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Case No: LM-2022-000105

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

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

Date: 06/07/2023

Before :

Paul Stanley KC
(sitting as a Deputy High Court Judge)

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Between :

KVB CONSULTANTS LIMITED and Others	**Claimants**
- and -	
JACOB HOPKINS MCKENZIE LIMITED and Others	**Defendants**

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- -

Mr Hugh Sims KC and Mr Jay Jagasia (instructed by **Acuity Law**) for the **Claimant**
Mr Simon Howarth KC (instructed pro bono by Advocate) for the **Twelfth Defendant**

Hearing date: 20 June 2023

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Approved Judgment

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This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 6th July 2023.

PAUL STANLEY KC:

Introduction

1. The claimants in this case are a number of companies and individuals. Between October 2015 and March 2019 they invested a combined total of about £1.7 million in one or more of eight investment schemes. The schemes were devised, managed, and promoted by Mr Andrew Callen, through a company Jacob Hopkins Mckenzie Limited (the first defendant, which I shall call "JHM"). JHM traded under the trading name "How Refreshing". The schemes were designed to allow investment in property development opportunities, which would be developed (or partly developed) and sold at a profit, to be split between the investors and JHM. The ventures failed; half of them have been repossessed by lenders; Mr Callen was made bankrupt on 1 February 2022.

2. In this application I am concerned only with the claims that the investors make against the twelfth defendant, Kession Capital Limited ("KCL"). It is the only remaining active defendant. KCL became involved because JHM lacked authorisation from the Financial Conduct Authority that was considered necessary for the business. KCL took on JHM as its "authorised representative" under section 39 of the Financial Services and Markets Act 2000 ("the Act"). It lent its regulatory permission to JHM, and thereby became responsible for supervising JHM, and accepted responsibility for JHM's conduct of the business it had authorised under section 39(3) of the Act. The claimants say that KCL is liable to them. In this application, they contend that the liability is so clear that the court should give summary judgment. Alternatively, they argue that KCL's pleaded case should be struck out in whole or in part.

Summary judgment

3. The approach to summary judgment is not in dispute: see *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch), at [15] (Lewison J). Under CPR 24, summary judgment is not to be granted if a defence has a "realistic" as opposed to a "fanciful" prospect of success. Such a defence must carry "some degree of conviction", which means that it is more than merely arguable. In relation to facts, the court does not conduct a mini trial. But it is not obliged to accept factual assertions where they are clearly without real substance. Nor will it disregard realistic chances that a fuller investigation of the facts at trial may alter the evidence and so affect the outcome of the case. So far as legal issues are concerned, the court should grasp the nettle and decide a short point of law or construction if it is satisfied that it has before it all the evidence necessary for a proper determination of the question. But summary judgment is not an appropriate vehicle for determining complex points of law whose correct resolution may depend on evidence that is not before the court, but which is likely to exist and be available at trial.

The facts

4. The account that follows sets out those facts that have been established with sufficient clarity that it would be fanciful to suppose that a trial would lead to their significant revision, and the key areas where the facts are not so established.

5. Mr Callen's CV describes a varied career. He had served in the army and been a police officer. By the time he introduced himself to KCL, he had qualified as a solicitor (in 2003), and was practising as such. He professed to specialise in "High Court Work around Turnaround, Insolvency, and commercial business fraud and investment". Quite soon after he was introduced to KCL he stopped practising, but remained a solicitor, and continued to emphasise his legal qualifications, for example by including his LLB degree in his email signature. His CV also listed various investment qualifications, and attested to experience as an entrepreneur in various business ventures, some apparently successful.

6. At some point (it is not clear exactly when), Mr Callen developed a business which involved attracting investment for small "refurbishment" property schemes. Those are not directly in issue here, except that they form the background to the grander schemes with which this case is concerned.

7. Mr Kessler, KCL's CEO, has given evidence on behalf of KCL. He says that Mr Callen first contacted KCL on 1 October 2014, completing a "new client questionnaire" online. In that form he described his business (then Jacob, Hopkins & McKenzie LLP) as "currently Legal Consultancy … Going forward to offer Property funded refurbishments", and said he had heard about KCL by "google search". His interest was in becoming an "authorised representative" of KCL in order to carry out that business. He provided a CV, which set out the experience I have described.

8. I have little evidence to explain how that initial contact progressed over the following months. Mr Kessler exhibits a business plan. It is undated, but it is safe to infer that it originated at a fairly stage, because although the trading name "How Refreshing" is used, the corporate entity concerned is still identified as Jacob, Hopkins & McKenzie LLP ("the LLP").

9. The proposed business is described as follows:

> "The objective of this proposed and FCA regulated business is to provide investors with the opportunity to invest in Residential properties in need of Refurbishment or of properties bought out of repossession, or Auction, and to realise a profit following any works needed to be done.
>
> The proposal is that each property will be bought in a new and separate company each time with shares allotted at a £1000 per share. Typical purchases initially will be in the region of less than £100,000.
>
> …
>
> The title to the property will vest solely in the shareholders and it is repeated that there is one new company per property."

10. The business plan described the aim of the business as follows:

> "The aim of the business is to offer experienced property developers who have satisfactorily elected up to the FCA

> requirements on Sophisticated/Professional investor to earn a steady return on their moneys which carries a lower element of risk (as classified under property investment), and to which the investors, ultimately, are in total control of their investment as shareholders of an SPV. This is defined by the rights of voting and meetings etc under the Companies Act as amended etc."

11. That initial approach led KCL to appoint the LLP as an authorised representative. The terms of that agreement are not in evidence.

12. Evidently there was then a decision to restructure the business arrangements, substituting JHM for the LLP. There is no substantial documentary or witness evidence about how that happened, and I have seen no revised business plan. But we know that it led to the conclusion of an Appointed Representative Agreement dated 30 June 2015, which represented the first appointment of JHM.

13. The Appointed Representative Agreement defined the "Relevant Business" as follows:

> "Relevant Business means regulated activities which the [Appointed Representative] is permitted to carry out under this Agreement which are subject to the limitations of the Appointor's part IV permission as detailed in Schedule 5. For the avoidance of doubt, the AR is not permitted to carry out any investment management activities.
>
> The [Appointed Representative] is permitted to market and promote its services, arrange business and give advice.
>
> The [Appointed Representative] will conduct business with professional clients, elective professional clients and eligible counterparties.
>
> The [Appointed Representative] is not permitted to conduct any business with retail clients.
>
> The Appointor acknowledges that the [Appointed Representative] will offer advisory and arranging services to third party investors with regard to residential property investment. There is no pooling of capital and no CIS."

14. Schedule 5 to the Agreement, which set out the limitations on KCL's Part IVA permissions, listed various regulated activities that KCL was entitled to conduct. Among other things it stated that KCL could not "conduct any investment management activities", "operate a collective investment scheme" or "give advice to retail clients". It did, however, include as activities that fell within KCL's permissions "advising on … rights to or interest in investments … share … unit", and "arranging … deals in investments … rights to or interests in investments … share … unit". Those headings correspond to articles in the Financial Services and Markets Act 2000 (Regulated Activities) Order, SI 2001/544, articles 25 and 53.

15. The investment schemes which have led to this claim appear to have been conceived and operated between late 2015 and 2018. The claimants' case is that some of them first become involved with the Limited Liability Partnership in the original "refurbishment" schemes, and later became involved with JHM in the more ambitious "development" schemes. With one exception, JHM classified each claimant as an "elective professional investor", a "high net worth investor", a "professional client", or a "sophisticated investor". The claimants say that in most cases those classifications were incorrect, but that is not a matter on which they rely for this application.

