plant was seeking to rebut all the arguments of Mr Ranson. So who exactly is signing up on 13 April? Name them, please, Mr Downer. A. No, a number aren't and there is still a few that aren't quite ready to sign. Q. Who is signing, in the present tense, on 13 April? A. I don't think they are in a position to -- they are close to signing. That's my view at that time, but are they going to sign on 13th or 14th, then no. Q. Nobody is signing on 13 April, are they? They are still knocking each other around by email on 20 April. So they are not signing on the 13th. A. No, but Ms Reader is not saying there that they are going to sign up tomorrow. MR JUSTICE LEECH: She has been given to understand -- A. By her client. MR JUSTICE LEECH: -- they are in the process of execution, isn't she? A. I told their client that this is the situation and this is what we are progressing and it's our intention to sign these options. MR JUSTICE LEECH: Can I just ask you this before we leave this -- I'm sorry, Mr Seitler, to interrupt. Is that a fair -- do you think what Miss Reader says there, she says: "I have spoken to my client." This is on page 10. A. Yes. MR JUSTICE LEECH: And: "I am keen to see a copy of the option agreement as well ..." Then if you just concentrate on words, she wants to know if there is: "... one option agreement being signed up to by all of the long leaseholders or whether separate agreements..." Is that an accurate reflection of what you told Rockwell, namely that there were an option agreement or option agreements being signed up to? Is that an accurate reflection -- A. No, it's not, it's just that -- they weren't signed up but we were in the progress -- progressing to get them signed up."

162. Mr Seitler also put the correspondence about the timing of the NDA to Ms McGinn. He suggested to her that she ducked Ms Reader's question for two weeks. He also suggested to her that she knew that it was untrue to say on 26 April 2018 that a finalised version was expected imminently given Mr Ranson's intransigence the number of other Suiteholders who had yet to commit to the option agreement:

> "So Mr Downer knew that the option wasn't finalised, didn't he? A. Yes. Q. And he didn't know when it would be finalised, which is why he is asking you; correct? A. No, we were hoping that it would be very soon. We were working hard to get it finalised. Q. Right, but he didn't know when it would be finalised? A. No. Q. And he was nevertheless instructing you to say it was very close? A. Yes, because it was quite close at that time. Q. Right. So the next day -- so if we could go now into{E2/38/5} -- on 26 April 2018, you respond to DWF and you don't use the words "very close", do you, in the email on page 5? What you do, in the second paragraph, is you say: "... a finalised version is expected imminently ..." Correct? A. Yes."
>
> "Q. But you knew because you were seeing emails that you now realise you shouldn't have been seeing, you were being passed information from the other side of the curtain showing the rancour, showing the internecine

> warfare between these suite holders, and a few days later, 26 April, after 11 April, you are saying you expect a finalised version imminently. Mr Ranson wasn't bought off for weeks. A. Yes, but the legals between me and Howard Kennedy were still continuing whilst the commercial negotiations with Bola were ongoing. Q. So as far as the relations with Howard Kennedy were concerned, yes, but you knew that when you said a finalised version is expected imminently, that wasn't going to happen, didn't you? A. No, because we were progressing the drafting and the negotiation of the actual option agreement in -- (inaudible) all of this was ongoing. Q. When you said to DWF: "...a finalised version is expected imminently ..." Did you expect them to understand that it wasn't agreed with the parties and that it was as far away from execution as really it was or did you think that they would take that to mean it's coming along in a matter of days? A. No, we were hoping and always expecting a finalised version to be ready as soon as possible."

(2) The Side Deals

163. In late May 2018 Mr Downer met Mr Mulryan to discuss Ensign House and by email dated 21 May 2018 he reported back to Ms McGinn, Mr Burgwin and Mr Lal. His email suggests that Mr Mulryan and he had discussed a possible sale of shares in EHL and he summarised those discussions as follows:

> "Saw Donnal [sic], very good meeting, he had a report from Lorraine on Ensign which he didn't quite follow, I have now filled in the gaps and he is happy, he showed me a letter you had sent Lorraine that said the price was £20m, he was struggling to get his head round that when I told him it was £26m, he is also aware there some "extras" to be paid to Simon, Bolla, Sopher and Hughes, what he wants is an exact breakdown of who is getting what, including LAMA, Butterworth & Wu, and the additional side payments."

164. Mr Downer had asked Mr Alford to provide the details of the Side Deals agreed with the Suiteholders and on 23 May 2018 at 6.32 pm Mr Alford sent him a table headed "Ensign House – Option side agreements". The subject line of his email was "Ensign House – Option Incentives 23.5.18" and I will refer to this table as the "**Option Incentives Table**". Much earlier, on 23 March 2018 Mr Alford had also sent Mr Downer a copy of the Price Allocation Schedule prepared by Howard Kennedy (above) which set out the individual prices to be paid to the Suiteholders for their Suites calculated by area.

165. On 23 May 2018 at 6.39 pm, and once he had received the Options Incentives Table, Mr Downer sent an email to Mr Mulryan and Mee enclosing the Price Allocation Schedule. In the covering email he stated as follows:

> "As promised attached is the breakdown of who is getting what payment, the option agreement had a different figure in as it didn't at the time include the below parties, all these three parties will now be part of the Option Agreement apart from LAMA which I have explained. I'm going to send you a separate email showing the "extra" payments some of the suite holders are getting, feel free to ask any questions as it is pretty confusing at first glance!
>
> Wu – £1,112,785.50
>
> Sopher - £1,568,2.30.44
>
> Butterworth - £1,737,66036
>
> Lama not in Option (£1,211,579.53) = £26.5m."

166. Two minutes later Mr Downer sent a second email to Mr Mulryan and Mr Mee this time attaching the Option Incentives Table. In the covering email he made the following comment: "These are the option incentives, note the Bolla Ransome [sic] £5.5m includes his premium under the main option on his two suites, so he gets £5.5m in total. Again any queries let me know." Mr Seitler cross-examined Mr Downer on the basis that his representation that Mr Wu, the Sopher Trust and Mr Butterworth would "now be part of the Option Agreement" was misleading:

> "Q. My question was about 23 May, Mr Downer. As at 23 May, was it true to say that all these three parties, Wu, Sopher, Butterworth, will now be part of the option agreement? A. At that point, no, they weren't part of the option agreement. Q. Right. So it's not a true statement, as it stands, is it? A. It's a true statement in the sense of what my state of mind was and what I was thinking when I wrote that email. Q. No, because you used the word "now". A. Will now be part of the option agreement going forward. Q. I asked you where is Mr Butterworth's agreement at this point? A. I've just confirmed; as of 23 May, he wasn't in the option. Q. Right. So why are you saying he will now be part of the option agreement -- A. Now going forward. That's what I meant. Q. How could you say that without having any evidence of Mr Butterworth's agreement? A. Well, I've just explained, now going forward, now going forward. I know what I meant, I wrote the email."

(3) Ensign House: costs

167. By email dated 21 June 2018 Mr Downer wrote to Mr Mee again this time attaching a spreadsheet which Mr Lal had prepared and sent to him earlier that day. It contained a summary of costs for Ensign House totalling £340,944 (ex VAT) or £351,022 (including VAT). The individual costs included bills submitted by Jones Day, Howard Kennedy and Browne Jacobson, Carey Olsen, DKLM Solicitors (who were acting for Mr Ranson) and

counsel's fees. It also included the sum of £16,665 paid to Mr Ranson. In the covering email Mr Downer stated as follows:

> "Please see the costs to date in Ensign House ltd, this have been incurred in tying up the Option Agreement, mainly on Solicitors fees, the only way it will work, (as the option is non assignable), is you taking over the Ensign Option position is to buy the SPV, it hasn't traded and only has these costs and no income, it's a Jersey Company. I suggest the share structure reflects the% of retained profit I get in the development going forward. To be clear I expect the money back I have sent to date, £341k net of VAT, plus you will be responsible for the option premiums, most people are taking £1, but one owner is £62.5k on signing and the other is £50k on signing."

168. By early June 2018 Mr Mulryan had instructed a corporate solicitor, Mr Matt Walker of Gowling WLG (UK) LLP ("**Gowling**"), to act for Rockwell and Ms McGinn dealt with him in relation to the possible purchase of shares in EHL. By email dated 22 June 2022 she reported to Mr Walker about a call between Mr Mulryan and Mr Downer which had taken place earlier that day. She recorded the following proposal in relation to Ensign House:

> "In relation to Ensign House, the engrossment option has been issued and is in the process of being signed by the various parties so exchange is imminent. I attach a table which shows the current position. There are a couple of side agreements with some of the leaseholders which we agreed to enter into as an incentive for them to sign up to the option and I will let you have those shortly. It has been suggested that we transfer 80% of the shares in Ensign House Limited to your client and enter into a shareholders agreement to document the terms which have been agreed which are as follows:
>
> 1. 80/20 profit share in your client's favour
>
> 2. Your client will be responsible for 100% of all funding including the option premiums, costs etc including the payments of £62,500 and £50,000 due to 2 tenants on exchange
>
> 3. My client is refunded its costs to date which currently stand at £341,000."

(4) Exchange of contracts

169. On the same day, however, Mr Walker replied stating that these terms remained to be agreed and suggesting that Ensign House was "disassociated" from the acquisition of Quay House for the time being. He also stated as follows:

> "However, as a result, my client will need some comfort around planning for Quay House – I suggest an obligation on any entity owned or controlled (directly or indirectly) by John will not object to Rockwell's planning application for Quay House and will not encourage anyone else to do so; they would also enforce the corresponding obligation in clause 5.4 of the Ensign House Option Agreement until we do a deal for that."

170. Mr Walker's reference to clause 5 of the current draft of the option agreement drew attention to a difficulty for Mr Downer which the sale of Quay House would create. Clause 5.1 of the option agreement (as currently drafted) imposed an obligation upon EHL to use all reasonable endeavours to procure that QHL submitted a planning application for Quay House within eighteen months, to pursue it expeditiously and diligently and to obtain planning permission during the option period. If QHL sold Quay House, Ms McGinn was concerned that EHL would be unable to comply with these obligations and had already warned Mr Downer about this in an email dated 15 June 2018:

> "The Ensign Option has obligations which relate to Quay House so once we sell either the company or the property we lose our ability to comply with those obligations so we would be in breach so it's better for us to reach a deal with Donal sooner than later."

171. Nevertheless, on 29 June 2018 QHL exchanged contracts for the sale of Quay House to a new vehicle called Quay House Admirals Way Land Ltd for a purchase price of £26,000,000 and it paid a deposit of £1,950,000. Mr Downer was prepared to exchange contracts without agreeing terms with Rockwell over Ensign House. But in cross-examination he said that he would have liked to have sold the options to Rockwell with Quay House at the same time:

> "Q. We have got all that but we have also established, because you've told his Lordship, you would have liked to have sold options in Ensign House to Rockwell -- A. I did, that's correct. Q. At the same time -- roughly at the same time or along with -- A. Along with, thank you. Q. Along with Quay House? A. Correct."

172. Mr Downer's hope or expectation was that the sale of Quay House would not be made public until the option agreement for Ensign House had been concluded and by email dated 4 July 2018 Ms McGinn wrote to Mr Walker asking him to confirm that Rockwell would not be applying to put any notices on the title to Quay House or to register anything at the Land Registry or Companies House until after completion.

(5) Completion

173. On 27 July 2018 completion took place. Mr Downer's evidence in cross-examination was that he was delighted to "push Quay House over the line" and that he received £22.5 million from the proceeds of sale after the repayment of a loan of about £3 million made by the Standard Bank in Jersey and the discharge of its first charge over the property. The amount which Mr Downer received consisted of the principal sum of £17 million which he had personally advanced to QHL and interest payments of £5.25 million. The balance of £109,000 which QHL retained in its bank account, however, was insufficient to repay Mr Downer in full or a number of its other creditors.

174. Two of those creditors, TC Developments (South East) Ltd ("**TCD**") and BUJ (the architects), brought claims against QHL in relation to work which they had carried out for the development of Quay House and in October 2018 they both obtained freezing injunctions. Mr Downer accepted that TCD had a claim for £150,000 plus VAT. He also accepted that BUJ had later obtained a judgment debt for approximately £354,000. Finally, he accepted that QHL was wound up voluntarily in Jersey and by its creditors in the UK. I was taken to a feasibility study which BUJ had prepared and sent to Mr Alford on 19 July 2018 for 45, 50 and 55 storey developments (the "**BUJ Feasibility Study**") which features later in this dispute. The merits of EHL's case were hardly improved by the fact that BUJ remained unpaid and was unable to enforce its judgment against EHL.

175. Following completion Mr Downer expressed signs of weariness in relation to the demands made by the Suiteholders. For example, by email dated 20 August 2018 he wrote to Mr Alford responding to new demands by Mr Hughes stating: "I'm fast losing patience with these people." On 23 August 2018 he also wrote to Ms McGinn (with a copy to Mr Alford) in response to a request from Mr East and Mr Inzani expressing the view that: "It's fast becoming a nightmare."

(6) The Suiteholders' reaction

176. On 5 October 2018 Property Week published a leading article dealing with the sale of Quay House. The headline was "Firethorn Trust acquires site in Canary Wharf for £200m development". The synopsis for the story also stated: "Debut deal for investment company backed by two US family offices, which plans £200m redevelopment alongside Rockwell Property at Canary Wharf site." The Firethorn Trust was one of the investors

in Rockwell and Mr Downer was concerned that Rockwell might have committed a breach of its NDA. He instructed Mr Crocker of Howell & Co again and by email dated 5 October 2018 Ms McGinn wrote to Mr Crocker providing an overview of the sale. She continued:

> "The matter is extremely sensitive as Investin is currently in the process of negotiating an option agreement with the neighbouring property known as Ensign House. That option agreement is extremely complicated as it involves 18 different companies all owning various interests in the building and has taken years to negotiate. The Ensign option is linked to Investin owning Quay House so we did not want the Ensign owners to know we had sold the building. The top story below was released in today's press and one of the Ensign owners has already picked up on it. We are concerned that because of this story it will have implications for the Ensign option."

177. Mr Downer accepted in cross-examination that part of his negotiating strategy with the Suiteholders was to encourage them to believe that Investin had a unique position in the market and a strong incentive to acquire Ensign House because it owned Quay House. But once it became public knowledge that Investin had sold Quay House, the Suiteholders began asking questions. Rockwell remained interested in acquiring options over Ensign House and one way to meet the Suiteholders' concerns was to describe the arrangement between Investin and Rockwell as a "joint venture". On the day the story had broken Mr Alford suggested to Mr Downer: "Need to stick to JV line but longer goes on the more we risk issues with EH." Mr Downer replied: "I don't disagree, im [sic] pissed off they have done this, Firethorn in control here not Donnal!"

178. Mr Alford adopted this approach with Mr Plant who was sceptical. By email dated 6 October 2018 he wrote to Mr Alford having read the article and stating: "doesn't look like a JV to me". On the same day Mr Alford replied as follows:

> "The fund behind the JV/deal put the piece in property week as want the market to know for PR reasons. John – lnvestin are still involved in planning upside of QH with Rockwell, that can't be in press. John and Rockwell owner are mates - both live in Monaco- how they met. Basically John wanted to spread risk as costs only going to increase going forward. it doesn't change our commitment to EH and Option deal."

179. By email dated 16 October 2018 Mr Holliday wrote to Mr Alford and Ms McGinn on behalf of the boards of both Freeco and Manco asking for confirmation about the sale,

whether the option agreement would be transferred to the new owners and, if not, what EHL's intentions were for both Ensign House and the Boot. Mr Alford forwarded this email to Mr Downer with the comment "Think we need to push JV line with QH". Mr Downer replied: "We ain't got a lot of choice, I can see this coming off the rails!" Ms McGinn suggested that Mr Alford should downplay the sale and say nothing had changed. Mr Alford replied:

> "I agree, and what I've told Paul - is complicated and nothing has changed. Rockwell and no one else will touch EH with title/Lama sorted - he agrees. He noted at EH board meeting last Friday, where this has come from, as long as HK done their job EH are protected and will get their money. I think we need to note we are involved with Rockwell on PP for QH as a JV?? what I've told Simon and Paul - they accept."

180. On 17 October 2018 Mr Alford reported to Mr Downer and Ms McGinn that he had discussed the queries with Mr Holliday who had told him that they were mostly from Mr Ranson and that his hand was forced and he had to send the email. He also said that Mr Holliday still wanted to get the option agreement signed. Later that day he reported on a conversation with Mr Plant: "Spoke to Simon re queries - he thinks nonsense and will deal with internally once we have responded." Ms McGinn's response was as follows:

> "Are we formally admitting to the sale? I am concerned that if we do then it opens everything up again and HK will want to start looking at the option because it is linked to the QH planning application."

181. Mr Downer's response was also negative: "I agree, the whole thing will collapse." On 17 October 2018 Mr Rhys Baker of Howell & Co wrote to Ms McGinn asking her whether she suspected that the Suiteholders would not agree to enter into the option agreement now. He also asked her whether the intention had been to amend it once the sale of Quay House had taken place. Her responses were as follows:

> "We are not sure but it's becoming more and more doubtful, they have all become aware of the article and are questioning it, they even called a board meeting last Friday to discuss it."
>
> "No, the intention wasn't to amend it as we have spent years getting it to this point. our commercial view was to exchange the option as it was and once we had everyone under contract we could tackle the Quay House obligations if and when they arise. Ultimately there are wider title issues on the Ensign House title which need resolved before anyone would buy it which is why they are dealing with us."

182. On 22 October 2018 Mr Holliday wrote to Mr Alford asking him to explain "Investin's official relationship with Rockwell". Mr Downer instructed him: "Tell him jv partners on Ensign House". He also told Mr Alford that he would ask Mr Mee to provide a comfort letter. By this date Mr Downer and Mr Alford had still not confirmed that Quay House had been sold and on 23 October 2018 Mr Johnstone wrote to Ms McGinn asking her to set out the position. Mr Alford's response was to ask for the letter from Rockwell as soon as possible and Mr Downer agreed: "100%, one thing for sure they ant [sic] going to sign unless we get Rockwell onside".

183. After further internal discussions about how far Rockwell might be prepared to go, Mr Downer approached Mr Mee, who agreed to write to Mr Holliday (and then did so on 29 October 2018). He was not prepared to say that Investin and Rockwell were in partnership together or involved a joint venture whether in relation to Quay House or Ensign House):

> "John Downer of lnvestin has provided me with your contact details. As I believe you are aware, Rockwell completed the purchase of Quay House over the summer. We have an ongoing dialogue with lnvestin on a number of opportunities, including the adjacent Ensign House building. Our solicitors are fully up to speed on the Option Agreement and we look forward to working with lnvestin on the project."

184. On the same day Ms McGinn sent an email to Mr Johnstone confirming that Quay House had been sold and that Investin was continuing to work in partnership with the new owner. Ms McGinn's email prompted Mr Johnstone to send an email to Mr Plant on 2 November 2018 (which he copied to Mr Alford) stating that Ms McGinn had confirmed that QHL had sold Quay House and advising him that the options should be assigned to the purchaser. Mr Johnstone also advised Mr Plant that EHL would be unable to comply with its obligation to procure that the planning application was submitted in 18 months. He therefore suggested a meeting with all participating parties.

185. In response Mr Alford emailed Mr Mee pointing out Howard Kennedy's suggestion for a meeting with all Suiteholders and asking Mr Mee to attend a meeting on 7 November 2018. That meeting took place and on the following day Mr Johnstone wrote to Ms Boulton reporting on the meeting and suggesting that it was positive (although Manco was still not prepared to consent to Mr Hughes subletting his Suite):

> "The meeting that took place yesterday with Investin and Rockwell (attended by representatives from the freehold company, Manco and a majority of the participating suiteowners) at Ensign House was very positive and gave everyone to opportunity to ask questions.
>
> As to the waiver of Manco's requirements in terms of underletting of your suite, I understand these are not able to be waived for the reasons previously stated.
>
> As you now represent Howard in relation to the option agreement, I need to receive confirmation asap (whether from Howard or you) as to whether or not he is willing to participate in the transaction on the current basis.
>
> I need to write to the other participating parties (who have previously confirmed that they wish to proceed) to seek their final authority to proceed to exchange the option and therefore I need that confirmation one way or the other by 5pm tomorrow please. If it is a no, then I remove reference to suite 15 throughout the signed options, which I hold."

(7) Rockwell's continued interest

186. Although EHL had agreed that Quay House should be "disassociated" from Ensign House, Rockwell continued to assist Investin to resolve the outstanding issues in relation to Ensign House after the sale of Quay House was made public. On about 4 September 2018 Rockwell instructed Gowling to explore whether it was possible to acquire title insurance for the Superior Leases and to attempt to resolve the issue raised by Lama and on 5 September 2018 Gowling identified the Dual Group ("**Dual**") as potential underwriters.

187. By email dated 24 September 2018 Ms Kelly Lines, a senior underwriter at Dual Asset Underwriting, confirmed that Dual was open to the idea of underwriting the risk but wanted to take counsel's advice. By email dated 26 September 2018 Ms McGinn wrote to Mr Downer asking whether Investin should offer to underwrite these costs and on the same day Mr Downer replied stating: "Let's see what Rockwell say". When Mr Seitler put this email to him, Mr Downer did not accept that he was not prepared to fund these costs and was only prepared to go forward if Rockwell paid them.

188. At all events, Rockwell agreed to pay these costs and by email dated 25 October 2018 Mr Downer wrote to Mr Alford and Ms McGinn confirming Rockwell's agreement to fund counsel's advice. On 30 November 2018 Gowlings sent instructions to counsel, in which Rockwell rather than Investin was identified as the potential purchaser of Ensign House and that this was to be achieved by a sale of shares in EHL. It is clear, therefore,

that at the end of October 2018 the proposal that Rockwell should take over Investin's interest or position in Ensign House was well advanced and that the sale of shares in EHL remained a live option.

189. On 4 October 2018 Gowlings also advised that the only solution to the Lama problem was to reach a compromise with the SFO and by email dated 18 December 2018 Mr Mee informed Mr Downer that he had made contact with Mr Jonathan McGarry at the SFO. On 20 December 2018 Mr McGarry wrote to Mr Mee on 20 December 2018 setting out the SFO's position:

> "Thank you for telephoning me with regard to Suite 14 earlier this afternoon when I confirmed that the SFO's restraint order in this matter remains in force. While the SFO is not adverse to exploring ways in which the development plans may be facilitated any discussions would, by necessity, have to involve the leaseholder and those with an interest in that corporate entity."

190. This email contained Mr McGarry's email address and telephone number at the SFO. On 20 December 2018 Mr Mee forwarded the email to Mr Downer and on the same day Mr Downer forwarded on the email chain including this email to Mr Alford. In his response dated 21 December 2019 Mr Alford reminded Mr Downer about the Price Allocation Schedule (which contained the area per square foot of Suite 14). He also stated: "We should contact Amora [sic] in NY. If he doesn't have to fund legals – he will want to talk re sale".

191. By email dated 7 January 2019, and immediately after the Christmas break, Mr Downer told Mr Alford that he was proposing to speak to Mr Mee of Rockwell. On the same day Mr Downer wrote to Mr Alford expressing the view (with which Mr Alford agreed) that Mr Mee needed to be aware that "the deal is likely to fall apart in Jan if we don't sign up 17 of 18 LH after 4 years of trying to get to this point". On 11 January 2019 Mr Downer spoke to Mr Mee who had by now spoken to Mr McGarry and Mr Downer wrote to Ms McGinn and Mr Alford reporting his conversation. I set out the relevant extracts (excluding the progress report which Mr Mee had given Mr Downer for Quay House):

> "Still very keen on Ensign, he said the SFO guy very friendly and helpful and wants to do a deal without going to court, (what this means he didn't know), but he feels there is a deal to do and could arrange a meeting quickly. Told him we had tracked down Ammora and his Solicitor and Lisa hopefully speaking to his Solicitor next week. Confirmed Ammora

> wants an apartment in Central London and will move the SFO charge across. Next step Lisa is for you to speak to Ammoras Solicitor…. He acknowledged Counsel still working on the insurance point and they are happy to pay costs. Expect Ammora will want his legals paying and im [sic] sure Rockwell will cover."

192. On 11 January 2019 Mr John Furber QC gave advice in writing to Rockwell. His advice was that EHL could not lawfully demolish Ensign House unless it acquired all of the leasehold interests in the building. He also advised that it was unlikely that an injunction preventing demolition would be granted but that damages could be awarded which would be assessed on the following basis:

> "In all the circumstances, I consider that there is a substantial risk of a number of claims for "negotiating damages" made by persons owning short term reversionary interests, which will probably be calculated by reference to a share in the anticipated profits of a proposed development which could not be lawfully carried out without acquisition of those interests. Calculation of the value of such claims would require a viability assessment of a specified development and a calculation of the available developer's profit. The share of that profit available to potential claimants would take account of the fact that those claimants would be taking no development risk, which would be undertaken by the actual developer. I will be happy to advise further on calculations such as this if and when instructed in more detail."

193. By email also dated 11 January 2019 Ms McGinn wrote to Ms Caroline Wort, a solicitor at Gowling, proposing a call to discuss the next steps and whether it was worth taking out an insurance policy in the light of Mr Furber's advice. Following that call, Mr Mee spoke to Mr Mulryan and on 22 January 2022 he wrote to Mr Downer and Ms McGinn. It is apparent from this email that Dual required a valuation before it was prepared to underwrite the risk:

> ""Further to the call last week, I've had a conversation with Donal regarding the valuation report required for the insurance quote. Understandably, he does not want to incur a c.£30,000 cost for this work before we make further progress with the SFO related issue. Considering we would be able to obtain a valuation report within 3-4 weeks of instruction, and I'm assuming a couple of weeks or so thereafter required to finalise the insurance quote, we're essentially looking at 2 months to conclude this part of it. To my mind the next logical step is a meeting with LAMA's lawyer and the SFO to try and establish if we have a chance of resolving the issue. If we can agree a route forward in said meeting, we would then be happy to instruct the valuation report. I imagine it will take

> at least a couple of months to formalise any agreement with LAMA/SFO and therefore the valuation/insurance part would not be delaying matters."

194. By email dated 23 January 2019 Ms McGinn replied stating that she had spoken to Lama's lawyer, Mr Kenkre, and he was waiting for "KYC" documents from Mr Ammora before he could progress. She also stated that she would update him early in the following week. By this date, however, Mr Downer had spoken to Mr Connolly and Ms Monique Sutherland, who was a partner in DLA (FEC's solicitors), had exchanged emails with Ms McGinn. By email dated 28 January 2019 Ms McGinn wrote to Mr Downer and Mr Alford raising the question of a contract race:

> "See below from Monique this morning. I think it might be useful if I ask her to confirm her instructions before I start bombarding her with information. We should also think about what (if anything) we tell Rockwell? Technically we aren't selling land so it doesn't qualify as a contract race so I am not obliged to notify them."

195. Mr Downer's instructions were: "If we don't need to legally inform Rockwell then its heads down!" Mr Alford also contributed to this discussion: "Let's get the ball rolling with full info - to discuss commercial terms with FEC I'd say that's the time to update Rockwell". However, once this exchange had taken place no meaningful discussions took place between Investin and Rockwell in relation to the acquisition of Ensign House.

196. Apart from his exchange with Ms McGinn on 22 and 23 January 2019 I was taken to emails from Mr Mee to Ms McGinn and Mr Downer on 5 February 2019, 22 March 2019, 28 May 2019, 24 July 2019 and 22 November 2019 chasing for updates on Ensign House. On three occasions Ms McGinn or Mr Downer promised to provide an update but failed to do so and on three occasions there appears to have been no reply at all. Mr Seitler put a number of these emails to Mr Downer:

> "Q. So in July you say you will get back to Rockwell as soon as possible but actually you don't contact them again and it's Rockwell who chase you in November; correct? A. Yes. Q. You don't reply to Rockwell in November either, do you? A. I don't recall. Q. Right. You see, what's being said on your behalf, Mr Downer, is that you remained in contact with Rockwell about the potential for Rockwell to acquire the option as late as November 2019 and what's said on your behalf is that these emails constitute you being in contact with Rockwell about the potential for Rockwell to acquire the option at this time. But the truth is, isn't it, Mr Downer, that Rockwell chased you intermittently, two emails over a five-month period, but you didn't make any effort, either after July or after

> November, to remain in contact with them? A. Because I was waiting for positive news from Terry. Q. But whatever the reason, you didn't provide the update in July, despite promising to, and you didn't respond to them in November. A. I saw little point until I had positive news from Terry. Q. You didn't chase Terry either? A. Because I was waiting to hear. No news was good news. Q. You did nothing and the reason you did nothing about these occasional emails from Rockwell is that you weren't interested any more. You had sold Quay House. You had your 21 million plus and you no longer needed Ensign House. That's the truth of it? A. Not at all. I was protected by the NDA and I was waiting to hear from Terry, who was my agent. Q. In your own words, even you realised you had had your turn? A. No."

(8) Mr Hughes' Side Deal

197. On 9 November 2018 Ms Boulton replied to Mr Johnstone's email dated 8 November 2018 (see Section (6) above) putting an ultimatum to Investin. She put forward terms which required Investin to pay Mr Hughes the rent for his Suite or to provide him with another tenant, that any new lease would not contain a rent-free period and that Investin would provide a rent deposit and guarantee. Ms Boulton also made it clear that this was not negotiable and that if Investin did not agree, both parties would "walk away". Mr Downer was prepared to agree to Mr Hughes' terms provided that the new lease contained a three month rent-free period but, after some resistance, he agreed in full and by email dated 26 November 2018 Ms McGinn sent Ms Boulton a draft supplemental agreement.

198. On 4 December 2018 Ms McGinn chased Ms Boulton who did not reply until 28 January 2018. On that date she sent an email raising a number of further issues. The principal problem which she identified was that Manco was still not prepared to permit Mr Hughes to grant a sublease even to Investin. She also stated that Mr Hughes required all of his costs to be paid before further discussion. On 30 January 2018 Ms Boulton confirmed that she would fix her costs at £3,800 (plus VAT) and Ms McGinn asked for Mr Downer's authority to agree this as a "capped final figure". This proposal prompted the following email exchange between Mr Downer and Mr Alford:

> "No, I want to let it ride a few days with Monique first and see how real they are, think we then start asking them to cover everything that will tell us or not if there up for this"
>
> (Mr Downer to Mr Alford)

> "Ok, I don't think that's the way to play this, we will lose more time-between Rockwell and FEC we will have a deal within next few weeks. We don't yet have the building secured and Simon is in my ear....I will send a holding mail to Ruth."
>
> (Mr Alford to Mr Downer)
>
> Id ignore her for now, it will send the wrong message, if JC is serious they will start spending money ... we have had our turn!"
>
> (Mr Downer to Mr Alford)

199. Mr Seitler put Ms Boulton's request and this email exchange to Mr Downer. He asked why Mr Downer was not prepared to give a costs undertaking for £3,800 (plus VAT) and his answer was as follows:

> "Q. Yes, there we are. You weren't even prepared to spend a few thousand pounds to agree the option with Howard Hughes. That's how little you cared about it -- A. Not at all. Q. -- because you had had your turn. A. No, I wanted them to have skin in the game and show commitment. Q. Your case is that you were due to make a killing as soon as the options were exchanged. £20 million in an instant is what your case is in this litigation. You also say that, even if you couldn't get Lama signed up, you would still make £15 million in an instant by exchanging on the other 17 suites. That's your case in this litigation; yes? A. Yes. Q. So with £15 million at stake and all you've got to do is push it over the line and agree to pay the 3,800 to Ruth Boulton, you, if that's what you were minded to do, would have, of course, said yes, and would have given all sorts of sweeteners and appeasers and smooth things over and go the extra mile and do everything to get this over the line. But you didn't, didn't you? A. I just explained, I wanted FEC to show commitment and have skin in the game. Q. No, no, because that's a minor consideration compared to the £50 million you make overnight once everyone signs up because you've agreed to Howard Hughes' £3,800 legal fees. You make 50 million quid. Why not say yes? A. I wanted FEC to have skin in the game."

200. The transcript records that Mr Seitler said "£50 million" in the extract above. But he had in fact said "£15 million" as I then pointed in the passage immediately below. Mr Seitler then put it to Mr Downer that his reason for refusing to give the undertaking was a "rubbish answer" and that the real reason why he would not agree to pay Mr Hughes' legal fees was that the 17 Suites were no longer worth what he had agreed to pay for them in the option agreement.

201. I deal with Mr Downer's evidence about value in greater detail below. But Mr Seitler also put an email to him dated 24 January 2019, in which Mr Alford had passed on a request from Mr Eyad Ammora for his travel and accommodation expenses to be paid.

Mr Downer's response was "Another one with his hand out, why don't we lay a private jet on!" Mr Alford replied stating: "I thought that, it's not like he isn't getting anything out of it!" Mr Downer's riposte was "Yes Idiot!" Although Mr Downer described this email exchange as "banter" Mr Seitler suggested again that he had lost interest in Ensign House:

> "Q. Yes. That reflects your position. Lama is not the one thing you are waiting to solve. By this time, it's just a question of banter now. It's just an opportunity for banter and insult, quite honestly. It really doesn't matter anymore to you, does it? A. It matters a lot. Q. {E3/279/1}. You see, if it mattered a lot, instead of just calling him an idiot and saying, get him a private jet, you would say what are those travel costs, can we cap them. Is there something we can do to compromise on that. I'm going to make £30 million if Lama comes round quickly. But it's just not relevant anymore because you've lost interest. A. I've not lost interest."

(9) Findings

(i) Representations to Rockwell

202. I am not satisfied that Mr Downer or Ms McGinn represented to Rockwell or DWF that Investin had entered into binding option agreements with the Suiteholders or held options over Ensign House (as Mr Downer had represented to Jigsaw). But in my judgment, it was misleading to represent that the parties were in the process of signing or entering into the option agreement and over-optimistic to express the view that a finalised version was expected imminently.

203. I am also satisfied that Mr Downer intended to give a misleading impression to Rockwell when he instructed Ms McGinn to inform Ms Reader that "it was very close". As Mr Seitler put to him, he did not know when the agreement would be finalised and had to rely on Ms McGinn for that information. I make it clear that, in making this finding, I have borne in mind that Rockwell and DWF did not complain later that they had been misled and probably took the view (as Mr Downer did) that these statements were within the boundaries of acceptable negotiating tactics.

204. I do not accept that Mr Downer's email dated 23 May 2018 was misleading either. By that date the Sopher Trust had agreed in principle to enter into the option agreement and to a Side Deal for £125,000 and although Mr Wu had not actually committed himself at that date, he did so two days later. I agree that Mr Butterworth was not "in the option"

by 23 May 2018 and did not commit himself until the end of June 2018. But Mr Alford had assured Mr Downer on 9 May 2018 that both Mr Wu and Mr Butterworth "will sign certainly". I am satisfied therefore that on 23 May 2018 Mr Downer was confident that all three Suiteholders would be parties to the option agreement and did not intend to mislead Mr Mulryan and Mr Mee.

(ii) Representations to Suiteholders

205. The Suiteholders' reaction to the sale of Quay House gave rise to two factual issues which I have to resolve. First, Mr Seitler suggested to Mr Downer and Ms McGinn that once news of the sale had broken, they misled the Suiteholders by telling them that there was a joint venture between Investin and Rockwell and that this was not true because, as Mr Downer had accepted earlier in his evidence, there was no joint venture and Investin had no further interest in Quay House after the sale.

206. Ms Wicks accepted that Mr Alford's preferred strategy was to maintain that Investin and Rockwell were in a joint venture but submitted that Mr Downer was not prepared to mislead the Suiteholders. I accept that submission. By email dated 18 October 2018 Mr Downer wrote to Ms McGinn and Mr Alford telling him: "We can't tell lies, if you want to say something we say Rockwell have purchased QH and we are working in partnership with Rockwell on Ensign House." I am satisfied that his instructions not to tell lies were genuine and Ms McGinn adopted his formulation in her reply to Mr Johnstone. I am also satisfied that this email contained a fair description of the relationship and that the use of the word "partnership" was intended in a loose and non-legal sense.

207. Moreover, Mr Downer agreed to Mr Mee sending the email to Mr Holliday dated 29 October 2018 and attending the meeting on 7 November 2018. There was no dispute that Rockwell was honest and straightforward in its dealings with both Investin and the Suiteholders in 2018 and 2019. As Ms Wicks pointed out in closing submissions, Mr Seitler put it to Mr Downer that Rockwell would not lie for him and made the same submission in closing argument. Finally, there was a continuing relationship and Rockwell assisted Investin to explore insurance cover for the Superior Leases and to resolve the Lama issue.

(iii) The Suiteholders' Attitude

208. I also have to consider what the Suiteholders' attitude to Investin was after they had discovered that it had sold Quay House. In their Appendix 1 Ms Wicks and Mr Lee submitted on the facts that Mr Holliday and Mr Plant remained "entirely on board with the option deal". Mr Seitler challenged this conclusion on the basis that they had relied on Mr Alford's emails to Mr Downer and they proved nothing because Mr Alford was always trying to keep the deal alive. Ms Wicks and Mr Lee responded by producing and referring to all the emails in which Mr Alford had reported back to Mr Downer on his ongoing negotiations with Mr Holliday and Mr Plant and their discussions with Mr Ranson. They also submitted that Mr Alford was generally honest with Mr Downer about the Suiteholders and their commitment.

209. I find that all of the Suiteholders remained interested in the ultimate sale of Ensign House and continued to negotiate with Mr Alford to grant options after they became aware of the sale of Quay House. The correspondence to which Ms Wicks and Mr Lee referred me clearly demonstrates this to be the case. Indeed, it is self-evident that the Suiteholders remained willing to negotiate with Mr Alford because they ultimately agreed to sell their interests to FEC.

210. On the other hand, I am not satisfied that the Suiteholders remained willing to grant options to EHL for £1 after the sale of Quay House. EHL was no longer a special purchaser with a particular incentive to acquire Ensign House. Indeed, Mr Ranson's immediate reaction to the news of the sale was to ask Mr Downer to advance him a further £1 million. If Investin had continued or renewed negotiations with the Suiteholders directly between February 2019 and February 2020, I consider it more likely than not that they would have held out for a substantial deposit or conditional contracts. However, I accept that Mr Downer was a tough negotiator and that there was a real and substantial chance that he would have worn them down and they would have agreed to his terms (if no others were available).

(iv) Mr Downer's attitude

211. I do not accept Mr Downer's evidence that he was waiting to hear from Mr Alford between January and November 2019 and I accept Mr Seitler's submission that Investin's negotiations with Rockwell more or less came to a standstill once Mr Mulryan had refused to pay for a valuation of Ensign House until the Lama issue was resolved. I find

that once Mr Downer had been introduced to Mr Connolly and he had agreed to fund the costs of resolving the Lama issue, Mr Downer lost interest in the negotiations with Rockwell.

212. If he had been serious about pursuing the negotiations with Rockwell or if his intention had been to elicit competitive bids from both FEC and Rockwell, I have no doubt that Mr Downer would have been proactive and would have chased Mr Alford for an update each time Mr Mee asked him for one. I have no doubt either that he would have chased Mr Alford for frequent updates on the negotiations between FEC and Lama.

213. Moreover, I do not accept Mr Downer's evidence that his reason for refusing Ms Boulton's request to give a costs undertaking was because he wanted FEC to have "skin in the game". I am satisfied that when he used the expression "we have had our turn" he meant it and I find that by the end of January 2019 Mr Downer had lost interest in the negotiations with the Suiteholders and was no longer willing to fund their costs. It is striking that he was not prepared to give an undertaking to pay £3,800 (plus VAT) to ensure that Mr Hughes entered into the option agreement or to pay Mr Eyad Ammora's travel expenses to resolve the Lama issue and to obtain a release of Suite 14 from the Restraint Order. As Mr Seitler pointed out, these were tiny sums in the context of a potential profit of £20 million.

214. I consider that all of these findings of fact are supported not only by the contemporaneous documents but also by Mr Downer's subsequent conduct and, in particular, his very limited involvement in the subsequent negotiations and his treatment of Mr Alford. I also consider that they are also supported by his unwillingness to give any instructions to revise the option agreement until he was confident that FEC had made the decision to buy Ensign House. In particular, I rely on an exchange of emails on 7 February 2019 in which Ms McGinn explained that Investin would be in material breach of the option agreement (as currently drafted) and Mr Downer accepted that the relevant clause would have to be removed. Mr Alford expressed the view that Investin could probably get away with altering the clause. But Mr Downer's response was: "Let's wait until we know Connolly 100%".

215. However, I make these findings of fact subject to one important qualification. I am not satisfied that Mr Downer no longer saw Ensign House as a commercial opportunity for

Investin or that EHL did not have an interest in Ensign House which he could exploit for commercial profit. I accept that he believed that he had what Ms Wicks described as a "first mover's advantage" and a "position" which he could sell to a third party or exploit to negotiate a joint venture or profit share on the sale of Ensign House and for this reason he was concerned to ensure that he got any third party to sign an NDA. But I am fully satisfied that what he was not prepared to do was to devote either his own energies or any further resources to fresh negotiations with the Suiteholders.

216. In conclusion, I find that Mr Downer was willing to let FEC have its "turn" in the sense that he was prepared to permit Mr Alford to work with Mr Connolly and to continue negotiations with Lama provided that FEC funded any further costs itself. I consider below in much greater detail what Mr Downer would have done at the end of January 2019 if Mr Connolly had not become actively involved in those negotiations or agreed to fund any further costs or had sought EHL's consent to purchase Suite 14 from Lama.

J. Mr Alford's Investin Retainer(s)

(1) Quay House: The Retainer

217. Mr Downer's evidence was that he agreed to pay Mr Alford 6.75% of any profit which QHL made on the sale of Quay House and £225,000 upfront as an advance on his profit share. It was also Mr Downer's evidence that he advanced Mr Alford a further £60,000 in monthly payments of £5,000 per month when Mr Alford got into financial problems. The terms of the retainer were the subject matter of email negotiation on 22 August 2013 and after two preparatory emails, the following exchange took place:

> "John Following conversation, we have agreed; 6.75% profit share. 2.5% of £9m upon completion Monthly PM fee of £5k and I will have an active involvement in the planning process."
>
> (Mr Alford to Mr Downer)
>
> Profit is net profit after all legal, professional, acquisition costs, funding costs, technical costs, stamp duty costs, etc. Project Management as we discussed I would like to sit down with you next week and agree how this works, then we can agree how you run it and fees. Everything else agreed."
>
> (Mr Downer to Mr Alford)
>
> "6.75% net profit after all standard costs noted below. And we discussed no excessive costs being introduced to reduce the profit. PM role/fee – ok

> lets sit down however you had previously agreed £5k per month. We are then all agreed. Confirmed."
>
> (Mr Alford to Mr Downer)

218. The subject line of the email chain which contained these emails was "Quay House Fee Proposal". Mr Downer confirmed in cross-examination that £225,000 was 2.5% of £9 million and that he paid it on completion. It was also his evidence that he did not begin to pay Mr Alford a monthly retainer of £5,000 until about 2017 and that he stopped making the payments on the sale of Quay House (although he could not recall the month in which they ceased). Finally, he also said that in 2017 he and Mr Alford agreed that the initial £225,000 would come off the "top line figure".

(2) Ensign House: The Retainer

219. It was Mr Downer's evidence that on 17 March 2015 he met Mr Alford in Monaco and agreed in principle that EHL would pay Mr Alford 7.75% of any profit which it realised on Ensign House together with an upfront cashflow payment of £150,000 and that on 23 March 2015 he met Mr Alford at Gatwick Airport and confirmed his terms. In cross-examination Mr Downer gave further background to this agreement. He said that Mr Alford had become a personal friend and had attended his stag weekend and wedding in January and February 2015 and then visited Mr Downer in Monaco before the meeting at Gatwick on 23 March 2015.

220. There was no contemporaneous record of the agreement for Mr Alford's retainer in relation to Ensign House. However, by email dated 20 July 2015 and timed at 11.10 am Mr Alford wrote to Mr Downer setting out the terms which he understood to have been agreed by them in relation to both retainers:

> "As requested on Friday. A note to confirm our agreement for Ensign House/EH. To recap, we have an agreement for QH of 6.75% profit share once property sold. We agreed £125k as an upfront cash flow payment. We discussed and agreed in principle back in March at Gatwick Airport a profit share of EH 7.75% and £150k upon signing when we will have a tradeable asset upfront cash flow payment. A marginal increase on QH as the deal is an option agreed at a very good price by me after many months of liaising/negotiating with Paul Holiday/EH stakeholders with considerable uplift subject to planning permission. Pls confirm the above is as you understand for EH."

221. The subject line of Mr Alford's email was "EH – QH". By email also dated 20 July 2015

and timed at 11.30 am (i.e. 20 minutes later) Mr Downer forwarded this email to himself under the subject line "Terry Proposed Fee Agreement Ensign House". Mr Downer accepted that he did not reply to this email or confirm his agreement to its terms and Mr Seitler put it to him that he did not regard these terms as binding (as reflected in the subject line). Mr Downer did not accept this and said that he confirmed these terms orally to Mr Alford in a telephone conversation shortly after the email. He could not explain why he did not reply to the email itself. After exploring this issue, Mr Seitler put the following case to Mr Downer:

> "MR SEITLER: What I'm going to suggest to you, Mr Downer, is in fact that what's happening here is that there was only a discussion in outline terms in Gatwick Airport in March 2015 and in fact what happened was that Mr Alford or you mentioned the lack of clarity as to terms and that there was loose ends from Gatwick and that's what prompted Mr Alford to write to you on the Friday. That's why you retitled it, "Proposed", because that was his proposal. And therefore, it's not correct to say that the agreement was done and dusted in Gatwick in March 2015. In fact, it was done and dusted, on your account, when you responded to him shortly after the 20 July email. A. Yes, as I say, my recollection was because I know he came to see me because he knew I was going to Jersey specifically and I don't come through the UK very often, and he knew I was going to Jersey, so he wanted me to get ratification and then obviously he sends – and I thought -- I told him then, that's dealt, it's sorted in Jersey, I've spoken to them about it. Then, obviously, he sends this in, and I have just titled it up, but I'm adamant that was the agreement and I spoke to him -- I don't recall when -- and confirmed those terms."

222. Negotiations between Mr Alford and the Suiteholders took far longer than Mr Downer and Mr Alford had anticipated for reasons which I have explored. By email dated 30 June 2017 Mr Alford wrote to Mr Downer saying that his cash flow was "really tight" but reminding him that he had brought in £500,000 from Verum Victum and that Quay House was "back on track". He then stated:

> "Im hoping we can agree an advance of £10k against Ensign Option being signed – which im very confident will happen over next 6 to 8 weeks, by Sept latest. I will pay back £10k from the £200k we've agreed upon signing Option. Apologies for having to ask for an advance but don't think its unreasonable bearing in mind how much time I spend on deal and how close we now are to unlocking this site and I wouldn't unless I had to."

223. On the same day Mr Downer pointed out to Mr Alford that it was costing him £250,000 per year to hold Quay House. However, he offered to pay Mr Alford a development

management fee or "DM" fee of £3,000 per month until the end of the year. Mr Alford replied the same day stating that he only needed the cashflow payment until the option agreement was signed and the "agreed £200k paid". He proposed a fee of £4,000 per month until the option fee was paid and stated: "I wouldn't expect a DM fee once £200k settled." Mr Seitler put this email chain to Mr Downer and suggested that he was stringing Mr Alford along making him believe that he had agreed his terms when he had not really done so:

> "MR SEITLER: So he replies -- remember he has already referenced 200,000 "we have agreed" and you don't pick that up in any way or contradict it or put him right, set the record straight. A. I agree, I didn't. Q. You didn't? A. I agree. Q. Instead, you write what you write and then he reiterates the 200 again. He says: "Thanks. Appreciate DM fee, I only need cash flow until EH Option signed and agree £200k paid." And he actually repeats the 200 in every paragraph of this email, doesn't he? A. He does. Q. And you didn't respond to this, did you? A. No, because he was relentless and it was just my way of dealing with it because he was a desperate person. Q. Hang on, he is a friend of yours? A. Sorry. Q. Isn't he? He's a friend of yours? A. Yes, he is a friend, or he was. Q. He has mentioned now, on 30 June -- he has mentioned 200,000 four separate times, hasn't he, three times in the top email and once in the 10.55 email, yes? A. Yes, I agree. Q. Isn't the real reason you are not picking it up because you had agreed 200,000 with him? A. No, I hadn't. Q. So you are just happy for people to say things that you know are not true and you just let them go, do you? Is that the type of person you are? A. Not at all. Q. So why are you just letting it go? A. Because it was my way of dealing with it. That's just how I dealt with it at the time. Q. But this is the man you are working with every day, isn't it? A. Yes, I'm speaking to him multiple times per day sometimes or per week, yes. Q. Did you have in mind that he was trusting you? A. In what respect? Q. Did you think he regarded you as a trustworthy person to be in business with? A. Yes. Q. So why are you allowing him to believe something that's not right, namely that £200,000 had been agreed? A. Because, as I've said, he was just relentless asking for money from me and I also knew from friends that he owed several other people large amounts of money. Q. But, Mr Downer, you keep repeating the same thing. It's not an answer to say the reason why you didn't contradict somebody, somebody you are working with at this time, saying something wrong four times is because he was always asking for money. It doesn't follow. A. I accept I could have dealt with it better but it was just my way of dealing with it. I'm a busy person. Q. No, what's really happening here is that you are deliberately ignoring the 200,000 because you are trying to maintain maximum flexibility in your dealings with him because you are stringing him along, making him think that he has agreed more than you think he has and then at the end of the day you can turn round and refuse to pay him the higher amount. That's why you are ignoring him. You are parking the issue in order to give yourself maximum flexibility, aren't you? A. No, it's not the case. At around the

> same time, I think I mentioned, my Lord, in the case, I did him a reference -- a very strong reference -- he wouldn't have got it without me -- to Shawbrook Bank for a refinance of his mortgage, which he begged me to do. Q. What's that got to do with anything? A. I was helping him out. He was desperate for cash, I was doing what I could. Q. If you are so kind to him and so transparent, why are you not telling him, "We haven't agreed 200; it's 150." A. Because it was just my way of dealing with it -- said no, can I have this instead, can I have that, can I have this. Q. What were you trying to achieve by ignoring these four references to 200,000, what was your objective? A. If I had just said no, he would have said, can I have this instead, can I have that instead, and I had to draw a line under it. Q. Is he not entitled to know where he stands in his agreement with you? A. Yes, I've said I should have been straighter with him and just said no. I accept that. It was just my way of dealing with the situation. Q. Were you trying to avoid conflict with him? A. Probably. But, as I say, I was worried if I said no, he would just ask for something else. Q. No, you were worried that if you had said no or clarified the relationship in any way, he would have stopped acting for you? A. Not at all. Q. And stopped working his socks off on Ensign House? A. Not at all, when I was doing him mortgage references and he was raising hundreds of thousands of pounds."

224. Mr Downer's birthday was 24 October 2017. By email dated 22 November 2017 Mr Alford wrote to him again referring to a discussion which had taken place before his birthday and setting out the new terms which he said had been agreed. These differed substantially from the terms set out in his email dated 20 July 2015:

> "As discussed and agreed before your birthday, I think its important we have our agreement signed off by Jersey for good order. Certainly now QH back on track and EH close to signing after many years work on my part for EH and QH post CIT.
>
> To recap QH deal
>
> 6.75% Net profit share of planning gain uplift/sale before any third party payment STPP for EH. (I did try to negotiate 10% at time- however you mentioned having to employ development partner/CIT) We need to settle Andy deal – he's on £500k as agreed of which £100k been paid on purchase. So £400k to settle from QH. We can discuss how we deal with
>
> EH Option deal
>
> 15% Net profit from planning gain uplift/sale – we agreed at Heathrow when we met back in June (as deal an option and you aren't having to fund purchase of site) invoice £200k on LH signing/exchanging Option – I did ask for £250k we shook on £200k – since then I've had Paul asking for money on signing I'm funding from £200k."

225. Mr Downer did not reply to this email either by accepting these terms or by rejecting them on the basis that they had never been agreed. Mr Seitler pressed Mr Downer on Mr

Alford's suggestion that they had shaken hands on these terms and asking him why he did not reply challenging this email if it was not true. Mr Downer conceded that it would have been much better if he had replied to this email and Mr Seitler then put the following explanation to him:

> "Q. Yes. You see, what I'm saying is you are trying to maintain maximum flexibility so that, when it comes to it, when it all happens, if it all happens, you maybe don't pay him anything, just like when Quay House sold and he didn't get a penny. A. Because he wasn't due a penny. Q. Yes. What you are doing is you are keeping the flexibility, in order to then turn round and do a deal with him over his fees, short of what he would have got if he had a formalised, written agreement. A. Not at all. Q. You see, as it stands, as it stands, the difference between what you say the terms with Mr Alford were and what he thinks the terms were, is worth about £1.5 million. It's shown in the fact that he thinks he is on 15 per cent net profit. Do you accept that £1.5 million would be a life changing amount of money for Mr Alford? A. For Terry? Q. Yes. A. I don't know if it would be life changing, the way he spent, but it's a large sum of money. Q. Well, you said he was a desperate man. A. He was a desperate man. Q. He owed people money. It's not unreasonable for him to want an agreement in writing, when anybody can see, even at this point, that there is £1.5 million worth of ambiguity in the arrangements between you? A. But, my Lord, we work in a business where massive figures are bandied about all the time. It's just a commercial reality of the business. Q. What's really happening here is you are dangling the possibility of very big payments, 1.5 million, 3 million, in front of him, to keep him working for you? A. Not at all. Q. So he doesn't do a deal -- A. If he was due any money -- Q. -- with another buyer. A. If he was due any money, he would have paid. I have been in this business for 30 years and, without being big-headed, I haven't got to where I've got to by not paying people's profit shares. Q. You see, the reality is, especially when it comes to Ensign House, you haven't got any sort of position, you are not prepared to put any money down even for a blocker, so the position is vulnerable and you control Terry by the promise, the possibility, of large commission payments to him? A. Not at all. Q. Without actually committing to terms in writing that would bind you to pay them. A. It's not the case."

226. On 16 February 2018 Mr Alford chased Mr Downer again in relation to the terms of his retainer and his fees. He forwarded his earlier email dated 22 November 2017 and then asked the following question: "Any news with our draft agreement as per our agreed below terms?" He also stated that he had mentioned it several times since November and that "you noted Lisa is drafting the document – nothing received as yet". He followed this up with a detailed commentary on the work which he had put in on Quay House and then continued:

> "We are close to finalising the EH Option agreement after nearly 4 years since I first introduced the deal to you in June 14 Can you let me know when I will receive a draft, as you have agreed we need a document for Jersey to sign off?"

227. On the same day Mr Downer replied stating that it was on his list to go through with Ms McGinn but invited Mr Alford to send him a draft agreement. Under cover of an email dated 1 March 2018 Mr Alford send him a draft letter in relation to his retainer for Quay House and a draft letter for his retainer in relation to Ensign House and asked Mr Downer whether he should send them to Ms McGinn. Mr Downer replied: "I will read first and send to her". The draft letter for Mr Alford's Ensign House retainer was addressed to Mr Whale in Jersey and provided as follows under the headings "Ensign House" and "Ensign House Limited":

> "I am writing to you in connection with my meeting with John Downer which occurred in June 2017 when it was agreed that I would receive 15% of the net profit from any planning gain or uplift or any sale of the above mentioned property. The 15% figure was agreed on the basis that as this is an option agreement, first introduced by myself in June 2014, and subsequently negotiated by myself over several years, Ensign House Limited is not having to fund the purchase of the site therefore in essence my 15% net profit share will be easier to determine.
>
> It was further agreed that on the leaseholders signing the Option Agreement in the agreed form and subsequent exchange of the Option Agreement I will be permitted to invoice Ensign House Limited the sum of £200,000.00 which will be discharged within five working days of exchange of the Option Agreement.
>
> I would be grateful if you would acknowledge the above mentioned agreement by arranging for the authorised officer to sign the enclosed duplicate letter for and on behalf of Ensign House limited. The agreement will of course bind any associated company if they enter into the Option Agreement or any successors in title."

228. On 5 March 2018 Mr Alford chased Mr Downer asking him whether he had forwarded the agreements to Ms McGinn and on 9 March 2018 he wrote to Mr Downer again asking him to get Ms McGinn to respond. Mr Downer replied: "She will look at it next week." On 19 March 2018 Mr Alford chased Mr Downer again stating that he had received nothing and commenting: "Been asking for weeks now". Ms McGinn's evidence was that Mr Downer did not send either of these agreements to her (or at least not until after the sale of Quay House):

> "Q. And just so I'm clear in my mind, we know you say you weren't involved in the fee negotiations in relation to Terry Alford. Did you ever discuss Mr Alford's fee arrangements with Mr Downer? A. No. Q. And then Mr Alford asks: "Did you forward the attached to Lisa?" At the top of page 2, and then: "Can you please ask Lisa to respond re attached agreement letters?" And then: "She will look at it next week." And then: "John. Still nothing from you or Lisa on attached -- can you pls deal with? Been asking for weeks now." All this time you are not, for the avoidance of doubt, being sent the agreement that Terry Alford has drafted; correct? A. Yes."

229. On 23 May 2018 Mr Alford sent Mr Downer the Option Incentives Table: see Section I(2) above. Less than ten minutes later Mr Downer sent it on to Mr Mulryan and Mr Mee. At almost exactly the same time Mr Alford forwarded on to Mr Downer an email chain beginning with his email dated 22 November 2017, including their exchanges on 16 February 2018 and ending with their exchanges during March 2018. In his email dated 23 May 2018 he stated that: "I know you said its fine agree however can you pls confirm our agreement with Jersey – attached if you haven't already". Mr Downer did not reveal that he had used the Option Incentives Table in his negotiations with Rockwell but replied: "That's why im trying to sort this table out to explain the deal fully to them!" Mr Downer accepted that this was an excuse and when Mr Seitler asked him why he was not prepared to give Mr Alford a fee agreement, his evidence was as follows:

> "Q. Why are you not giving Terry Alford a fee agreement? He is working for you. We see he is working day in, day out, he is chasing and chivvying with relentless optimism, he is working his fingers to the bone for you, Mr Downer. Why are you making an excuse as to why you won't give him a fee agreement? What's going on? A. Because I think my way of dealing with this, my Lord, I was just pushing him off because, as far as I was concerned, we had a fee agreement in place and this was just Terry, unfortunately, with his hand out again, looking for more money and looking for a renegotiation of existing terms."

230. Mr Seitler returned to the drafts which Mr Alford had sent to Mr Downer on the following day. Mr Downer accepted that he should have given a negative answer to Mr Alford when he repeatedly asked whether the terms were agreed. The following exchanges then took place:

> "MR SEITLER: Do you accept that you allowed Mr Alford to believe that the terms of his agreements, as put before you in writing in those two letters, were agreed? A. For the 15 per cent? Q. Yes, the terms of the two letters. Do you accept -- A. Yes, I led him to believe it was going to be

> sorted. I accept that. Q. Right, thank you. You allowed him to think that the terms of those two formal letters were agreed -- A. The enhanced terms, but I still maintain I had an existing agreement. Q. Let me finish my question, if you will, Mr Downer. A. Sure. Q. I just want to get this clear in my mind, so I understand it. You allowed Mr Alford to think the terms of the two letters were agreed, even though you believed they weren't? A. Of the 15 per cent letter, but I already had an agreement for the 7.5 per cent. Q. You allowed him to think he was getting the 15 per cent profit share plus 200,000 on signing. That's what he thought since Heathrow. A. Because, as I've said, it was just a convenient way to deal with it, to push him off. Q. You allowed him to labour under an illusion, didn't you? A. For the reasons I've given, yes. Q. So the position is -- let me see if I understand this correctly, because I may not. A. Mm-hm. Q. The position is he thinks he is getting 15 per cent profit and £200,000 on execution and you think it's the Gatwick deal of 7.75 per cent profit and 150,000. That's it, isn't it? That's the extent of the mismatch in thinking? A. Yes. Q. So there is a big difference between what he thought the arrangement was and what you thought the arrangement was; correct? A. Yes, he wanted a new arrangement."
>
> "Q. And that's how you operate, isn't it? That is your way of working, isn't it, just like you let people in your inner circle think that your negotiating position is no conditional contract under any circumstances, where, in fact, you might consider it. In the same way as that, you let third parties like Mr McGarry think you've got options over parts of Ensign House and you let Rockwell think that options are being signed at the moment and now, in the same way, you are allowing Mr Alford to think he is getting twice the amount that you think he is getting. It's the same, same way of dealing with people, isn't it, allow them to labour under the illusion of a false understanding, to have a false understanding and you say nothing and don't contradict it? That's your way of doing it. That's clever, I see it's clever but that's your way of doing it, isn't it? A. Absolutely not. Q. You are giving him just enough reassurance so that he carries on working his fingers to the bone for a pay-out but really you are preserving yourself with all the wriggle room necessary to make sure, as he did, he got nothing. That's the way of operating opposite Terry Alford, as it is opposite other third parties? A. Absolutely not."

(3) Quay House: Mr Alford's fee

231. Mr Downer and Ms McGinn kept the sale of Quay House confidential and, as I have explained, the Suiteholders only learned about it in October 2018 from the article in Property Week. Mr Downer and Ms McGinn did not inform Mr Alford about it either until after exchange of contracts. By email dated 3 July 2018 Ms McGinn wrote to Mr Downer asking whether Mr Alford knew about the sale. Mr Downer's reply was: "Yes told him". Mr Downer could not recall when precisely he told Mr Alford but he accepted that he must have told him after exchange and before completion.

232. On the sale of Quay House Mr Alford was entitled to a profit share of 6.75%. On 28 August 2018 Mr Downer spoke to Mr Alford about his fee and by email dated 29 August 2018 Mr Alford wrote back to him stating as follows:

> "I've slept on yesterday call, I did call you to run through final costs. There is no way the budget/costs for QH can be up to circa 20m. That would be 11.5m of costs over 4.5 years – that's 212k per month since completion in Feb 14… I am disappointed you sold the site when we were within 6 months from securing planning consent for 38 floors, which would have generated a value in excess of 35m however I completely understand you have had enough. I really hope you don't knock me on my share of the deal after all the time effort and stress of the last 5 years, bringing in Ray's 500k and turning around the relationship with Tower Hamlets. I have invested 5 years into the deal much of that time spent undoing George K fuck up. I also don't want to fall out with you over this we are friends and also still need to work together on EH, again extremely frustrating although very close to exchanging again after 4 years effort."

233. Mr Downer replied stating that he understood Mr Alford's frustration and that Mr Lal was pulling together a spreadsheet of the costs. He also assured Mr Alford that "there is nothing to hide here". On 4 September 2018 Mr Lal sent a link to an Excel spreadsheet to Mr Alford which he had called "quay house UK and jersey summary of invoices.xlsx". He copied it to Mr Downer and it showed that there had been a loss on the transaction of £601,946.17. Mr Lal had calculated this loss after deducting £5,273,278 in interest. He had shown the £500,000 non-refundable deposit paid by Verum Victum as a credit but he had set off against this credit £389,841.24 in costs paid by Investin Bankside.

234. On 5 September 2018 Mr Downer and Mr Alford must have spoken because on that day Mr Alford wrote to Mr Downer again stating that he had been in shock since their call that afternoon. He continued as follows:

> "There is over £5.3m of profit which I have put my life on hold for. The letter noting 38 floors support from Tower Hamlets secured the sale with Mulryan. You would not have had that letter without my contacts and efforts, fact! We never discussed and you never once mentioned that you would gain a preferred profit over me. Why didn't you mention this before now? We did agree a profit share – that I would receive 6.75% of the net profit after all costs. That £355k profit represents a life-changing amount for me, to escape and move on from my situation and 5 years of work and stress. I put my complete faith in you on this project and acted in your best interest at all times, trusting that you would keep to your commitment to 'get me straight', your words not mine. The deal has made a profit and you are not prepared to offer me anything. I accept there's a cost for money but

> not 64%. You refinanced and took out 2m upon purchase and borrowed most of the costs represented by 5.8rn of finance costs for the deal. How can you claim 5.3m of cost on your money when you borrowed practically all the of the cost at expensive rate to fund the project in the first place. I am looking at financial ruin and potential bankruptcy on this after the time and effort I have invested with no financial outcome."

235. Mr Downer did not reply to this email. Instead, he wrote to Ms McGinn suggesting that they should bring in Rockwell to deal with the outstanding issues provided that it reimbursed EHL for its fees:

> "He currently has the hump over the Quay House sale, I think we bring Donnal in on this now and get them to take over the option on signing subject to them reimbursing our fees to date on the Ensign deal and they pick up the Option fees and indemnify us for the PGs over the rents etc and subject to agreeing commercially acceptable terms. Obviously they can sort the Insurance and LAMA situation also."

236. I have already dealt with Rockwell's continued involvement. Ms McGinn's response was to ask Mr Downer whether she should no longer copy Mr Alford into any of the email traffic. His response was: "Certainly nothing involving Gowlings and Donnal [sic] but everything else you can do as normal please". Mr Seitler suggested to Mr Downer that he was washing his hands of Ensign House:

> "Q. There we are, there is an email further down the line that I will be saying is the absolute end of the line, but this is washing your hands, isn't it? A. No. Q. Of course it is? A. No. Q. Of course it is? A. No. Q. You are actually telling Lisa McGinn, "Get Rockwell to pay our expenses and I'm out of Ensign." A. No. Q. What do you mean "no"? Why are you saying no? It's ridiculous, it says it in black and white. A. Because it's the truth."

237. Following this exchange, I also asked Mr Downer whether he no longer trusted Mr Alford in relation to the negotiation of the options and he accepted in graphic terms that he was concerned about Mr Alford's reaction to the sale of Quay House:

> "A. No, my Lord, I didn't trust him in negotiations to Rockwell because, when he knew that Rockwell had purchased Quay House, it was like holy water on the devil in terms of his attitude to Rockwell. Donal is this, Donal is that, they've stolen it off us, it's a bad deal, so you know, with that attitude, at that time, I didn't want him dealing with Donal or Nick and certainly I didn't want him creating a bad reputation for me with Donal because Donal is also a Monaco resident and it's a bit of a village and we see each other regularly. So I didn't want my name slandered."

238. In the event, Mr Alford wrote to Mr Downer again on 7 September 2018 describing the effect on him of the sale of Quay House and pleading for some kind of fee:

> "This is difficult for me to write, you didn't respond to my email of Wed night. Tbh, I'm still in a bit of shock and trying to deal with this situation. Bottom line for me is I am fucked and pretty broken after 5 years of all-consuming effort on QH. Over the last 3 years QH and EH has been a full time job. For the deal to be sold and for me to receive nothing at all is devastating and I don't know what I'm going to do. This is 1 deal of many for you, I know it was a huge stress and financial risk, however you have sold it got your money back with 5m of interest, you can move on. I can't move on, I genuinely do not know how I'm going to try to move forward if the last 5 years of QH has come to nothing…. Can we pls discuss some kind of nominal fee- even if against EH which we be exchanged within the next week or so I which I didn't have to write this but I do not know what to do. I also thought we were friends – I know how you are in business but this is my life."

(4) Quay House: costs

239. The Excel spreadsheet which Mr Lal sent to Mr Alford contained three tabs which contained the following entries:

(1) Tab 1 (rows 16 to 96) contained a numbered list of 75 payments accrued or paid between 14 February 2014 and 12 March 2014. These payments were numbered 1 to 75.

(2) Tab 2 (rows 19 to 92) contained a list of 73 payments accrued or paid between 9 May 2014 and 29 September 2015. These payments were numbered 76 to 148.

(3) Tab 3 (rows 24 to 126) contained a list of 101 payments accrued or paid between 3 December 2014 and 28 June 2017. These payments were numbered 149 to 259.

(4) Tab 3 (rows 127 to 343) contained a list of 216 payments which were undated but were numbered 260 to 476.

(5) Finally, tab 3 (rows 344 to 359) contained a list of 16 payments which were unnumbered and undated.

240. Mr Seitler provided me with a hard copy of the Excel spreadsheet and he took me to twelve of the unnumbered and undated payments at the end of tab 3 and asked me to annotate them. I set out the payments in Table 1A and Mr Seitler's annotations are in the

second column:

Table 1A

Row		Payee	Gross	VAT	Net
344	A	Jones Day	£36,000.00	£6,000.00	£30,000.00
345	B	Bolaji Ranson	£8,332.80		£8,332.80
346	B	Bolaji Ranson	£8,332.80		£8,332.80
347	C	DKLM Solicitors	£1,440.00	£240.00.00	£1,200.00
348	D	Jones Day	£22,500.00		£22,500.00
349	E	Jones Day	£16,349.79		£16,349.79
350	F	Carey Olsen	£1,260.00		£1,260.00
351	G	Wilberforce	£4,950	£825.00	£4,125.00
353	H	Sent to BJ	£98,820.00		£98,820.00
354	J	BJ	£52,036.98	£8,612.66	£43,424.32
355	K	BJ Fee	£2,400.00	£400.00	£2,000.00
356	L	BJ undertaking	£10,600.00		£10,600.00

241. Mr Seitler compared these unnumbered and undated payments which Mr Lal had added to the spreadsheet with the costs schedule headed "Summary of Costs" which Mr Lal had also prepared and which Mr Downer had forwarded on to Mr Mee on 21 June 2018: see Section I(3) (above). Again, he asked me to annotate a number of items on this schedule and, again, I set out the entries in Table 1B with Mr Seitler's annotations in the first column:

Table 1B

	Summary of Costs	Gross	VAT	Net
B	Bolaji Ranson	£16,665.60		£16,665.60
C	DKLM Solicitors	£1,440.00	£240.00	£1,200.00

D	Sent to Jones Day	£22,500.00		£22,500.00
A	Sent to Jones Day	£36,000.00	£6,000.00	£30,000.00
E	Sent to Jones Day	£16,349.79		£16,349.79
F	Carey Olsen	£1,260.00		£1,260.00
G	Wilberforce	£4,950.00	£825.00	£4,125.00
H	Browne Jacobsen Undertaking	£24,400.00		£24,400.00
H	Browne Jacobsen Undertaking	£5,280.00		£5,280.00
H	Browne Jacobsen Undertaking	£25,340.00		£25,340.00
H	Browne Jacobsen Undertaking	£1,200.00		£1,200.00
H	Browne Jacobsen Undertaking	£28,203.73		£28,203.73
H	Browne Jacobsen Undertaking	£11,350.00		£11,350.00
H	Browne Jacobsen Undertaking	£3,046.27		£3,046.27
J	BJ Bills	£52,036.98	£8,612.66	£43,424.32
K	BJ Fee	£2,400.00	£400.00	£2,000.00
L	Browne Jacobsen Undertaking	£10,600.00		£10,600.00

242. There is a clear correspondence between all of the entries in the first table and the entries in the second table apart from the payments to Browne Jacobson. However, Mr Seitler pointed out that the total of the seven entries which were described as "Browne Jacobsen Undertaking" on the summary of the costs for Ensign House sent to Mr Mee amounted to £98,820 and corresponded to the payment on row 353 of tab 3 of the Quay House spreadsheet, i.e. entry H in Table 1A (above)).

243. I am satisfied that Mr Seitler's analysis of the Quay House spreadsheet and Ensign House

costs schedule is accurate and I find that entries A to H in the Excel spreadsheet which Mr Lal sent to Mr Alford on 4 September 2018 and set out in Table 1A were expenses which EHL had incurred in relation to Ensign House and not expenses which QHL had incurred in relation to Quay House. I deal with the consequences of this finding below but return now to the facts.

244. Mr Alford found it difficult to understand the Quay House spreadsheet even with the assistance of Mr Daire Gilmore, an accountant or financial adviser, whom Mr Downer had recommended. By email dated 18 September 2018 he wrote to Mr Downer and Mr Lal for clarification of a deduction of £2 million and how the interest payments had been calculated. On the same day Mr Lal replied stating that the £2 million was an adjustment to the £11 million price paid by QHL to reflect the fact that it involved an inter-company transfer to move the asset to Jersey and that the schedule reflected the original price of £9 million. This was, therefore, an adjustment in Mr Alford's favour although it did not ultimately make any difference. Mr Lal also attached a schedule of loan interest and explained that Mr Downer had charged QHL interest at 10% per annum.

245. Once he had put the Excel spreadsheet to Mr Downer, Mr Seitler returned to Mr Alford's email dated 7 September 2018 and Mr Downer accepted that he did not reply to this email either. I then asked him whether he thought he ought to have made some payment to Mr Alford and his evidence was as follows:

> "A. Sorry, my Lord to cut across you. But I had made other payments. I knew he was borrowing money. This is the trouble with this Quay House situation. Prima facie everybody sits here and says, oh, John Downer he got £4 or £5 million but they don't think John Downer having sleepless nights, writing cheques out, stress, finding £17 million, borrowing sites -- luckily, I owned a lot of other assets and I could borrow money off other sites on a low leverage basis and cheaper, and I was under a great deal of stress myself and it was -- the buck stopped with me at the end of the day and I had to, you know, get on with it, and I just followed -- I know, I followed professional advice, I'm paying these people a lot of money, so I followed what they say."

