Neutral Citation Number: [2024] EWHC 1174 (KB)

Case No: KB-2022-000075

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 May 2024

Before:

GERAINT WEBB KC
(sitting as a Deputy High Court Judge)

- -

Between:

NICHOLAS PAUL SHANE MCHALE

Claimant

- and –

(1) ANDREW JOHN DUNLOP
(2) CHETWODE LIMITED
(IN LIQUIDATION)

Defendants

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- -

Zachary Bredemear (instructed by **ebl miller rosenfalck**) for the **Claimant**
Stephanie Wookey (instructed by **Macintyre Law**) for the **First Defendant**

Hearing dates: 19 – 22 March 2024

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Approved Judgment

This judgment was handed down remotely at 10:30am on 17 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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A. Introduction

1. The Claimant, Mr Nicholas McHale, claims damages from the First Defendant, Mr Andrew Dunlop, in respect of losses arising from investing his pension savings, via a small self-administered scheme ('**SSAS**'), in two year and five year loan notes in an overseas investment scheme known as the Dolphin Trust between 2016 and 2018. The Dolphin Trust subsequently became known as the German Property Group ('**GPG**'),

2. In October 2020 the Financial Conduct Authority ('**FCA**'), the Financial Services Compensation Scheme ('**FSCS**') and the Financial Ombudsman service published a joint statement to explain that companies in the GPG had entered preliminary bankruptcy proceedings in Germany and to advise on the procedure for making complaints to the Ombudsman and/or claims to the FSCS.

3. Mr Andrew Lockington, a friend of Mr McHale, arranged for him to meet with Mr Dunlop, an 'introducer' of investors to the Dolphin Trust, in January 2016. A series of meetings and communications took place between Mr McHale, Mr Dunlop and Mr Lockington in 2016 and thereafter. With the assistance of Mr Dunlop, an SSAS was set up in respect of Mr McHale's pension funds and the vast majority of his pensions savings were transferred to this SSAS. In total Mr McHale invested £320,000 in Dolphin Trust loan notes with either a 2-year or 5-year term via the SSAS. Those investments were in three separate tranches: (a) in August 2016 a sum of £150,000 was invested (£75,000 in 2-year loan notes and a further £75,000 in five year loan notes); (b) in March 2018 £50,000 was invested in 5-year loan notes; and November 2018 £120,000 was invested, again in 5-year loan notes.

4. There are two limbs to Mr McHale's pleaded case. The first limb is a professional negligence claim for damages which is put on the basis that the Defendants "assumed the duties of reasonable care and skill, good faith to be expected of a financial adviser" acting within "the Code of Conduct" under the Financial Services and Markets Act 2000 (**'FSMA'**) and that they acted in breach of duty by "putting their own interests above those of their client by recommending [Dolphin Trust] because of the high commission it paid…".

5. The second limb is a claim for an account of the alleged undisclosed commission received by Mr Dunlop in respect of the relevant investments into the Dolphin Trust. The Claimant's skeleton clarified that the claim was for breach of fiduciary duty in respect of "half-secret" commissions, it being accepted that Mr McHale knew that commission was payable, but not the amount of the commission and, further, that Mr McHale had been offered a share of the commission.

6. The Second Defendant, Chetwode Limited ('**Chetwode**'), was a company operated by Mr Dunlop. Chetwode was listed with the FCA as an Introducer Appointed Representative for a company called Openwork Limited which was originally named on the Claim Form as a Third Defendant. That claim was discontinued following service of Openwork Limited's Defence and it was not contended at trial that Openwork Limited had any involvement in matters concerning Dolphin Trust. Chetwode went into voluntary liquidation in 2022 and was not represented at the trial. Mr Bredemear, counsel for the Claimant, confirmed that no relief is sought from Chetwode.

7. By their Defence the Defendants deny that Mr Dunlop was a financial adviser, as opposed to an introducer to the Dolphin Trust. The existence of the alleged duty of care, breach, reliance and causation are denied. The claim for undisclosed commission is denied and it is averred that Mr Dunlop agreed to share his commission equally with Mr Lockington and that Mr Lockington then entered into a separate agreement to share the commission with Mr McHale.

B. The pleadings and the procedural history

8. The Claim Form was issued in January 2022. The brief details of claim endorsed on the Claim Form identify claims for breach of statutory duty under the FSMA, breach of contract, negligence and negligent misstatement and alleged that Mr Dunlop "carried out regulated activities including giving investment advice to the Claimant, communicating collective investment schemes and recommending and arranging for Pension Funds to be transferred to a Small Self-Administered Pension Scheme and to be thereafter invested by way of loan notes issued by Dolphin Trust". The Claim Form was amended in April 2022 to add the claim for undisclosed commission.