16. There were eight relevant schemes. It is common ground that the first seven schemes were structured as follows:

    i) Mr Callen identified a development opportunity.

    ii) The investors, once they had decided to invest, paid cash to the client account of a firm of solicitors (the 11th defendant, with whom I am not concerned).

    iii) The site was purchased by an SPV. One SPV was created for each site. The investors did not become shareholders in the SPVs: the shares were held by Mr Callen.

    iv) Each SPV made a "declaration of bare trust". There are said to be various unexplained or surprising features of these documents (though I do not think a complete copy of any of them was in evidence). The oddities include (a) in at least some cases the settlor appears not to be the SPV that would have been expected to hold the legal title; (b) in some cases later declarations of trust appear to have been made in a way that would have deprived some existing beneficiaries of part of their existing share; and (c) the settlor appears to have granted security interests in the land notwithstanding the bare trusts. But it is not necessary for present purposes to explore those oddities, nor to ask whether the "bare trust" mechanism really had the effect that Mr Callen seems to have represented it would. What is clear—and not in dispute—is that the investors were given to understand that their investment took the form of the acquisition of a physically undivided interest in the development land which would in due course be sold for their benefit. They did not expect to play any significant part in the day-to-day management of the land, which was to be left to JHM.

17. The first seven schemes appear to have been launched as follows (so far as the claimants' investments are concerned):

    i) Scheme HR61 (Winchfawr) received its first investment on 3 October 2015 and its last on 8 September 2015.

    ii) Scheme HR65 (Hirwaun) received its first investment in October 2015, and its last investment in January 2018.

    iii) Scheme HR66 (Brynithel) received its first investment in December 2015 and its last investment in April 2016.

    iv) Scheme HR75 (Tredegar) received all its investments in September 2016.

v) Scheme HR71 (The Bryn/Rhigos) received its first investment in August 2016 and its second and last investment in June 2017.

vi) Scheme HR79 (Salisbury Road) received its first investment in December 2017, and its last investment in March 2019.

vii) Scheme HR81 (Porth) received all its investments between March and June 2017.

18. The claimants plead that they were encouraged to invest by a variety of written and oral representations and material. That included emails, discussions, videos, and contact with Mr Callen through involvement in his property refurbishment programme. Not every claimant received the same promotional material, and some of it (such as emails and oral representations) is not described or evidenced in much detail. For present purposes, it is sufficient to focus on videos (which nearly all the claimants say they saw), and "site particulars" (which all the claimants say they saw).

19. I have not seen the videos, or transcripts of them. I was taken to various documents—not dated—which are either scripts for or transcripts of videos, on which KCL provided certain comments. Whether these were the videos that the claimants saw and say they relied on is not clear. The most that I think can be said is that, in general terms, the videos described schemes in which investors would own an interest in the land being developed. For example, one video upon which KCL commented either in draft or after reviewing JHM's website (it is not possible to say which) included statements such as the following:

> "[Y]ou can become involved with us knowing comfortably that your interest is registered at the land registry. For those of you who don't know the land registry system what happens there is the land registry where we have got a site says basically How Refreshing Winchfawr Ltd holds this site on trust for the beneficiaries listed in schedule A attached below and on the land registry there will be Schedule A and it will have a list of all of the investors and how many parts they own.
>
> Therefore they have legal title to this property or this land and that is what protects them in terms of any shenanigans or happenings going on."

20. At least by the time that KCL reviewed these videos or scripts, it must have understood that the bare trust structure was being used. The original business plan was ambiguous on the point: it refers to title being held by "the shareholders", but this could be a reference to their holding it through the company. It was certainly not describing a scheme such as those ultimately adopted because it certainly envisaged investors being shareholders in the SPVs. I address the evidence about the date of KCL's knowledge in greater detail later in this judgment.

21. Some other key promotional material, which all the claimants say they saw, took the form of what are called "site particulars". The example I have seen takes the form not of information about a particular site, but of an illustrated "example". It states that

"[e]ach Development is an SPV held as Trustee with the legal beneficiaries of the land as the Investors". That is a confusing description (since the SPV was not "held as Trustee": the arrangement was that the SPV would hold the land as trustee). But it must have been intended to describe the bare trust arrangement.

22. Some of the investors also received a "client care letter". The letter mis-described JHM as being "regulated as an Investment business" (the footer correctly described it as an authorised representative of KCL). It stated that Mr Callen would have "overall management and responsibility for your investment". The letter explained that client money would be held by a firm of solicitors until the land was purchased, at which point the "post purchase moneys go to our Property Development Company which carries out all the Planning and Building Regs application, Site Infrastructure, roads, Dwellings and all the other facilities required under traditional build." It was said that "once a land deal is sold out …. the new balance will … end up on your Solicitors client account".

23. In terms of pleading and evidence about how the various promotions were approved or relied upon, the position is as follows:

    i) Paragraph 14 of the particulars of claim pleads in general terms that Mr Callen promoted the schemes by a variety of written and oral representations. Paragraph 15 refers to a client care letter.

    ii) Schedule 2 to the particulars of claim sets out the various promotional material that each of the investors received.

    iii) At the end of paragraph 17 it is alleged that "KCL approved the various financial promotions concerning the Investment Schemes, including the Site Particulars". That paragraph is not admitted in KCL's defence, on the ground that KCL says it does not have the requisite knowledge to admit or deny it. The claimants submitted that was an unsatisfactory and indeed improper plea: KCL must know what it approved. I agree up to a point. KCL should know what it approved. But I would not seriously criticise KCL for its refusal simply to admit or deny the allegation as it has been made. The particulars of claim plead copious "promotional activities", some in very general terms, without any precision. It seems to me understandable, in those circumstances, that KCL might say that it is unable to admit or deny whether *all* the vaguely specified promotional activities were approved by it, if that is the allegation being made. At any rate, the position is that it is not admitted.

    iv) Paragraph 99 of the particulars of claim alleges that the activities of KCL included "unlawfully approving financial promotions". No specificity as to the particular promotions is offered. That paragraph is denied, and in particular KCL denies that it "unlawfully approved" any materials or financial promotions. That form of denial leaves it obscure whether what is being denied is approval, or that the approval was unlawful, or both.

    v) Mr Kessler's statement points out that the claimants have not adduced evidence that KCL had approved promotions "for the purposes of section 21 of FSMA". He does not however explain what promotions were approved, or for what purpose. The documents exhibited to his statement show that someone at KCL commented on videos in particular (though, as I have said above, without much

clarity as to whether these are prospective or retrospective). There are various forms, which appear to date from 2017, dealing with promotions. It is not clear what promotions they relate to. Some are approved. Some are rejected.

vi) The claimants also point out that in an email dated 1 February 2018, Mr Kessler told Mr Callen that "we have over the years signed off on your financial promotions". In general terms, that is (as the evidence shows) true. But it is a short email and I think it would give it a weight it did not deserve to suppose that Mr Kessler was intending to assert that KCL had approved every financial promotion that JHM had made. His immediate purpose was to refute complaints that Mr Callen was by that stage making that KCL had done nothing for the money it was paid.

24. The upshot is this. There is little clarity about precisely which of the financial promotions KCL approved (for any purpose), though it approved at least some. There is documentary evidence, though only from a relatively late stage, of some sort of formal approval process. But there is no direct evidence that in general, much less as a whole, KCL approved every promotion on which the claimants rely, or even that it approved all the key ones. Nor, in relation to any of the claimants, is there direct or clear evidence as to precisely which promotional statements each claimant relied on in making any particular investment.

25. Mr Kessler's evidence (corroborated by the terms of the Appointed Representative Agreement and by later correspondence) is that before it agreed to appoint JHM, KCL gave some thought to whether the schemes that JHM was to market would be collective investment schemes (CISs). That mattered because CISs are the subject of notoriously stringent regulatory requirements, and KCL did not have the necessary authorisations to operate them, promote them, or approve their promotion. Mr Kessler says that KCL relied on assurances that Mr Callen gave that the schemes were not CISs—assurances which Mr Callen sometimes claimed had been confirmed by advice from counsel (though the dates of such advice, if it existed at all, are not clear, and it is not suggested that KCL saw it). KCL accepts that it did not seek its own legal advice. It does not seem to have kept a record of its thinking on the subject. Or, if it did, it has not produced it.