246. Although Mr Alford was shocked by the failure to pay his profit share on the sale of Quay House and Mr Downer was worried about his reaction to this news, Mr Alford continued to ask Mr Downer to sign an agreement in relation to his retainer for Ensign House. Between 3 October 2018 and 10 October 2018 they exchanged the following emails:

> "Re our agreement on Ensign, draft attached – can you advise who I should address attached to, Stephen Whale- Darren English?? Now exchange immanent I would like to have letter signed off by Jersey."
>
> (Mr Alford to Mr Downer, 3 October 2018)
>
> "Can you pls confirm who I need to address letter to at Jersey? I have been asking for some time"
>
> (Mr Alford to Mr Downer, 8 October 2018)
>
> "You said your Solicitor was drawing up an agreement, I was waiting to see that?"
>
> (Mr Downer to Mr Alford, 8 October 2018)
>
> "I need to confirm name at Jersey for him to send – why I keep asking..."
>
> (Mr Alford to Mr Downer, 8 October 2018)
>
> "Let me double check with Roger the full name and address"
>
> (Mr Downer to Mr Alford, 8 October 2018)

247. Later that day, Mr Downer asked Mr Lal to send him EHL's name and company address and Mr Downer forwarded on those details to Mr Alford when he had received them. He also agreed that Mr Alford should send the agreement to Mr Whale. On 8 October 2018 Mr Alford forwarded on a draft from his solicitor and on 8 October 2018 Mr Downer finally forwarded this on to Ms McGinn. I was unable to find this draft in the trial bundle but it appears to have been common ground that it was the draft which Mr Alford had sent to Mr Downer eight months earlier. On the same day Mr Alford wrote to Ms McGinn directly, stating that he had chased Howard Hughes and bringing her up to date with the negotiations. By this time he was already dealing with the fallout from the Property Week article and the news that Investin had sold Quay House.

(5) The Statements of Case

248. Ms Wicks contended throughout the trial that the Defendants had admitted that there was a binding contract of retainer between EHL and Mr Alford and that having failed to withdraw that admission they remained bound by it. Mr Seitler's position was more nuanced. He accepted that the Defendants had admitted the existence of such retainer but submitted that they had always made it clear that it had come to an end in July 2018. He also contended that they had always denied that any contract (whenever formed or terminated) gave rise to a fiduciary relationship. Before setting out my findings in relation to the contract (if any) between EHL and Mr Alford I consider the parties' statements of case. Ms Wicks and Mr Lee provided a detailed summary of the statements of case both

in their original form and as amended with their closing submissions. Having considered all of the amendments it is only necessary, in my judgment to set out the relevant passages in their final form.

(i) The Re-Re-Amended Particulars of Claim

249. EHL's pleaded case in relation to Mr Alford's retainer in relation to Ensign House was set out in paragraphs 5, 15, 29, 58 to 60 and 83. I set out those paragraphs in their final form and as amended:

> "5. Mr Alford is a property introducer who until recently worked as a self-employed agent or representative of EHL and now works for Colliers International in Vietnam."
>
> "15. In summer 2018, following receipt of an unsolicited offer for Quay House, Investin Quay decided not to proceed further with the proposed development of Quay House and sold Quay House to a special purpose vehicle called Quay House Admirals Way Land Limited which had been established by Rockwell Properties Limited ("Rockwell")…."
>
> "29. EHL entrusted Mr Alford with the conduct of discussions with FEC UK as well as the on-going discussions with one remaining owner with whom terms needed to be agreed, namely Lama."
>
> "58. As explained above, Mr Alford was engaged by EHL as a self-employed agent or representative to assist with obtaining the proposed option and also, following FEC UK's approach to EHL to progress the discussions with FEC UK.
>
> 59. EHL placed trust and confidence in Mr Alford in relation to both matters and had a legitimate expectation that, in dealing with them, Mr Alford would not utilise his position in a manner which would be adverse to EHL's interests and/or promote his interests.
>
> 60. It follows that Mr Alford's relationship with EHL was fiduciary in nature and that he owed (among others) the following fiduciary duties to EHL: a duty of loyalty, a duty to avoid conflicts of interest, a duty to act in good faith, a duty not to profit from his position, a duty not to act for his own benefit or for the benefit of a third person, and a duty to take reasonable care to protect EHL's interests."
>
> "83. If it was Mr Connolly, then Mr Connolly, and, through him, FEC UK and/or EHFL, wrongfully, and with intent to cause damage to EHL, procured breaches by Mr Alford of his contract of engagement with EHL. Mr Alford's contract of engagement with EHL contained implied terms mirroring or giving effect to the fiduciary duties referred to in paragraph 60 above which were breached by Mr Alford in the manner explained in paragraph 61 above."

(ii) Further Information

250. By a request dated 9 December 2020 the Defendants requested EHL to provide further information of its case in relation to both Mr Alford's retainer for Quay House and his retainer for Ensign House. In the reply dated 9 February 2021 it was made clear that there were two separate retainers and EHL's case in relation to Ensign House was pleaded as follows:

> "(1) In 2015, after the prospect of obtaining an option in respect of Ensign House had become a serious possibility and EHL had been established for the purpose of acquiring the option, Mr Alford was separately retained by EHL to progress discussions for the proposed option with the owners of interests in Ensign House.
>
> (2) The retainer was agreed between Mr Alford and Mr Downer in face-to-face discussions at Gatwick Airport in March 2015 and confirmed in an email from Mr Alford to Mr Downer on 20 July 2015.
>
> (3) The retainer was reflected (among other things) in: (a) EHL's conduct in entrusting Mr Alford with responsibility for carrying on discussions with the owners of interests in the Property on its behalf (and providing him with an Investin email address and business card to enable him to do so); and (b) Mr Alford's conduct in carrying on such discussions on behalf of EHL and reporting back to EHL regarding the discussions.
>
> (4) Whilst the retainer remained on foot, Mr Alford was, again, free to work for himself or other principals in respect of projects other than Ensign House but was not free to work for himself or other principals in respect of Ensign House. Such restriction was necessarily to be implied (on the grounds of business efficacy and/or as an obvious inference in all the circumstances) from the role Mr Alford had agreed to undertake under the retainer. Further or alternatively, such restriction arose from the fiduciary nature of Mr Alford's role."

(iii) The Re-Amended Defence

251. The Defendants admitted the existence of the retainer until July 2018. However, it is important to set out the relevant paragraphs and the reason why the Defendants contended that the retainer had come to an end. Again, I set out the relevant paragraphs in their final form and as amended, subject to one point. In the original Defence the Defendants had not admitted the exclusive nature of the relationship alleged in the Particulars of Claim at paragraph 29. But in their Re-Amended Defence they denied it:

> "5. It is admitted and averred that until July 2018, Mr Alford was treated as an agent by Investin Quay but save as aforesaid, no admissions are made to paragraph 5 of the Re-Amended Particulars of Claim."
>
> "15.2.1 The first sentence of the second instance of paragraph 15 of the Re-Amended Particulars of Claim is admitted and averred; 15.2.2. From

the time that Investin Quay agreed to sell Quay House to Rockwell, EHL's purposes in purchasing options in Ensign House were frustrated; 15.2.3. For one thing, the draft options then in play were all dependant on planning permission for Quay House, which under Rockwell's ownership was thereby no longer in the hands of Mr Downer; The whole purpose of the acquisition of options in Ensign House – which was hitting the rocks anyway due, not least, to Lama – fell away from July 2018; 15.2.5. This was reflected in statements made by Mr Downer to Mr Alford along the lines of "I'm done, you can do what you like with it" (referring to Ensign House) and the unilateral stopping of his small monthly retainer…"

"29. Insofar as paragraph 29 of the Re-Amended Particulars of Claim relates to a period after the disposal of Quay House in July 2018, that paragraph is denied. There was no agreement after that point (and it is ~~not admitted~~ denied there was one before that point) between Mr Alford and EHL for Mr Alford to work exclusively for EHL as opposed to his being a free agent, entirely at liberty to facilitate an arrangement with any party likely to complete a purchase of the relevant interests in Ensign House. As to the averment that there was only one remaining owner with whom terms needed to be agreed, namely Lama, paragraph 16 above is repeated."

"58. Paragraph 58 of the Re-Amended Particulars of Claim is admitted as regards the period up to July 2018, which was a time long before FEC UK's alleged approach to EHL referred to in paragraph 21 of the Re-Amended Particulars of Claim. Such relationship came to an end – as reflected in the small monthly retainer being paid to Mr Alford ceasing at that time – at that point, and was therefore not in existence at the time of the alleged approach.

59. Paragraph 59 of the Re-Amended Particulars of Claim is admitted as regards the period up to July 2018 but it is denied that EHL did, or was entitled to, place trust and confidence in Mr Alford in relation [sic] it purchasing an option from the owners of interests in Ensign House or selling EHL's shares to FEC UK or, after that point had a legitimate expectation that Mr Alford would not utilise his position in a manner which would be adverse to EHL's interests or promote his interests. After July 2018 Mr Alford was a free agent, as EHL must have appreciated.

60. Paragraph 60 of the Re-Amended Particulars of Claim is denied, and it is denied that Mr Alford's relationship with EHL was fiduciary in nature and that he owed fiduciary duties to EHL of the sort set out therein, as regards the period after July 2018."

"83. Paragraph 83 of the Re-Amended Particulars of Claim is denied, and it is denied that Mr Connolly, and, through him, FEC UK and/or EHFL, wrongfully, and with intent to cause damage to EHL, procured breaches by Mr Alford of his contract of engagement with EHL. Any such arrangement was over by July 2018. It is further denied therefore that any 'contract of engagement with EHL' contained implied terms mirroring or giving effect to the fiduciary duties referred to in paragraph 60 of the Re-Amended Particulars of Claim or which were breached by Mr Alford in the manner referred to in paragraph 61 above. At the relevant time FEC UK, EHFL and Mr Connolly believed that Mr Alford was a free agent, and

> was entitled to act as he did, and they had no knowledge of the existence or terms of any contract of engagement between Mr Alford and EHL."

(iv) Further Information

252. By a request dated 18 January 2021 EHL also requested that the Defendants provide further information of their case that the retainer had come to an end in July 2018 and to explain the apparent inconsistencies in the Defence. All four Defendants served a reply dated 12 March 2021 which was amended on 10 August 2022 (when DLA had ceased to act for Mr Alford and he had been debarred from defending the claim). In particular, it was made clear that the non-admission (and then denial) in relation to paragraph 29 related to the period after July 2018:

> "2. **Request under paragraph 5 of the Defence**: Please confirm (in the light of the admissions at paragraphs 58 and 59) that the non-admission of Mr Alford's position as a self-employed agent or representative of EHL is, at least as regards the period up to July 2018, an error and, if so, amend the Defence accordingly. **Response**: No such confirmation is given or is necessary. As is evident from paragraph 58 of the Defence, if not paragraph 5 itself, the non-admission in paragraph 5 of the Defence relates only to the allegation as to the recency of Mr Alford acting as self-employed agent of EHL: July 2018 is not recent, necessarily."
>
> "17. **Request under paragraph 29 of the Defence**: Paragraph 29 fails to address what is alleged in paragraph 29 of the Particulars of Claim. Please state whether it is admitted or denied that in and following January 2019 EHL entrusted Mr Alford with both the on-going discussions with Lama and the conduct of discussions with FEC UK. **Response**: Paragraph 29 of the Particulars of Claim does not specify the time period to which it relates. Paragraph 29 of the Defence seeks to remedy that imprecision by responding as regards the position after July 2018. In that sense, rather than failing to address what is alleged in paragraph 29 of the Particulars of Claim, that approach actually remedies such inherent imprecision. It is denied that in and following January 2019 Mr Alford was retained or entrusted by EHL: after the sale of Quay House the relationship had soured and was, although not dead, somewhat perfunctory."
>
> "29. **Request under paragraph 58 of the Defence**: Please explain how the admitted retainer of Mr Alford as a self-employed agent or representative of EHL is alleged to have ended in July 2018, giving details of any relevant notices or discussions alleged to have been given or to have occurred between Mr Alford and EHL. **Response**: The retainer came to an end when the monthly retainer that had been being paid to Mr Alford ceased, in July 2018, Quay House having been sold. Mr Downer telephoned Mr Alford at around this time and said he had sold Quay House and that since Mr Alford's retainer was based on Quay House, it was coming to an end. Shortly afterwards, Mr Alford's e-mail address at Investin was withdrawn. That the termination should occur in this way is

> not surprising: there was no formal written agreement between Mr Alford and EHL in the first place, Mr Downer having declined to provide one."

(v) The Correspondence

253. Under cover of a letter dated 28 July 2022 DLA served a draft Re-Amended Defence in which the Defendants withdrew the admissions made in paragraphs 5, 58 and 59 (above). They denied that Mr Alford was ever an agent of EHL and advanced the case that there was no binding or formal agreement between Mr Alford and EHL. By letter dated 29 July 2019 SCW objected to the Defendants withdrawing the admissions on the basis that the Defendants required permission to do so. By letter dated 8 August 2022 DLA invited SCW to agree to the withdrawal of the admissions in a spirit of co-operation and on the following basis:

> "5.2 Your client's case is that the retainer between EHL and Mr Alford was agreed between Mr Alford and Mr Downer in face-to-face discussions at Gatwick Airport in March 2015 and confirmed in an email from Mr Alford to Mr Downer on 20 July 2015: see the Claimant's First Response to Further Information on page 3.
>
> 5.3. However, on review of the emails between Mr Alford and Mr Downer it has become clear that neither party regarded that agreement as binding in and of itself. Instead, it was necessary to have EHL's Board in Jersey authorise the arrangement, and to agree to the final terms. On review of the disclosure, it appears that no such authorisation was given."

254. By letter dated 9 August 2022 SCW maintained their opposition on the basis that the relevant emails had been available since May 2020. By letter also dated 9 August 2022 DLA replied stating that they would serve a revised statement of case with the agreed amendments and let SCW have any application to amend paragraphs 5, 58 and 59 in due course. In the event, no application was made to amend those paragraphs or for permission to withdraw any admissions before trial. I made it clear to Mr Seitler during the trial that I would be unwilling to entertain an application for permission to withdraw the admissions given that the Defendants had chosen not to pursue their application.

255. I am satisfied that all four Defendants made a clear admission that Mr Alford was engaged by EHL as a self-employed agent or representative to assist with obtaining the proposed option or options over Ensign House. I am also satisfied that the only positive case which the Defendants advanced was that it came to an end in July 2018 when QHL stopped making the monthly payments of £5,000. Further, the basis of the retainer was

clearly set out in EHL's further information dated 9 February 2021 and if the basis for EHL's case had been unclear before that date, the Defendants could and should have applied to withdraw the admission. Finally, I am satisfied from the correspondence that the Defendants fully understood the nature of the case which they had to meet and the nature and extent of the admission which they had made.

256. I am not satisfied, however, that the Defendants ever made a clear admission that EHL was entitled to place trust and confidence in Mr Alford or that it had a legitimate expectation that he would not act adversely to its interests or promote his own interests even before 2018. Paragraph 59 of the Re-Amended Defence was ambiguous and EHL never sought clarification of it or further information relating to that averment. Moreover, the Defendants consistently denied that Mr Alford was a fiduciary. In my judgment, it was always open to them to argue that Mr Alford's retainer did not have the character of a fiduciary relationship or give rise to fiduciary obligations.

(6) Ensign House: Findings

(i) The Agreement

257. I accept Mr Downer's evidence that on 17 March 2015 in Monaco he agreed in principle with Mr Alford to pay him 7.75% of the profit from Ensign House and an upfront payment of £150,000. I also accept his evidence that on 23 March 2015 he met Mr Alford again at Gatwick Airport and confirmed these terms. Mr Alford's email dated 20 July 2015 provides direct support for his evidence and I find, therefore, that on 23 March 2015 Mr Downer agreed to pay Mr Alford 7.75% of any profit which it realised from Ensign House and an advance of £150,000.

258. I also find that Mr Downer and Mr Alford agreed that Mr Alford's profit share would be paid on the sale of Ensign House and that the advance of £150,000 would be paid when the Suiteholders entered into a binding agreement to grant options to EHL. In his email dated 20 July 2015 Mr Alford compared the terms of his Quay House retainer with the terms recently agreed in relation to Ensign House and it is clear from the context that the parties intended Mr Alford's profit share to be payable on the sale of Ensign House in the same way as his profit share from Quay House. Mr Alford also referred to the payment of £150,000 "upon signing". But I am satisfied that the parties understood this to mean the formalities necessary to give rise to a binding option agreement. Mr Alford

described this as a "tradeable asset" and EHL would only have had a tradeable asset if it had an enforceable chose in action.

259. In assessing whether to accept Mr Downer's evidence I have also considered the later emails and draft letter agreements which Mr Alford sent to Mr Downer. There was an issue between the parties whether Mr Downer agreed to an upfront payment of £200,000 in June 2017 and then to an increased profit share of 15% in October 2017 and Mr Downer did not accept in evidence that he had. However, I gained no real assistance from the evidence on this issue. Whether or not Mr Downer later agreed to these terms, I consider it highly improbable that Mr Alford would have agreed to act for EHL in the negotiations with the Suiteholders if Mr Downer had not agreed to pay him a fee just as he had agreed to pay him a fee in relation to Quay House.

260. Nevertheless, I go on to consider whether Mr Downer agreed to pay Mr Alford an increased upfront payment of £200,000 and an increased profit share of 15%. I am not satisfied that Mr Downer agreed to either of these terms in 2017 and I find that he did not do so for the following reasons:

    (1) Both of Mr Alford's emails dated 30 June 2017 involved requests for an improvement in his terms because of his financial position and the length of time taken to negotiate the option agreement. In the first email he asked for an advance of £10,000 and in the second he suggested a development management fee of £4,000 per calendar month until the option agreement was signed. But there is nothing in either email to suggest that the parties had reached final agreement.

    (2) In my judgment, the emails dated 30 June 2017 do no more than reflect an ongoing negotiation. I find that it was more probable than not that Mr Downer told Mr Alford that he was prepared to consider increasing his upfront payment to £200,000 and that Mr Alford then attempted to improve on this by asking for an advance of £10,000 in his first email. Mr Downer's response was to offer a management fee of £3,000 per month instead of the increase in the upfront payment. Mr Alford then countered by asking for a management fee of £4,000 per month together with the increase in upfront payment from £150,000 to £200,000.

    (3) I, therefore, accept Mr Downer's evidence that he had not agreed to increase Mr Alford's upfront payment to £200,000. I also accept that he was not trying to park

the issue or to mislead Mr Alford. Both parties referred to a number of emails in which Mr Alford was willing to assert that parties had agreed terms when they had not. I am satisfied that his emails dated 30 June 2017 were further illustrations of either his optimism or his negotiating technique. I am also satisfied that Mr Downer's way of dealing with it was (as he said) to ignore it.

(4) It is also clear from Mr Alford's emails dated 22 November 2017 and 16 February 2018 that there was a further discussion about Mr Alford's terms shortly before Mr Downer's birthday on 24 October 2017. It is also clear from them that Mr Downer told Mr Alford that any agreement between them would have to be signed off by EHL's board of directors in Jersey and I note that the two draft letters were addressed to Mr Whale. I consider it more probable than not that during this conversation Mr Downer told Mr Alford that he was prepared to consider an increase in his profit share to 15% but that this would have to be approved by Mr Whale in Jersey and that this prompted Mr Alford to send the first email setting out his proposed terms and the reasons for the increase in both the profit share and the upfront payment.

(5) I also accept Mr Downer's evidence that he never agreed to these terms. He did not reply to Mr Alford's first email and his response to the second was to ask Mr Alford to send him a draft agreement. Moreover, he did not sign or return the draft agreement to Mr Alford or even pass it on to Ms McGinn and take advice on its terms. Ms McGinn accepted that Mr Downer did not ask her to review to the draft agreements until October 2018 (below).

(6) Mr Downer accepted in cross-examination that his email to Mr Alford dated 23 May 2018 was no more than an excuse and that he led Mr Alford to believe that his enhanced terms were agreed. I am not satisfied that either admission provides a sufficient basis for finding on an objective basis that there was an agreement between the parties. Although it is possible to accept an offer by silence, Mr Downer chose not to respond substantively to Mr Alford's request and the replies which he did send were equivocal.

(7) It is possible that Mr Alford might have been entitled to a raise a defence of set off to EHL's claim based on the doctrine of promissory estoppel in the light of Mr

Downer's admission that he led Mr Alford to believe that his enhanced terms had been agreed. But Mr Alford was debarred from defending the claim. Moreover, if EHL had been successful in persuading the Suiteholders to enter into a binding option agreement, I am not satisfied that Mr Downer would have agreed to pay Mr Alford £200,000 or a profit share of 15% of the proceeds of sale for the reasons which Mr Seitler put to him.

261. In my judgment, the real issue between the parties was the one which the Defendants proposed to raise in the draft Re-Amended Defence, namely, whether the agreement between Mr Downer and Mr Alford was intended to be binding and enforceable in the absence of a formal, written agreement approved by the directors of EHL in Jersey. Mr Downer described it in his witness statement as an "agreement in principle" and he filed Mr Alford's email dated 20 July 2015 under the heading "Terry Proposed Fee Agreement".

262. Ms Wicks submitted that the Defendants were bound by the admission in paragraph 58 of the Re-Amended Defence. She also submitted that it was not possible for me to decide this issue fairly on the evidence because EHL had not given disclosure in relation to this issue or called any evidence in relation to the approval of the agreement by EHL's directors in Jersey. Although Mr Seitler drew my attention to the fact that the issue whether Mr Alford was EHL's agent was an issue for disclosure in the Disclosure Review Document, I accept Ms Wicks' submissions. If the Defendants had applied to for permission withdraw the admission at trial, I would not have permitted them to do so (as I indicated to Mr Seitler in argument). I would have refused to do so regardless of the merits because I could not have been satisfied that there was no prejudice to EHL. Moreover, I would have been concerned that the admission had originally been made not only on behalf of the FEC parties but on behalf of Mr Alford himself.

263. But in any event, I am satisfied that the agreement between Mr Downer and Mr Alford was intended to be binding and enforceable and I find that it was for the following reasons:

    (1) In the case of ordinary commercial transactions, it is not usually necessary to prove that the parties intended to create legal relations and the burden of proving that they did not have that intention is on the party who asserts that no legal effect was

intended. Moreover, that burden is a heavy one: see *Chitty on Contracts* 34th ed (2021) Vol 1 at 4—207.

(2) Although Mr Downer filed Mr Alford's email dated 20 July 2015 under the subject line which referred to a proposed fee agreement, there is nothing in the email itself to suggest that Mr Downer and Mr Alford expected the agreement to be formalised before it took effect. I accept Mr Downer's evidence that he used the word "proposed" because he had not yet communicated his confirmation of acceptance to Mr Alford and that he did so by telephone shortly after receiving it.

(3) Moreover, Mr Downer's evidence is supported by the conduct of the parties in relation to Quay House. Mr Alford and Mr Downer exchanged emails and on the basis of this agreement, QHL paid Mr Alford's advance of £225,000. There was no suggestion that the exchange of emails did not give rise to a binding and enforceable agreement or that a formal agreement was necessary before Mr Downer arranged for the payment.

(4) Mr Downer's evidence is also supported by Mr Alford's own conduct. He provided his services as EHL's agent and negotiated with Suiteholders on his behalf. Between November 2015 and July 2018 he used his Investin email address to negotiate with the Suiteholders, he reported back to Mr Downer or to Ms McGinn on all material developments and he offered advice to Mr Downer in relation to the negotiations and the terms which EHL might achieve. I am satisfied that he did so pursuant to the agreement reached between himself and Mr Downer and on the basis that EHL was bound to pay the agreed fees if the transaction was successful.

(5) It was also Mr Downer's evidence in cross-examination that he obtained informal confirmation from Jersey that the agreement had been approved. Again, I accept that evidence. Mr Downer was a director and the ultimate beneficial owner of EHL and the directors in Jersey provided corporate services. It is highly improbable that they would not have approved or ratified a business decision which he had taken on behalf of the company.

(6) Finally, I take comfort from the fact that on 9 December 2020 DLA served the Defence on behalf of Mr Alford himself admitting the retainer. If Mr Alford had raised any concerns about the admission before the Defence was served,

experienced counsel and solicitors would not have made it.

(ii) Termination

264. The Defendants' pleaded case was that Mr Alford's retainer came to an end when he ceased to receive his monthly retainer of £5,000 and that shortly afterwards his Investin email account was withdrawn. Mr Seitler formally put this case to Mr Downer and he dismissed it. I also accept his evidence on this point. In my judgment, Mr Alford's retainer did not come to an end either pursuant to its terms or by mutual agreement in July 2018 for the following reasons:

(1) On 22 August 2013 Mr Downer and Mr Alford reached agreement in relation to Mr Alford's retainer for Quay House and on 17 and 23 March 2015 they reached agreement in relation to his retainer for Ensign House. There is no suggestion that the second agreement was intended to be a variation of the first and I find that there were two separate contracts of retainer.

(2) Although it was not clear when precisely Mr Downer agreed to pay and then paid Mr Alford £5,000 per month, I find that this was a term of the Quay House retainer and the Defendants admitted this in the Re-Amended Defence: see paragraph 7. Again, Mr Downer could not recall precisely when QHL stopped paying Mr Alford's monthly fee but I am satisfied that it was in or about July 2018.

(3) There was no express agreement between Mr Downer and Mr Alford that the Quay House retainer had come to an end when QHL stopped paying the fee. But in my judgment, it must have done so either on the basis that there was an implied term that the retainer would terminate when Quay House was sold or on the basis that it was terminable on reasonable notice and that Mr Alford either waived the period of notice or that QHL effectively gave notice by terminating the payments.

(4) But however and whenever the Quay House retainer came to an end, I am satisfied that the termination of the retainer had no effect on Mr Alford's retainer for Ensign House. This was a separate contract and I was not taken to a single email in which either Mr Downer or Mr Alford asserted that Mr Alford should stop work on Ensign House once those payments had ceased.

265. In closing submissions Mr Seitler and his team advanced the alternative argument that Mr Alford's retainer came to an end because EHL had repudiated it by deliberately excluding him from the negotiations with Rockwell once Mr Downer had told him that he would not receive a fee on the sale of Quay House. Mr Seitler submitted that this allegation had been pleaded in the Re-Amended Defence: see paragraph 15.2.5 (above). I reject this submission. That paragraph was a response to paragraph 15 of the Re-Re-Amended Particulars of Claim (also above) which was concerned with the sale of Quay House. But in any event, I dismiss this allegation for the following reasons:

(1) It was never pleaded or put to Mr Downer that Mr Alford's retainer contained a term that EHL could not negotiate directly with potential purchasers or that it was required to disclose any such negotiations to him. Other agents introduced potential buyers to Mr Downer and there is no suggestion that either Mr Downer or Mr Alford considered that EHL was bound to deal exclusively with the Suiteholders or potential purchasers through Mr Alford alone.

(2) Mr Downer accepted that once Quay House had been sold, he no longer trusted Mr Alford himself to negotiate with Rockwell. But it was never pleaded or put to him in clear terms that there was a complete breakdown in his relationship with Mr Alford which might have justified a finding that EHL had committed a repudiatory breach of contract.

(3) But even if Mr Downer's conduct amounted to a repudiatory breach of contract, I am satisfied that Mr Alford did not accept the repudiation of his retainer. Indeed, on 8 October 2018 he re-sent the draft of his engagement letter to Mr Downer and asked him to agree it. This is inconsistent with him accepting that the relationship or his retainer was at an end. Moreover, he continued to negotiate with the Suiteholders and report back to Mr Downer and Ms McGinn. Indeed, he was closely involved in managing the Suiteholders' expectations after the publication of the Property Week article and news of the sale of Quay House had broken.

(iii) <u>The Quay House spreadsheet</u>

266. Mr Downer accepted in cross-examination that the Excel spreadsheet which Mr Lal sent to Mr Alford on 4 September 2018 formed the basis for QHL's accounts and for the loss which it claimed to have suffered in legal proceedings in both Jersey and England. He

also accepted that he gave evidence in both Jersey and England relying on the figures which Mr Lal had produced and put into the spreadsheet. But he did not accept that he was closely involved in its preparation and it was his evidence that he relied on Mr Lal for their accuracy.

267. I have found that the entries A to H in Table 1A were expenses which EHL had incurred in relation to Ensign House and not expenses which QHL had incurred in relation to Quay House. Mr Seitler put it to Mr Downer that he had deliberately misled Mr Alford and also defrauded QHL's creditors by inflating its losses. Before he did so, however, I warned Mr Downer that he was entitled to exercise the privilege against self-incrimination and to refuse to answer Mr Seitler's questions. Mr Downer elected not to answer them and made no comment.

268. In the light of recent authorities, it would have been open to the Court to draw the inference from his decision not to answer the questions, that Mr Downer had deliberately misled the creditors or QHL and Mr Alford himself. However, in my judgment this is a classic example of a collateral issue, which the Court should not attempt to resolve in a case such as this where there were a large number of factual and legal issues already in dispute. I say this for the following reasons:

(1) Although Mr Seitler produced convincing evidence that Mr Lal had included in the spreadsheet costs relating exclusively to Ensign House rather than to Quay House, Mr Lal did not give evidence and I cannot be satisfied that he deliberately included those costs to inflate QHL's losses. Importantly, I was taken to an email dated 28 September 2018 which Mr Lal wrote to Ms Pauline Harvey of JTC stating that: "The quay house figures don't make sense – at least to me".

(2) Moreover, it would have been necessary for Mr Seitler to persuade me not only that Mr Lal fraudulently inflated QHL's costs but also that he did so on Mr Downer's instructions or that Mr Downer knew that he had done so when he deployed the spreadsheet. Mr Downer's evidence was that he relied on Mr Lal (who sent the spreadsheet both to him and to Mr Alford at the same time).

(3) There was no evidence before the Court that Mr Downer had exhibited the spreadsheet in legal proceedings in either Jersey or England or that he verified its contents and, as he pointed out, he was not cross-examined in either jurisdiction. If

he did not exhibit or refer to the spreadsheet in a witness statement or give evidence about it, the allegation which Mr Seitler put to him is far less compelling.

(4) If the other figures in the spreadsheet were accurate, QHL would not have avoided insolvency and Mr Alford would not have received a profit share even if the costs listed in Table 1A had been excluded from QHL's profit and loss account. If Mr Lal deliberately inflated QHL's costs to engineer its insolvency, it would have been necessary for the Defendants to prove that many other costs and expenses in the spreadsheet had also been falsified.

(5) Finally, I am satisfied that this issue goes solely to credit and not to any substantive issue. If Mr Lal had falsified the spreadsheet on Mr Downer's instructions and Mr Downer had fraudulently denied Mr Alford his profit share on the sale of Quay House, then it might have been open to Mr Alford to treat this as a repudiatory breach of both retainers when this issue came to light. Moreover, I might have been prepared to consider a late amendment even at trial to plead this issue provided that it could have been properly dealt with. But Mr Alford was debarred from defending and played no part in the trial.

269. For these reasons, therefore, I am not prepared to draw any adverse inference from Mr Downer's decision to exercise his right to silence and to refuse to answer Mr Seitler's questions about the spreadsheet. Moreover, I accept the finality of the answers which he gave to Mr Seitler's questions under the collateral questions rule. In particular, I accept his answers that the spreadsheet was pulled together by the accounts department, that he only ever had a "quick skim through" and that he relied on what Mr Lal had told him.

(iv) The Relationship

270. Although I have found that there was a binding contract of retainer and that it did not come to an end in July 2018 and although I have dismissed the allegation that Mr Downer defrauded the creditors of QHL and deliberately misled Mr Alford in relation to his profit share on the sale of Quay House, it does not follow that the evidence which Mr Downer gave about his treatment of Mr Alford on the sale of Quay house or its effect on the relationship between them is irrelevant to the issues which I have to decide. Indeed, this episode demonstrates that there was a striking change in Mr Downer's attitude to Mr Alford on the sale of Quay House.

271. Mr Downer accepted in evidence that in 2017 and 2018 he let Mr Alford believe that he would receive £200,000 on the signing of the option agreement and a 15% share of the profit on its resale. He was not prepared to agree these terms but he was not prepared to reject them either. In my judgment, the reason for this was the one which Mr Seitler put to Mr Downer: "You are giving him just enough reassurance so that he carries on working his fingers to the bone for a pay-out". I find therefore that until the sale of Quay House Mr Downer let Mr Alford believe that he would agree to his revised terms to motivate him to negotiate with the Suiteholders.

272. Mr Downer also accepted that once Quay House had been sold and he had rejected Mr Alford's claim for a profit share, he did not trust Mr Alford to negotiate with Rockwell because, as he put it: "it was like holy water on the devil in terms of his attitude to Rockwell". Indeed, Mr Alford's reaction was so strong that Mr Downer was concerned that his personal reputation might be affected and that Mr Alford might slander him to Mr Mulryan in Monaco. Mr Alford's reaction could hardly have come as a surprise to Mr Downer and I find that after the sale of Quay House Mr Downer was no longer concerned to motivate Mr Alford to reach agreement with the Suiteholders and that he did not care about retaining Mr Alford's goodwill. I also find that the reason for this was the one which Mr Seitler put to Mr Downer, namely, that he was washing his hands of Ensign House and his primary concern was to recover his costs from Rockwell.

273. Ms Wicks and Mr Lee submitted that Mr Downer believed that he had treated Mr Alford fairly. He reminded me that he had paid Mr Alford his advance of £225,000 and £60,000 towards his profit share and that he had funded the loans to QHL personally. I am prepared to accept that Mr Downer believed that he had not been unfair to Mr Alford and that he also believed that QHL was not liable to pay Mr Alford his profit share. However, Mr Downer had made a very profitable investment by lending to QHL at a rate of interest at 10% per annum and received back £5.27 million in interest. It was always within his gift to make some payment to Mr Alford to reward him for introducing this investment. Moreover, to ease Mr Alford's disappointment at receiving nothing on the sale of Quay House and to motivate him to redouble his efforts in relation to Ensign House, Mr Downer could have agreed to Mr Alford's fee proposals. He did neither and I am satisfied he did neither for the reasons which I have given.

K. FEC's Introduction

(1) FEC's initial interest

274. By email dated 28 June 2018 Mr Andy Palmer of Cushman & Wakefield introduced Mr Connolly to Mr Alford with a view to FEC taking a temporary marketing suite in Quay House. It appears from Mr Palmer's email that Mr Connolly and Mr Alford had met socially before. By email also dated 28 June 2018 Mr Alford replied stating: "We have Quay House and possibly our Car park." Mr Alford sent this email from his Investin account and Mr Connolly accepted in evidence that Mr Alford was "working on Investin's behalf".

275. By email dated 24 July 2018 Mr Alford sent Mr Connolly a schedule of accommodation for Quay House and he responded by expressing interest in Ensign House. He specifically asked Mr Alford: "What's the timing again? When do we need to complete on Ensign?" Mr Alford replied: "Ensign is circa 18 months. Obviously do not mention Ensign deal to Mark Tamuta or anyone on estate you've dealt with." Mr Tamuta was the building manager of Ensign House. In his first witness statement Mr Connolly explained this email as follows:

> "In Terry's response to me on 24 July 2018, he asked me not to mention the Ensign deal to Mark Tamuta or anyone on the estate. Mark Tamuta was the building manager for Ensign House, although I don't think I'd met him when Terry sent that email. The principle behind Terry's email is that John Downer/Investin had done a deal with the seller of Ensign House, and they had got the seller thinking that Investin were going to buy the building. Terry was telling me not to let anyone from Ensign know that I was looking at Ensign because if I did it could unravel the work Terry had done to convince the seller that John Downer/Investin were going to buy Ensign House, and not just flip it."

276. Ms Wicks suggested to Mr Connolly that secrecy would only have been necessary if the Suiteholders could pull out of the deal and that he must have known that Investin had not exchanged contracts to acquire an interest in Ensign House. He did not accept this and I then explored what kind of interest he believed Investin to have in Ensign House:

> "Q. I just want to make clear that what I'm putting to you, Mr Connolly, the reason why it wasn't a surprise when you received this email from Mr Alford is that you realised or you knew that Investin didn't have an exchanged contract on Ensign House? A. No, no that's not the case. I've always thought that they had -- I always thought at this time that they had a position on Ensign House. Q. By a position, you mean an exchanged contract, do you? A. Yes, like a legal position. MR JUSTICE LEECH:

> Can you just explain to me what you -- when you say a legal position, what kinds of position are we talking about? A. Well, they've got -- they've got control of the -- they've got legal control of the asset, whichever position that is, whether it's an option or exchange or whatever it is, but they've got legal control of that asset. MR JUSTICE LEECH: So it could either be an option agreement, an option to acquire it or an actual exchange -- A. Or an actual exchange of contract. Like John did for Quay House, for instance. He exchanged it and we were looking to buy it and he completed the purchase after we had a few offers and we didn't agree to it, but I always thought that they had some legal control over Ensign House. MR JUSTICE LEECH: Your words in paragraph 29 are: "... and not just flip it." So the concern was letting the suite holders know that he was -- A. Going to sell it straight away. MR JUSTICE LEECH: Sell it straight away. A. Yes. MR JUSTICE LEECH: If you thought he had a -- let's say a contract or an option, why would it matter whether -- and he had got legal control of the asset, why would it matter if he just sold it on rather than develop it? A. I hear what you are saying, I understand what you are talking about, but I think that, you know, any kind of disruption in a deal is not good, okay, and I guess, you know, him saying, "Don't speak to anyone on site," means that just don't speak to anyone and, you know, it's fair enough, right? You don't want to be making everyone aware that you are going to be buying, potentially purchasing someone else's position on Ensign House. So I didn't take it -- I mean, I can hear what Ms Wicks is saying but, at this time, I always thought that they had a position on Ensign House, a legal position on Ensign House."

(2) Mr Connolly's calculation

277. On 3 September 2018 Mr Alford sent the BUJ Feasibility Study to Mr Connolly and on 6 September 2018 he forwarded it on to Mr Michael Ng, an architect engaged by FEC in Hong Kong, asking him to see what FEC could develop on the site. By email dated 12 September 2018 Mr Ng sent him a first round feasibility study for two towers of 55 floors and 30 to 33 floors respectively. The first provided for commercial and private residential units and the second for affordable housing. In his first witness statement (as originally served) Mr Connolly gave evidence that he had carried out a calculation based on the BUJ Feasibility Study which resulted in a residual land value of £29 million and set out the calculation itself in bullet point form. In his first witness statement (as amended shortly before trial) he had inserted the expression "back-of-fag-packet" before the word "calculation" and had changed some of the figures.

278. Ms Wicks suggested to Mr Connolly that he had fabricated this entire exercise to lend colour to his evidence that Mr Alford told him that Investin was looking for a purchase price of above £30 million and to provide support for his evidence that his own view was

that it was worth £30 million. Mr Connolly accepted that he had thrown away his workings to produce the calculation and that he could not recall certain key elements of it. He also accepted that he could not recall the precise numbers which he had used as inputs for the calculation. But he maintained that he had produced a calculation at the time and that his view had always been that Ensign House was worth £30 million:

> "MS WICKS: What I'm going to suggest to you, Mr Connolly, is that, when you came to make your witness statement four years after September 2018, you did not recall that this was the back of a fag packet calculation which you had done and instead you made these calculations up when you made your witness statement, in an attempt to persuade the court that the land is worth only £29 million when you know it's worth very much more than that. Isn't that right? A. No. I've always thought this land was worth £30 million or less. I understand where -- what you are discussing in terms of the numbers and I do get that but it never changed my mind of thinking. I did a number of calculations around various different opportunities I've got and I knew that -- you know, £30 million for this asset, Ensign House, was a full price. And I can remember doing the calculation to get it to 29 million, which included some of these key elements, which was the 85 per cent on the efficiency, which drove the rest of the numbers. So I'm just correcting it in the context of the fact that the numbers weren't right. It's a simple mistake.
>
> Q. You just said, I think, to his Lordship that when you made your witness statement, that you could remember some of the key elements of this calculation? A. Yes. Q. Are you saying you didn't recall all of it? Q. Are you saying you didn't recall all of it? A. Well, I'm not the best with numbers all the time and I can't recall exactly what I did or didn't do at this time, other than knowing that, in my view, the asset value of Ensign House was £29 million, and I did do a high-level review, which I wrote it down and, unfortunately, because I didn't think this was going to continue on -- I've done that many time and I just threw the calculation away, but I knew -- I used the BUJ appraisal, which had numbers in it. Actually, the reason why I had to do the calculation myself was because some of the numbers in terms of the net areas weren't correct, so that's why I've done this calculation.
>
> Q. So to be absolutely clear, what I'm putting to you, Mr Connolly, so that there is no doubt about it? A. Yes. Q. What I'm suggesting is that, when you came to make your witness statement, you wanted to try and persuade the court that the land was worth, roughly speaking, what FEC ultimately paid for it and so you took the BUJ study, which had been disclosed, and you back-calculated a calculation to try and make it look as though you thought that the land was worth 29 million in September 18. That's the position, isn't it? A. Well, my view has never changed. It has always been 30 million for this. I understand the question, okay, and, no, that's not correct. I did -- this calculation on the basis of what I remember at the time and I remember at the time the calculation included certain key inputs, which was the levels which I mentioned, certainly the value and also the

> efficiency, and when I came to read my witness statement again, it didn't add up, so I wanted to correct it."

(3) FEC's renewed interest

279. FEC did not pursue its initial interest in Ensign House. However, by email dated 7 January 2019 Mr Connolly wrote to Mr Alford for an update and Mr Alford replied stating that: "Yes, several units are up for let…Option is progressing if you want to discuss." Mr Connolly responded asking Mr Alford: "Can you let me know what you think is best for our marketing suite? Did you exchange??" Mr Alford forwarded this email exchange to Mr Downer with the comment: "Connolly is still interested". By email dated 8 January 2018 Mr Downer asked him whether he thought that Investin had "signed the option" and Mr Alford expressed the view: "I haven't confirmed we have or haven't". Mr Downer's reaction to this was to instruct Mr Alford that Investin would want Mr Connolly or FEC on an NDA.

280. Mr Downer gave evidence that the reason why he decided to engage with FEC was that it created another way for EHL to realise its interest in Ensign House. He identified three different ways in which EHL could profit from the situation:

> "a. One was to complete the options, and assign them to FEC (or some other third party buyer). The remuneration could have been structured as an upfront premium plus a development profit share once the Property was developed, much in the same way we proposed to do with Rockwell. Alternatively, the buyer could have just made a one-time payment for the assignment of all the options, and the price paid would of course reflect the property's development potential.
>
> b. It would have been possible, too, to simply assign 17 of the 18 options to FEC, and effectively "sell" FEC the project information, as well as the contacts we had built up with the SFO and Mr Ammora, allowing them to carry on negotiations with Lama on their own. We would likely have structured it as an upfront payment for the 17 of 18 the 17 of 18 options, with a significant uplift upon Lama signing a deal. Alternatively, we could also have asked for a development profit share.
>
> c. FEC could also pay us a substantial premium and profit share in exchange for us releasing them from their obligations under the NDA, and allowing them to use Terry's services as an introducer. Alternatively, instead of a profit share arrangement, we could also have demanded a one-time payment for releasing them from the NDA. In both scenarios, I would likely have asked for an uplift upon FEC (or whichever third party took over our position) completing their own deal with all the leaseholders."

281. He also said that his preference would have been option (a) (above) but that he was also open to options (b) and (c). He then dealt with the commercial terms which he would have expected to achieve:

> "As to what commercial terms I would have expected from options (b) and (c), I was open to different deal structures. We could have demanded a premium for releasing the NDA and assigning them options over the 17 suites, with a further sum payable once option over Suite 14 had been secured. The exact price we could have charged is, I understand, a matter for expert evidence, but I estimated at the time a price of some £50-60m. Alternatively, we could also have structured it as a profit share agreement. As I explained at paragraph 84 above, we had in mind an 80/20 profit split (with 10% upfront premium) in mid-2018. This deal was conceived with the options still unsigned, and the Lama issue still outstanding. By mid-2019, our bargaining position was much improved, with 12 of the 13 leaseholders essentially signed on, a solution for Lama on the horizon, and Quay House having been sold. So realistically, I think we would probably have agreed a 10% premium with a 60/40 profit share."

282. In the course of their exchange of emails on 8 January 2018 (above) Mr Downer and Mr Alford also discussed the problems presented by Lama. Mr Alford asked Mr Downer to speak to Mr Mee and Mr Downer replied: "I have a call in to him, can you see Connolly paying 30m for Ensign without LAMA and then understanding all the problems". To this Mr Alford replied: No, but I can see a [sic] them paying 2m for Option of 17 now with a top up on Lama." Given the view which Mr Downer expressed to Mr Alford on 8 January 2019 Mr Seitler suggested to Mr Downer that he did not even believe that the options were worth what he had agreed to pay the Suiteholders:

> Q. We have seen only moments ago you can't imagine John Connolly paying the option price of 30 million. Terry is saying 2 million. He is saying 2 million and that's only because FEC are interested in a marketing suite in the same block. That's not 17 binding options being worth 15 million. You knew they were worth nowhere near 30. You knew that Terry's 2 was more the order of it and, therefore, you were never going to exchange the agreements that Howard Kennedy were holding, even if they could be amended with the suite holders' consent, because they weren't worth the figures in them anymore. A. Not at all. And whatever Terry thought, I knew I could do a better job negotiating with FEC than Terry, and Terry's financial interests were different to mine. He would have sold for a lot less than I would have sold for. He just wanted money. He would have sold and signed up to anything."

(4) 16 January 2019: Mr Alford and Mr Connolly

283. On 16 January 2019 Mr Connolly met Mr Alford to discuss Ensign House and on the same day he sent an email to Mr Ng asking if he had done any further work on the project. On 17 January 2019 Mr Ng reminded him about the first-round preliminary feasibility study which he had sent earlier and asked for his comments. On 21 January 2019 Mr Ng sent Mr Connolly an updated study combining both affordable and market residential units but with a separate "podium" of seven floors for retail and office use. Mr Connolly's gave the following evidence in his witness statement about the meeting with Mr Alford:

> "Terry ignored my question about exchange over email, but he did then tell me that Rockwell had not completed on Ensign House. I see that, a couple of days later, Terry emailed to arrange a catch up. Checking my calendar I see we met on 16 January 2019 and by this meeting I knew that Rockwell had not completed on Ensign House. This meeting on 16 January 2019 was also when we first discussed the options. I'm pretty sure that Terry said that they had these options (as in legal, not commercial options) which they had signed with the owners of Ensign House. I had been involved in a lot of company transactions in the past, and so I think I assumed immediately that the way the options would work would be for FEC to buy the company that owned the options and then we would change directors of that company. I'm pretty sure that at this meeting with Terry, he set out the deal, and told me that all the options were signed or agreed except for one of the owners of Ensign House where there was an issue with the SFO. I can't remember if at that time he told me which suite it was or the names of the individuals involved, but he explained there was an issue with the SFO and so there was one option out of the 18 that had not been signed. That was what I was led to believe. That's why I signed the NDA. Life's too short. I would have never wanted to mess around with a number of different owners. The reason I went into this deal was because it was all wrapped up and ready to go."

284. Mr Connolly's evidence was that he understood the phrase "option is progressing" in Mr Alford's email dated 7 January 2019 to be a reference to a commercial choice rather than a legal option and, in particular, to Rockwell's choice whether to buy Ensign House rather than the grant of an option by the Suiteholders. It was also his evidence that this is why he asked Mr Alford whether exchange had taken place. Ms Wicks challenged this evidence:

> "MS WICKS: So whose option was progressing? A. So at this time, I was under the impression that Rockwell was looking to progress the deal on Ensign House, and Terry is saying option is progressing. I thought it was their option to buy the land, not option as in a legal sense. Q. Why on earth would Mr Alford invite you to discuss the progressing option if what he is talking about is a deal between Investin and Rockwell? A. Because they hadn't exchanged, because by this point -- so I put a bit of context. When

> I spoke to Terry in the August or the September, he told me that Rockwell were in the box seat to buy Ensign House. He mentioned to me what the amount was in terms of to acquire Ensign House and I felt it was too much. So that's why I just sort of stepped back. I didn't speak to Terry or ask any more questions because I thought Rockwell were in a position to progress with the deal on Ensign House and I thought they were looking to do to that by the end of the year, which was December or January, and that's why I'm asking whether or not they exchanged, again in the context of them buying Ensign House, as a purchase, and when he is saying "Option is progressing, if you want to discuss", that means they haven't done the deal yet, which for me was quite interesting, which meant that there was an opportunity because they still hadn't done the deal yet on Ensign House. Q. Mr Connolly, I'm going to suggest that that is not what you meant in your email or how you understood Mr Alford to be responding to you because "Option is progressing if you want to discuss" would be a very odd way for Mr Alford to communicate to you that Rockwell have not done the deal with Investin and therefore it is available to FEC. And when you ask, "Did you exchange," you are asking about the thing which Mr Alford is mentioning, namely the option, which was progressing. So in this email exchange, what you and Mr Alford are talking about is Investin's option on Ensign House and you are asking whether or not that option had exchanged. That's right, isn't it? A. I mean, I understand -- reading the emails, you know, back now, you could see why you would assume that but I did not know that they had options at this point in time. I thought it was a straightforward purchase of Ensign House. When he said, "Option is progressing," I thought at that time that the deal on acquiring Ensign House was progressing, not the options. I did not know at this point that they had options."

285. Ms Wicks also challenged Mr Connolly's evidence about his meeting with Mr Alford on 16 January 2019. She took him first to the Re-Amended Defence and the Defendants' pleaded case that Mr Connolly understood EHL to have an "oven-ready" deal:

> "Q. And if we could go, please, to {A1/3/11}, let's have a look at paragraph 22.1: do you see that? A. Yes. Q. And this is describing what you understood the position to be at the time that you signed the NDA. And in the second sentence it says: "Mr Connolly understood that EHL had in place an 'oven-ready' deal to purchase options in all interests in Ensign House, save in relation to Lama's interest in the Property, and that all that was required to occur to render such purchase binding was for EHL to sign agreements which had already been executed by the owners of all such interests. On that basis and that basis alone, Mr Connolly agreed to enter into an NDA." Is that true? A. Yes. Q. So at the time you entered into the NDA, you knew that the options had not been exchanged and they were not binding. A. When I -- the position that I thought at the time was the options had been signed by the individual suite holders -- and actually I can't recall whether I thought at the time whether the directors of Investin had also signed those options and I think I recall that -- you know, at the

> time I thought that we would have to buy the Ensign company that held the options in order to exercise them but, in any event, I thought that the options were signed by the suite holders, which is the main issue. Q. The thing is, Mr Connolly, you work in the property field and you know that a contract in relation to land isn't binding until it has been put down in writing by both parties, each side has signed their version and that those parts have been exchanged. That's right, isn't it? A. Yes. Q. So until that process happens, everybody is free to walk away, whether or not they've signed the document, aren't they? A. Yes."

286. Ms Wicks then took Mr Connolly to his evidence about the meeting on 16 January 2019 itself. She suggested to him that his evidence about this was inconsistent with the Defendants' pleaded case that there was an "oven-ready" deal:

> "Q. And right at the bottom of page 11 and on the top of page 12, you say, as you've just done to his Lordship, you think you: "... assumed immediately that the way the options would work would be for FEC to buy the company that owned the options and then we would change directors of that company." That's not something you actually discussed with Mr Downer, is it? A. No. Q. No. Or indeed Mr Alford? A. No. Q. So it was just something in your own head. Okay. And then you say later in this paragraph -- you were told, you say: "... that all the options were signed or agreed except for one of the owners of Ensign House where there was an issue with the SFO." So let's just take that for a moment. You've said that what is said in the defence and counterclaim is true. When you understood the options were signed, you did not think they were binding, did you? A. I did. I did think they were binding. Q. But you've just told his Lordship - A. I understand, I understand. Yes, so there is a slight discrepancy here. I did think at the time that the options had been executed and that's why, in my head, I presumed the directors of Ensign had to change because they had already signed the option and, obviously, the personnel which were in the Ensign House Limited vehicle would change upon us acquiring that company and then, obviously, our directors would then take place of the directors that were already in control. That's what I thought immediately. However, obviously, there is some discrepancy between what Ms Wicks (inaudible) in regards to the defence and this. But in any event, I thought at the time that the options were definitely signed by the suite holders and I also thought that they were signed by the Ensign company. But there is a slight discrepancy in the fact that the main issue for me was the suite holders were committed and then that was what I thought was the main sort of driver behind the options."

287. Finally, Ms Wicks challenged Mr Connolly's evidence that the reason why he was interested in the deal put forward by Mr Alford was that it was "all wrapped up and ready to go". She suggested to him that he was very keen to look at any opportunity in the Marsh Wall area and that whether or not Investin held signed or binding options, Ensign

House was still a very valuable opportunity which Mr Connolly was keen to investigate. Mr Connolly accepted this although he did not concede that his evidence about the deal was false.

(5) Findings

(i) June 2018: Mr Connolly's initial understanding

288. I accept Mr Connolly's evidence that when Mr Palmer put him in touch with Mr Alford and Mr Alford interested him in purchasing Ensign House, he believed that Investin had a contractual right to acquire Ensign House itself although he did not know whether it had acquired an option or had exchanged contracts to purchase the property. In my judgment, it was reasonable for him (or, for that matter, any other potential purchaser) to assume that Investin had something concrete to sell.

289. Moreover, the fact that Mr Downer was contemplating selling that interest on to Rockwell would have confirmed his belief that Investin's interest in Ensign House was capable of being assigned to a third party. Finally, Mr Connolly's explanation for the secrecy makes sense in that context. Even if the Suiteholders had granted options to Investin, they would have been concerned to ensure that Investin exercised those options and complied with its obligations in relation to Quay House rather than sell on to a third party.

(ii) September 2018: Mr Connolly's calculation

290. Again, I accept Mr Connolly's evidence on this issue. I find that in or about September 2018 he prepared a rough calculation to arrive at an estimate of the purchase price based on the BUJ Feasibility Study, that he could not recall the precise figures and that he reconstructed that calculation by working backwards and using the study. I also accept that he corrected a number of errors in the calculation when he came to amend his first witness statement. It might have been better if Mr Connolly had explained this in greater detail when he made his amended statement. But I am not satisfied that he fabricated the entire exercise or that he failed to carry out a rough calculation at the time. This is what any seasoned developer would have done.

291. Ms Wicks submitted that Mr Connolly must have fabricated his evidence in relation to

this calculation for four particular reasons which I address in turn. Those reasons and my findings in relation to each of them are as follows:

(1) *The BUJ Feasibility Study*: Ms Wicks submitted that Mr Connolly would have used Mr Ng's first round feasibility study instead of the BUJ study as the basis for his calculations. I disagree. It seems unlikely that FEC would have obtained planning permission for Mr Ng's radical proposal of two separate towers for commercial and private residential units and affordable housing respectively. Mr Connolly's evidence (which I accept) was that it was unrealistic for these reasons.

(2) *The Workings*: Mr Connolly's evidence was that he threw away the piece of paper on which he worked out the calculation and Ms Wicks submitted that it was highly improbable that he would have been able to reproduce it or to recall it sufficiently to correct it later. I agree that it is improbable that Mr Connolly would have been able to remember all of the figures without retaining his workings. But his evidence was that he remembered what the key inputs were and then recreated the calculation and amended it when he realised that it contained arithmetical errors. In my judgment, this is not improbable given Mr Connolly's familiarity with calculations of this kind.

(3) *Working Backwards*: Ms Wicks also submitted that Mr Connolly conceded in cross-examination that he worked backwards from £29 million (which was the figure which he wished to justify) and at best this was a reconstruction of his preferred version of events. Although I agree that Mr Connolly reconstructed the calculation because he could not remember the precise figures, his evidence was that he could recall that he came to a figure of £29 million and reconstructed the figures which he had used and then corrected the errors.

(4) *Mr Alford's view*: Finally, Ms Wicks submitted that it was inconceivable that Mr Alford would have told him that Investin was looking for a price of over £30 million and that he placed a value of £60 million on Ensign House (£30 million to acquire the options and £30 million to exercise them). I reject that submission. It is clear from the exchange of emails on 8 January 2018 that Mr Alford expected FEC to pay £30 million to purchase Ensign House and a premium of (at least) £2 million to Investin for the options themselves provided that the Lama issue could be

resolved. In my judgment, this provides direct contemporaneous support for the evidence which Mr Connolly gave that Ensign House was worth £30 million.

(iii) Mr Alford's view

292. Ms Wicks put the suggestion to Mr Connolly that Mr Alford placed a value of £60 million on Ensign House on the basis of calculations based on the revised feasibility study prepared by Mr Ng in Hong Kong. I found that exercise unconvincing in the light of the contemporaneous evidence of Mr Alford's actual views. I also bear in mind that Mr Ng did not send that study to Mr Connolly until 21 January 2019 and two weeks after the exchange between Mr Alford and Mr Downer. I find that Mr Alford expected FEC to pay £30 million for Ensign House and a premium of £2 million to Investin for options over 17 Suites with a higher figure if Investin could secure an option over Suite 14.

(iv) 21 January 2019: Mr Connolly's understanding

293. I accept Mr Connolly's evidence about the exchange of emails on 7 January 2019 and that when he asked the question "Did you exchange??" he intended to refer to an exchange of contracts between Investin and Rockwell rather than an exchange of contracts for the grant of options by some or all of the Suiteholders. It seems to me unlikely that Mr Connolly would have used the word "exchange" in the context of an option agreement as opposed to exchange of contracts for an outright sale and purchase.

294. But even if he had been referring to exchange of contracts with the Suiteholders, it is common ground that Mr Alford did not reply to his email and that the question remained unanswered. It is also clear from the subsequent exchange between them that Mr Downer and Mr Alford took a deliberate decision between them not to inform Mr Connolly whether the Suiteholders had signed the option agreement before he had entered into an NDA. Again, if it is necessary for me to do so I find that Mr Downer instructed Mr Alford not to confirm whether or not the Suiteholders had signed the option agreement until FEC had entered into an NDA.

295. I also accept Mr Connolly's written evidence that at the meeting on 16 January 2019 Mr Alford explained the terms of the option agreement which he had negotiated with the Suiteholders and led him to believe that all the options had been signed or agreed by all of the Suiteholders except for one which had an issue with the SFO. It is unnecessary for

me to decide the precise form of words which Mr Alford used because FEC UK withdrew its potential counterclaim for fraudulent representation. But in case there is any doubt, I am not satisfied that Mr Alford made a misrepresentation to Mr Connolly or that he did so with Mr Downer's authority. It is probable that he would have adopted an ambiguous form of words (as both Mr Downer and he had done before).

296. Moreover, I do not accept that there was an inconsistency between the Defendants' pleaded case and Mr Connolly's evidence. Indeed, it seems to me quite likely that Mr Alford used the terms "oven-ready" deal or a deal which "was all wrapped up and ready to go" or that Mr Connolly used those terms as shorthand for the position which Mr Alford had described to him. Both phrases are ambiguous and their meaning may vary depending on the context. Mr Connolly's evidence was that he assumed that the transaction would take effect by way of a sale of shares in EHL and a change of directors and I accept that evidence. It is not implausible to describe this as "an oven-ready" deal in the sense that Investin had secured a commitment from the Suiteholders but needed to go through various corporate formalities before FEC UK could take over the deal.

297. I find, therefore, that on 21 January 2019 Mr Connolly believed that Investin held signed options over 17 of the 18 Suites apart from Suite 14 and that he believed that the deal between Investin and the Suiteholders apart from Lama was "oven-ready" or "all wrapped up and ready to go" in the sense that the Suiteholders had made a commitment but further legal formalities were required before FEC UK could acquire those options from Investin.

298. Finally, however, I find that Mr Connolly did not discuss any of those formalities with Mr Alford. In particular, I find that Mr Alford did not tell Mr Connolly what document or documents the Suiteholders had signed nor what legal formalities were required before EHL could sell the options to FEC. Mr Connolly did not suggest that he asked Mr Downer or Mr Alford before he signed the NDA what interest EHL had in Ensign House or that either of them gave him the answer to that question. But in case there is any doubt, I find as a fact that Mr Connolly did not ask this question and neither Mr Downer nor Mr Alford answered it.

L. The NDA

(1) The Terms

299. On 21 January 2019 Mr Alford requested Ms McGinn to prepare an NDA. In the covering email he stated: "I've spoken with John D – Connolly wants to acquire EH Option. Need NDA to get ball rolling". On the same day Ms McGinn sent it to him and he forwarded it on to Mr Connolly, who signed it on behalf of FEC UK. Ms Joanna Lazarek, his personal assistant, then sent it back to Ms McGinn directly. She also copied the email with its attachment to Mr Alford. On 22 January 2019 Mr Downer counter-signed it on behalf of EHL.

300. The NDA took the form of a letter. It was headed "Ensign House, Admirals Way London E14 9XG (Property)" and stated to be from EHL. The introductory paragraph provided as follows:

> "We are writing in connection with a proposal to sell to you our interest in the Property (**Proposed Transaction**). In consideration of us supplying you with information and documentation relating to the Property and the Proposed Transaction and all information and documentation supplementary to the Property and Proposed Transaction either directly or indirectly, you agree to be bound by the agreement set out in the terms of this letter."

301. Clause 1 of the numbered clauses in the NDA was headed "Confidentiality of discussions, documents and information" and clause 2 was headed "Permitted Disclosure". They provided as follows:

> "1.1 In this letter, Confidential Information means all confidential information (however recorded or preserved) disclosed by us or our Representatives (as defined below) to you and your Representatives whether before or after the date of this letter in connection with the Proposed Transaction, concerning:
>
> 1.1.1 the existence and terms of this letter, and the fact that discussions relating to the Proposed Transaction are taking place between you and us and our Representatives;
>
> 1.1.2 any information that would be regarded as confidential by a reasonable business person relating to the Property; and
>
> 1.1.3 any information that would be regarded as confidential by a reasonable business person relating to the business, affairs, customers, clients, suppliers, plans, intentions, or market opportunities of us (or of any member of the group of companies to which we belong).
>
> **Representatives** means employees, officers, agents, advisers, representatives and officers.
>
> 1.2 Copies of any Confidential Information (and records of any information supplied orally), whether made in paper form or any other form, including CD-ROM or electronic form are referred to as Copies.

> 1.3 You must keep the Confidential Information confidential and not disclose it in whole or in part to any third party except as permitted by paragraph 2.
>
> 1.4 You may not use any Confidential Information except for the purposes of your due diligence exercise in connection with the Proposed Transaction (**Permitted Purpose**).
>
> 1.5 You and anyone to whom disclosure may be made in accordance with this letter may make Copies but only insofar as is reasonably necessary for the Permitted Purpose.
>
> 2.1 You may only disclose Confidential Information to your Representatives with our consent and provided that:
>
> 2.1.1 such disclosure is made only to the extent that is required for the Permitted Purpose;
>
> 2.1.2 you inform the recipient of the confidential nature of the Confidential Information before disclosure; and
>
> 2.13 at all times you procure that the recipients comply with the obligations that you have under this letter (both relating to the Confidential Information and other matters).
>
> 2.2 You must notify us of the name, address and standing of each person to whom you have disclosed Confidential Information pursuant to this paragraph 2.
>
> 2.3 You must inform us immediately upon becoming aware or suspecting that a person to whom disclosure of Confidential Information is not permitted by the terms of this letter has become aware of Confidential Information."

302. Clause 3 provided for FEC UK to return or destroy Confidential Information if EHL requested it to do so. Clause 4 was headed "Inspection of the Property" and provided as follows:

> "4.1 If you wish to inspect the Property or to make arrangements for any valuation, survey or other investigation of the Property to be carried out by you or your professional advisers which involves visiting the Property, you must make arrangements for such visits only with our consent.
>
> 4.2 If we require, you and your professional advisers may only visit the Property accompanied by one or more of our representatives as notified to you and only at such times (which may or may not be during normal working hours) as we specify."

303. Clause 5 was headed "Enquiries of Third Parties" and it expressly prohibited FEC UK from contacting any third parties (such as the Suiteholders) except in the following circumstances:

> "5.1 You and your professional advisers may only make such pre-contract searches or enquiries of and obtain such documents and information from

> our professional advisers as are properly required for your due diligence exercise in connection with the Proposed Transaction and not otherwise.
>
> 5.2 You and your professional advisers may not contact any third parties in connection with the Property or the Proposed Transaction without our prior consent and in accordance with all proper requirements we notify to you."

304. Clause 6 provided that if the Proposed Transaction did not proceed, FEC UK was bound to keep confidential and not to use for any purpose "any reports, valuations, correspondence, search and enquiries results and documents, information or other papers" which it had prepared or received from its advisers or any statutory body in connection with the Proposed Transaction. Clause 7 contained a number of limited exceptions of which only clause 7.1 is relevant:

> "The obligations as to confidentiality and non-disclosure in this letter do not apply to any Confidential Information or other matters that:
>
> 7.1.1 are or become generally available to the public (other than as a result of its disclosure in breach of the terms of this letter by you or your Permitted Recipients);
>
> 7.1.2 we agree in writing is not confidential or may be disclosed."

305. Clause 8 prohibited public announcements in relation to the Proposed Transaction, clause 9 provided that the obligations contained in the NDA would continue notwithstanding the return or destruction of the Confidential Information and clause 10 contained an entire agreement clause.

(2) Mr Alford's role

306. Ms Wicks put a number of questions to Mr Connolly about his understanding of Mr Alford's role at the date of the NDA. He agreed that at that time he understood Mr Alford to be Investin's "selling agent":

> "Q. And what you do in this paragraph is you describe your understanding of the relationship between Mr Alford and Mr Downer. You say: "At that point in time I thought Terry was working with John Downer, although I didn't know or think about the basis of terms on which Terry was working, but I knew that John Downer had the money and that Terry was doing the work negotiating. I thought it was an Investin deal where we were talking about a premium to get into that position, covering their costs (which had been paid by John Downer) and it would cover Terry getting paid. That was what I thought." So what you thought at this time, in January 2019, was that Mr Alford is on Mr Downer's side of the deal with the suite

> holders, isn't he? A. Yes. Q. Yes. He is fulfilling the same function that he later fulfilled for FEC? A. Yes. Q. Yes. He is Investin's buying agent. A. He is Investin's selling agent at this point, to me."

307. Later, Mr Connolly gave evidence that he thought that there was a partnership between Mr Downer and Mr Alford. When Ms Wicks probed that evidence, he said that he thought Mr Alford was a partner in the deal because he was getting a profit share:

> "A. No, I didn't. I think I said earlier on that I didn't know what the relationship was between John Downer and Terry at the time. You know, I knew that Terry was doing the negotiation and John had cash but I thought actually they were part of the same company. I thought they were part of Investin as an organisation. That's what I thought. I didn't think that Terry was an independent agent because he wouldn't have had the Investin email or the Investin banner. So at the time, I thought they came as a package. I didn't think that Terry was an agent working on behalf of John Downer. Q. Right, so you thought from the Investin banner that he was effectively an employee of the Investin company? A. Well, I didn't think he was an employee but I thought he was working in some partnership with him, whatever that might be. I knew that he wasn't an employee because he was -- he was an agent historically, and I just thought he was part of the same party in relation to this deal. I didn't think he was a separate agent. Q. You didn't think he had money in the Quay House deal, though, did you? A. In the Quay House deal? Q. He would have his fee as an agent. You didn't think he was an investor in Quay House, did you? A. Well, I knew he was -- he had a partnership with him. I didn't think that Terry was an investor in Quay House, I knew that John Downer owned Quay House, but it's not crazy to think that, you know, Terry had some -- it wasn't just a fee arrangement on a percentage basis, it was more about, you know, a share of -- as it turns out, a share of profits. I'm just trying to think about what I thought at the time. I certainly didn't think that Terry was, like, an independent agent working separately with John Downer. I thought he was part of the Investin group or -- but I knew he wasn't an employee. I don't know whether that's easy to explain, but I knew he wasn't sort of getting a -- you know, because, as far as I was concerned, John Downer/Investin was a very sort of -- you know, an investment vehicle, which doesn't hold that many staff anyway. So I didn't think he was an agent, I thought he came part of the -- I thought he was a partner with John Downer in the deal. MR JUSTICE LEECH: You thought he was part of the same organisation? A. Yes. MR JUSTICE LEECH: Did you actually ever think about the precise nature of the relationship, whether he was an employee or an agent -- A. No, I didn't. MR JUSTICE LEECH: -- or a consultant? A. No, it was always we want a premium for the options, we want a premium for the options, and I didn't think how that was going to be split between them. I obviously knew that they would both be remunerated for that and I wasn't really bothered about it because the way I look at it is the deal comes to me. That's how much you've got to pay for the option or pay for the deal or pay for the land, you know, does that work

> for you. What they do is irrelevant for me because, if it doesn't work for me as a price, then I wouldn't pay it. MR JUSTICE LEECH: And how they split it up is less important -- A. How they split it up is irrelevant."

(3) The MLA initial proposals

308. On 22 January 2019 Macreanor Lavington Ltd ("**MLA**"), a firm of London architects, sent a six page document headed "Ensign House, South Quay Initial Proposals" to Mr Connolly. It contained comments on the BUJ Feasibility Study and set out their own proposals for footprint and layout and compared a number of different schemes. The MLA initial proposals were not dated but Ms Wicks put to Mr Connolly that the date in the trial bundle index was 22 January 2022. Mr Connolly accepted that he had instructed MLA to "critique the scheme" put forward by BUJ. But he also gave evidence that he sent the BUJ Feasibility Study to MLA before he signed the NDA.

(4) 24 January 2019: The Shepherd's Bush meeting

309. On 24 January 2019 Mr Connolly and Mr Chiu met Mr Alford at a hotel in Shepherd's Bush. In his witness statement Mr Connolly gave evidence that Mr Alford told Mr Chiu and him that Investin had all the options in place apart from Suite 14 and that when Mr Chiu asked Mr Alford why Mr Ammora did not want an option, he said that there had to be an outright sale and that Mr Downer did not want to buy it outright. He also said that the conversation then moved to FEC buying Suite 14 and paying a premium for the 17 signed options. Ms Wicks challenged this evidence:

> "Q. Okay, let's just concentrate on what you say was discussed about Lama and the SFO. You say: "When the boss asked Terry why they hadn't got an option ..." That is why Investin hadn't got an option in place with Ammora: "... Terry told us that Ammora didn't want an option and that there had to be a sale instead, but that John Downer didn't want to buy his unit outright." None of that is true, is it, Mr Connolly? Mr Alford did not say any of those things. A. He did. That's what we discussed. Q. And then you say a little bit further on: "The conversation then went towards the idea that FEC would just buy the unit and get control." That's not true, either, is it? That was not discussed at this meeting? A. It was, it was discussed at this meeting. Q. You are absolutely sure? A. I'm sure that we discussed at the meeting the issue around the SFO and unit 14 and the fact that -- if that unit could be bought and resolve the problem, then that's the way we should travel and that's what we would do if we were in the position which Mr Downer was in, to unlock it. Q. What I'm going to suggest to you, Mr Connolly, is that this conversation that you say you had and is recorded in this part of your witness statement did not happen at the

> Shepherds Bush meeting? A. Okay. Q. And that the potential for FEC to buy the Lama unit outright didn't arise until significantly later. Is that right? A. We discussed this at the meeting on this date, the issue around the SFO and buying the unit. Obviously, there is something coming but this is my recollection of that meeting."

(5) 28 January 2019: Mr Downer, Mr Alford and Mr Connolly

310. On 28 January 2019 a telephone call took place between Mr Downer, Mr Connolly and Mr Alford. This was the first and probably the only occasion on which Mr Downer spoke directly to Mr Connolly. After the call, Mr Connolly sent an email to Mr Downer stating as follows:

> "Good to speak to you earlier on and as discussed we are very interested in moving this opportunity forward. In the first instance I would be grateful if you can let my Lawyers (copied in) to have access to the SFO order currently in place on the latest remaining office unit owner so we can understand the legal process in more detail? You mentioned it might be easier for your internal counsel to discuss direct?"

311. By email also dated 28 January 2019 Mr Downer replied stating that he had copied in Ms McGinn so that she could run through the legal process with Ms Monique Sutherland and Mr Stephen Malley, who was also a partner at DLA. Ms McGinn followed up this email by writing to Ms Sutherland directly and proposing a call the following day. By email dated 28 January 2018 Ms McGinn also wrote to Mr Downer asking him: "How much do we want to tell them? Do they know we used to own QH?" Mr Downer replied to her the following day: "Will call you this morning to discuss."