9. I am informed that a case management conference listed for February 2023, was vacated by agreement to enable the Claimant to amend its case following service of the Defence. Subsequently, the Claimant served a draft Reply on 28 February 2023, some 7 months after service of the Defence. An application was made on 4 April 2023 to amend the Particulars of Claim and to serve a Reply out of time. That application was dismissed at a hearing before Deputy Master Toogood KC on 12 December 2023; I am informed that the reasons given included that the proposed amendments introduced a new case and, further, were too compressed and inadequately pleaded.

10. Mr Bredemear, who appeared for the Claimant at the trial, was not responsible for the Particulars of Claim or the draft Reply. Prior to the trial he confirmed to the Defendants that the claims for breach of statutory duty, breach of contract and negligent misstatement were not being pursued. At the start of the trial I directed that an Amended Particulars of Claim should be produced so that there was no doubt as to which parts of the Particulars of Claim were abandoned; the draft amended pleading, consisting only of deletions, was provided during the course of the trial and not objected to by the First Defendant.

11. Ms Wookey, who appeared for the First Defendant, invited me at the outset of the trial to strike out the remaining claims/grant summary judgment for the Defendant. She submitted that the Particulars of Claim fail to state how the alleged duties arise, fail to identify the alleged scope of those duties and noted that even if that reference to "Code of Conduct" was to be understood as referring to the FCA Handbook, it was unclear how unidentified aspects of the FCA Handbook might be said to apply to an 'introducer' dealing with an unregulated investment opportunity. She prayed in aid the seriousness of the allegations in circumstances in which FSMA provides for various potentially relevant prohibitions and offences. She submitted that there was no pleaded alternative allegation that Mr Dunlop had overstepped his role as an 'introducer', as suggested in the Claimant's skeleton, and raised the concern that the Claimant's skeleton went beyond the Claimant's pleaded case. Further, she emphasised the absence of any express plea of reliance or causation. It was contended that both the claims in negligence and the claim for undisclosed commission were bound to fail in all the circumstances. Her 'fallback' position, articulated at the outset of her skeleton, was that the Claimant must not be permitted to go beyond the confines of his pleaded case at trial.

12. In circumstances in which no written application had been served, whether for summary judgment or strike out, I was not persuaded to accede to Ms Wookey's oral request for a preliminary determination against the Claimant on the face of the pleadings. Whilst no express case on reliance and causation was pleaded, the Defence denied both reliance and causation and the Claimant's witness statement provided some additional clarification as to his case in this regard, and I noted that no Part 18 request had been served for further clarification. Nevertheless, I made clear my serious concerns in respect of the manner in which the Claimant's case was pleaded, including in respect of the existence and scope of the alleged duties, and the need for the Claimant not to advance unpleaded allegations in the absence of any further application to amend.

C. Issues

13. At my direction, the parties produced an agreed list of issues during the course of the trial. The agreed issues are as follows:

In respect of the claims for common law negligence:

i) Did Mr Dunlop owe Mr McHale a duty of care at common law to prevent economic loss?

ii) If so, what was the scope of any such duty of care?

iii) Did Mr Dunlop breach any such duty of care by putting his own interests above those of Mr McHale by recommending the Dolphin Trust because Mr Dunlop would be paid a high commission in the event of any such investments?

iv) Would the Claimant have invested in Dolphin Trust even if Mr Dunlop had properly performed his duty?

v) Should the Claimant's damages (if any) be reduced under s.1 of the Law Reform (Contributory Negligence) Act 1945?

In respect of the claims for undisclosed commission:

vi) Did Mr Dunlop owe Mr McHale a fiduciary duty?

vii) If so, did Mr McHale give fully informed consent to Mr Dunlop receiving commission of 20% in respect of investments into the Dolphin Trust?

viii) If not, what remedy is Mr McHale entitled to?

14. The Particulars of Claim described the Dolphin Trust as an unregulated collective investment scheme, but it was common ground between the parties that it was not necessary for me to determine whether such a description was accurate.

D. Privilege against self-incrimination

15. Mr Bredemear correctly drew my attention to the fact that certain questions he would be asking Mr Dunlop in cross-examination rendered it appropriate to consider the issue of privilege against self-incrimination in circumstances in which various potentially relevant prohibitions and offences are provided for by FSMA, including the following:

i) Section 19 of FSMA prohibits a person from carrying on a regulated activity unless that person is "authorised" or "exempt" within the meaning of the Act. Section 23(1) provides that it is an offence to contravene the general prohibition provided for by s.19.

ii) Section 21 of FSMA provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless they are an authorised person or the content of the communication is approved by an authorised person. Pursuant to s.24 it is an offence for a person who is not an authorised or exempt person to describe himself as such or to behave or otherwise hold himself out in a manner which indicates (or which is reasonably likely to be understood as indicating) that he is an authorised or an exempt person in relation to the regulated activity.