26. The Supreme Court decided the *Asset Land* case, to which I refer below, in April 2016. It appears from documents that are in evidence that this led to some discussion between Mr Callen and KCL, though the documents are not entirely consistent. In an "updated business plan" dated March 2017, Mr Callen claimed that he had, in July 2016 highlighted a concern arising out of case law that there was a "danger of the entity being accused of being a Collective Investment Scheme". It must be likely that the "case law" in question was *Asset Land.* The letter asserted that the directors of KCL did not share his doubts. It said, however, that "all marketing activity was put on hold", and that no further marketing had taken place since June 2016, while Mr Callen aimed to restructure his activities so that they would be compliant even if the schemes were CISs. Mr Callen repeated that claim in a letter he wrote in December 2017 in which he asserted that from summer 2016 he "stopped marketing my services and investment opportunities at this point due to my fear of the position JHM might be in".

27. I have difficulty in reconciling this with other known facts. It seems unlikely (whatever Mr Callen told KCL) that marketing activity was "put on hold" in summer 2016. Investments continued to be accepted in considerable quantity thereafter. Moreover,

although Mr Callen claimed that it was KCL that considered the schemes remained legitimate, and he who had doubt on the subject, a letter he wrote on 11 February 2017 to Mr Venkiteswaran of KCL (who was also an investor) says that having raised the issue with KCL's compliance officer, he had taken advice from a third party compliance firm who had advised that "it is not immediately clear what regulated activity you would need FCA approval for". He goes on to claim that on further advice as a "belt and braces" approach agreed with yet another compliance firm, he had decided to proceed by registering as an AIFMD and appointing a third party to operate the schemes as CISs. I would hesitate to accept at face value Mr Callen's assertions that KCL would have contradicted him if he had said that the schemes were, after all, CISs. It did not claim the expertise to do so, and had no motive to do so.

28. It does however seem inherently probable, and consistent with the near-contemporaneous documents, that by mid-2016 the issue had resurfaced, and Mr Callen was no longer fully confident (if he ever had been) that the schemes were not CISs. It is likely, but not certain, that he was at least claiming that he was suspending or curtailing his marketing activities until he could put the business on a sound regulatory footing. But KCL did not take any steps to end the relationship, and I have seen no evidence that anything was done to verify or enforce Mr Callen's assurances that he was not marketing the development schemes. Meanwhile, however, Mr Callen does appear to have been looking for a new structure.

29. That is what was done in relation to the eighth scheme, Kingsley Terrace. For that scheme there was an operating agreement (dated 26 February 2017) between the SPV, JHM and a firm called MJ Hudson Management Limited ("MJ Hudson"), which was to operate the scheme as a CIS (having, as I understand it, the relevant authorisations to do so). There was an offering memorandum, which it is pleaded was approved not by KCL but by MJ Hudson. In an email dated 8 April 2022, Mr Callen said that MJ Hudson had "everything to do with the Kingsley Site". But there is very little detailed evidence about it before the court. Of the investments in that scheme, one was made in December 2017, but most were made on various dates in May 2018.

30. By late 2017, relationships between Mr Callen and KCL (which had previously been close enough that it appears that Mr Callen and KCL were planning some sort of joint venture under the name "Chancery & Stone") had thoroughly soured. As I read the correspondence, in particular Mr Callen's letter of 27 December 2017, his main complaint became that KCL had delayed his ability to launch schemes structured along the lines of the Kingsley Terrace scheme since July 2016. He claimed damages for lost opportunities as a result. This led to correspondence in the course of which Mr Callen terminated the Authorised Representative Agreement with effect from 1 February 2018.

31. The particulars of claim make wide-ranging allegations about misrepresentations and misconduct by Mr Callen. Mr Hugh Sims KC (who appeared for the claimants) rightly accepted, however, that for the purposes of this application I have to proceed on the basis that it is at least arguable that Mr Callen acted honestly, and that the whole complaint about the schemes rests solely on their technical infringement of the general prohibition, and the rules prohibiting promotion of CISs. I should make it clear that there is no allegation that KCL acted dishonestly or without integrity.

The schemes in law

32. The starting point for much of the argument in this case is that each scheme was a CIS within the meaning of section 235 of the Act. Although there was not ultimately any real dispute about that, it is necessary to explain the position in a little detail.

33. Section 235 provides as follows:

> "(1) In this Part 'collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> ...
>
> (2) The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics—(a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; (b) the property is managed as a whole by or on behalf of the operator of the scheme. …"

34. By subsection (5), the Treasury may carve out certain arrangements which would otherwise fall under section 235, and provide that they do not "amount to a collective investment scheme". The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, makes such provision. I shall refer to this instrument as the "Collective Investment Schemes Order". Paragraph 21 of that order provides that "Subject to sub-paragraph (2) … no … body corporate other than an open-ended investment company, amounts to a collective investment scheme". Sub-paragraph (2) provides that this carve-out does not apply to limited liability partnerships.

35. Working out whether a given set of arrangements amounts to a CIS is not always simple. It always requires analysis not only of the formal legal documents, but of the facts on the ground, the way the scheme is explained and marketed to investors, and the operators' actual planned activity. The leading case is *Financial Conduct Authority v Asset LI Inc* [2016] UKSC 17, [2016] Bus LR 524. For present purposes, the key points that have emerged from this jurisprudence are as follows:

    i) When the court is identifying the "arrangements" which comprise a putative CIS, it is concerned with a question of fact. "The word 'arrangements' has its ordinary meaning": *Asset Land* at [53] (Lord Carnwath); see also at [91] (Lord Sumption) ("a broad and untechnical word"). They comprise not only the

contractual relationship, but the understandings and expectations of the participants about how the scheme will be operated, including those deriving from how the scheme has been promoted and sold. Such understandings are relevant even if they are not legally binding. The court is concerned with substance and not with form.

ii) On the other hand, as Lord Sumption points out in *Asset Land* at [91], it is the arrangements that comprise the scheme, and not the way the scheme is actually operated, that matters. Conduct after the arrangements are made may throw light on what the arrangements were. But it is not itself the touchstone.

iii) "Day-to-day control" is not just about formal legal control. It, like "arrangement" is a non-technical term, which looks to "the reality" of the situation: see *Asset Land* at [59]. Although there *may* be a difference of opinion between the opinion of Lord Carnwath and that of Lord Sumption (at [94]), it is narrow and for present purposes irrelevant (Lord Sumption's point being that a person might have control without ever choos to exercise it). They agree, however, that the question is about real control, and that the control in question must relate to "the property" which means the property with respect to which the arrangements were made. The fact that an investor retains control of something (for instance its own share) is not enough to save arrangements from being a CIS if the property that is the subject of the arrangements—which is being managed to produce a return—is controlled by someone else. One critical hallmark of a CIS is that the investors do not have day-to-day control of that property.

iv) Sub-section (3) provides two alternative bases on which particular arrangements may constitute a CIS: pooling (limb (a)), or management of the property as a whole (limb (b)). What must be managed "as a whole" is not the *scheme*, but the property that is subject to the arrangements: see *Asset Land* at [96]. Management can embrace a wide range of activities involving varying degrees of control.

v) As Lord Sumption put it, at [99], "[t]he fundamental distinction which underlies the whole of section 235 is between (i) cases where the investor retains entire control of the property and simply employs the services of an investment professional … to enhance value and (ii) cases where he and other investors surrender control over their property to the operator of a scheme so that it can be either pooled or managed in common, in return for a share of the profits generated by the collective fund".