312. By email dated 29 January 2019 Mr Connolly reported to his superiors in Hong Kong (including both Mr Chiu and Mr Hoong) on a range of different matters. Under the heading "Ensign House – Canary Wharf" he provided the following update:

> "JC to do some legal work to ensure the last remaining owner can transfer their SFO order and free up the unit for the option. JC also to investigate acquiring some units earlier to reduce price. Our assessment is there will be a 10-15% discount on the £30.6m price if we complete purchase of the building earlier than the 3-year option. We can push buying the option down from £3.5m. David and Chris to confirm their decision."

313. There is no contemporaneous documentary evidence recording what Mr Downer, Mr Alford and Mr Connolly said to each other on 28 January 2019 beyond these emails.

Moreover, Mr Connolly could remember a call with Mr Downer, Ms McGinn and Ms Sutherland on 7 February 2019 although he could not distinguish them clearly. Nevertheless, it is common ground that Mr Connolly expressed a strong interest in the opportunity to acquire Ensign House (as he stated in his subsequent email to Mr Downer).

314. It was Mr Downer's evidence that he gave Mr Connolly a short "primer on the background to the deal" and explained that "12 of the 13 leaseholders were very close to completion". Finally, it was his evidence that he explained some of the few outstanding issues and, in particular, the issue with Lama. He denied that he had told Mr Connolly that the deal was "oven-ready". In cross-examination he firmly rejected the suggestion that he had told Mr Connolly that 12 of 13 option agreements had been signed when he used the expression "very close to completion".

315. Mr Connolly accepted in his witness statement that he did not really remember the call with Mr Downer and Mr Alford although it was his clear understanding that the option did not include Lama and that Mr Downer was not proposing to resolve this issue. In cross-examination Ms Wicks put Mr Downer's evidence to him. He did not accept that Mr Downer made it clear that the options were not binding. But he did concede that he was not clear who would be involved in resolving the Lama issue:

> "On 28 January you had a call, didn't you, with Mr Downer? A. Yes. Q. And in that call, Mr Downer explained that 12 of the 13 leaseholders were close to completing the option? A. Well, that's -- that was not discussed at the meeting. Q. I'm going to suggest that it was. That's exactly what Mr Downer said. A. Yes. Q. And he was explaining, as you already knew, that the option was not yet exchanged; it was not binding. That's right, isn't it? A. No, it's not right. I always thought that the options were exchanged. Q. And he explained that there were some outstanding matters to deal with, including the Lama issue? A. Yes. Q. But he didn't say, as you claim, "I'm not interested in dealing with the Lama issue." He didn't say that, did he? A. That was my recollection. Q. What he gave you to understand was that he wanted to unlock the Lama issue and get Lama signed up to the option along with the other suite holders. That's right, isn't it? A. No, no. Q. And he said that Investin still needed to talk to the SFO about Lama. That's right, isn't it? A. The conversation about the SFO and discussions around Lama were talked about at the meeting. I'm not too sure who actually was going to be responsible for, if you like, taking control of those conversations but I knew that obviously Terry was going to lead it, in terms of whether we were going to be involved at that time or whether John Downer was just going to be involved solely -- because I don't think we agreed at that meeting whether we would actually be involved in the negotiations with Lama or not. So that's what I took away from it but that

> wasn't agreed at this moment in time, who would be involved in those discussions with Lama. Q. So would it be fair to say that at the meeting the fact that there was work needed to be done on the Lama issue was discussed? A. Yes. Q. But you say it wasn't at that stage clear whether it was Investin who were going to take that work forward or FEC? A. Yes."

316. Finally, Ms Wicks questioned Mr Connolly about his email dated 29 January 2019 to FEC's Hong Kong management. Ms Wicks suggested to him that the following statement was a falsehood: "They are willing to discount the overall payment should the option be exercised earlier say between 10-15%". The following exchange then took place:

> "Q. Thank you. So this is right, isn't it, Mr Connolly, that what you are discussing in this email is not an alternative deal to doing the deal with Investin, it's a staged process? First, you are going to get Lama to join in the option? A. Mm-hm. Q. Second, you are going to buy the option from Investin and, third, you are going to try and improve on the deal and bring down the price by completing earlier. Have I got it right? A. Yes, that's correct, what you are saying, but the point about the 3.5 million was that was the premium that we were paying John Downer, okay? So that's what he wanted. That's what I'm saying. That changes from between 2 and 3.5. At this time, I've said 3.5. But what I'm actually saying is, we can bring that premium down, so if we commit to John Downer, we will get it for less than 3.5 million, which is what that is. Q. Mr Connolly, it may be convenient for you to say that now but you just told his Lordship a moment ago that you had had no discussion in the conversation the day before about how much you would be paying Investin for the options, had you? A. I did not have a discussion in that meeting but I had already had a discussion with Terry about how much money they wanted as a premium for their options. I knew at this point how much they wanted to be paid as a premium for the options in terms of Investin, what they wanted. Q. You never discussed with Mr Downer -- A. I didn't. Q. -- a price for the option? A. I didn't, I didn't. I was always discussing with Terry. Q. Yes. So you never confirmed that this was even in the ballpark of Mr Downer's expectations? A. No, because I knew what their expectations were. They wanted a premium for the work that they had done in terms of securing the options and that was in the form of, you know, between two -- he said 3.5 and, as it turned out, we were talking about 2/2.5 million. I knew that's what they wanted for us to basically step into their shoes and that was the deal. The deal was, you've got this executed -- you've got the signed options. We will then pay you a premium for us stepping into that position, which was in the order of 3.5 -- between 2 and 3.5 million, and then you would go and then we would complete the options with the remainder of the suite holders. Q. Mr Connolly, I'm going to suggest that that's not true, that you did not think that Investin were asking for £3.5 million, that this email is worded in not quite the right way and what you meant was that you would be able to push the option prices down by about 3.5 million? A. No, otherwise I would say that. This doesn't say that. You know, I've actually dealt with the option prices in the line before. So my view was

> that we would be able to get a 10 or 15 per cent discount on the price of the options from the suite holders and that's what's dealt with in that sentence and then in the last sentence, where I say: "We can push buying the options down from £3.5m." It's the premium that we are paying for the options that Downer wanted for the options. That's what that refers to. Q. To be clear, I'm suggesting to you that Mr Downer would not have been content with 3.5 million and he never indicated to you that he would have been? A. If Mr Downer wasn't content with 3.5 million, then I wouldn't be here today. The reality is we were discussing the premium and how much that would cost to step into their shoes. Mr Alford was doing -- Mr Alford was the person that was speaking to me. He is the person that brought me the opportunity. He is the person that set out the opportunity, and I discussed with him the commercial terms of the agreement, with Terry and John Downer. That's what happened."

(6) 29 January 2019: Ms McGinn and Ms Sutherland

317. On 29 January 2019 Ms McGinn spoke to Ms Sutherland by telephone. In her witness statement she gave evidence that she recalled talking through (a) the title structure; (b) the initial negotiations in 2014 and 2015, the involvement of Jones Day and DWF and the reasons why the option was not successfully negotiated the first time around; and (c) the recent negotiations with the leaseholders "outside of the main options" and their Side Deals. It is also likely that Ms Sutherland spoke to Mr Connolly later that day. Ms Wicks suggested to Mr Connolly that Ms Sutherland told him that that the options were not legally binding. He did not accept this and his evidence was as follows:

> "Q. And what I'm going to suggest, Mr Connolly, is that it would have been apparent in that conversation that you had with Ms Sutherland, if it hadn't have been apparent very much earlier, that the options had not exchanged and that they were not legally binding. A. We didn't -- if we did discuss it, then I didn't hear it, and -- I know that sounds stupid but I've -- I always thought that the options were signed and, you know, the documents show that I asked Monique not to focus -- don't look at the options, because I just took it for complete that the options were signed and agreed, and just focus on the SFO. We are talking about -- I think we talked about fees, and I didn't want to spend any money on the options because there was no point because we needed to make sure that the SFO, unit 14, can be delivered. Without it, the options were worthless to me. So that was always the instruction to DLA and to Monique. And that remained so all the way through in my head. That's what I thought at the time. I never thought that these options weren't in a legally binding position in terms of moving this forward."

(7) 30 January 2019: Disclosure of information

318. By email dated 30 January 2019 Mr Alford wrote to Mr Connolly asking him to instruct Ms Sutherland to send a note to Ms McGinn asking her to provide copies of the Restraint Order and material information relating to Suite 14, the option agreement and the Side Deals. Ms Sutherland sent an email in these terms to Ms McGinn on the same day. Before doing so, Ms McGinn asked Ms Sutherland to confirm her instructions and Ms Sutherland replied (on Mr Connolly's instruction): "My instructions are to undertake some due diligence to enable my client to take forward commercial discussions."

319. Before she replied to Ms Sutherland, Ms McGinn wrote to Mr Downer asking whether she should just send "the basic info for now" and Mr Downer confirmed that she should. Mr Alford also asked her to copy him in on all of the information which she sent Ms Sutherland. Ms McGinn then sent five emails to Ms Sutherland which she copied to Mr Downer and Mr Alford attaching the following documents:

    (1) The letter from the SFO to Mr Awad Ammora dated 28 June 2011, the Lama Skeleton Argument, the King Order of King J and the Lama Statement of Evidence (which Mr Ammora had sent to Ms Crocker);

    (2) A flowchart setting out the title structure of Ensign House, a spreadsheet setting out information relating to the individual titles and a copy of the freehold registered title;

    (3) The current draft of the option agreement prepared by Howard Kennedy described by Ms McGinn in the covering email as an "engrossment";

    (4) The Superior Lease of Suite 2 together with the underlease which Mr Hayklan and Mr Bews had granted to Mokum together with their registered title; and

    (5) The instructions to Mr Furber QC and his written advice.

320. It was not clear from the copies of these emails stored in the electronic trial bundle that all of the documents (above) were attached. For example, it was not clear from the original copy in the electronic bundle that the Lama Statement of Evidence was attached to Ms McGinn's original email. However, on 8 April 2019 Ms Sutherland forwarded Ms McGinn's email to Ms Laura Ford, a solicitor at DLA who advised FEC in relation to the SFO issue, and that copy had the Lama Statement of Evidence attached. In the event,

there was no real dispute before me about what Ms McGinn sent to Ms Sutherland and to whom she copied these emails. But for the avoidance of doubt, I find that the five emails had the documents set out immediately above attached to them.

321. On 30 January 2019 Ms Sutherland forwarded all five emails on to Mr Connolly stating that she would review them for him. Mr Connolly replied: "I only need your advice on the SFO order. If this is messy then I don't want to spend anymore time on it so please keep this to a min." I was not taken to any written advice which DLA gave to Mr Connolly in relation to any of these documents. Nor was I taken to any email in which Ms Sutherland pointed out to Mr Connolly that the option agreement had not been signed or exchanged by the Suiteholders.

(8) 13 February 2019: Mr Connolly's recommendation

322. By email dated 13 February 2019 Mr Connolly wrote to Mr Chiu and Mr Hoong and their colleagues in Hong Kong setting out his recommendation in relation to Ensign House and he attached both the feasibility study prepared by Mr Ng of HPA and the MLA initial proposals. He then set out the following summary:

> "Following on from visit to the UK I now have had some more time to review the above opportunity in conjunction with DLA our legal advisors and set out below the summary
>
> **Background**
>
> Investin Plc have been pulling together the acquisition of Ensign House for over 3 years. The basis of the deal is a Freehold purchase of the site from 18 different property interests throughout the building. Affectively [sic] there are 18 different owners all with different ownership percentages i.e. some own more office suites (which comprise the overall building) than others. Investin Plc started this exercise due to a defect in the title of Quay House (another building within the overall estate) which they owned and could not develop without the support of the owners of Ensign House. Investin Plc have recently sold Quay House to another developer unconditional and their requirement for Ensign House is no longer urgent. They are looking to recoup their legal costs along with a premium for assigning their option agreement.
>
> **Current Position**
>
> Investin Plc have 17 of the 18 land owners signed up to the option agreement with 1 remaining. The last owner has an enforcement from the SFO (Serious Fraud Office) for 50% of the ownership in their interest in Ensign House.
>
> **Option Agreement**

> The option agreement is for a 3 year term which is extendable by the option holder i.e. no money needs to be paid for the freehold until after 3 years OR earlier should the option holder wish to complete earlier. The agreement is for £26.5m with additional side agreements with various owners totalling £4.1m all of which are fully documented and are legally contracted (total for freehold is £30.6m). The option is joint and several so there is no other way the individual owners can do anything without the permission of the option holder. Investin Plc are currently wanting £4m payment for their position but I feel a deal can be done around £2.5m with a £500k retention payable once the issue with remaining owner is resolved.
>
> **Legal Position**
>
> On high level review all the legal agreements are sound. DLA have advised that there is a legal mechanism which will allow the remaining owner to transfer the SFO order either to an escrow account OR to another property. This is absolutely possible BUT potentially will take some time (between 6-12 months). In addition, on review of the information we have identified some issues with the title (very strange) but these can be covered through title defects insurance which should be straight forward to allow us develop.
>
> **Added Value**
>
> Most of the owners of the units have held them for a long time and most are free of debt. They are willing to discount the overall payment should the option be exercised earlier say between 10-15%, potentially circa £26m for the freehold."

323. Mr Connolly then set out both the advantages and disadvantages of the acquisition (in which he included both the Lama issue and the title problem created by the Superior Leases). He then made the following recommendations:

> "On review I think this is a very interesting opportunity which has potential. We need to ensure we are happy all the legal contracts are sound but I believe we can pay £2.5m for the option with a further £500k on completion of the final owner which incentives the agent."

324. Ms Wicks drew attention to Mr Connolly's statements that he had reviewed the opportunity with DLA and that on high level review all the legal agreements are sound. She suggested to him that these statements were untrue and that DLA had advised him that the option agreement:

> "Q. And if we go under "Legal Position", you say: "On high level review all the legal agreements are sound." Doesn't that indicate that you had asked DLA to review all the legal agreements? A. That wasn't quite the case. Q. What wasn't quite the case, that you -- are you suggesting to his Lordship that you are not telling the truth to your bosses in Hong Kong in

> this email? A. I'm telling -- the way that I set this out was that we were in a position to proceed and that the legal documentation had been provided to us but, at the bottom, in terms of a bit of a catch-all, I say we still need to review in detail the legal documentation, because, again, the point here was that I thought the options were executed, there was no need for us to review those options, and the bits that weren't quite straightforward was the SFO and I think there was -- did I mention something about the title defects, which is the reversionary leases effectively, which were -- I think I said strange, and that was what we needed to review. On the basis of when I sent this email, I thought that the options were signed and agreed and we didn't have to do any real due diligence on that because it was done. Q. So under the heading, "Option Agreement" you've described an option agreement as being for a three-year term? A. Yes. Q. And you say: "The agreement is for £26.5m with additional side agreements with various owners totalling £4.1m all of which are fully documented and are legally contracted (total for freehold is £30.6m)." But you knew that wasn't true, didn't you? A. No."

325. Ms Wicks also challenged the statement which Mr Connolly made under the heading "Added Value" that the Suiteholders were willing to accept a discount of 10% to 15%. She suggested to him that he must have known that this was untrue. Mr Connolly accepted that he had not spoken to any of the Suiteholders himself. But he said that it was common sense that the Suiteholders would accept less if they were offered a better deal. He also confirmed that the statement in his email was based on what Mr Alford had told him:

> "Q. But you were spinning it to your bosses in Hong Kong as if you had already had discussions with the owners of the units, weren't you? A. No. I want to try and answer your questions, Ms Wicks, straight. The point here was that there was an opportunity -- there always is an opportunity, where you have options, to have a chat with the land owner which you've got the options with to negotiate a better price to complete the purchase earlier. That was always going to be the case with this or any other option. MR JUSTICE LEECH: That may be common sense, but what has been put to you is that you said something which was untrue. Did Mr Alford give you this information or not? Did he say that he had spoken to suite holders and they had said that they -- A. No. MR JUSTICE LEECH: -- if money was up front -- A. No. MR JUSTICE LEECH: If you did a deal with them now, they would take less? A. No, that was only our opinion -- MR JUSTICE LEECH: He didn't tell you that? A. No, Terry told me that, yes. Terry told me that. Terry said, look, there is a few of these guys who are getting on and they wanted to get their money sooner rather than later, but he hadn't -- to be straight, he hadn't spoke to the suite holders about it. So this was just an added value of a potential opportunity with us to be able to negotiate with the suite holders. MR JUSTICE LEECH: So even -- whether you got that information from Mr Alford or not, you would accept

> that you have overstated the position in this document, would you? A. Yes."

326. Mr Connolly stated in his witness statement that he had talked about the premium with Mr Alford and that they had discussed a figure of £2.5 million (of which £500,000 would cover the legal costs). He also stated that he was pretty sure that he had talked with Mr Chiu about paying another £500,000 to incentivise Mr Alford to solve the Lama issue. Ms Wicks challenged Mr Connolly's evidence that he believed that Investin would accept a premium of £3 million for selling the options:

> "Q. And it's not right, is it, that you thought that Investin would do a deal at 2.5 million with a 500,000 retention? A. They would have definitely done the deal at that level. MR JUSTICE LEECH: What makes you so sure? A. Because that's what they wanted. They had options, which, in my view, were signed, and they wanted a premium to move out of the options, and the building, as the asset, was £30 million. It was not any more than that. And John Downer, obviously, had sold Quay House. You know, I knew that. And I knew the main reason for John Downer to get involved in Ensign House was to facilitate the planning or at least add value to Quay House. That was no longer required. So as far as I was concerned, them two just wanted to recuperate whatever they can and leave. That was obvious for me in terms of the way I felt at the time. And when we were talking about the £2 million or the 2.5 or the 3, it was a premium for us to step into their position, which actually is not a bad price, you know. I mean, obviously, people have got different opinions but, you know, to buy into an option to repay Mr Downer for all of his legal costs and then to step into the option was what was the deal that we had on the table. There was no other discussion about anything else other than a premium to get into the position and that was it, and if I would have given 2.5 million, he would have done that deal but, as we find out later, I thought the options were signed. MS WICKS: We will have a look at that, Mr Connolly. A. Yes. Q. For the moment, could I ask to you look at the bottom of page 1, please, and there you say: "We need to ensure we are happy all the legal contracts are sound but I believe we can pay £2.5 million for the option with a further £500k on completion of the final owner which [incentivises] the agent." It says "incentives" but I think it means "incentivises"; yes? A. Yes. Q. So it's going to be a £3 million price altogether for the option, with £500,000 of that retained until Lama has signed up to the option. Is that right? A. Yes. Q. And who is the agent who is incentivised by this mechanism? A. Well, it's Investin. Q. The agent is Investin? A. Yes. Q. Isn't the agent Terry Alford? A. No. Q. Are you sure the agent is not Terry Alford, who is being incentivised to get the final owner into the option by the fact that he will make his commission on the 500,000 which is payable once Lama signs up? A. Sorry, can you repeat the question? Q. What I'm suggesting, Mr Connolly, is that you know that Mr Alford is being paid a commission as agent for Investin. A. No. Q. And he will be incentivised to sort out the Lama position because there is £500,000 retained until Lama signs up, at

> which point he gets his commission on that 500,000. A. No. No, so -- can I understand correctly? You are saying that I'm thinking Terry is different from Ensign and John Downer here and that I'm saying that once -- sorry, Investin get half a million for the final option being signed, we would then pay Terry a percentage of that for his fee? Q. No, Mr Connolly. A. Sorry. Q. What I'm suggesting this indicates, that you knew that Mr Alford was working as Investin's agent on a commission basis? A. No. Q. And therefore, he would get -- under this arrangement, he would get his fee in two parts. He would get a percentage of the 2.5 million -- yes, of the initial 2.5 million and then he would get a percentage of the 500,000 when that was released. And the effect of structuring it like that would be to incentivise him to get Lama signed up to the option because it would mean he would get more money when Lama did sign up to the option. A. I maybe just cut across it. In this email, we seen Investin as the agent, okay? So Investin were the people -- it says "agent" but actually I'm talking about Investin. I'm talking about Terry and John combined. I'm not talking about Terry being separate to John Downer because, at this time, Investin were John Downer and Terry. So the agent I referred to -- and maybe the term of "agent" isn't right -- is Investin. So Investin would get £2.5 million premium and then, when we signed the deal with Lama, they would get an extra half a million quid. That's it."

(9) Findings

(i) Mr Connolly's understanding of Mr Alford's role

327. I accept Mr Connolly's evidence and I find that on 24 January he believed that Mr Alford was performing the role of Investin's selling agent although he was not independent. I agree with Mr Connolly that an independent estate agent would not have held himself out as a member of Investin's organisation or used an Investin email but would have operated under their own banner like Mr Gardner of JLL.

328. I also accept Mr Connolly's evidence and I find that he believed Mr Alford to be in a partnership or joint venture with Mr Downer. His basis for reaching this conclusion was not that Mr Alford was an investor but that he could not have been acting on a straight commission basis like an independent agent and must have had some other involvement or interest. In my judgment, this was a fairly accurate conclusion. Mr Alford had acted as a project manager on Quay House and had agreed a share of the profit on the sale of Ensign House.

(ii) 24 January 2019: Mr Alford's representation

329. I accept Mr Connolly's evidence and I find that on 24 January 2019 Mr Alford told him

and Mr Chiu that Investin had all the options in place apart from the option over Suite 14. In my judgment, the best evidence of what Mr Connolly was told by Mr Alford is set out in Mr Connolly's emails to Mr Chiu and Mr Hoong dated 29 January 2019 and 13 February 2019. It is clear from both of those emails that Mr Connolly believed that Investin had binding options over 17 of the 18 Suites and although Ms Wicks challenged the veracity of both emails, I can see no reason why Mr Connolly would have chosen to lie about this issue. Nor did Ms Wicks suggest one either to Mr Connolly in cross-examination or in closing submissions.

330. Moreover, although Mr Connolly stated in his email dated 13 February 2019 that DLA had reviewed the opportunity and that the legal agreements were sound, I am not satisfied that DLA had appreciated that Investin did not have binding options over those 17 Suites or that they had advised Mr Connolly to that effect. I have reached this conclusion for the following reasons:

(1) Mr Connolly instructed Ms Sutherland to limit her review to the Restraint Order. There is no suggestion that she did not comply with those instructions or carry out a wider review.

(2) In my judgment, it would not have been obvious to DLA that the option agreement had not been signed. Ms Sutherland would not have seen any signatures at the bottom but Ms McGinn described it as an "engrossment". One conclusion which she might have drawn was that there were many different signed versions and that the engrossment had been sent to her for convenience.

(3) If Ms Sutherland had appreciated that the option agreement was not binding, I would have expected her to report that immediately and to ask for instructions. I would also have expected Mr Connolly to raise the issue with Mr Alford or Mr Downer himself. There is no suggestion that either did so.

(4) I am not satisfied that there is a real inconsistency between the email dated 13 February 2019 and this conclusion. Ms Sutherland may well have cast her eye over the option agreement to check its terms and I accept Mr Connolly's evidence that she had looked at the Superior Leases. Moreover, the words "on high level review all the legal agreements are sound" are exactly the kind of words which a solicitor might have used after a brief review of this kind.

(ii) 28 January 2019: Mr Downer's representation

331. Mr Downer accepted that on 28 January 2019 he told Mr Connolly that the option agreements were "very close to completion" but he did not accept that he said that the option agreement had been signed by 12 of the 13 Suiteholders or that he intended to convey that impression. I find on a balance of probabilities that he did not make that representation.

(iii) 28 January 2019: Mr Connolly's understanding

332. However, I also accept Mr Connolly's evidence that following the call on 28 January 2019 he continued to believe that 12 of the 13 Suiteholders had signed the option agreement and I find that although Mr Downer did not make a positive misrepresentation to Mr Connolly on that call, what he said did not displace the misleading impression which Mr Alford had created on 24 January 2019 (and before). I have reached this conclusion for the following reasons:

(1) Mr Connolly's evidence is supported by the contemporaneous statements which he made in his emails dated 29 January 2019 and 13 February 2019. Again, I can see no reason why he would not have told his superiors that the options had not been signed if he had known this to be the case.

(2) The phrase "very close to completion" would have confirmed what Mr Connolly had been told by Mr Alford without being literally untrue. In a sale of land completion normally follows exchange of binding contracts and a lay person, even an experienced property developer, could have been forgiven for reaching the conclusion that there was a binding contract in place but that legal formalities remained outstanding.

(3) If Mr Downer had made it clear that the Suiteholders were not contractually bound, I have little doubt that Mr Connolly would have reacted immediately and either tried to obtain an immediate release from the NDA or asked for permission to approach the Suiteholders directly or even, possibly, walked away from the transaction entirely. I also have little doubt that he would have asked Hong Kong for instructions given the unusual situation in which he had been placed.

(iv) Lama

333. Mr Connolly could not recall the conversation on 28 January 2018 clearly and in the light of his concession that it was left unclear who would be dealing with the Lama issue, I do not accept that Mr Downer told him in terms that he was no longer interested in resolving this issue. Nevertheless, I accept Mr Connolly's evidence that he gained this impression. It is clear from his email dated 29 January 2019 that Mr Downer had asked him to get involved in this issue and to take legal advice. It is also clear that this was the principal (if not the only) outstanding issue which Mr Downer described in the course of the call. I am satisfied that this attitude or approach would have given Mr Connolly the impression that Mr Downer was not interested in resolving this issue himself (or, perhaps more significantly, paying for it to be resolved).

(v) The Premium

334. Mr Connolly's email dated 29 January 2019 to Mr Chiu and Mr Hoong provides evidence that Mr Alford had suggested a premium of £3.5 million to him. His subsequent email to Mr Chiu dated 13 February 2019 stated in terms that: "Investin Plc are currently wanting £4m payment for their position." I find that Mr Alford put potential prices of £3.5 million and £4 million to Mr Connolly. Both emails provide direct evidence of this. The difference between the two figures may be explained by Mr Connolly's evidence that £500,000 was intended to cover the costs and one figure was net and one was gross. But whatever the explanation, I am satisfied that Mr Alford told Mr Connolly that Investin wanted either £3.5 million or £4 million for the options.

335. I also accept Mr Connolly's evidence that he discussed a premium of £2.5 million with Mr Alford and that he discussed increasing it to £3 million with Mr Chiu if FEC could secure Suite 14. Again, this evidence is consistent with all of the contemporaneous documents. Not only is it consistent with Mr Connolly's own emails to Mr Chiu and Mr Hoong in Hong Kong but it is also consistent with the exchange on 8 January 2019 between Mr Alford and Mr Downer. Indeed, it is striking that the only price which Mr Alford mentioned to Mr Downer for the sale of the options to FEC was a "a premium of £2m to Investin for 17 of the options with a higher figure if Investin could secure an option over Suite 14."

336. Moreover, I find the explanations which Ms Wicks put to Mr Connolly about both of his

emails to Mr Chiu and Mr Hoong unconvincing. She suggested to Mr Connolly that in the first email he must have meant to say "We can push buying the option down by £3.5 million" rather than "We can push buying the option down from £3.5 million". But that is not what he said and there was no reason to believe that Mr Connolly had made a mistake. This was just an attempt to try and explain an inconvenient document.

337. Ms Wicks also suggested to Mr Connolly that he must have been referring to Mr Alford's fee in the second email. But he clearly found the explanation put to him confusing (as did I). I thought at first that Ms Wicks was suggesting that Mr Alford would be paid a commission of £3 million. But then she suggested that he would only be getting a percentage of £3 million. But neither explanation made sense to me. Nor was it clear why Mr Connolly would be discussing this at all given that Mr Alford's commission would be paid by Investin and not by FEC.

338. Mr Connolly accepted that he never discussed a premium with Mr Downer. In particular, he accepted that he did not discuss a price for purchasing the options on 28 January 2019. I have to consider, therefore, whether Mr Alford floated the offer of £3.5 million and put forward the offer of £4 million with Mr Downer's authority or knowledge. I find that Mr Downer gave his authority for the following reasons:

    (1) Mr Downer's evidence was that he would have charged FEC a premium of £50 million to £60 million for either of his options (b) and (c) (above), i.e. selling the options to FEC together with the project information or for releasing FEC from the NDA and Mr Alford from his retainer. I do not accept that evidence in the light of the exchange of emails on 8 January 2019. This exchange provides direct contemporaneous evidence that Mr Downer was concerned that FEC would not even agree to pay as much as £30 million without Lama.

    (2) Moreover, I was taken to no document in which Mr Downer expressed the view that the options were worth £50 million to £60 million. On 8 December 2014 Mr Alford expressed the view that Ensign House might be worth £50 million with the benefit of planning permission. But there is no contemporaneous document which suggests that Mr Downer held that view five years later or thought that it was worth that sum without planning permission.

    (3) I am satisfied that throughout the first three phases of the negotiations Mr Alford

acted on the instructions of Mr Downer and reported back to him. It is fair to say that his modus operandi was often to try and negotiate the best deal possible before reporting back to Mr Downer about the negotiations but he always did so. Moreover, it is a key part of EHL's case that Mr Alford was not independent and acted at all times as its agent.

(4) Mr Alford's negotiations with Mr Connolly bear a similar stamp to his negotiations with the Suiteholders. I consider that it is more probable than not that he put forward a headline price of £4m but suggested that Mr Downer would be prepared to accept a lower offer of £2.5 million for 17 options and £3 million with Lama. I also consider it more probable than not that he would only have done so with Mr Downer's knowledge.

(vi) Ms McGinn

339. Ms Wicks also submitted that Ms McGinn would have made it clear to Ms Sutherland that the options had not yet been exchanged and that Ms Sutherland communicated that to Mr Connolly. I do not accept that submission. If Ms McGinn had remembered telling Ms Sutherland on their call that the options had not yet been exchanged (or believed that she had done so), she would have stated so clearly in her witness statement. However, her evidence was that she only told Ms Sutherland about the Side Deals. For the reasons which I have set out in detail I am not satisfied that on 29 January 2019 Ms Sutherland was made aware that the option agreement had not been signed or exchanged and that the options were not binding.

340. Finally, before sending any information to DLA Ms McGinn asked for Mr Downer's instructions and he authorised her to send what she described as basic information. She also copied him into the emails which she had sent to Ms Sutherland. I am satisfied, therefore, that both Mr Downer and Ms McGinn considered the attachments to those emails to be the basic information to which she had referred and that Mr Downer expressly authorised Ms McGinn to send those attachments to DLA and to use them for the Permitted Purpose (as defined in the NDA).

M. Suite 14

(1) Lama's wish list

341. On about 10 January 2019 Mr Alford made contact with Mr Eyad Ammora and on that day he sent Mr Ammora an email asking him to provide details of his solicitor and any contact at the SFO. By email also dated 10 January 2019 Mr Ammora informed Mr Alford that an "interested party" had tracked down his former solicitor, Mr Mark Kenkre, who was a partner in Trowers & Hamlins LLP in Birmingham. Mr Alford also wrote to Mr Downer stating that he intended to make contact with Mr Kenkre and speculating that the interested party was either Mr Ranson or Mr Holliday.

342. Between 11 January 2019 and 30 January 2019 Mr Alford continued to correspond with Mr Ammora and Mr Kenkre and Ms McGinn exchanged introductory emails with him. It is apparent from these exchanges that further progress was being held up Mr Ammora's failure to provide the necessary identity documents to enable Mr Kenkre to satisfy his money laundering checks. Mr Ammora also asked for his personal expenses to be paid and Mr Downer refused to pay them (as I have set out above). However, by the end of January 2019 or early February 2019 the necessary checks had been carried out and by email dated 12 February 2019 Mr Ammora informed Mr Alford that he had been approached by "a second interested party" and that he was waiting for their offer. By email also dated 12 February 2019 Mr Alford informed Mr Downer that this was Mr Ranson.

343. By email dated 19 February 2019 Mr Ammora wrote to Mr Alford enclosing a Word document which he described as a "list of Lama wishes". He stated that: "this doc just clarifies in general Lama conditions, subject to personal meeting". Mr Alford then forwarded it on to Mr Downer. The enclosed document contained the following wishes or proposals:

> "• The agreement will be for 2 months extendable if the delay was due to tardiness by Lama not the potential buyer. This agreement to be signed by both parties prior to lawyer authorization.
>
> • Dr. Awad and Mrs. Nihad Ammora will agree to the restraint by the SFO of their 100% net proceeds from the sale of the office to your buyer in return for receiving exactly the benefits and the proceeds that all other owners of the same square footage area office will get from the sale together with a 900,000 G.B.Ps that will go to sourcing a flat for Mrs. Nihad Ammora in central London as a compensation for agreeing to the restraint of her 50% ownership of office and to act as accommodation instead of Damascus -Syria.

> • The SFO to be initially approached by the buyer's lawyers or any other lawyer agreed between the parties to establish contact and propose the offer to it for their response. Lama will consider authorizing the specific law firm agreed to represent it in the communications with SFO on the matter of lifting the restraint order to effect the sale. All corresponds with the SFO to be relayed to Lama for approval prior to dispatch and all received to be cc'd to Lama in a timely fashion.
>
> • All expenses including legal and transactional costs pertaining the sale of office and purchasing the replacement flat to be Bourne by the buyer. This includes transferring the ownership title costs of the flat to Mrs. Nihad Ammora's name. a letter with the buyer's name on it confirming this needs to be signed by a director/CEO of the buyer's company and relayed to Lama by email and by mail to the London address."

344. Mr Downer's comment on the wish list in his witness statement was that it reflected Mr Ammora's "undue confidence and belief that he held all the cards". He gave evidence that he asked Mr Alford to send Mr Ammora's wish list to Mr Connolly in a spirit of openness and knowing that he had the protection of the NDA. In cross-examination he also accepted that Mr Ammora was pushing for an outright sale of Suite 14 rather than the grant of an option:

> "Q. Yes. So she gets a £900,000 flat out of this. It would have been the biggest side deal. Ammora wasn't interested in doing an option, was he? He was only interested, in any event, in an outright purchase; correct? A. If you look at the correspondence, he was more than happy to enter into an option agreement first time round. Q. Well, at this point he is not, he is interested in a sale of unit 14, isn't he? A. That's his position at the moment, this email, yes. Q. So we can agree that at least. As at January 19 what Mr Ammora is looking at is a sale? A. That's what he is pushing for, yes. Q. Yes, and you weren't prepared to agree to that, and what your evidence says, Mr Downer -- in your statement you say this reflected Mr Ammora's undue confidence and belief that he held all the cards; correct? A. Yes, I think he thought he did."

345. Despite this admission, Ms Wicks continued to put the case to Mr Connolly that the wish list set out the price which Mr Ammora was looking for to enter into the option agreement. Mr Connolly did not accept this although he accepted that Mr Ammora was looking for the same price as the other Suiteholders were getting under the option agreement. Ms Wicks also challenged Mr Connolly's evidence that Mr Downer never wanted to deal with Mr Ammora:

> "Q. Mr Connolly when you say in your witness statement that Mr Downer never wanted to deal with Ammora, that's not true either, is it, because the

> whole point of what you and Mr Alford were doing, at this stage in time, was to try to get Ammora unlocked, so that Lama could sign Investin's option. That's true, isn't it? A. I agree with what you are saying in terms of -- in terms of the principle. I think what I was talking about really, in terms of John not wanting to deal with Ammora, was more about the history of the deal rather than Terry acting on behalf of Investin to unlock this deal. Q. Right. So when you were saying John Downer didn't want to deal with Ammora, what you are saying is that Terry was dealing with Ammora on John Downer's behalf, rather than John Downer dealing with it personally? A. Yes."

346. By email dated 21 February 2019 Mr Alford wrote to Ms McGinn stating that he was hoping to meet Mr Ammora in London during the following week and he asked for an update on the status of the signatories to the option agreement. By email dated 21 February 2019 she wrote back providing Mr Alford with the following status report (which he forwarded on to Mr Ammora):

> "The current status of the option agreement is that the actual agreement has been agreed between me and Howard Kennedy solicitors who act for all of the suiteholders except for Lama Petroleum. The terms and conditions have been approved by each of the suiteholders and they are in the process of getting the option signed and obtaining their lenders consent to enter into it. A copy is attached."

347. Mr Alford had not yet sent a copy of the option agreement to Mr Ammora and he pressed Ms McGinn for a copy. He asked her to send the draft and Mr Downer suggested that she do so with the prices redacted or blanked out. Mr Alford chased Ms McGinn the same day giving as the reason for the urgency: "I'm trying to confirm a time to meet Eyad this week and he's asking questions loaded by Bola who has a party trying to secure Eyad in a lock out." By email dated 28 February 2019 Mr Alford wrote to Mr Downer as follows:

> "Fyi I had a call from Paul late yesterday, told him I was hoping to meet Ammora [sic] this week- he knew Ammora [sic] was in town Simon also called for an update, Simon is fine Paul doesn't have an allegiance to Bola – just wants money/deal - told him Bola is out for more money only for himself…. Ammora [sic] has probably confirmed to Bola he's meeting me while in UK. I'm seeing him at 11 at Connolly office."

(2) 28 February 2019: the Lama meeting

348. On 28 February 2019 Mr Ammora came to Mr Connolly's office in London for a meeting with him and with Mr Alford. Mr Alford told Mr Downer about the meeting in advance and his response was "Ok, good luck" (see below). But he was not prepared to attend the

meeting himself and had no concern about Mr Connolly meeting Mr Ammora. By email dated 1 March 2019 Mr Alford then reported back on the meeting and the terms which Mr Ammora had put forward. Mr Downer's response was not about the terms but to look to FEC to pay his legal costs as reflected in the following email chain:

> Fyi I had a call from Paul late yesterday, told him I was hoping to meet Ammora [sic] this week – he knew that Ammora [sic] was in town. Simon also called for an update, Simon is fine. Paul doesn't have an allegiance to Bola – just wants money/deal — told him Bola is out for more money only for himself…Ammora [sic] has probably confirmed to Bola hes meeting me while in UK. I'm seeing him at 11 at Connolly office."
>
> (Mr Alford to Mr Downer: 28 February 2019)
>
> "Ok, good luck"
>
> (Mr Downer to Mr Alford: 7 March 2019)
>
> "I did call yesterday. Meeting went ok --- he wants his wish list agreed to and legal fees covered to confirm lock out. 900k as well as Option premium of 1.14m is deal ... I agreed in principle and shook hand – Connolly is confirming with bosses re legal fees if they will cover Do you want to consider covering?"
>
> (Mr Alford to Mr Downer: 1 March 2019)
>
> "Let's see what Connolly comes back with, call you shortly."
>
> (Mr Downer to Mr Alford: 1 March 2019)
>
> FEC will cover Lama legals to agree exclusivity...There [sic] sending me a draft agreement for Ammora [sic]"
>
> (Mr Alford to Mr Downer: 7 March 2019)
>
> "Ok good"
>
> (Mr Downer to Mr Alford: 7 March 2019)
>
> "Fyi Re FEC covering legals"
>
> (Mr Alford to Mr Connolly: 7 March 2019)

349. There was no real dispute between the parties that Mr Alford's first email was accurate and that on 28 February 2019 he had shaken hands with Mr Ammora on an agreement in principle. In his witness statement Mr Connolly stated that he agreed to Mr Ammora's terms with a view to getting him to sign an exclusivity agreement and Ms Wicks put it to him a number of times that agreement was reached at this meeting. The real issue between the parties was the nature of the agreement and whether it was for the grant of an option over Suite 14 or for an outright sale.

(3) The Exclusivity Agreement

350. By email dated 28 February 2019 Mr Connolly instructed DLA to draw up a lock out agreement and he forwarded on to them Mr Alford's email to him enclosing Mr Ammora's wish list. On 6 March 2019 Ms Sutherland sent him a first draft of the agreement which was ultimately executed and dated 11 April 2019 (the "**Exclusivity Agreement**"). The first draft identified the potential buyer as an Isle of Man company called Drakar Ltd and it provided for an exclusivity period of six months during which Lama would not send out any sale contract, title or other information in connection with the "Transaction" (as defined below) to anyone other than the buyer.

351. The draft agreement also provided that Lama would not conduct discussions or enter into any commitment with any third party or permit any person other than the buyer to view or obtain a survey of Suite 14. Recital A used the following form of words to summarise the anticipated Transaction:

> "The Buyer is interested in buying the property known as Ensign House, Admirals Way, London El4 registered under title EGL343350 (the "**Freehold**"). The Seller holds a leasehold interest in Suite 14 of the Freehold by virtue of a sub-underlease dated 31 July 1987 which is registered under title EGL2031l 0 (the "**Property**"). The Seller is offering the Property, which shall be deemed to include any interest deriving its value from the Property, for sale and the Buyer is interested in negotiating terms to buy it for fair value, and by way of additional consideration to acquire a residential property in London for a price not exceeding £900,000, but requires to have the exclusive right to negotiate for a limited period (the "**Transaction**")."

352. In her covering email Ms Sutherland identified two problems: first, there was no way of knowing whether Mr Eyad Ammora had authority to bind Lama or that he was who he purported to be; and, secondly, even if the agreement was binding the signatory was in Syria and Suite 14 was subject to the Restraint Order. Mr Connolly forwarded the email and attachment on to Mr Alford, who replied as follows:

> "This looks fine in principle to agree exclusivity. It covers 900K price Doesn?t [sic] note Option premium of circa 1,050,000 as Ammora [sic] has requested. It cover buyer undertaking sellers legal fee. And 6 month exclusivity. It doesn?t [sic] note FEC as ?buyer? he may query that. Do you want to KYC Ammora [sic] whilst he?s [sic] in UK? I will run past Ammora [sic] to get ball rolling."

353. Mr Connolly's evidence was that at the meeting on 28 February 2019 Mr Ammora was very clear that he did not want to grant an option. Ms Wicks challenged this evidence a

number of times and took Mr Connolly to Mr Alford's chain of emails with Mr Downer (above), which he had forwarded on to Mr Connolly on 7 March 2019. She suggested to Mr Connolly that the parties were discussing an option not a sale. Mr Connolly's evidence was as follows:

> "Q. So, Mr Connolly, it's not a question, is it, of FEC doing a separate deal with Mr Ammora to buy Suite 14 outright, it's about FEC oiling the wheels to get Ammora signed up to Investin's option, which will then be sold to FEC. Is that the case? A. No, it's not, no. I just want to say something on this, if that's okay, your Honour. I don't tend to -- I'm reading most of my emails on my iPhone. I think my iPhone at the time, yes. I don't tend to scroll down all the emails. The point here was that Terry was -- I was actually quite shocked, to be honest, because I attended the meeting with Ammora, we had a discussion about the possibilities of the deal. He mentioned very clearly that he didn't want to do the option and he vented his frustration about the process. But I thought it was Investin to secure that position but they wouldn't pay for the legal fees to underwrite Ammora to get the exclusivity agreement in place. So I thought if you want us to do it, then we are going to have to get the benefit of that exclusivity agreement because I wouldn't want to be paying legal fees for Investin to get it, if Investin don't want to pay the legal fee. I don't know how much it was. It wasn't too much. So this is the point where I thought, well, you know, John is aware of what we are doing but he is quite happy for us to get on with it because why would we underwrite legal fees for an exclusivity agreement for someone else? And that's what we did. And the exclusivity agreement is not an option, it's a purchase. Q. Well, Mr Connolly, what I'm going to suggest to you is that the exclusivity agreement is compatible with both option and purchase, but that, as demonstrated by this email exchange, which is forwarded to you, at this stage, in early March 2019, what you are all working towards is the same position, namely seeing if you can facilitate a position whereby Lama Petroleum can be signed up to the same option as the other suite holders with Investin. That's right, isn't it? A. No, so I will try and be a bit more clearer. So before this point, before I met Ammora, I didn't know how it was going to be unlocked, whether it was an option -- actually I didn't think about it. When I met with Ammora and he was very clear he didn't want to sign an option, I knew that wasn't the way we could go and the only way we could go was for a sale, and we drew up the exclusivity -- I'm sure what you say is correct, but the exclusivity was drew up on the basis of a transaction and not an option agreement. So there was no way that he would sign the option. He was never going to sign the option, the Investin option. He wasn't going to sign any option. Even with FEC, he wouldn't sign the option."

354. By email dated 12 March 2019 Mr Alford informed Mr Connolly that Mr Eyad Ammora had changed the signatory on the Exclusivity Agreement to his father, Mr Awad Ammora, and Mr Connolly forwarded the amended draft on to DLA. He enclosed a pdf

of the first draft which Mr Ammora had amended in manuscript changing the names. Clause 3.1(b) of the draft imposed an obligation upon the buyer to "provide appropriate undertakings to pay agreed legal fees to the Seller's UK regulated solicitors". Mr Ammora had amended this clause in manuscript to add the words: "including transfer of agreed property transfer [sic]". Again, this provides clear evidence that he was contemplating an immediate transfer of the property.

355. By email also dated 12 March 2019 Ms Sutherland wrote to Mr Connolly responding as follows to the change in signatory: "I don't think he owns the property legally – I think that makes the agreement even more meaningless!" By email dated 18 March 2019 Mr Connolly chased her for the amendments: "Don't worry Have you done this yet??" By email also dated 18 March 2019 Ms McGinn wrote to Mr Alford asking what the latest was and he replied: "I'm waiting for confirmation from John C re legal fees for Ammora [sic]".

356. On 4 April 2019 Mr Connolly informed Mr Alford that the identity of the buyer would now be an English company, Crouch End (FEC) Ltd. By email also dated 4 April 2019 Ms Sutherland wrote to Mr Connolly copying in her associate, Mr Sam Millar, asking about the change of buyer in the Exclusivity Agreement. She then raised the question whether Mr Connolly needed a fee proposal for dealing with "the acquisition of the options" or whether he was going to see if he got a positive signal from the SFO first.

357. On 10 April 2019 the Exclusivity Agreement was executed by Mr Awad Ammora and on 11 April 2019 Mr Connolly executed it on behalf of Crouch End (FEC) Ltd. Although minor changes had been made to the draft, Recital (A) was in the same form as the first draft and the agreement contained the principal terms which I have summarised (above). In particular, it provided for an exclusivity period of six months. Mr Seitler suggested to Mr Downer that he had no further interest in Ensign House because he was prepared to give FEC a "blocker":

> "Q. And then in March 2019 you truly give up the ghost because you allow FEC to agree an exclusivity agreement with Lama, don't you? A. Why wouldn't I? They are on an NDA and Terry is there as my agent. Q. Please, Mr Downer, let's see for both our sakes if we can finish this quicker. If you just answer the question. A. Yes, okay. Q. In March 2019 you allow FEC to agree exclusivity with Lama, don't you? A. Yes. Q. You give away a blocker; correct? A. I don't give away a blocker at all. I gave permission

> for Terry to give permission to them that they could go ahead and agree exclusivity with Lama. I thought it was a sensible strategy."
>
> "MR SEITLER: And this agreement, between FEC and Lama, you are aware of -- A. Yes. Q. -- and you consent to it happening; yes? A. Yes. Q. And what it amounts to is a six-month exclusivity agreement with Ammora, which is made on 11 April 2019. A. Yes. Q. So if we can have a quick look at page 2, please. {E3/340/2}. Recital B: "The buyer shall have an exclusive right to enter into the transaction for a period of six months." This is called a lock-out agreement, isn't it? It's more than that actually; well, it's a type of lock-out agreement, isn't it? A. It's a type, yes. I mean, FEC, as I read it, wanted to lock him down with some sort of agreement, but it's interesting, isn't it, that FEC want that -- wanted that agreement with my blessing but my NDA is a problem, you know."

358. After the short adjournment on the same day Mr Downer asked to clarify his evidence about the Exclusivity Agreement and, in particular, that he had never seen it before. He said this:

> "A. Good afternoon, my Lord, good afternoon, Mr Seitler. My Lord, could I just address a point, I was just thinking while I was having my lunch. On the exclusivity agreement that we saw just before we broke, I just wanted to make the point to my Lord that I never saw -- that was never sent to me, that agreement. I just wanted to make that point. I just thought about it while I was having my soup, that's all. Q. But you knew that an agreement was being entered into between FEC and Mr Ammora in relation to an exclusive period for FEC to treat with Ammora. A. I just knew there was an exclusivity agreement. That was it. So I didn't know what the terms of that agreement would be and, as I just pointed out to his Lordship, that I never saw that."

359. In these passages I understood Mr Downer to have accepted that he was aware that FEC had entered into the Exclusivity Agreement with Lama and that he had agreed to this even though he had not seen the agreement itself until the trial. He did not suggest that he expected EHL to be a party to the agreement and it formed no part of EHL's case that FEC committed a breach of the NDA by entering into the Exclusivity Agreement on its own account. Moreover, it was entirely reasonable for Mr Connolly to assume that FEC was acting as a principal rather than as EHL's agent given that Mr Downer had asked him to pay the legal costs. Nevertheless, I asked Mr Downer to clarify the position in the course of his re-examination:

> "MR JUSTICE LEECH: I'm sorry, this is quite an important period. You were aware that it was FEC that had exclusivity. I understand that you were not aware of the terms of the agreement which Mr Seitler showed you but

> you were aware that FEC had exclusivity, that there was an exclusivity period under which -- what did you think FEC were going to do during that six-month exclusivity period? A. Just progress the situation with the SFO and stop Lama doing anything else, agree the deal with the SFO and Lama and then come back to me and then I would enter the transaction with Lama. MR JUSTICE LEECH: I see. MS WICKS: So when it came to a final signature on a done deal with Lama, either by way of sale or by way of option, would it be Investin signing that -- A. Totally. Q. Not FEC? A. No way. I never gave permission for that, my Lord."

(4) 3 April 2019: Mr Connolly and Mr Alford

360. Mr Connolly's evidence in his witness statement was that on 3 April 2019 he met Mr Alford in a pub called the Victoria at Lancaster Gate and Mr Alford told him that the options had not been signed and completed. He also stated that he was a bit annoyed but not completely surprised because Mr Alford had already complained about Mr Downer a number of times and told him that there were "some issues" with the options. Ms Wicks challenged this evidence and suggested to him that there had been a complete change of direction as reflected in DLA's attendance notes of the calls on 10 and 11 April 2019 to which I now turn.

(5) Mr McGarry's contact details

361. By email dated 9 April 2019 Mr Connolly asked Mr Alford to call Ms Sutherland and provide the contact details "for the person dealing with this case in the SFO". On the same day Mr Alford pasted the email dated 20 December 2018 from Mr McGarry to Mr Mee into an email to Mr Connolly and Ms Sutherland and identified him as the point of contact and that this was "the last note from him Dec 18". On 9 April 2019 Mr Alford spoke to Mr McGarry, who proposed a meeting at his office in May. They arranged a call for 11 April 2019 and Mr Alford reported back to Mr Connolly and Ms Sutherland:

> "I've spoken to Johnathan McGarry at SFO Johnathan is happy to speak/meet with us to 'find a way forward' the call was very positive re a solution. I discussed the outline re Ammora exclusivity agreement and consent to open discussions. Johnathan suggested a meeting at his office to discuss next steps. He is away next two weeks and is available to meet week of 7th May. Monique ---1 will send a separate mail to Johnathan cc you ---feel free to contact if you want to speak with him."

362. On the same day Mr Alford wrote to Mr McGarry confirming the arrangements and who would be joining the call. In the first paragraph of the email he stated: "Following on

from our telephone conversation of this morning, as discussed, we are looking at the possibility of acquiring lease 14 Ensign House – Lama Petroleum." On the same day Ms Sutherland also forwarded on to Ms Ford the material supplied by Ms McGinn in relation to Lama

(6) 10 April 2019: The DLA conference call

363. On 10 April 2019 a preparatory call took place which Mr Alford, Mr Connolly, Ms Sutherland and Ms Laura all joined. The purpose of the call was to brief DLA about the upcoming call with Mr McGarry on the following day and to establish a strategy. DLA's attendance note records that Mr Alford explained the background to Ms Ford before either Ms Sutherland or Mr Connolly joined the call and that he gave her the following overview (my emphasis):

> "TA explain that the matter concerned a property in Ensign House near Marsh Wall in Canary Wharf. There are 18 properties and the original plan was to purchase these as part of an option that related to the planning permission granted on an adjacent building. There are eleven (11) different ownerships relating to the properties in Ensign House. **TA added this approach had changed and separate alternative agreements had been reached with the other owners.**
>
> TA explained that the Property at issue is Suite 14 (the "**Property**") which is owned by Lama Petroleum Limited, a UK registered company with two (2) directors Eyad Ammora ("**EA**") and Nihad Ammora ("**NA**"). The individual subject to the SFO restriction order is Dr Ayham Ammora ("**AA**"). He is the husband of NA and father of EA. The ownership of the property is split 50/50 between AA and NA. Lama Petroleum Limited was subject to a blanket order from the UK Government due to business dealings in Syria ten (10) years ago.
>
> TA went on to explain that his conversations so far with JM have indicated the SFO are interested and amenable to allowing the sale to take place. TA also made clear that the likely conditions of the sale being allowed were that the sale proceed monies not be allowed to leave the UK and that AA not be a beneficiary."

364. DLA's attendance note then records that Ms Sutherland joined the call and made some comments about the process which the SFO would expect and the mechanics of the deal. It also records Mr Alford's comment that EA and NA (above) did not want any monies transferred to them and that the purchase of a property was key for them. It then records that Mr Connolly joined the call and introduced himself before he and Mr Alford gave the following explanations to DLA (again my emphasis):

> "**JC explain [sic] that TA was working for Dorsett on this and had full authority**. JC stated that for Dorsett the most important thing was to find out whether the SFO will allow this to happen or whether it is too difficult to do. JC said his superiors are coming over to London later in the year and will want to no [sic] whether this deal is feasible."
>
> "JC explained that NA would get an apartment in Crouch End in 2 years as part of the proposed deal. JC stated that they would be buying the Property for £700,000 in cash for 100% ownership (at red book valuation) and as a premium also buying them a property worth £900,000. JC asked what the SFO might do in response, will they take cash or simply shift the restraining order to the new property in Crouch End?
>
> TA confirmed that a commercial agreement between Dorsett and the Ammora's was in place."

365. Ms Wicks suggested to Mr Connolly that the explanation which Mr Alford gave to Ms Ford before he joined the call (and, in particular, the sentence which I have highlighted in bold) showed that he was now working for FEC on an alternative plan and that he had agreed this with Mr Connolly on 3 April 2019:

> "Q. What I would suggest, Mr Connolly, is what this clearly shows is that Mr Alford is now working to promote the FEC deal to the suite holders in Ensign House by 10 April, isn't he? A. No, I didn't speak to him about the transaction. Obviously, Terry was very nervous when I spoke to him about that on the 3rd, the fact that he didn't have the options signed and we weren't progressing with that deal. What Terry was doing away from what my understanding was was nothing to do with me, and I had never spoke to Terry about any kind of transaction at this point. Q. And I need to suggest to you that that's not right, Mr Connolly? A. Okay. Q. And that's exactly what you had done on 3 April 2019? A. Okay, well, I mean the evidence shows in terms of emails, correspondence and discussions, along with minutes of meetings with my boss, that the only time I spoke to Terry about a transaction and the fact he could work for us was in the June of this year. There is a lot of emails and correspondence around that. If I was doing it now, why would I not have already had an email with him or a text or whatever, because that never happened, at this stage."

366. Ms Wicks also put to Mr Connolly the statement which he made after he joined the call (and which I have also highlighted in bold). He denied that Mr Alford was acting for FEC. Ms Wicks also suggested to Mr Connolly that his description of the deal with Mr Ammora was inaccurate and that there was no commercial agreement in place:

> "Q. So the description that you are giving to DLA Piper of the deal with Mr Ammora is not the one that had been agreed and Mr Alford had shaken hands on in February, is it? A. No, because I was toying with the idea of trying to negotiate with Mr Ammora, which involved, rather than giving

> him the amount of money that he wanted, giving him 700, 1.8 instead, and that's what I was playing around in my mind at this moment in time but, as I said, in the end it was just easier just to agree to his terms. Q. Okay. So when in the next paragraph: "TA confirmed that a commercial agreement between Dorsett and the Ammoras was in place." That's not accurate in the context in which it's given. They certainly haven't agreed to FEC buying the property for 700,000 in cash, have they? A. No, but they had signed the exclusivity agreement by this point, right? Sorry, I think they had signed the exclusivity by this time. An exclusivity is a lock-out. It doesn't necessarily mean we can't negotiate. So my view at this moment in time was to try to get a better price and potentially look at reducing the commercial term which is agreed in the exclusivity agreement -- well, stated in the exclusivity agreement. Q. So is the position this, that Mr Ammora thinks, at this stage, the deal he is going to get is the deal that was discussed at the end of February, namely the option premium of 1.14 million and 900,000 for a flat? A. Yes, the option premium, so whether you call it option premium or whether you just call it 900,000, and the flat. That's what he was expecting. At this moment in time, that was what was in the exclusivity agreement, but I think it's clear now, right, that it's not an option, it's a transaction. And he never was going to sign the option."

367. Following the conference call on 10 April 2019 Ms Ford sent a list of questions to Ms Sutherland for the call the following day. By email dated 11 April 2019 Ms Sutherland wrote back to Ms Ford stating: "I think John is going to agree that the site it is buying for FEC will be at its market value at the time, the apartment needs to be for a minimum price of £600k but value may also be relevant". When she put this email to Mr Connolly, Ms Wicks accepted that Ms Sutherland meant "suite" when she used the word "site". Mr Connolly confirmed that there was uncertainty whether the SFO would require a formal valuation but accepted he did want to reduce the price.

(7) 11 April 2019: The SFO conference call

368. On 11 April 2019 the conference call with Mr McGarry took place and Mr Alford, Mr Connolly, Ms Sutherland and Ms Ford all joined it. DLA's attendance note of the call records that Mr McGarry saw no reason why Suite 14 could not be purchased provided that the sale proceeds did not include a reduction for the purchase of a property for Mrs Ammora. It also records that Mr McGarry required two independent valuations to be provided by the purchaser and that Mr Alford stated in response:

> "TA said the valuation was circa between £600,000-£700,000. TA said they were trying to acquire the whole building so there was an associated uplift as a result."

369. Ms Wicks took Mr Connolly through the remainder of the attendance note and he accepted that the "key takeaway" from the conference call was that the SFO was concerned to ensure that the Ammoras could not take any benefit from the transaction by way of cash or property and that the proceeds of sale of Suite 14 would have to be paid into a bank account which was subject to the Restraint Order. Immediately after the call Mr McGarry wrote to Mr Alford setting out the SFO's position:

> "Many thanks to you all for finding the time to discuss the Ensign Hse issue with me earlier this morning. While I would welcome the opportunity to explore this matter further it is important for all concerned to realise that the purpose of the existing restraint is to preserve the value of the asset concerned against any future confiscation order. I am sure however that a straight forward solution can be found to the issue at hand. I understand that Mr. Amora [sic], Dr. Amora's [sic] son, may be willing to meet on 9th May to explore matters further."

370. On 11 April 2019 Mr Alford spoke to Mr McGarry again and reported back by email to Mr Connolly, Ms Sutherland and Ms Ford that he was positive that a deal could be done. By email dated 12 April 2019 he wrote back to Mr McGarry in the following terms confirming that he was organising a meeting with Mr Eyad Ammora on 9 May 2019:

> "Further to our telephone call earlier today, we are organizing to meet with yourself and Eyad Ammora on 9th May, Ammora is agreeable to meet which is a good start. I will confirm meeting time on 9th May once we know Ammora travel details to London which are being organized as we speak. You requested confirmation of the $600k charge on Lease 14 Ensign House, E14 9UD DLA Piper are looking into the Title we will confirm all above. Speak in due course and look forward to meeting on 9th May."

371. Mr Alford copied this email and the chain containing all of the emails between himself and Mr McGarry since 9 April 2019 not only to Ms Sutherland and Ms Ford but also to Mr Downer. It is common ground that this was a mistake although Mr Downer's reaction was not surprise or concern but to forward this chain to Ms McGinn with the comment: "Looks like he is making some progress". Ms McGinn replied: "Good news. And DLA seem to be incurring costs which is a good sign". Mr Downer's final comment was: "Yes looks encouraging".

372. It is also important to note that the email address which Mr Alford had used for all of his emails to Mr McGarry was Terence.alford@lyonhousegroup.co.uk. For closing

submissions Ms Wicks and her team produced a spreadsheet which listed the emails which Mr Alford sent from his Investin email account and this spreadsheet confirms that after 11 April 2019 Mr Alford barely used his Investin email account at all. On 16 April 2019 he forwarded on an email which Mr Ammora had sent to that account and on 25 June 2019 Mr Connolly sent an email to that account himself.

(8) 18 April 2019: Mr Connolly and Mr Hoong

373. On 18 April 2019 Mr Connolly called Mr Hoong. In his witness statement he stated that he could recall this conversation "like it was yesterday". He gave evidence that he told Mr Hoong that the options had not been signed by the Suiteholders and that he discussed with Mr Hoong whether FEC should pay an introduction fee to Investin rather than a premium but Mr Hoong did not agree. It was also his evidence that Mr Hoong and he decided to continue to try and secure Suite 14 and if they could "Ensign was worth a shot". Ms Wicks challenged Mr Connolly's evidence on the following basis:

> "But in paragraph 77 of your witness statement, you refer to a meeting between you and Mr Alford on 3 April 2019, don't you? A. Yes. Q. And you say at that meeting that's when you found out that the options weren't signed. A. Yes. Q. That's your evidence. And then in paragraph 78, you refer to a telephone conversation that you say took place on 18 April 2019 with Chris Hoong. A. Yes. Q. And he essentially says, we are not going to pay anything to John Downer. Is that fair, your evidence? A. Yes. Q. And then at paragraph 79 -- look at the bottom of paragraph 79 -- you say you thought you would see if you could secure the Ammora suite and then, if you could, then Ensign was worth a shot. A. Yes. Q. So you think Ensign House is worth going for if you can get Ammora on board? A. Yes. Q. What I'm going to suggest to you, Mr Connolly, is that something rather different happened. I'm going to suggest that from about early to mid-April, you and your bosses and Terry Alford start to consider structuring the arrangements with the suite holders as direct purchases rather than an option. And initially, you pursue a twin track; you are looking both at an option and also at purchases in the alternative. And you decide that, if you can get hold of Lama's Suite 14, you will do a direct purchase with the suite holders. And that if you do a direct purchase with the suite holders, you will cut Investin out of the deal. And that's got nothing to do with any sudden discovery that options are not exchanged, which you've always known, and that you are pretending in these proceedings to have suddenly discovered that the option was not exchanged, as an excuse for a deliberate decision to cut Investin out of the deal. So those are the propositions that I'm going to put to you. That's the case that I'm going to put to you."

374. Mr Connolly's evidence was that he was very disappointed but not surprised when Mr

Alford told him on 3 April 2019 that the options had not been signed and that he wanted some time to think about it. But he also said that the meetings on 10 and 11 April 2019 were positive and that he knew then that the dispute over Suite 14 could be resolved. He then spoke about his discussion with Mr Hoong:

> "So then I had to speak to my boss about the fact that the options weren't signed, which is what I did on 18 April, and, you know, it wasn't a great conversation, right? But I understand there was some value in what -- the position that we had. We wouldn't have knew about Ensign House if Terry wouldn't have brought us the deal. We wouldn't have knew about the position if that wasn't described to me. There was something I thought we could do and that's why I asked, you know -- as soon as I said to Chris that the options weren't signed, he just went, "Well, what's that about?" And I was like, "I don't know". I mean, I said to him I was absolutely under the impression that these options were signed because we would never have got to the position we got to, and I certainly wouldn't be having the conversation with Chris about it if we knew about this or we had an understanding of a deal months ago, right? And that's when Chris was quite straightforward and said, "Look, the options are worth nothing. If they are not signed, they are worth nothing to us." And I said, "Well, look, can we do some kind of introductory fee to try and get something back from them." And effectively, Chris was saying, well, if Terry is the person that you were dealing with, if anyone gets any money it should be Terry, right, in terms of introduction. But I said, no, I think both of them need to get an introductory fee. But that's how we left it with Chris because, at the end of the day, I said to him, actually, it's not even worth thinking about again if we can't get the SFO and we have got this meeting in May and that that will really give us a pretty definitive idea of whether the SFO can be resolved or not."

(9) 31 May 2019: Mr Connolly and Mr Chiu

375. By email dated 1 May 2019 Ms Bridget Dalgliesh of the SFO wrote to Mr Alford postponing the meeting on 9 May 2019 because Mr McGarry had to have an unforeseen operation. On 31 May 2019 Mr Connolly met Mr Chiu in London. Mr Connolly produced handwritten notes of the meeting which recorded as follows under the heading "Ensign House":

> "JC focus – acquiring Syrian's unit & work with Terry to agree prices with all other office suite holders. As option agreements are messy & not executed. JC to confirm Terry can work with us directly to acquire ↑/above. - /overall price needs to be >26m."

376. This note is the first contemporaneous document which records a decision by FEC or Mr

Connolly to engage Mr Alford to act for FEC in relation to the purchase of Ensign House. Ms Wicks asked Mr Connolly about this conversation on both Day 10 and Day 11 and both times he resisted the suggestion that such a decision had been taken before:

> "A. Yes, so the meeting didn't happen in the May, when it was supposed to. It got kicked back. The boss was over at the end of May and we had a chat about various opportunities, including Ensign House, and I said to him exactly what I said to Chris about the deal -- in fact, actually, he already knew from Chris that the deal, in terms of the options, wasn't signed. And that's when we discussed, you know, the possibility of looking at a different type of deal. So there was absolutely, your Honour, no way in the world that we had a dual position. The way that it changed and the focus of the structure changed when we discussed it with my boss on 31 May in London and that's when we decided to have a chat with Terry to see whether or not, you know, things can move in a different way, right? In April, Terry knew quite clearly from me that there was no way that we would continue with the deal that was proposed, which was the premium for the options, because the options weren't signed. So he wasn't happy about that but that was just the way it was. I felt duped. I felt -- you know, and, of course, the evidence now, looking back at it, suggests I should have been looking at stuff and maybe I should have been, but I was so busy at the time and I'm so angry for myself to let it get to the position that it got to but that's the way that it was. And now, you know, there is many things I would have done differently. But we had no conversations about having a dual attack. It was always just after the 31 May meeting, when we had a discussion about what we can do next. So that was it."
>
> (Day 10)

> "But when David is in the UK, we get to -- I get more of his time, right? So we get to sit down and we go through the projects, the opportunities, obviously, and everything else, and that's when we discussed the Ensign House project and whether or not it would still be of interest for us to do a different type of deal, which would be obviously a transaction rather than the options, which were dead and messy, as it says here, because, obviously, the complication of the link to the planning consent for Quay House. So at this meeting we agreed that I would speak to Terry and I would see whether or not he could work for us direct, rather than, obviously, as he was with Investin, in order to try to get a different type of deal. Q. So you've explained that your original strategy was to get the options first and then use the options to bargain down the suite holders, to depress the prices, wasn't it? A. Mm-hm, yes. Q. And by this point, you realise that the better strategy is to pursue direct purchases, and because the option agreements are messy and not executed, there is nothing to stand in your way doing that. Is that right? A. A transaction strategy is the only strategy. To go down the route of options again -- well, it wasn't for us."
>
> (Day 11)

377. Ms Wicks then moved on to the NDA. Mr Connolly accepted that he had never gone back to Mr Downer and asked to be released from the NDA on the basis that he had signed it under false pretences. He also accepted that he had not been misled by Mr Downer but by Mr Alford. Ms Wicks then turned to the position of Mr Alford himself:

> "MS WICKS: So, Mr Connolly, it's the end of May and into June 2019 and your boss has asked you to confirm that Terry can work with FEC directly; okay? That's what he has asked at that meeting, hasn't he? A. Yes. Q. And you say in your witness statement that you asked Mr Alford and he said yes, and that was in June? A. Yes. Q. So presumably, in order to carry out your boss's instructions properly, you will have checked to make sure that you properly understood what job Terry Alford had been doing for Investin in relation to Ensign House; yes? A. No, I wasn't particularly concerned about what role or job he had with Investin, just purely that he could work for us. Q. Did he tell you that he was a free agent? A. He told me he was an agent in that he had no agreement with John Downer on Ensign House. Q. So he told you he was an agent and is that the first time that you say that you realised that he was an agent for John Downer rather than a partner or a part of the Investin company? A. No, like I said before, I didn't think he was an agent for John Downer, I thought he was working in partnership with John Downer. When I asked him whether he could work directly for us, he said he was free to do so because he was an agent and he was self-employed and that he didn't have a contract with John Downer on Ensign House. And I presumed that because he hasn't got a contract with John Downer on -- if he did have a contract, then that would be different because he was very clear to me that he didn't have a contract or allegiance to John Downer, that he was happy to come and work for us, to facilitate the deal."

378. Mr Connolly gave evidence that if he had known that Mr Alford was not free, he could have found another agent to act for FEC and he identified a couple of agents who had the necessary knowledge of the market. Ms Wicks then asked him why he did not check the position with Mr Downer. Because of its importance, it is necessary for me to set out the passage from Mr Connolly's cross-examination in full:

> "Q. Just a few moments ago, before the short break, you told his Lordship that Mr Alford, Terry Alford, "definitely misled me" in relation to the status of the options. A. Yes. Q. So you couldn't trust him to tell you the truth about whether he was free to work for FEC, could you? A. I'm not surprised by why Terry did that. Many other agents do that, you know. If they are -- they are trying to make money, they do elaborate on the truth or they do see things progress in a way that they feel suits them. So I didn't -- I didn't blame Terry for it, I didn't hold a grudge against him. I was upset that he left it so long before he told me but I -- but it wasn't a case of me never wanting to work with Terry again. I've done it with other agents, where they've done very similar situations, where I continue working with

these people. You just got to understand what you are working with. Q. And by this stage, you knew Mr Alford was unhappy with Mr Downer, didn't you? A. Yes. Q. So wasn't it the case that everything told you you could not rely on Terry Alford to tell you the truth about whether he was free to work for FEC? A. Well, it was quite clear, right -- we are all grown-up business people, right? So if you are asking someone, "Have you got a contract with someone" and they say, no, then you take it for what they say. That's the reason -- did I trust Terry? I don't need to trust Terry because actually we give him some directions of travel, then -- and he goes through on those directions, then that's fine. I mean, I think, trust is quite a big -- you know, it's not an easy thing to describe in business, right? There is certain levels of trust that you give people and, with Terry, we had a long conversation about the situation with John Downer and how he continued with Ensign because he had no other option -- well, he had a number of options -- opportunities at the time but he still wanted to see if he could get something from Ensign House. But I think when we had that conversation in April -- this is me talking to him in June. When we had the conversation in April and I made it very clear that he didn't have anything to sell, his mind changed and, when I spoke to him again in the June, I asked him quite specifically whether he could or he couldn't work for us because of his arrangement with John Downer or Investin and he was very clear to me. He said, you know, a couple of things which made me think that he was clearly not going to be working with John Downer again and that related to how he was dealt with at Quay House, more of the detail around that, the fact that he said -- you know, he said to Terry, you know, you can do what you want with Ensign House. So there was a couple of things which Terry told me at that time, which made me think, well, if he hasn't got a contract and actually the way he has been treated by John Downer, I understand now fully, then there is no reason why I can't say to him, "You can come and work for me." Or, "Come and work for us" in relation to this. Q. Why not drop Mr Downer an email, “FEC is thinking 3 doing a deal with the suite holders, we are progressing the Lama position. Just to check that it's fine for Terry to work with us on that." Why didn't you do that? A. No, because -- I mean, of course, in hindsight, that might have been another good route to take but, you know, he knows what he can and what he can't do. Me asking him a question direct -- and I asked him a few times, "Can you work for us?" And his response every time was, "I do not have an agreement with Investin or John Downer on Ensign House and I am free to do whatever I want." Q. Isn't the reason why you don't make contact with Mr Downer because you knew what Mr Downer would say. He would say, "Hold on a second, you signed an NDA with me, you've got a load of my confidential information and there is absolutely no way that I'm going to allow you to use Terry Alford, who is my agent on this deal." A. Well, Terry told me that John was no longer interested in Ensign House in the June, that he had very little correspondence or communication with John Downer and that he wasn't interested, and the deal that I had with Investin was no longer there. It was never a deal that we were going to proceed with. So this new structure and new deal was something very different from what it was before. So I felt no reason to call John Downer because the deal that we had with him was

> dead and we were moving on. Q. But, Mr Connolly, you may have thought that the deal that you, FEC, had with Investin was dead. I mean, obviously we disagree about that but we have heard your evidence on that. But you didn't think that Mr Downer's interest in Ensign House had come to an end, did you? A. Yes. Q. What, because Terry Alford said, "John Downer says I can do what I like with Ensign House." A. John Downer -- since the call that we had in the January and the discussion that we had about Ammora fee in the March, John Downer had no contact -- well, he didn't even have any contact with me in March, and so, as far as I was concerned, like I said to you before, unless you keep on going at something, then you know you're interested. As far as I was concerned, John Downer didn't come forward, and what Terry was telling me was that he had lost interest and he told Terry to get on with it because of the way that he was treated on Quay House."