16. Section 14 of the Civil Evidence Act 1968 recognises the privilege against self-incrimination and provides for the right of a person in any legal proceedings, other than criminal proceedings, to refuse to answer any question if to do so would tend to expose that person to proceedings for an offence of for the recovery of a penalty. That general position is modified by certain statutes, in particular:

i) Section 13(1) of the Fraud Act 2006 provides that a person is not to be excused from answering any question put to him in proceedings "related to property" on the ground that "doing so may incriminate him …of an offence under this Act or a related offence".

ii) Section 13(2) provides that in proceedings for an offence under the Fraud Act or a related offence, a statement or admission made by the person in answering such a question is not admissible in evidence against him.

iii) Section 13(3) provides that "proceedings related to property" means any proceedings for the recovery or administration of any property or an account of

any property or dealings with property and that "property" means money or other property whether real or personal.

iv) Section 13(4) provides that "related offence" means "(a) conspiracy to defraud (b) any other offence involving any form of fraudulent conduct or purpose".

17. It was common ground between the parties that the claims against Mr Dunlop fell within the definition of "proceedings related to property" within the meaning of s.13 of the Fraud Act 2006.

18. I invited submissions on the analysis and approach taken Mr Nicholas Thompsell, sitting as a Deputy Judge of the High Court in ***Trafalgar Multi Asset Trading Company Limited (in liquidation) v James David Hadley & Others*** [2023] EWHC 1184 (Ch), at [153] to [190], to the effect that the offences under s.23 and 24 of FSMA should both be treated as "related offences" within the meaning of s.13 of the Fraud Act 2006. The parties invited me to adopt the same approach and to proceed on the basis that Mr Dunlop could not avail himself of the privilege against self-incrimination in relation to potential offences under either s.23 or s.24 of FSMA, but that, on the same analysis, his answers to any such questions could not be used in the course of any criminal trial based on offences under those sections. I agreed to that request, noting, as had Mr Nicholas Thompsell, that the approach adopted in respect of this analysis could not be taken as the final word on these issues. Prior to Mr Dunlop giving evidence, Ms Wookey confirmed that she had explained the issues, and the approach adopted, to Mr Dunlop.

E. The factual evidence

19. Given the highly fact-sensitive nature of the issues concerning both the existence and scope of the alleged duties, I shall provide a fairly detailed summary of the evidence which appears to me to be particularly relevant to the issues I have to determine.

Overview of the factual witness evidence

20. I heard evidence from Mr McHale and from Mr Dunlop. No other witnesses were called and no expert evidence was adduced.

21. Mr McHale's witness statement contained a few drafting notes and some errors (see, for example, [27] below). It had clearly been drafted a considerable time prior to service and not updated (see [91] below). He confirmed that the statement had been prepared by his solicitors and that the drafting notes were made by his solicitors. He generally gave his oral evidence in a straightforward manner and made certain concessions which were contrary to his own interests. He was candid as to his inability to remember much of the details of his discussions with Mr Dunlop which took place on multiple occasions between six and eight years ago and, on occasion, he was unsure as to the chronology of events. On certain points he gave inconsistent and/or contradictory evidence and there were some important points on which I was not able to accept his evidence as reliable.

22. Mr Dunlop gave evidence in a deliberate and considered manner. He is clearly an intelligent person and very alive to the importance and implications of the questions put to him. Mr Bredemear pointed out that, as a former policeman, he was used to giving evidence; Mr Dunlop agreed but emphasised that it had been a long time since he had

been used to giving evidence. He generally accepted points that were obviously correct on the face of the documents, though he was slow to accept the clear implications of an email relating to commissions, as explained at [71] below.

Nicholas McHale's background

23. Mr McHale was born in 1966 and started working as a clerk at NatWest bank at the age of 16 in 1982 before moving to First Interstate Bank of California where he worked for eight years as a foreign exchange (also commonly referred to as FX or Forex) currency trader. Between 1995 and 2001 he worked for an Australian bank, Westpac Banking Corporation ('**Westpac**'), as a senior FX trader. He then moved to Skandinaviska Enskilda Banken AB ('**SEB**') in 2001, where he worked for eight years as a senior dealer/currency trader. His CV includes a period of employment with National Australia Bank in 2008-2009 as a currency trader managing a team of five traders. He subsequently worked as an FX dealer in Copenhagen. His CV includes periods of employment between 2011 and 2013 as a Senior Currency Trader for Marex and for Vision Wealth Capital Management in "March 2013/May 2016" as "Head of Trading & Sales". His CV states that he started working for Mercury Forex AG in July 2016 as "Senior Portfolio Manager FX".