36. It is beyond doubt that the arrangements in which the investors participated were CISs. I do not understand Mr Simon Howarth KC, who appeared for KCL, to disagree. The whole basis of the schemes was that the investors would contribute money which would be used to purchase property which the investors would own in equity, but over which they would not have any day-to-day control; that the property would be managed for their overall and collective benefit by JHM and its SPV; and that the profits, if and when realised, would be shared. Those were arrangements falling within the letter and spirit of section 235.

37. Had the arrangements simply been that the investors subscribed for shares in the SPV, and received profits as dividends or on winding up, there would not have been a CIS, because of the terms of paragraph 21 of the Collective Investment Schemes Order. The FCA's guidance in PERG 11.2 correctly points out, however, that this paragraph only provides a safe harbour if "*all* your rights in the scheme derive from ownership of securities issued by a body corporate". That manifestly did not apply to the schemes. Indeed, *none* of the investors' rights so derived.

38. It follows that all the schemes were CISs. The first seven schemes were plainly unlawful: nobody involved in them had any authorisation to operate them, and there was no lawful route by which they could be promoted or marketed. It is not, however, clear that the Kingsley Terrace scheme was not lawfully operated. In that case, an appropriately authorised firm was recruited to operate the scheme. The claimants' case is that Kingsley Terrace remained an unlawful scheme because the purported operator did not in fact function as operator, but JHM operated it. That is a question on which I have little evidence. But I shall deal with the Kingsley Terrace scheme separately later.

The claimants' case

39. Mr Sims put the claimants' case under three broad headings: (a) as a claim based on breach of the rules in the FCA's Supervision handbook, SUP 12 (the "Supervision Claim"), (b) on the ground that KCL had unlawfully approved promotions so as to become liable to the claimants under section 241 of the Act, and (c) on the basis of section 39(3) of the Act, alone or in conjunction with the Conduct of Business Rules (COBS) or provisions of the Act relating to promotions. The issues I must decide, therefore, are whether KCL has a real prospect (more than barely or merely arguable, not fanciful) of successfully defending itself against those claims at trial.

40. As I said above, the Kingsley Terrace scheme raises quite distinct issues, and I propose to deal with it quite separately. Paragraphs 41 to 93 below should therefore be read as discussing only the first seven schemes.

Section 39 of the Act

41. I propose to deal first with the application of section 39. The essence of the claimants' case in this respect is as follows:

    i) Under the Appointed Representative Agreement, KCL accepted responsibility for JHM's business. It appointed JHM "as its appointed representative to carry on the Relevant Business on behalf of the Appointor". And under clause 6.1 it "accepts responsibility for all [JHM's] activities in carrying on the Relevant Business under this agreement".

    ii) The Relevant Business was defined to include the variety of activities set out in the Schedule, and it expressly said that JHM was "permitted to market and promote its services, arrange business and give advice".

    iii) In those circumstances, JHM's activities in promoting the various schemes (which were exactly what the parties envisaged it would do) fall within the scope of the responsibility accepted by KCL.

iv) It follows that KCL is responsible for any breach by JHM of COBS or the Act. Leaving aside anything else which might have been wrong with the various representations, any recommendation to participate in an unlawful collective investment scheme would inevitably involve a breach of COBS 2.1.1R (acting honestly, fairly and reasonably), 4.2.1R (ensuring promotions are clear, fair and not misleading), or 9.2.1R (being suitable for the investors). It would also follow that KCL is liable for all JHM's promotional activities, which were such as to give rise to liability.

42. In answer to this, Mr Howarth KC, who appeared for KCL, contended that the argument was fundamentally flawed. Its premise was that the schemes were CISs. But, he contended, CISs were excluded from the ambit of "relevant business", and therefore not something for which KCL had accepted responsibility. It was only prepared to appoint JHM on the strict understanding that there would be no CISs. In addition, he said, the claimants' case was that they were retail investors, and the terms of appointment expressly prohibited JHM from dealing with them. Whatever was done, therefore, was outside the terms of KCL's acceptance of responsibility, and therefore not subject to section 39.

43. The necessary starting point is section 39 of the Act, which provides as follows:

> "(1) If a person (other than an authorised person)—
>
> (a) is a party to a contract with an authorised person ("his principal") which—(i) permits or requires him to carry on business of a prescribed description, and (ii) complies with such requirements as may be prescribed, and
>
> (b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,
>
> he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.
>
> …
>
> (3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."

44. This section does two things. First, it defines the scope of an exemption from the general prohibition in section 19 of the Act. Appointed representatives do not breach the general prohibition so long as they are "carrying on that business for which [their] principal has accepted responsibility" of a "prescribed description". Its second function is to set out the consequences of that exemption. These are that the principal is responsible "to the same extent as if he had expressly permitted it" for anything said or done by the representative "in carrying on the business for which he has accepted responsibility".

45. In *Anderson v Sense Networks Ltd* [2019] EWCA Civ 1395, [2020] Bus LR 1, at [35] David Richards LJ held that these two things are linked: "Exemption and liability under section 39(3) are co-extensive".

46. That gives rise to at least two obvious questions. First, how far can an appointor—by limiting the scope of the appointment—limit its liability? For instance, could the appointor (say) restrict the agent to providing "suitable" advice, and thereby give itself the ability to say, if unsuitable advice is given, that the acts fell outside the scope of the appointor's responsibility? That, if it could be done, would dramatically narrow section 39(3). David Richards LJ met that objection as follows (at [40]):

> "[Mr Sims submitted that] even if statutory responsibility may be restricted to only part of a business, liability cannot be excluded by reference to a failure properly to conduct the business. I agree with that, but I do not agree with Mr Sims' next submission that it is impossible to distinguish between 'what' and 'how', so that the only sensible answer is to define the authorised person's responsibility by reference to its authority to conduct business of a prescribed, generic description. In my view it will be a rare case which presents any difficulty in distinguishing between what activity may be carried on and how a permitted activity is carried on."

47. At [49] David Richards LJ gives as an example of such a "how" case one in which the appointed representative, in breach of its obligations, offered an inducement to obtain an investment.

48. The second class of troublesome case is one in which, having been appointed to conduct a particular category of business, the representative steps somewhat outside that category in its narrow sense. An example is *Martin v Brittannia Life Ltd* [2000] Lloyds Rep PN 412, in which advice was given both about taking out an endowment policy and pension policy (which was within the relevant class of business) and about surrendering life policies and taking out new investments (which was not). Such cases were explained in *Anderson* as based on the proposition that such incidental advice falls within the actual authority of the advice when it is "inherently bound up with and incidental to" the specified area. The question therefore becomes one of defining "what" the appointor accepted authority for, approaching that question with a broad eye for commercial reality, and alert to the fact that terms defining how the appointor is to conduct the business are not to be taken as circumscribing it.

49. The Court of Appeal's decision in *Anderson* shows that it would be wrong to apply section 39 with the single-minded objective of imposing the broadest possible liability upon those who appoint representatives (and see also the decision of Jacobs J at first instance [2018] EWHC 2834 (Comm), [2019] Bus LR 1601, at [131]). Promiscuously broad liability would entail promiscuously broad exemption, and that is not what the Act intends. Section 39 permits and requires lines to be drawn, based both on the prescribed categories of business for which exemption can be claimed, and the business for which the representative is appointed by the terms of the relevant agreement. It operates alongside other principles including the ability of a concerned consumer to ascertain from the register whether a person is authorised or exempt, and the obligations of the appointor to supervise the representative, which are not limited to the particular

business that has been authorised. But it is equally necessary not to dissect an appointment in a spirit of pedantry, divorced from commercial reality. JHM was appointed as a representative, ostensibly to "carry on the Relevant Business on behalf of the appointor". The reality, however, was that JHM in no real sense acted "on behalf of" KCL. Rather the reverse: KCL was paid to lend its regulatory imprimatur to JHM's activities, and JHM used that as a selling point, to reassure potential clients. The relevant business was defined without conspicuous precision. The definition was nearly circular: "Relevant Business" means the business that JHM is "permitted to carry out", and the business that JHM is permitted to carry out is the "Relevant Business". *Anderson* reminds us that a claimant cannot use section 39 to hold a firm liable for activities of representatives which are outside the scope of the business for which responsibility was assumed. But it is not to be read as encouraging or requiring the court to take an artificially narrow view, or to assist appointors to draft away or around responsibility for business which in commercial reality falls squarely within the contemplated appointment.