(10) 4 July 2019: The SFO meeting

379. By email dated 4 June Mr Alford wrote to Mr Connolly and DLA to inform them that Mr McGarry was back at work. By email dated 20 June 2019 he then wrote to Mr Connolly informing him that the meeting would now take place on 4 July 2019 at the SFO's offices. In a second email dated 20 June 2019 Mr Alford wrote to Mr Connolly to update him on his progress with the other Suiteholders apart from Lama:

> "I met with the Board of Directors of Ensign House Ltd, who are all leaseholder/stakeholders in the Freehold, in April 19. We discussed the position re purchasing all 17 leases, excluding suite 14 Lama Petroleum/ Ammora, and taking the deal forward as a transaction and not as an Option Agreement – TBC The Board have secured an outline insurance policy to indemnify the redevelopment of the Freehold in relation to the Reversionary leaseholders on the title. Estimated policy premium £40,000 – far less than the previously noted £900,000. I have not seen the policy details but was informed its robust to underwrite the development. We will have sight of for due diligence was terms agreed. The Board is very keen to progress the deal as a multiple asset transaction which is the preferred route to an Option Agreement.
>
> I've separately met with the Lion share Leaseholder who owns 4 of the 18 leases. He and his brother are also very keen to agree a transaction deal. I'm in regular contact with the main stakeholders in the building, I have relayed as much as I need to as this stage re Ammora/SFO in order to communicate intent to get deal done. Bottom line is all of 11 individual leaseholders, excluding Lama/Ammora, controlling 17 leases, as there are several multiple owners, are very keen to agree a sale – I have been dealing with them for 5 years now so the timing is key to agree terms over the next few weeks once we have clarity on the Ammora/SFO position – meeting 4th July."

380. Mr Alford proposed a fee of £5,000 for his work to date. Ms Wicks put the first part of this email to Mr Connolly and she asked him whether he knew that in April 2019 Mr Alford was having conversations with the directors of Freeco, who were Mr Boughtwood, Mr Ranson and Mr Holliday. Mr Connolly denied this and suggested that Mr Alford might have been exaggerating the position to justify his fee:

> "Q. You don't think he did have a conversation at all -- A. I don't think he did. No, I think he might have got this wrong. I don't know why he said April. Because he has got that date wrong. He might just be trying to push it back. I mean, if Terry had a conversation with the stakeholders in April or May, then I knew nothing about. I never discussed it with him. So it was up to him if he wanted to do that. I can't control that, but I certainly didn't speak to him in April or May about him having conversations with the freeholders, at all. So this is in relation to the 5 grand that he wanted, I guess to justify the position of giving him 5 grand for his work to date. But I think he has got -- I think he has either got that April date wrong or he is slightly trying to inflate the time he spent on this project. Because this is what I asked him in the June. This email to me is 20 June, right? Q. Yes. A. So you will see no correspondence, emails or texts from me to Terry in April or May in relation to Ensign House, especially not in relation to the leaseholders."

381. By email dated 25 June 2019 Ms Leslie Azam, Mr Connolly's PA, wrote to Mr Alford confirming that FEC was prepared to cover the legal costs of the meeting and Mr Ammora's travel costs (a total of £17,600). On the same day Mr Alford wrote to Mr Connolly providing a summary of recent developments in relation to Suite 14 and Mr Connolly forwarded it on to Mr Hoong with the comment that Mr Alford had been coordinating communications with Lama and the other Suiteholders. Mr Alford's email stated as follows:

> "I have spoken numerous times now with Eyad Ammora, who is travelling to London next week from Sudan to meet with ourselves and the SFO, Allan Maidment solicitor as well as the Bank with the legal charge on suite 14 Ensign House, basically all the parties connected to lease and transaction of unit 14 Ensign House. He is as positive as we are for the meeting to go well with the SFO next Thursday and intends to agree terms with us following the meeting. Eyad is aware of the cost, time and effort involved to reach this point. It has taken weeks to organize the SFO meeting, as you know. Jonathan McGarry at the SFO out of office for 5 weeks due to having an operation at short notice and we had to postpone the meeting pencilled in for early May. Eyad Ammora chased me for the meeting with the SFO and I know how keen Ammora is to reach a resolution and a deal, as are the SFO."

382. By email also dated 25 June 2019 Mr Connolly wrote to Mr Alford providing the form of words for an email which he asked Mr Alford to send to Mr McGarry stating that FEC would cover the reasonable legal fees and travel costs of Mr Ammora's solicitor, Mr Allan Maidment, up to a maximum of £3,100 (including VAT). By email dated 27 June 2019 Mr Alford also wrote to Ms Ford copying in Mr Connolly and briefing her for the meeting on 4 July 2019. In the course of that email he made the following statement:

> "At the moment we are discussing a potential transaction purchase for all 17 leases with the leaseholders in Ensign House as well as an Option agreement. Ammora is mindful he is the remaining leaseholder not yet agreed to sign an Option Agreement and is not to [sic] aware will most likely proceed as a transaction."

383. Ms Wicks suggested to Mr Connolly that even at this stage he was "twin-tracking" the possibility of both a direct sale and an option. She also suggested that Mr Ammora was in the same position as the other leaseholders. Mr Connolly did not accept this. He made the point that the SFO would not have agreed to an option for the following reasons:

> "MS WICKS: Yes. I say it means that Mr Ammora is in exactly the same position as the other leaseholders, that the discussions are for the potential either for a transaction purchase or for an option. A. No. So the exclusivity agreement, all the emails between all the parties about a transaction never mentioning options, and there is one slight sentence on the back of Terry Alford's email which says options, which it shouldn't say, because we weren't doing it and that's what -- after the options were dead in April, we had no inclination to do options. Why would we go back -- well, you've seen how long it takes. There is no way that we would go back and go and start renegotiating options, and Terry was very clear with that anyway."
>
> "MR JUSTICE LEECH: If the SFO had said, "Well, we don't mind Lama entering into an option but we are not prepared to agree to a transaction which involves half the money going to buy a new flat for Mrs Ammora," what would your reaction be? A. In the April conversation? MR JUSTICE LEECH: Well, even around this time, in June. A. That would never have happened, your Honour, because they were always -- the only way to lift the SFO order was to take £600,000 -- MR JUSTICE LEECH: It's putting off, really, I suppose -- A. Yes, it's a question but that was never on the table. That would never have been a situation where they would allow Ammora to sign an option or sign any kind of property interest without releasing the SFO order. MR JUSTICE LEECH: So what do you think he is referring to there? I mean -- A. I really don't know. MR JUSTICE LEECH: It does come to you, this email. A. It does, yes."

384. By email dated 27 June 2019 Ms Ford wrote to Mr Connolly and Mr Alford enclosing a memo setting out a number of issues for discussion with Mr Ammora and Mr Maidment

at the meeting on 4 July 2019 and asked for comments. On the same day Mr Alford made some detailed comments which included the following:

> "I would mention the Variation Order applied for and refused Nov 15 – does that need to be revisited, If/when Ammora reaches agreement with SFO. The Variation Order noted related to signing a Sale Option Agreement Nov 15 – DWF solicitors dealt with the Variation Order application for Ammora – Lisa McGinn from Investin should have sent you info in relation to this earlier this year."

385. Ms Ford replied stating that she would add a note in relation to the variation order (which was a reference to the King Order) and request any relevant correspondence from the SFO. By email dated 28 June 2019 she sent the revised memo to Mr Maidment. By email dated 1 July 2019 he replied stating that no formal application to vary the Restraint Order had been made in November 2015. He also enclosed a copy of the Restraint Order itself.

386. On 4 July 2019 the meeting with the SFO took place and Mr Connolly, Mr Alford and Ms Ford met Mr McGarry, Mr Eyad Ammora and Mr Maidment at DLA's offices. DLA's attendance note of the meeting records that the parties held private meetings for about an hour. It also records that when they came together Mr Maidment immediately informed Mr Connolly and Mr Alford that the SFO and Mr Ammora had come up with a solution. He also confirmed that FEC and Lama could go ahead and agree Heads of Terms. By email dated 8 July 2019 Mr Alford wrote to Mr Connolly and Mr Ammora confirming the terms of the agreement which had now been reached:

> "Following last weeks positive meeting with the SFO; I write to confirm the agreement to acquire 14 Ensign House, E14
>
> Purchase Price, £1,150,000
>
> Purchase Premium £900,000 – (to facilitate the purchase of an apartment)
>
> Timing, the above monies to be deposited 10 working days post the Court Order allowing the transfer of 14 Ensign House.
>
> Far East Consortium (purchaser) to cover legal costs in relation to the transaction.
>
> The SFO have advised a timeframe of 3 months to allow the Variation Order to be agreed by the Court. The SFO will apply to the Court to vary the Order following confirmation of the agreement with the Am mora Family."

387. Although DLA's notes of the meetings on 10 and 11 April 2019 indicate that Mr Connolly had intended to try and negotiate Mr Ammora down from £1.14 million and he

gave evidence that he toyed with the idea of paying £700,000 (or £1.8 million in total), he also gave evidence that in the end it was just easier to agree to Mr Ammora's terms. DLA's attendance note of the meeting on 4 July 2019 confirms that this was what he did. It records that there were no further negotiations between the parties once Mr Maidment had made his announcement. Indeed, it records Mr Connolly as saying: "We have the commercial terms agreed." As Ms Wicks pointed out to him, there was a slight increase in the price which Mr Connolly finally agreed to pay for Suite 14 from £1.14m to £1.15m.

(11) Findings

(i) Option or outright sale

388. I accept Mr Connolly's evidence that Mr Ammora was not prepared to enter into an option agreement and that on 28 February 2019 he and Mr Alford agreed in principle to an outright sale and purchase of Suite 14. There is no documentary evidence to suggest that he had changed his mind between the wish list on 19 February 2019 and the meeting on 28 February 2019 and Mr Downer admitted himself that what Mr Ammora was asking for was an outright sale.

389. Moreover, I also find that there was no change in Mr Ammora's position between the meeting at Mr Connolly's offices on 28 February 2019 and the execution of the Exclusivity Agreement on 11 April 2019. The contemporaneous documents provide clear evidence that Mr Connolly, Mr Alford and Mr Ammora only ever contemplated an outright sale after the date of their first meeting. In reaching this conclusion, I place particular reliance on the first draft of the Exclusivity Agreement, Mr Ammora's manuscript amendments, Mr Alford's email to Mr McGarry dated 9 April 2019, DLA's attendance note of both calls on 10 and 11 April 2019 and the Exclusivity Agreement (as finally executed).

390. Ms Wicks submitted it was unsurprising that the Exclusivity Agreement provided for an outright sale given that Mr Connolly had forwarded Mr Ammora's wish list on to DLA. But this only serves to confirm that there was no change in his position between 19 February 2019 and 11 April 2019. Indeed, if there had been a material change in the terms agreed, then Mr Connolly would have instructed Ms Sutherland to that effect and further negotiations would have been necessary.

391. Ms Wicks placed reliance on the words "Option premium" in Mr Alford's emails dated 1 March 2018 and 6 March 2018. But I am satisfied that he used that term to identify the source and amount of the additional price to be paid for Suite 14. Neither email contains any indication that Mr Ammora had agreed to enter into the option agreement itself. Even if he had, it would have been necessary for Lama to enter into a supplemental agreement to record the Side Deal in relation to his mother's flat. Again, the contemporaneous documents contain no evidence that Mr Alford or Mr Connolly ever contemplated a Side Deal for Lama either on 28 February 2019 or on 6 March 2019.

392. Finally, I also find that Mr Ammora's position did not change between the execution of the Exclusivity Agreement on 11 April 2019 and the conclusion of the meeting at the SFO's offices on 4 July 2019. Ms Wicks and Mr Lee did not challenge the accuracy of DLA's attendance note of that meeting and it provides clear evidence that there were no further negotiations between the parties at that meeting. The fact that Mr Connolly accepted the terms on which Mr Alford had shaken hands on 28 February 2019 (subject to a very slight increase) without further negotiation confirms, in my judgment, that Mr Ammora never agreed to grant an option and only ever agreed to an outright sale.

393. The only document which might suggest that Mr Ammora was contemplating the grant of an option is Mr Alford's email dated 27 June 2019. I have reconsidered that email in the light of Mr Connolly's evidence, the other documents and the context. Mr Ammora knew that Mr Alford was (or had been) negotiating an option agreement with the other Suiteholders. He also knew that Lama was the only Suiteholder not to have agreed to sign the agreement. In that context, I find that the purpose of Mr Alford's email was to caution Ms Ford not to reveal that he was intending to put a new deal to the other Suiteholders to purchase their Suites outright. If Mr Ammora or Mr McGarry had known this, they would have appreciated that Suite 14 had a greater ransom value. In my judgment, Mr Alford was comparing the current negotiation with the negotiations as Mr Ammora understood them when he described "a potential transaction purchase for all 17 leases….as well as an Option agreement".

394. It follows from this analysis that I also accept Mr Connolly's evidence that on 31 May 2019 he and Mr Chiu were not considering alternative strategies involving either the grant of an option and an outright purchase of Suite 14. I find that at the meeting Mr Chiu instructed Mr Connolly to take steps to acquire Suite 14 outright and to work with Mr

Alford to agree prices to acquire the remaining Suites. The handwritten notes of the meeting record that Mr Chiu authorised Mr Connolly to pursue a "transaction strategy". In my judgment, this was clearly a reference to an outright sale and Mr Connolly confirmed this himself in his evidence.

395. Moreover, I can see no obvious reason why Mr Connolly and Mr Chiu would have pursued an alternative "option strategy" and there is no suggestion that they did in any of the other contemporaneous documents (with exception of the email dated 27 June 2019). I also agree with Mr Connolly that it is highly unlikely that either the SFO or any lender would have agreed to the grant of an option. What Mr McGarry was concerned to achieve was a sale which would enable the Restraint Order to be discharged and realise sufficient proceeds to generate a surplus.

396. Finally, in Appendix 1 to their closing submissions Ms Wicks and Mr Lee conceded that by 4 July 2019 the proposed transaction which the parties had in mind was undoubtedly a purchase rather than an option. Again, this concession only serves to confirm that Mr Connolly and Mr Alford had not been "twin-tracking" both alternatives only 10 days earlier. Ms Wicks and Mr Lee gave no explanation when or why Mr Connolly and Mr Alford would have given up this approach and focussed on an outright purchase.

(ii) The Exclusivity Agreement

397. Although he did not quite say so in terms, I am satisfied that Mr Downer accepted in evidence that he consented to FEC entering into the Exclusivity Agreement with Lama. But in case there is any doubt, I find that he agreed with Mr Alford that he could negotiate an exclusivity period with Lama on behalf of FEC and that he consented to Mr Connolly (or an FEC company of which he was a director) entering into agreement to that effect. I also find that in the email exchanges between 28 February 2019 and 7 March 2019 Mr Downer gave Mr Alford written authority to attend the meeting and to negotiate on behalf of FEC.

398. It was also obvious to Mr Downer that Mr Connolly would use the exclusivity period to negotiate a purchase of Suite 14. It would have made no sense for him to agree to the Exclusivity Agreement if he did not anticipate that further negotiations would take place during the lock-out period. Moreover, it is clear from his reaction to Mr Alford's email dated 12 April 2019 that he was aware that a meeting was scheduled to take place on 9

May 2019 and that he did not object to it taking place. I find, therefore, that Mr Downer authorised FEC and Mr Alford to continue the negotiations with Mr Ammora during the exclusivity period to see if they would produce a favourable outcome.

399. However, I accept Mr Downer's evidence that he did not give permission to FEC to purchase Suite 14 "as a blocker" and I find that he did not do so. I doubt very much whether Mr Downer thought beyond the negotiations in January and February 2019. But if he had, the obvious time for him either to strike a deal with FEC or to take back control of the negotiations himself (to coin a phrase) was once Mr Connolly and Mr Alford had agreed terms in principle with Lama and the SFO.

(iii) Mr Alford's status

400. When Ms Wicks challenged Mr Connolly's evidence that Mr Downer never wanted to deal with Mr Ammora, Mr Connolly accepted without qualification that Mr Alford had originally been dealing with Mr Ammora on Mr Downer's behalf. I accept that evidence and I find that Mr Alford was continuing to act as Investin's agent in negotiating with Mr Ammora. Indeed, he continued to use his Investin email account until 16 April 2019.

401. There is no direct evidence of any negotiations between Mr Alford and the Suiteholders between 19 February 2019 and 4 July 2019 and the correspondence which Mr Wu disclosed to the Defendants (below) strongly suggests that Mr Alford was putting them on hold until he had resolved the position over Suite 14 with the SFO and Mr Ammora. However, in his email dated 20 June 2019 Mr Alford told Mr Connolly that in April 2019 he had met the freeholders of Freeco and that he had also met separately with Mr Plant to justify a fee of £5,000.

402. Mr Connolly expressed the view that Mr Alford was probably exaggerating the position to justify his fee. I agree and I am not prepared to find that any meaningful negotiations took place between Mr Alford and the Suiteholders between 19 February 2019 and 4 July 2019 on the basis of this email alone. It is quite possible that Mr Alford met Mr Plant or Mr Holliday and the other directors of Freeco on a couple of occasions during this period but that he did so to keep in touch and to give them an assurance that the sale of Ensign House was not dead. But in any event, I accept Mr Connolly's evidence that Mr Alford did not inform Mr Connolly about these meetings until 20 June 2019. I return to this point again below.

(v) Mr Connolly's purpose

403. I accept Mr Connolly's evidence that he did not agree to a change of direction with Mr Alford on 3 April 2019 and to an alternative plan to promote a deal with FEC to the other Suiteholders. On the contrary, I find that the "turning point" was 31 May 2019 when Mr Chiu instructed Mr Connolly to work with Mr Alford to agree prices with them. I make this finding primarily because there is no contemporaneous record of such an agreement or plan before that date. I am also satisfied that Mr Connolly would not have agreed such a plan with Mr Alford without obtaining instructions from Mr Chiu or Mr Hoong to do so.

404. Ms Wicks placed reliance upon DLA's attendance notes of the two calls on 10 and 11 April 2019 in support of her case. But I am not satisfied that they provide evidence that Mr Connolly and Mr Alford had made such a plan on 3 April 2019. In particular:

(1) I cannot place very much reliance on Mr Alford's statement that the approach had changed and "separate alternative agreements had been reached with the other owners". This statement was made to Ms Ford before Mr Connolly and Ms Sutherland had joined the call and she had only limited knowledge of the background.

(2) Further, on any view this statement was inaccurate. Mr Alford had not reached agreement on behalf of FEC to purchase their Suites from the other Suiteholders by April 2019 and he did not put forward terms on behalf of FEC and begin to negotiate with them in earnest until July 2019 (at the earliest). It is likely, therefore, that Josh Burnett, the trainee who had prepared the attendance note, did not record what Mr Alford had said accurately.

(3) In my judgment, the probable explanation is that Mr Burnett conflated two statements made by Mr Alford. The first statement was that it was necessary to take a different approach after the sale of Quay House and this is consistent with Mr Alford's earlier statement that "the original plan" was to purchase them "as part of an option that related to the planning permission granted on an adjacent building". The second statement was that Investin had reached separate agreements in relation to the Side Deals with the Suiteholders.

(4) I cannot place much reliance either on Mr Connolly's explanation that Mr Alford was "working for Dorsett on this and had full authority". In my judgment, the "this" to which Mr Connolly was referring was the negotiations with the SFO and Mr Ammora. The paragraphs of the note which follow this statement deal exclusively with their position and there is no mention of the Suiteholders at all.

(5) Finally, I place no reliance on the last sentence of the note which records that Mr Alford said that there was a commercial agreement in place between FEC and the Ammoras. I have found that Mr Alford did reach agreement in principle with Mr Ammora on 28 February 2019 and that the terms of this agreement did not change between that date and the execution of the Exclusivity Agreement.

405. I do, however, attribute some weight to Ms Sutherland's email dated 4 April 2019. This provides evidence that Mr Connolly's instructions before that date were that he intended to acquire the options from Investin if the negotiations for Suite 14 were successful. It also provides evidence that he was still contemplating the "acquisition of the options" on the day after the meeting with Mr Alford. I was not taken to a reply to this email and I accept that it is quite possible that Mr Connolly would have kept DLA in the dark if he had been conspiring with Mr Alford the day before. However, in my judgment it is more likely that he would have replied to Ms Sutherland stating that there were no options to acquire and that he was no longer intending to do so.

406. I also accept Mr Connolly's evidence about his conversation with Mr Hoong on 18 April 2018 and I find that until that date Mr Connolly still intended to pay a premium to Investin for the acquisition of the options or, once he had discovered that the option agreement was not signed, to acquire its position. This is consistent with the other findings of fact which I have made and with Ms Sutherland's email dated 4 April 2018. His evidence about this discussion also confirms my conclusion that he would not have been prepared to agree to a change of direction or to implement it without instructions from Hong Kong.

407. In conclusion, I find that until 3 April 2019 Mr Connolly's purpose was to progress negotiations with Lama with a view to acquiring options over 17 of the Suites from EHL and from then until 18 April 2019 to acquire its position. I also find that between 18 April 2019 and 31 May 2019 Mr Connolly was waiting to hear from Mr McGarry whether it would be possible to progress those negotiations further and took no action and used no

information in connection with any transaction. Finally, I find that on 31 May 2019 there was a turning point and from that date onwards Mr Connolly's purpose was to buy the Suites in Ensign House outright and directly from the Suiteholders.

(vi) FEC's Role

408. In their closing submissions, Ms Wicks and Mr Lee also submitted that FEC had no substantive role to play in breaking the deadlock between Lama and the SFO and that its role was no more than to organise this meeting. In support of this submission they relied upon an email dated 24 January 2020 in which Mr Eyad Ammora asserted with feeling that he was the reason why FEC had been able to acquire Ensign House. Mr Seitler and his team made very different submissions about the resolution of the problem with Suite 14:

(1) Mr Downer and Mr Alford did not track down Mr Ammora's former solicitor, Mr Kenkre. Another potential buyer did so.

(2) Mr Alford was the only one making any effort to resolve the issue with Lama. That is entirely consistent with him acting as an independent agent who needed to bring a deal together in order to be paid for the work he had done.

(3) Mr Downer was not prepared to pay anything towards resolving the issue with Lama. In particular, he was not willing to pay his legal fees and travel expenses.

(4) Mr Downer did not push matters ahead or encourage their resolution but reacted to requests from Mr Ammora as though he were something of a joke. They gave a number of examples and, in particular, his barb about the private jet and his description of Mr Ammora as an "idiot". They also pointed out that he declined to attend the original call with Mr Ammora.

409. Subject to one point, I accept Mr Seitler's submissions on this issue and I reject those of Ms Wicks and Mr Lee. I find that Mr Downer and Mr Alford were not responsible for locating Mr Kenkre and that Mr Downer was not prepared to pay anything to resolve the Lama issue or to attend calls or meetings or to take Mr Ammora's requests seriously. I also find that FEC was instrumental in bringing the SFO and Mr Ammora together and to the release of Suite 14 from the Restraint Order. If Mr Connolly had not agreed to pay

Mr Ammora's legal fees and expenses, I have no doubt that the meeting on 4 July 2019 would not have taken place. I also consider it highly improbable that there would have been any agreement with Mr Ammora, if FEC had not offered to buy Suite 14 outright for £1.15m and to pay £900,000 for a new flat for his mother.

410. I also accept Mr Seitler's submission that Mr Alford and not Mr Downer was making the effort to resolve the Lama issue between January and July 2019. However, I do not accept that this demonstrates that he was an independent agent acting on his own account in trying to bring the parties together. Mr Alford was given considerable discretion by Mr Downer to deal with the Suiteholders (including Lama) and the fact that Mr Downer had only limited involvement does not prove that he was acting on his own account. I deal with Mr Alford's status during this period in greater detail below.

N. Mr Alford's FEC Retainer

(1) Early discussions

411. Mr Connolly's evidence in his witness statement was that by July 2019 he had asked Mr Alford a few times whether he could work with FEC to deliver Ensign House. In particular, he could recall a conversation in June 2019 in which Mr Alford had told him that he was not working with Mr Downer anymore and that he could definitely work with FEC. It was also his evidence that he spoke to Mr Alford immediately after the meeting on 4 July 2019:

> "After that meeting I had a chat with Terry separately while we were still at DLA's offices and asked him, now it looked like the Ammora issue would be resolved, to send me your thoughts on the overall price for a transaction on Ensign House. I also asked him again whether he could act on FEC's behalf without it complicating any situation with Investin and he said that he didn't work for Investin, that he was an independent agent, he was self-employed and that he didn't have any contract with Investin. Terry was mightily clear, he was telling me that he had done all of the work, he'd done all of the negotiations with the suite holders, and although Downer had paid the legal fees it didn't matter because he'd sold Quay House which was his objective and he had told Terry he could do what he liked with Ensign House. As I have explained above, I did not think that there was anything unusual in what he was saying, it was clear and logical to me, and I had no reason to doubt him."

412. On 4 July 2019 Mr Alford also sent three emails to Mr Connolly. In the first he

summarised the outcome of the meeting with the SFO, largely repeating the contents of this email in his email dated 8 July 2019 (above). In the second email he asked Mr Connolly to confirm the details of the company to whom he would address the invoice for his agreed fee of £5,000 "which covers my time and expenses over the last 6 months dealing with Ensign House".

413. On 10 July 2019 Mr Alford submitted an invoice in the name of "Terence Alford Ltd" for £4,950 (plus VAT) and it is common ground that FEC paid this invoice. Ms Wicks challenged Mr Connolly's evidence about the discussion on 4 July 2019 on the basis that he must have known that Mr Alford was not a free agent:

> "Q. And Mr Alford invoices you for -- it's in fact £4,950, rather than £5,000, isn't it, and that's paid to him? A. Yes. Q. After this meeting. So there is no contract with Mr Ammora at this stage, is there, between FEC and Mr Ammora, but Mr Alford is nevertheless paid £5,000? A. There is no contract between us and -- well, there is -- well, there is an exclusivity agreement. Q. But you haven't exchanged contracts with Eyad Ammora? A. No, we haven't. Q. But you nevertheless pay Mr Alford the £5,000? A. Yes. Q. In your witness statement, you say that, immediately following that meeting with the SFO, you had a conversation with Terry Alford? A. Yes. Q. Is that when you engaged him effectively to carry out the negotiations with the rest of the suite holders of Ensign House? A. Not quite. We had a conversation about next steps, basically, so how a deal would look and also for him to think about providing me a fee for carrying out that role. Q. So you asked him to propose a fee -- A. Yes. Q. -- for carrying out that role, and you say that you asked again whether he could act for FEC. A. Yes. Q. And he said yes. A. Yes. Q. But what I suggest to you, Mr Connolly, is you knew that wasn't true. You knew he was not free to act for FEC in the negotiations on Ensign House because he had been acting for Investin in that same role? A. No, I asked him quite clearly, a number of times and again at this meeting, whether he could act for FEC free of Investin and once again he reiterated his position with regards to his relationship with John Downer and the fact that he could work with us direct. Q. And you didn't believe that Mr Downer had told Mr Alford he could do what he liked with Ensign House, did you? A. I did."

(2) Mr Alford's proposal

414. In his third email dated 4 July 2019 Mr Alford forwarded to Mr Connolly a fee proposal which provided for a fee of £1 million. The proposal was headed "draft" and Mr Connolly accepted that Mr Alford must have sent it to him once already that day. The text suggests that Mr Alford intended to attach both the Price Allocation Schedule and the Option Incentives Table. But he did not attach them either to the draft or his subsequent email

and did not in fact send those documents to Mr Connolly until a few days later. In the draft Mr Alford explained that the total consideration for all 18 Suites (including Suite 14) was £26,500,000 and that the total for all of the Side Deals was £4,281,841 (excluding Lama). He then continued:

> "Total purchase price of the Option Agreement **£30,784,841**. The above figure excludes the premium Investin Ensign House Ltd demanded to sell the Option agreement for – circa £2,500,000. I propose to acquire all 18 leases and the Freehold of the building on behalf of FEC, as a transaction and not as an Option agreement commanding for an agreed fee of £1,000,000. Please confirm agreement of the above as discussed."

415. Ms Wicks and Mr Lee accepted that Mr Alford's fee was not agreed at this stage but remained Mr Alford's proposal for what he wanted to be paid and, in my judgment, they were right to do so. However, Mr Alford's description of his fee proposal as "agreed" was consistent with the finding which I have made in relation to his fee negotiations with Mr Downer (above) and the finding which I have made about the way in which he reported on negotiations with the Suiteholders. Indeed, this was the case which Ms Wicks put to Mr Connolly:

> "So is it right to say that, at this stage, because the Lama situation is effectively resolved or resolving, you feel that you can proceed with the acquisition of the other suites and the freehold of Ensign House? A. Yes. Q. But his fee of £1 million hadn't been agreed when he sent this email, had it? A. No. Q. It's his proposal, that's what you said a moment ago. A. It is. Q. And would it be fair to say that Mr Alford has a habit of describing his fees as agreed when in fact what he is doing is making a proposal. That's a fair comment, isn't it, Mr Connolly? A. Well, that's what this says, and the reality is it wasn't agreed at this moment in time."

416. Mr Alford also referred to the premium which EHL had demanded as about £2.5 million. Again, this is consistent with the findings which I have made about the discussions between Mr Alford and Mr Connolly about the premium for the sale of the options. Mr Connolly's evidence was also consistent with both his earlier evidence and my conclusions:

> "MS WICKS: This is going over old ground but Mr Downer had never mentioned a £2.5 million amount, had he? A. Not to me, no. Q. And in the email we looked at yesterday with his Lordship, where you are reporting back in February to Hong Kong, you say, "Investin wants 4 million but I think we can get them down to 2.5 million plus a £500,000 retention." A. Yes. Q. So 3 million. When Mr Alford, in this email, refers to the premium

> Investin Ensign House Limited demanded, you and he both know that's not what Mr Downer was asking for, don't you? A. To be fair, I hadn't spoke to Mr Downer direct. Again, I assumed what Terry was telling me was on their behalf, and that's what we agreed. As I also said, that if there was anything more than that, then I would never have accepted it, and all the way along there has been two consistent things: number one is I thought the options were signed, and, number 2, I was due to pay a premium to step into their shoes on the options, which was £2.5 million. And that has been consistent. Q. Are you suggesting to his Lordship that you agreed with Mr Alford that Investin would be paid £2.5 million? A. Well, we never got to that position. The idea was that we would pay him the £2.5 million for the premium but it was all sort of subject to us understanding what was going on with the SFO. So -- and then obviously, when -- you know, the issue hit with the option agreements, we never really got any further than that. Q. And what Mr Alford is doing in this email, by reminding you or referring to the figure of circa 2.5 million, is he is trying to demonstrate the amount of money that you are going to save by going with him at £1 million, as opposed to going with Investin at 2.5 million, isn't he? A. Actually what he is saying is it didn't -- so our previous numbers must have included the 2.5 million but, obviously, now that's no longer relevant, that doesn't include the 2.5 million which was in the numbers above."

(3) The meeting on 12 July 2019

417. By email dated 1 July 2019 Mr Plant wrote to each of the Suiteholders. This email was not copied to Mr Alford and was disclosed by Mr Wu (as Ms Wicks put to Mr Connolly). It records that negotiations with the Suiteholders had come to a halt for a period of six months. However, Mr Plant now reported that Mr Alford had a specific proposal to present to the Suiteholders:

> "As you are all aware, progress with the proposed Option Agreement with Investin has come to a halt. I have had conversations with all of you at one time or another over the past 6 months or so, letting you know that there is still an interest in the building albeit from a different party. Notwithstanding this, Terry Alford still remains the main point of contact. I am aware that, in the meantime Bola has spoken with most of you about another party, who may also be potentially interested in purchasing the building. Over the previous few months, I have had several encouraging conversations with Terry. Whilst we have not seen much in the way of activity our end, it seems to be the case that he has been progressing matters to a significant extent.
>
> As I now understand things, Terry is now looking to present a very attractive proposition to the suiteholders. This will apparently dispense with the requirement of an Option Agreement and instead be a straightforward transfer. I am told that the consideration payable to each suiteholder will be for exactly the same amount as previously agreed in the

> Option Agreement. Terry tells me that in order for this to deal to be entered into with all suiteholders, there are several hurdles to overcome. This comes as no surprise as they broadly reflect the issues that needed to be addressed before the Option Agreement would have been exercised. I am informed that a majority of these issues have been/are in the process of being resolved. The main one is the issue surrounding suite 14 (Lama Petroleum). Apparently, the interested party that Terry has been speaking to has already incurred considerable expense in obtaining legal advice and arranging an all parties meeting in the next few weeks in order to put this matter to bed."

418. On 12 July 2019 Mr Alford met Mr Plant, Mr Ranson and Mr Inzani to discuss his proposal and by email dated 16 July 2019 Mr Plant wrote to all of the Suiteholders setting out the offer which Mr Alford had put to them. Again, it is important to note that Mr Wu disclosed this email and that it was not copied to Mr Alford. Mr Plant described FEC as a "Far East investor" who was in the process of acquiring Suite 14 and wanted to acquire the other 17 Suites simultaneously. He then set out the offer which Mr Alford had made:

> "Against this backdrop, Terry was then able to provide details of the offer put forward by the investor. The offer itself looks more attractive and straight forward than the previous Option proposal, namely:
>
> ● each suiteholder sells its interest with no conditions as previously considered in the Option. The sale will be by way of a transfer with completion per lease upon vacant possession per unit.
>
> ● The proposal is not linked to a planning application and therefore does not require a delayed execution time period of 36 month to allow for planning permission.
>
> ● the sale price per suite is to be the same as the noted in the Option Agreement.
>
> Terry stated that the investor is aware the market has softened over the last 18 months. Notwithstanding this, the Investor will stand behind the same price per lease as agreed in the Option on the basis of a joint sale of all 18 leases."

419. Although he did not accept that Mr Alford had been acting on his instructions before this date, Mr Connolly accepted without qualification that on 12 July 2019 Mr Alford was acting as FEC's agent when he put forward this proposal. He also accepted that the prices which the Suiteholders had agreed to accept in their negotiations with Investin were very important:

> "Q. Can you agree with me, particularly given that email, Mr Connolly, that knowing what the suite holders were going to be paid under the option

> formed a very important part of your negotiating strategy with the suite holders? A. Yes. Q. Because you didn't have to guess at what they might be willing to take, did you? A. No. Q. And you could keep the price the same but improve on the terms from the suite holders' perspective by offering a direct purchase rather than an option? A. Sorry, improve ...Q. Well, you could keep the price the same for those who only had the option and no side deals -- you kept the price the same but you could improve on the terms of the option by offering a direct purchase instead. A. Yes. In terms of certainty of completion."

420. By email dated 15 July 2019 Ms Sutherland wrote to Mr Alford attaching the flowchart of leases and the spreadsheet which Ms McGinn had sent to her at the end of January 2019 stating that: "John has asked me to send you the details that we have of the leaseholders which is in the chart attached." Mr Connolly accepted that this information had been provided by Investin under the NDA and it is clear from her email that Ms Sutherland sent them to Mr Alford on Mr Connolly's instructions. By email dated 16 July 2019 Mr Alford replied as follows copying in Mr Connolly:

> "The flow chart you sent, first attachment, is correct bar suite 14 Lama Petroleum. As you know we are in process of acquiring suite 14 Lama Petroleum/Dr Awad Ammora represented by his son Eyad Ammora. The second chart attached notes the entire 18 leaseholds and parking allocation of Ensign House – use as reference. The parking bays are not owned but are allocated per lease, in any event we are acquiring the freehold to include all the parking bays. I'm in the process of confirming the up to date status re sublets over the last 6 months, noted in green on your chart. I will confirm once updated."

421. On 16 July 2019 Mr Connolly forwarded this email chain back to Ms Sutherland and asked for a fee quote in relation to the purchase of the remaining Suites. On the same day Ms Sutherland provided an initial quote. It is clear from this exchange that Mr Connolly had instructed her that FEC would acquire the remaining Suites in the name of a special purpose vehicle because she stated as follows in the covering email: "See attached. not sure who you want the Buyer to be so have square bracketed this in the heading".

422. The quote itself was not in evidence but on 25 July 2019 Mr Connolly forwarded the entire email chain to Leesha Khemlani, Dorsett's senior legal counsel, stating that he had agreed a legal spend of £60,000 and asking for her comments. It is clear from her response that she used the flowchart and spreadsheet to assess DLA's fee quote. It is also clear that the fee quote extended to the purchase of all of the Suites because on 26 July 2019 she replied stating as follows:

> "You mentioned that you have agreed with Chris 60K for legal fees for the transaction but looking at the quote the real estate work for feasibility and superior title review and for acquisition of suite 14 and SFO advice already amounts to around 32.5K, so you will have 275K remaining for the real estate work for other leasehold acquisitions. From the exchange of emails I see that there are 18 leaseholds? If BCLP charges 4K+ for each owner represented by different solicitors, will 27.K be sufficient? Do we know how many owners there are? Do we want to budget in some contingency as there are always last minute issues popping up?"

(4) Mr Connolly's response

423. By email dated 16 July 2019 Mr Connolly also wrote to Mr Hoong confirming that the Suiteholders had now committed to selling the Suites in accordance with the previous option agreements and that he was meeting Mr Alford later that day to formalise the position. Mr Connolly met Mr Alford later that day (as he accepted) and on 17 July 2019 he wrote to Mr Alford to confirm their discussion:

> "As discussed can you please provide me with a fee agreement for managing the delivery of the acquisition of the above property. A summary of the agreement is:-
>
> ● Base fee of £1m (subject to no intervention from Investin) to be paid upon exchange of contracts for the freehold of the building
>
> ● Base price of £26.5m
>
> ● Option Price of £30.6m
>
> ● Incentive fee to reduce the price to £26.5m or lower
>
> ● All simultaneous exchanges to be done at the same time including suite 14
>
> Look forward to receiving your proposal."

424. Mr Connolly gave evidence that his agreement to these terms was subject to sign-off from Hong Kong which he had not yet obtained. He also confirmed that he was prepared to pay Mr Alford an incentive fee if he managed to negotiate the base price below £26.5 million. Ms Wicks then focused on the words "subject to no intervention from Investin" in brackets in the first bullet point. Mr Connolly accepted that the only way in which he could be certain that Mr Alford could work for FEC was by asking Investin. He also accepted that he knew that there was a risk of intervention by Investin if he did not do so. But he did not accept that Mr Alford's confirmation that he was free to work for FEC was worthless or that the FEC deal had to be kept secret from Investin:

"Q. Why were you concerned about intervention from Investin, Mr Connolly? A. I was concerned all the way along. I didn't want -- this is really getting back to the fact that Terry could work for us, away from Investin. And again, I wanted to reconfirm that because we didn't want any problems with Terry having a separate deal with Investin for whatever. We just wanted to be absolutely crystal clear that he could work directly for us and that's what this is. Q. But the only way to be crystal clear about whether or not Terry Alford could work for you without intervention from Investin would be to ask Investin, wouldn't it? A. In hindsight, I agree with that. I cannot not agree with that. That's correct. But at the time -- you ask someone if they can work for you, they say yes, you reconfirm it, they say yes, that's fine, you know, you move on. You know, I didn't feel I needed to or was compelled to call John Downer. I didn't actually think I had John Downer's number at this point in time. In fact, I didn't. I didn't even have his contact details, obviously I had his email address. Q. What I suggest, Mr Connolly, is that what this email shows is that you knew there was a risk of intervention from Investin? A. I always knew there was a risk, not of intervention. That's the wrong way of putting it. The intention of this email was to say that he could work for us free of any contractual relationship with Investin. Q. So what you are asking for confirmation for -- A. I already had confirmation but I'm reiterating it. Q. You are reiterating -- you want confirmation from Mr Alford that he is free to work for FEC? A. Yes. Q. Without intervention from Investin? A. Yes. Q. Because that's the only basis on which you would have paid him £1 million, isn't it? A. Well, yes, because he -- so he could work for us direct. Q. But you knew, didn't you, Mr Connolly, that Mr Alford's confirmation was worth absolutely nothing? A. Sorry, I'm just going to get a drink. (Pause) No, I didn't, I don't know why you say that. Q. Because you knew that he was the person making money out of coming to work for FEC, so you were incentivising him to earn £1 million, and more, potentially, by coming to work for FEC and breaching his obligations to Investin. A. No, it's the same as offering someone a job or asking someone to -- you know, to work with you. Are you employed? No, are you working with someone? No. Do you have any contractual arrangements with anyone else? No. Okay, great, you can come and work for us. It's as simple as that, it's nothing more than, oh, come and work for us for a fee. It's actually, you know, can you work for us. The fee is very much about your ability to deliver, it's not a case of -- this fee, not now but when it was approved, was really on to Terry to make sure that he got this development -- sorry, this transaction over the line. This was far from complete at this point and actually, as it turns out, you know, we nearly dropped it many times and he would never have got paid one penny, so he was fully aware of what he was getting himself into. But because of the situation historically and because of the partnership that he had with John Downer, I just wanted to make sure that he was no longer part of that organisation and he wasn't contractually bound into that organisation in any shape or form, and that's what I constantly said to him -- not constantly but that's what I asked him on numerous occasions and this is where I've reiterated it. So if Terry says he can work for us, he can work for us. Q. You knew the FEC deal had to be kept secret from Investin, didn't you, otherwise they would stop it? A. No, not at all. Q. Isn't that

> what you were concerned about? A. No. Q. Isn't that why you say you are only prepared to agree to deal with Mr Alford -- A. I wasn't concerned about Investin at all because, as far as I was aware, and what Terry was telling me, that John Downer wasn't bothered about this project anymore, and I didn't get anything from him saying that and so -- Q. You didn't ask him? A. He didn't give me anything. It goes two ways, right? But the point is that Terry said "John Downer is not interested in this any more, I'm free to work with you." And I took him at face value. That was it. That was what we agreed. I had no problem, if Investin want to come back and do their option deal, fair enough, let they try and do it. That's okay with me but, as far as I was concerned, at this point in July, John was no longer interested."

425. By email dated 17 July 2019 Mr Alford replied to Mr Connolly's email from earlier that day. He did not accept that this email properly reflected the principles of their discussion. It is also clear that he understood Mr Connolly's phrase "intervention from Investin" to be a reference to the NDA:

> "Thanks for confirming the outline principles however the below does not accurately reflect my understanding of the agreement. You need to take your own legal advice re the NDA signed with Investin. The agreed base fee is not connected to the previous Option agreement, which was not executed. The deal is now a transaction as the leaseholders will not agree to sell if the proposal was as an Option in any event. My solicitor, Paul Crumplin, ccd, will draft a fee agreement. I will forward next day or so."

426. Mr Connolly's evidence was that Mr Alford confirmed to him many times that he could work for FEC without a problem and that he did not have a contract with Investin which caused a problem. Ms Wicks then suggested to him that he had turned a blind eye to Mr Alford's obvious conflict of interest:

> "Q. You were just taking from this email what you wanted to take. You were shutting your eyes to what was blindingly obvious, Mr Connolly, which was that Terry Alford was not free to work for FEC because he had a conflict of interest because he had worked previously on the same job for Investin. Isn't that right? A. I mean, life is not law, right? And he had a horrible time with John Downer. He explained everything to me, what happened with him and John Downer. He confirmed to me many times that he didn't want to work with John Downer. He couldn't trust him, he had no contract with him -- "Don't worry, John" -- and that is the fact. If we are talking about a legal position, maybe you may have a point but the reality is some way different. Why would he say that to me in the way that he said it to me -- I had no reason why not to believe him, no matter how many emails or how many letters or whatever we say, for me, it's irrelevant. If the person sitting in front of you is explaining to me his position with Investin or his historic position with Investin, you know, and explaining to

> me why he can work for me, it was a compelling argument. I would be the -- I put myself in his shoes and I would do the same. I would do exactly the same. I'm sorry, so I don't really need his confirmation in writing, and I know that you are looking at this email in hindsight, which is fine, but from my perspective, it was fine, he was clear to work for us. He had no allegiance to John Downer or Investin at all. Actually it was very much different."

427. Mr Connolly accepted that £1 million was a very substantial fee and substantially more than FEC would have paid an agent in other circumstances. He also accepted that it was a life-changing sum of money for Mr Alford. Ms Wicks put three reasons to Mr Connolly why he was prepared to agree such a fee. He accepted the first but not the other two:

> "Q. So the first reason I've suggested to you -- and I think you've agreed with me -- is that Mr Alford was more valuable to FEC than other agents because of the relationships he had already built? A. Yes. Q. That's right, isn't it? And the second reason, which is rather linked, but the second reason was that Terry Alford was more valuable than other agents because he could give you confidential information about the prices which Investin had agreed with the suite holders and we have seen -- and you've agreed -- that that was commercially valuable to you. That's right, isn't it? A. Yes. Q. And the third reason why -- MR JUSTICE LEECH: You did agree with that second proposition, but the first proposition that was put to you was that that's the reason why you were willing to pay him a bigger fee. Is that correct too? A. That he knew the prices? MS WICKS: Yes. A. No, that didn't really have any bearing too much on the fee, sorry. The fact that we knew the prices wasn't -- Q. You knew the prices from the information provided to you by Investin directly, rather than -- A. This is the debate we have had, so I'll move on. But the prices were provided (inaudible) Investin but Terry provided me with the prices. He said they were his information. MR JUSTICE LEECH: But that wasn't a particularly --A. (Overspeaking) the fee, no, no. MS WICKS: And the third reason why you agreed to pay such a large fee to Mr Alford was that you agreed with him that he would pay you a substantial sum of money after receiving that fee. Isn't that right? A. No. Q. We will come and have a look at that. A. Yes."

(5) The FEC Price Breakdown

428. On 17 July 2019 Mr Alford sent Mr Connolly the Price Allocation Schedule and the Option Incentives Table together with another copy of his draft proposal dated 4 July 2019. In the covering email he set out the new baseline and headline figures (including Suite 14) which were now £27,338,418.47 and £31,623,259.47. In the final paragraph he stated as follows:

> "You previously noted an incentivised fee to agree the bulk purchase of circa 10% of the saving on the difference between base price of £27,338, 418 and total premium side deals £31,623,259 = £4,284,841. I will obviously do my best to agree the purchase for the most competitive figure and as close to £27,338,418 in any event, however please confirm?"

429. In this email Mr Alford wanted to clarify the basis for his incentive payment and he used the Price Allocation Schedule and Option Incentives Table to do so by showing the prices which Investin had agreed with the Suiteholders. In his witness statement, Mr Connolly also gave evidence that he also had a long call with Mr Alford to discuss the incentives which would be required to give to the individual Suiteholders. He accepted in cross-examination that during this call Mr Alford gave him "lots and lots of the information you need to understand how best to negotiate with all the different leaseholders in the building".

430. By email dated 18 July 2019 Mr Connolly sent Mr Alford a photograph of a handwritten table under the subject line "Schedule". His evidence was that he found all the information which Mr Alford presented to him confusing and asked him to put it in this table. It is clear from the attached photograph that what he required for each unit was the base price, the previous incentive and a target figure. He also stated that this is why he believed that he had not looked at the Price Allocation Schedule and the Options Incentive Table when Mr Alford had sent them to him earlier the day before.

431. On 19 July 2019 Mr Alford sent Mr Connolly three handwritten schedules in which he had provided the requested information. In the covering email he also provided detailed notes about his negotiations with each Suiteholder. Ms Wicks took Mr Connolly to Suites 6 and 11 as an example on the first schedule. It showed a base price of £2,840,159 and a previous incentive of £5,500,000 of which £62,500 was to be paid on exchange. In the target column it also showed a base price of £2,840,159, no payment of £62,500 on exchange and then: "Negotiating final price, as close to £2,840,159 as possible". Ms Wicks asked Mr Connolly to explain his strategy:

> "So is it right, Mr Connolly, that the strategy was, in respect of the suite holders who don't have a side deal, who didn't have a side deal with Investin, offer them the option price? A. Yes. Q. Yes? A. The base price. Q. And in respect of the suite holders who did have a side deal with Investin, use that side deal as a ceiling and try to push them down? A. No. We give them -- I give them a specific figure. Q. But the figure -- the specific figure was always lower than what had been -- A. Yes, yes -- of

> course. Q. Yes. Because you are trying to get the overall price down from what had been agreed by Investin? A. To a certain number, yes, which would work for us. Q. Yes, and that wasn't by changing the option price, it was by reducing the amounts in the side deals, wasn't it? A. Yes. Q. Yes. So would you agree with me that, from the suite holders' perspective, the fact that FEC knew what the side deals were with Investin substantially affected their negotiating position with FEC? A. No. Q. Well, Bola Ranson is not in a very good position, is he, because he can't come to you and say he wants 6 million because you know exactly what he has been prepared to agree with Investin. A. No, we set out the target. I mean, I don't know whether you can skip forward to the schedule or not but we set out the target and that was it. So it was up to Terry to negotiate below that. Anything above that we wouldn't have accepted. Q. The price could only come down from what was agreed with Investin, it could never go up, could it, from the suite holders' perspective? A. No, that's correct, that's correct, yes."

432. Under cover of an email dated 22 July 2019 Mr Connolly sent Mr Alford two spreadsheets which were called "Ensign Price breakdown" and "Ensign Price breakdown FEC". In the covering email he explained that the first set out the previous deals with the Suiteholders under the proposed option agreement and the second was the target agreement for the FEC deal. I will refer to this as the "**FEC Price Breakdown**" and in it, Mr Connolly set out the existing incentives and set out a series of targets to reduce the total incentives to £1,538,420 and the total price to £28,038,418.47. It also showed that the target price was £3,684,841 less than the price payable by EHL under the original option agreement.

433. By email dated 23 July 2019 Mr Connolly chased Mr Alford for his comments on the two schedules. On the same day Mr Alford replied stating that he had not clarified the schedules yet because he was still negotiating the individual incentives as low as possible. But he also stated that he expected to have everything in place within 48 hours. In a second email Mr Connolly then suggested that he should send the figures to Hong Kong so that they could set the benchmark. But in the final email in the chain Mr Alford asked him to hold off for 48 hours.

434. In the event, Mr Connolly spoke to Hong Kong on about 29 July 2019. On that day he sent an email to Mr Hoong updating him on Suite 14 and attaching the FEC Price Breakdown. It was his unchallenged evidence that he spoke to Mr Hoong shortly afterwards and that they agreed to a fee of £1 million for Mr Alford but not to a further incentive payment. In the email Mr Connolly also stated that "we need to set up a UK

company for this acquisition".

(6) Legal advice

435. Mr Connolly accepted that he took legal advice from DLA in response to Mr Alford's email dated 17 July 2019. He also accepted that he instructed DLA in late July 2019 and received their advice in early August 2019. Ms Wicks took him to an email dated 23 July 2019 which Ms Sutherland had sent to her colleague, Mr Robert Shaw, asking him to give advice and by email dated 31 July 2019 Ms Connolly asked Ms Sutherland whether she had heard back yet. By email dated 5 August 2019 Ms Emma Lloyd, a Senior Associate, wrote to Ms Sutherland stating as follows: "I have seen the email re the NDA and thought it had gone off but I may have got the wrong end of the stick."

(7) Mr Mee's email dated 24 July 2019

436. On 24 July 2019 Mr Mee wrote to Mr Downer bringing him up to date on the Quay House planning application. He also asked about Ensign House and stated that another hotel operator had a requirement for another 350 rooms in the area. He then stated: "We'd be keen to explore this on Ensign". I have referred to this email briefly above in the context of Mr Downer's general inactivity. However, this email prompted Mr Downer to get in touch with Mr Alford and he forwarded it on to Mr Alford's Investin email account stating: "Terry not spoken for a while, hope all ok, see below from Nick, take it things haven't moved forward at Ensign?" Within a minute or so Mr Alford had forwarded the email chain on to Mr Connolly with the following message: "Fyi Can you call me….".

437. Mr Connolly accepted that this was the sort of "intervention" from Investin about which he had been concerned. But he described this as Mr Alford's problem and he said that he was not particularly concerned about it. The following exchange then took place:

> "Q. Right. So the intervention that you were particularly worried about arose from the fact that Mr Alford had been working for Investin and had now flipped to FEC? A. Yes. Q. Yes. So that was the particular risk you were worried about right now? A. All the way through, yes, until we were satisfied that he could work with us. Q. And you couldn't have been satisfied when you saw this email exchange, could you? You weren't satisfied, were you, Mr Connolly? A. I was satisfied, I was satisfied. Q. What it shows, you had known Rockwell had been in advanced negotiations with Investin before you signed the NDA. That's what you say in your witness statement and you confirmed in your evidence. A. Yes,

> over a year ago. Q. And here you have Rockwell saying to John Downer they would be keen to explore a hotel operator on Ensign, along with an additional use. That's serious interest, isn't it? A. I'm not too sure. Obviously, reading it now, yes, I mean, but if they had serious interest, they wouldn't just send one email, they would have done the deal. I mean, as far as I was concerned. And if you've got serious interest, you do not do nothing and then seven months later or however long, four months later, send a random email."

438. Ms Wicks drew Mr Connolly's attention to the fact that the email from Mr Downer had gone to Mr Alford's Investin email address. Mr Connolly's evidence was that Mr Alford had begun to use his Lyon House email address in April and that he understood this to be a sign that he had broken away from Mr Downer. But he could not recall speaking to Mr Alford about the email from Mr Downer. Ms Wicks then put it to him that he must have spoken to Mr Alford about it and that he had not behaved honestly:

> "Q. What I'm going to suggest, Mr Connolly, is that you will have spoken to Mr Alford because this was a really important email to get, particularly at this very sensitive time, and that you and he together agreed what the line would be to take with Mr Downer and that was one where Mr Alford would be non-committal and just say, the negotiations are ongoing, leaving Mr Downer to believe that Mr Alford was still working for Investin in trying to unlock the Lama situation? A. If I knew Terry did that, we would not have proceeded with him, 100 per cent. If I knew and he told me that he had spoke to John Downer about this deal or anything else, that would sell -- I would not have proceeded with him because that was not what he was telling me, and I would be very surprised -- it had nothing to do with me if he did, but if he did do it, I would be very surprised -- if you found photographic records to show that Terry called John Downer after this email, I would be very surprised. Q. Mr Connolly, you were, at the very least, shutting your eyes to the absolutely blindingly obvious, which was that Mr Alford was not free to work for FEC, and that Mr Downer thought he was still working for him on Ensign House. That's right, isn't it? A. No. Q. It wasn't an honest way to proceed, was it? You treated it as not your problem but it was your problem. A. No. It wasn't my problem."

439. Ms Wicks reminded Mr Connolly that he had taken legal advice about the NDA and that Ms Sutherland had received information on the basis that it was to be used for the purpose of commercial discussions with Investin. She suggested to him that he must have been aware that he was not entitled to use that information for a different purpose and that he appreciated that there was a risk that Investin might take legal action. Finally, she suggested to him that he was willing to take that risk and that this was dishonest:

> "What I am going to put to you, Mr Connolly, is that you just didn't care about the risk of Investin's intervention because you and your bosses were really keen to have property in Canary Wharf, weren't you? A. Yes. Q. And by this time, the deal with the suite holders is in sight, isn't it? A. No, the deal with the suite holders -- the structure of the deal with the suite holders is agreed in principle but it's certainly not in sight. Q. And you had had a positive meeting with the SFO and you thought that -- A. Yes. Q. -- the deal with Lama could be achieved? A. Yes, hence the reason why I thought now let's look at the structure, let's move this forward, if we can. Q. And so you were prepared to take the risk and plough on anyway, weren't you? A. There was no risk as far as I was concerned. Q. What I want to be clear about is that what an honest person would have done would be to go back to John Downer and clear it all with John Downer and you did not do that and that was dishonest, wasn't it, Mr Connolly? A. I think that's a bit of a harsh accusation, to be fair. The fact that I didn't speak to John Downer doesn't necessarily mean I'm dishonest, and I don't know what an honest person would do in that situation. I would like to think I'm honest, and I did what I did. So I think that's it. I don't think I'm dishonest for not speaking to John Downer. I think that's not a right accusation."

440. Finally, Ms Wicks challenged Mr Connolly's evidence that Mr Alford had led him to believe that Mr Downer had told him that he could do what he liked with Ensign House and that he must have appreciated that this was not possible by July 2019. She then suggested that he was prepared to cheat Mr Downer because of the way he had treated Mr Alford over Quay House:

> "Q. Isn't the reality, Mr Connolly, that you formed a view of John Downer from what Mr Alford was saying and you thought that made it acceptable to cheat him of the Ensign House opportunity? A. No. I don't cheat anyone. I have never cheated anyone and I still don't cheat anyone. The fact is John Downer had a deal with me, which was signed options. If those options were signed and I could get the SFO over the line, he would have been given the £2.5 million we agreed in terms of the premium, full stop. That's what would have happened. But because he didn't have anything signed -- looking back at it now, there is no way that I can understand how someone can think that they are going to sell unsigned options. So I was irritated with myself, but anyway, I've got no ill feeling against John Downer and I certainly didn't want to cheat anyone out of a deal. The fact is he didn't have a deal, and I was working with Terry on this deal, which was different from the option agreement. And that's it."

441. Whatever Mr Alford and Mr Connolly may have discussed, there is no direct evidence that Mr Alford either replied in writing to Mr Downer's email dated 24 July 2019 or spoke to him about it by telephone. After a further exchange with Mee on the same day, Mr Downer wrote to Mr Mee stating that he had "reached out to Terry for an update" and

would get back to him as soon as possible. However, Mr Downer did not get back to him and on 22 November 2019 Mr Mee wrote to him again stating that Rockwell still liked the idea of taking Ensign House forward. Mr Downer forwarded this email to Ms McGinn who confirmed that Rockwell had entered into an NDA which only expired on completion of the sale of Ensign House.

(8) The agreed fee: £970,000

442. The fee which FEC finally agreed to pay Mr Alford was £970,000 and by email dated 23 September 2019 he wrote to Mr Connolly stating that he would send a fee agreement for that figure that day. Mr Connolly explained in cross-examination that the reason for the reduction was that FEC ultimately agreed to pay £30,000 more than the target price to Mr Plant and that Mr Alford's fee was to be reduced to meet that additional cost:

> "A. So I -- so the fee was agreed at the million pounds, and the text you've just showed me there before that if you see the next text after that, because Simon Plant came in for more money later on, as he has done all the way along, and I think the amount that we had allocated from -- I don't know the exact numbers but we can refer to the text -- I think was 180 and he wanted 210. And that's why Chris was saying, "What's Terry doing? Why are we going over the agreed amount?" And he asked us what his fee was again and I said it was £1 million as we agreed and then there was another text after that saying, well, he has got to take some pain, and I went back to Terry and I said, "Look, Terry, we are 30 grand over the allocated amount which we agreed in terms of Simon Plant. Chris wants you to take that as an impact because we agreed the level," and Terry agreed to that. So that's why it went down by 30 grand, because of the increase of the Simon Plant payment from 180 to 210 or something like that."

443. By email also dated 23 September 2019 Mr Alford sent the draft fee agreement prepared by his solicitor, Mr Paul Crumplin, to Mr Connolly. The draft provided for Mr Alford (who was defined as the "**Introducer**") to enter into the contract on behalf of a company called Landseer Capital Ltd ("**Landseer**"). By email dated 1 November 2019 Michael Heyworth-Dunn, who was in house counsel at FEC, provided an amended version to Mr Connolly, which he sent on to Mr Alford. On 18 November 2019 Mr Alford provided his comments to Mr Connolly and on 27 November 2019 Mr Alford provided him with a final version. By 9 December 2019, however, it had still not been approved and Mr Connolly accepted in evidence that Mr Alford had to chase him for the executed agreement.

(9) The Fee Agreement

444. The agreement was finally executed the following year. On 21 January 2020 Landseer (which was now defined as the "**Introducer**") and FEC UK (which was defined as the "**Buyer**") entered into a fee agreement (the "**Fee Agreement**") under which the Buyer agreed to pay a fee of £53,888.88 per Suite (which amounted to £970,000 in total) payable within 5 working days of exchange of contracts or, if the contract was conditional, upon 5 working days of the condition being satisfied. Clause 1.1 and clause 5.1 provided as follows (and the Suiteholders were defined as the "**Sellers**"):

> "1.1 The Sellers seek to find a Buyer willing to purchase the Property. The Introducer will assist with such introduction and will take part in any such negotiations between the Sellers and the Buyer. The Introducer will continue to monitor sales negotiated and will assist the Buyer in exchanging contracts for and completing such sales. The Introducer shall not deal with any third party in respect of the Property or the potential sale and purchase of it or of any part of it."
>
> "5.1 Nothing in this Agreement shall constitute an exclusive arrangement or appointment as between the parties and subject to clause 1.1 the Introducer shall be free to continue in its business as carried on as at the date of this Agreement including the introduction of parties to companies in respect of investment."

(10) Findings

(i) The Negotiations

445. In the light of Mr Plant's email dated 1 July 2019 to Mr Wu and the other Suiteholders I find that negotiations between Mr Alford and the Suiteholders on behalf of Investin came to a halt in January 2019 and that no meaningful negotiations took place between January and June 2019. Mr Plant stated that he had had "several encouraging conversations" with Mr Alford but that he had not "seen much in the way of activity our end". This is consistent with my conclusion that Mr Alford kept in touch with him and assured him that the deal was not dead but no more.

(ii) Mr Alford's retainer

446. I find that on 4 July 2019 Mr Connolly agreed to pay Mr Alford £5,000 (plus VAT) for the work which he had done for FEC between January 2019 and the end of June 2019. Having found that there were no meaningful negotiations between Mr Alford and the

Suiteholders (apart from Lama) during that period, I find that this fee related to Mr Alford's work in negotiating the Exclusivity Agreement and the final terms of the agreement between FEC, Lama and the SFO.

447. Mr Connolly accepted that on 4 July 2019 he discussed next steps with Mr Alford and that Mr Alford was acting as FEC's agent at the meeting on 12 July 2019. I find that on 4 July 2019 Mr Connolly instructed Mr Alford to attend that meeting and put forward FEC's proposal to acquire the remaining Suites to Mr Plant, Mr Ranson and Mr Inzani and then to continue negotiations with them. I also find that Mr Alford continued to act as FEC's agent in the negotiations from that date until (at least) 11 February 2020.

448. I accept Mr Connolly's evidence that on 4 July 2019 there was no agreement about Mr Alford's fee and that he asked Mr Alford to put forward a fee proposal. I find, however, that on 16 July 2019 Mr Connolly agreed Mr Alford's fee of £1 million subject to confirmation or approval by Hong Kong. Although there was some disagreement between Mr Connolly and Mr Alford about whether this fee was linked to the original option prices, I am satisfied that Mr Connolly agreed the amount of the fee at that meeting. I am also satisfied that Mr Connolly obtained Mr Hoong's approval to pay Mr Alford £1 million on 29 July 2019. I deal with the additional terms of that agreement below.

449. Finally, I accept Mr Connolly's evidence that Mr Hoong reduced the fee from £1 million to £970,000 because of the negotiations with Mr Plant and that Mr Alford agreed to the reduction of his fee and submitted a draft fee agreement containing that figure on 23 September 2019. This figure was finally reflected in the Fee Agreement which was signed by the parties early the next year and dated 21 January 2020. In substance, therefore, Mr Alford accepted Mr Connolly's proposal in his email dated 16 July 2019 that his fee was linked to achieving the target price.

(ii) Mr Connolly's purpose

450. It is not entirely clear when Mr Connolly decided to use a new company or SPV to acquire Suite 14 and the other Suites. But I am satisfied that from 16 July 2019 this was his purpose and I find that from that date Mr Connolly's purpose was to acquire all of the Suites in Ensign House through a special purpose vehicle company to be formed or acquired for the acquisition.

(iii) Risk of Intervention

451. Mr Connolly accepted that there was a risk of intervention by Investin. Ms Wicks focussed on the position of Mr Alford and whether he was free to act for FEC and I return to Mr Connolly's evidence in relation to that issue when I address the claim for dishonest assistance (below). But whether or not Mr Connolly knew or turned a blind eye to the fact that Mr Alford was still retained by Investin, it is clear from their email exchange on 16 and 17 July 2019 that both Mr Connolly and Mr Alford knew and understood that there was a risk that Investin might "intervene" in the sense that it would exercise its rights under the NDA to prevent FEC pursuing the negotiations with the Suiteholders.

452. I find that both Mr Connolly and Mr Alford knew or believed that it was a breach of the terms of the NDA for FEC UK to approach the Suiteholders directly and to negotiate with them to purchase their Suites. The NDA is not a long document or difficult to understand and I would have found that Mr Connolly understood this whether or not he had taken legal advice. But he also took advice from DLA and although the Defendants did not waive privilege in relation to that advice, I am entitled to draw the inference and I do draw the inference that he was properly advised about the terms of the NDA.

453. Finally, I find that both Mr Connolly and Mr Alford understood and appreciated that there was a risk that Investin might take steps to enforce the terms of the NDA but I also find that Mr Connolly was willing to take that risk because he believed that Mr Downer had lost interest in Ensign House and that the option deal was dead. In my judgment, this was the "intervention" which Mr Connolly had in mind and to which he was referring in his email dated 16 July 2019 and it is clear from his reply dated 17 July 2019 that this is how Mr Alford understood it.

O. Negotiations with the Suiteholders: the Final Phase

(1) The Price Allocation Schedule

454. By email dated 23 July 2019 Mr Alford wrote to all of the Suiteholders enclosing the Price Allocation Schedule. He stated that it set out the individual price per Suite for the "aborted Option deal of late last year". He also stated that: "As of 9 months ago this deal was dead and going nowhere again after 4 years". He then explained the current position in the following terms:

> "To put you in the exact picture, I have spent 9 months getting the deal to this point as a straightforward transaction with clarity re price not linked to planning permission to add value to an adjacent property. My time funding myself. Not a straightforward task I can assure you in the present market with Brexit and overall political uncertainty, along with the title issues of Ensign House. I have managed to negotiate with an investor and agreed in principle the attached values as a bulk purchase, the same values noted in the aborted Option. The investor will only stand behind the attached prices as 1 collaborative deal exchanged simultaneously. This deal can exchange contracts as a sale transaction within 6 weeks once all agreed."

455. Ms Wicks suggested to Mr Connolly that Mr Alford lied to the Suiteholders because the deal with Investin had not been dead since October 2018. Mr Connolly's evidence was that he did not see this email at the time although he accepted that some of Mr Alford's negotiating tactics and use of language left a little to be desired. I did not take him to be accepting that Mr Alford had lied.

(2) August to September 2019: Mr Plant and Mr Ranson

456. By email dated 1 August 2019 Mr Alford wrote to Ms Sutherland confirming that final terms had been agreed with 10 of the Suiteholders apart from Mr Plant, Mr Ranson and Mr Hughes. By email dated 9 August 2019 Mr Connolly also wrote to Mr Hoong setting out the position as it stood and summarised the main points:

> "• We have agreed the commercial terms with 10 of the 12 owners (12 of the 18 units in the building) which includes the Syrian's unit
>
> • We have therefore secured £18.67m in agreements which is 66.5% of the overall target acquisition price (£28,088,418.47)
>
> • There are 2 remaining owners to agree the final commercial terms which is purely in relation to their 'incentive' payments. Currently we are offering no incentive payment however they are insisting on some level of payment BUT this is currently more than we have allowed for within the budget.
>
> • Simon Plant owner of 4 units wants £800k incentive, currently targeting £300k
>
> • Bola Ranson who owns 2 units wants £1.5m incentive, currently targeting £300k
>
> • DLA are instructed to pull together all the contracts and have engaged with the solicitors for the owners of the units HOWEVER have not issued the contracts until the remaining owners agree
>
> • SFO have agreed to release the order on the unit currently owned by the Syrian and the court date is set for the 1st week of October (exact date to be agreed)

> • We are, subject to the last remaining owners agreeing in the next 2 weeks, on programme to exchange late October."

457. Ms Wicks suggested to Mr Connolly that he had kept Mr Chiu and Mr Hoong in the dark about the legal difficulties which he had encountered by retaining Mr Alford. She returned to this point again in the context of this email to Mr Hoong:

> "Q. This is 9 August 2019. By this stage, you've received legal advice on the NDA from DLA Piper. We discussed that yesterday, didn't we? A. We did. Q. And yet is it right to say that you didn't tell Mr Hoong or Mr Chiu that you were taking advice? A. You asked me this yesterday. Q. Yes. A. I said no. Q. No that you didn't? A. No, I didn't. Q. You didn't tell them that you were taking advice and you didn't tell them what that advice was? A. No, they knew the situation. They were, you know, not happy about the original deal and how it was brought to us and they felt, and they still do feel, that we were -- we signed under false pretences, which is -- underlines their frustration right now. Q. Isn't the truth, Mr Connolly, that you had a vested financial interest in this transaction proceeding because you were going to earn a substantial amount of money personally by way of Mr Alford's bribe and you don't want your bosses in Hong Kong to know that there are any risks around FEC continuing to use Mr Alford on this transaction or in relation to the NDA? A. No, actually, we discussed this great lengths in May. We ironed out all the information. We were all of the same opinion that, you know, we had signed an agreement which executed options. We actually couldn't understand how he was expecting to sign unexecuted options, and we were all confident of the way and the route of travel, and through the discussions I had with Terry, again we were very clear that he could work for us and we had no problem with that at all."

458. At the end of August 2019 Mr Plant and Mr Ranson were still holding out for the original Side Deals which they had agreed with Mr Alford. By email dated 28 August 2019 Mr Alford wrote to Mr Connolly bringing him up to date with his discussions with both of them. Ms Wicks and Mr Lee drew attention to the following paragraph in which Mr Alford expressed concern about the source of FEC's information:

> "Firstly, I noted to Simon and Bola FEC were offered the previous Option deal by a third party and not by Investin directly. Previous Option deal was being punted around, no one wanted to buy due to terms, and Quay House sold 12 months ago – Option died as linked to PP for QH… If Simon asks how FEC were aware of previous Option numbers – note that point. If Simon or Bola think FEC decided to approach deal as a transaction for less money than Option they will use as leverage. Ive explained the Option never exchanged and was nonsense the transaction deal on table now is certainty etc…"

459. Mr Connolly accepted that Mr Alford was not telling the truth when he told Mr Plant and Ranson that FEC was not offered the previous option deal by Investin but by a third party. He also accepted that he knew that Mr Alford was not telling the truth:

> "Q. So you knew that Mr Alford, negotiating on FEC's behalf with Mr Plant and Mr Ranson, is telling them something which is not true? A. Yes. Q. And the reason why he is having to note this to Mr Plant and Mr Ranson is that they are wondering how FEC have come to know the terms of the side deals that they had with Investin, aren't they? A. The previous option numbers, which I don't think side deals. That's options of the base prices. Q. Well, Mr Plant and Mr Ranson are the people who are holding out -- A. Yes. Q. -- in these negotiations with FEC. A. Yes. Q. And they are holding out, aren't they, Mr Connolly, because they had particularly good side deals with Investin? A. Yes."

460. Mr Connolly also accepted that Mr Alford suggested to him that he should lie to Mr Plant if he was ever asked how FEC became aware of the terms of the Investin deal although he did not accept that he ever did so. Finally, Ms Wicks suggested to him that the reason why the Suiteholders were unable to play off FEC against Investin was that Mr Alford misled them:

> "Q. So right at the beginning of the trial, his Lordship wondered aloud, I think, why the suite holders didn't play FEC off against Investin. Isn't it right, Mr Connolly, that the reason that they didn't was because they were being told things by Mr Alford which were not true? A. Well, a difficult question to answer. I think -- number one, as I said, in July when we agreed with Terry, there was a risk that he was going to take, how he was going to get there was up to him, and if he didn't get there, then there was no deal. If he got there, then there would be a deal. The options at that point were, as far as I was concerned, were dead, Terry was telling me that they were never going to sign the options and he had to redo the options. Obviously, there had been no communications with the suite holders, so, you know, we had a price that we would pay and that was it and we had some allocation for the suite holders that may have required more incentives but again that was put on top of the price. It wasn't a side deal. It was very clear. Q. So you weren't at all concerned about the fact that Mr Alford was telling things to the suite holders on your behalf that you knew not to be true? A. Well, I didn't know about it and, okay, he sent me this email -- I can see it, it's there in black and white, you know, but -- when I spoke to Simon, I was pretty clear -- and Bola, I was pretty clear that they either accept the offer that I've give them or not and if you don't accept it, we will not proceed. It doesn't matter about what was on the table before. It's irrelevant. This is the deal that we are dealing with now and if you wanted to accept it, great."

461. By the middle of September 2019 FEC had still not reached agreement with Mr Plant

and Mr Ranson, who were trying to hold Mr Alford to the Side Deals which he had offered on behalf of Investin (as Mr Connolly also accepted). By email dated 18 September 2019 Mr Connolly wrote to Mr Alford stating that FEC's final terms would be on the table until midday on 19 September 2019 and that FEC would withdraw its offer unless he received confirmation that all of the Suiteholders had accepted it. Mr Alford then forwarded this on to the Suiteholders.