24. Mr McHale accepted that whilst at SEB he held an FCA "controlled function" ('**CF**') as an investment adviser, with a CF21 designation, between December 2001 and October 2007; he also held a customer dealing authorisation, CF 30, between November 2007 and May 2008, which authorised him to provide financial advice to customers. His FCA record shows that he was also listed as having a CF30 customer dealing authorisation between August 2011 and February 2013 and August 2013 to November 2013. He confirmed that in order to obtain these FCA authorisations he had to pass examinations which included understanding risk and reward, market volatility and the importance of diversification within investment portfolios. He describes himself in his CV as "experienced, professional, reliable and compliant FX Portfolio Manager with a 25-year career with top tier banks and Fund Managers". He also confirmed that he had worked for overseas funds which were not regulated by the FCA and he understood the difference between funds which were and were not regulated by the FCA.

25. As at January 2016 Mr McHale was 49 years of age, married to Tara McHale, and had two adult children. He had a defined benefit pension scheme as a result of his employment with Westpac which had a cash equivalent transfer value of around £252,000. He also had two personal pensions with Aegon worth about £21,000 and £51,000 and two with Phoenix Life worth about £18,000 and £20,000.

Andrew Lockington

26. The impression given by Mr McHale was that he had come to know Mr Lockington (the former brother-in-law of a friend) and his family very well and that, by January 2016, Mr McHale regarded him as a friend.

27. Mr McHale's statement claims that he understood that Mr Lockington had worked for Dolphin Trust for 11 to 12 years. In cross-examination, he confirmed this "might be a slight error" as a result of his witness statement having been written by his lawyers. Mr McHale did not believe that Mr Lockington worked for Dolphin Trust. Mr McHale's oral evidence was that he believed that Mr Lockington was "FCA regulated" and

regulated by the International Compliance Association ('**ICA**') and able to give financial advice. His evidence was that he talked to Mr Lockington about other investment opportunities.

28. From the FCA register it appears that Mr Lockington had held CF21 and/or CF30 authorisations for much of the period from 2003 to 2013. He was employed by St. James's Place Wealth Management Plc between 2010 and 2013. According to the register extract I have seen, he does not appear to have held relevant FCA authorisations in 2016.

29. Mr McHale's witness statement confirmed that he had been told by Mr Lockington that the Dolphin Trust was "doing very well" and that he had told Mr Lockington that he was "looking to put some money" into the Dolphin Trust. Mr Lockington then introduced Mr McHale to Mr Dunlop.

Andrew Dunlop and Chetwode

30. After a career in the police Mr Dunlop moved into financial services. He worked with St James's Wealth Management Plc, initially as a trainee Investment Adviser in 2007 and (CF22) and then as a customer adviser (CF30) from November 2007 to March 2012. At this time, therefore, he was authorised by the FCA to give investment advice to customers. After leaving St James's Place, Mr Dunlop became an introducer for the Dolphin Trust investment scheme. He entered into a 'service level agreement' dated 10 February 2014 to act as an introducer to Dolphin International Group Limited via a company which he set up called Esoteric Solutions Limited. The agreement recites that Mr Dunlop attended a "comprehensive briefing" and "sat a knowledge test" in relation to the Dolphin investment opportunity. It also includes the following:

> "3. I understand that the Dolphin investment opportunity is NOT an unregulated collective investment scheme and that it is classified as an exemption under the financial promotions regime… I understand that the investment opportunity has been approved by a reputable UK law firm …
>
> 4. I agree to use only the sales and marketing material that have been approved and provided to me by Dolphin….
>
> 6. For non IFA only. I understand that I am not authorised to give advice on this or any other investment and that should this be required the prospective investor should seek it from a qualified financial advisor"

31. Mr Dunlop says that he set up Chetwode to enable him "to work through the company and provide services". There were no other individuals working for Chetwode. Chetwode was authorised by the FCA from 2015 to 2020 as an Appointed Representative for Openwork Limited, but not for Dolphin Trust.