50. The claimants' skeleton argument did not clearly distinguish between two aspects of what JHM did, but in oral argument Mr Sims accepted that they need to be kept separate.

51. In the first place, JHM, alone or with its SPVs, *operated* various collective investment schemes. In my view, in so far as this is the complaint, it is not possible to attribute liability to KCL under section 39. The core problem is this. Under section 39(1), one of the requirements for valid exemption is that the business to which the agreement relates and in relation to which responsibility is accepted should be "prescribed". The prescribed categories are specified in the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217. They do not include the activity of operating a collective investment scheme. It follows that even if the agreement had in terms purported to appoint JHM for that purpose, it would not have been sufficient to exempt JHM from the general prohibition. And since, as *Anderson* holds, exemption and responsibility under section 39(3) are co-extensive, section 39(3) could not apply. Moreover, the agreement does not, fairly read, assume responsibility for those activities, which were unquestionably outside the categories of activity that KCL itself was entitled to undertake, and not (as the parties thought) activities for which KCL's regulatory umbrella was required.

52. (It does not necessarily follow that a person who purported to appoint another to carry on an activity which is not prescribed would not be liable. At common law, those who participate in a joint enterprise are jointly and severally liable for torts committed in the course of that enterprise. A representative who operated a CIS could incur statutory liability as a result and, joint enterprise liability might attach to a person who had jointly participated in that. But that liability would arise not under section 39, but under common law rules of accessory liability. An authorised person would also run a substantial risk of breaching the rules in SUP 12 if it appointed a representative for that purpose. So my conclusion that section 39 does not provide a route to liability in such a case does not leave a gaping hole in the overall statutory scheme. But it is unnecessary for me to decide that point because there is no such pleaded claim here, and the claimants do not seek summary judgment on that basis.)

53. The second aspect of JHM's activities, however, lay not in operating the schemes but in promoting and marketing them, and encouraging investors to participate in them.

Those activities are within the prescribed categories within which representatives may be appointed. They also fell within the activities that KCL was authorised itself to conduct. Subject to the submissions I consider in paragraphs 54–58, they were expressly contemplated under the Agreement.

54. KCL submits that promotion of these schemes nevertheless fell outside the boundary of the Relevant Business, for two reasons. First, because, on the claimants' case, that they were impermissibly directed mostly at retail clients. Mr Howarth submits that this is a "what" not a "how". I do not agree. Specifying the characteristics of those investors who may be appropriate candidates for an investment seems to me to be a central case of an instruction which is directed at *how* the appointed representative should carry on the business, not part of the definition of the business. It would strip section 39 of much of its intended effect if a mistake about the categorisation of a client deprived the appointed representative of exemption, and the client of protection. The line between "how" and "what" is drawn not by considering the way a particular limitation is expressed. Skilful drafting can easily express instructions about an agent's conduct ("do not market to retail clients") or legal categorisation ("market only if the investment is suitable") as if they were limitations on authority ("you may market only to professional clients for whom the investment is suitable") or on the scope of the business ("relevant business is marketing suitable investments to professional clients"). What matters is the commercial activity ("marketing"), and its substance.

55. Mr Howarth's second submission is that if there is one thing clear from the agreement it is that JHM was not authorised to market CISs. They were, on the contrary, expressly excluded from the definition of "Relevant Business". So, if the claimants' case is that JHM did that, it is self-defeating. As Mr Howarth submits, KCL took great care not to authorise JHM to operate or encourage investors to invest in CISs, and cannot be taken to have achieved the opposite result.

56. I would accept that if the Agreement were to be so construed, then the exclusion of the schemes from the Agreement would be a matter of "what" rather than "how", or at least that it would arguably be so. That, after all, is in essence the decision in *Anderson,* though its application to the facts here might still be open to debate. But I do not accept that the Agreement's broad terms should be so construed. When the Agreement is interpreted against the relevant background, it is beyond doubt that the parties intended that marketing these very schemes (or schemes structured as these ones were) to be "relevant business". The statement at the end of the definition, "There is no pooling of capital or CIS", did not limit the scope of the contemplated business, but expressed the parties' mutually agreed conclusion about the legal label that should have been attached to it. That conclusion was incorrect. There was a pooling of capital, and the schemes were CISs. But the retrospective discovery of that legal reality cannot affect the conclusion that this was in every sense the very business that the Agreement contemplated.

57. That conclusion would be contestable if there was any real possibility that KCL could establish that the structure of the business departed from what had been originally agreed, so that JHM ended up conducting not the sort of CIS-free business that was originally contemplated, but something different. I did, at one point, wonder whether that was in fact KCL's submission. Could it be said that the business described in the original plan (investment through shareholding in an SPV) was innocuous, but that Mr Callen departed from that agreement, so that he carried on a business different from

that which fell within the agreement, as happened in *Anderson*? But that is not KCL's pleaded case, nor what its evidence says, nor the basis of the submissions to me. Although Mr Kessler refers to PERG 11.2, he does not say that he (or anyone at KCL) relied on it in assessing the business at the time. He makes no complaint that the schemes as carried out departed from the original intention. He exhibits no correspondence suggesting that was the case. Although there is no contemporaneous record before around 2016 or 2017 that unambiguously shows that KCL knew about the bare trust arrangements, there is no indication that it ever regarded them as surprising, or unexpected, or unauthorised. Mr Kessler says in terms (at paragraph 57 of his witness statement, referring to the onboarding process for JHM, and therefore to the initial stages of the relationship) that "[Mr Callen] wanted to further enhance his offering and start developing properties and at the time as far as I was aware wanted to follow a similar SPV structure to the refurbished properties *but further involved a bare trust structure"* (emphasis added).

58. In my view, therefore, although the operation of the CIS schemes fell (as a matter of law) outside the scope of section 39, JHM's activities in promoting and marketing them fell within it and the Appointed Representative Agreement. They were that agreement's very raison d'être. KCL and JHM thought, wrongly, that those activities would not involve any CIS. But that simply reflected a shared misapprehension about the legal label to attach to the agreed activity, not any limitation on the activity itself.

59. It follows that KCL has no reasonable prospect of establishing that it is not responsible for JHM's promotional and advisory activities.

60. That is not, however, the end of the matter for section 39 imposes responsibility not liability, which must be found elsewhere. The particulars of claim make numerous allegations of wrongdoing against Mr Callen. But for present purposes it is not suggested that any of them can be summarily determined beyond the fact that the investments in question were a CIS. So the question is: is that sufficient to establish liability?

61. In this respect, the claimants advance two cases. The first relies on COBS. There is no doubt that if JHM knew or ought reasonably to have known that the schemes were unregulated CISs, marketing or advice to clients to participate in them would be impermissible. I put on one side, for the moment, COBS 4.2.1R (which requires firms to ensure that communications are "clear, fair and not misleading"), because liability under that rule would essentially overlap with liability under the rules governing promotions to which I refer below. But liability under the other COBS rules that the claimants rely upon is fault based. Under COBS 2.1.1R, the obligation is to act "honestly, fairly and professionally". Under COBS 9.2.1R, the obligation is to take "reasonable steps" to ensure that suitable advice is given. These are not, then, rules of strict liability. So the question whether JHM's conduct fell short of what the rule required is not answered simply by categorising the schemes as being, in law, CISs.