462. It is clear that Mr Alford had choreographed this ultimatum. It is also clear that it had the desired effect because he wrote back to Mr Connolly the same day confirming that Mr Ranson was now agreed. By 23 September 2019 Mr Plant had also agreed to accept FEC's offer on the basis that he would have a purchase and lease back arrangement with a rent-free period. On that day Mr Alford wrote to Mr Connolly agreeing to a fee of £970,000. In the same email he also confirmed that the price agreed with Mr Plant was £6,369,391 and that the price agreed with Mr Ranson was £3,250,000. Mr Connolly accepted that his own email had been no more than a negotiating tactic designed to put pressure on the remaining Suiteholders to agree terms.

(3) Heads of Terms

463. By 2 October 2019 Mr Connolly had instructed DLA to act for FEC in relation to the acquisition of the individual Suites and on that day, he wrote to Ms Sutherland stating that they needed to move quickly. On 10 October 2019 EHFL was incorporated for the purpose of the acquisition and on 17 October 2019 Mr Alford sent Heads of Terms to each of the Suiteholders providing that FEC would pay £1,500 (plus VAT) towards their legal fees, a 5% deposit on exchange of contracts with a target date of 28 days and completion with 24 months of vacant possession.

464. Once Mr Alford had sent out Heads of Terms, the transaction entered its final phase as DLA negotiated the detailed terms of the individual contracts with the solicitors acting for the Suiteholders. By early November 2019 Ms Sutherland was sending out draft contracts to the firms of solicitors who were acting for the individual Suiteholders. Aaron Jenkins, an associate solicitor at DLA, dealt with much of the day-to-day conveyancing and by 26 November 2019 he was also sending out Commercial Property Standard Enquiries ("**CPSEs**") and draft transfers.

465. On 29 November 2019 an internal call took place between Ms Sutherland, Mr Jenkins

and Ben Forgiel-Jenkins, another partner who was dealing with the corporate side of the transaction. They discussed Freeco and Manco and the risks associated with acquiring those companies. After the call, Mr Jenkins wrote to them both enclosing the flowchart and spreadsheet which Ms McGinn had sent to Ms Sutherland on 30 January 2019. By email dated 3 December 2019 Darren Grindlay, a senior associate, gave corporate advice to Ms Sutherland to deal with the approval by the directors and shareholders of Freeco and Manco of the sale of both the freehold and the Headlease.

466. By email dated 3 December 2019 Ms Sutherland advised Mr Connolly that it was preferable to acquire the interests in Ensign House rather than the shares in Freeco, Manco or Thames Haven Management. Mr Connolly replied stating that he was on a train and asking her to send through the flowchart so that he could have a look at it on his phone and on the same day Mr Jenkins sent it to him to help him make sense of Ms Sutherland's advice.

467. Ms Wicks took Mr Connolly to an email dated 16 December 2019 which Ms Boulton had sent to DLA. She was still acting for Mr Hughes but had not appreciated that Mr Alford was no longer acting for Investin and she wrote to DLA stating that: "This is all a bit deja vu – we already had an agreed form of lease with your client from the previous abortive transaction." When Ms Sutherland queried this with Mr Alford, he told her that all of the Suiteholders were aware that it was a different deal. He also wrote to Ms Boulton directly stating that: "There is no previous lease DLA have drafted or are aware of. Hope the above is clear."

468. Ms Boulton then raised this with DLA and Ms Sutherland wrote to her stating that: "I am not aware of the details of any previous transaction". Mr Connolly accepted that it was a "bit naughty" for Mr Alford to send an email suggesting that DLA had no familiarity with the earlier deal. But he did not accept that Ms Sutherland's email was carefully worded to avoid contradicting Mr Alford.

(4) The last round

469. Both parties described the last round of negotiations in some detail in closing submissions. But I consider it unnecessary to prolong this narrative by setting them out. Ms Wicks and Mr Lee submitted (and I accept) that those negotiations were not dissimilar to the protracted negotiations which EHL had experienced between July 2018 and

October 2018. Indeed, by email dated 22 December 2019 Mr Alford wrote to Mr Connolly expressing the following view:

> "I know these characters too well – I've had the same issues with them for nearly 6 years –-they all want deal to happen and are in fact desperate to sell and cash in but will all try to negotiate until last minute, they can't help themselves."

470. Mr Connolly accepted that this was a fair description and his comment was: "A. Yes, I think we have seen that over the last 12 days." The very last Suiteholder to come round was Mr Ranson and the principal stumbling block related to the terms on which he was required to try and buy out the Superior Lease of Suite 11. On 17 December 2019 Mr Connolly met Mr Ranson at the Hilton Hotel in London and immediately afterwards Mr Ranson tried to negotiate an improvement to the terms which FEC had offered. On 9 January 2020 Mr Connolly made a final offer and on 13 January 2020 Mr Ranson rejected it. By email dated 15 January 2020 Mr Connolly wrote to him in the following terms:

> "Following your email I have had a chat with my chairman about your position given all the other units are agreed and ready to exchange on Friday. As expected we will not be 'held to ransom' with agreeing something not in line with our agreed 'base' position. My clear instructions are that if you don't agree and don't exchange on Friday we will walk away from this deal. A bit of context. I have agreed to all your terms except for the 'cap of £20k' in relation to the reversionary lease. What we want you to agree (which is the principle) is to, in the worst case scenario, that we hold a 5% retention of the base cost ie £57k. This is only if after 30 months post exchange you cannot resolve the condition. So we are £37k apart on the worst case (which I think you can agree is unrealistic given the discussions you have had with George Walker). In addition to the above, we had a terrible meeting with the council planners on Monday regarding the development potential of the site. We know it's the first meeting and things will get better but they are clearly not as open to development as we assumed which makes the current price of the site 'tight'."

471. The following exchanges then took place, all on 15 January 2020. Mr Ranson replied to Mr Connolly stating that he could not agree to exchange as things stood. Mr Connolly's response was to tell Mr Ranson that he would instruct DLA that FEC was pulling out of the deal and that Mr Alford (whom he had copied in) should advise the remaining Suiteholders. Mr Connolly then instructed Ms Sutherland to withdraw the papers from their solicitors and she sent an email to Mr Kushal Morzeria of DKLM Solicitors, who were acting for Mr Ranson, stating that she had been instructed that FEC was no longer

proceeding and that they should treat the papers as withdrawn. Finally, Mr Alford wrote to all of the Suiteholders stating as follows:

> "I have been advised FEC are withdrawing from the deal -- I've been copied into emails to your solicitors legal papers are withdrawn. This is very disappointing all round for you as well as myself, as I convinced FEC to take on the project a year ago and have spent the past 12 months trying to put this deal together. The Chairman of FEC is in UK and has told John Connolly he will not waste anymore time or money on this deal as final terms are still not agreed even though I agreed terms with each of you in writing back in October. FEC are a well funded serious development company who have done all they can to try to work with you. I am frankly lost for words that basically 1 Lease holder has caused this to happen at this time when the deal should be exchanging within 48 hours. As I have previously noted to you I will not spend anymore of my time and resources trying to help you get this deal done as the above it hugely embarrassing and disappointing."

472. On 16 January 2020 at 8.17 Mr Alford wrote to Mr Connolly expressing the view that the other Suiteholders would put pressure on Mr Ranson and that he would cave in by the following Monday, if not the following day. By 11.34 on the very same day Mr Ranson had accepted the final offer (subject to some minor points) and DLA had written back to Mr Morzeria informing him that they had been instructed that the transaction would proceed. This episode provides a final illustration of the view expressed by Mr Alford in his email dated 22 December 2019.

(5) February 2020: exchange of contracts

473. Even after DLA had threatened to withdraw the papers, FEC continued to encounter drafting difficulties with Mr Ammora, Mr Ranson, Mr Wu and Mr Hughes right up until exchange of contracts. However, on 5 February 2020 FEC exchanged contracts with Lama for the purchase of Suite 14 and on 7 February 2020 FEC exchanged contracts with the remaining Suiteholders for the purchase of the remaining Suites. On 11 February 2020 FEC announced the acquisition of Ensign House for a total sum of £28.25 million.

474. The individual contracts provided for the payment of a deposit of 5% and most of them provided for completion within 24 months. Completion of the purchase of Suite 14 took place immediately on 5 February 2020. The purchase of Suite 9 was to complete within 6 months and took place on 7 August 2020. The purchase of Suite 16 was due to be completed within 12 months and the purchase of Suite 18 was due to be completed within

18 months.

475. I set out in Table 2 the base prices and Side Deals which Investin had either agreed in principle to pay to the Suiteholders (or was negotiating with them) side by side with the base prices and Side Deals which FEC ultimately contracted to pay to them.

Table 2

Suite No.	Suiteholder	Base Price (EHL)	Side Deal (EHL)	FEC Price	Completion Date
1	EPPL	£1,430,116.96		£1,430,116.96	7.2.22
2	EPPL	£1,125,785.50		£1,125,785.50	7.2.22
3	EPPL	£1,699,920.04		£1,699,920.04	7.2.22
4	RJLIB	£1,568,230.44		£1,568,230.44	7.2.22
5	Mr Wu	£1,125,785.50		£1,125,785.50	7.2.22
6	Mr Ranson	£1,699,920.04	£62,500 on Exchange £2,597,340.73 on completion	£2,109,919.00	7.2.22
7	Professor Whiteman	£1,607,576.72		£1,607,576.72	14.2.22
8	Tower Pension Trustees	£1,140,239.93	£1.3m, lease back with 12 month rent free and guarantee	£1,216,644.64	2.9.21
9	Simon Plant, Daniel Plant	£1,737,660.36	See Suite 8 (above)	£1,854,097.89	7.8.20
10	Simon Plant, Daniel Plant	£1,607,576.72	See Suite 8 (above)	£1,715,297.58	7.2.22
11	Mr Ranson	£1,140,239.23	See Suite 6 (above)	£1,140,240.00	7.2.22
12	Mr East and Mr Inzani	£1,737,660.36		£1,737,660.36	7.2.22
13	The Sopher Trust	£1,693,230.44 (inc £125,000	New lease or guarantee rent	£1,568,230.44	10.2.22

		premium)	of £42,750 pax		
14	Lama			£2,050,000.00	5.2.20
15	Mr Hughes	£1,737,660.36	New lease or guarantee rent of £38,500 pax	£1,737,660.36	4.2.22
16	Simon Plant, Daniel Plant	£1,438,916.98	See Suite 8 (above)	£1,583,351.62	5.2.21
17	GNN	£1,140,239.23	£155,000 on exercise of option and £150,000 on completion	£1,240,238.00	7.2.22
18	SRC	£1,737,660.36	Rent guarantee of £65,000 pax	£1,737,660.36	7.2.22

(6) The Superior Leases

476. In his email dated 20 June 2019 (above) Mr Alford reported to Mr Connolly that the board of directors of Freeco had obtained an outline insurance policy in relation to the Superior Leases for a premium of £40,000. On 17 July 2019 Mr Langman also forwarded to Mr Alford a quotation for defective title insurance. In the covering email he stated that the quotation was for £2,950 per Suite for eight Suites providing cover of £12.5 million per Suite with a total of £100 million cover. By email dated 2 October 2019 Mr Langman wrote to Mr Alford again in the following terms:

> "I am pleased to advise that we have re-approached insurers and advised them that we are now only concerned with 6 leases as detailed below. Insurers have noted that the owners of Suite 2 have in the past tried to contact S Hayklin and J Bews but failed to make contact. Insurers are happy to accept this situation provided no contact was made with either party (see condition 3 below). Policy coverage remains unaltered as per previous draft policies forwarded to you but we can produce a new draft policy to fit the 6 leases if you require it. Please also find attached an insurance product information document outlining the cover provided. Please note we can produce one master policy covering the 6 leases up to £100m or we can produce 6 separate policies for each lease each with a separate sum insured of £16,666,666. Should you require a smaller number of leases the sum insured per lease can be proportionately increased but the overall premium due of £22,400 remains unchanged."

477. On 18 July 2019 Mr Alford forwarded Mr Langman's first email to Mr Connolly with

the attached quotation. On 7 October 2019 he also forwarded on Mr Langman's second email (above) to Mr Connolly stating as follows:

> "Not sure I resent the revised – Policy only applicable to unit 2 on ground floor as other 5 headleases are being purchased. The insurers have been informed the underlease for unit 2 has troed [sic] to contact/find the Headlease with no success – appears the head lease is absent or not contactable."

478. By September 2019 Mr Connolly had become concerned to resolve the issues relating to the Superior Leases and on 10 September 2019 he forwarded on Mr Langman's first email and the quotation to Mr Heyworth-Dunn and Ms Sutherland. On 11 September 2019 Mr Heyworth-Dunn instructed Ms Sutherland to advise whether a defective title policy would protect FEC against the risks associated with the Superior Leases and on 17 September 2019 Mr Connolly sent Mr Heyworth-Dunn the spreadsheet and flowchart from Ms McGinn together with Mr Furber's instructions and advice.

479. By email dated 7 October 2019 Ms Sutherland advised that it was DLA's view that registration of new interests in any new building on the site of Ensign House would be a challenge where old leases remained registered and that this was likely to affect acquisitions and funding. Mr Alford had raised the issue with Mr Plant who complained to him on 30 November 2019:

> "In truth, this is a double whammy. The deal with FEC was on the basis that the reversionary point would not be an issue. Now it is. Further, FEC now expect me to pay any ransom payment that Hambros asks. The deal won't proceed with FEC, or anyone else for that matter, until the reversionary leases are resolved. You cannot secure development funding/ invest tens of millions of capital until point resolved, no bank will fund the construction. FEC would have walked away from deal 3 months ago unless the 6 x reversionary leases are in a position to be resolved. There is time between exchange and completion to resolve the issue as I see it being 24 months."

480. In the event, FEC agreed a mechanism for resolving the issue with each of the Suiteholders who held their Suites subject to a Superior Lease. Each contract generally required the Suiteholder to use all reasonable endeavours to acquire the Superior Lease before completion (or some variant of this obligation) and imposed a financial penalty if they failed to do so. For example, clause 9.1 of the contract for the purchase of Suites 6 and 11 imposed the following obligations upon Mr Ranson:

> "The Seller covenants to use reasonable endeavours to acquire the Superior Leasehold Interest as soon as reasonably possible after the date of this agreement and to register its interest at HM Land Registry without merger with the Property prior to the Completion Date on the following basis: (a) for consideration which is as low as the Seller is reasonably commercially able to negotiate and is payable on actual completion of the transfer of the Superior Lease with no deferred payment or overage and for the avoidance of doubt, the Seller shall not be required to acquire the Superior Leasehold Interest for a sum which is more than fifty seven thousand and twelve pounds (£57,012.00) plus VAT (if applicable); (b) that the Lease Transfer (or agreement to transfer) will contain no obligations that would bind any owner of the Superior Lease other than under the usual conveyancing indemnity to comply with title matters and tenant's covenants on and from acquisition; and (c) to include the transfer of any share in any lease reversionary to the Superior Lease if held by the Superior Tenant."

481. This obligation gave Mr Ranson a real incentive to try and find Mr Walker and purchase the Superior Lease of Suite 11 and it is clear that he was taking steps to do so even before exchange of contracts. By email dated 9 January 2020 Mr Alford wrote to him asking for an update and on that day, he sent a long email setting out the steps which he had taken and then forwarding on his email correspondence with Mr Walker's wife. He gave the following explanation (which I set out in full):

> "I spent some time trying to actually track down GW. I knew that this would take some time as I had not had any correspondence at all with him since purchasing the Suite 11 back in 2007. I write to all of his known addresses, both residential and business. Initially I head nothing so I wrote again several weeks later. Then on 3rd October 2019, GW called me on the phone. He seems a very helpful and pleasant man. He did mention that his health hasn't been perfect and this might slow things down a little. He also said that October/November is his various company year ends and as such he was much busier at this time of the year. He was very familiar with the building and the area despite selling all of his long leasehold interests in the building. We spoke for around 30 minutes. He gave me some very interesting information about the area as a whole and the location. We joked and got on exceptionally well. lt is fair to say that GW is a pleasant man.
>
> I told GW that I wish to acquire the reversionary interests of both Suite 11 & Suite 12 (located next door to one another). I explained that it was my intention to knock down the internal wall between the suites and apply for a planning permission change of use for an education facility. I explained that the general Bl office demand was slow and that the office was sitting empty. GW explained to me why he retained the reversions in the first place (government tax benefit at the time -which I already knew). I stated that would be willing to cover the legal cost of transferring the reversionary

> lease. GW said that this was not necessary as he himself was and is a solicitor although he doesn't practice anymore. I also stated that I would be willing to pay £5,000-£10,000 for his time in resolving this but GW said that he would resolve things in any event.
>
> GW requested a copy of the reversionary leases and lease plans. He said that I should email these to him and also post a physical copy to him. I did this on 30th October 2019. Approximately 1 week later GW phoned me to confirm receipt of the hard copy of the leases and said that he would deal with it. He specifically said that I should give him a few weeks if possible as he was due to go into hospital and had quite a lot on.
>
> I chased GW via phone and email for an update on his progress but was not able to reach him. His wife emailed me on 4/12 stating that he was back into hospital and was expected home the following week. I called the following week and could not reach him. His wife called me on the phone saying that he had not come back to work yet. I didn't call him over the xmas break.
>
> I called again on 8/1/20 and didn't reach him. His wife responded today by email to say that after being in hospital for a while they are now away and recuperating until the end of the month. She said that she would get him in contact with me at that point. I have no reason to doubt that GW will do everything that he has said. We have spoken around 6 time on the phone for good durations. He is comfortable speaking with me. He seems a man no longer driven by money or greed and very much interested in quality of life and helping people. There is not much more that I can do at this stage until GW is available again at end of the month."

482. By email dated 30 March 2019 Mr Ranson wrote to Mr Connolly informing him that the transfer deeds had been submitted to Mr Walker for execution and enclosing copies. His comment was that: "We are making good progress." Despite his complaint (above), Mr Plant had also been making good progress with Hambros. By email dated 8 December 2019 he wrote to Rachel Iles and Tim Pyle at Hambros explaining the problem and they agreed to obtain a valuation of the Superior Leases of Suites 16, 17 and 18. By email dated 17 February 2020 Mr Pyle wrote back to Mr Plant providing the following proposal:

> "The valuer has confirmed there is little value in the head-leases, consequently we are getting approval from the directors of SG Hambros Trust Company to transfer the leases. That shouldn't be a problem but needs to be formally approved. In the meantime, we have a quote from Farrer & Co, a SG panel law firm, to oversee the transfers on behalf of the Trust Company with an estimated fee of £3,190 plus VAT and any HMLR disbursements for all three properties. Please let me know if that is acceptable."

483. Between 7 February 2020 and 8 September 2020 the Suiteholders were able to acquire six of the eight Superior Leases and by the time of trial only two Superior Leases remained outstanding. The position in relation to each Superior Lease is (or was at the trial) as follows:

(1) *Suite 2:* Mr Bews and Mr Hayklan are both now dead. Mr Bews' executors have agreed in principle to enter into a deed of surrender subject to EHFL giving an undertaking to cover legal fees up to a cap of £1,500 plus VAT. By letter dated 31 January 2022 DLA wrote to the executors of Mr Hayklan proposing to take a surrender of the estate's interest, to compromise any breaches of covenant for £20,000 and to pay £1,500 plus VAT towards their legal fees. No response had been received by the date of trial.

(2) *Suite 9*: Mr Simon Plant and Mr Daniel Plant exercised their option to acquire the Superior Lease and by a transfer dated 24 November 2017 they acquired the Superior Lease for £1. By transfer dated 7 August 2022 they also transferred it to EHFL.

(3) *Suite 10*: Mr Simon Plant and Mr Daniel Plant exercised their option to acquire the Superior Lease of Suite 10 but it has not been transferred to them because Mr Walker died before the transfer had been completed. The benefit of the option has now been assigned to EHFL. It is also protected by a unilateral notice in the register of title no. EGL 262346. The terms of the option agreement require the registered proprietor to transfer it "not for money or anything which has a monetary value".

(4) *Suite 11*: Mr Ranson agreed to purchase the Superior Lease of Suite 11 and Suite 12 from Mr Walker for £4,000 and by transfer dated 23 June 2020 Mr Walker transferred it to him. By transfer dated 7 February 2022 Mr Ranson then transferred it to EHFL.

(5) *Suite 12:* By transfer dated 23 June 2020 Mr Walker also transferred the Superior Lease of Suite 12 to Mr Ranson. By transfer dated 7 February 2022 he then transferred it to EHFL.

(6) *Suite 16*: By transfer dated 1 September 2020 Hambros transferred the Superior Lease of Suite 16 to Mr Simon and Daniel Plant. The transfer did not record the

payment of any monetary consideration but I have assumed that Mr Plant and his brother paid Hambros' fees (as Mr Pyle had requested). The Superior Lease has now been transferred to EHFL.

(7) *Suite 17*: By transfer also dated 1 September 2020 Hambros transferred the Superior Lease of Suite 17 to GNN. Again, the transfer did not record the payment of any monetary consideration. The Superior Lease has now been transferred to EHFL.

(8) *Suite 18*: By transfer also dated 1 September 2020 Hambros transferred the Superior Lease of Suite 18 to SRC. Again, the transfer did not record the payment of any monetary consideration. The Superior Lease has now been transferred to EHFL.

(7) Findings

(i) 23 July 2019

484. In the light of his email dated 23 July 2019 I find that Mr Alford made direct use of the Price Allocation Schedule in his negotiations with the Suiteholders on behalf of FEC. However, I do not accept that Mr Alford misled the Suiteholders by stating that "As of 9 months ago this deal was dead and going nowhere again after 4 years". This fairly reflects the findings of fact which I have made about the state of negotiations between Investin and the Suiteholders after the sale of Quay House.

(ii) 28 August 2019

485. I find that Mr Alford deliberately lied to Mr Plant and Mr Ranson by telling them on or about 28 August 2019 that FEC had been offered the option deal by a third party. I also find that he did so because he knew that it was obvious that this information was confidential to Investin and the Suiteholders and that unless he provided them with this explanation, they would correctly assume that he had divulged this information to Mr Connolly and FEC. There is no evidence that Mr Connolly maintained this fiction to the Suiteholders and I accept his evidence that he did not do so.

(iii) 16 December 2019

486. I am not satisfied, however, that Mr Alford deliberately lied to Ms Boulton in the light of my findings in relation to the third phase of the negotiations. The new deal did not involve the grant of an option over Suite 15 but an outright sale and purchase, FEC had no connection with Investin and Mr Alford was entitled to take the view that Mr Downer had walked away from the option in October 2018. Further, I am not satisfied that any criticism of Ms Sutherland was justified. Her email was concerned with a detailed point of drafting which had arisen over the terms of an underlease and, if anything, her exchange with Ms Boulton was just illustrative of a large number of detailed issues which still had to be resolved before exchange of contracts.

(iv) 22 December 2019

487. Mr Connolly agreed with Mr Alford's email dated 22 December 2019 and I also agree with that assessment. I am satisfied that FEC's negotiations with the Suiteholders followed a very similar pattern to EHL's negotiations with them. I am also satisfied that Mr Alford adopted very similar negotiating tactics on behalf of FEC as he had adopted on behalf of EHL. He played off the individual Suiteholders against each other and put as much pressure on them as possible to reach final agreement.

P. The Disputed Payments

(1) EHFL to Mr Alford

488. Between 10 February 2020 and 4 January 2021 Mr Alford submitted five invoices to EHFL pursuant to the Fee Agreement and it is common ground that EHFL paid him £970,000 plus VAT totalling £1,163,996.90. I set out the invoices and the payments in Table 3 (below). DLA made the first and second payments on behalf of EHFL directly into Mr Alford's personal bank account at the NatWest Bank plc (the "**NatWest**") and FEC UK made the third and fourth payments into the same account. EHFL either made the fifth and final payment or transferred the money to FEC UK to enable it to do so.

Table 3

Invoice No.	**Date**	**Payment**	**Date**
010	5 February 2020	£646,666.60	10 February 2020

011	10 February 2020	£129,333.32	14 February 2020
012	14 August 2020	£129,333.32	27 August 2020
015	21 September 2020	£193,997.00	8 October 2020
016	28 December 2020	£64,666.66	8 January 2021
016 (Duplicate)	4 January 2021		
Total		**£1,163,996.90**	

(2) Mr Alford to Mr Connolly, his family and associates

489. EHL obtained an order against the NatWest for disclosure of the bank statements of Mr Alford's personal account at the NatWest for the period 1 January 2020 to 1 December 2020. Mr Connolly was also required to disclose the bank statements for his personal bank account at Barclays Bank plc ("**Barclays**"). Those bank statements show that Mr Alford made the payments in Table 4 (below) to Mr Connolly or to members of his family or to individuals associated with him. The Defendants also provided the following information about some of the recipients: Mr Joe Connolly is Mr Connolly's father; Mr Steve Connolly is his brother; Mr Daniel Freeman is a friend; and Mr Adam Curtis is a business associate.

Table 4

No.	Date	Payee	Amount	Transaction Details
1.	10.2.20	John Connolly	£9,999.00	JC EH EH MUSHROOM VIA ONLINE - PYMT FP 10/02/2010 44132809357811000N
2.	11.2.20	John Connolly	£9,999.00	JC EH JC MAGIC M VIA ONLINE - PYMT FP 11/02/2010 55110851050020000N
3.	13.2.20	Daniel Freeman	£5,000.00	DANIEL FREEMAN JC JC - EH VIA ONLINE - PYMT

				FP 13/02/2010 52051936116161000N
4.	13.2.20	Steve Connolly	£5,000.00	STEVE CONNOLLY JC JC - EH VIA ONLINE - PYMT FP 13/02/2010 10052313440090000N
5.	17.2.20	Joe Connolly	£7,000.00	JOE CONNOLLY EH - JOHN C VIA ONLINE - PYMT FP 15/02/2010 45030854454882000N
6.	17.2.20	Steve Connolly	£3,000.00	STEVE CONNOLLY JC JC - EH VIA ONLINE - PYMT FP 15/02/20 10 25031055283990000N
7.	18.2.20	Joe Connolly	£3,000.00	JOE CONNOLLY EH - JOHN C VIA ONLINE – PYMT FP 18/02/2010 33111020217983000N
8.	18.2.20	John Connolly	£7,000.00	JC EH JC MAGIC M VIA ONLINE - PYMT FP 18/02/2010 01111201182971000N
9.	21.2.20	Joe Connolly	£9,999.00	JOE CONNOLLY EH - JOHN C VIA MOBILE - PYMT FP 21/02/20 10 15102517655449000N
10.	24.2.20	John Connolly	£9,999.00	JC EH JC MAGIC M VIA MOBILE - PYMT FP 24/02/2010 60112445933875000N
11.	27.2.20	Andrew Palmer	£9,999.00	ANDREW PALMER SAIGON EH VIA MOBILE - PYMT FP 06/03/2010

				07082634635553000N
12.	4.3.20	John Connolly	£9,999.00	JC EH JC MAGIC M VIA MOBILE - PYMT FP 24/02/2010 60112445933875000N
13.	6.3.20	Andrew Palmer	£9,999.00	ANDREW PALMER SAIGON EH VIA MOBILE - PYMT FP 06/03/2010 07082634635553000N
14.	9.3.20	John Connolly	£9,999.00	JC EH JC MAGIC M VIA MOBILE - PYMT FP 09/03/2010 36064400558477000N
15.	13.3.20	John Connolly	£9,999.00	JC EH JC MAGIC M VIA MOBILE - PYMT FP 13/03/2010 04083004401892000N
16.	14.8.20	John Connolly	£10,000.00	JC EH JC MAGIC M VIA MOBILE - PYMT FP 13/03/2010 04083004401892000N
17.	28.10.20	John Connolly	£10,000.00	JC EH JC MAGIC M VIA ONLINE - PYMT FP 28/10/2010 04133153897927000N
18.	29.10.20	Adam Curtis	£10,000.00	ADAM CURTIS - JC JC CAR VIA ONLINE - PYMT FP 29/10/2010 26142647647224000N
19.	5.11.20	John Connolly	£7,000.00	JC EH JC MAGIC M VIA MOBILE - PYMT FP 05/11/2010 44014438043936000N

20.	26.11.20	John Connolly	£5,000	JC EH JC MAGIC M VIA MOBILE - PYMT FP 05/11/2010 44014438043936000N
21.	12.1.21	John Connolly	£5,000.00	Received from Alford T/CP Ref: JC Magic M
Total:			**£166,991.00**	

490. Mr Alford included the following details in the narrative or 18 of the 21 payments in Table 4 (above): "JC EH". Wicks put it to Mr Connolly that this acronym was intended by Mr Alford to record that the payment in question was to Mr Connolly and in respect of Ensign House. Mr Connolly said in evidence that he had never seen these references before and I accept that they were taken from Mr Alford's bank statements which Mr Connolly had not seen before the NatWest disclosed them. In relation to payment no. 21, however, Mr Connolly used the legend "Magic M" himself to describe the payment. He accepted that this was a reference to "Magic Mushrooms" and was a private joke between Mr Alford and him.

491. The three payments which did not refer to "JC EH" were made by Mr Alford to third parties and not to Mr Connolly or members of his family. Payments no. 11 and no. 13 were made to Andrew Palmer and both included the detail "EH". Payment no. 18 was made to Mr Curtis included the details "ADAM CURTIS – JC" and "JC – CAR". Again, the obvious inference to draw is that this was payment made by Mr Alford to Mr Curtis on behalf of Mr Connolly in relation to Mr Connolly's car. This conclusion is supported by a series of texts between Mr Connolly and Mr Curtis.

(3) The Statements of Case

(i) The Further Information

492. In the Particulars of Claim, EHL made a general allegation that the Defendants were liable to account to EHL for all profits or benefits which they received from their dishonest assistance of Mr Alford's breaches of fiduciary duty. This allegation was denied. On 18 January 2021 (as I have already set out) EHL made its first request for

further information and on 12 March 2021 the Defendants answered it. Their response contained the following answer to the following question about Mr Connolly's conduct:

> **"Request under paragraph 74 of the Defence:** Please state whether Mr Connolly has received any fees, commissions, payments or other benefits (including from Mr Alford) in connection with EHFL's acquisition of the Property and, if so, provide details of the same. **Response:** the remuneration of Mr Connolly by EHFL or FEC UK is not an issue in these proceedings and is irrelevant. No payments have been made by Mr Alford to Mr Connolly."

(ii) The Amended Particulars of Claim

493. On 22 September 2021 Chief Master Shuman gave permission to EHL to amend the Particulars of Claim to plead a more specific allegation that Mr Connolly was liable to account for profits or benefits which he received by misusing EHL's confidential information:

> "…in the case of Mr Connolly, all bonuses or other payments received or receivable by him or any entity owned or controlled by him from FEC or any other source (EHL understands that Mr Alford may have made a payment to Mr Connolly) which are referrable to his involvement in EHFL's acquisition of the Property on the basis that these are profits or other benefits which have been generated from the misuse of the Information."

(iii) The Amended Defence

494. On 25 January 2022 Chief Master Shuman gave permission to the Defendants to serve the Amended Defence, in which they denied that any profit or other benefit had been generated from the misuse of any confidential information and that either Mr Alford or Mr Connolly was liable to account for any profit or benefit which they had made. The Defendants denied the allegation against Mr Connolly in the following terms:

> "That Mr Connolly is liable to return to EHL any bonuses or other payments received or receivable by him or any entity owned or controlled by him from FEC or any other source which are referrable to his involvement in EHFL's acquisition of the Property on the basis that these are profits or other benefits which have been generated from the misuse of the Information."

495. This remained the Defendants' pleaded position up to and throughout the trial. By letter dated 11 February 2022 SCW wrote to DLA asserting that their client had been told by

Mr Alford that he had paid a "bung" of £200,000 to Mr Connolly, his friends and family out of the fee which was paid to Landseer. They also stated that Mr Alford had then changed his story and now said that Mr Connolly had made a loan to him of £20,000.

(iv) The Amended Further Information

496. On 10 August 2022 the Defendants served an amended response to EHL's request for further information. They had amended the response to the request under paragraph 74 (above) to add one word. Their pleaded case remained that the remuneration of Mr Connolly was irrelevant. They also stated: "No such payments have been made by Mr Alford to Mr Connolly."

(4) Mr Connolly's Evidence

497. On 20 May 2022 DLA served Mr Connolly's witness statement. He dealt with the initial fee of £5,000 which FEC paid to Mr Alford for his assistance in relation to Suite 14 and then continued as follows:

> "114. FEC agreed to pay him the £5k initial fee (this was paid in July 2019) for the work done on Ammora's unit. I was still talking to Terry on a regular basis and at some point he asked me if there was any other way to help him. At this time I was regularly going to casinos. Over the summer I had been able to win on numerous occasions which meant that I had cash in my house which had been paid by the casinos I visited. Around the end of August, when I was speaking to Terry again about his situation, I knew I had money sitting in the house and so I decided to personally loan him £20,000. The loan had nothing to do with the business (as in FEC) and certainly nothing to do with the Ensign House transaction. It was a personal loan between me and Terry.
>
> 115. As it was a personal loan I decided that we didn't need to document it in a loan agreement. I trusted Terry even though there was a risk that the money would be lost to me which I was prepared for although I would not have been happy about it. I did not know when Terry would pay me back, but ultimately he repaid the personal loan to me in full in February 2020."

(i) Payment No. 3: Daniel Freeman

498. On 13 February 2020 Mr Alford paid £5,000 to Mr Daniel Freeman. Mr Connolly accepted that he was a mutual friend and Ms Wicks took him to a text message dated 10 February 2020 which he sent to Mr Freeman stating: ""Morning rambler! Getting the money this week eventually! What account do you want it transferred into?" Mr

Connolly's explanation for this payment was that he and Mr Alford had agreed to buy a taxi with Mr Freeman:

> "Q. What was that payment made for? A. So that payment was made towards a taxi that we were buying, so Dan owns one of the taxis in a local taxi rank -- taxi firm. So we were -- so he was telling me how it was doing well and they wanted a new minibus. So they wanted 10 grand for a new minibus. So me, Dan and Terry had a conversation about it. Terry decided that he would want to get involved, so I gave 5 grand cash to Dan. Terry transferred 5 grand over and we were going to buy a minibus for the taxi rank called Green Dot. Q. So this is a joint purchase -- A. A joint purchase, yes. Q. Of a minibus taxi? A. Yes."

499. When Ms Wicks asked Mr Connolly where the documents relating to this purchase were, his evidence was that it never took place because the country went into lockdown and he and Mr Alford agreed to buy a taxi from a Mr Stephen (or Simon) Oliver who went bust and failed to return the funds. Ms Wicks suggested that this was a complete fabrication and that it was part payment of a bribe:

> "Q. Mr Connolly, I've got to put to you that is not true. That money that was paid to Mr Freeman was paid for your benefit and it was part payment of a bribe from Mr Alford, channeled through Daniel Freeman, your mutual friend? A. No. Can I ask what you mean by "bribe", please? Can you clarify? Q. What I mean by a bribe, Mr Connolly, is a sum of money or other benefit paid to you or for your benefit in return, in this case, for agreeing Mr Alford's fee for FEC. A. Okay. No, that's not the case. None of these payments have got anything to do with Ensign House but we will go through it. Q. So none of these payments have got anything to do with Ensign House but let me just concentrate first of all on the payment that you've just talked about on 13 February, £5,000. The transaction details say Daniel Freeman, JC. So it's not a payment to Daniel Freeman for his own benefit. It's a payment for your benefit, isn't it, JC? That's you? A. I've never seen these references. None of these references I've seen until the disclosure early this year. Q. And then it's "JC-EH", which clearly means John Connolly, Ensign House. A. I can't tell you that."

(ii) Payment No. 1 to No. 15: Mr Connolly (and his family)

500. Between 10 February 2020 and 13 March 2020 Mr Alford paid £95,000 to Mr Connolly himself or to his father and brother. His evidence was that this sum represented the repayment of the loan to which had referred in his witness statement together with £75,000 for the use of the money:

> "MR JUSTICE LEECH: Just take a pause. So he said that he would give you another £15,000 on top of the money that he was already -- A. Yes, so he said he would give us three times my 20 grand, which was 60 grand in total, and then on -- after the November, he said he would give us another 15 grand for the fact that he hadn't give us the money. I did not have anything, you know, I had to agree to it because that was what it was but, I must admit, I didn't think he was going to give us to that level of money and, in the end, he did. And it was -- you know, a loan that I give him and an agreement that he said to me that he would return and that's what you are seeing here in terms of the payments. MS WICKS: All of them? A. Not all of them, no. Q. So what you are asking his Lordship to believe -- is this right? -- that £75,000 worth of the payments that are shown on this schedule are the repayment of a £20,000 loan? A. Plus the 20,000, so 95 in total. Q. Sorry, this is coming in new to me, Mr Connolly, so you will have to excuse me if I'm a bit slow catching up. How much did you lend Mr Alford originally? A. 20,000. Q. Yes? MR JUSTICE LEECH: How much did he repay? A. 95. MS WICKS: And is the £20,000 loan the one that you mention in your witness statement? A. Yes, in August."

501. It was also Mr Connolly's evidence that £8,000 was paid to his brother in relation to a holiday villa in Orlando. Ms Wicks took him to a number of text messages which he sent to his brother about the payments. None of them referred to a holiday or a villa and when his brother asked who Mr Alford was, he said: "My partner in a deal." Ms Wicks then put it to him that the deal to which he was referring was an agreement to pay him £200,000 out of his fee from FEC:

> "Q. He was in effect your partner in a deal, wasn't he? The deal was you would procure a very large fee from your company and he would pay you a bribe of about £200,000 for doing that? A. No. Q. That was the deal that you were referring to when you were chatting with your brother? A. No, it's not that at all. I agreed the fee with Terry in the July. I had a conversation with Terry in the August, after the fee was agreed, with Hong Kong. So I did not have any discussions with Terry about anything on the personal side before -- before August and the fee was agreed in July. So the fee had nothing to do with the agreement that I had with Terry very separately and it's a personal arrangement. And I had -- over the year, I had a number of different deals with Terry, which weren't part of the fee."

502. Finally, it was also Mr Connolly's evidence that he asked Mr Alford to pay £19,999 directly to his father because he owed some money to his father but his father refused to accept £10,000 and repaid it to him:

> "Q. Yes? And then on 21 February 2020, at the top of page 3, he makes a payment of £9,999 to your father, so a pound short of £20,000 in total; yes? A. Yes. Q. And do you accept that those monies were for your

> benefit? A. Yes. Q. And do you accept that they were part payment of a bribe by Terence Alford to you? A. They were part payment of the loan repayment that Terry agreed to pay me. Q. So why are they being paid to your father? A. I wish I had never got them -- so I owed my dad money from a long -- he has been borrowing us money over the years and I want to repay it. So I asked Terry to transfer him the money. I told me dad that I was going to come from Terry. He didn't want the money back but I said, you need to take the money, so the first 10 grand that went through to him repaid a loan that I had had with him for -- over a number of years, and the second one was because I wanted to -- because then at this point, Terry confirmed to me that, because of -- I helped him out and that he agreed to do it, he was going to pay us the full amount of money. I never thought he would, but he confirmed that that's what he was going to do. So I thought, because my dad had lent me the money for some time, that I would pay him more money back, which was the 10 grand, and he called me up and said, "What are you doing?" And I said, I'm paying you money back for the money that, you know, you lent me over the years, and he just said, "No, I don't want it," and he transferred the money back to me. So that's when -- so the money was transferred back to me on the 24th. Q. That's your story for the repayment of the 24 February 2020 of 10,000? A. 24th, yes, so Terry paid him ten and he paid me the ten back, on the 24th."

(iii) Payment No. 11 and No. 13: Mr Palmer

503. On 27 February 2020 and 6 March 2020 Mr Alford made two payments to Mr Andrew Palmer totalling £19,999 using "EH" in the description of each payment. Mr Connolly accepted that Mr Palmer had originally introduced him to Mr Alford in June or July 2018 but he denied that these two payments were part of a bribe which Mr Alford made to him.

(iv) Payment No. 16 and No. 21: Mr Connolly

504. On 14 August 2020 Mr Alford paid £10,000 to Mr Connolly and on 12 January 2021 Mr Alford paid him £5,000. It was his evidence that these were two loans. It was also his evidence that he repaid £5,000 of these loans in cash in November 2021 and £10,000 in July 2022 on the sale of a car which was sold by Mr Curtis (below).

(v) Payment No. 17 to No. 20: Mr Connolly and Mr Curtis

505. Between 28 October 2020 and 26 November 2020 Mr Alford made three payments to Mr Connolly totalling £32,000 and one payment to Mr Curtis of £10,000. Mr Connolly's evidence was that Mr Alford and he agreed to buy a car from Mr Curtis for £30,000 of which Mr Alford's contribution was £20,000 and his own £10,000 but that he changed his mind because the car had maintenance problems and that Mr Alford acquired 100%.

Ms Wicks took Mr Connolly to the registration document and he confirmed that the car, a Porsche 911, was always registered in his name. It was also his evidence that the car was sold in July 2022:

> "A. July 22. I transferred him -- we got 35 grand for the car in total, 10 grand in -- a 10 grand transfer to me and then 25 grand cash, and I transferred 5 grand at the time to Terry and then, when he was here in October, I paid him the remainder of the money. So overall we were squits (sic) basically. We sold the car and I paid him the money back that I owed him."

506. Ms Wicks took Mr Connolly to his own bank statements and showed him that on 25 July 2022 he received £10,000 from Mr Stephen Barrass and that on 9 September 2022 he paid £5,000 to Mr Alford. She put it to him that he only realised £10,000 on the sale of the car and paid Mr Alford £5,000 from it. Mr Connolly accepted that Mr Barrass purchased the car but gave evidence that he paid a further £25,000 in cash.

507. On 24 October 2022 Mr Connolly sent a draft agreement to Mr Alford by WhatsApp and asked Mr Alford to sign it and on 28 October 2022 Mr Alford returned it by WhatsApp having signed it. Mr Connolly also asked him to send the original back to him stating "Put private and confident [sic] on the envelope please." The document was headed "Payment Agreement between Terence Alford and John Connolly" and provided as follows:

> "**Concerning Car Investment and Repayment of Loans**
> Payments Made
> £5,000 via Bank Transfer 9th September – first repayment of car
> £16,000 cash payment 21st October – second repayment of car
> £10,000 cash payment 21st October – repayment of loan
> There is no more outstanding debt between the parties"

(5) Findings

(i) The payments to Mr Connolly, his family and associates

508. I do not accept Mr Connolly's evidence in relation to any of the payments in Table 4 apart from payment No. 11 and payment No. 13 (below). I find that in early July 2019 Mr Alford and he agreed to share a fee of £1 million for the acquisition of Ensign House

if Mr Connolly was able to persuade his principals in Hong Kong to agree to it. I also find that Mr Alford and Mr Connolly agreed that Mr Alford would get 80% of the fee and Mr Connolly would get 20% of the fee (which was £200,000 based on an assumed fee of £1 million). I have reached this conclusion for the following reasons:

(1) The "transaction details" in the final column of Table 4 (above) are all taken from Mr Alford's NatWest account. I am satisfied that he used the acronym "JC EH" to refer to Mr Connolly and Ensign House. I accept that Mr Connolly had not seen the statements before this action but he offered no alternative explanation.

(2) The timing of the initial payments to Mr Connolly, his family and associates closely coincided with the payments by FEC UK (or EHFL) to Mr Alford. FEC UK made the first two payments totalling almost £776,000 to Mr Alford on 10 and 14 February 2019 and between 10 February 2020 and 13 March 2020 Mr Alford made payments No. 1 to No. 15.

(3) The timing of the later payments to Mr Connolly also coincided closely with payments to Mr Alford. On 14 August 2020 he submitted an invoice for £130,000 to FEC and on the same day he paid Mr Connolly £10,000. On 8 October 2020 FEC paid him £193,997 and between 28 October 2020 and 5 November 2020 he paid £22,000 to Mr Connolly and Mr Curtis. Finally, on 8 January 2021 FEC (or EHFL) paid Mr Alford £64,666.66 and on 12 January 2021 he paid £5,000 to Mr Connolly.

(4) Mr Alford used the reference "EH MUSHROOM" or "JC MAGIC M" to refer to a number of the direct payments to Mr Connolly. The reference "JC Magic M" also appears on Mr Connolly's bank statement for payment No. 21. The obvious inference to draw and the inference which I do draw is that "magic mushrooms" was the code for the payment.

(5) The explanations which Mr Connolly gave for the individual payments which Ms Wicks put to him were unsupported by any documentary evidence at all and became more and more incredible. Mr Connolly's explanation for the payment of £5,000 to Mr Freeman made little sense. He said first that it was to buy a minibus with Mr Alford and Mr Freeman. But when asked to produce the documents, he said that the transaction never took place because the seller became insolvent and

failed to return the funds. But even if this was true, there should have been a paper trail of some sort.

(6) Mr Connolly's evidence that he lent Mr Alford £20,000 and that Mr Alford agreed to repay him £95,000 (despite his protestations) was wholly incredible. It was equally incredible that Mr Connolly needed to borrow £15,000 from Mr Alford only five months later or that Mr Alford had the money available. Ms Wicks submitted that he was stuck with the explanation in his witness statement that he lent £20,000 to Mr Alford and had to do the best he could once Mr Alford's and his bank statements had been disclosed. I agree.

(7) Mr Connolly's explanations for the payments to his brother and father were equally incredible. Indeed, his brother asked him who Mr Alford was and he answered: "My partner in deal." This was entirely consistent with the conclusion which I have reached that Mr Alford agreed to pay him a proportion of his fee. Equally incredible was the suggestion that he asked Mr Alford to repay a loan which his father had made to him and that his father refused to accept the money. The obvious inference and the inference which I do draw is that Mr Connolly asked Mr Alford to route the funds through the bank accounts of his father and brother to preserve secrecy. This would also explain why his brother was concerned about the source of the payment.

(8) Finally, I do not accept Mr Connolly's explanation for the payment to Mr Curtis. I am prepared to accept that the money was used to buy a car and that it had mechanical problems. But I reject Mr Connolly's explanation that he bought it with Mr Alford or that he resold it for £35,000 (including £25,000 in cash). He was always the registered keeper and the obvious inference to draw and the inference which I do draw is that Mr Connolly asked Mr Alford to pay £10,000 out of his commission directly to Mr Curtis for the purchase of the car.

(9) Finally, I draw the inference that Mr Connolly and Mr Alford struck their agreement on 16 July 2019. This would explain why Mr Alford resisted any suggestion that the fee should depend on the original option price, why Mr Connolly and he prepared such detailed calculations for submission to Hong Kong between 17 July 2019 and 23 July 2019 and why Mr Alford asked Mr Connolly to

hold off for 48 hours to secure the agreement of as many Suiteholders as possible.

509. I am driven, therefore, to the conclusion that Mr Connolly deliberately fabricated the extract in his witness statement which I have set out (above) and then deliberately lied to the Court. I am also driven to the conclusion that in October 2022 Mr Connolly asked Mr Alford to sign a sham agreement which did not reflect the true agreement between them with the intention of using it to mislead the Court. It may well be that the payment of £5,000 to Mr Alford on 9 September 2022 was linked to this request but Ms Wicks did not ask me to make a finding to that effect and it is unnecessary for me to reach a final conclusion on that issue.

(ii) The payments to Mr Palmer

510. Mr Palmer introduced Mr Connolly to Mr Alford and Mr Alford's reference for the two payments to him totalling almost £20,000 were "SAIGON EH". Ms Wicks and Mr Lee accepted that the reasons for assuming that these payments were made pursuant to the agreement between Mr Alford and Mr Connolly were less strong but submitted that the Court should draw the inference that they formed part of Mr Connolly's bribe or, as I have chosen to describe it, his commission.

511. I am not prepared to draw the inference that Mr Palmer was a conduit for payments by Mr Alford to Mr Connolly. Where Mr Alford made a payment to or on behalf of Mr Connolly, he used the reference "JC EH" or "JOHN C" rather than "EH SAIGON". In my judgment, it is more likely that Mr Alford agreed to pay £20,000 to Mr Palmer out of any commission which he earned from Mr Connolly. The timing of these payments supports this conclusion because they were both made out of the first tranche of payments which Mr Alford received from FEC. This also explains the "EH" reference on Mr Alford's bank statement.

(iii) Mr Alford's fee

512. Mr Alford had to accept a reduction in his fee of £30,000 and the final figure of £970,000 is reflected in the Fee Agreement. £970,000 plus VAT totals £1,164,000 and I find FEC UK or EHFL paid that sum to Mr Alford pursuant to the Fee Agreement (less £3.10). I also find that Mr Alford paid £146,993 to Mr Connolly and £19,998 to Mr Palmer. Ms Wicks and Mr Lee did not suggest that Landseer or Mr Alford failed to account to HMRC

for the VAT. I find, therefore, that Mr Alford received a fee of £970,000 (ex VAT) for introducing FEC to Ensign House and acting as its agent (before the payments to Mr Connolly and Mr Palmer) and a fee of £803,009 (ex VAT) (after the payments).

(iv) Mr Connolly's fee

513. I find that Mr Connolly received £146,993 of the total amount of £1,164,000 which Mr Alford received. This amounts to approximately 12% of £970,000 (ex VAT). Ms Wicks did not suggest that I should draw the inference that Mr Connolly received the balance of 20% or £200,000 and I am not prepared to do so. There could be many reasons why Mr Alford either did not or could not pay the balance to Mr Connolly and I am not prepared to speculate further.

IV. Breach of Contract

Q. The NDA: Meaning and Effect

(1) The Information

514. Ms Wicks and Mr Lee divided the information which EHL provided to FEC UK into a number of categories and Mr Seitler adopted that categorisation. The parties also referred to it collectively as the "**Information**" and used the term "**Confidential Information**" to refer exclusively to the material which they argued was confidential within the meaning of clause 1.1 of the NDA or under the general law of confidence. I adopt the same classification and divide up that information into the following sub-categories:

A. Pricing Information

515. On 30 January 2019 Ms McGinn sent Ms Sutherland a draft of the option agreement. Schedule 1 contained the prices which EHL had agreed to pay, or was proposing to pay, to each Suiteholder (apart from Lama). On 17 July 2019 Mr Alford sent Mr Connolly the Price Allocation Schedule and the Option Incentives Table and on 19 July 2019 Mr Alford sent the base prices and Side Deals to Mr Connolly again in his handwritten tables. I will refer to the information in these documents as the "**Pricing Information**".

B. Soft Information

516. On 29 January 2019 Ms McGinn provided details about the negotiations in 2014 and

2015 and the more recent negotiations to Ms Sutherland. Mr Alford also provided information about the Suiteholders' preferences, demands, relationships and roles. In particular, Mr Connolly accepted in cross-examination that Mr Alford gave him "lots and lots of the information you need to understand how to negotiate with all the different leaseholders in the building". Ms Wicks described this as "soft" knowledge and this is a fair description of the knowledge of the Suiteholders which Mr Alford had built up over the previous five years. I will use the phrase "**Soft Information**" to describe this information.

C. Title Information

517. On 30 January Ms McGinn sent Ms Sutherland a flowchart and a spreadsheet setting out the title structure of the different interests in Ensign House and a summary of title information. Ms McGinn also sent office copy entries of a number of the titles and a sample of a Superior Lease (although Ms Wicks and Mr Lee did not rely on this Information in their closing submissions). I will refer to this as the "**Title Information**".

D. Lama Information

518. On 28 January 2019 Mr Downer and Mr Alford explained the problem about Lama to Mr Connolly and on 30 January 2019 Ms McGinn sent Ms Sutherland the SFO's letter dated 28 June 2011, the Lama Skeleton Argument, the King Order and the Lama Statement of Evidence. On 19 February 2019 Mr Alford also provided Mr Connolly with Lama's "wish list". Finally, on 9 April 2019 Mr Alford provided Mr Connolly with Mr McGarry's details. I will refer to these documents or items of Information as the "**Lama Information**".

519. One of the puzzles about Category D is how FEC obtained a copy of the Restraint Order itself. Ms McGinn did not send it to Ms Sutherland on 30 January 2019 and Ms Wicks and Mr Lee did not suggest that it was provided under the NDA. The trial bundle contains an email dated 1 July 2019 from Mr Maidment's assistant, Sally Shaw, to Ms Ford enclosing a copy. It may well be that DLA did not have a copy of it until that date. At all events, I was not taken to any documents to show that Ms McGinn or Mr Alford provided a copy.

E. Counsel's Advice

520. On 30 January 2019 Ms McGinn sent Ms Sutherland copies of Mr Furber's instructions and his written advice in relation to the Superior Leases and their effect on the development of Ensign House.

F. The BUJ Feasibility Study

521. On 3 September 2018 Mr Alford sent the BUJ Feasibility Study to Mr Connolly. On 6 September 2019 he forwarded it on to Mr Ng and at some time before 22 January 2019 he forwarded it to MLA.

522. Mr Seitler's primary argument was that none of the Information was confidential for two reasons which I consider below. However, he accepted in his closing submissions that the specific Information set out in Categories A, B and E was confidential if that argument was unsuccessful. He did not accept that the Title Information was confidential and although he accepted that the letter from the SFO to Mr Ammora was confidential, he did not accept that the Lama Skeleton Argument or the King Order were confidential either.

(2) The Proposed Transaction

523. The NDA defined the term the "**Proposed Transaction**" as "a proposal to sell you our interest in the Property" and the term "**Confidential Information**" as all confidential information disclosed before or after the date of the NDA "in connection with the Proposed Transaction". Mr Seitler's primary argument was that EHL had no legal or equitable interest in Ensign House and nothing to sell. It followed, so he submitted, that there was no Proposed Transaction and none of the Information had been disclosed in connection with one.

524. In both his oral and written submissions Mr Seitler anticipated an obvious question, namely, why EHL would ask FEC UK to enter into an NDA which had no effect. His answer to this question was that this was a device or stratagem adopted by Mr Downer whenever he was negotiating a potential deal and that Ms McGinn had adopted a general but unsuitable and ill-fitting precedent which did not cover a situation where in substance both EHL and FEC UK were potential purchasers and EHL had no legal rights over or to

the relevant property.

525. Ms Wicks submitted that that this interpretation of the NDA was wrong and that there was nothing in the NDA which required the word "interest" to be narrowly confined to an existing proprietary interest and it could be interpreted to mean either an existing commercial interest or a future proprietary interest. She pointed out that neither party had discussed the terms or timing of the potential sale and it could have taken a number of different forms. For instance, EHL could have executed the option agreement before assigning the options to FEC UK or it could have made available to FEC UK the Information which it held to enable FEC UK to approach the Suiteholders direct. All that both parties intended at the time of the NDA was that there would be a transaction between them under which "something would be sold by EHL to FEC UK."

526. I accept Ms Wicks' submission and I reject Mr Seitler's argument. In my judgment, the expression "our interest in the Property" in the introductory paragraph of the NDA is to be construed as meaning "any interest which we have or may acquire in the Property". I also accept that the word "interest" is not limited to a legal or beneficial interest in the Property but may extend both to a contractual right which does not confer a proprietary interest in the Property and also to an interest in protecting sensitive Information relating to the Property which has a commercial value. I have reached this conclusion for reasons which I now explain.

527. It is common ground that the NDA must be construed against the shared factual background known to both parties. For the following reasons, however, I am not satisfied that the term "our interest" should be construed in the limited way proposed by Mr Seitler when viewed against the shared factual background (as I have found it to be):

    (1) The Proposed Transaction was defined by reference to a sale of "our interest" in the Property and not to the interests of the Suiteholders who had proprietary interests in Ensign House. Mr Downer, Mr Alford and Mr Connolly all knew that EHL was not the legal owner of Ensign House and on a very simple level, therefore, "our interest in the Property" could not have been understood by any of them to mean legal title to "the Property".

    (2) There is no dispute that Mr Downer and Mr Alford knew that EHL had no beneficial interest in Ensign House on 21 or 22 January 2019. I have found that on

21 January 2019 Mr Connolly believed that Investin held signed options over 17 of the 18 Suites apart from Suite 14 and that he believed that the deal was "oven-ready" or "all wrapped up and ready to go" in the sense that the Suiteholders had made a commitment to Investin but further legal formalities were required before FEC UK could acquire those options from Investin.

(3) However, I have also found that Mr Connolly did not discuss those formalities with Mr Alford and that he did not ask Mr Downer or Mr Alford at any time before he signed the NDA what interest EHL had in Ensign House. He could easily have done so or, better still, instructed Ms Sutherland to ask Ms McGinn. But he did not. If he had been asked, therefore, on 21 January 2019 what interest he was proposing to buy and when he was proposing to buy it, he could only have said that he was proposing to buy whatever interest EHL had and that the sale would take place at some time in the future.

(4) Finally, Mr Connolly accepted that Ensign House was a valuable opportunity which he was keen to investigate and that he had to sign an NDA to take that opportunity forward. In very simple terms, Mr Alford had introduced this valuable opportunity to him and the NDA was the price which he had to pay to explore it.

528. I am also satisfied that the wider interpretation advanced by Ms Wicks is consistent with both the language and commercial purpose of the NDA when viewed objectively. I say this for the following reasons:

(1) In my judgment, clause 1.1 must be read as a whole. There is no need to place an unduly restrictive interpretation on the meaning of "Proposed Transaction" because it is qualified by both clauses 1.1.2 and 1.1.3. Information was, therefore, only "Confidential Information" if it would be so regarded by "a reasonable business person" either as relating to the Property itself or to the affairs, customers, clients, suppliers, plans, intentions or market opportunities of EHL.

(2) EHL had been negotiating to acquire future proprietary interests in Ensign House, namely, options over either 17 or 18 Suites. EHL also had a commercial interest in Ensign House because Mr Downer was still hoping to sell his position to a third party or use it to negotiate a profit share or joint venture. In my judgment, a reasonable business person would have regarded that interest as a valuable one,

that it related to the Property and that it also related to EHL's intentions and market opportunities.

(3) There is no obvious reason why the parties would have imposed the additional limitation that the Proposed Transaction had to relate to the sale of a proprietary interest in Ensign House as at the date of the NDA. One of the obvious ways in which the parties might have given effect to the Proposed Transaction was by a sale of shares in EHL. Indeed, Mr Connolly made that assumption even though he did not discuss this with Mr Alford.

(4) Moreover, it is quite possible that EHL might have wanted to assign the benefit of other contractual rights which did not give rise to a legal or beneficial interest in the Property. For example, if EHL had persuaded the Suiteholders to enter into an exclusivity agreement (as FEC persuaded Lama), then there is no reason why this would not have been a valuable interest which EHL could have assigned to FEC UK and which it would have wanted to protect by an NDA.

(5) Likewise, there is no obvious reason why EHL would not have wanted to protect an interest which it hoped to acquire in the future. Take the same example again. If EHL had entered into an exclusivity agreement with the Suiteholders, the NDA would have covered not only that interest in Ensign House but also any future interest which it was hoping to acquire during the exclusivity period. It cannot have been limited, therefore, to rights in existence at the date of the NDA.

(6) Finally, I am not satisfied that there is any reason why it would not have been a legitimate commercial aim for EHL to protect a future interest which it hoped to acquire even though it had no present contractual rights over Ensign House. For example, if EHL had prepared detailed plans for the development of Ensign House in preparation for applying for planning permission, it might have wanted to disclose that information to FEC UK to maximise the price which FEC UK might have been willing to pay. But it would not have wanted FEC UK to exploit that information in making a rival bid to the Suiteholders.

529. But even if this construction of "our interest" is wrong and it was limited to a proprietary interest in the Property, I am far from satisfied that the consequence was that FEC UK was free to use the Information as it pleased. Clause 1.4 provided a limited purpose for

which Confidential Information was disclosed and clause 6 provided that if the Proposed Transaction did not proceed, FEC UK was required to keep all information confidential. My initial view was that even if Mr Seitler was right about the meaning of the Proposed Transaction, FEC UK was not entitled to use the Information at all. But Ms Wicks did not argue that there was an express or implied term restricting the use of the Information in the event that there was no Proposed Transaction and I do not consider this point further.

(3) Publicly Available Information

530. Clause 7.1 provided that the obligations of confidentiality did not apply to any Confidential Information which was or became generally available to the public (otherwise than as a result of a breach of the NDA). Mr Seitler argued that the flowchart and spreadsheet in Category C and the Lama Statement of Evidence, the Lama Skeleton Argument and the King Order in Category D all fell within that category. I accept that submission in relation the King Order but I reject it in relation to the other documents for the following reasons:

(1) The flowchart and spreadsheet were not published documents or documents which were available to members of the public although they contained Information derived from a publicly available source, namely, the HM Land Registry. However, the flowchart also contained information which was not available to the public at all, namely, details of occupational leases which were not required to be registered at the Land Registry.

(2) I might have found that the flowchart and spreadsheet fell within clause 7.1 or, to be more exact, those parts which contained publicly available Information, if I had been satisfied that they were no more than a means of communicating or transmitting that Information to DLA. But I am satisfied that their preparation also involved legal knowledge and skill and that they were intended not only to provide title information but to assist DLA to understand it in their preliminary investigations. DLA would no doubt have expected to carry out their own title searches and check that the information on the flowchart and spreadsheet were accurate. But it gave them considerable assistance in that exercise.

(3) The King Order fell within CPR Part 5.4C(1)(b) which provides that a person who

is not a party to proceedings may obtain from the court records of a judgment or order given or made in public. There is nothing on the fact of the Order to suggest that it was given in private and Mr Seitler did not submit that it was. I am satisfied, therefore, that it was generally available to the public from the date on which it was made.

(4) The Lama Skeleton Argument and the Lama Statement of Evidence both fell within CPR Part 5.4C(2) and it would have been necessary for a member of the public to make an application to the Court for permission to obtain copies before they were available. It is also clear from the notes in the Supreme Court Practice 2023 ed, Vo1 1 at 5.4C.7 that the Court has a wide discretion whether to grant or refuse permission. There was no evidence before the Court to suggest either way whether permission would have been granted. I am not satisfied, therefore, that these documents or the Information contained in them were generally available.

(4) Whose Information?

531. Mr Seitler also submitted that the Information was not EHL's because it did not make a sufficient contribution to its creation. In particular, he submitted that the Information in Categories A, B and D was assembled by the Suiteholders or by Mr Alford and provided to Mr Downer or Ms McGinn, who did no more than pass it on to Mr Connolly and DLA. He relied on the decision of His Honour Judge Hodge QC sitting as a Judge of the High Court in *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch) at [40]:

> "I accept Mr Vanhegan's submissions. In his classic statement of the law in *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415 at 419 Megarry J identified the three essential elements of a claim for breach of confidence (where there was no contractual relationship between the parties) as follows: (1) the information itself must have the necessary quality of confidence about it; (2) the information must have been imparted in circumstances importing an obligation of confidence; and (3) there must be an unauthorised use of the information to the detriment of the party communicating it. I acknowledge that there is a fourth essential ingredient (identified by the Court of Appeal in *Fraser v Evans*) which Megarry J omitted to mention, no doubt because he considered it to be so obvious that it did not merit express articulation: that the complainant must be the person who is entitled to the confidence, and to have it respected. In my judgment, that requires the claimant to show that he has a sufficient interest in the information to entitle him to maintain an action to restrain its unauthorised dissemination or use. In my judgment, however, it is not appropriate to approach the issue whether this requirement is satisfied in

> terms of an inquiry as to whether the relevant information is the claimant‟s "property". As Lord Denning MR observed in Fraser v Evans at 361B-C: "The jurisdiction is based not so much on property or on contract as on the duty to be of good faith.
>
> Indeed, as the Court of Appeal recognised in *Coogan & Phillips v News Group Newspapers Ltd* [2012] EWCA Civ 48 (decided after I had reserved judgment) at paragraphs [33]-[39], confidential information is not strictly "property"; although it is "property-like", and it is not inappropriate to include it as an aspect of "intellectual property". Thus, in my judgment, and in the context of the present case, the appropriate inquiry should be directed to considering whether the claimant has demonstrated that CMP had made a sufficient contribution to the creation of the relevant confidential information, in the furtherance of its own commercial interests, to justify the imposition of a duty, recognised by the courts, and owed to CMP (and thus to the claimant), to keep that information secret, and entitling them to restrain its unauthorised use. I accept Mr Vanhegan‟s submission (at paragraph 214 of his written closing) that valuable confidential information which CMP has generated as a result of its own skill and labour, and from its own audits and relationship with Bombardier, such as the choice of devices, their location and contact information, and customer-specific device and service pricing information, is capable of constituting CMP's confidential information."

532. In that case the judge was concerned with a contractual duty of confidentiality (as here). But he described the contract as applying to "information of an inherently confidential nature" and "the valuable body of inherently confidential information". It is hardly surprising, therefore, that he applied the general principles of the law of confidence to the question whether information was protected by the agreement. Moreover, in *Matalia v Warwickshire CC* [2017] EWCA Civ 991 the Court of Appeal rejected a submission based on this passage that a claimant did not have standing to maintain an action for breach of confidence unless there was either an express agreement imposing a duty of confidence upon them or they were the "owner" of the information. David Richards LJ (as he then was) emphasised that the judge was only dealing with the specific context and did not intend to lay down a general principle (at [28] and [29]):

> "That passage is entirely contrary to Mr Bragiel's submission. It is not any the less so because Judge Hodge went on to say that the appropriate inquiry "in the context of the present case", which was very different from the case before us and concerned commercial information connected with pricing and a tender process, was whether the claimant's company had made a sufficient contribution to the creation of the information, in the furtherance of its own commercial interests, to justify the imposition of an enforceable duty to keep it secret. Whether a duty of confidence arises in favour of a claimant will always depend on the precise circumstances of the case, but

> if confidential information is imparted by A to B in circumstances where B knows or ought to know that it is imparted in confidence, that may and often will be sufficient to affect the conscience of B in equity so as to impose on him in favour of A a duty to keep the information confidential. Whether that is the limit of the circumstances in which a claim for breach of confidence may be maintained is one of the issues raised under the second ground of appeal, but it, like the "privacy" cases, suffices to show that breach of confidence is a broad doctrine."

533. In my judgment, the decision in *Jones v IOS (RUK) Ltd* is distinguishable from the present case. The judge in that case considered it necessary in the particular context to consider whether the Claimant had made a sufficient contribution to the creation of the relevant confidential information and in doing so he applied the general principles of the law of confidence. I am not satisfied that this is a necessary inquiry in the present case because the NDA contained a detailed definition of Confidential Information and FEC UK owed a contractual duty to keep the Information confidential if it fell within that definition and the conditions in clauses 1.1.2 and 1.1.3 were satisfied. The purpose of the parties was, therefore, to provide an agreed test which would determine whether EHL had a sufficient interest in the Information to justify its protection.

534. But in any event, I accept Ms Wicks' submission that EHL had a sufficient interest in all of the Information. Mr Seitler did not submit that the test in either clause 1.1.2 or 1.1.3 was not met or that a "reasonable business person" would not have regarded any of it as confidential either in relation to Ensign House or in relation to the business, affairs, plans, intentions or market opportunities of EHL. In my judgment, he was right not to do so. But in case there is any doubt I am satisfied that all of the Information either fell within clause 1.1.2 or clause 1.1.3 of the NDA. Mr Seitler did not specifically address Mr Alford's handwritten schedules (Category A), or Mr McGarry's contact details and Lama's wish list (Category D). But, again, in case there is any doubt, I am satisfied that these documents also fell within clauses 1.1.2 or 1.1.3 and contained Confidential Information.

535. Finally, I record that Mr Seitler did not submit in terms that the Court should not treat some of the Information as Confidential because it was privileged and confidential and EHL had obtained it in breach of confidence itself. This would have raised a difficult issue, namely, the extent to which the NDA was unenforceable on grounds of illegality and this is not an issue which I have considered. Nevertheless, this is a factor which I

consider the Court is entitled to take into account in relation to the appropriate remedy for breach of the NDA or the misuse of Confidential Information.

536. Likewise, Mr Seitler did not submit that the Court should not treat the BUJ Feasibility Study as Confidential because Mr Downer allowed QHL to default on its payment obligations to BUJ which had to obtain a judgment against QHL and which, even then, it was unable to enforce. If I had found that FEC UK had committed a breach of the NDA in relation to the BUJ Feasibility Study, I would also have found that this was a factor which the Court was entitled to take into account in relation to the appropriate remedy for breach of the NDA or the misuse of Confidential Information.

R. Breach

537. The principal breach of contract which EHL alleged against FEC UK was the breach of clause 1.4 and, in particular, using the Confidential Information for a purpose or purposes other than the Permitted Purpose of due diligence in connection with the Proposed Transaction. The unauthorised purpose upon which EHL relied was "enabling EHFL to acquire Ensign House". EHL also alleged breaches of clauses 1.3, 1.5, 2 and 5.2.

(1) Clause 1.4

(i) The Permitted Purpose

538. I have found that the turning point came on 31 May 2019 and from that date onwards Mr Connolly's purpose was to buy the Suites in Ensign House outright and from the Suiteholders directly. I find, therefore, that until 31 May 2019 FEC UK did not use any of the Information except for the Permitted Purpose including the Information in Category D.

(ii) Category A

539. Ms Wicks submitted that Mr Connolly used the Pricing Information in three ways: first, as a starting point for the last phase of the negotiations; secondly, to fix a target price for each Suite; and, thirdly, to strengthen its bargaining position in relation to each individual Suiteholder. Mr Seitler accepted that Mr Connolly used the Pricing Information but submitted that this use was very limited. I accept Ms Wicks' submission and I find that Mr Connolly used the Pricing Information for the purpose of acquiring the interests of

the Suiteholders in Ensign House for the following reasons:

(1) It is clear from Mr Plant's email dated 1 July 2019 to the Suiteholders that Mr Alford began negotiations with the Suiteholders on behalf of FEC on the basis that each would receive the base price which EHL had offered and which most of them had accepted by October 2018. For the reasons which I have set out above, I attribute considerable weight to this email and the subsequent correspondence which Mr Wu disclosed.

(2) Moreover, on 23 July 2019 Mr Alford sent the Suiteholders the Price Allocation Schedule in his capacity as FEC's agent. In the covering email he stated in terms that he had agreed in principle a "bulk purchase" at the same base prices shown in the Schedule.

(3) It is also clear from Mr Alford's three handwritten schedules and the FEC Price Breakdown that Mr Connolly's strategy was to reduce the overall price of Ensign House by re-negotiating the Side Deals and he accepted as much in cross-examination. He used the Options Incentive Table to agree a target for each Suite with Mr Alford and he obtained authority to instruct Mr Alford to negotiate with the Suiteholders up to the agreed targets.

(4) Mr Connolly suggested that the Pricing Information was of limited value in fixing the target figures because he put forward a global figure to each of the Suiteholders and not a separate Side Deal. I do not accept this evidence and, in my judgment, Mr Connolly was attempting to downplay the value of the Pricing Information considerably. In his email dated 9 August 2019 to Mr Hoong he referred specifically to the Side Deals which EHL had agreed with Mr Plant and Mr Ranson and the targets which he was hoping to achieve.

(5) Mr Connolly also suggested that he would never have paid more than £28.5 million for Ensign House and that Mr Chiu and Mr Hoong would never have authorised him to do so. But this figure was based on the calculations which Mr Connolly had carried out in the FEC Price Breakdown. Moreover, he used that breakdown to incentivise Mr Alford to negotiate lower prices than the target figures on the basis of the FEC Price Breakdown (although Mr Alford was ultimately unable to achieve this completely).

(6) Finally, it is clear from his email dated 28 August 2019 that Mr Alford used the Pricing Information in order to formulate his tactics for negotiating with Mr Plant and Mr Ranson in August and September 2019. As he explained, he planned to negotiate them down by arguing that they could not expect to receive as much as they had negotiated with EHL for the grant of options on an outright sale. He could only adopt these tactics because both Mr Connolly and he were aware of the Side Deals which Mr Plant and Mr Ranson had agreed with EHL.

540. In conclusion, I find that after 31 May 2019 Mr Connolly did not use the Pricing Information for the Permitted Purpose but for the purpose of enabling FEC to acquire Ensign House. I also find that from 16 July 2019 he used it for the purpose of acquiring Ensign House through an SPV to be formed for the acquisition. Finally, I find that FEC UK committed a breach of clause 1.4 by using the Pricing Information for that unauthorised purpose.

(iii) Category B

541. I find that Mr Alford and Mr Connolly used Soft Information throughout the negotiations with the Suiteholders between August 2019 and February 2020 (which I have described in detail in section III). I also find that they did so for the purpose of enabling FEC to purchase Ensign House. I give three examples upon which I have placed particular reliance in reaching this conclusion:

(1) In early July 2019 Mr Alford approached Mr Plant to re-open the negotiations with the Suiteholders on behalf of FEC and on 12 July 2019 he met Mr Plant and Mr Ranson with Mr Inzani on Mr Connolly's instructions. Ms Wicks submitted (and I accept) that Mr Connolly knew from the outset that Mr Plant was the person with whom he should make contact and that he would take the lead in the negotiations and used this Soft Information to put FEC's proposal to the Suiteholders.

(2) Between 18 September 2019 and 23 September 2019 Mr Connolly and Mr Alford used Soft Information to persuade Mr Ranson and Mr Plant to accept FEC UK's offer. In his email dated 18 September 2019 Mr Connolly stated that FEC would withdraw if all of the Suiteholders had not accepted the offer by the following day and Mr Alford then circulated it to the Suiteholders. Mr Connolly accepted that this was a negotiating tactic and, in my judgment, that is what it was. (For the avoidance

of doubt, I consider this to be unlike Mr Downer's ultimatum at the beginning of 2016 when negotiations came to an end and did not revive until the Verum Victum offer).

(3) On 15 and 16 January 2020 Mr Connolly and Mr Alford used Soft Information to persuade Mr Ranson to accept FEC's final offer. I am satisfied that he would not have instructed DLA to withdraw papers from the Suiteholders' solicitors if Mr Alford had not been confident that they would be able to put pressure on Mr Ranson to agree and that he would succumb to that pressure.

(4) Mr Seitler submitted that Soft Information would have been easy for any purchaser to learn and that there were a number of agents whom FEC could have instructed. These included Mr Cherryman who was based in Beaufort Court and had connections with many of the Suiteholders. I reject that submission. Mr Alford's email dated 22 December 2019 provides clear evidence that over five years he had developed a personal relationship with the Suiteholders together with a detailed understanding of their attitude to risk and their negotiating tactics. I am not satisfied that any other agent could have provided the same Soft Information to Mr Connolly.

542. I find that the purpose for which Mr Connolly used the Soft Information on behalf of FEC UK after 31 May 2019 was not the Permitted Purpose but the unauthorised purposes which I have found in relation to the Pricing Information. I also find that FEC UK committed a breach of clause 1.4 of the NDA by using the Soft Information for those unauthorised purposes.

(iv) Category C

543. Mr Seitler submitted that FEC UK did not use the Title Information but created its own and that DLA had to verify it independently. He also submitted that to do otherwise would have been negligent. I do not accept that submission. Although I accept that DLA had to verify the Title Information and that a reasonable solicitor would have examined the underlying documents, the Title Information gave DLA a head start. Moreover, the NDA contemplated that FEC UK would use the Information to carry out due diligence and this was how DLA used the Title Information (although not for the Permitted Purpose). Finally, there is no evidence that DLA ever generated their own versions of

these documents and when either FEC or DLA needed to explore complex title issues they went back to the spreadsheet and flowchart which Ms McGinn had sent them.

544. The contemporaneous documents provided a number of clear instances of the misuse of the Title Information. In particular, on 16 July 2019 Mr Connolly authorised or permitted DLA to use both the flowchart and spreadsheet to understand the title structure of Ensign House and to prepare a fee quote. On 25 July 2019 he also sent them to Ms Khemlani to enable her to assess that fee quote. On 17 September 2019 he sent Mr Heyworth-Dunn the spreadsheet and flowchart to obtain advice about title insurance. Finally, on 29 November Mr Jenkins sent the flowchart and spreadsheet to Mr Forgiel-Jenkins to give corporate advice and on 3 December 2019 Mr Jenkins sent them to Mr Connolly to enable him to understand and consider that advice.

545. I find that FEC UK used the Title Information on behalf of FEC UK after 31 May 2019 and also that the purpose for which it did so was not the Permitted Purpose but the unauthorised purposes which I have found in relation to the Pricing Information. I also find that FEC UK committed a breach of clause 1.4 of the NDA by using the Title Information for those unauthorised purposes.

(v) Category D

546. Ms Wicks submitted that Ms Ford used the Lama Information to give advice in relation to the potential agreement with the SFO and to contact Mr McGarry and set up calls and meetings with him. In relation to the period before April 2019 I reject that submission and I find that FEC UK used the Lama Information either for the Permitted Purpose or with the consent of EHL until 18 April 2019 when Mr Connolly spoke to Mr Hoong. I also find that FEC UK did not use the Lama Information at all between that date and 31 May 2019 whilst Mr Connolly was waiting to see whether the negotiations with the SFO and Lama would progress.

547. But even if these actions fell outside the Permitted Purpose, I have found that Mr Downer expressly authorised Mr Alford to negotiate an exclusivity period with Lama on behalf of FEC and that he consented to Mr Connolly (or an FEC company of which he was a director) entering into agreement to that effect. I have also found that he consented to FEC and Mr Alford continuing to negotiate with Lama and the SFO after the Exclusivity Agreement was signed. Finally, I am satisfied that he gave his consent in writing to these

actions under clause 7.1.2 of the NDA in the exchange of emails between 1 March 2019 and 7 March 2019.

548. I accept that on 15 July 2019 Mr Alford asked Ms Ford to consider the King Order and that she used it to amend her memo for the meeting on 4 July 2019. However, for the reasons which I have already given I am satisfied that this was a publicly available document. Moreover, there was no evidence to suggest that Mr Connolly, Mr Alford or DLA made use of the SFO's letter dated 28 June 2011, the Lama Statement of Evidence, the Lama Skeleton Argument or Lama's wish list after 31 May 2019. Indeed, the wish list had probably served its purpose by either 28 February 2019 or 11 April 2019.

549. On 9 April 2019 Mr Alford provided Mr McGarry's contact details to Mr Connolly and DLA. There was no direct evidence that any of them used those details to set up the meeting on 4 July 2019 (or thereafter). But I draw the inference that they must have done so. I find, therefore, that FEC UK committed a breach of clause 1.4 by using Mr McGarry's contact details after 31 May 2019 for the same unauthorised purposes as the it used the Pricing Information. But I do not find that it committed any other breach of contract in relation to the Lama Information.

(vi) Category E

550. I have found that on or about 17 September 2019 Mr Connolly instructed Mr Heyworth-Dunn to send Mr Furber's instructions and advice to Ms Sutherland to enable her to give advice in relation to the Superior Leases and title insurance. I find, therefore, that FEC UK committed a breach of clause 1.4 by using that Information for the specific purpose of enabling it to decide whether to take out title insurance against the risks associated with the Superior Leases and for the wider purpose of enabling it to purchase all of the interests in Ensign House through a special purpose vehicle. Neither of these purposes was permitted by the NDA.

551. Mr Seitler submitted that FEC UK could have obtained counsel's advice from another leading counsel with the same or similar expertise as Mr Furber and that it would have cost about £5,000. I accept both of these propositions. But this does not excuse the breach of contract and is relevant only to the assessment of damage or other available remedies. The fact remains that Mr Connolly did not comply with the NDA and instruct alternative counsel. He used Information supplied to him by EHL under the NDA.

(vii) Category F

552. Clause 1.1 of the NDA defined Confidential Information disclosed by EHL "whether before or after the date of this letter". On 3 September 2018 Mr Alford sent the BUJ Feasibility Study to Mr Connolly and on 6 September 2018 he sent it on to Mr Ng. In January 2019, he also sent it to MLA and he asked them to provide a critique of the study. On 22 January 2019 they provided the MLA Proposal and on 13 February 2019 Mr Connolly sent both documents to Mr Chiu.

553. I do not accept that Mr Connolly committed a breach of clause 1.4 by sending the BUJ Feasibility Study to Mr Ng or to MLA before 21 January 2019 or using it to prepare his own calculation. Moreover, although the NDA applied to Information disclosed to FEC UK before 21 January 2019, I am satisfied that it only applied to the use of that Information after that date. I do not accept, therefore, that by signing the NDA Mr Connolly committed breaches of the NDA retrospectively. Moreover, even if Mr Connolly instructed MLA after he had signed the NDA, I do not accept that he committed a breach of clause 1.4 by doing so or sending MLA's initial proposals and the BUJ Feasibility Study to Mr Chiu. I am satisfied that these actions formed part of FEC UK's due diligence exercise in relation to the Proposed Transaction.

(2) Clause 1.3

554. Ms Wicks submitted that FEC UK committed a breach of clause 1.3 by disclosing Confidential Information to a third party, namely, EHFL. Mr Seitler submitted that any breach could only have taken place after 10 October 2019 when EHFL was incorporated and registered at Companies House. I accept that submission. In relation to Categories D and E I have not found that FEC UK misused that Information after 10 October 2019 and in relation to Category F I have not found that FEC UK misused that Information at all. In relation to the other categories my findings are as follows.

(i) Category A

555. Ms Wicks did not draw my attention to any documentary evidence that Mr Connolly or Mr Alford used (or misused) the Pricing Information after 10 October 2019. Indeed, it is clear that EHFL was only incorporated once FEC UK had finally agreed terms with Mr Plant and Mr Ranson. Moreover, Mr Connolly only agreed Mr Alford's final fee of

£970,000 once the purchase price of all of the Suites had been fixed. Finally, it is clear from the subsequent documents that the subsequent negotiations over price took place because FEC wanted to impose additional obligations on the Suiteholders to secure the buyout or surrender of the Superior Leases.

556. But even if FEC UK misused the Pricing Information after 10 October 2019 I am not satisfied that this amounted to a breach of clause 1.3. Ms Wicks and Mr Lee submitted that "Mr Connolly necessarily shared this Information with EHFL" but they did not explain when or how he must have done so. Nor did they provide me with the corporate analysis which would be necessary to find that Mr Connolly's knowledge or actions should be attributed to EHFL. He only became a director of EHFL after 10 October 2019 and it does not necessarily follow that the Information which was sent to him in his capacity as an executive of FEC or a director of FEC UK or stored on his computer (or by his PA) should be treated as held by him on behalf of EHFL. Nor does it follow that by continuing to store documents he should be treated as having disclosed them to himself in a different capacity. I therefore dismiss the claim for breach of clause 1.3 in relation to Category A.

(ii) Category B

557. I have specifically found that Mr Alford shared Soft Information with Mr Connolly in December 2019 and January 2020. In particular, Mr Alford shared his views with Mr Connolly in his email dated 22 December 2019 and I have drawn the inference that it was he who suggested the tactics used on 15 and 16 December 2020 to Mr Connolly. Throughout this period, Mr Alford was acting as FEC UK's agent and Mr Connolly was both a director of FEC UK and a director of EHFL. There is no suggestion that he intended to act in one capacity rather than the other during this period and I find, therefore, that in breach of clause 1.3 Mr Alford as FEC UK's agent disclosed Soft Information to Mr Connolly as a director of EHFL. I do not find that FEC UK committed any other breaches of clause 1.3 in relation to Category B.

(iii) Category C

558. On 29 November 2019 Mr Jenkins sent the flowchart to Ms Sutherland (with copies to other members of her team) and on 11 December 2019 he sent it to her again. I was not taken to any engagement letter but by 26 November 2019 Mr Jenkins was already sending

out draft transfers and CPSEs on behalf of EHFL and DLA later executed the individual contracts on behalf of EHFL with the delegated authority of Mr Connolly. Although these were no more than internal emails, DLA were now acting on behalf of EHFL and I am satisfied that the email disclosures to Ms Sutherland amounted to a breach of clause 1.3. Further, on 3 December 2019 Mr Jenkins also sent the flowchart to Mr Connolly, who was also acting in a dual capacity as a director of both FEC and EHFL. I find that this email disclosure was also a breach of clause 1.3. I do not find that FEC UK committed any other breaches of clause 1.3 in relation to Category C.

(3) Clause 1.5

559. Ms Wicks and Mr Lee submitted that FEC UK committed breaches of clause 1.5 by making copies of the Information for the unauthorised purposes which I have set out above. However, they did not identify either in the Re-Re-Amended Particulars of Claim or in any of their written submissions any specific documents which the Defendants were said to have copied in breach of clause 1.5. Nor did they explain what form the copies took, how they were stored and what use the Defendants then made of those copies.

560. Clause 1.2 defined the term "Copies" to include "electronic form". It is unclear whether it was intended to extend to Word documents or pdfs attached to an email which is then stored on a server on in an inbox and I heard no argument on this point. But I incline to the view that it was intended only to cover the deliberate reproduction of information to be stored and then used later. If the term "Copies" was limited to deliberate reproductions then I am not satisfied that any of the Defendants committed a breach of clause 1.5 and none was identified. If the term was so wide that it extended to any email stored on a server, then it adds nothing to the breaches of clauses 1.3 and 1.4 which I have found above. I therefore dismiss the claim under clause 1.5.

(4) Clause 2

561. Finally, Ms Wicks and Mr Lee submitted that FEC UK had committed a breach of clause 2 by disclosing Confidential Information to its Representatives without its consent and without complying with the requirements of clause 2.1 and clause 2.2. They identified three groups of Representatives: (i) DLA, (ii) FEC International (i.e. Mr Chiu and Mr Hoong), and (iii) MLA.

(i) DLA

562. I have found that on 29 January 2019 Mr Downer expressly authorised Ms McGinn to send all of the Information to DLA which she attached to her emails dated 30 January 2019. Mr Downer also authorised Mr Alford to send the Lama wish list to Mr Connolly and I am satisfied that he must have expected and intended Mr Connolly to send it to DLA because Mr Downer wanted Mr Connolly to cover the legal fees of any negotiations with Lama. Accordingly, I am satisfied that EHL gave its consent to FEC UK to disclose all of the Information in Categories A, C, D and E (above) and that FEC UK disclosed that Information for the Permitted Purpose. None of the disclosures to DLA upon which EHL relied were made after 31 May 2019 and I am also satisfied, therefore, that they were made for the Permitted Purpose.

563. There is, however, no evidence that Mr Connolly complied with clauses 2.1.2 and 2.1.3 of the NDA. In particular, there is no evidence that he provided DLA with a copy of the NDA itself until the end of July 2019 or took any other steps to ensure that DLA complied with its terms. Given that Mr Downer consented to all of this information being provided to DLA, I might have considered the failure to comply with these provisions to be *de minimis*. But DLA continued to act for FEC UK after 31 May 2019 when FEC UK began to act in breach of the NDA itself and to misuse Confidential Information. It may well be that DLA would have been unable to continue to act if FEC UK had fully complied with clause 2. I find, therefore, that FEC UK committed breaches of both clause 2.1.2 and 2.1.3 in disclosing the option agreement (in Category A) and the Information in Categories C, D and E to DLA without complying with clauses 2.1.2 and 2.1.3.

(ii) FEC International

564. There was no evidence that FEC International, Mr Chiu or Mr Hoong were officers, employees or agents of FEC UK or that they had any formal authority to represent the company (and this seems unlikely since they were officers of its parent). Ms Wicks and Mr Lee submitted that FEC International was an "adviser" for the purposes of clause 1.1. I reject that submission. Mr Chiu and Mr Hoong did not give advice to Mr Connolly. He reported to them and they gave him instructions and authority on behalf of the FEC Group as a whole.

565. But even if I am wrong and FEC International was an "adviser" for the purposes of clause

1.1 of the NDA, the only evidence of breach upon which Ms Wicks and Mr Lee relied was that on 13 February 2019 Mr Connolly sent Mr Chiu the MLA Report which incorporated some of BUJ's calculations. If I am wrong about the construction of clause 1.1, then I accept that Mr Connolly committed a breach of clause 2 by sending the MLA Proposal to Mr Chiu without obtaining EHL's consent or complying with clauses 2.1 and 2.2. However, if it is necessary to do so, I also find that Mr Downer would have given his consent to this disclosure on or before 13 February 2019 if Mr Connolly had asked him and pointed out that Mr Hoong and Mr Chiu were the ultimate decision makers.

(iii) MLA

566. The MLA initial proposals were dated 22 January 2019 but I was not taken to any evidence to show when Mr Connolly instructed them to prepare it and I am not satisfied that on a balance of probabilities he disclosed the BUJ Feasibility Study to them after he executed the NDA. I have also found that the NDA did not have retrospective effect. Accordingly, I dismiss the claim for breach of clause 2 in relation to the disclosure to MLA.

(5) Clause 5.2

567. EHL also alleges that FEC UK committed breaches of clause 5.2 by liaising with the Suiteholders. This allegation is admitted in the Re-Amended Defence and in closing submissions Mr Seitler accepted that FEC UK liaised with the Suiteholders to negotiate the terms of their deal and with EHFL in relation to EHFL's acquisition of the Property. In my judgment, this admission was properly made and strongly supported by the evidence. I find, therefore, that in breach of clause 5.2 FEC UK contacted the Suiteholders in connection with the Property without the consent of EHL.

V. Breach of Confidence

S. Primary Liability

(1) The Law

568. Ms Wicks and Mr Lee cited the well-known decision in *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415 as authority for the proposition that to establish primary liability for breach of the equitable duty of confidence or misuse of confidential information, EHL

must satisfy three conditions: (i) The Information had the necessary quality of confidence, (ii) it was imparted in circumstances importing an obligation of confidence and (iii) it was used in an unauthorised way. In relation to the second limb of this test Sir Robert Megarry V-C. also stated that information is imparted in confidence where "a reasonable man standing in the shoes of the recipient would have realised upon reasonable grounds the information being given to him in confidence". Mr Seitler did not challenge this test and I, therefore, apply it.

569. Based upon their closing submissions it appeared to be common ground between the parties that where parties have entered into a contract which imposes a contractual duty of confidentiality, their equitable rights and obligations are governed by the contract. Mr Seitler cited *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) for this proposition. In that case Sales J made the following statement of principle at [329]:

> "Turning to the Claimants' claim for relief based on breach of obligations of confidence, four matters call for comment. First, each of RFML, the Rutland Funds and Mr Cartwright acquired the confidential information in the Business Plan (including, in particular, the information regarding the identity of H & T as a viable and attractive target for acquisition) in circumstances in which an obligation of confidentiality arose in relation to them. The obligations owed by RFML in relation to the confidential information provided to it were confirmed and defined by the September contract and the November contract, and merge with the obligations of RFML under those contracts. Where parties to a contract have negotiated and agreed the terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the ordinary case there is no wider set of obligations imposed by the general law of confidence: see e.g. *Coco v Clark* at 419. In my view, that is the position here as between the Claimants and RFML."

570. Mr Seitler cited this proposition in support of his argument that if the NDA imposed no duty of confidence upon FEC UK (because there was no Proposed Transaction), then none of the Defendants owed an equitable duty of confidence. Ms Wicks submitted that notice of the terms of the NDA was notice to Mr Connolly, Mr Alford and EHFL and that because the Information was protected by the NDA, the contractual duty to keep it confidential also gave rise to an equitable duty. But she did not accept the converse, namely, that if the NDA did not protect the Information because the parties had inadvertently used the wrong words, this did not prevent an equitable duty of confidence arising.

571. In the event, I have found that the NDA imposed a contractual duty of confidence upon FEC UK and it is unnecessary for me to decide whether FEC UK, Mr Connolly or Mr Alford (or any of them) would have been bound by an equitable duty of confidence if I had found against EHL on the construction of the NDA. But I am also satisfied that the three conditions set out in *Coco v Clark* (above) are satisfied and that an equitable duty of confidence arose. I am also satisfied that it was co-extensive with the duties under the NDA and that did not extend to any other Information.

572. Mr Seitler also submitted that there was no case for saying that Mr Connolly received any information in his own capacity since all of his dealings were on behalf of FEC UK. He cited no authority to support this submission and I reject it. It is clearly established that an equitable duty of confidence may arise independently of a pre-existing relationship and that where a party has notice that information is confidential, he or she may come under their own equitable duty of confidence.

573. For example, in *Vercoe* (above) Mr Cartwright was a partner of RFML but both were held to be liable for breach of confidence and in *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] RPC 29 Arnold J (as he then was) made this point at [248] in the context of accessory liability:

> "Secondly, in many cases, the question of accessory liability does not actually arise, because the putative accessory has acquired or received the information with notice, even if not knowledge, that it is confidential. In those circumstances, the putative accessory will come under his own equitable obligation of confidentiality, and will therefore be primarily liable for any disclosure or use of the information regardless of whether he is aware that those acts amount to a breach of confidence. The issue only arises where the accessory has not acquired or received the information."

(2) Application

(i) Quality

574. Ms Wicks submitted that all of the Information in Categories A to F had the necessary quality of confidence and I have found that all of the Information (with the exception of the King Order) was Confidential Information within the definition in clause 1.1 of the NDA. The equitable obligation of confidence does not attach, however, to trivial or useless information (see *Force India* (above) at [223]) and at times Mr Seitler came close

to submitting that the Information was either trivial or useless. I am satisfied that all of the Information had the necessary quality of confidence apart from the King Order and that it was neither trivial nor useless even if it may be difficult to measure precisely what impact it had on the negotiations between FEC and the Suiteholders.

(ii) Notice

575. There appears to be no dispute that Mr Connolly and Mr Alford both had notice of the NDA. But in case there is any doubt, I find that they were both aware of its terms. On 21 January 2019 Mr Connolly signed it and his PA, Ms Lazarek, sent the signed copy to Ms McGinn copying in Mr Alford. Mr Seitler submitted (and I accept) that EHFL could not be liable for equitable breaches of confidence committed before 10 October 2019 when it was incorporated. I accept that submission and I did not understand Ms Wicks to dispute it (although she disputed the Defendants' case that on the facts no breaches of confidence took place after that date).

576. I also find that Mr Alford and Mr Connolly knew what Information Ms McGinn had sent to Ms Sutherland on 30 January 2019. She copied in Mr Alford to each of her emails to Ms Sutherland, who also forwarded them all on to Mr Connolly. On 17 September 2019 Mr Connolly himself forwarded a number of those emails and their attachments to Mr Heyworth-Dunn. I am satisfied, therefore, that both Mr Alford and Mr Connolly had notice that the Information contained in those emails was Confidential Information.

577. Finally, I find that both Mr Alford and Mr Connolly knew that both the Price Allocation Schedule and the Option Incentives Table were confidential. On 23 July 2019 Mr Alford sent the Price Allocation Schedule to the Suiteholders. He did not copy his email to Mr Connolly but I am satisfied that Mr Connolly knew that Mr Alford was intending to send the schedule to the Suiteholders and to use the Information contained in it to negotiate with the Suiteholders because on 23 July 2019 Mr Alford informed him that he was still negotiating the individual incentives as low as possible and asked for a further 48 hours.

578. This does not demonstrate by itself that either Mr Alford or Mr Connolly knew that the two documents were confidential. However, I find that both of them knew and understood that they were. The option agreement which Ms McGinn had sent to Ms Sutherland on 30 January 2019 contained the base figures for the purchase of each Suite. I have also found that on 28 August 2019 Mr Alford misled Mr Plant and Mr Ranson

about the source of the information in the Price Allocation Schedule because he knew that the "previous Option numbers" were confidential to Investin. In my judgment, this was also obvious to Mr Connolly because Mr Alford asked him to maintain the same fiction although I accept his evidence that he did not lie to the Suiteholders himself.

579. There was no evidence that either Mr Alford or Mr Connolly had actual notice that the Soft Information which Mr Alford provided to Mr Connolly or Mr McGarry's contact details were confidential. But in the light of my other findings, I am satisfied that a reasonable man standing in their shoes would have understood that all information relating to the earlier negotiations and the steps taken by EHL to acquire options over Suite 14 were covered by the NDA and were, therefore, confidential.

(iii) Misuse

580. For these reasons, therefore, I am satisfied that Mr Connolly is liable for the same breaches of confidence or misuse of confidential information as FEC UK even though his liability arose for breach of the equitable duty of confidence and its liability arose for breach of contract. I find, therefore, that Mr Connolly misused the Pricing Information, the Soft Information, the Title Information, Mr McGarry's contact details and Mr Furber's instructions and advice in breach of his equitable duty of confidence to EHL.

581. I am also satisfied that Mr Alford is liable for misusing the Pricing Information, the Soft Information, the Title Information and Mr McGarry's contact details. I was not taken to any evidence that Mr Alford misused Mr Furber's instructions and advice after 31 May 2019 and I do not accept that he did so. There is no obvious reason why he would have given instructions to DLA or used that information himself. I, therefore, find that Mr Alford is liable for the same breaches of confidence as Mr Connolly apart from the breach of confidence in relation to Category E.

582. Finally, I am also satisfied that EHFL is liable for the same breaches of confidence as FEC UK after its incorporation on 10 October 2019. In the event, I have only found that FEC committed breaches of clause 1.4 in relation to Soft Information and Title Information falling within Categories B and C after that date. Accordingly, I find that EHFL is only liable for those breaches of confidence.

T. Accessory Liability

583. It was also EHL's case that in the event that any of the Defendants were not directly liable for breach of confidence because they did not themselves use the Information, they were liable as accessories for breach of confidence. The substantive difference between primary liability and accessory liability in this context relates to the state of mind of the wrongdoer. For accessory liability the claimant must prove that the accessory knew that the recipient had received and misused confidential information or turned a blind eye to that fact: see *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556 at [26] (Lord Neuberger).

584. In the present case, I am satisfied that Mr Alford, Mr Connolly and EHFL have incurred primary liability for the misuse of the Confidential Information. I have found that both Mr Alford and Mr Connolly misused the Information in Categories A, B, C and D themselves. I have also found that Mr Connolly was acting in his capacity as both a director of FEC UK and EHFL after 10 October 2019. It follows, therefore, that EHFL has primary liability with Mr Connolly after that date. This leaves only the Information in Category E. There was no evidence that Mr Alford was aware that Mr Connolly sent it to Mr Heyworth-Dunn or that he intended DLA to use it to give advice in relation to the Superior Leases. I am not satisfied, therefore, that Mr Alford is liable as an accessory in relation to the Information in Category E.

VI. Breach of Fiduciary Duty

U. Was Mr Alford a Fiduciary?

585. Ms Wicks and Mr Lee accepted that even if I found (as I have done) that there was a binding contract of retainer between EHL and Mr Alford in relation to Ensign House, it does not automatically follow that Mr Alford was a fiduciary. They identified three kinds of property agent: introducing agents, selling agents and buying agents. They accepted that introducing agents do not owe fiduciary duties to a buyer, that selling agents owe fiduciary duties to the seller not the buyer and that buying agents owe fiduciary duties to the buyer. They submitted that Mr Alford was a buying agent and, as such, he was not entitled to act for both seller and buyer and that he owed a duty not to market Ensign House to other potential buyers apart from Investin. They accepted that if he was a fiduciary, his fiduciary duties only extended to Ensign House and that he was free to market other properties to third parties.

(1) The Law

(i) General principles

586. Some agents owe fiduciary duties and some do not and it is important to understand why the law holds the former but not the latter to a different standard. I begin my analysis of this issue with Millett LJ's classic description of a fiduciary in *Bristol & West BS v Mothew* [1998] Ch 1 at 18B-D:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

587. Moreover, there are many different kinds of fiduciary relationship and not all fiduciaries have the same responsibilities or owe the same duties. Both parties reminded me of Fletcher Moulton LJ's famous example of the errand boy in *Re Coomber* [1911] 1 Ch 723 at 729-30. They also agreed that a relationship of trust and confidence does not necessarily give rise to a fiduciary relationship and that the key question is whether the agent has undertaken to perform a task or function for the principal in such a way that it gives rise to a reasonable or legitimate expectation that the agent will subordinate their own interests to the interests of the principal. Mr Seitler cited the formulation of Leggatt LJ in *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [159] (which is frequently cited in the context of joint ventures and similar relationships):

> "Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith,

> *'Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another*' (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as the 'distinguishing obligation of a fiduciary'. Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position."

588. It is clear from the first part of this passage that the difference between a fiduciary agent and a non-fiduciary agent does not depend on whether the agent is a decision-maker. It may be enough that the agent has considerable influence over the principal's decision-making by giving advice or that the agent has information relevant to the principal's decision. In *Keppel v Wheeler* [1927] 1 KB 577, for example, the Court of Appeal held that a selling agent had a duty to communicate a new and higher offer to a seller after he had already accepted an offer subject to contract. Bankes LJ framed this as a continuing duty of disclosure at 586:

> "The question is, what in these circumstances was the position in law of the respondents? I am satisfied after the very full discussion which has taken place that at any rate their duty as agents did not terminate until the contracts were exchanged between the plaintiff and Mr. Essam. I do not mean that they were bound to look out for other purchasers; but I do mean that so long as they continued agents, it was their duty to communicate any offer which came to them larger or more satisfactory than the one which they had already submitted to their principal. I think that duty is plain, where, as here, the information comes as a result of submitting particulars which they had submitted in the first instance to Mr. Daniel as agents for the appellant. In these circumstances, I am not going to discuss all the matters which have been debated in testing this question whether the agency had or had not determined, because it seems to me that an agent may well say: "I have done everything which, assuming that the matter went through, would entitle me to receive my commission," and yet remain under the obligation of an agent to disclose such matters as the particular offer in this case."

589. It is also clear from the second part of the passage in *Al Nehayan v Kent* (above) that the potential for conflict either between duty or between duty and interest may be a reason

for imposing fiduciary duties upon an agent. If the agent receives confidential information or generates valuable commercial opportunities whilst acting for the principal, the principal is entitled to expect that the agent will subordinate his or her own interests to those of the principal and will not use the information or exploit the opportunities themselves and without the principal's informed consent.

590. It is right to say (as Ms Wicks and Mr Lee accepted) that because the agent has access to confidential information and the duty to keep it confidential, it does not follow automatically that he or she owes all the duties of a fiduciary. In *Walsh v Shanahan* [2013] EWCA Civ 411 the Court of Appeal held that the agent had committed a breach of confidence even though the relevant fiduciary relationship had come to an end: see [38] (Rimer LJ). But Mr Seitler accepted that two of the many factors which may give rise to a fiduciary relationship are the existence of a relationship of confidence and the scope for one party to exercise a discretion or power which may affect the interests of another: see *Breen v Williams* (1996) 186 CLR 71 at [24] (Gaudron and McHugh LJJ).

591. Mr Seitler also reminded me that where the principal relies on a contract as the foundation for the fiduciary relationship, its terms are all important and he cited another classic statement of principle, this time of Mason J, in *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 at 97 (cited by Lord Browne-Wilkinson in *Kelly v Cooper* [1993] AC 205 at 215):

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

592. In my judgment, therefore, an agent's functions, access to confidential information, influence over the decision-making process and the potential for possible conflicts may give rise to a legitimate or reasonable expectation that the agent will act in the principal's interest to the exclusion of his or her own or a third party's interest. To use a concept taken from Lady Arden's judgment in *Children's Investment Fund Foundation (UK) v*

Attorney General [2022] AC 155, those characteristics may give rise to the "reasonable expectation of abnegation of self-interest". She stated this at [47] and [48]:

> "47. The Court of Appeal adopted the following test put forward by Finn J, sitting in the Federal Court of Australia, in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, para 177: "a person will be in a fiduciary relationship with another when and in so far as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest …"
>
> 48. This formulation introduces the additional concept of reasonable expectation of abnegation of self-interest. Reasonable expectation may not be appropriate in every case, but it is, with that qualification, consistent with the duty of single-minded loyalty. There was a suggestion in this case that a member would not expect to find that he was a fiduciary."

(ii) Buying agents

593. Ms Wicks and Mr Lee submitted that buying agents are normally fiduciary agents and cannot act for both a seller and buyer in relation to the same transaction and cannot market the same opportunity to other buyers. They cited *Regier v Campbell-Stuart* [1939] Ch 766 as an example. In that case a buying agent was instructed to find a property but when he found one, he terminated the agency, bought it himself and then sold it on to the principal at a profit. Farwell J held that he had duty of disclosure and stated as follows at 768-9:

> "When the relationship of principal and agent exists, the agent may terminate that relationship by himself selling to his principal property which belongs to him so long as the principal knows that the property does in fact belong to the agent and that the agent is intending to sell his own property. But that must, in my judgment, be limited to this extent, that it is the duty of every agent to act honestly and faithfully towards his principal, and, if he conceals most material facts from his principal and by means of a fraud obtains an advantage for himself by purporting to sell or by selling property which is his own, then the duty which lies upon him is not put an end to by such a contract, and he remains liable to account for any secret profit which he has made as the result of the transactions between himself and the principal."

594. Ms Wicks and Mr Lee also relied on the fact that Mr Connolly had accepted in cross-examination that if a purchaser had agreed a fee with an agent, the agent could not then speak to other potential buyers and had an obligation to keep details of negotiations with

the seller confidential. Ms Wicks also relied upon clause 1.1 of the Fee Agreement (above), which imposed an obligation upon Mr Alford not to deal with any other party in relation to Ensign House. She submitted that clause 1.1 was typical of the duty of a buying agent to act exclusively for the principal.

595. Mr Seitler submitted that the fact that Ms Wicks had to rely on the agreement between the Defendants rather than between EHL and Mr Alford showed the weakness of her case. He also submitted that property introducers are not generally fiduciaries and he relied on *Kelly v Cooper* (above) in which a selling agent acted for two sellers who sold adjacent properties to the same buyer. The seller refused to pay the agent's commission and brought a claim against the agent for damages on the basis that the agent owed a duty to inform the seller about the purchaser's offer for the adjacent property (which would have given the seller an opportunity to bargain for a higher price). The Privy Council rejected the claim and held that the agent was entitled to the commission. Lord Browne-Wilkinson stated as follows at 214B-D:

> "In a case where a principal instructs as selling agent for his property or goods a person who to his knowledge acts and intends to act for other principals selling property or goods of the same description, the terms to be implied into such agency contract must differ from those to be implied where an agent is not carrying on such general agency business. In the case of estate agents, it is their business to act for numerous principals: where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function. Yet it is normally said that it is a breach of an agent's duty to act for competing principals. In the course of acting for each of their principals, estate agents will acquire information confidential to that principal. It cannot be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals. The position as to confidentiality is even clearer in the case of stockbrokers who cannot be contractually bound to disclose to their private clients inside information disclosed to the brokers in confidence by a company for which they also act. Accordingly in such cases there must be an implied term of the contract with such an agent that he is entitled to act for other principals selling competing properties and to keep confidential the information obtained from each of his principals."

596. Mr Seitler also relied upon *Prince Eze v Conway* [2018] EWCA 88 in which Mr and Mrs Conway brought proceedings against Prince Eze for failing to complete the purchase of

their property. He defended the claim on the basis that the contract was unenforceable because they had paid a bribe to his agent, Mr Obahor. The judge rejected the claim and the Court of Appeal upheld his decision. Asplin LJ began her legal analysis by stating that although the relationship of principal and agent is a fiduciary one, not every person described as an agent is the subject of fiduciary duties: see [40]. She identified the real question at [43] (references removed):

> "The real question, therefore, is whether the person receiving the benefit or the promise of a benefit was acting in a capacity which involved the repose of trust and confidence in relation to the specific duties performed rather than on some general basis and whether the payment to him in that capacity was such that a real position of potential conflict between his interest and his duty arose: see *McWilliam & Anr v Norton Finance (UK) Ltd* [2015] 1 All ER (Comm) 1026 per Tomlinson LJ at 1041d and *Novoship* per Christopher Clarke J at [106] and [107]. …. The requirement that the recipient of the payment or the promise of payment must be someone with a role in the decision-making process in relation to the transaction or someone who is in a position to influence or affect the decision taken by the principal, as referred to in *Novoship* at [108], seems to me to be no more than a means of satisfying the central criterion that the recipient owes fiduciary duties to the principal in relation to the transaction in question and a means of determining the extent of his obligations and fiduciary duties."

597. Asplin LJ then considered the basis for the judge's findings and concluded that he had made no error of law in reaching the conclusion that Mr Obahor was not a fiduciary. She followed this with a detailed analysis of the judge's reasoning but it is sufficient for present purposes to set out her summary of the judge's conclusions at [46]:

> "In particular, he found that: Mr Obahor was "in substance a salesman" having presented a "pre-packaged deal" (see judgment at [112]); Prince Eze "did not regard Mr Obahor as a trusted adviser" and was not an agent "in any significant sense of the word" (see judgment at [113]); "[W]hat followed until late June 2015, was at most an attenuated form of agency. Mr Obahor was not being instructed to do anything beyond facilitate the progress of a transaction … He had authority to receive and communicate information but he had no ability to affect Price Eze's legal position vis-à-vis the Conways" and his function was to "chivvy" (see the judgment at [114]); and in the final stage when the documentation was signed his authority "could not be construed as extending to anything other than progressing the purchase in accordance with the agreed terms of the contract", he "acted on instructions from Mr Howarth and Prince Eze" and his authority was "for the purpose of facilitating the progress of the contract that Prince Eze had signed and wanted brought to fruition" (see judgment at [115])."

(2) Application

598. Mr Seitler submitted that the relationship between Investin and Mr Alford was comparable to the relationship between Prince Eze and Mr Obahor. He submitted that although Mr Alford did more than introduce Ensign House to Mr Downer, he negotiated with the Suiteholders out of self-interest and to obtain payment of his fee rather than because he was obliged to do so. He relied on the fact that Mr Alford was not the decision-maker and he characterised Mr Alford's negotiations with the Suiteholders as "chivvying" them along like Mr Obahor in *Prince Eze v Conway* (above). Mr Seitler made four submissions on the facts:

(1) First, Mr Downer did everything possible to prevent Mr Alford having a clear view of his payment terms and it cannot lie in his mouth to say that a fiduciary obligation was also imposed. He submitted that Mr Downer repeatedly lied and systematically played games with Mr Alford and that: "If you treat someone like dirt, you cannot expect them to treat you like a King."

(2) Secondly, Mr Alford's duties were defined by reference to the introduction of Ensign House to EHL. To a great extent, therefore, Mr Alford had already performed his side of the bargain and the imposition of subsequent duties was inconsistent with that role. He was no more than an introducing agent.

(3) Thirdly, Mr Alford did more than introduce Ensign House to EHL. But he did so to increase his prospects of being paid. He took it upon himself to "chivvy" the Suiteholders along and offer strategic advice but Mr Downer did not particularly take that advice and Mr Alford was not an Investin adviser.

(4) Fourthly, and finally, the property business in which Mr Downer operated was not one of trust and it is important to bear in mind this wider context. Mr Seitler drew attention to an answer which Mr Downer had given in relation to Jigsaw in which he said that he trusted Mr Ryan McGarry "as far as you can in this business".

599. Despite Mr Seitler's powerful submissions both orally and in writing, I am satisfied that there was a fiduciary relationship between Mr Alford and EHL. In my judgment, Mr Alford was a buying agent and not an introducing agent and I find that that he owed fiduciary duties to EHL. I make this finding for the following reasons:

(1) I agree with Mr Seitler that the starting point of the inquiry must be the contract of retainer between EHL and Mr Alford. The email dated 20 July 2015 did not specify Mr Alford's duties and was principally concerned with his fee. This is unsurprising since he had already been working for Investin on the purchase of Ensign House for some months already. However, he described his function as "liaising/negotiating with Paul Holliday/EH stakeholders".

(2) In my judgment, this was an accurate description. I have found that Mr Alford introduced Ensign House to Investin and then negotiated on its behalf with the Suiteholders using his Investin email address after 25 November 2015. He also kept Mr Downer, Mr Kyriacou and later Ms McGinn informed about the progress of the negotiations. He also gave advice to them about the conduct and tactics of the negotiations.

(3) I have also found that Mr Alford did not market Ensign House to any other potential purchasers during the first phase of the negotiations. In particular, I have found that he identified a unique development opportunity which he actively pursued on Mr Downer's instructions and on behalf of Investin.

(4) Accordingly, I am satisfied that once the contract of retainer between Mr Alford and EHL had come into existence, Mr Alford owed a contractual duty to pursue that unique development opportunity by negotiating and liaising with the Suiteholders on behalf of EHL and on Mr Downer's instructions. Moreover, this conclusion is consistent with the admission which the Defendants made but did not withdraw. They admitted that Mr Alford was engaged by EHL as a self-employed agent to assist with obtaining the proposed option and then to progress discussions with FEC UK.

(5) I have found that Mr Alford continued to negotiate exclusively on behalf of EHL throughout the second phase and third phase of the negotiations and that he did not market Ensign House to any potential purchasers or competing bidders during those two phases either. I also attach considerable weight to the fact that on 8 January 2018 Mr Alford introduced FEC to Mr Downer and that he facilitated the execution of the NDA. This conduct is consistent with Mr Alford owing a duty to act exclusively for EHL and not to introduce Ensign House to competing bidders.

(6) I am satisfied that from March 2015 onwards it was obvious to both Mr Downer and Mr Alford that there was a risk that a conflict of interest would arise if Mr Alford was free to act in his own interests or in the interests of third parties. Mr Connolly accepted from Ms Wicks that Ensign House was a very valuable opportunity whether or not Investin had signed options and Mr Downer instructed Ms McGinn to prepare NDAs in relation to a number of different parties during the second phase of the negotiations.

(7) I have found that the Pricing Information, Soft Information and Title Information fell within the definition of Confidential Information in the NDA. I am satisfied that from March 2015 onwards Mr Alford and Mr Downer both appreciated that information relating to the negotiations with the Suiteholders was confidential and, in particular, the prices which they were individually prepared to accept.

(8) Finally, I have found that throughout all four phases of the negotiations Mr Alford acted as Investin's principal negotiator (although Mr Downer attended a handful of meetings himself). I have also found that Mr Downer played a more passive role and that he relied on Mr Alford's advice in relation to strategy, terms and tactics. As such, I am satisfied that Mr Alford had considerable influence over Mr Downer's decision-making although it is clear that Mr Downer made the final decisions.

(9) Accordingly, I am satisfied that it was both reasonable and legitimate for Mr Downer to expect that Mr Alford would subordinate his own interests and the interests of any third party who approached him to the interests of EHL. I am also satisfied that in conducting negotiations with the Suiteholders, Mr Alford was not chivvying them along for his own personal benefit but acting in the course of his contractual and fiduciary duties as an agent.

(10) I have found that Mr Downer did not reply to Mr Alford's emails about his fees, that he sometimes gave excuses and that he led Mr Alford to believe that his enhanced terms were agreed. On the other hand, I have also found that Mr Alford was trying to improve on his terms and asserted that they had been agreed when they had not. This conduct does not reflect particularly well on either of them but it was not unusual in the market in which they both operated. I am also satisfied

that this conduct did not prevent a fiduciary relationship arising. Mr Alford was content to act for EHL despite the absence of a formal fee agreement and Mr Downer's failure to agree to his increased fees and Mr Downer continued to trust Mr Alford to negotiate with the Suiteholders on EHL's behalf.

(3) Principal

600. Mr Alford did not identify his principal very clearly in his email dated 20 July 2015. But there appears to have been no dispute that it was EHL because the Defendants admitted that Mr Alford was engaged by EHL in the Re-Amended Defence. Moreover, Mr Seitler did not suggest that if I found Mr Alford to be a fiduciary, he owed the relevant duties to Mr Downer personally or to some other entity. But in case there is any doubt, I find that following the formation of the contract of retainer, Mr Alford's principal was EHL. It had been incorporated in 2014 for the purpose of acquiring Ensign House and Mr Alford used the phrase "Ensign House/EH" at the end of the first sentence in his email dated 20 July 2015. I am satisfied that he was intending to refer to both Ensign House and EHL in that sentence. Mr Alford identified EHL as his principal in the draft letter which he sent to Mr Downer on 1 March 2018 and if I had been in any doubt, this draft confirms that he understood EHL to be his principal.

(4) Fiduciary Duties

601. It is common ground that Mr Alford was an independent consultant on a profit share arrangement and not a salaried retainer. Mr Seitler submitted that even if he was a fiduciary, he owed duties of honesty and fidelity but not a duty to act exclusively for EHL. Mr Seitler relied on *Re Coomber* (above) and *New Zealand Netherlands Society "oranje" Inc v Kuys* [1973] 1 WLR 1126 in which the Privy Council held that the secretary of a society was not acting as a fiduciary in publishing a newspaper. Lord Wilberforce stated as follows:

> "The present case is concerned with an officer of an incorporated, non-profit-making society. Kuys was not paid for his services but he was a trusted employee; and he was ready to agree that he had duties of trust and confidence placed in him. On the other hand the scope of his responsibility and the dividing line between that and his own personal interests were loosely defined. It appears from the evidence that he was able to run a small insurance business of his own: also it appears that he was permitted a personal interest in the group travel service which he managed for the

> society. A person in his position may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at."

602. In my judgment, the principle which Lord Wilberforce identified in the last sentence of this passage does not assist Mr Seitler in the present case. Ms Wicks did not suggest that Mr Alford was not free to introduce other properties to other clients or potential buyers but only Ensign House. I have found that Mr Alford owed a contractual duty to negotiate with the Suiteholders to acquire Ensign House on behalf of EHL and that there was an obvious risk of conflict if Mr Alford did not subordinate his own interests (or the interests of third parties). I am satisfied that Ms Wicks drew the dividing line in the correct place and that Mr Alford owed the fiduciary duties which Millett LJ set out in *Mothew* (above) to EHL in discharging that duty. I find, therefore, that Mr Alford owed the duty to act in good faith, not to make a profit out of his trust, not to place himself in a position of conflict and not to act for his own benefit or the benefit of a third party without the informed consent of EHL but that those duties were limited to his retainer for Ensign House.

(5) Implied Term

603. Given that the contract of retainer did not impose an express obligation upon Mr Alford to act exclusively in the interests of EHL or to subordinate his own interests (or of any third party) to those of EHL, Ms Wicks accepted that she had to demonstrate that the test for contractual implied terms was also satisfied. She submitted that the Court should adopt the test set out in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 where Lord Neuberger summarised the law as follows at [16]:

> "There have, of course, been many judicial observations as to the nature of the requirements which have to be satisfied before a term can be implied into a detailed commercial contract. They include three classic statements, which have been frequently quoted in law books and judgments. In *The Moorcock* (1889) 14 PD 64, 68, Bowen LJ observed that in all the cases where a term had been implied, "it will be found that … the law is raising an implication from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have". In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, Scrutton LJ said that "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract". He added that a term would only be implied if "it is such

> a term that it can confidently be said that if at the time the contract was being negotiated" the parties had been asked what would happen in a certain event, they would both have replied "'Of course, so and so will happen; we did not trouble to say that; it is too clear'". *And in Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, MacKinnon LJ observed that, "[p]rima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying". Reflecting what Scrutton LJ had said 20 years earlier, MacKinnon LJ also famously added that a term would only be implied "if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".

604. Mr Seitler did not challenge the submission that I should apply *Marks & Spencer Plc v BNP Paribas* (above) and I therefore do so. In my judgment, the test is satisfied in the present case and it was an implied term of the contract of retainer that Mr Alford owed the fiduciary duties which I have set out above. I place particular reliance on the officious bystander test in the present case because Mr Alford had already been acting as Investin's agent since at least March of that year and he expected to carry on the same role. I accept Ms Wicks' submission, therefore, that it went without saying that Mr Alford could not market Ensign House to other potential purchasers or bidders or place himself in a position of conflict.

605. Ms Wicks and Mr Lee did not submit that I should imply the duties of a fiduciary into Mr Alford's retainer simply because I had found the existence of a fiduciary relationship. It seems to me that they might have done so on the basis that this was a relational contract and that the Court should imply fiduciary duties into it in the same way as it would imply them into, for example, a contract of partnership. Nor did they submit that Mr Alford owed free-standing fiduciary duties which arose (or survived) independently of the contract. I do not, therefore, consider either of these interesting issues.

(6) Termination

606. For the reasons which I have stated, I have dismissed the allegation that Mr Downer deliberately misled Mr Alford in relation to his profit share on the sale of Quay House. I have also found that EHL did not commit a repudiatory breach of Mr Alford's contract of retainer and that, even it did, Mr Alford did not accept that breach and bring the contract to an end. Nevertheless, I consider that it is still open to me to reach the conclusion that the relationship of trust and confidence between Mr Downer and Mr

Alford was so fractured by the sale of Quay House that it is no longer appropriate to treat Mr Alford as a fiduciary after that date. In particular, I have in mind Mr Downer's striking evidence that Mr Alford's reaction to the sale of Quay House was "like holy water on the devil".

607. Although I have considered this issue carefully, I am not satisfied that there was a fundamental change in the personal relationship between Mr Downer and Mr Alford or that the fiduciary relationship came to an end on the sale of Quay House. Mr Alford continued to act for EHL and, as Ms Wicks pointed out, he was closely involved in managing the Suiteholders' expectations and attended the meeting on 7 November 2018. If Mr Downer no longer trusted him to deal with the Suiteholders, he would never have permitted him to attend that meeting. Likewise, Mr Alford introduced FEC UK to Mr Downer in January 2018. If Mr Alford had regarded himself as a free agent and no longer bound to act exclusively for EHL, it is unlikely that he would have done so. I find, therefore, that Mr Alford continued to owe fiduciary duties to EHL after the sale of Quay House.

V. Mr Alford: Breach of Duty

608. In *Mothew* (above) Millett LJ first considered whether the agent (in that case a firm of solicitors) had been acting in breach of "the double employment rule" by acting for both lender and borrower. He concluded that this was not something of which the lender could complain because it knew that the solicitors were acting for the borrower and, indeed, instructed them for that reason: see 18H to 19A. He then continued as follows (at 19D-H):

> "That, of course, is not the end of the matter. Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.
>
> Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary

> must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.
>
> Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v. Cox and Hatt* [1917] 2 Ch. 71; *Commonwealth Bank of Australia v. Smith* (1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule."”

(1) The Exclusivity Agreement

609. In my judgment, Mr Alford did not commit a breach of fiduciary duty by negotiating with Lama on behalf of FEC in relation to the Exclusivity Agreement or advising Mr Connolly in relation to that transaction. I am satisfied that Mr Downer gave his fully informed consent to Mr Alford assisting Mr Connolly to negotiate the Exclusivity Agreement. In fairness to Ms Wicks and Mr Lee, they did not press this suggestion.

(2) Change of email address

610. On or about 12 April 2019 Mr Alford copied Mr Downer into an email which he had sent to Ms Sutherland and Ms Ford from his Lyons House Group email account by mistake. From that date onwards he used that email account to communicate with Mr Connolly, DLA, Mr McGarry and the Suiteholders rather than his Investin email account. From that date onwards he also stopped providing updates to Mr Downer and Ms McGinn about the progress of any of the negotiations with Lama or the Suiteholders (although it is fair to say that Mr Downer hardly chased him or even asked him for information).

611. I have found that Mr Connolly did not engage Mr Alford to act for FEC in early April 2019 and that FEC did not take the decision to work with Mr Alford to acquire Unit 14 and agree prices until 31 May 2019. I have also found that Mr Downer gave his consent to Mr Alford continuing to negotiate with Lama and the SFO during the exclusivity period. However, I draw the inference that Mr Alford stopped using his Investin email

account and reporting to Mr Downer and Ms McGinn because he consciously took the decision that it was no longer in his interests to promote EHL as the purchaser of Ensign House but in his interests to promote FEC. I find that from 12 April 2019 onwards Mr Alford was inhibited in the performance of his fiduciary duties to EHL by his own interests and he deliberately preferred his own interests and the interests of FEC to the interests of EHL. In doing so, I also find that he committed a breach of the duty of good faith.

(3) Suite 14

612. I have found that Mr Alford did not conduct any meaningful negotiations with the Suiteholders between April and June 2019 beyond keeping in touch with them. On 20 June 2019, however, Mr Alford wrote to Mr Connolly in advance of the meeting on 4 July 2019 offering him strategic advice and proposing a fee of £5,000 for his work to date in relation to Lama. On 27 June 2019 he briefed Ms Ford for the meeting on 4 July 2019 and he attended that meeting himself to assist Mr Connolly in relation to the negotiations. He also followed up the meeting by conducting final negotiations with Mr Ammora before reporting back to Mr Connolly on 8 July 2019.

613. Although I have found that FEC did not retain Mr Alford until after the meeting on 4 July 2019 and his fees had not yet been discussed and agreed, I am satisfied that there was an actual conflict between the interests of EHL and the interests of FEC during this period and that Mr Alford committed a breach of the duty of good faith by promoting FEC's interests without terminating his retainer from EHL and obtaining its consent to him acting for FEC. In my judgment, Mr Alford was acting as an introducing agent rather than a buying agent during this period and trying to promote a deal between FEC and Lama. But in doing so, he was acting contrary to the interests of EHL.

614. I draw the inference that Mr Alford was fully aware of this conflict of interest and consciously chose not to inform Mr Downer of the negotiations and the agreement with Lama. I draw this inference from his failure to reply to Mr Downer's email forwarding on Mr Mee's email dated 24 July 2019 and his email to Mr Connolly dated 28 August 2019. The latter email shows that Mr Alford was well aware that he had disclosed confidential information to FEC and that there was a conflict between the interests of his former and current principals. I am also satisfied that by 20 June 2019 Mr Alford was

aware of the conflict between their interests and that he took a conscious decision not to disclose the position to Mr Downer or ask for his consent to act for FEC. I find, therefore, that this was a breach of the duty of good faith.

(4) The Suiteholders: The Final Phase

615. On 12 July 2019 Mr Alford met Mr Plant and Mr Ranson to put forward a proposal on behalf of FEC and Mr Connolly accepted that from that date he was acting as FEC's agent. If I am wrong and the actual conflict rule was not engaged before this date, I find that it was engaged on 12 July 2019 when Mr Alford began to act as FEC's agent. For the same reasons which I have set out above, I draw the inference that Mr Alford was fully aware of this conflict of interest and consciously chose not to inform Mr Downer of the negotiations and agreement with the Suiteholders. I find that by failing to do so Mr Alford committed a breach of the duty of good faith.

(5) Confidential Information

616. I have found that the Title Information and the Pricing Information were Confidential Information within the meaning of the NDA and that Mr Alford committed a breach of the equitable duty of confidence by misusing them. In particular, on 16 July 2019 he commented on the flowchart of leases. On 17 July 2019 he sent the Price Allocation Schedule and Options Incentives Table to Mr Connolly, on 19 July 2019 he sent Mr Connolly the three handwritten schedules and on 23 July 2019 he commented on Mr Connolly's FEC Price Breakdown and then sent the Price Allocation Schedule to the Suiteholders.

617. Ms Wicks did not address me separately about Mr Alford's fiduciary duty of confidence and whether it was necessary to establish that he committed a deliberate breach of that duty. But in any event, I find that Mr Alford deliberately committed a breach of his fiduciary duty of confidence for the following reasons. Mr Alford was aware of the terms of the NDA, he knew what information Ms McGinn had provided to Ms Sutherland and he deliberately lied about the Price Allocation Schedule to obscure the fact that this information was confidential to EHL. In the absence of detailed submissions, however, I am not prepared to find that Mr Alford committed a breach of his fiduciary duty of confidence by misusing the Soft Information or Mr McGarry's contact details (despite my findings on breach of confidence).

(6) The Fee Agreement

618. It is common ground that FEC UK paid Terence Alford Ltd £5,940 for Mr Alford's services in relation to Lama and I have found that EHFL or FEC UK paid Mr Alford a total fee of £803,009 for introducing FEC to Ensign House and acting as its agent. Mr Seitler did not suggest that EHL authorised the payment of the first fee (even though much of Mr Alford's work related to the Exclusivity Agreement) or, for that matter, the second fee. Mr Alford received total fees, therefore, of £808,009 (ex VAT) for introducing the opportunity to purchase Suite 14 and then the whole of Ensign House to FEC without the authority of EHL.

619. Ms Wicks and Mr Lee cited *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 as authority for the proposition that it is an inflexible rule of equity that where a fiduciary has made an unauthorised profit within the scope of their duty, he or she is bound to account for it to their principal. *Novoship* (above) was concerned with the payment of bribes and, in my judgment, the no profit rule is not engaged here. There is no suggestion that Mr Alford would not have been able to introduce FEC to Ensign House or charge a fee of £808,009 for doing so if he had been a free agent.

620. However, it is because Mr Alford was not a free agent that the wider no conflict rule or actual conflict rule (to use the terminology in *Mothew*) is engaged. Mr Alford was not entitled to place himself in a position where his personal interest conflicted with his duty to EHL without its authority, and I find that by introducing FEC to Ensign House for fees which were later agreed at £808,009 and then paid, Mr Alford consciously preferred his own interests to the interests of EHL and committed a breach of the duty of good faith.

(7) Termination

621. These findings give rise to an obvious question. Mr Downer would not give Mr Alford a written contract and had not agreed to pay him a monthly retainer. Mr Alford must have been entitled to terminate his retainer from EHL upon reasonable notice and one month would have been an obvious and reasonable notice period. So why did Mr Alford not terminate the retainer before agreeing to act for FEC? In my judgment, there are two related answers to that question.

622. First, Mr Alford would have appreciated that if he terminated the retainer, the information

which he had gathered on behalf of EHL would remain confidential and he would have been unable to use it for the benefit of FEC. Moreover, he would also have appreciated that once he had terminated the retainer, Mr Downer would have taken steps to ensure that it remained confidential by enforcing the NDA and his own duty of confidentiality. Secondly, I have no doubt that Mr Alford still hoped or believed that if FEC did not buy Ensign House, he might be able to present an alternative deal to Mr Downer and earn his 7.5% commission.

W. Mr Connolly: Dishonest Assistance

(1) The Law

623. EHL also advances claims for dishonest assistance in Mr Alford's breaches of fiduciary duty against all three of the other Defendants. In *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) Cockerill J set out the test for dishonest assistance in the following passage at [82] and [83] which I gratefully adopt (including the detailed references):

> "82. In this area, too, the law was not seriously in issue. The ingredients of liability in dishonest assistance are:
>
> i) There must be a trust or fiduciary obligation owed by the trustee/fiduciary to the claimant. It suffices if the trust in question is a constructive or resulting trust: McGrath, *Commercial Fraud in Civil Practice* (2nd ed.) at [9.34].
>
> ii) Because dishonest assistance is a type of accessory liability, there must be a breach by the trustee/fiduciary: *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 382, *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908; [2015] QB 499. That is common ground for the purposes of my decision. However, I should note that Mr Ohmura reserves the right to argue, if this matter were to go to a higher court, that liability for dishonest assistance would not arise in relation to a breach of the kind that is alleged in this case.
>
> iii) The breach by the trustee/fiduciary need not be dishonest: because liability of the third party is fault-based, what matters is the nature of their fault, not that of the trustee/fiduciary: *Royal Brunei Airlines*, 384-5, 392, *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164 at [109].
>
> iv) The third party must have assisted in, induced or procured the breach. It is necessary to show that the relevant assistance played more than a minimal role in the breach being carried out, but there is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss: *Baden v Société General pour Favoriser le*

Development du Commerce et de l'Industrie en France SA [1993] 1 WLR 509 at [246].

v) The third party must have acted dishonestly in providing the assistance. The test in its modern incarnation derives from Royal Brunei Airlines at 386-7 and is now set out in *Ivey v Genting Casinos (UK) t/a Crockfords* [2017] UKSC 67 at [74]: "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

vi) However, the standards in question are those of an ordinary honest person in the circumstances of the defendant. Thus, in applying the test of dishonesty, the Court must have regard to all the circumstances known to the defendant at the time, and have regard to the defendant's personal attributes, such as their experience and the reason why they acted as they did: *Royal Brunei Airlines v Tan* at 391.

83. Accordingly:

i) There is no need to prove that the defendant was aware of the details of the underlying fraud, that there existed a trust, and/or they knew the facts which give rise to the trust: McGrath at [9.133]. It suffices if they simply know that they are assisting the fiduciary to do something he or she is not entitled to do: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1505], *Twinsectra v Yardley* at [24] per Lord Hoffmann.

ii) The defendant has the requisite dishonest state of mind if they deliberately close their eyes and ears, or deliberately refrain from asking questions, lest they learn something they would rather not know, and then proceed regardless: Royal Brunei Airlines, 389. Or as it was put by Lord Scott in *Manifest Shipping Co v Uni-Polaris Insurance Co* [2003] 1 AC 469: "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

> iii) However, a defendant does not have the requisite dishonest state of mind if he merely suspects what is going on: *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511 where (in the context of a case with a distinct factual parallel to this one) Colman J put the matter with characteristic clarity and good sense: "it is not enough that on the whole of the information available to [the defendant] he ought as a reasonable man to have inferred that there was a substantial probability that the funds originated from the Bank. It must be established that he did indeed draw that inference…. If third parties are to be held accountable on the basis of accessory liability for breaches of trust committed by others the standard of proof of dishonesty, although not as high as the criminal standard, should involve a high level of probability."”

624. Ms Wicks and Mr Lee submitted (and I accept) that it is irrelevant whether the individual who is alleged to have been dishonest subjectively knew or believed that their conduct was dishonest: see *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314 at [23] to [32] (Sir Andrew Morritt C) and *Ivey v Genting Casinos Ltd* [2018] AC 391 at [74] (quoted in the passage above). They also accepted that where “blind eye” dishonesty is alleged, mere suspicion was not enough and that they had to demonstrate that the relevant individual had “solid grounds for suspicion which he consciously ignored”: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 at [19] and [20] (Lord Hoffmann).

625. It was also common ground that the burden of proof for dishonesty is the normal civil standard, namely, the balance of probabilities. Ms Wicks and Mr Lee cited the decision of Eder J in *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 (Comm) for the proposition that the Court must consider carefully what is and what is not inherently probable where a defendant is known to have acted fraudulently or reprehensibly already. Eder J stated this at [89]:

> “As submitted by Mr Berry, the last point is important – or at least potentially important – in this case. I am prepared to accept that in a very broad general sense, it may well be true to say that it is inherently improbable that a particular defendant will commit a fraud. But it all depends on a wide range of factors. For example, if the court is satisfied (or it has been admitted) that a defendant has acted fraudulently or reprehensibly on one occasion, it cannot necessarily be considered inherently improbable that such defendant would have done so on another; or if, for example, the court is satisfied (or it has been admitted) that a defendant has created or deployed sham or false documents, the court cannot assume that it is inherently unlikely that such defendant did so on other occasions. For the avoidance of doubt, I should make absolutely plain that this is not to say that inherent probability is irrelevant. On the

> contrary, as submitted by Mr Casella, I accept, of course, that the court should take into account the inherent probability of an event taking place (or not taking place) as is made abundantly plain by Baroness Hale in the passage from *Re S-B* quoted above. However, as it seems to me, the court must in each case consider carefully what is – and is not – inherently probable having regard to the particular circumstances – but the standard of proof in civil cases always remains the same i.e. balance of probability."

626. I accept that it is more likely that a defendant who commits fraud once is more likely to act dishonestly on a second occasion and that a defendant who lies about the first occasion is more likely to be telling lies about the second. Nevertheless, I remind myself that in criminal cases the judge will give the jury a *Lucas* direction warning them against the assumption that a defendant who lies must necessarily be guilty: see *R v Lucas* [1981] QB 720. As Judge LJ pointed out in *R v Middleton* [2001] Crim LR 251 people do not always tell the truth. Sometimes, they do not (or cannot) always bring themselves to face up to reality. Indeed, innocent people sometimes tell lies even when by doing so they create or reinforce the suspicion of guilt and whilst the guilty often resort to lying to hide and conceal the truth, the innocent can sometimes misguidedly react to a problem or postpone facing up to it or attempt to deflect ill-founded suspicion or fortify their defence by telling lies.

(2) Breach of Fiduciary Duty

627. I have held that Mr Alford was a fiduciary and owed the fiduciary duties to EHL set out in *Mothew* (above) in relation to the purchase of Ensign House. These fiduciary duties did not involve holding money or the stewardship of other assets or control over EHL's affairs like a trustee or the director of a company. But Mr Seitler did not submit that a dishonest accessory could not be liable for assisting a fiduciary agent who owed these duties and, in my judgment, he was right not to do so: see *FM Partners* at [82](i) (above).

628. I have also held that Mr Alford committed breaches of those duties and that he did so consciously and deliberately. Ms Wicks did not invite me to find that he was dishonest and I have not done so. Mr Alford may well have believed that he was well within his rights to accept an alternative engagement from FEC after his treatment by Mr Downer over the sale of Quay House. I am not satisfied that the question whether Mr Alford was dishonest by objective standards is a simple exercise or that I should answer it in circumstances where Mr Alford was debarred from defending and did not play an active

role at trial.

629. But in any event, Mr Seitler did not submit that Mr Connolly could not be liable for dishonest assistance even if Mr Alford acted honestly and, in my judgment, he was right not to submit this either: see *FM Partners* at [82] (ii) (above). A wrongdoer may be the prime instigator of a breach of trust or a breach of fiduciary duty where the trustees themselves are not dishonest (and it is not necessary for me to consider the additional point left open by Cockerill J in that paragraph).

(3) Assistance

630. Ms Wicks and Mr Lee submitted that Mr Connolly induced or assisted Mr Alford to commit breaches of his fiduciary duty by instructing him to represent FEC and by directing him in relation to the negotiations. They also submitted that he assisted Mr Alford by negotiating and approving his fees. Mr Seitler did not really dispute this element of the claim either and I accept those submissions. I find that Mr Connolly assisted Mr Alford to commit the breaches of fiduciary duty in Sections V(4) to V(6) (above). Mr Connolly accepted that Mr Alford was acting on FEC's instructions from 12 July 2019 onwards and Mr Connolly played an active role in the negotiations himself.

631. I am not satisfied, however, that Mr Connolly induced or assisted Mr Alford to commit the breaches of fiduciary duty in Sections V(1) and V(2). I have rejected EHL's allegation that the turning point came in early April 2019 and found Mr Alford did not conduct any meaningful negotiations with the Suiteholders between April and June 2019 (beyond keeping in touch). I have also accepted Mr Connolly's evidence that Mr Chiu and he did not make the decision to work with Mr Alford to acquire Ensign House until 31 May 2019 (as recorded in the handwritten notes of their meeting on that date) and that he did not instruct Mr Alford to act for FEC until after 4 July 2019.

632. This leaves the period between 20 June 2019 and 4 July 2019 in Section V(3) (above) when Mr Alford was acting as an introducing agent and setting up the deal with Lama: see Section V(3). I am satisfied that Mr Connolly induced or assisted Mr Alford to commit that breach of fiduciary duty and that he played a more than minimal role in doing so: see *FM Partners* (above) at [82](iv). Although Mr Alford was acting as an introducing agent trying to set up the deal between FEC and Lama and had not been retained by FEC, Mr Connolly agreed and authorised the payment of the legal costs of

the meeting and Mr Ammora's travel costs and I have held that the meeting on 4 July 2019 would not have gone ahead if he had not done so. He also drafted an email for Mr Alford to send, attended the meeting itself and authorised Mr Alford to go ahead and agree Heads of Terms.

633. Finally, Ms Wicks and Mr Lee submitted that Mr Connolly assisted Mr Alford to commit breaches of fiduciary duty by failing to inform EHL that Mr Alford was working with FEC. It is unnecessary for me to decide this issue given my other findings. But if it were necessary for me to do so, I would not be prepared to accept this submission. Mr Connolly owed no legal duty (whether in his personal capacity or as director of FEC UK) to inform EHL that Mr Alford was committing a breach of duty. The fact that he failed to make enquiries may provide evidence (even compelling evidence) that he was dishonest. But in my judgment, his failure to do so cannot by itself amount to assistance for the purpose of accessory liability. The position might be different if EHL were able to point to a duty under the NDA to report Mr Alford to EHL. But the point was not argued that way and I do not consider it further.

(4) Dishonesty

634. The real issue between the parties was whether Mr Connolly was dishonest and, in particular, whether he knew or turned a blind eye to the fact that Mr Alford was committing breaches of fiduciary duty by "switching sides" and acting for FEC for a fee. Again, there was no real dispute on the law and Mr Seitler did not submit that it was necessary for the Court to find that Mr Connolly knew that Mr Alford was a fiduciary or that he had committed breaches of fiduciary duty. In my judgment, it is enough for EHL to demonstrate that Mr Connolly knew or suspected that Mr Alford was still retained by EHL to act exclusively on its behalf and not entitled to introduce or act for a competing purchaser. However, it is not enough for EHL to demonstrate that Mr Connolly had vague feelings of unease. It must prove on a balance of probabilities that Mr Connolly had good reason to believe that Mr Alford was still retained by EHL and made a deliberate decision not to investigate further.

(i) 20 June 2019

635. I have found that in January 2019 Mr Connolly believed that Mr Alford was Investin's agent and that Investin would pay his fee. I have also found that Mr Connolly believed

that he must have been in some sort of partnership with Mr Downer in relation to Ensign House primarily because he was using an Investin email account. Ms Wicks also relied on the first email in the chain dated 28 February 2019 to 7 March 2019 as evidence that Mr Connolly knew that Mr Alford was still Investin's agent at that date. I accept that Mr Connolly knew that Mr Alford was still engaged by Investin and reporting to Mr Downer at that date.

636. I have also found that on 31 May 2019 Mr Chiu instructed Mr Connolly to check whether Mr Alford was free to work with FEC. Ms Wicks submitted that he must have had some degree of suspicion at that date because he had not checked before. I do not accept that submission. I have rejected EHL's case that Mr Connolly instructed Mr Alford in April 2019 and found that Mr Connolly did not progress the transaction at all until he was informed that Mr McGarry was well again and back at work. It is unsurprising, therefore, that Mr Connolly had taken no steps to check Mr Alford's availability until 31 May 2019.

637. I have accepted Mr Connolly's evidence that in June 2019 Mr Alford told him that he was free to work for FEC because he was an agent, self-employed and that he did not have a contract with Mr Downer on Ensign House. Ms Wicks submitted that an honest person would have been highly suspicious of these statements. In assessing whether to accept that submission, I have to bear in mind the context in which Mr Alford told Mr Connolly that he was now free to act for FEC. In particular:

    (1) Mr Downer was not prepared to give Mr Alford a written contract and Mr Connolly and DLA were not sent or shown any documents either by Mr Downer, Ms McGinn or Mr Alford which put Mr Connolly on notice that Mr Alford owed fiduciary duties to EHL on 20 June 2019 or thereafter. Indeed, the only "badge" of Mr Alford's agency was his Investin email address and Mr Alford stopped using that in April 2019.

    (2) I accept Mr Connolly's evidence that he understood from this that Mr Alford had now broken away from Mr Downer. This might have excited suspicion by itself but Mr Alford copied his email dated 12 April 2019 to Mr Downer by mistake. Mr Downer did not object to him using that email address and did not respond to that email beyond exchanging comments with Ms McGinn.

    (3) I accept that Mr Alford did not copy this email to Mr Connolly (because he sent it

to Mr Downer by mistake). But he copied it to Ms Sutherland and Ms Ford who could have been expected to raise any concerns with Mr Connolly if they had had any doubt about Mr Alford's ability to act for FEC.

(4) Mr Downer and Mr Connolly spoke only once on 21 January 2019. Mr Downer did not suggest in evidence that he told Mr Connolly that Mr Alford was his exclusive agent and not free to act for FEC. Indeed, I have found that Mr Downer permitted Mr Alford to introduce FEC to Mr Ammora, to negotiate with him for the Exclusivity Agreement and to negotiate with him during the lock-out period provided that FEC paid Mr Ammora's legal fees.

(5) Further, Mr Downer did not ask to attend the meeting on 28 February 2019 or ask to see the draft of the Exclusivity Agreement and to comment on its terms (or even instruct Ms McGinn to do so). Nor did he ask to see the final agreement once it had been signed or to attend the conference call with Mr McGarry or to attend the meeting originally scheduled for 9 May 2019 all of which he was aware of (to Mr Connolly's knowledge or the knowledge of DLA).

(6) There was an expected delay of three months before the meeting on 4 July 2019 which was principally due to Mr McGarry's ill-health. During that period, Mr Downer did not get in touch with Mr Connolly at all. Moreover, as the date for the meeting drew closer, he did not get in touch either to discuss the meeting itself or the terms of any deal. Mr Connolly might have drawn the conclusion that Mr Alford had deliberately cut Mr Downer out of the loop. But he might also have drawn the conclusion that Mr Alford was right and that Mr Downer had lost interest in Ensign House altogether.

(7) I have found that on 3 April 2019 Mr Connolly learnt for the first time that Investin did not hold binding options over the other Suites. Mr Connolly accepted that Mr Downer had not misled him but that he believed that he had been misled by Mr Alford. He, therefore, had a reason not to believe what Mr Alford said. But he also had a strong reason to believe that Mr Downer had lost interest in Ensign House and a reason to explain why Mr Downer had been willing for him to take over and fund the negotiations with Lama and the SFO.

638. Given the factual context, I am not satisfied that Mr Connolly had solid grounds for

disbelieving Mr Alford when Mr Alford told him that he was free to work for FEC and I reject Ms Wicks' submission. I have reached this conclusion primarily because Mr Alford's assurance that he was a free agent was consistent with Investin's conduct after January 2019 as it was known to Mr Connolly. Mr Downer had permitted Mr Alford to introduce FEC to Lama and had taken no interest thereafter. Moreover, I am not satisfied that Mr Connolly's revelation in April 2019 changed the position. Although it cast doubt on Mr Alford's personal reliability, it explained why Mr Downer had lost interest. He had been unable to get binding options over any of the other Suites and was not prepared to spend time and money resolving the Lama issue.