62. In that regard, it seems to me that there are two different periods. The easier, for the claimants, is the later period that occurs after (around) July 2016. The contemporaneous correspondence contains admissions by JHM that, from at least the summer of 2016, Mr Callen had realised that there was at least sufficient uncertainty about the status of the schemes that he should suspend marketing them, and he said he had done so. In fact, as the evidence shows, he did not do so. Or at the least, he remained willing to accept

additional investments. It is indeed fanciful to suppose that JHM could, given Mr Callen's professed state of mind at the time, credibly assert that this was consistent with the discharge of its obligations under COBS. Once Mr Callen realised that the schemes might be unlawful, JHM should have ensured that no further investments were made until that issue had been fully resolved. By my calculation, some £902,000 was invested during this period.

63. I am not, however, persuaded on the evidence before me that the same conclusion should be reached for the period from 2015 to mid-2016.

64. During that period, I must for present purposes assume, Mr Callen honestly believed that the schemes were lawful. But was that a reasonable belief? The position is not the same for him as it is in relation to KCL in respect of its supervisory obligations, which I discuss below. Unlike KCL, Mr Callen was a qualified lawyer, who might be expected to work out that the schemes could not benefit either from the exemption under paragraph 21 of the of the Collective Investment Schemes Order, or from the supposed principle (ultimately shown to be hollow in *Asset Land*) that section 235 could be avoided by structuring a scheme so that it involved individual property rights. Unlike KCL, there can be no doubt that he understood intimately every aspect of the schemes, and precisely what his references to "tenants in common" meant.

65. However, I would not be prepared to conclude that JHM acted unreasonably on a summary basis. Mr Callen claimed, at least sometimes, to derive support for his view from contact with compliance professionals and counsel. Precisely what they were told and what advice they gave, or when, has not been explored, and would be a matter for trial. Nor have the parties investigated in detail the views expressed by commentators on these topics at the time. Improbable as it may now seem to imagine that it could have been thought that conferring "shares" of the equitable title to land through a bare trust would avoid a scheme being characterised as a CIS, I would not reach that conclusion on a summary basis. Putting hindsight aside, it does not seem fanciful that, before *Asset Land* was decided, there might have been at least a body of professional opinion which would have considered that the relevant "property" in this case was the individual investors' equitable interest and that since they retained control over that property there was no CIS.

66. It follows that I would not give summary judgment in relation to all the claims for breach of COBS, although I would be prepared to give summary judgment for those of them which concern investments which took place after July 2016.

67. That, however, is not the only basis for the claimants' claim. The additional argument runs as follows:

    i) In each case the claimants invested because of various promotions made to them.

    ii) Section 238 of the Act provides that "An authorised person must not communicate an invitation or inducement to participate in a collective investment scheme." That is subject to various exceptions, but none applies here.

    iii) Under section 39(3), KCL is "responsible, to the same extent as if he had expressly permitted it, for anything done" by JHM within the scope of the

Appointed Representative Agreement. KCL is therefore to be taken to have breached section 238.

iv) Under section 241 of the Act, section 138D of the Act applies to such a breach, so that "[a] contravention by an authorised person of [s 238] is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty." It is not in dispute that the claimants are "private persons" to whom this provision applies.

68. In my view, the legal steps in this argument are sound. The argument (unlike the more specific argument from "approval of promotions" to which I refer below) does not depend on whether KCL in fact approved all, or any, of the inducements and invitations that JHM communicated. Because of section 39(3) all of them, approved or not, fall within KCL's responsibility. None of the promotions would have been a lawful one, whether purportedly approved by KCL or not.

69. It might be argued (though I do not think Mr Howarth did argue) that there is a gap in the logic of the argument at step 3, and that JHM's promotions (even if they were acts for which KCL is statutorily responsible) were not made "by" KCL, nor "approved" by it (although deemed "permitted"). I doubt this is correct: the responsibility that section 39(3) imposes is intended to be comprehensive within its scope, so that JHM's acts are to be regarded as KCL's. But even if it were correct, it would not make any difference to KCL's liability. For JHM's promotions would still, inevitably, be a breach of section 21 of the Act, because JHM was not entitled to make any financial promotion that had not been approved by an authorised person, and any purported approval of promotion would be ineffective under section 240(2) of the Act. It would follow that someone who invested based on the unlawful promotions would be entitled to compensation under section 30(3) of the Act. KCL would be liable on that claim by virtue of section 39(3). I am therefore satisfied that because KCL is responsible for JHM's promotions, it is liable to compensate the claimants for investments which they made because of those promotions.

70. Step 1, however, is not a legal point at all, but a factual one. Each claimant needs to show that one or more of the promotions was at least a cause of his, her, or its decision to invest. Mr Howarth, albeit to some extent as a post-script to his submissions, suggested that there might be room for argument about causation. But that looks, on this point, fancifully speculative. No doubt investors will have had many reasons to invest and some (such as Mr Sridar Venkiteswaran, who was an employee of KCL) may have learned about the schemes from sources other than invitations communicated by JHM. But all the investors credibly say that they received promotional material, and it is unreal to imagine that any investor would have invested without invitations from JHM playing at least a substantial causal part in that decision. That is enough.

71. It follows that, with the exceptions that I discuss in the next paragraph, I conclude that KCL has no reasonable prospect of establishing at trial that it is not liable for the first seven schemes. In marketing those schemes to investors, JHM was acting within the business for which, under the Appointed Representative Agreement, KCL had accepted responsibility. All the promotional activities in that regard were, whether JHM knew it or should have done, prohibited by section 238 of the Act, and under section 241 of the

Act each of the claimants has a cause of action for breach of statutory duty against KCL as a result.

72. I referred above to certain exceptions. They relate to scheme HR 79 (Salisbury Road). For that scheme, three claimants made their investments in 2018 or 2019. Ms Cizek and Ms Rayner each invested £20,000 on 20 July 2018, which was some 6 months after termination of the Appointed Representative Agreement. KVB Consultants Ltd invested £12,000 on 12 March 2019. That was more than a year after the termination of the Appointed Representative Agreement.

73. If those investments resulted from invitations communicated by JHM after the termination of the Appointed Representative Agreement, it seems to me well arguable (indeed likely) that KCL would not be liable for them under section 39. The particulars of claim, verified by a statement of truth, confirm that each of these investors received promotional material. But they contain no information about when that material was provided. Mr Sims submitted that if the investments were the outcome of activity that took place while JHM was an appointed representative, the fact that the investment happened later would not matter. That seems right: if actions for which KCL assumed responsible led to investment, then the fact that the investment occurred after termination of the Appointed Representative Agreement would not matter. But it is for the claimants (individually) to establish this fact. I do not think I can fairly hold, when the facts have not been investigated and there is no detailed evidence about each investor's decision, that KCL will not be able to show that whatever invitation led to those claimants investing on those occasions lies outside its responsibility. (The same would apply to the COBS claims so far as these investments are concerned.)

74. Accordingly, KCL has no real prospect of establishing a defence in respect of the first seven schemes, except in relation to the claims identified in the preceding paragraphs. Although Mr Kessler's witness statement suggested that there might be some other reason for trial, Mr Howarth wisely accepted that the material relied on does not demonstrate any such reason. Accordingly, and to that extent, the claimants are entitled to summary judgment.