639. For these reasons I accept Mr Connolly's evidence in the long passage which I have set out in Section M(9) (above). I find that in May or June 2019 Mr Alford told Mr Connolly that Mr Downer was no longer interested in Ensign House and that: "I do not have an agreement with Investin or John Downer on Ensign House and I am free to do whatever I want." After careful consideration, I also accept Mr Connolly's evidence that he believed this and that he decided not to call Mr Downer because he thought the deal with Investin was dead and, as he put it, "we were moving on".

(ii) 4 July 2019

640. On 4 July 2019 Mr Alford asked for a fee of £5,000 (plus VAT) for his work for the period January 2019 to June 2019 and FEC UK paid it a week later. Ms Wicks put it to Mr Connolly that he was paying for Mr Alford's exclusivity and that he must have known that Mr Alford had agreed the same terms with Mr Downer. Mr Connolly refused to accept this and I accept his evidence on this point. In particular, I accept that as a result of receiving the request for a fee of £5,000, he did not suspect that Mr Alford was acting in breach of his retainer from EHL and deliberately chose not to investigate. It is possible that he might have suspected that Mr Alford had agreed a similar fee structure with Mr Downer for exclusivity. On the other hand, it is more likely that he formed the view that Mr Alford operated in a casual way and did not agree formal terms or ask to be paid until he had achieved some success.

641. Moreover, Mr Alford's request for payment for the period between January 2019 and June 2019 would have brought it home to Mr Connolly that Mr Alford was not being paid by EHL for his work in relation to Ensign House. This would have lent colour to Mr

Alford's assertions that he was an independent contractor and a free agent and also that he had made a break from Mr Downer.

(iii) 16 July 2019

642. Ms Wicks placed great emphasis on the phrase "subject to no intervention by Investin" in Mr Connolly's email dated 17 July 2019. She suggested to him that the intervention which he had in mind was not only the enforcement by EHL of its rights under the NDA but also under Mr Alford's contract of retainer. I have set out the passage from Mr Connolly's evidence in full and I will not repeat the findings which I made in Section N(10) (above). In summary, Mr Connolly accepted that he had in mind an intervention under the NDA and but not an intervention based on the premise that Mr Alford was not a free agent. I accept Mr Connolly's evidence and I find that on 16 July 2019 he knew that there was a risk that EHL might intervene to enforce the NDA, that he did not know or suspect that there was a risk that EHL might intervene to enforce Mr Alford's retainer and prevent him acting for FEC and that he did not turn a blind eye to the obvious.

(iv) 24 July 2019

643. Finally, Ms Wicks placed great reliance on the email chain which Mr Alford forwarded on to Mr Connolly on 24 July 2019. She suggested to Mr Connolly that this demonstrated that Rockwell still had a serious interest in Ensign House, that he discussed the email with Mr Alford and that they agreed that they would take a non-committal line. She also suggested to him that he was shutting his eyes to the "absolutely blindingly obvious which was that Mr Alford was not free to work for FEC and that Mr Downer thought he was still working for him on Ensign House".

644. I do not agree with Ms Wicks that the email chain dated 24 July 2019 showed either that Rockwell had a serious interest in Ensign House or that Mr Alford was not free to work for FEC. Mr Mee's inquiry was expressed in casual terms "Just thought I would check how you're getting on with Ensign". It was also prompted by an inquiry from another hotel operator. Mr Downer's email was equally casual and confirmed what Mr Connolly already understood, namely, that Mr Alford had had no contact with Mr Downer for months. It was also clear that Mr Downer had only got in touch with him because of Mr Mee's enquiry. I am not satisfied, therefore, that this email chain provided Mr Connolly with obvious grounds for believing that Mr Alford was still retained by EHL or owed an

obligation to act exclusively on its behalf. I accept his evidence and I find that on 24 July 2019 he did not believe or suspect this and that he did not shut his eyes to the obvious.

645. I also accept Mr Connolly's evidence that he could not recall the conversation with Mr Alford after he had received this email chain and that he did not agree that Mr Alford should lie to Mr Downer by telling him that he was still working for Investin and trying to unlock Suite 14. If he had conspired with Mr Alford to mislead Mr Downer in this way (as Ms Wicks put to him), I would have expected Mr Downer to disclose a reply from Mr Alford in which he deliberately misled Mr Downer. But I was not taken to a reply and none was put to Mr Connolly.

646. I consider it more probable than not that Mr Alford's desire to speak to Mr Connolly and their subsequent discussion was prompted by a concern that EHL might discover that FEC UK was committing a breach or breaches of the NDA and that they simply agreed that Mr Alford would ignore Mr Downer's email unless Mr Downer followed it up or chased for an answer. In the absence of any direct recollection from Mr Connolly or any reply from Mr Alford to Mr Downer, I find on a balance of probabilities that this is what took place. In the event, Mr Downer did not follow Mr Mee's request up. This would also have allayed Mr Connolly's concerns.

(v) The NDA

647. Ms Wicks' primary case was that Mr Connolly knew or turned a blind eye to the fact that Mr Alford was not a free agent and acting in breach of his retainer from EHL. She did not submit in terms that the mental element of accessory liability was made out because Mr Connolly knew that FEC UK was itself acting in breach of the NDA or was prepared to take the risk of enforcement by EHL. In my judgment, there is a simple answer to this point. To establish that Mr Connolly is liable for assisting Mr Alford to commit breaches of his fiduciary duty, EHL must prove that he knew that Mr Alford was not entitled to act for FEC or turned a blind eye to this fact. It is not enough to prove that Mr Connolly knew that FEC UK was itself in breach of its own obligations to EHL. This is the subject matter of a claim for unlawful means conspiracy and I address it in that context.

648. I have also considered whether Mr Connolly's willingness to commit a breach of the NDA so damages his credibility that I should not accept his evidence on this point even though I found him for the most part to be a convincing witness and his evidence to be

consistent with the contemporaneous documents. I am not satisfied that I should reject his evidence for this reason. He accepted without hesitation that Mr Downer was open and had not misled him. He also accepted candidly that at about the time of the meeting with Mr Chiu on 31 May 2019 he walked away from the NDA. I regard these admissions as evidence of Mr Connolly's candour rather than the reverse. I have no doubt that Mr Connolly fully understood the implications of these admissions both for the defence of EHL's claim and any potential counterclaim for rescission of the NDA.

(vi) The Secret Commission

649. I have found that Mr Alford paid Mr Connolly a secret commission of £166,991 and that he deliberately lied to the Court about the payments made by Mr Alford to him, his family and his associates. Ms Wicks and Mr Lee placed great weight on both the secret commission itself and Mr Connolly's lies in support of the dishonest assistance claim. They submitted that it demonstrated his attitude to loyalty and that it created a very substantial incentive on Mr Connolly to turn a blind eye to the reality of Mr Alford's position with EHL.

650. I accept that the fact that Mr Alford paid him a secret commission and that he lied about it casts very considerable doubt on Mr Connolly's credibility. But after weighing this up against both the documents and Mr Connolly's evidence as a whole, I am not satisfied that I should reject his evidence which I found to be both credible and consistent with the contemporaneous documents.

651. Moreover, I consider it inherently unlikely that Mr Alford bribed Mr Connolly to turn a blind eye to him acting in breach of his retainer from EHL. I consider it far more likely that Mr Alford agreed to share his fee with Mr Connolly to get him to persuade his principals in Hong Kong to pay such a large introducer's fee. Mr Connolly's evidence was that this was an unusually high fee and Mr Connolly knew that Mr Hoong and Mr Chiu would require some persuasion to agree to it. Indeed, they later insisted that Mr Alford accept a £30,000 reduction when Mr Plant held out for £30,000 more than the target price. In my judgment, this was the obvious incentive for Mr Connolly to put Mr Alford's fee to Mr Hoong and Mr Chiu together with the detailed figures at the end of July 2019.

652. If anything, I consider it less likely that Mr Connolly would have been willing to ask his

principals to agree a fee of £1 million or to negotiate a secret commission of 20% for himself if he had known or suspected that Mr Alford was still retained by EHL. In my judgment, Mr Connolly was able to recommend such a large fee to Mr Hoong and Mr Chiu and they were prepared to accept it because they recognised Mr Alford's value to them and his unique relationship with the Suiteholders. But, as Mr Connolly said in evidence, there were other agents whom he could have used to negotiate with them even if they did not have Mr Alford's insight or the unique relationship.

(vii) The Inherent Probabilities

653. Finally, I have stood back from the documents and Mr Connolly's detailed cross-examination to consider the inherent probability that Mr Connolly was dishonest: see *Otkritie International Investment Management Ltd v Urumov*. I am not satisfied that it is inherently probable that because he agreed a secret commission with Mr Alford, Mr Connolly turned a blind eye to Mr Alford's breaches of fiduciary duty. I say this for the following reasons:

(1) Ms Wicks suggested to Mr Connolly several times that the obvious thing to do was to check Mr Alford's status with Mr Downer. But unlike most of the authorities upon which Ms Wicks and Mr Lee relied, this is not a case in which Mr Alford misappropriated EHL's assets and Mr Connolly helped him to do so. Mr Connolly drew the analogy with offering someone a job or taking on a consultant or contractor. I agree that this is a fair analogy. When someone applies for a job, it is not usual to check with their former employer that their employment has come to an end. It is a fair assumption to make that it has or they would not be asking for a job.

(2) I have accepted Mr Connolly's evidence that he did not have a grounded suspicion that Mr Alford was still retained by EHL and that he was not dishonest by failing to check Mr Alford's status with Mr Downer. But it is still instructive and a useful form of reality check to consider what Mr Downer would have been able to say if Mr Connolly had asked him whether Mr Alford was telling the truth when he said that he was self-employed and did not have a contract with EHL.

(3) Mr Downer would have had to agree that Mr Alford was self-employed and that he did not have a written contract. If Mr Downer had said that although he did not

have a written contract, Mr Alford was retained by EHL and unable to act for FEC, the only document which he would have been able to show Mr Connolly to support this claim was Mr Alford's email dated 20 July 2015. Moreover, if Mr Connolly had asked whether EHL was paying Mr Alford a retainer or had paid him anything at all over the previous five years, Mr Downer would have had to concede that it had not paid Mr Alford anything at all. Finally, Mr Downer would have been bound to confirm that he had paid Mr Alford nothing on the sale of Quay House.

(4) In my judgment, it would not have been dishonest for Mr Connolly to take the view that Mr Alford was free to act for FEC. Indeed, I take the view that he could have been forgiven for doing so. I have not found the question whether Mr Alford was a fiduciary and bound to act exclusively in the interests of EHL an easy question to decide after weeks of evidence and detailed submissions from leading counsel of great authority.

(5) Conclusion

654. I, therefore, dismiss the claim for dishonest assistance against all three Defendants. If I had found that Mr Connolly was dishonest, I would have found all three Defendants liable for dishonest assistance. Mr Seitler did not dispute that Mr Connolly was liable for dishonest assistance even if he was acting in his capacity as a director of either FEC UK or EHFL. Nor did he dispute that Mr Connolly's actions and state of mind could be attributed to both FEC UK and to EHFL (after the date of its incorporation) for the reasons given by Ms Wicks and Mr Lee. Finally, in case my decision on this issue is wrong, I go on to consider below, at paragraph 798, what relief I would have granted against Mr Connolly and the other Defendants if I had found them liable for dishonest assistance.

VII. Economic Torts

X. Procuring Breach of Contract

655. EHL advanced alternative claims for procuring breach of contract. It alleged that Mr Connolly procured Mr Alford to commit breaches of his contract of retainer and, in the alternative, that Mr Alford procured FEC UK to commit breaches of the NDA. At trial, Ms Wicks and Mr Lee pursued EHL's primary case that Mr Connolly had procured Mr

Alford to commit breaches of his retainer. They submitted that it was necessary to prove a breach of contract, inducement and intention. They relied on the evidence which they adduced in support of their dishonest assistance claim.

656. I am satisfied that Mr Alford committed breaches of fiduciary duty and breaches of the implied terms of his retainer. I am also satisfied that Mr Connolly induced Mr Alford to commit the breaches set out in Sections V(3) to (6) (above). However, I am not satisfied that Mr Connolly intended to induce those breaches of contract and fiduciary duty. Ms Wicks and Ms Wei accepted that intention in this context means either actual knowledge or wilful blindness or reckless indifference to the truth. For the reasons which I have set out in Section W(4) (above) I find that Mr Connolly did not know or turn a blind eye to the fact that Mr Alford was acting in breach of his retainer or breach of fiduciary duty and for those same reasons I find that he was not recklessly indifferent to the truth either.

657. I, therefore, dismiss the claim for procuring breach of contract against all three Defendants. If I had found that Mr Connolly was dishonest, I would also have found all three Defendants liable for tort of procuring breach of contract and in case my decision on this issue is wrong, I go on to consider what relief I would have granted against Mr Connolly and the other Defendants if I had found them liable.

Y. Conspiracy

(1) The Law

658. The final cause of action which EHL advanced against all four Defendants including Mr Alford was the tort of conspiracy and, again, there was no real dispute about the law. In *Kuwait Oil Tanker v Al Bader* [2000] 2 All ER (Comm) 271 Nourse LJ set out the following statement of general principle:

> "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."

659. I also adopt Cockerill J's summary of the individual elements of the tort of conspiracy in *FM Capital Partners v Marino* (above). They have been cited and relied in a number of cases including, most recently, by Calver J in *ED&F Man Capital Markets Ltd v Come*

Harvest Holdings Ltd [2022] EWHC 229 (Comm) at [466]. That summary was as follows (including the references):

> "The elements of the cause of action are as follows:
>
> i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: *Kuwait Oil Tanker* at [111].
>
> ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: *Kuwait Oil Tanker* at [108]. Moreover:
>
> a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see *Kuwait Oil Tanker* at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".
>
> b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: *Lonrho Plc v Fayed* [1992] 1 AC 448, 465-466, [1991] BCC 641; see also *OBG v Allan* [2008] 1 AC 1 at [164-165].
>
> c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166]. iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in *OBG v Allan*, referring to cases where:
>
> > "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."
>
> v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: *Revenue and Customs Commissioners v Total Network* [2008] 1 AC 1174 at [104].
>
> vi) Loss being caused to the target of the conspiracy."

660. In *ED&F Man Capital Markets* (above) Calver J provided the following analysis of the mental element which I find particularly helpful in the present case. He distinguished between four categories of case at [487] to [489] and I adopt those categories myself below:

> "487. 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**).
>
> 488. 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." (emphasis added)
>
> 489. 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**)."

661. There is a difference between an intention to injure or cause harm and an intention to commit a breach of contract. Indeed, these two different states of mind may give rise to different torts. In *OBG Ltd v Allan* [2008] 1 AC 1 Lord Hoffmann stated this at [62] and [63] (in dealing with category 4 cases):

> "62. Finally, there is the question of intention. In the Lumley v Gye tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must

> have been intended are different. *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 shows that one may intend to procure a breach of contract without intending to cause loss. Likewise, one may intend to cause loss without intending to procure a breach of contract. But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions.
>
> 63. The master of the Othello in *Tarleton v M'Gawley* may have had nothing against the other trader. If he had gone off to make his fortune in other waters, he would have wished him well. He simply wanted a monopoly of the local trade for himself. But he nevertheless intended to cause him loss. This, I think, is all that Woolf LJ was intending to say in a passage in *Lonrho plc v Fayed* [1990] 2 QB 479, 494 which has proved controversial: "Albeit that he may have no desire to bring about that consequence in order to achieve what he regards as his ultimate ends, from the point of view of the plaintiff, whatever the motive of the defendant, the damage which he suffers will be the same.""

662. Finally, a defendant's belief that their actions are justified does not normally provide a defence to a claim for conspiracy if they have the necessary intention to injure. The Court of Appeal has recently resolved one long-standing controversy in the law of conspiracy and decided by a majority that it is not necessary to establish that the defendants knew that the means which they used to injure the victim of a conspiracy were unlawful: see *Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2021] Ch 233 at [139] and [171]. In that case, Arnold and Phillips LJJ declined to follow the view expressed by Toulson LJ in *Meretz Investments NV v ACP Ltd* [2008] Ch 244 that it is a defence to a claim for unlawful means conspiracy that the defendants believed that they had a lawful right to act as they did: see [135] to [137].

663. Lewison LJ (who had been the judge at first instance in *Meretz*) gave a dissenting judgment in which he strongly argued for such a limitation on the scope of unlawful means conspiracy. He drew attention to the justification which Lords Sumption and Lloyd-Jones had used in *JSC BTA Bank v Ablyazov (No 14)* [2020] AC 727 for deciding that a conspiracy was actionable where the unlawful means was contempt of court. He said this at [222] to [224]:

> "222. The most recent authority is that of the Supreme Court in *JSC BTA Bank v Ablyazov (No 14)* [2020] AC 727. What was alleged in that case was a conspiracy to injure by unlawful means; namely a series of

contempts of court. In their joint judgment Lord Sumption and Lord Lloyd-Jones JJSC pointed out at para 6 that:

> "The successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy. The elements of the four established economic torts are carefully defined so as to avoid trespassing on legitimate business activities or imposing any wider liability than can be justified in principle."

223. They added that of all the economic torts conspiracy "is the one whose boundaries are perhaps the hardest to define in principled terms." Having considered a number of cases, they went on to say at para 10 that what makes a conspiracy actionable is "the absence of just cause or excuse." They added at para 11:

> "Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant."

224. The test proposed is whether there is a "just cause or excuse" for combining to use unlawful means; which I take to mean means which are in fact unlawful. But what this test does not answer is the question whether it is a "just excuse" that the actor did not intend to use unlawful means; and did not appreciate that the means that were used were in fact unlawful."

664. In *Palmer Birch v Lloyd* [2018] 4 WLR 164 the defendants relied on *Ablyazov (No 14)* in support of an argument that there was a defence of justification to a claim for unlawful means conspiracy. His Honour Judge Russen QC rejected this argument. He stated as follows at [189] to [193]:

> "190. I therefore do not regard the passage in paragraph 11 of the judgment in Ablyazov (No. 14) as support for the existence of a discrete defence of justification to an unlawful means conspiracy allegation. The words relied upon by Ms Lee have to be read in their context, including earlier paragraphs of the judgment which refer to both Quinn v Leathem and Lonrho plc v Fayed in recognising that, provided it is the means by which damage is inflicted, it is in the fact of conspiracy that the unlawfulness resides; and also that there can be no "just cause or excuse" to combine to use unlawful means any more than there can be to act with the predominant intent required for a lawful means conspiracy.
>
> 191. In *OBG Ltd v Allan*, at [153]-[155], Lord Nicholls addressed the element of unlawful means within the tort of unlawful interference (not conspiracy). He favoured the wider rationale for that tort, which was that it seeks to curb clearly excessive conduct, and that: "The law seeks to

> provide a remedy for intentional economic harm caused by unacceptable means. The law regards all unlawful means as unacceptable in this context."
>
> 192. I regard that observation as entirely apposite in the context of an unlawful means conspiracy. If defendants have agreed to deploy unlawful means with an intention to harm, and harm to the claimant has resulted, then I do not see how their conduct can be unacceptable but "justified".
>
> 193. In my judgment, therefore, it follows that justification, as a defence, only falls to be addressed in the context of the inducement tort and cannot be raised as a defence to an otherwise established unlawful means conspiracy."

665. His Honour Judge Russen QC also dealt with the question whether a director can combine with a company of which he is a director when he is acting within the scope of his authority. Ms Wicks and Mr Seitler did not address me directly on this point although I rejected a similar submission of Mr Seitler's in relation to the misuse of confidential information. The judge cited the decision of Morgan J in *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch) at Annex I and said this at [213] to [216]:

> "213. In *Digicel* (Annex I, at [61] and [77]) Morgan J held that a director can conspire with a company of which he is a director (he was not there addressing the position of a sole controller). Whether or not he had done so was, the judge observed, dependent upon a detailed examination of the facts and also subject to what he described as the limitation in *MCA Records v Charly Records*.
>
> 214. Mr Bradley relied himself upon *MCA Records v Charly Records* though this was really for the purpose of equating Michael's position (not Christopher's) to that of Mr Young in that case. In his closing submissions in reply, Mr Bradley reminded me of the way that Michael's non-constitutional control of HHL, and his involvement and participation in its affairs, was pleaded in the APOC (para. 40.4), the Reply (paras. 13, 17 and 27) and the Response (No. 17) to the Request for Further Information.
>
> 215. So far as Christopher's potential personal liability is concerned, the judgment of Chadwick LJ in *MCA Records v Charly Records* shows that this may hinge upon an "elusive question" (as Rimer J at first instance had put it). But it is clear that liability on the part of a director for the tort of conspiracy can arise where the company itself is also a wrongdoer. So much is clear from the judgment of Chadwick LJ (with whom Tuckey and Simon Brown LJJ agreed). He said (at [37]) "the relevant enquiry is whether he has been personally involved in the commissions of the tort to render him liable as a joint tortfeasor" and (at [41]) "would A's involvement in the acts of B be such as to give rise to liability as a joint tortfeasor if A were not a director of B". These statements were made by reference to a number of authorities and the judge was addressing the position of joint tortfeasors generally. They included *The Koursk* [1924] P

> 140, at 156, and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, at [20]-[21], and Chadwick LJ recognised that a director who becomes concerned with his company in a joint act done in pursuance of a common purpose, or who procures or induces the company to commit the tort, himself becomes a joint tortfeasor.
>
> 216. It is certainly not the case, therefore, that a director cannot be personally liable in tort for acts taken by him in that capacity any more than it is the case that merely acting as a director or employee will result in the office-holder being jointly liable for any tort committed by the company with his involvement. As Morgan J said in *Digicel*, the question will involve a detailed examination of the facts, subject always, in a case of conspiracy, to the observation I have made about the doubt over a claim which is made only against a company and its sole controller. The claimant needs to show a degree of involvement in the tort on the part of the director, and that his acts (and, where relevant, intention) are sufficiently bound up in the company's acts, to make him personally liable. In this case, the thrust of PB's allegations against Christopher is that he in fact abnegated his duties to HHL and knowingly, and therefore without any good faith on his part, permitted the company to carry into effect Michael's conspiratorial designs."

(2) Combination

666. I am satisfied that from 20 June 2019 Mr Connolly combined together with Mr Alford to negotiate with the Suiteholders to purchase Ensign House on behalf of a new company to be formed or acquired for that purpose. I also find that Mr Connolly was not simply carrying out his constitutional function as a director of FEC UK but that he performed all of the relevant acts or gave the relevant instructions on behalf of both companies so that he should be treated as one of the combining parties. I also find that on its incorporation on 10 October 2019 EHFL joined the combination because it was acting through the agency of Mr Connolly.

(3) Intention to Injure

667. The critical issue in relation to the conspiracy claim is whether any of the four Defendants (including Mr Alford) had the intention to injure EHL. Ms Wicks and Mr Lee did not submit that either Mr Connolly or Mr Alford had the predominant purpose of injuring EHL and, in my judgment, they were right not to do so. Although both Mr Connolly and Mr Alford had reason to be angry with Mr Downer, I am satisfied that their predominant purpose was not to cause EHL harm but to promote their own interests and the interests of FEC. I am satisfied, therefore, that this is not a category 1 case in Calver J's classification in *ED&F Man Capital Markets*.

668. In my judgment, however, Mr Connolly and Mr Alford sought to secure their end (the purchase of Ensign House) by a means which they knew to be unlawful (committing breaches of the NDA and misusing Confidential Information). I have found that Mr Connolly and Mr Alford both knew that it was a breach of the NDA to approach the Suiteholders directly. I have also found that they both knew that all of the Information which Ms McGinn sent to Ms Sutherland on 30 January 2019 was Confidential Information. Finally, I have found that both Mr Connolly and Mr Alford knew that the Price Allocation Schedule and the Option Incentives Table were confidential. Accordingly, I am satisfied that this is a category 2 case and that Mr Connolly and Mr Alford intended to injure EHL.

669. Mr Seitler submitted that neither Mr Connolly nor Mr Alford had the intention to harm EHL because Mr Downer was "out" by January 2019 and the Suiteholders were done with Mr Downer's "offer". I have held that Mr Connolly believed Mr Alford when he said that Mr Downer had lost interest in Ensign House and I am prepared to accept for the purposes of this issue that Mr Alford believed this too although he did not give evidence. It follows, therefore, that Mr Seitler's submission reflects Lord Hoffmann's statement in *OBG v Allan* that one may intend to cause loss without intending to procure a breach of contract or, in this case, to commit one.

670. Despite the attractive simplicity of Mr Seitler's argument, I am unable to accept it for reasons which I now explain. I accept that the mental element for unlawful means conspiracy is an intention to injure and that an intention to commit a breach of contract is not necessarily the same. However, they often are. Where the contract confers valuable rights on C, a breach of contract by D1 necessarily involves causing harm to C. Moreover, where D1 combines with D2 to violate those rights by committing a breach of contract, they necessarily intend to cause harm to C.

671. Moreover, in my judgment it is no answer for D1 and D2 to say that they thought the rights had no commercial value or that they believed C had no use for them or would not exercise them. If it is not a defence for them to say that they believed that they were lawfully entitled to act as they did, it cannot be a defence for them to say that the invasion of C's rights was justified because they had no value. It is no defence because it is not for D1 and D2 to decide what value to place on C's rights and also because the law does not recognise a defence of justification. I agree with His Honour Judge Russen QC that

if D1 and D2 have agreed to deploy unlawful means and harm to the claimant has resulted, their conduct cannot be both unlawful but also justified.

672. Take a very simple variant of the facts in *Meretz* (above). D1 grants an option over development land to C to buy it for market value. The option agreement contains a covenant not to charge the land or sell it to a third party. D1 enters into a joint venture with D2 to raise money to develop the land and they charge the property to D3 which is an associated company of D2. D3 then enforces the charge depriving the option of any value. Both D1 and D2 know that the charge to D3 will involve a breach of the option agreement by D1. But they decide to take the risk that C will not enforce it because they think that C is no longer interested in acquiring the land. In my judgment, it is no answer for D1 or D2 to say that they did not believe that C ever intended to exercise the option or that they believed that the option rights were worthless.

673. So far so good. However, this analysis only applies if the NDA can be treated as conferring valuable rights on EHL. In my judgment, it did. In construing the NDA I have held that a reasonable business person would have regarded EHL's interest in Ensign House as a valuable one. Moreover, confidential information only retains its value if it remains confidential and its recipients comply with their duty to keep it confidential. It seems to me that where they combine to misuse it for their own ends, then they have caused damage. I am satisfied, therefore, that Mr Connolly and Mr Alford had the necessary intention to injure EHL even though they believed that Mr Downer had lost interest in Ensign House.

(4) Unlawful Means

674. I find that FEC UK, EHFL, Mr Connolly and Mr Alford used unlawful means to acquire Ensign House. FEC UK committed breaches of the NDA, Mr Alford committed breaches of fiduciary duty and Mr Connolly, Mr Alford and EHFL committed breaches of the equitable duty of confidence and misused Confidential Information. I have found that Mr Connolly did not know or turn a blind eye to the fact that Mr Alford was a fiduciary. But in my judgment, this does not prevent an actionable conspiracy arising. He had the necessary intention to harm or injure EHL. This is enough.

VIII. Causation

675. EHL advanced alternative cases on causation which turned on the Court's assessment of Mr Downer's conduct and what he would have done if the Defendants (including Mr Alford) had not committed the relevant breaches of duty which I have found (above). I will call them "**Limb 1**" and "**Limb 2**". EHL also divided Limb 2 into two further alternatives which I will call "**Limb 2A**" and "**Limb 2B**". It was common ground that EHL had to prove its own actions to the civil standard on a balance of probabilities and that where it relied on the actions of the Suiteholders it had to prove that there was a real and substantial chance that the Suiteholders would have taken the relevant action.

676. Ms Wicks and Mr Lee also submitted that the same standard of proof must logically apply whether the claim was for breach of contract, breach of confidence or breach of fiduciary duty. They cited *Bugsby Property LLC v LGIM Commercial Lending Ltd* [2022] EWHC 2001 (where the claim was for breach of contract), *Jones v IOS* (above) (where the claims were for breach of contract and breach of confidence) and *Také Ltd v BSM Marketing Ltd* [2007] EWHC 3513 (where the claims were for breach of fiduciary duty including breach of confidence). Mr Seitler did not challenge this submission and I accept it. It must be right as a matter of logic that if the same test is to be applied to the same evidence (whatever the cause of action), the Court should apply the same standard of proof.

(1) Limb 1

677. EHL's primary case was that if the Defendants (including Mr Alford) had not committed the relevant breaches of duty, EHL would have exploited its position in relation to Ensign House by progressing negotiations for options over all 18 Suites and that, if it had done so, there was a real and substantial chance that all of the Suiteholders (including Lama) would have granted options to EHL to acquire their Suites by 28 February 2020.

678. I begin with the relevant counterfactual analysis. Ms Wicks and Mr Lee submitted that if the Defendants had complied with their contractual and equitable obligations, they would not have pursued the Ensign House opportunity independently but would have taken one of the following courses of action: (i) they would have walked away from Ensign House entirely, (ii) they would have waited for EHL to acquire all 18 options and then acquired these options from EHL or (iii) they would have acquired EHL's position immediately and taken forward the negotiations themselves.

679. Ms Wicks and Mr Lee accepted that even on the relevant counterfactual analysis EHL would have permitted FEC to pursue negotiations with Lama. I have found that EHL authorised FEC to explore negotiations with the SFO and to enter into the Exclusivity Agreement. I have also found that the turning point came on 31 May 2019 and that FEC UK began to use Confidential Information for an unauthorised purpose from that date. In my judgment, that date is the appropriate time at which to test the three alternatives (above).

680. The counterfactual analysis required in this case seems to me to involve an additional factor which is not so often present in other cases. By 31 May 2019 Mr Downer had permitted Mr Connolly to use Mr Alford and to take control of the negotiations with Lama. He was therefore passive and his course of action would have been dictated by FEC's behaviour. Moreover, Ms Wicks and Mr Lee effectively conceded that the Defendants could have lawfully complied with their contractual and equitable obligations in the three separate ways which I have set out (above). The question for the Court is what standard to apply to FEC's conduct and which of those alternatives to choose.

681. It seems to me that there are three possibilities. First, the Court could apply the principle which usually applies to the assessment of damages for breach of contract, namely, that a defendant is assumed to have performed his or her obligations in the way least onerous and most beneficial to their own interests: see *McGregor on Damages* 21st ed (2021) at 10—111. Secondly, the Court could assess the defendant's conduct on the balance of probabilities in the same way as the claimant's conduct or, thirdly, the Court could assess damages on each alternative basis by reference to loss of a chance principles (provided that the claimant can prove on a balance of probabilities that he would have reacted positively in each hypothetical situation).

682. In my judgment, the appropriate course in the present case is to decide on a balance of probabilities what FEC or Mr Alford would have done on or immediately after 31 May 2019 if they had complied with their obligations and then decide how EHL would have acted in response to their actions. However, in case this is the wrong approach I go on to express my views briefly on the alternatives.

683. I have found that Mr Connolly considered Ensign House to be a valuable commercial opportunity whether or not EHL held binding options over the 17 remaining Suites. I

have also found that he knew that FEC UK was acting in breach of the NDA by pursuing negotiations directly with the Suiteholders but that he was prepared to take the risk that EHL would not enforce the NDA. In my judgment, the right question to ask is what Mr Connolly would have done if he and his principals had been unwilling to take that risk but had been concerned to comply with the terms of the NDA.

684. I find that it is more probable than not that in those circumstances Mr Connolly would have instructed Mr Alford to report on the outcome of the negotiations with Mr McGarry and Mr Ammora to Mr Downer and to arrange a meeting or discussion in which Mr Connolly would have asked Mr Downer to release FEC from the NDA so that it could pursue the opportunity to purchase Suite 14 and, if that was successful, to pursue the opportunity to purchase the remaining Suites. I also find that it is more probable than not that if Mr Connolly had made such an approach, Mr Alford would have asked Mr Downer to release him personally from any obligations which he owed to EHL so that he could act for FEC in the negotiations with Lama and any subsequent negotiations with the Suiteholders.

685. I turn, therefore, to consider how Mr Downer would have acted himself if Mr Connolly and Mr Alford had made this approach. Mr Downer identified three possible ways in which he would have reacted to such an approach in his witness statement and I have set them out (above). His evidence in his witness statement was that his preference would have been to take over the negotiations himself:

> "On balance, my preference would probably have been option (a) above, because I would have preferred to retain control over the options in Ensign House. There seemed to be a very good prospect of resolving the Lama issue (and indeed, in reality it was successfully resolved). So even if FEC or Rockwell had walked away from the deal, EHL would have simply tied up the loose ends and resolved the matter with the SFO ourselves (much in the same way FEC eventually did), and secure all 18 options. I imagine that could have been done at the latest by February 2020 (which was when FEC's own deal was completed), possibly earlier. Once that was done, we would have been in a very good position to market the options themselves, bearing in mind the potential development profit of Ensign House was considerable."

686. I have no doubt that Mr Downer had convinced himself by the trial that he would have taken back control of the negotiations himself and that he would have been able to persuade the Suiteholders to complete the options. However, I do not accept his evidence

for the following reasons:

(1) I have found that by the end of January 2019 Mr Downer believed that EHL had "had its turn" and was no longer prepared to fund any of the costs of negotiating with the Suiteholders. I have also found that he was prepared to give FEC its turn to negotiate with Lama.

(2) I am not satisfied that the situation had changed so radically by the end of May 2019 that Mr Downer would have changed his mind. There had been some progress but Mr Ammora had only agreed to enter into the Exclusivity Agreement and the SFO had not yet agreed to permit any kind of sale. Indeed, Ms Wicks submitted on EHL's behalf that the Exclusivity Agreement was not binding on Lama at all.

(3) Moreover, Mr Ammora had made it clear to Mr Alford in his wish list that he wanted an outright sale of Suite 14 and Mr Downer knew this (as he accepted in evidence). It was even less likely that Mr Ammora would grant an option for £1 to EHL (with or without the SFO's consent).

(4) It was also obvious to Mr Downer from Mr Ammora's wish list that it would be necessary for him to fund Mr Ammora's legal costs and further expenses. I can see no reason why Mr Downer would have agreed to do this at the end of May 2019 if he was not prepared to fund them two months earlier.

(5) Mr Downer did not suggest that he would have conducted any further negotiations himself. But I have found that after the sale of Quay House he did not care about Mr Alford's goodwill and would not agree to his revised fee proposal. Mr Downer was not prepared to trust Mr Alford to negotiate with Rockwell and described his attitude to Rockwell as "holy water on the devil".

(6) Mr Downer had not progressed the negotiations with any of the other Suiteholders whilst Mr Connolly and Mr Alford were making initial contact with Lama. On 28 January 2019 Mr Downer refused to pay Ms Boulton's fees capped at £3,800 plus VAT and he was no closer to agreeing options over the other 17 Suites.

(7) Finally, Mr Downer's evidence on this point was not compelling and did not carry any real conviction. He was only able to say that on balance he would probably

have chosen option (a) (above). I am satisfied that his evidence was almost entirely coloured by hindsight and the knowledge that EHFL had been able to achieve what he had been unwilling or unable to do.

687. I find on a balance of probabilities that EHL would not have progressed negotiations for the grant of options by the Suiteholders if Mr Alford had reported to Mr Downer on the progress of the discussions with Lama and Mr Connolly and Mr Alford had approached him to be released from their obligations at the end of May 2019. I, therefore, dismiss EHL's claim based on Limb 1. In case my decision on this issue is wrong, I go on to consider whether there was a real and substantial chance that Lama or the other Suiteholders would have agreed to grant options to EHL in Section (4) (below).

688. I add that at various points during his evidence Mr Downer stated that he would if necessary have been prepared to purchase Suite 14 or the other Suites outright. For example in re-examination, Ms Wicks asked him what would have been a successful outcome to the negotiations between FEC and Mr Ammora:

> "Q. What would have been a successful conclusion of that work from your perspective at the time? A. That he would have agreed the deal with Mr Ammora, the SFO and that would have led to me tying up the deal with Lama. Q. Right. So when you say "the deal", what was the deal with Lama that you envisaged tying up? A. Well, my preference, my Lord, was the option deal, of course. But if I needed to pull the trigger and write the cheque out to do the deal and give the 900,000 or 2 million, I would have done it."

689. The possibility that EHL might buy Suite 14 or any of the other Suites outright did not form part of EHL's case on Limb 1 but, in any event, I reject this evidence. On 19 February 2019 Mr Downer knew that Mr Ammora wanted an outright sale of Suite 14 when he saw the wish list (as he accepted in evidence). He could have pulled the trigger and written the cheque then. But he chose not to do so but rather to give FEC its turn. If Mr Downer had been at all serious about buying Suite 14, I have no doubt he would have taken that opportunity to test the water with Mr Ammora himself and if Mr Ammora had refused to grant an option, Mr Downer would have made him an offer then and there. In my judgment, Mr Downer's evidence on this issue was also clouded by hindsight and the knowledge that FEC had been able to buy Suite 14 a year later.

690. I turn briefly to consider the other two alternatives and, in particular, what EHL would

have done if FEC had either walked away from Ensign House or waited for EHL to acquire options over all 18 Suites. I have found that Mr Downer would have been proactive and chased Mr Alford frequently if he had any intention of pursuing the negotiations with the Suiteholders or in engineering a competitive bidding situation between FEC and Rockwell. I am not satisfied on a balance of probabilities that Mr Downer would have taken any action at all to progress the negotiations with Lama or the other Suiteholders if FEC had made no further contact with EHL and simply walked away from Ensign House after the end of May 2019. I, therefore, dismiss EHL's case on Limb 1 on both of these alternatives also.

(2) Limb 2A

691. EHL's first alternative case was that it would have progressed negotiations with the remaining Suiteholders and acquired options over the remaining 17 Suites. This was very much EHL's fall-back position and designed to meet Mr Seitler's argument that the Exclusivity Agreement prevented Lama from granting an option to EHL over Suite 14. In the event, I dismiss EHL's case on Limb 2A for the same reasons as I have dismissed EHL's case on Limb 1. Indeed, I consider it even less likely that Mr Downer would have re-opened negotiations with the remaining Suiteholders if Lama and the SFO were no longer able to negotiate directly with him.

692. It is also unnecessary for me to decide whether the Exclusivity Agreement was binding or whether it prevented Lama negotiating with EHL for the grant of an option. The real significance which I attach to the Exclusivity Agreement is that Mr Downer was (as I have found) prepared to consent to Lama entering into an Exclusivity Agreement with FEC. Mr Downer had no way of knowing whether it was binding because he never even asked to see a copy at the time. Ms Wicks and Mr Lee accepted that Suite 14 was the key to unlocking Ensign House. But Mr Downer did not care enough about Suite 14 even to discover what terms FEC had agreed with Lama. Moreover, they never gave a credible explanation for Mr Downer's willingness to give FEC the first chance to obtain the key to unlock the door.

(3) Limb 2B

693. EHL's second alternative case was that it would have sold its position in Ensign House to a third party and enabled it to take the benefit of the work which it had carried out.

Given the findings of fact which I have made about Mr Downer's conduct, I am satisfied that this is the most likely outcome and I find on a balance of probabilities that if Mr Connolly and Mr Alford had approached Mr Downer at the end of May 2019 and asked to be released from their obligations, Mr Downer would have agreed to release FEC UK in return for the payment of a fee and would have also agreed to release Mr Alford from his retainer and any obligations of confidence.

694. So far, I have adopted a counterfactual analysis which assumes that Mr Connolly would have approached Mr Downer. But I bear in mind the fact that Mr Alford owed separate and independent duties to EHL. For the sake of completeness, therefore, I have considered what the outcome would have been if Mr Alford had reported back to Mr Downer about the negotiations between FEC and Mr Ammora and the SFO but FEC had either walked away or done nothing.

695. In that event, I am also satisfied on a balance of probabilities that Mr Downer would have approached Mr Connolly directly with a view to selling him EHL's position. Mr Downer had attempted to sell his position to Rockwell the previous summer under an NDA and he continued to try and do so even after Rockwell had "de-coupled" Quay House and Ensign House. In my judgment, he would have used the NDA as the basis for a similar negotiation a year later. Indeed, Mr Alford prepared the Options Incentive Table in the context of those very negotiations.

(4) Mr Connolly

696. Finally, if Mr Connolly had approached Mr Downer or Mr Downer had approached Mr Connolly, I find that Mr Connolly would have agreed to pay a premium to EHL for its position and to be released from the NDA. I am quite satisfied that Mr Connolly would have agreed to pay a premium but only on the basis that it would become payable if FEC was able to acquire all 18 Suites. I consider the rationale and the amount of such a premium in the assessment of damages (below).

(5) The Suiteholders

697. If I am wrong to reject Limb 1 and Limb 2A, I briefly state my conclusions in relation to the conduct of the Suiteholders. If it had been necessary for me to do so, I would have found that there was a real and substantial chance that all of the Suiteholders apart from

Lama would have agreed to grant options to EHL for £1. I consider that after the sale of Quay House, the Suiteholders would have held out for a substantial deposit or conditional contracts given that EHL was no longer a special purchaser with an incentive to buy Ensign House. However, I accept that Mr Downer was a tough negotiator and that there is a substantial chance that he would have worn them down and they would have agreed to grant options to EHL on his terms. But I would have valued that chance at no higher than 30%.

698. I would also have found that there was a real and substantial chance that Lama would have agreed to grant an option to EHL to purchase Suite 14. But I would have found that this chance was relatively small and I would have valued it at no higher than 15%. I have rejected EHL's case that Mr Ammora was willing to grant an option and that FEC was negotiating the terms of the option agreement with him until a relatively late stage. Indeed, it is clear from Mr Ammora's wish list that he was always looking for an outright sale. I also consider that the grant of an option would have been unattractive to the SFO. Nevertheless, I am prepared to accept that there was a small chance (but one above the relevant threshold) that Mr Downer would have persuaded Lama to grant an option for £1.

699. EHL's pleaded case did not specify the terms on which the Suiteholders would have granted options. In its final form EHL's case was that it would have progressed negotiations for "its options" and that there was a real and substantial chance that the Suiteholders would have granted them. I have found that there was a 15% chance that Lama would have agreed to grant an option to EHL for £1 and a 30% chance that the remaining Suiteholders would have agreed to do so. In my judgment, however, those chances would have significantly improved if EHL had agreed to pay a substantial premium for the options or agreed to enter into a conditional contract and pay a deposit. However, given my primary findings I do not consider these possibilities further. They were not pleaded or addressed in detail at the trial.

700. Finally, I record that I would have rejected Mr Seitler's argument that the way in which EHL had negotiated with both the Suiteholders and third parties was fundamentally dishonest and that this claim falls outside the category of lost claims for which damages are assessed on a loss of a chance basis: see *Perry v Raleys Solicitors* [2020] AC 352 at [26] (Lord Briggs). I have made detailed findings in relation to the individual points

which Mr Seitler put to Mr Downer and although he accepted that he had lied to Jigsaw, I have not found that he lied to the Suiteholders. I have found that Mr Downer received and made use of privileged and confidential information (including the Price Allocation Schedule). But Mr Holliday and Mr Plant volunteered this information and Mr Alford sent it to him and I am not satisfied that this would have been sufficient to put EHL's claim into the category of claim identified by Lord Briggs in *Perry v Raleys* (above).

(5) The Pleading Point

701. Mr Seitler took two points in his closing submissions which I must also address. The first was a pleading point. He submitted that it was not open to EHL to advance a case that it would have negotiated with FEC for a release from the NDA or to release Mr Alford from his obligations because this was not the way in which Limb 2B was pleaded. He also submitted that it was not open to Ms Wicks to argue that Mr Downer would have bargained for a profit-sharing arrangement (as he had attempted to do with Rockwell).

702. Mr Seitler was correct to point out that paragraph 44D of the Re-Re-Amended Particulars of Claim (in which Limb 2B is pleaded) is primarily directed to a sale of EHL's position to a third party rather than to FEC itself:

> "Alternatively, EHL would have exploited its position by allowing a third party (such as Rockwell) to take the benefit of the work it had already carried out in relation to the Property in return for payment of a sum of money or other consideration. Such arrangement (in effect, a "sale" of its position in relation to the Property) would have been implemented on in or around June/July 2019 by:
>
> (1A) EHL completing attempting to complete the options with all leaseholders save Lama (EHL contends that it has lost the chance to do so, and that there was a least a real and substantial chance that these 12 leaseholders would have granted EHL an option to acquire their interest in Ensign House), and assigning these options to the relevant third-party buyer; and/or
>
> (1) EHL making the Information available to the third party and allowing the third party to complete its own deal with the benefit of the Information (whether by securing options along the same lines as EHL or purchasing the Property outright as EHFL later did); and/or
>
> (2) EHL making the services of Mr Alford available to the third party. Mr Alford had been closely involved in the discussions with the owners and had got to know them, their interests and aspirations very well. As a consequence of his fiduciary duties to EHL, he was not free to assist other

> parties to acquire the Property but EHL could have agreed to permit him to assist the third party as part of any deal with the third party.
>
> This was, in effect, the kind of arrangement from which FEC UK and EHFL benefited, save that the use of the Information and Mr Alford's service took place without EHL's knowledge and consent and without making any payment to EHL. On this alternative case, and on the basis that it was a virtual certainty that the non-Lama Suiteholders would have granted EHL an option had EHL sought to complete the existing deal, EHL's loss is the amount it would have received from the third party pursuant to the arrangement. This will also be a matter for expert evidence. EHL believes that the amount is substantial and not far below the difference between the price payable under the options and the true market value of the Property."

703. The pleaded case (above) fairly reflects the case which Ms Wicks ran on Limb 2B both in her written and oral closing submissions. However, I have found that Mr Downer would not have sold his "position" to a third party such as Rockwell but would have sold it to Mr Connolly by releasing FEC UK from the NDA and Mr Alford from his retainer. The issue which I have to decide is whether I should simply dismiss the claim on Limb 2 on the basis that EHL failed to prove its pleaded case or whether I should go on and assess damages on the basis of the facts as I have found them to be.

704. In my judgment, the facts as I have found them, fall within EHL's pleaded case and the appropriate course is to go on and assess damages rather than dismiss the claim. It is clear from the first sentence of the first paragraph and the first sentence of the last paragraph (above) that EHL's case was that FEC took advantage of EHL's position without paying the price which Mr Downer would have been able to secure from a third party. In my judgment, EHL is entitled to recover damages on that basis. Moreover, if there were any doubt about the basis for the claim Mr Downer explained it in his witness statement:

> "But I was also open to options (b) and (c) above. If FEC had not breached the NDA, I expect that they (or really, any other third party buyer like Rockwell) would have approached us to negotiate a deal to take over our position in Ensign House sometime around February or March 2019."

705. I had considerable sympathy with Mr Seitler's position and Ms Wicks could hardly complain about being held to her pleaded case given the importance which she attached to the admission made by the Defendants (above). However, for the reasons which I have given I am satisfied that EHL is entitled to damages on the basis of the facts as I have found them to be.

706. Nevertheless, I accept Mr Seitler's submission in relation to a profit-sharing arrangement. EHL's case on Limb 2B (above) was that it would have sold its position "in return for a payment of a sum of money or other consideration". It did not refer to a joint venture or agreement under which EHL would be entitled to a profit share on the development of Ensign House. But in any event, I am not satisfied that Mr Downer would have tried to engage FEC and Rockwell in a bidding war and held out for a profit-sharing arrangement in negotiations with FEC. I say this for two reasons.

707. First, the contemporaneous documents show that Mr Downer hoped to persuade FEC to pay a premium of up to £4 million for the options. I was taken to no documents in which he instructed Mr Alford to put forward a profit-sharing arrangement. But, secondly, Mr Downer had no proprietary or contractual interest in Ensign House to sell. Mr Downer proposed a profit-sharing arrangement to Rockwell on the basis that EHL would obtain binding options over either 17 or 18 Suites and that Investin would then sell 80% of the shares in EHL to Rockwell in return for a share of the development profit. This kind of deal was not available to him at the end of May 2019.

(6) Board Approval

708. Finally, Mr Seitler pointed out that in his oral evidence Mr Downer was at pains to emphasise that EHL's decisions were made by its board of directors in Jersey but it gave no disclosure and called no evidence to prove what attitude they might have taken in the hypothetical situations which I have considered above. I accept that criticism. Indeed, until I asked for a list of the directors of EHL, I had no real idea who they were or had been at the relevant time and I was not taken to the minutes of any meetings of the board of directors to show what views they held about Ensign House at any time over the period between 2014 and 2020.

709. However, I am not satisfied that this is a ground for dismissing the claim on Limb 2B. Mr Downer was the principal decision-maker and I have no doubt the board of directors in Jersey would have deferred to his commercial views unless they thought that to do so would have put them in breach of their duties as directors. Nevertheless, I am satisfied that the failure to call any of the other directors is an additional reason for caution in relation to Mr Downer's evidence. They would have been able to shed light on Mr Downer's attitude to the negotiations with the Suiteholders and how he would have

behaved at the end of May 2019.

(7) Conclusion

710. I dismiss EHL's claims on Limb 1 and Limb 2A but I accept EHL's claim on Limb 2B. I find on a balance of probabilities that if Mr Connolly had not been prepared to commit a breach of the NDA, he would have approached Mr Downer and asked for a release. I also find on a balance of probabilities that Mr Downer would have negotiated a fee to release FEC UK from the NDA and released Mr Alford from his retainer rather than instruct him to progress negotiations with Lama or the Suiteholders on behalf of EHL. Finally, EHL has not satisfied me on a balance of probabilities that Mr Downer would have progressed those negotiations itself if FEC had walked away from Ensign House or, indeed, waited for EHL to take further action. I therefore go on to assess damages on that basis.

IX. The Market Value of Ensign House

711. On 12 July 2022 Ms Seal made her first report ("**Seal 1**") and on 2 September 2022 she updated it to deal with the Superior Leases ("**Seal 2**"). On 21 September 2022 she made a report in reply to Mr Johnston's first report ("**Seal 3**") and on 20 November 2022, very shortly before trial, she made a second supplemental report ("**Seal 4**"). On 12 July 2022 Mr Johnston made his first report ("**Johnston 1**") and on 21 September 2022 he also made a reply report ("**Johnston 2**"). On 20 October 2022 Ms Seal and Mr Johnston made their joint statement (the "**Joint Statement**") and on 3 November 2022 Mr Johnston made an amendment to the Joint Statement ("**Johnston 3**"). Both experts were instructed to value Ensign House as at 28 February 2020 and also to value EHL's position as at 1 June 2019. Both adopted the definition of Market Value set out in the RICS Valuation Standards (the "**Red Book**") which is as follows:

> "The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's-length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

712. Ms Wicks and Mr Lee submitted that by definition the successful bidder in a competitive market is the one which bids the highest and that in this context, it is the developer who takes the most optimistic view of what it can build on the Property. A cautious or

pessimistic bidder will be outbid by another prepared to take on greater risk with the potential for greater profit. I accept those submissions.

713. Both experts used a residual appraisal or valuation ("**Residual Valuation**") as their primary method of arriving at the Market Value of Ensign House. They also cross-checked that against open market comparable transactions ("**Comparable Valuation**") although the weight which they attributed to that exercise differed. In Seal 1, Ms Seal gave a helpful description of a Residual Valuation:

> "I have primarily assessed the value of the Property by the residual method. The residual method is based on the concept that the value of a property with development potential is derived from the value of the property after development minus the cost of undertaking that development, including a profit for the developer. The approach of a residual appraisal is to calculate the total gross development value (i.e. income) of each element and subtract from this the total development cost, including construction costs, marketing costs and profit. Also subtracted are associated site costs including fees, finance costs and stamp duty. The sum that remains equates to the residual 'value' of the site."

714. Ms Seal then pointed out that because there was no planning permission for Ensign House, a purchaser would consider different potential planning outcomes. For this reason she had run two models which depended on the amount of affordable housing which Tower Hamlets LBC imposed as a condition of granting planning permission. The first model reflected the same assumption as Mr Johnston, namely, that a purchaser would be required to provide 35% by habitable room or 26.2% by unit of affordable housing and the second model (which she described as the "market-facing" scheme") reflected affordable housing of 17% by unit.

Z. The Residual Valuation

715. Ms Seal and Mr Johnston were agreed on a large number of the inputs required for the Residual Valuation: the total floor areas, the affordable residential rate, the number of car parking spaces, the gross development value ("**GDV**") of the ground floor commercial space and the clubhouse on the 38th floor of the proposed development, the developer's profit, the construction costs, the marketing, letting and disposal fees and the pre-sales and run off period for financing costs.

716. The experts were unable to agree on three critical inputs which had a significant impact

on the residual value: the GDV of the private residential units, the affordable housing ratio and professional fees. The first two inputs were closely linked because a reduction in the affordable housing ratio increases the number of private residential units. In the event, I made a provisional determination on three alternative bases and with the consent of the parties I asked Ms Seal and Mr Johnston to run three Residual Valuations for me. They agreed those valuations and, with the consent of the parties again, they provided them to me on a confidential basis. I explain them in greater detail below.

(1) The Development

717. In theory, there are a range of developments which a purchaser might have in mind before bidding to acquire Ensign House. Both experts took a pragmatic view and assumed that a purchaser would make an offer to acquire the property on the basis of the plans as submitted by MLA on behalf of EHFL (subject to the affordable housing ratio). Those plans envisaged a 56 storey tower of which levels 1 to 6 consisted of lobbies, community space and plant; levels 6 to 20 consisted of affordable housing; levels 21 to 37 consisted of private units, level 38 consisted of a floor of amenity space called the clubhouse and levels 41 to 55 consisted of private units.

(2) GDV: Private residential units

718. The principal issue between the parties was the sales rate for each private residential unit. Ms Seal's opinion was that it should be £1,275 per square foot ("**psf**"). Mr Johnston's opinion was that it should be £1,148 based on the comparables but he raised it to £1,200 to take into account the improvements in design and efficiency which a developer might expect to achieve throughout the development process. I expressed the view in opening that this is the kind of variance one might expect between the two opinions of highly experienced professional valuers (as both Ms Seal and Mr Johnston are). Nevertheless, I have to decide between these two opinions.

(i) The Data

719. Both experts relied on sales data derived from eight comparable towers (the Wardian, Landmark Pinnacle, the Madison, Aspen, Spire, One Park Drive, South Quay Plaza and 10 Park Drive) from which they derived an adjusted sales rate psf for each comparable. Ms Wicks and Mr Lee described in the closing submissions at Appendix 5 what Ms Seal

had done:

> "Mr Johnston having agreed to take the approach Ms Seal had originally adopted (i.e. to exclude floors other than 21-55 and dates other than 2017-Q1 2020 for comparables other than Aspen and 10 Park Drive), Ms Seal took upon herself the job of merging the two sets of data and weeding out the data which did not fall within the chosen sample or which was repeated. She flagged, by colouring in blue, the lines of data on which her and Mr Johnston's information differed: there were 3 such datapoints, of the 468 in total."

720. Mr Faulkner was critical of the way Ms Seal had gone about this exercise and Ms Wicks was critical of Mr Johnston in failing to ask for the merged datasets when he could and then criticising Ms Seal. It is unnecessary for me to resolve these issues because by the time they both came to give evidence, the experts were largely agreed about an overall sales rate psf for each building. Their rival sales rates are set out in the first table which I attach as Annex 1 and I will refer to it as the "**Comparables Table**". But it can be seen from the first line "Achieved Value according to data" that both Ms Seal and Mr Johnston were very largely agreed on the adjusted sales rate for each comparable.

(ii) Pricing Schedules

721. The way in which both experts arrived at their adjusted sales rate was to draw up a pricing schedule or "stack" of all the sales in each of the eight buildings to arrive at an adjusted sales price for each kind of unit on the relevant floor. Mr Johnston had disclosed his pricing schedule. Ms Seal did not disclose her pricing schedules. However, in Seal 3 she produced a series of tables for each comparable showing the conclusions which she had drawn from her pricing schedules. In each table she set out the unit type (studio, one bedroom, two bedroom, three bedroom), the minimum, maximum and average size, the minimum, maximum and average price and an overall average. Finally, she produced a table and a graph summarising the conclusions from her earlier tables: see Seal 3, ¶4.45.

(iii) The Comparables Table

722. This was not the end of the exercise which Ms Seal carried out in Seal 3, however. For each comparable she made percentage adjustments to each individual table for the following factors: unit size, views, heights, private amenity space, timing of sales, location and specification. She then produced a table headed "Private Residential

Comparables Table" in which she produced a sales rate psf after the adjustments. Immediately below the heading she stated: "The following shows the comparison with other schemes on a like for like basis."

723. Following the joint statement, Mr Johnston adopted the same approach and produced the first version of the Comparables Table. It showed Ms Seal's achieved sales value, her adjustments for each comparable and then the adjusted sales rate psf which her adjustments produced. It also showed his achieved sales value, his own adjustments for each comparable and then the adjusted sales rate psf which his adjustments produced. Mr Faulkner produced a final table which included all of the concessions which each expert had made during cross-examination and this is the version which I reproduce at Annex 1.

724. I should also record that in cross-examination Ms Seal fairly accepted that the achieved sales value for the Wardian was £1,280 and for South Quay Plaza was £1,288. Her achieved value figures for Landmark Pinnacle, Aspen, Spire and One Park Drive are the figures which Ms Seal produced from the merged data in Seal 3. There is a small difference between the figure which Ms Seal used for the Madison in Seal 3 and the figure given in the Comparables Table, which has been reduced from £1,146 to £1,125. This is because the net internal area of the individual units did not include "winter gardens" (which are a form of recessed balconies which both experts routinely included in the NIA of each comparable).

725. Although Ms Seal had produced the first version of the Comparables Table and had adopted the methodology which it illustrates, she tried to distance herself from it in cross-examination. Moreover, in their closing submissions Ms Wicks and Mr Lee submitted that the Comparables Table was "of very little use in understanding either Ms Seal's valuation or that of Mr Johnston". I disagree. I found the Comparables Table to be of real assistance in testing the evidence of the experts and I am satisfied that it is a reliable tool for deciding the appropriate sales rate. I have reached this conclusion for the following reasons:

    (1) Ms Seal used this methodology in Seal 3. She recognised that the most accurate way to adjust the comparables was to make a percentage adjustment for each factor and then to produce an adjusted sales rate psf for each comparable before standing

back to consider each figure. She herself described this as a comparison on a like for like basis. I agree with her.

(2) Ms Seal's principal objection to the use of the Comparables Table was that a purchaser in the open market would not carry out such an exercise or prepare such a table. I am prepared to accept that the purchaser of an individual flat would not carry out this kind of exercise in deciding whether to buy a flat in any of the comparable properties. I also accept that the table should not be used slavishly and that it is necessary for the expert valuer to stand back and look at the outcome in the round.

(3) But I also consider it likely that a hypothetical purchaser (or a lender) who wanted to buy the whole of Ensign House for development would take valuation advice. If such a developer instructed BNP Paribas or Knight Frank to advise them, they would have to find some method of analysing the comparables in a way which made sense in arriving at their valuations and presenting that evidence to their developer or lender client. The Comparables Table was one of the principal ways in which they presented their analysis to the Court.

(4) But whether or not a purchaser or a valuer acting for a purchaser would have adopted a similar methodology, I have to decide between the evidence of the two experts in this case. Ms Wicks and Mr Lee did not really explain how in practical terms I could decide what input to use in the Residual Valuation for the sales value psf if I simply ignored the Comparables Table. They urged me instead to adopt the "unit pricing" table and graph which Ms Seal had produced setting out prices by unit type for each of the comparables and for the subject property: see Seal 3, ¶4.49.

(5) However, the problem for the Court in using "unit pricing" was that Ms Seal had not produced her pricing schedules so that I could compare them with Mr Johnston's schedule and, if necessary, decide between them. Even then, the pricing schedules had not been adjusted and I would have had to decide how to adjust them. Such an exercise would have placed a very considerable burden on the Court.

(6) By contrast, I found the Comparables Table particularly useful in the present case because the experts were able to agree the comparative importance of the individual comparables and most of the adjustments (both whether to make them at all and, if

so, the percentage adjustment). This both narrowed the dispute between the experts and also gave me a framework to decide the issues between them. But in any event, the Comparables Table and a unit-pricing approach ought to produce the same result if the evidence presented to the Court was accurate.

(7) Finally, in cross-examination Ms Seal described the analysis in the Comparables Table as "at a very high level and indicative [in] nature". She also stated that: "It's useful to explain our conclusions but it was not a method of valuation." But later she said that a hypothetical purchaser would not do this kind of "microanalysis". It is difficult to see how the Comparables Table involved both a very high-level assessment and at the same time a counter-productive microanalysis. It is hard to resist the conclusion that Ms Seal distanced herself from the Comparables Table because she did not like some of the conclusions to be drawn from it.

(8) In conclusion, I am satisfied that the Comparables Table provided the most useful and practical means of deciding what was a very complex valuation issue on the evidence before me. Ms Wicks and Mr Lee's alternative either required me to re-invent the wheel myself or just accept Ms Seal's evidence and dismiss Mr Johnston's evidence as unreliable. I am not prepared to do so. I found them to be both reliable witnesses and I am satisfied that the Comparables Table provided the best and most objective way to decide between their opposing views.

(iv) The Adjustments

726. As I have stated, the value of the Comparables Table to me was that the experts were able to agree most of the adjustments and arrive at a very narrow range of figures for most of the comparables. It is difficult to resolve the remaining issues because they were subjective. The approach which I have taken is not to make a further adjustment unless there was compelling evidence for it and I could be sure that the view expressed by one of the experts was clearly wrong.

727. *Views.* Apart from a difference of 1% in relation to South Quay Plaza, there was a difference of 2% in relation to the Wardian. Ms Seal declined to split the difference between them and Mr Johnston gave me a detailed explanation for his percentage adjustment of -2%. I prefer Ms Seal's evidence on this point and that no adjustment should be made. The experts had already made adjustments for height and specification.

Given the proximity of the Wardian to Ensign House, it is not appropriate to make a further adjustment for views. It is also difficult to say what the view will be from a 56 storey tower until it has been built.

728. *Private Amenity Space.* I heard a great deal of evidence about private amenity space (i.e. external balconies and internal winter gardens). However, most of that evidence was directed at the consistency of Ms Seal's approach although Ms Wicks also suggested to Mr Johnston that his efficiency and optimisation savings might include external balconies. However, I am pleased to say that by the conclusion of the evidence both experts were agreed on the adjustments for balconies and winter gardens apart from a 2.5% difference between them for One Park Drive and 10 Park Drive.

729. In my judgment, it is unnecessary for me to decide that issue or, indeed, to decide whether Ms Seal changed her approach when she became aware that the FEC plans for Ensign House did not include balconies. One Park Drive and 10 Park Drive were less useful comparables and the difference between the experts on this issue was not decisive. Moreover, I am fully satisfied that Ms Seal was properly expressing her views in accordance with her duty to the Court. I return to Mr Johnston's efficiency savings again below.

730. *Development Amenities*. Mr Johnston made an adjustment of between -2% and -4% for each of the comparables because the FEC planned layout of the building had a limited and restricted amount of space available for development amenities. By contrast, Ms Seal made no adjustment to any of the comparables for this feature. Again, I prefer Ms Seal's evidence on this issue for the following reasons:

    (1) Mr Faulkner took me to the brochure for the Landmark Pinnacle which had three floors of amenity space and included a cinema room, indoor garden play area, an adult indoor garden, gym with spectacular views, private dining, golf simulator, games room, residents' lounge and full-floor roof terrace. He also submitted (and I accept) that the Wardian had a swimming pool, gym and spa, cinema room, sky lounge, rooftop observatory and private dining.

    (2) Mr Johnston's evidence in re-examination was that FEC was a special purchaser and would be able to give access to Aspen to the residential occupiers of Ensign House. He said that this explained the limited development amenities in the FEC

planned layout. However, I must approach this valuation on the basis that the purchaser is not a special purchaser with access to alternative amenity facilities.

(3) I have to arrive at a Residual Valuation of Ensign House on the valuation date based on the definition of Market Value (above). This means that I have to ignore the other amenities which FEC might have available at Aspen and look at the proposed building in isolation or that FEC might have been prepared to pay a higher price because it had other amenities available at Aspen.

(4) Mr Johnston accepted that his adjustment was based on the additional space or floor area of the amenities at the Wardian. His argument was that a purchaser in the open market would have to increase the amenity space and reduce the private sales space to compete with the Wardian or Landmark Pinnacle or to accept that the lack of amenity space would impact on the value of residential units. However, he accepted that to produce the kind of facilities at Landmark Pinnacle or the Wardian would require not only a reduction in private sales area but also significant increase in costs.

(5) Moreover, it is clear that a developer or purchaser to whom it sold on Ensign House would have to decide how to recover the costs of the amenities themselves. Mr Johnston produced an email dated 1 December 2022 in which Mr Steven Tennant, Ballymore's developments director, had provided the following information to Mr Connolly about the Wardian:

> "Further to our call and relating to your question regarding residents amenities/clubhouse/gyms, I confirm that although Ballymore as managing agent of our estates may appoint operators for our facilities, we do not rent them to third party operators. The operator may organise private rentals for residents or third parties, however any revenue surplus arising is recycled to reduce the service charge.
>
> There is a historic project, where the residents chose to reduce the scope of the service charge by renting out the gym. Similarly, at this project any revenue is solely for the benefit of the residents and service charge.
>
> We are also exploring projects where we will market new OMS residential projects "amenity free" or "amenity light", in an effort to reduce the headline service charge. In these instances, we will find commercial tenants, and the rent will be to the benefit of the landlord. But in these instances we will be clear in our marketing that the project does not have resident only facilities."

(6) It is clear from this, therefore, that Ballymore either has to bear the cost of the amenities or try to recover them through the service charge. It is also clear that the residents have taken steps to try and reduce the service charge by renting out the gym and that Ballymore is exploring other ways to try and reduce the service charge.

(7) I am not satisfied that a purchaser in the open market would make a reduction in its bid for the large and improved amenities at the Wardian. Both experts were agreed that they were valuing a mid-market scheme and Mr Johnston accepted that a smaller number of residents would be using the amenities at Ensign House. In my judgment, a purchaser might well consider it more attractive and profitable to adopt a scheme which maximised the private sales area and reduced development costs but was still able to generate one complete floor of amenity space on the 38th floor. This might also be attractive to a long-term investor given the lower service charges which would be required to maintain the amenities.

(8) Finally, as Ms Wicks put to Mr Johnston, it is hard to compare the glossy brochure produced for the Wardian or Landmark Pinnacle without seeing the brochure which FEC (or a subsequent building owner) would produce for Ensign House. I, therefore, err on the side of caution and make no adjustment.

731. *Timing of Sales/Developer Strategy.* These factors were only relevant to 10 Park Drive, where Ms Seal had made an adjustment of 11.25% for the timing of sales and Mr Johnston had made a 15% adjustment for developer strategy. It is unnecessary for me to decide these differences either for two reasons: first, because the data for 10 Park Drive was very historic and Ms Seal accepted that data for sales between 2015 and 2017 was less perfect (although she was not prepared to discard 10 Park Drive as a comparable). Secondly, it is unnecessary for me to decide this issue because the two adjustments cancelled each other out and the difference between Ms Seal's adjusted value and Mr Johnston's adjusted value was only £16 psf. I found it just as easy just to compare their final figures.

(v) <u>The Comparables: Analysis</u>

732. *The Wardian.* Ms Seal accepted that the Wardian was the best comparable. The parties agreed that the achieved sales value was £1,280 psf and the only adjustments on which

they disagreed were the views where Mr Johnston made an adjustment of -2% and the development amenities where Mr Johnston made an adjustment of -3%. I have rejected those adjustments and I accept that the appropriate adjusted achieved value for the Wardian is £1,194. This is higher than Mr Johnston's sales rate of £1,148 psf but lower than Ms Seal's sales rate of £1,275 psf.

733. *Landmark Pinnacle.* Ms Seal accepted that Landmark Pinnacle was a strong comparable. She also accepted that this was not only for its location but also because the adjustments required to the achieved value were small. I have accepted Ms Seal's evidence in relation to the adjustments and I accept that the appropriate adjusted achieved value for Landmark Pinnacle is £1,120. This supports Mr Johnston's sales rate of £1,148 and does not support Ms Seal's sales rate of £1,275.

734. *The Madison.* Ms Seal accepted that she would pay most attention to the Wardian, Landmark Pinnacle and the Madison because they were all good mid-market schemes. I have also accepted her evidence in relation to the adjustments and I accept that the appropriate adjusted achieved value for the Madison is £1,142. Again, this supports Mr Johnston's sales rate of £1,148 psf rather than Ms Seal's sales rate of £1,275.

735. *Aspen*. Neither expert placed much reliance on Aspen and the difference between their adjusted achieved values were very small. Ms Seal's figure was £1,127 and Mr Johnston's figure was £1,113. Ms Seal's evidence was that Aspen was one of the worst comparables because all of the sales were in the lower part of the building (and both experts made an adjustment of 21% for this factor alone). Given my conclusion in relation to development amenities, I accept that the appropriate adjusted achieved value for Aspen is £1,127. But even after this adjustment in Ms Seal's favour, the final figure supports Mr Johnston's sales rate of £1,148 psf rather than Ms Seal's sales rate of £1,275.

736. *Spire.* Ms Seal described the Spire and One Park Drive as at the luxury end of the market and both experts considered these two comparables to be worse than the other four. However, I attach significant weight to the Spire because the experts agreed on the data. They also agreed that the adjusted achieved value was £1,196 psf. Given their different methodologies and their different starting points, this is strong evidence that the data on which both experts relied was accurate and also that they got their adjustments absolutely right. Neither expert had much enthusiasm for the Spire. But this is because it did not

really support either of their sales rates. For that reason too, I give greater weight to it than they were prepared to do.

737. *One Park Drive.* There was nothing to choose between the data used by the experts. Ms Seal's evidence was that the achieved sales value was £1,401 and Mr Johnston's evidence was that the achieved sales value was £1,407. I adopt Mr Johnston's figure because it is more helpful to Ms Seal and he can hardly complain if I adopt it. Ms Seal made an adjustment of -2.5% for development amenities. Mr Johnston made an adjustment of -5% for private amenity space and -4% for private development amenities. For the reasons which I have given I accept Ms Seal's evidence that no adjustment is appropriate for development amenities and I split the difference for the private amenity space at One Park Drive and make an adjustment of 3.75%. This results in an overall adjustment of -14.75% which I round up to 15%. I find, therefore, that the appropriate adjusted achieved value is £1,196 based on Mr Johnston's achieved value of £1,407.

738. *South Quay Plaza, 10 Park Drive*. Ms Seal accepted that 10 Park Drive was also one of the worst comparables and that South Quay Plaza was better but not as good as the other comparables. 10 Park Drive was not a reliable comparable because of the historic nature of the data and South Quay Plaza involved asking prices which Ms Seal had discounted by 5% to 8% to reflect this fact. Nevertheless, I accept that these two comparables provide support for Ms Seal's sales value of £1,275 psf, particularly if no adjustment for development amenities is made.

(vi) Conclusion

739. I find that the appropriate sales rate before any savings for efficiencies and optimisation is £1,200 psf. In my judgment, the best evidence is the adjusted achieved value for the Wardian which I have found to be £1,194. The experts' agreement that the adjusted achieved value for the Spire was £1,196 also provides firm support for this conclusion and the adjusted achieved value for One Park Drive which I have found to be £1,196 provides additional support. Finally, the remaining five comparables are all within a bracket less than 10% either side of that figure which, as I have already stated, is the kind of variance one would expect between expert valuers of the skill and experience of Ms Seal and Mr Johnston.

740. Ms Wicks suggested that Mr Johnston made the uplift from £1,148 to £1,200 because he

was heavily influenced by the price which FEC had paid and because his sales rate produced a figure which was too low and not credible. I have dealt with Mr Johnston's credibility in section II (above). But I accept his evidence that the figure of £1,200 psf looks and feels right given his experience of the market, his knowledge of the relevant comparables and the detailed analysis which he has set out in the Comparables Table. I find, therefore, that the open market sales value of the development proposed on Ensign House is £1,200 psf.

741. Mr Johnston also made an uplift of £52 psf for efficiency and optimisation savings. It was his evidence that the specification which a hypothetical purchaser would adopt is fluid and that an experienced developer would expect to make further savings as they improved specification. He also confirmed that the kind of improvements which he had in mind were internal and would optimise the layout and attractiveness of the scheme but would have a nominal effect on costs. Ms Wicks challenged Mr Johnston's evidence on the basis that he was manipulating his sales rate to bring it in line with the actual purchase price which EHFL paid for Ensign House.

742. I accept Mr Johnston's evidence. It seems very likely that a hypothetical purchaser would expect to improve on the layout, design and specification of the development after purchase and as they became more familiar with the site and its problems and their plans became detailed. I am also satisfied that Mr Johnston was expressing his honest opinion that efficiency and optimisation savings could be achieved. Indeed, Ms Seal's evidence was consistent with his. She expressed the view that the net internal area for the proposed development could be increased although she used this as a justification for a lower developer's profit rather than an increase in the sales rate.

743. I find, therefore, that the hypothetical purchaser would add a small premium to the sales rate to reflect this expectation. Although Mr Johnston added £52 psf, I add £37.50 psf and I find on a provisional basis that the appropriate sales rate which a hypothetical purchaser would use in their Residual Valuation is £1,237.50 which is the mid-point between Ms Seal's sales rate of £1,275 and Mr Johnston's sales rate of £1,200.

(3) GDV: Affordable units

(i) Planning Policy

744. Ms Seal helpfully explained the planning policies which were relevant to affordable housing in the Joint Statement. She explained that the Mayor of London has set a strategic target of 50% of affordable housing across all sources of supply in the London Plan. She then continued:

> "The 50% affordable housing target was introduced in the 2001 London Plan. In August 2017, the Mayor adopted supplementary planning guidance ('Homes for Londoners: Affordable Housing and Viability SPG') which introduced a 'Fast Track' route with a reduced affordable housing target of 35% to encourage developers to increase the supply of affordable housing. However, a 'viability tested' route was retained to enable schemes that could not meet the reduced 35% target to come forward. These two routes have subsequently been incorporated into the 2021 London Plan. For the avoidance of doubt, the 'fast track' and 'viability tested' routes were in place in 2020. LB Tower Hamlet's Local Plan mirrors this approach."

745. Ms Seal also explained that the NPPF, the London Plan and the Tower Hamlets local plan all placed the onus on applicants who were not able to provide 35% affordable housing by habitable room to produce a "**Financial Viability Assessment**" or "**FVA**" which is typically considered at the planning application stage:

> "Applicants who are not able to provide 35% affordable housing and are seeking to utilise the 'viability tested' route must submit a 'Financial Viability Assessment' ('FVA') to the local planning authority to evidence the level of affordable housing they consider their scheme can viably provide. In their FVA, applicants provide a residual valuation of their proposal (the style of valuation that both myself and AJ have provided) which they compare to the 'benchmark land value' of the application site. The benchmark land value is established by valuing the existing use and adding a 'premium' to incentivise the landowner to release the land for development. The percentage of affordable housing entered into the residual valuation is adjusted until the resulting land value is broadly equal to the benchmark land value.
>
> The local planning authority will either review the FVA itself, or appoint external development surveyors to review it on their behalf. The reviewer will scrutinise the inputs to the appraisal, the supporting evidence, and the appraisal itself to ensure that the case the Applicant is seeking to advance is correct. This process typically involves a series of negotiations on inputs so that the local planning authority can satisfy itself that the outcome is robust and the level of affordable housing maximised."

746. Finally, Ms Seal stated that the Development Viability Team of BNP Paribas consistently reviews or originates 250 to 300 Financial Viability Assessments a year including tower

schemes of the kind which I have to consider in this action (and she gave three examples). She then explained that the GLA had created a suite of formulae to run "early" and "late stage" FVAs and she gave the following evidence about how those formulae operated:

> "At a technical level, appraisals are not routinely attached to the Section 106 agreement, contrary to AJ suggestion, where developers have sought (and LPAs agreed) sub-policy levels of affordable housing on 'Viability Tested route' schemes. This is because the GLA has created a suite of formulae to run 'early' and 'late stage' reviews of viability after permission has been granted that render the original appraisal redundant. Early and late stage review mechanisms are routinely applied to developments across the capital and developers prefer this to securing planning permission for schemes that are ultimately undeliverable as the level of affordable housing is too high.
>
> Contrary to AJ's assertion, the formulae operate by comparing (a) the GDV and costs at the application stage to (b) the GDV and costs at the time the review is undertaken. Critically, the formulae allow the developer a 20% return on the increase in GDV before any surplus for affordable housing is calculated. This additional profit is considered a cost on the scheme. If, with this cost accounted for, the scheme is still profitable they receive another tranche, 40% of that additional profit. When the local Authorities share of the profits reach the point which equates to a 35% affordable scheme 100% of the additional profit goes to the developer. I.e, at the point that 35% affordable (or financial equivalent) has been provided, as GDV's rise, the developer is in the same position that he would have been had he offered 35% upfront, but in the process he will have taken a significant additional profit share. He will also have derisked his position considerably, only needing to provide 35% affordable housing if GDV values rise, and not needing to provide it if market conditions are poor."

747. Mr Faulkner took Ms Seal in cross-examination to The Affordable Housing and Supplementary Planning Guidance 2017 (the "**SPG 2017**") entitled "Homes for Londoners" which the Mayor of London had published in August 2017. Part Three provides guidance on FVAs and it states as follows at §3.3 to §3.5:

> "3.3 Overall the Mayor aims to establish whether the proposed level of affordable housing and other contributions are the maximum that can be reasonably supported or whether further obligations and/ or a greater level of policy compliance could be achieved. This assessment process will inform the Mayor's comments at referral Stage 1 and subsequent decision at referral Stage 2. 3.4 The Mayor will use the residual land value methodology to determine the underlying land value once the costs of the development (including developer's profit) are deducted from the gross development value. 3.5 There are a number of viability models used in the industry such as the GLA's own Affordable Housing Toolkit, the HCA

> model, Argus Developer, and bespoke models. Where viability information is required, the LPA, and for referable schemes the Mayor, should be provided with the full working model and/ or all the assumptions and calculations included in the modelling so that officers can test and interrogate the information. There must be no hidden calculations or assumptions in the model. This will allow officers to vary assumptions to ascertain impact on the conclusions. Without this the LPA and Mayor cannot properly assess the validity of the appraisal and the assumptions used to underpin the affordable housing offer."

748. Ms Seal accepted that this guidance did not permit a "naughty developer" to tweak its sales evidence down to make it look as if GDV was going to be lower. But she did state that there were standardised inputs and that a developer carrying out a FVA would use "the most tried and tested GDV not 'I think I'll do that well' GDV". SPG 2017 also explains how the local planning authority will test whether the proposed level of affordable housing was the maximum which could be reasonably supported by a proposed development. The first stage involves a comparison between the developer's residual valuation against the "benchmark land value" and it stated at §3.37 and §3.38:

> "3.37 Within planning viability assessments there are two assessments of land value that are undertaken to determine whether a proposal is viable: the assessment of residual land value and benchmark land value. The residual land value is determined through deducting development costs from development value to ascertain the underlying land value. This is then compared with the benchmark land value. The benchmark land value can be considered as the value below which a reasonable land owner is unlikely to release a site for redevelopment. 3.38 The process for establishing an appropriate benchmark land value for a viability assessment is key, because this indicates the threshold for determining whether a scheme is viable or not. A development is typically deemed to be viable if the residual land value is equal to or higher than the benchmark land value, as this is the level at which it is considered that the landowner has received a 'competitive return' and will release the land for development."

749. SPG 2017 provides a detailed breakdown of the inputs into residual valuation which will be compared with the benchmark valuation and Mr Faulkner took Ms Seal through them briefly. She accepted that they were very similar to the exercise which the experts had undertaken in these proceedings. The second stage of the exercise is to add an "Existing Use Value Plus" Premium to the benchmark value. SPG 2017 explains this at §3.43 and §3.44:

> "3.43 The 'Existing Use Value plus' (EUV+) approach to determining the benchmark land value is based on the current use value of a site plus an appropriate site premium. The principle of this approach is that a landowner should receive at least the value of the land in its 'pre-permission' use, which would normally be lost when bringing forward land for development. A premium is usually added to provide the landowner with an additional incentive to release the site, having regard to site circumstances. 3.44 The benefit of this approach is that it clearly identifies the uplift in value arising from the grant of planning permission because it enables comparison with the value of the site without planning permission."

750. SPG 2017 then provides some detailed guidance about the EUV + benchmark land value. It should exclude hope value associated with development on the site or alternative uses. It also gives a range of between 10% and 30%:

> "Premiums above EUV should be justified, reflecting the circumstances of the site. For a site which does not meet the requirements of the landowner or creates ongoing liabilities/ costs, a lower or no premium would be expected compared with a site occupied by profit-making businesses that require relocation. The premium could be 10 per cent to 30 per cent, but this must reflect site specific circumstances and will vary."

751. Ms Wicks and Mr Lee placed considerable emphasis in their closing submissions on Ms Seal's familiarity with this process and the acknowledged expertise of the BNP Paribas Development Viability Team in producing Financial Viability Assessments. They compared this with the evidence of Mr Johnston, who frankly accepted that he was not an expert in affordable housing but had relied upon the advice provided by the Knight Frank planning team.

(ii) Rate

752. Mr Johnston adopted an equivalent sales rate of £375 psf for affordable housing. When she saw Johnston 1, Ms Seal agreed that figure without any explanation: see Seal 3, ¶4.51. In cross-examination Mr Faulkner suggested to her that she had adopted Mr Johnston's figure because it produced a higher valuation by £6m. In re-examination Ms Wicks asked her to explain why she had accepted Mr Johnston's figure and she gave the following explanation:

> "Q. That's 131 units at £375 square foot. Would you explain to his Lordship how you came to give that evidence. A. So, as I say in my first report, I speak with the BNP Paribas affordable housing team. As you are

> aware, Knight Frank also has an affordable housing team. However, they have the same name but they have very different functions. So our affordable housing team works solely on viability calculations. They have been around since 2003, just arguing viability, and as we were talking about today and yesterday, in viability, there are standardised inputs and when you value affordable housing, using standardised inputs, you set it out, as I did in my first report. Knight Frank have an affordable housing team that, on Mr Johnston's evidence, doesn't do viability. What they do -- MR JUSTICE LEECH: Could you just wait a moment. Then you can tell me what the Knight Frank affordable housing team do. A. What they do is agency sales. So they take developers' affordable housing within their planning and sell it to registered providers. So when Mr Johnston's report had a very different figure in it from mine, what he was looking at was how much do these units actually sell for in the market, whereas what my team had done, in hindsight, was produce a standardised format valuation of them, as if it was going into a viability appraisal and, of course, the right approach to take for a market-facing residual is what do these units actually sell for, and I was more than happy to take Knight Frank's opinion on that because they are far better placed to provide an opinion on that than my viability team."

753. I accept Ms Seal's evidence and I reject the suggestion that she was being opportunistic to adopt Mr Johnston's rate for affordable housing. I am grateful to both experts for reaching agreement on the rate and to Ms Seal for the candour with which she accepted that Knight Frank had greater experience of sales of affordable housing in the market than BNP Paribas. But in the light of Ms Seal's admission, I must approach the evidence provided by the BNP Paribas Development Viability Team about the affordable housing ratio with greater caution. As she accepted, this experience is not directed to sales in the open market but to the planning process.

(iii) Ratio

754. Mr Johnston's evidence was that purchasers would assume a "**Fast Track**" compliant scheme of 35% by habitable room or 26.2% by unit if they were to accept a developer's profit of 25%. His evidence was that a purchaser would be taking a big risk if they were to assume that they would do better than a Fast Track compliant scheme when buying the land. He also gave evidence of his own experience at Blackwall Yard and expressed the opinion that higher affordable housing was the direction of travel:

> "MR JUSTICE LEECH: This is a valuation exercise, isn't it. A. It is a valuation -- MR JUSTICE LEECH: The valuer has got to decide what to pay for the land in advance of the viability. A. Correct. MR JUSTICE LEECH: Is that a fair comment? A. Yes, yes, that's a fair comment. I mean,

> my only comment on this which I've made is, number one, at the valuation date we were working on a site which had planning for 700 units and the developer asked me at no time no run any appraisals less than 35 per cent. I went back and checked the file and thought okay, why didn't they, and I have asked them and they said it just made their life much easier. I think if you are -- and I do accept that people will argue for a lower proportion. I think there is a cost that comes with that, though, and I think that would have to be reflected in the valuation somehow. So we wouldn't assume less than 35 per cent if it doesn't have planning and not -- I think it's a big, big risk, particularly with the way that market has evolved. Yes, that's -- so that's the valuation perspective. MS WICKS: Well, Mr Johnston, the example you gave of the work you were doing at the valuation date, that's a reference to valuation work you were doing on Blackwall Yard? A. That's correct, yes. Q. Can you agree with me that the fact that one developer chose not to attempt to reduce the amount of affordable housing it was providing is not necessarily a good guide to what the market perception would be at the valuation date? A. That is my perception and that is not -- that's one example, which is obviously quite relevant to this valuation. I think if you look at all the decisions that flowed in the DP9 document, it's quite clear what the direction of travel is."

755. Mr Johnston also made the point that the way in which a seller and a buyer in the open market would normally resolve the uncertainty over the affordable housing provision would be an overage provision and that a purchaser would not normally pay in advance for something which it did not know it would be getting:

> "So I accept, Mr Johnston -- and I'm sure we can agree -- that there are going to be some schemes where a developer decides to pursue the fast-track route, but you would agree with me, wouldn't you, that the environment in which the hypothetical purchaser finds itself in relation to developments which are very similar to the one it's planning, you can see that most developers successfully negotiate viability in relation to affordable housing. That's right, isn't it? A. Historically, yes. Q. Historically is what's going to matter to the hypothetical purchaser on the valuation date, isn't it? A. Well, no, because you've got to try and look forward as well and think, what am I going to get here. I think the challenge from a valuation point of view, and from a market point of view -- because this is slightly insoluble, my Lord, because you don't know what you are going to get, and I think the way the market solves that problem is through an overage clause. So you might do the land deal. Okay, we have done our sums on 35 per cent affordable. If we get that reduced, then we will pay you a planning overage and then there will be some mechanism agreeing how much extra will be paid. So I think -- I don't see a circumstance where somebody would pay in advance of knowing that risk because of the impact it will have on -- one on GDV but also on the land value."

756. Mr Johnston also pointed out that even if the local planning authority granted planning

permission on the basis of less than 35% per habitable room or 26.2% by unit of affordable housing, the purchaser would still have to take the risk of a late stage review at which the local planning authority would clawback an element of the profit:

> "Q. But this is all about risk, isn't it, Mr Johnston? Your cautious bidder -- your bidder, who bids 27 million for this site, is going to be outbid by Ms Seal's bidder, who bids 52? A. No, I don't -- no, I think -- well, I don't see -- I don't see that, I'm afraid, I don't agree with. Q. And you suggested that there was a change in the environment somehow, but if the hypothetical purchaser went and took advice before buying Ensign House, about whether it would need to achieve 35 per cent affordable housing, we can tell from this what it would be advised, can't we, because we know your planning team's advice is it's possible to reduce -- A. Yes. Q. -- from the 35 per cent affordable housing, and we know that, at the valuation date, advice would have been given that viability challenges were likely to be successful because we can see that, for example, Crossharbour, granted permission in 2021, North Quay in September 2021, and Cuba Street in March 2022, went on to successfully negotiate less than 35 per cent affordable housing by habitable room? A. Yes, but all of these will have a review mechanism attached to it. So therefore, that's where it becomes circular, my Lord. You don't know what you are going to pay. I think we have had one come in with the clients estimating, estimating, but the review mechanism will add another 10 million to the contribution. So you end up back in the same place. This is a difficult thing to solve and the argument does become quite circular. So if you go in at lower than policy amount, you then need to account for any potential future payment somehow, in some way, shape or form. You don't know what that's going to be."

757. Finally, Mr Faulkner submitted that there are good reasons for developers to adopt the Fast Track route whatever their perception of risk. They avoid the time and expense of a viability assessment. They also avoid the risk that the local planning authority would impose an affordable housing provision of more than 35% by habitable room and up to the 50% target. They also avoid a late stage review and the difficulties which Mr Johnston identified (above).

758. Ms Seal adopted an affordable housing ratio of 17% by unit. She arrived at it by taking the average affordable housing provision of six comparable single towers (in chronological order): Dollar Bay, Spire, Amory Tower, Quay House, 30 Marsh Wall and Halcyon. Ms Seal accepted that planning permission was never granted for Quay House and that Dollar Bay, Spire and Amory Tower were all historic. She was unable to say when planning permission was granted for each one and whether the purchaser also had to pay a commuted sum in lieu of the full affordable housing provision.

759. Mr Faulkner took Ms Seal to another comparable, Cuba Street. In March 2022 planning permission was granted for 421 residential units of which 321 were to be private and 100 to be affordable. This was 24% by unit and just below the Fast Track provision of 35%. Ms Seal contrasted Cuba Street with Halcyon which she considered to be a really good example:

> "Q. And what we are dealing with in this case -- so you are saying that the hypothetical purchaser will target 17 per cent and the FEC scheme is 26 per cent. I mean, it's really, really close to target, isn't it? Cuba Street -- I keep coming back to Cuba Street. It's the one that got away on the land comps and now it comes back and it's a really recent, July 2019, sale. Planning application is really recent. It's a 2020 planning application. It's a 53-storey tower and it's right next to Ensign House. And it's really close to the policy (inaudible), isn't it? A. Well, it has clearly been negotiated because it's 30 per cent and policy is 35 per cent, so they have, as everybody else does, gone in to negotiate that. I think a really good example would be Halcyon, wouldn't it? That appears in the joint statement. Because that application -- that is literally just consented, I think, at the time of the sale. I have no ability to search this document. I don't know whether you do. Q. We are at page 32 of your first report, that's the list -- tab 2, page 32, that's the list and you can see there that it's 21 per cent by unit? A. Yes."

760. Given the importance which she placed on the BNP Paribas Development Viability Team's expertise at carrying out Financial Viability Assessments, it is surprising that Ms Seal had not instructed them to prepare one and provided it with one of her reports. Mr Faulkner asked her to go through the process in cross-examination and she accepted that she had carried out such an assessment only a week before:

> "Q. Okay. So do you remember on Thursday we discussed the existing use of the building in its current form? A. Yes. Q. And we went through, we did a rough calculation -- A. Yes. Q. -- and the best guess was 14.5 million for existing use; yes? A. I think we got to something like that. Q. If we add a premium, a maximum premium allowed for this, of 30 per cent; yes? A. Yes. Q. That gets us to -- let's call it 19 million. A. Okay, yes. Q. So our benchmark EUV plus is 19 million now? A. Yes. Q. So let's now think about what would happen on a viability argument if you propose your market-facing scheme. A. Yes. I've done this exercise. Q. You haven't done it in your report? A. I haven't, I did it last week because I thought about this in advance. So I can talk you through that. Q. Let me talk you through where we get to at the moment. The benchmark is £19 million; yes? A. Yes. Q. Your residual valuation is £52 million, yes? A. So that's our residual valuation market-facing. That's not the standardised inputs that the viability appraisal requires. Q. Right. Well, the viability appraisal -- you go to the planners and you say, "I want to do a scheme with 17 per

> cent units affordable." A. Yes. Q. And you run the numbers? A. Yes. Q. On a residual valuation? A. Yes. Q. You say, "That will make the land value 52 million." That's what your -- A. That's not the answer you get in a viability. So I think a good read across would be the Cuba Street site because, as we point out, very close, similar characteristics, so actually, if you adopt the agreed standardised inputs in their viability appraisal, ours comes out at between 2 and 5 million. So we are not using market-facing inputs, we are using the standardised inputs. So it was really useful to have a recent planning consent where they've argued this very close by and just move the numbers across and we end up with between 2 and 5 million. Q. Ms Seal, you are coming to court and you are saying the amount of affordable housing is dependent upon a viability assessment; yes? A. Yes. Q. And you did your first report and there is no viability assessment in there, is there? A. No, and I haven't intended to do a viability assessment but I thought, in order that I could understand the criteria -- the characteristics of this site better, given that this Cuba Street site had recently received a consent, for my own education, I went through the process, using the inputs that had been agreed, and that was the conclusion that I reached. I didn't include it in my evidence because I've only just done that exercise."

761. Ms Seal then referred to SPG 17 and suggested that there was a difference between land transactions and Financial Viability Assessments which are typically undertaken on a standardised basis. Mr Faulkner suggested that all this meant was that one did not take into account what the developer itself had paid or was forecasting. Ms Seal's response was as follows:

> "MR FAULKNER: So what this is saying is that it's a standardised basis because you don't take into account what a developer has actually paid or you don't in fact take into account what a developer themselves might actually be forecasting or whatever. It's part of a viability assessment, but you are not moving away from an ordinary residual valuation. A. Another exercise to do, obviously, in the evidence, it sets out that BNP Paribas were involved in the negotiations of viability at North Quay. That's a Canary Wharf scheme, so very similar kind of product to ours. Again, using their standardised inputs into our appraisal, would also be quite useful and again we get a much lower and lower than the benchmark land value result. Q. What I am saying is that what this exercise clearly demonstrates is that the existing use value is far, far -- this site, on this particular site, is far, far below any residual valuation that would be carried out in a viability assessment and there is no hope of getting 17 per cent affordable housing on that basis. A. I completely disagree."

762. I prefer Mr Johnston's evidence in relation to the ratio of affordable housing and I find that a willing purchaser entering into an arm's-length transaction to buy the site on the valuation would adopt a Fast Track compliant scheme of 35% by habitable room or

26.2% by unit to achieve a developer's profit of 25%. I prefer Mr Johnston's evidence and make this finding for the following reasons:

(1) A hypothetical purchaser who adopts a Fast Track scheme knows with certainty that the affordable housing provision would be 26.2% by unit and that it will avoid the time and costs of a Financial Viability Assessment and the risk of a late-stage review. As Mr Faulkner submitted, there are immediate benefits in adopting a Fast Track scheme.

(2) In my judgment, a hypothetical purchaser would not agree to buy Ensign House on the assumption that the affordable provision would be much lower than 35% unless there was a strong likelihood that the local authority would grant planning permission on that basis and that there was very little risk of a late-stage review. Mr Johnston put it very well in evidence when he said that a buyer is unlikely to pay the seller for a benefit which it could not be certain it would ever get or share a profit with the seller which it could not be certain it would ever obtain.

(3) I am not satisfied that Ms Seal's historical analysis would have given a purchaser any real assurance. Three of her comparables were over six years old and in relation to Quay House, planning permission had been refused. Ms Seal was unable to say when the planning applications had been made or whether the purchaser had to make a commuted payment. I therefore discount these comparables. Ms Seal placed a lot of reliance upon Halcyon where the affordable housing provision was 21% by unit. But this was only 5% below the Fast Track provision. Moreover, a well-informed valuer would have known that the application had originally been refused and had only been granted on appeal.

(4) I also agree with Mr Johnston that a purchaser would have taken the view that the direction of travel was upwards. Ms Seal's other recent comparable was 30 Marsh Wall where the affordable housing provision was 19%. Further, although planning permission was not granted for Cuba Street until March 2022, this comparable clearly shows the trend and I consider it appropriate to take it into account. An earlier application had been refused and a subsequent application was submitted on 29 May 2020. Moreover, Ms Seal placed a great deal of reliance on it in her answers which I have set out (above).

(5) But even if a hypothetical purchaser had been considering whether to bid for Ensign House on the basis of the Halcyon or any of Ms Seal's other comparables, the obvious way for a purchaser to test whether there was a likelihood of achieving an affordable housing provision of 17% was to carry out a Financial Viability Assessment. Ms Seal did not do so for either Seal 1 or Seal 3 (or ask the BNP Paribas Development Viability Team to do so). She said that she had carried out such an exercise shortly before giving evidence but she did not produce it to the Court.

(6) In my judgment, a Financial Viability Assessment would have shown that the prospect of achieving an affordability provision of 17% was very small for the reasons which Mr Faulkner put to Ms Seal in cross-examination. The EUR + benchmark for Ensign House was £19 million even with a substantial premium of 30%. If Ms Seal was correct and the value of Ensign House was £52 million (assuming affordable housing of 17%), then an increase to 35% would not have reduced the land value anywhere near the EUR + benchmark. Indeed, it is likely to have been well above Mr Johnston's valuation (which assumed a 35% affordable housing provision).

(7) Ms Seal did not accept this. She said a number of times that the standardised inputs which a developer would use for their residual valuation would be different and she prayed in aid Cuba House where the developer had agreed a provision of 24% and, therefore, less than the Fast Track benchmark. However, she did not explain what the standardised inputs were and why they would have produced such a radically different outcome from her "market-facing" appraisal. In the absence of such an explanation, I am reluctant to accept her evidence. In my judgment, the only obvious way in which a developer could persuade Tower Hamlets LBC to accept that it could not sustain an affordable housing provision of 35% was by gaming the system.

(8) Moreover, this conclusion accords with the real world. Ms Seal could not explain why FEC would have adopted a Fast Track scheme if a 17% provision had been achievable. Her evidence was that FEC was less motivated to squeeze the final pound out of Ensign House because they had bought the site cheaply. I found that an unconvincing explanation.

(9) Finally, I place some reliance on the fact that in *Davey v Money* [2018] EWHC 766 (Ch) Ms Seal made an expert's report on behalf of Dunbar Assets PLC in which she produced an expert valuation for a 55 storey tower in which she assessed the affordable housing provision at 35% and the developer's profit at 25%. Her reason for adopting a different approach in these proceedings was that she adopted a "pushy" scheme in both cases but with the benefit of hindsight it was better to take a riskier approach in relation to the affordable housing provision rather than the number of floors. I am bound to say that I also found this explanation more than a little unconvincing.

(4) Developer's profit

763. The experts were agreed that a developer's profit of 25% was appropriate for the FEC scheme and both ran their Residual Valuations on that basis. However, although they agreed on the figure, their individual assessments of the risks were very different. The two significant differences between them related to the affordable housing ratio and the Superior Leases.

(i) Affordable housing ratio

764. Ms Seal gave evidence that a developer's profit of 25% was appropriate for the FEC scheme whether the affordable housing ratio was 17% or 26.2% by unit. Mr Faulkner made a number of detailed criticisms of Ms Seal's evidence in relation to the developer's profit for her "market facing" scheme and he submitted that she had seriously under-estimated the risks associated with that scheme. In particular, he submitted that a hypothetical purchaser faced with these risks would require a much higher developer's profit to adopt Ms Seal's "market-facing" scheme with an affordable housing ratio of 17%.

765. Given my conclusions on the affordable housing ratio (above), it is unnecessary for me to consider these criticisms of Ms Seal's evidence and I express my views very briefly. I agree with Mr Faulkner that there was a significant risk that Tower Hamlets LBC might refuse to grant planning permission for the "market-facing" scheme and that the risks associated with changes in the market and increases in development costs might significantly impact on the profitability of the development. I also agree that a hypothetical purchaser would have wanted a higher developer's profit before it would be

willing to adopt the "market-facing" scheme. Finally, I agree that a developer who was prepared to accept a lower developer's profit of 25% would have been more likely to "play safe" and adopt a Fast Track affordable housing ratio. For these reasons also, I prefer Mr Johnston's evidence in relation to the affordable housing ratio.

(ii) The Superior Leases

766. The principal issue between the experts in relation to the developer's profit related to the Superior Leases and how a hypothetical purchaser would approach them. Ms Seal's evidence was that a purchaser would not be unduly worried by them and would have made a costs allowance of £50,000 to cover "de-risking their position" (i.e. taking out insurance cover or negotiating a surrender or both). Mr Johnston's evidence was that a purchaser would have run a Residual Valuation with a developer's profit of 22.5% rather than 25% if the freehold title to Ensign House had been unencumbered and free of the Superior Leases. Mr Johnston accepted in evidence that this adjustment of 2.5% involved a reduction of £7 million in the developer's profit.

767. I first set out the factual position as it was at the valuation date when a purchaser would have been considering what developer's profit they should assume for the purposes of their residual valuation. I also assume that for these purposes the hypothetical purchaser would have the benefit of legal advice. The factual position which a hypothetical purchaser would have faced was as follows:

(1) *Suite 2*: According to Mr Langman's email dated 2 October 2019 EPPL had tried to make contact with Mr Bews and Mr Hayklan and had been unable to do so. But Mr Langman had obtained an insurance quote on the basis that no contact had been made.

(2) *Suites 9 and 10*: Mr Simon Plant and Mr Daniel Plant had exercised their option to acquire the Superior Lease of Suite 9 and were the registered proprietors. They also had a right of pre-emption and an option to acquire the Superior Lease of Suite 10 for nominal consideration and the option was protected by a Unilateral Notice in the charges register of title no. EGL 232646.

(3) *Suites 11 and 12*: Mr Ranson had informed Mr Connolly that he had made contact with Mr Walker who had told him that he had retained the Superior Leases for tax

purposes and agreed to transfer them to him either for nothing or for a relatively small cost to cover his time. (In the event, he transferred the Superior Leases to Mr Ranson for £4,000.)

(4) *Suites 16, 17 and 18*: Mr Plant had provided Mr Alford with an email from Mr Pyle confirming that Hambros was prepared to transfer the Superior Leases for no consideration if the Suiteholders paid the costs estimated at £3,190 plus VAT and their disbursements. In the event, Hambros transferred the Superior Leases to the holders of Suites 16, 17 and 18 for no consideration.

(5) *Insurance*: Mr Langman had obtained an insurance quote for £22,400 for all of the Superior Leases apart from Suites 9 and 10 (above) provided that no contact was made with the owners of the Superior Leases.

768. On 11 January 2019 Mr Furber had advised Rockwell that it was unlikely that the owners of the Superior Leases would obtain an injunction to restrain demolition of Ensign House but that there was a substantial risk that a developer might face claims for "negotiating damages". On 7 October 2019 Ms Sutherland had also advised FEC that a title policy would not provide adequate protection because it would be a challenge to register new interests whilst the Superior Leases remained on the registered title. I assume that a hypothetical purchaser would have received the same or similar advice.

769. The experts were agreed that the Superior Leases had no commercial value: see the Joint Statement, ¶3.31. The issue between them was whether a hypothetical purchaser would treat them, as Mr Johnston put it, as "more akin to a potential ransom strip which could inhibit development". Ms Seal did not consider that they held a potential ransom position and she relied on the fact that Mr Simon Plant and Mr Daniel Plant had been able to negotiate options to acquire the Superior Leases of Suites 9 and 10 for nominal consideration. She also relied on the subsequent deals which the Suiteholders were able to do with the owners of all of the Suites apart from Suite 2.

770. I prefer Ms Seal's evidence on this issue. In my judgment, a hypothetical purchaser would have taken the view that they could take an assignment of the option to acquire the Superior Leases of Suite 10 and negotiate the purchase or surrender of all of the other Superior Leases for a modest cost given the positive negotiations which had already taken place by the valuation date. It is possible that a hypothetical purchaser might have bought

a title policy for the Superior Lease of Suite 2 rather than try to contact Mr Bews and Mr Hayklan (both of whom are now dead). But either way, I am satisfied that Ms Seal's assessment of the costs of "de-risking" the Superior Leases at £50,000 was a reasonable one.

771. I also bear in mind that a hypothetical purchaser would have been facing a much more significant legal problem. Mr Johnston exhibited a report dated 29 April 2021 prepared by Mr Rob Croft of Gia Chartered Surveyors, and advising FEC in relation to rights to light claims. He recommended that FEC should budget for compensation of between £1.5 million and £1.7 million for claims made by neighbouring landowners. The experts were agreed that a hypothetical purchaser would have included costs of £1 million in their Residual Valuations to cover the purchase price of rights to light insurance.

772. Mr Johnston did not suggest that a hypothetical purchaser would also increase the developer's profit to take account of the risk that rights to light claims might hold up the development or require it to be revised once he had made provision for the costs of obtaining insurance. In my judgment, a hypothetical purchaser would have taken a similar view in relation to the Superior Leases and would not have adjusted the developer's profit once they had made reasonable provision for the costs either of buying out the relevant interests or insuring against them.

773. In fairness to Mr Johnston he did not press this point with great enthusiasm. He candidly accepted that he had not considered the factual position in detail and that he was unaware of the options to acquire the Superior Leases of Suites 9 and 10. He also accepted that there was no easy answer and he was prepared to accept that the increase in developer's profit might be 1.5% rather than 2.5%.

774. Finally, I take comfort from the fact that the Suiteholders have only had to pay £4,000 plus legal costs to buy all of the Superior Leases apart from the Superior Lease of Suite 2. Moreover, even if FEC is required to pay £20,000 for Mr Hayklan's interest in the Superior Lease of Suite 2, the total cost will be significantly less than the £50,000 provision which Ms Seal was prepared to make. I consider it highly unlikely that an experienced developer, who was aware of the ongoing negotiations, would have priced the risk of being unable to buy out the Superior Leases at £7m.

(5) Professional Fees

775. Ms Seal allowed for professional fees of 7% over and above planning costs of £2.5 million. She produced a detailed breakdown showing total costs of £11,959,000 (including contingency) and her evidence was that she went through it line by line with a project manager with BNP Paribas. Mr Johnston gave evidence that the normal range of professional fees was between 8% and 12% and he made provision for 10% on the basis that this was the mid-point and there were construction issues with the site itself.

776. It is not easy to resolve this issue without scrutinising the individual costs in detail. But on balance I prefer Ms Seal's evidence and I adopt her figure of 7% for professional fees. Ms Seal produced a detailed breakdown and Mr Johnston accepted in cross-examination that this was usual (although he also said that in his experience professional fees rarely come in at under 10%). To challenge Ms Seal's figures, therefore, I would have expected Mr Johnston to try and produce a breakdown of his own in the usual way. Moreover, as Ms Wicks and Mr Lee pointed out, the effect of adopting his figure would be to load an additional £4 million in costs and to increase the developer's profit. In my judgment, it would not be right to increase the costs by such a significant amount without clear evidence of the type and level of costs which a hypothetical purchaser would incur.

(6) Provisional Conclusion

777. I have found on a provisional basis that a hypothetical purchaser would adopt a sales rate of £1,237.50, an affordable housing ratio of 35% by habitable room or 26.2% by unit and professional fees of 7%. These inputs generate a Residual Valuation of £32,245,415 and I annex the Residual Valuation agreed by Ms Seal and Mr Johnston as Annex 2. Both experts were agreed, however, that a purchaser or valuer would cross-check their residual valuations against any comparable sales evidence before reaching a final conclusion. I therefore asked Ms Seal and Mr Johnston to run two further Residual Valuations adopting residential sales rate of £1,275 and then £1,200 but otherwise using the same inputs so that I could compare all three valuations against the comparable sales evidence. The first exercise produced a Residual Valuation of £37,618,009. The second exercise produced a Residual Valuation of £26,872,810.

AA. Development Land Comparables

(1) The comparables

778. Ms Wicks and Mr Lee produced a schedule of the development land comparables for closing submissions. This included fifteen comparables. Six were not open market sales at all but inter-company transfers or joint ventures. Eight also pre-dated January 2016. This left the following four comparables:

Table 5

Site	Date Sold	Price	Planning	%AH (unit)	Units	Price/Unit
Quay House	July 2018	£26m	No	17%	498	£52,209
30 Marsh Wall	Dec 2019	£26.6m	No	19%	271	£98,339
Halcyon	Jan 2020	£32.5m	Yes	21%	332	£97,892
Blackwall Yard	April 2020	£41.3m	No	29%	898	£46,044

(2) Analysis

779. Neither party placed much reliance on any of the other land comparables apart from these four. I discount them for the same reasons. They are either too historic to be of any real weight or the prices paid cannot be treated as a reliable guide to the open market value of Ensign House. The Court, the parties and the experts became very familiar with Quay House and its history over the course of the trial and I am satisfied that Ensign House is a more valuable site. Quay House is smaller, QHL could not obtain planning permission for it and the site lacked public space. In my judgment, Quay House provides a useful floor against which to consider the Residual Valuation of Ensign House.

780. Both experts agreed that Halcyon was the best comparable. But they both made significant adjustments to it to justify their own figures. Ms Seal adjusted it upwards because of its location and because the planning permission included additional community space. Mr Johnston adjusted it downwards because it had planning permission when it was sold and by 10% because Halcyon was sold with vacant possession and because Ensign House is encumbered by the Superior Leases.

781. In my judgment, Halcyon provides strong support for a Residual Valuation of £32,245,415. It was a sale of a development site close to Ensign House only a month before the valuation date with planning permission for 336 units. I do not accept Ms

Seal's evidence that Halcyon should be adjusted upwards for the adverse planning permission or because it is in a slightly worse location. I doubt very much that this would reflect the general perception of the market where the grant of planning permission would generally improve sales prospects. Moreover, the requirement to provide additional community space is cancelled out by the lower affordable housing ratio (and no doubt provided a justification for departing from the benchmark of 26.2%).

782. However, I also reject Mr Johnston's argument that the price of Halcyon should be adjusted downwards by 30% because it does not have the benefit of planning permission. The real value of 30 Marsh Wall as a comparable is that it involved a sale in the open market only one month before Halcyon at almost the same price per unit without the benefit of planning permission. Mr Faulkner submitted that it was unsafe to rely upon the unit price of £98,339 because it was sold in December 2019 long after the planning application for 271 units was withdrawn. I reject that submission. Ms Wicks took Mr Connolly to an appraisal which FEC carried out on 13 September 2019 in which it valued 30 Marsh Wall at £25 million based on 256 units of which 89 were affordable. In my judgment, any hypothetical purchaser would have carried out a similar appraisal and arrived at a similar conclusion.

783. Given the findings which I have made above in relation to the risks associated with the Superior Leases, I reject Mr Johnston's evidence that a downward adjustment of 10% should be made to either Halcyon or 30 Marsh Wall. I am satisfied, therefore, that when the sales evidence from Halcyon is analysed side by side with the sales evidence from 30 Marsh Wall, it provides strong support for the Residual Valuation of £32,245,415. That valuation also sits comfortably with the sales evidence from Quay House.

784. Mr Johnston placed strong reliance upon Blackwall Yard because he had personal experience of the transaction and because it did not have the benefit of planning permission. However, it is in a very different location and is a very different kind of development. It was sold after the valuation date and it involves five separate buildings from 9 to 39 storeys for 898 residential units, commercial and community space and a primary school. The experts disagreed about the school and whether it could be sold to a private operator, whether it was in addition to or instead of affordable housing and what conclusions I could draw from it. Given the range of issues, I agree with Ms Seal that the better course is to discount it.

(3) Overall conclusion

785. I, therefore, stand back and consider the Residual Valuation in the light of the development land comparables and the actual price paid by FEC to the Suiteholders. In my judgment, the development land comparables support the Residual Valuation of £32,245,415. I am also satisfied that none of the comparables justified me departing from the Residual Valuation and adopting either of the other valuations which I asked the experts to run based on their own residential sales rates. Both had to make what I considered to be unconvincing adjustments to the development land comparables to support their overall conclusions.

786. It is common ground that EHFL acquired Ensign House for £28.25 million. Neither expert relied on the price which it had paid in support of their valuation or argued that it represented the open market value. Ms Wicks suggested to Mr Johnston that the acquisition of all of the Suites would unlock its marriage value. Mr Johnston's evidence was that developers often overpay to acquire a development site and give up a share of the developer's profit to do so. Mr Faulkner also submitted that the Suiteholders were sophisticated and professional sellers who understood the market and that it was not surprising that Mr Connolly was willing to overpay for Ensign House and that they should keep the marriage value.

787. I accept Mr Faulkner' submission that the Suiteholders were sophisticated vendors and could be expected not only to appreciate the value of their property but to bargain for some share of the marriage value themselves. From the very beginning of the trial I found it very difficult to accept that they would have sold Ensign House for over £20 million less than it was worth. On the other hand, it is reasonable to expect that a purchaser would have unlocked significant marriage value by solving the problem with Suite 14 and acquiring all 18 Suites (as FEC has done). Again, standing back from the detailed valuation issues, it does not seem implausible to me that either Mr Connolly or Mr Downer could have gone out into the market immediately after acquiring Ensign House and sold it for £4 million more than they had paid for it.

788. I find, therefore, that the open market value of Ensign House on 28 February 2020 was £32,245,415, say, £32,250,000 or £32.25 million. Ms Seal gave evidence that the market had not changed significantly between 1 June 2019 and 20 February 2020 and Mr

Johnston did not disagree. I also find, therefore, that the open market value of Ensign House on 1 June 2019 was £32.25 million.

X. Remedies

BB. Damages or Equitable Compensation

(1) The Law

789. It was common ground that the Court may award "negotiating damages" for breach of confidence (and whether the duty of confidence arose under a contract or otherwise). The principal issue between them was whether the Court could award "negotiating damages" for breach of the obligations in the NDA which did not involve confidential information and whether the Court could award negotiating damages for the release of Mr Alford from his contract of retainer and his fiduciary obligations.

790. In *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 Lord Reed (with whom Baroness Hale, Lord Wilson and Lord Carnwath agreed) stated clearly that an award of damages in this context is truly compensatory and that the award of a hypothetical release fee should not be treated as a substitute where the claimant is unable to prove or quantify a loss for breach of contract. He stated as follows at [91] to [93]:

> "91. The use of an imaginary negotiation can give the impression that negotiation damages are fundamentally incompatible with the compensatory purpose of an award of contractual damages. Damages for breach of contract depend on considering the outcome if the contract had been performed, whereas an award based on a hypothetical release fee depends on considering the outcome if the contract had not been performed but had been replaced by a different contract. That impression of fundamental incompatibility is, however, potentially misleading. There are certain circumstances in which the loss for which compensation is due is the economic value of the right which has been breached, considered as an asset. The imaginary negotiation is merely a tool for arriving at that value. The real question is as to the circumstances in which that value constitutes the measure of the claimant's loss.
>
> 92. As the foregoing discussion has demonstrated, such circumstances can exist in cases where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed, as for example in cases concerned with the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement. Such cases share an important characteristic with the cases in which Lord Shaw's "second principle" and Nicholls LJ's "user principle" were applied. The

> claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the asset in question. The defendant has taken something for nothing, for which the claimant was entitled to require payment.
>
> 93. It might be objected that there is a sense in which any contractual right can be described as an asset, or indeed as property. In the present context, however, what is important is that the contractual right is of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way. That is something which is true of some contractual rights, such as a right to control the use of land, intellectual property or confidential information, but by no means of all. For example, the breach of a non-compete obligation may cause the claimant to suffer pecuniary loss resulting from the wrongful competition, such as a loss of profits and goodwill, which is measurable by conventional means, but in the absence of such loss, it is difficult to see how there could be any other loss."

791. Lord Reed set out twelve important conclusions at [95]. It is unnecessary for me to cite them all. Conclusions (1) to (5) identify a number of categories in which damages calculated by reference to a hypothetical negotiation are traditionally awarded. Conclusion (6) reiterates the importance of the compensatory principle. But conclusions (7) to (11) are directly relevant in the present case:

> "(7) Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed.
>
> (8) Where the breach of a contractual obligation has caused the claimant to suffer economic loss, that loss should be measured or estimated as accurately and reliably as the nature of the case permits. The law is tolerant of imprecision where the loss is incapable of precise measurement, and there are also a variety of legal principles which can assist the claimant in cases where there is a paucity of evidence.
>
> (6) Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages.
>
> (10) Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining

> the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.
>
> (11) Common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following *Attorney General v Blake* [2001] 1 AC 268."

792. Ms Wicks conceded that it might not be appropriate to award "negotiating damages" where the claimant's loss is the cumulative result of breaches of a number of obligations which do not fall within [93](10) (above). She made this concession on the basis of Lord Reed's comments at [99] and [100]:

> "99. The case is not one where the breach of contract has resulted in the loss of a valuable asset created or protected by the right which was infringed. Considered in isolation, the first defendant's breach of the confidentiality covenant might have been considered to be of that character, but in reality the claimant's loss is the cumulative result of breaches of a number of obligations, of which the non-compete and non-solicitation covenants have been treated as the most significant, as explained in para 17 above.
>
> 100. The judge has ordered a hearing on quantum. That hearing should now proceed, but it should not be, as he ordered, an assessment of the amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from their obligations. The object of the exercise is that the judge should measure, as accurately as he can on the available evidence, the financial loss which the claimant has actually sustained. How that assessment is best carried out is, in the first instance, a matter for the judge to consider, proceeding in accordance with this judgment. If evidence is led in relation to a hypothetical release fee, it is for the judge to determine its relevance and weight, if any. It is important to understand, however, that such a fee is not itself the measure of the claimant's loss in a case of the present kind, for the reasons which have been explained."

793. In the present case, I have found on a balance of probabilities that if he had not committed a breach of the NDA, Mr Connolly would have approached Mr Downer (or vice versa) and they would have negotiated a release fee not only for the use of the Confidential Information but for the release of Mr Alford and from the other terms of the NDA. In my judgment, *One Step (Support) Ltd v Morris-Garner* does not prevent the Court from assessing damages at common law on the basis of the amount which party Y would have charged party X to purchase a release from a contractual obligation where the breach in question has as a matter of fact deprived Y of the opportunity to bargain for a release fee.

794. This proposition can be tested fairly easily. If Mr Downer had become aware that Mr Connolly was proposing to approach the Suiteholders on 1 June 2019 he could have applied for an injunction to restrain him from doing so. He could also have obtained an injunction against Mr Alford restraining him from acting in breach of his retainer and his fiduciary duties. If the parties had fought the application through, it would have been open to the Court to award damages in lieu of an injunction (for which a hypothetical release fee would have been an appropriate award).

795. But the parties might have settled the application on terms that FEC UK was released from the NDA and EHL gave its consent to Mr Alford continuing to act for FEC. There is nothing in *One Step* to prevent the Court from awarding damages to EHL on the basis that the loss of the opportunity to bring such a claim and negotiate such a release is the loss which EHL has in fact suffered and for which it should be compensated. Indeed, Lord Reed did not rule out the possibility that the Court might assess damages by reference to a release fee in *One Step (Support) Ltd v Morris-Garner* itself. What he was at pains to point out was that it was not itself the measure of financial loss: see [100] (above).

796. I turn next to consider the correct approach to the assessment of "negotiating damages". In *Vercoe* (above) Sales J had to decide how to assess damages for breach of an obligation in almost identical terms to clause 1.4 of the NDA. He assessed damages by reference to the amount which the contract breaker should be taken to have agreed to pay to each of the relevant claimants to obtain their consent to use the confidential information other than for the permitted purpose: see [289]. I will adopt the same approach. He also provided the following guidance for carrying out that task at [290] to [292]:

> "290. *Wrotham Park* damages are not based on a simple assessment of what the parties to an agreement would in fact have agreed as the price to be paid by the obligor to the obligee to secure release from the negative covenant in question. On the facts in Wrotham Park it was found that the obligee having the benefit of a restrictive covenant preventing the development of certain land would not have agreed to any relaxation of the covenant so as to permit the development of that land which was in fact carried out by the obligor. In assessing damages for breach of the restrictive covenant the court constructed a hypothetical agreement, based on what would have been a reasonable payment to make for relaxation of the covenant in all the circumstances of the case, taking account of the profit which the developer expected to make and also of the fact that the

> obligee had sat back while the land in question was auctioned as land fit for development: [1974] 1 WLR at 815B-816B.
>
> 291. Important recent guidance on the approach to calculation of damages under the Wrotham Park approach is given by the Privy Council in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, at [46]-[54]. In particular, it was emphasised at [49] that both parties to the notional transaction to buy the release of the relevant contractual obligation "are to be assumed to act reasonably", and that the focus should primarily be on how the notional negotiation would have taken place bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place ([50]-[53]).
>
> 292. On my reading of the authorities, where damages are to be awarded on a *Wrotham Park* type basis, what is required from the court is an assessment of a fair price for release or relaxation of the relevant negative covenant having regard to (i) the likely parameters given by ordinary commercial considerations bearing on each of the parties (it would not usually be fair for the court to make an award of damages on this basis by reference to a hypothetical agreement outside the bounds of realistic commercial acceptability assessed on an objective basis with reference to the position in which each party is placed, and see *Pell Frischmann Engineering Ltd* at [53]); (ii) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties (see Brightman J's reference to the conduct of the beneficiary of the restrictive covenant in *Wrotham Park* at 815H-816B as a factor tending to moderate the award of damages in its favour and the reference of the Privy Council in *Pell Frischmann Engineering Ltd* at [54] to the relevance of extraordinary and unexplained delay by the claimant); and (iii) the court's overriding obligation to ensure that an award of damages for breach of contract – which falls to be assessed in light of events which have now moved beyond the time the breach of contract occurred and which may have worked themselves out in a way which affects the balance of justice between the parties — does not provide relief out of proportion to the real extent of the claimant's interest in proper performance judged on an objective basis by reference to the situation which presents itself to the court (see the discussion in *Experience Hendrix* at [27]-[30] of the special nature of the interest of the claimant which justified the award of damages in Blake equivalent to the profits which Blake had made in publishing his book about his treachery; the general discussion by Lord Nicholls in Blake at 282A-285H; and also compare *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344)."

797. Unlike *Wrotham Park* and *Vercoe*, the present case is one in which damages are based on a simple assessment of what the parties to an agreement would in fact have agreed as the price to be paid by the obligor to the obligee to secure release from the negative covenant in question. I therefore approach the assessment of damages in the following way:

(1) First, I determine on a balance of probabilities and by reference to the facts what release fee Mr Downer would have charged FEC UK, EHFL, Mr Connolly and Mr Alford to release them from their respective obligations on 1 June 2019. I will refer to this measure of loss as "common law damages".

(2) Secondly, I consider whether an award of "negotiating damages" assessed by reference to the principles set out by Lord Reed (above) should lead to a different result. For this purpose I also adopt a valuation date of 1 June 2019.

(3) Thirdly, if I am wrong and it is not appropriate to assess damages by reference to a fee for releasing FEC UK from clause 5.2 of the NDA or Mr Alford from his retainer, I consider what hypothetical release fee FEC UK, Mr Connolly and Mr Alford ought to pay to use the Confidential Information to acquire Ensign House. Again, I adopt a valuation date of 1 June 2019.

(4) In carrying out the first two exercises I use the term "EHL's position" to refer to its right to enforce FEC UK's obligations under the NDA and to enforce the terms of Mr Alford's retainer and the obligations of confidence owed by all four Defendants in equity. In carrying out the third exercise I use the term "EHL's position" to refer to EHL's right to enforce the obligations of confidence alone.

798. Neither of the parties suggested that the Court should assess equitable compensation for breach of confidence (or, for that matter, the fiduciary duty of confidence) on different principles to those applicable to breach of contract. Ms Wicks and Mr Lee relied on *Lonrho PLC v Fayed (No 5)* [1993] 1 WLR 1583 for the proposition that damages for conspiracy are at large. But they did not argue that I should award a different measure of damage on the same facts. I proceed on the basis, therefore, that on the facts of the present case the same measure of loss is recoverable for breach of the NDA, misuse of the Confidential Information, breach of fiduciary duty and damages for conspiracy. If I had found that Mr Connolly was liable for procuring a breach or breaches of Mr Alford's retainer, I would also have awarded damages on the same basis.

(2) Application

(i) Common law damages

799. Ms Seal placed a value of £15.14 million on EHL's position at 1 June 2019. Mr Johnston placed a value of £95,500 on EHL's position at the same date although he freely accepted that he found this exercise "incredibly difficult". Ms Seal's evidence was based on her valuation of Ensign House at £52 million and Mr Johnston's evidence was based on his valuation of Ensign House of £26.2 million. Given that I have found that the value of Ensign House on 1 June 2019 was £32.25 million, I find neither expert's opinion helpful on this issue and I, therefore, consider the position by reference to the findings of fact which I have made rather than the expert evidence.

800. Mr Downer, Mr Alford and Mr Connolly were all experienced property professionals with a thorough understanding of the market. I have found that Mr Alford put forward an offer of £4 million for the sale of the options on behalf of Investin with the authority of Mr Downer. I have also found that Mr Alford discussed a possible price of £2.5 million for 17 options and £3 million for 18 options with Mr Connolly. In my judgment, these negotiations show that all three of them were astute enough to realise that the marriage value which a purchaser would unlock by the "site" assembly of all of the different interests in Ensign House was in the region of £4 million. If the negotiations had continued, Mr Downer and Mr Connolly would no doubt have haggled over the share of the marriage of the value which FEC would have to pay to EHL.

801. I must, therefore, decide what share of the marriage value of Ensign House FEC would have agreed to pay EHL for its position. If EHL had been able to secure 17 binding options, it would in my judgment have been entitled to significantly more than 50% of the marriage value and if it had been able to secure all 18 options together with the superior interests, then it would have completed the site assembly and married all the interests in Ensign House together. In those circumstances, Mr Downer could have insisted that FEC pay EHL most, if not the whole, of the marriage value in order to unlock the developer's profit which FEC or a rival developer would earn by building a 56 storey tower on Ensign House.

802. However, in the counter-factual situation which I am considering, EHL had not acquired any of the options but had valuable information and the right to Mr Alford's services. Moreover, FEC UK and EHFL could not engage with the Suiteholders at all without being released from the NDA. In my judgment, the obvious outcome is that FEC would have agreed to pay EHL 50% of the marriage value, namely, £2 million. FEC would still

have made a substantial profit on the acquisition of Ensign House and could still have paid Mr Alford a substantial fee. Moreover, the purchase of EHL's position would have unlocked the developer's profit from the development.

803. I find on a balance of probabilities that if FEC UK and Mr Alford had not committed the breaches of duty or the unlawful actions which I have found, FEC UK would have agreed to pay EHL £2 million to purchase a release from the NDA, the right to use the Confidential Information for the purpose of acquiring all of the interests in Ensign House and a release of Mr Alford from his retainer. In my judgment, Mr Connolly would have been perfectly willing to pay this sum provided that it was conditional upon FEC acquiring all of the interests in Ensign House. Because it has been able to do so (apart from two Superior Leases which it ought to be able to acquire reasonably soon) I award damages and equitable compensation against all four Defendants on that basis.

(ii) Negotiating damages

804. In my judgment, £2 million is also the appropriate award of damages assessed by reference to the principles set out by Lord Reed in *One Step (Support) Ltd v Morris-Garner* and Sales J in *Vercoe.* I might have arrived at a different result if I had held that the market value of Ensign House was very different from the expectations of the parties on 1 June 2019. However, I have found that they were all well aware what marriage value would be unlocked by the acquisition of all of the different interests. I am also satisfied that, viewed on an objective basis, a 50:50 split in the marriage value strikes a realistic balance between the interests of the parties and does not provide relief to EHL out of proportion to its interest in the proper performance of the NDA.

805. In reaching this conclusion, I have carefully considered whether it was commercially acceptable for Mr Downer to ask FEC UK to enter into an NDA. I accept that it was unusual for one potential purchaser to ask another potential purchaser to enter into an NDA in circumstances where it had no proprietary or contractual interest in the target property. But I am satisfied that the NDA protected an acceptable commercial interest and one which EHL was entitled to protect. Mr Connolly did not have to execute it and he could have taken proper advice before he did so. He also accepted that Ensign House was a valuable commercial opportunity whether or not EHL held binding options.

(iii) Confidential Information

806. In my judgment, £600,000 is the appropriate award of negotiating damages for a hypothetical release fee for the Confidential Information alone. Mr Connolly valued Mr Alford's services at £800,000 and I divide the balance in half to assess the release fee for access to the Suiteholders and for use of the Confidential Information. Moreover, I am satisfied that FEC would have paid at least £600,000 more than £28.25 million to the Suiteholders if it had not had access to the Price Allocation Schedule, the Options Incentive Table and Mr Alford's Soft Information.

CC. Account of Profits

(1) The Law

(i) Fiduciaries

807. Ms Wicks and Mr Lee relied on the "inflexible rule of equity" that where a fiduciary has made an unauthorised profit within the scope of his or her duty, he or she is bound to account for it to their principal. In particular, they relied upon *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 where Longmore LJ stated that the breach of duty does not consist in making the profit but keeping it. He stated this at [104]:

> "It is important to appreciate the special position in which a fiduciary finds himself. The essence of the relationship between a fiduciary and beneficiary is that the latter has placed his trust in the former. The core duty of the fiduciary is single minded loyalty to his beneficiary. Thus the breach of duty does not consist in the making of a profit by the fiduciary, but in the keeping of it for himself. That is not a breach of a personal obligation; it is an abuse of the trust and confidence placed in him by his principal who put him in a position to make the profit because he trusted him not to serve his own interests. Equity's response to the breach of this trust is not to give redress for the breach in the form of equitable compensation but to enforce the duty: see Millett, "Bribes and Secret Commissions Again" [2012] CLJ 583."

808. Mr Seitler did not dispute this statement of principle and Mr Alford was debarred from defending the claim against him. I therefore accept that this is an accurate statement of the law. I also accept the submission that a fiduciary who gains a profit pursuant to an opportunity which results from his or her fiduciary position is to be treated as having acquired it on behalf of his or her principal and it is therefore beneficially owned by the principal: see *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] AC 250.

(ii) Accessories

809. In *Novoship* the Court of Appeal also accepted that an account of profits is a remedy available against an accessory who makes a profit by dishonestly assisting in a breach of fiduciary duty. The Court held, however, that an account of profits is not automatic in such a case and the Court has a discretion whether to grant such a remedy. Longmore LJ stated as follows at [119]:

> "We consider that where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then, as Lord Nicholls said in the *Blake* case [2001] 1 AC 268, the court has a discretion to grant or withhold the remedy. We therefore agree with Toulson J in the decision in the *Fyffes* case [2000] 2 Lloyd's Rep 643 that the ordering of an account in a non-fiduciary case is not automatic. One ground on which the court may withhold the remedy is that an account of profits would be disproportionate in relation to the particular form and extent of wrongdoing: see the decision in the Satnam case [1999] 3 All ER 652, 672B-C; *Walsh v Shanahan* [2013] EWCA Civ 411; [2013] 2 P & CR D18. In our judgment that is the case here."

(iii) Breach of Confidence

810. *Walsh v Shanahan* (above) was a claim for breach of confidence. In that case the Court of Appeal confirmed that an account of profits is a discretionary remedy and that there is no right to elect for an account of profits instead of damages: see [63] to [66]. In that case C and Ds had been involved in negotiations for a property acquisition. C then withdrew from the negotiations. He later brought a claim for an account of the profits which Ds had made from the acquisition on the basis that Ds were fiduciaries and that they had misused his confidential information. The judge held that the fiduciary relationship had come to an end (and I have already considered that aspect of the decision). He also dismissed the claim for an account of profits and the Court of Appeal upheld that decision. Rimer LJ explained the basis for his decision at [70], [71] and [73]:

> "70. The essence of the judge's decision as to remedy (which I draw from paragraphs 5 and 85 of his judgment) was that the only confidential information that the respondents appropriated was the benefit of the professional work from Jacobsens and M&G, being work they could have commissioned at their own expense. On the other hand, the account of profits sought was in respect of a property acquisition/development venture in which all the investment and risk had been taken by SLH (representing Messrs Shanahan, Leonard and the Hollerans), a project from which Mr Walsh had unequivocally withdrawn on 17 May 1999. The

judge no doubt had in mind, as is implicit in what he said, that the respondents' knowledge of the opportunity to acquire and develop the property was not itself information in respect of which they owed a duty of confidence to Mr Walsh. On the contrary, it was Allied who had informed Mr Walsh of that opportunity. Once the fiduciary duty owed by Allied to Mr Walsh came to an end, as it did on 17 May, Allied was entitled to offer the same opportunity to its other clients; and Allied was in principle also entitled to take the opportunity up itself. So also, subject to making a full disclosure to Allied and obtaining its consent, were its directors, Messrs Shanahan and Leonard. It was their alleged omission to do so that resulted in the O'Donnell proceedings, in which it was asserted that their acquisition and development of the property breached the 'no profit' and 'no conflict' duties that they owed Allied and had unfairly prejudiced Ms O'Donnell's interest as a member of Allied. Whether Messrs Shanahan and Leonard were or might be answerable to Allied for their conduct was not, however, a question that Mr Walsh was entitled to ask.

71. In those circumstances, the judge concluded that it 'would be manifestly disproportionate and in excess of the just response required' to direct an account of profits. He instead awarded damages and, in paragraph 1 of his 'assessment of damages' judgment, said they should be assessed 'by reference to the likely nominal cost of purchasing the assignment of the valuation report and the benefit of the use of the solicitor's work product.' He then recorded, in paragraph 2, that it was 'in effect, common ground … that if this approach is adopted then that leads to the conclusion that' Mr Walsh should recover the whole of the professional fees he had paid. To that, the judge added the £3,000 that Mr Walsh paid to Allied."

"73. In my judgment, subject to the point raised in the next paragraph, the judge's conclusion was unimpeachable. He exercised his discretion in a way not open to rational challenge. For my part, I find it difficult to see on what basis Mr Walsh considered that he had a claim of any merit to a share in the profits of the acquisition and development of the property: he had expressly spurned the opportunity of making such profits himself, and the making of such profits by the respondents did not involve their misappropriation of any proprietary interest of his in the property, since he had none. Ms Andrews made the point that if the maximum liability of the respondents is to pay professional costs which, had they acted properly, they would have incurred anyway, the judge's order can have had no deterrent effect. Compensation for civil wrongs as developed by the principles of the common law and equity is not, however, ordinarily assessed with an eye on deterrence. Cases in which awards of exemplary damages are appropriate provide an exception, and there may be others, but compensation is ordinarily assessed with the aim of providing the claimant with just redress for the wrong suffered, neither more nor less: it is not directed at penalising the wrongdoer pour encourager les autres. We also had some discussion in argument as to whether there is a general principle that wrongdoers like the respondents should always be stripped of their profits. There is not. Such a principle cannot co-exist with the recognition in the authorities that an account of profits is discretionary."

811. In *Walsh v Shanahan* Rimer LJ referred with approval to the analysis of Sales J in *Vercoe* (above). In that case the judge refused an account of profits for breach of a very similar contractual duty of confidence. Not only was the term itself very similar to clause 1.4 it also protected similar information, namely, a business idea or opportunity. The judge explained his reasons for refusing an account of profits at [345] and [356]:

> "345. In the present case, I consider that an award of an account of the profits made by the defendants would not be an appropriate remedy in relation to the Claimants' breach of confidence claim. For reasons given below, there was no fiduciary relationship between RFML and the Claimants. Nor did the Claimants provide RFML with information about a secret design or process analogous to other forms of intellectual property. The relationship between them was founded upon a contractual relationship, in which each side bargained at arm's length to define the obligations to be accepted by RFML in respect of the business idea or opportunity which Mr Vercoe and Mr Pratt had identified. The negative covenant given by RFML as to use of the confidential information was broadly equivalent to the restrictive covenant in Wrotham Park , and a remedy fashioned by reference to the same kind of notional reasonable transaction to buy release from the claimant's rights as was considered in that case seems eminently suitable in this case. There are the same sufficient means of determining the notional fair or reasonable price appropriate for this case as there were in that case.
>
> 346. The fourth point to be made in relation to this aspect of the Claimants' claims is that since RFML, the Rutland Funds and Mr Cartwright all acted together to make use of the relevant confidential information for their mutual benefit and (to act lawfully) they would all have needed to buy release from the rights of Mr Vercoe and Mr Pratt regarding protection of that confidential information, and since the extent of their liability is not measured by the extent of the profits made by each of them but by the reasonable price to buy release from Mr Vercoe's and Mr Pratt's rights, the fair outcome is that they should each be jointly and severally liable to Mr Vercoe and Mr Pratt for the damages representing that price."

(2) Application

(i) Mr Alford

812. I have found that FEC UK and EHFL between them paid Mr Alford a fee of £803,009 (exclusive of VAT) after the payments to Mr Connolly for introducing them to Ensign House and negotiating with the Suiteholders. I have also found that he failed to disclose the agreement for this fee in breach of fiduciary duty and that he is treated as having acquired it on behalf of EHL. I hold that he is liable to account for this sum to EHL and I will make a declaration to that effect and grant appropriate relief.

(ii) FEC UK

813. I have found that FEC UK is not liable for dishonest assistance but that it is liable for misuse of the Confidential Information and the tort of unlawful means conspiracy. However, I decline to order it to account for the profit which it made on the acquisition of Ensign House through EHFL for the following reasons:

(1) There was no fiduciary relationship between FEC UK and EHL and the Information which EHL provided to FEC UK did not relate to a secret design or process analogous to other forms of intellectual property. It related to the exploitation of a business or development opportunity. Moreover, EHL did not have any enforceable contractual or proprietary interest in Ensign House.

(2) FEC UK could have replicated most of the Information if it had been lawfully able to approach the Suiteholders although it would no doubt have taken time and further expense. The only Information which FEC UK would have been unable to replicate entirely was the Pricing Information and the Soft Information held by Mr Alford. But even that information was not irreplaceable and would not have prevented FEC from acquiring Ensign House. Mr Connolly could have employed another agent and negotiated with the Suiteholders to purchase Ensign House without any of this information if he had not signed the NDA.

(3) The relationship between FEC UK and EHL was primarily a contractual one (as in *Vercoe*) and, in my judgment, damages assessed by reference to the release fee which EHL would have charged FEC UK fully compensate EHL for the invasion of its interests in the present case. Moreover, this is not simply a case where negotiating damages should be awarded because it falls into a particular category for which such relief is available. It is a case in which I have found that EHL would not have pursued the business opportunity for itself but would in fact have negotiated for a release of the relevant contractual rights and for the use of the Information.

(4) The present case is analogous to *Walsh v Shanahan* where the claimant withdrew from negotiations for the business opportunity and the judge considered it disproportionate to order an account of profits. It is also analogous to *Vercoe* where the judge considered the fair outcome to be the award of a release fee rather than

an account of profits. In my judgment, the fair outcome in the present case is the same.

(5) Finally, I bear in mind the way in which EHL obtained the Price Allocation Schedule (which was probably the single most important document containing Confidential Information). Mr Downer was not above misusing confidential information belonging to others himself. I also bear in mind that EHL asserted confidentiality in relation to the BUJ Feasibility Study even though BUJ remained unpaid for its work in relation to Quay House and had to put QHL into liquidation. In my judgment, it would not be right to reward this conduct by ordering an account of profits.

814. If I had found FEC UK liable for dishonest assistance, I would, however, have ordered it to account for any profit which it made on the acquisition of Ensign House. In my judgment, a finding of dishonesty would have tipped the balance the other way. But since EHFL was formed to acquire the property, I have assumed that it made the profit rather than FEC UK (although I would have been prepared to order an inquiry to establish what (if any) part of the profit FEC UK made on the acquisition).

(iii) EHFL

815. I decline to order an account of profits against EHFL for the same reasons as I decline to order an account of profits against FEC UK. Moreover, I have found that EHFL only committed breaches of confidence in relation to Information in Categories B and C and after 10 October 2019. However, if I had found EHFL liable for dishonest assistance, I would have ordered it to account to EHL in full for the £4 million profit which it made on the acquisition of Ensign House.

(iv) Mr Connolly

816. I also refuse to order an account of profits against Mr Connolly personally for the same reasons. However, if I had found him liable for dishonest assistance, I would have ordered him to account to EHL for the profit of £146,993 which he made personally by sharing the introduction fee with Mr Alford. I would not, however, have ordered him to account to EHL for his annual bonus as an employee (or any part of it). Mr Connolly did not receive it at the expense of EHL and FEC may have paid it both with full knowledge

of all of the relevant facts and also to reward Mr Connolly for his performance in relation to matters which are wholly unconnected with this action.

XI. Disposal

817. I hold that FEC UK is liable for damages for breach of the NDA, that EHFL, Mr Connolly and Mr Alford are liable for misuse of the Confidential Information and that all four Defendants are liable for damages for the tort of unlawful means conspiracy. In addition, I hold that Mr Alford is liable for breach of fiduciary duty. But I dismiss the claims for dishonest assistance and procuring breach of contract. I also hold that all four Defendants are liable to EHL, and that EHL is entitled to recover from all four Defendants the total sum of £2 million on the following alternative bases:

    (1) FEC's liability for breach of contract;

    (2) Mr Alford's liability to pay equitable compensation for breach of fiduciary duty;

    (3) Mr Connolly, Mr Alford and EHFL's liability to pay damages for misuse of Confidential Information; and

    (4) all four Defendants' joint and several liability for the tort of conspiracy.

818. In addition, I hold that Mr Alford is liable to account to EHL for the fee of £803,009 which he received from FEC UK and EHFL for introducing FEC to Ensign House. I will deal with all further consequential matters on the handing down of this judgment. I hand down this judgment remotely and I formally adjourn the hearing of this action to a date to be agreed at which I will consider all consequential matters including interest, costs and permission to appeal.

XII. Postscript

819. After I had handed down my judgment in draft, the parties supplied corrections. They also agreed between them that I should modify the form of words which I had originally used in [817] (above). By letter dated 15 June 2023 Mr Seitler and Mr Faulkner wrote to me raising two issues in relation to [803] and [804] (above). First, in relation to [803] they asked the Court to clarify when the release fee would have become payable and whether a reduction should be made to reflect the fact that FEC had not acquired the

Superior Leases. Secondly, they invited me to clarify the basis on which I had awarded negotiating damages and submitted that they should be limited to the hypothetical release fee payable for the Confidential Information.

820. Mr Seitler and Mr Faulkner enclosed with their letter a witness statement dated 3 April 2023 and made by Mr Edward Allison, who is a development manager of FEC UK, giving evidence that the Superior Lease of Suite 2 was acquired by forfeiture on 23 March 2023. Mr Seitler and Mr Faulkner confirmed in their letter that by this date FEC had acquired all of the Superior Leases. By letter dated 19 June 2023 Ms Wicks and Mr Lee replied objecting that the letter dated 15 June 2023 was "a transparent attempt to reduce their clients' liability" but answering the points made. By letter dated 22 June 2023 Mr Seitler and Mr Faulkner responded to this by stating that they were genuinely seeking clarification and not seeking to re-argue the case.

(1) The Hypothetical Release Fee

821. Mr Seitler and Mr Faulkner ask me to clarify two matters: (a) the date on which the hypothetical release fee would have become payable; and (b) if payable before 23 March 2023 a discount should be applied to reflect the remaining uncertainty whether FEC would be able to acquire all of the interests in Ensign House and, in particular, the remaining Superior Leases. I am satisfied that it was legitimate for Mr Seitler and Mr Faulkner to ask me to clarify these two points and I do so.

(a) Date of Payment

822. I had it in mind that the hypothetical release fee would have been payable on exchange of contracts for the purchase of the 17 Suites from the Suiteholders. On 11 February 2020 FEC publicly announced that it had acquired Ensign House for £28.25 million: see [475] (above). In my judgment, that would have been the appropriate date for the satisfaction of the condition and the payment of the premium.

823. I held that any release fee would have been conditional because I was not satisfied that Mr Connolly would have been prepared to make an unconditional payment in relation to interests which Investin had been unable to acquire and which FEC had not yet acquired. But I was satisfied that both Mr Downer and Mr Connolly regarded the acquisition of contractual rights to acquire the interests of the Suiteholders in Ensign House as critical

rather than the date of completion. At all times Mr Downer was looking to acquire binding options over all 17 Suites in Ensign House which he could sell on and until April 2019 Mr Connolly was prepared to pay a premium to buy them. Accordingly, I find that the hypothetical release fee would have been payable on exchange of contracts for the acquisition of the 17 Suites. By 11 February 2020 FEC had exchanged contracts to acquire all of them.

(b) The Superior Leases

824. I did not consider that it was appropriate to make any further discount to reflect the fact that FEC had not acquired all of the Superior Leases by that date and, on reflection, I am satisfied that this was the correct decision for two reasons. First, I did not have it in mind that the payment of £2 million would have been conditional upon the acquisition of the Superior Leases. Secondly, as Ms Wicks and Mr Lee pointed out in their letter, I had already taken into account the uncertainty associated with the Superior Leases when making my findings in relation to the value of Ensign House. Moreover, by 11 February 2020 the only real uncertainty related to Suite 2: see [767] to [770] (above). I accept that the experts adopted a valuation date of 28 February 2020 and I made my findings by reference to that date. But I am satisfied that there was no real change in circumstances between 11 February 2020 and 28 February 2020.

(2) Negotiating Damages

825. Mr Seitler and Mr Faulkner invite me to reconsider whether I should limit negotiating damages to £600,000. I decline to do so. I have found that, as a matter of law, EHL is entitled to recover £2 million as negotiating damages and, if that decision is wrong as a matter of law and negotiating damages are limited to the amount which FEC would have paid for the Confidential Information, then damages are limited to £600,000: see [797] to [806]. In particular, I made it clear in the first sentence of [804] that I assessed negotiating damages on the same basis as common law damages and in [806] I intended to assess damages on an alternative basis if my decision in [804] was wrong as a matter of law. If this is not clear, then I make it clear now. It follows, in my judgment, that Mr Seitler and Mr Faulkner were attempting to re-open my findings on this point and I am not prepared to do so. This point must be the subject of an appeal.

ANNEX 1

Annex 1 consists of a one page table in colour headed "Private Residential Comparables Conclusion". This document is not annexed to the final judgment handed down to the parties and published in the National Archives. However, any party who wishes to obtain a copy may apply to the judge's clerk.

ANNEX 2

Annex 2 consists of a two page Appraisal Summary dated 17 May 2023 and produced by Knight Frank. This document is not annexed to the final judgment handed down to the parties and published in the National Archives either. However, any party who wishes to obtain a copy may apply to the judge's clerk.