Supervision

75. The claimants also argued that I should be satisfied that their claim in relation to supervision is one in relation to which KCL has no real defence. The essence of the submission was as follows:

    i) Under SUP 12.4.2R, before appointing a person as an appointed representative, the appointor must "establish on reasonable grounds" inter alia that the prospective appointee's activities "do not, or would not, result in undue risk of harm to consumers or market integrity", and that the appointing firm has "adequate controls over the [prospective appointee's] regulated activities".

    ii) Under SUP 12.4.1R that is a continuing monitoring duty. And under SUP 12.6.6R, a firm has a duty to take "reasonable steps to ensure" that the representative does not carry on regulated activities in breach of the general prohibition.

iii) KCL knew that the schemes could not be lawfully promoted by JHM as its representative if they were CISs. On its own case, when JHM was appointed, KCL simply relied on it (and its owner, Mr Callen) to reassure it that they were not. Mr Sims accepted that there might not be a breach of the relevant rules if KCL had taken its own legal advice, even if that advice had been wrong. But, in his submission, it could never be sufficient to rely simply on the representation of the prospective appointee in that regard.

iv) Had such advice been taken (based on full instructions) it would have been rapidly identified that the schemes were CISs, and JHM would never have been given the benefit of KCL's regulatory imprimatur.

76. KCL does not take issue with the first and second steps of this argument. It accepts that an authorised person who is considering appointing a representative must take reasonable steps to understand and assess the business. It would not have been acceptable for KCL to appoint JHM to promote business that it knew or reasonably ought to have known was not lawful. But Mr Howarth takes issue with the third, and I think also the fourth, steps in the argument. Mr Callen, he points out, was a solicitor of some years' experience, and also both qualified and experienced in financial services. This was not a bread and butter question of commercial good practice, but a tricky legal issue which was (even as JHM was appointed) headed to the Supreme Court. A lawyer might appreciate the critical significance of a bare trust; but for the uninitiated it would ring no alarm bells. An ordinarily careful firm in the position of KCL could reasonably defer to an apparently well-educated, and legally qualified, person who appeared (as I must assume he did) entirely honest and trustworthy. In any case, Mr Howarth submits, this is an issue on which at the very least expert evidence would be required to establish whether KCL's approach fell outside the reasonable range of approaches that a firm in its position might take.

77. On this question I would not be prepared to grant summary judgment. The claimants are right that the obligations under SUP 12.4.2 are substantial and important. They are positive obligations. It is not enough that the appointing firm does not have reasons to doubt the suitability of the prospective appointee: it must take positive steps to "establish on reasonable grounds" that the requirements are met. That is particularly important (and likely to require commensurate care) where the "representative business" is representative in name only. It is not business that the appointing firm itself has developed and conducts, for which it needs to appoint an agent (the classic case to which section 39 was designed to cater), but really a case where the appointing firm is "lending" its authorisation to business developed by another. In that context, the appointor's obligation extends beyond simply the definition of the business to which the appointment will relate. One of the dangerous things about section 39 is that it may lead members of the public to believe that an appointed representative is "regulated" in all aspects of its business. That makes it important that the appointing firm thoroughly explores all aspects of the appointee's activities, and how the exemption it is going to confer will be used.

78. That being so, the claimants evidently have cogent arguments that KCL did not do enough. Mr Howarth is correct, however, that in the end this is a question of fact. It depends on all the circumstances. I do not think it can be said that a firm can never, as a matter of law, rely on information or opinions communicated by a prospective appointee. In many respects it will often have to do so, and provided it has no reason to

doubt the information it is being provided with it will be reasonable to do so. That may extend to technical issues which are within the appointee's expertise. Although it would obviously have been better for KCL to have taken its own legal advice, the yardstick is "reasonable" practice, not "best" practice. I do not think Mr Sims is right to say that there is any rule, as a matter of law, that it was bound to do so. It will depend on a more thorough examination of the process of appointment than the evidence currently permits. So, at least for this application, Mr Howarth can legitimately pray in aid Mr Callen's qualifications. To the assembled ranks of His Majesty's counsel in the Rolls Building, much of what Mr Callen said on the topic seems, to say the least, confused, and sometimes unintelligible. But that does not mean that it did or should reasonably have appeared so to someone in Mr Kessler's position.

79. For my part I doubt that this is a question on which expert evidence would be required or useful. It is more a matter of common sense than genuine expertise. I doubt that expert evidence could do much to inform the court about the principles involved, and evidence which merely expresses an individual's views about how he or she would react to particular facts is not likely to be of much help, if it is admissible at all. But whether it is resolved by the court applying its own common sense or with the assistance of experts, the issue remains factual and sensitive to the precise circumstances established by the evidence. There is, as yet, scant evidence about what KCL's officers and employees were told, including what they were told about any third party advice Mr Callen may have said he had (and when), what they read, or how they analysed it.

80. For these reasons, although Mr Sims is right to point out the uphill struggle that KCL faces in explaining why it was reasonable to rely on Mr Callen's opinion without taking independent advice, I do not consider it fanciful to think that when the evidence is examined in detail, a judge might be persuaded that it had done just enough to discharge its obligations. It is a long shot, but one that KCL is entitled to play.

81. Mr Sims also drew attention to a compliance audit document in which KCL itself describes the schemes as consisting of "units in a collective investment scheme (cis) within a special purpose vehicle (spv) for each development. Each spv will operate as a Bare Trust scheme". That document, however, is undated. It certainly post-dates 2015. At trial, I have no doubt that the question of KCL's compliance with its supervisory duties would involve careful scrutiny of the changing landscape. That would include the steps taken by KCL after mid-2016 when Mr Callen raised the fear that *Asset Land* had exposed flaws in his previous analysis, and said that marketing should be suspended. As the evidence shows, however, JHM continued to accept investments—and indeed there is evidence apparently dating from 2017 that KCL was continuing to review promotional material. That raises questions about KCL's ongoing supervision. Why, since a main purpose of the Authorised Representative Agreement was to enable Mr Callen to market these schemes, did KCL not take steps to suspend or terminate the Agreement? How did JHM continue to allow clients to invest in these schemes when their legality was in doubt? Did KCL realise that was happening (and if not, why not)? The trial judge might very well be persuaded that even if KCL acted with sufficient diligence in 2015, its failure to terminate or clarify the Appointed Representative Agreement in 2016 was culpably complacent.

82. Those inquiries, however, would affect different claimants in different ways, and would involve examining how far KCL was entitled to rely on any representation made by Mr Callen that he had stopped or suspended marketing activities. The claimants have not,

for the purposes of this application, advanced a free-standing case that 2016 was a watershed: they pinned their colours to the proposition that KCL breached its supervisory duties from the moment that JHM was accepted as an appointed representative. In those circumstances it would not be appropriate for me to grant summary judgment on a case that has not been examined in detail.

83. None of that seems to me to be appropriate for summary judgment.

84. Finally, when it comes to causation, the claimants' case is not clear cut. How confidently can one say that if KCL had consulted an outside person (perhaps another lawyer, perhaps a compliance professional) in 2015, that it would have received clear advice that the schemes were CISs? Mr Howarth did not address me in detail on the point, preferring to confine his submissions to liability, which it overlaps with. Mr Sims submitted that whatever the subtleties of Asset Land type schemes, JHM's products were clearly the wrong side of the line. For reasons I have already given, I am not sure that is a safe conclusion, untainted by hindsight. *Asset Land* shows that it was, until 2016, regarded as at least an arguable question—difficult enough to justify the Supreme Court's attention—how schemes operated where the land was held individually. There is at least some indication that this is what Mr Callen imagined his own scheme achieved: that each individual investor became the owner, as a tenant in common, of part of the land. I agree with Mr Sims that it seems implausible that this would be enough to escape the statutory definition; nor is it clear that the "bare trust" arrangements did have that effect. But there is also at least some evidence that Mr Callen consulted supposedly well-qualified compliance specialists as late as 2016 and was told by them that the schemes passed muster. That evidence invites sceptical analysis; but that is what a trial is for. In those circumstances, this aspect of the claim falls within the category identified by Lewison J in *Easyair* as one where a fuller examination of the evidence might realistically make a difference.

85. For these reasons, had I not been granting summary judgment on the basis set out above, I would have refused to grant it on the supervisory claim.

Approval of promotions

86. The third basis on which the claimants put their case is that KCL approved the promotions which led the claimants to invest.

87. The argument runs as follows:

    i) Under section 21 of the Act, every financial promotion must be either made by an authorised person or approved by an authorised person.

    ii) Section 240(1) of the Act provides that "An authorised person may not approve for the purposes of section 21 the content of a communication relating to a collective investment scheme if he would be prohibited by section 238(1) from effecting the communication himself or from causing it to be communicated."

    iii) Section 241 of the Act provides that an authorised person who approves a promotion in breach of section 240 may be liable under section 138D to persons such as the claimants.

iv) KCL approved JHM's financial promotions under section 21.

v) Accordingly, it is liable for those promotions.

88. Mr Sims pointed out that this argument is a free-standing one, distinct from section 39. Whether or not JHM was KCL's appointed representative in relation to the CIS business, if KCL had in fact approved the financial promotions that were used, it would be liable.

89. Mr Howarth submitted that this argument failed on a number of points. In the first place, he said, the case had not been clearly or fairly pleaded. There was no sufficient evidence to establish, to the standard necessary for summary judgment, that KCL had approved the financial promotions. Nor, if it had done so, had it approved them "for the purposes of" section 21. He pointed to FCA guidance which makes it clear that approval need not necessarily be for that purpose, whereas section 238 is quite clear that it relates only to approval "for the purposes of section 21".

90. My conclusion about section 39 makes the point academic, so I will express my views briefly. I agree with Mr Howarth that this case is not clearly pleaded, or clearly evidenced. Mr Sims submitted, in effect, that the claimants' pleading was laconic but sufficient. It does plead that KCL "approved the various financial promotions concerning the Investment Schemes, including the Site Particulars". That is—at the end of the day—the only factual allegation necessary to found the claimants' case in this respect. The rest is a matter of law. I do not agree with that submission. The "various financial promotions" are not listed in detail. And they include oral communications and emails. If the intention were to plead that the content of each and every one of those communications was specifically approved by KCL for the purposes of section 21, that should be expressly stated. That deficiency might have been made good if the particulars of claim had clearly advanced the legal argument now being made, so that the reader could understand that the claimants must be making this factual allegation. But they do not, so that in this respect the claimants are really developing a novel argument off the back of a pleading that is far from precise.

91. In any case, even if pleaded, the allegation has not yet been made good. The most that the claimants can say is that KCL should have approved the promotions, and that it seems to have approved some. But they cannot identify exactly which, or when. They cannot, at present, point to documentary proof that KCL approved the only communication which is said to have been seen by all of them (the site particulars). When it comes to causation, although I have already explained why I think it is fanciful to suppose that KCL would not show that promotions (in general) were a cause of the decision to invest, I do not think it is remotely fanciful to suppose that it will turn out that individual claimants were influenced only by some of the promotions. So unless the claimants could establish that each and every promotion was approved, the strength of each claimant's case cannot be assessed.

92. I am not therefore persuaded that this way of putting the case is one in relation to which KCL has no real prospects of establishing a defence. Had I not held that KCL is liable for all JHM's promotional activities via section 39 of the Act, I would not have granted summary judgment based on this argument, given the pleaded case and the state of the evidence.

93. That makes it unnecessary to consider Mr Howarth's contention that if approval was given, it was not given for the purposes of section 21. I think that is unlikely. I can envisage circumstances in which a person approves a promotion for a purpose which is clearly entirely unrelated to section 21. Suppose, for example, that an authorised person happened to be a director of a (different) firm, and in that capacity voted to approve the company making a promotion. But it seems unrealistic to imagine that any approval that KCL gave would have been for any purpose other than under section 21: that would have been the obvious context and purpose within which it was given. Since, however, I agree with Mr Howarth in relation to the other parts of his argument, the question is academic.

Kingsley Terrace

94. I have set out the facts relating to Kingsley Terrace above. Six claimants make claims in relation to that scheme, totalling £260,000.

95. In my view, those claims are not capable of being summarily determined:

    i) The claimants' claim that the Kingsley Terrace scheme was an unlawful CIS depends on a factual assertion (that the operator of the scheme was not MJ Hudson but JHM) which has not been established. Nor is that a matter that I could realistically expect would lie within KCL's knowledge, so that the absence of evidence cannot count against it.

    ii) All the investments in Kingsley Terrace took place at a time when it was intended that the scheme would be carried out without KCL's involvement. Only one of them was made before May 2018, so that most were made some months after the termination of the Appointed Representative Agreement. Mr Callen has claimed that they were closely supervised by MJ Hudson.

    iii) The key promotional document for Kingsley Terrace was a placing memorandum, which the claimants plead was approved not by KCL, but by MJ Hudson.

96. The question for me is not whether the claimants have a real prospect of showing that the promotion of the Kingsley Terrace scheme involved activities for which KCL is responsible. The question is whether KCL has a real prospect of showing that it did not. It evidently does. On its face, the Kingsley Terrace scheme had nothing at all to do with KCL or the business that KCL had accepted responsibility for, and was always intended to be carried on as an avowed CIS under the umbrella of an entirely different firm. The claimants may in due course be able to overcome those obvious difficulties. But it is far from fanciful to suppose that they may not. For that reason, I do not consider that the claimants are entitled to summary judgment in relation to that scheme.

Summary judgment: conclusion

97. For the reasons given above, I have concluded that KCL has no real prospect of defending the following claims:

    i) Any of the claims in relation Winchfawr (HR 61), Hirwaun (HR 65), Brynithel (HR 66), New Tredegar (HR 75), The Bryn/Rhigos (HR 71) and Porth (HR 81).

ii) The claims of Aquarius Living Limited, and Mr Dilip Shah and Mrs Nelina Shah, in relation to Salisbury Road (HR 79).

98. I will accordingly grant summary judgment in relation to those claims. That judgment should consist of a separate judgment for each claimant, each of whom asserts a separate cause of action. I will hear counsel on the form of the judgment and upon interest and costs.

99. I have concluded that KCL does have real prospects of defending:

i) All the claims in relation to Kingsley Terrace (HR 82).

ii) The claims of KVB Consultants Ltd, Ms Cizek, and Ms Rayner in relation to Salisbury Road (HR 79).

100. It follows that, if the relevant claimants wish to pursue those claims, they must proceed to trial. That, however, raises case management issues. In the first place, as Mr Howarth accepted, the defence is in many respects unsatisfactory. It contains inconsistent admissions, denials, and non-admissions. It contains denials without explanation. It contains unexplained non-admissions of facts which it is hard to see are not within KCL's knowledge. Mr Howarth submitted that the appropriate course was simply to strike it out and order that a fresh defence be served. I regret to say that I see no other realistic course.

101. More importantly, in view of my conclusions, what seemed to be a trial over a not insignificant sum will, at most, be a trial in a much narrower compass, relating to two schemes only and a relatively small part of the overall claim. It may be that the affected claimants will wish to consider their position, and that all parties will wish to consider making proposals for case management more clearly proportionate to the issues that remain live.

102. I propose therefore, subject to hearing the parties, to:

i) Enter summary judgment as set out above.

ii) Strike out the defence.

iii) Require the service of a fresh defence, within 21 days.

iv) Direct that the case management conference be restored with a time estimate of 2 hours so that the court and the parties can reconsider case management directions.

103. I am grateful to counsel for their economical and focused submissions, and to Mr Howarth in particular for his mastery of the material on a pro bono basis at very short notice. All were of great assistance to me.