32. According to Mr Dunlop, he first met Mr Lockington when both of them were working for St James's Place Wealth Management. Mr Lockington maintained close personal ties with clients after he left St James's Place and told Mr Dunlop that he had clients

who would be interested in investing in Dolphin Trust. Mr Dunlop's evidence is that he agreed with Mr Lockington that any share of commission he earned through investments into Dolphin Trust by the clients that Mr Lockington "was advising" would be shared 50/50.

33. Mr Dunlop's evidence is that Mr Lockington requested copies of Dolphin Trust's brochure and provided his address to Mr Dunlop on 8 January 2016 so that Dolphin Trust could send brochures to him directly. He says that Mr Lockington told him about Mr McHale and that he was an experienced trader and was interested in investing in Dolphin Trust.

34. Mr Dunlop disclosed a form of file note setting out dates on which certain meetings took place with Mr McHale and the dates on which he says certain actions were taken in respect of Mr McHale's investments. In general, the chronology set out in those file notes appeared reasonably consistent with the other evidence available to me.

Mr McHale's 2016 investments in Dolphin Trust loan notes

35. Mr McHale first met with Mr Dunlop, together with Mr Lockington, at a restaurant in "Chinatown" in central London in January 2016. Mr Dunlop says it was around 11 January 2016. Mr McHale's evidence was that Mr Dunlop and/or Mr Lockington made a series of statements or representations at the meeting; his statement sometimes refers to what "they" told him and sometimes refers to what Mr Dunlop is alleged to have said. The main allegations are that Mr Dunlop (or he and Mr Lockington) said that: Dolphin Trust could offer "fantastic returns" or, at least, "very good results" and was "a very good company" and had been "achieving very good results for years"; Mr Dunlop and Mr Lockington were both "FCA registered"; Dolphin Trust was regulated in Germany; Dolphin Trust was buying and refurbishing blocks of flats in Germany "to let out"; Dolphin Trust had "billions of assets" and was issuing loan notes secured by first legal charges on property. Mr McHale says that Mr Dunlop explained the details of the investment opportunity: Dolphin Trust offered loan notes with a fixed rate of 10% per annum for 2 or 5 years with an option to earn 2% more on a 2-year deferred interest loan if no interim interest was paid and 10% extra on a 5-year deferred interest option. He was invited on a trip to see the projects in Berlin.

36. Mr Dunlop's evidence was that he attended the meeting as "an introducer" and "information provider" at Mr Lockington's request and was not attending in the capacity of an advisor or any other professional capacity. He says that, at this time, he was not authorised to give regulated financial advice and denies suggesting that he was regulated. He says that he stuck to the information set out in the Dolphin Trust brochure (see [40] below) and told Mr McHale that he was welcome to join him on a trip to see the projects in Berlin so that he could "see what the investment was all about for himself".

37. Following this first meeting, Mr McHale says that he did some due diligence on Mr Lockington, Mr Dunlop and on Dolphin Trust which involved asking family and friends about them, "including a contact in the Police" and that all the enquiries came back as "excellent". He said in cross-examination that he could not recall whether he checked the FCA register to confirm whether either Mr Lockington or Mr Dunlop were FCA registered. He says he was interested in the trip to Berlin, but was unable to go.

38. Mr McHale says that Mr Lockington (not with Mr Dunlop) came to his house on about 27 January 2016 and that it is possible that Mr Lockington gave him "some documents to do with Dolphin". WhatsApp messages suggest that Mr Lockington met with Mr McHale in Brighton on 27 January for dinner and then, again, the following morning at Mr McHale's house.

39. At some stage, according to Mr McHale, he was given a "detailed presentation" on the Dolphin Trust by Mr Dunlop at the Landmark Hotel near Paddington and he was shown a brochure. He says this took place between 18 January and 29 February. It was at this meeting, he says, that he agreed to invest in the Dolphin Trust and gave details of his assets to Mr Dunlop. He understood that all the work in setting up the new company and the bank account for the SSAS would be carried out by Mr Dunlop and understood that Mr Dunlop would receive commission from Dolphin Trust. At some stage, Mr Dunlop also explained that Mr McHale should apply to Rowanmoor Trustees Limited ('**Rowanmoor**'), who would act as the independent SSAS pension trustee. He thought he remembered Mr Dunlop providing him with a copy of the Dolphin Trust brochure but accepted that it was possible that he was given it by Mr Lockington "on behalf of Mr Dunlop". Mr Dunlop's position is that he believes that Dolphin Trust sent its brochure to Mr McHale directly and that Mr McHale received this on about 9 February 2016.

40. The Dolphin Trust brochure ('***the Brochure***') states that it "has been prepared by Dolphin Trust and approved by BlackStar Wealth Management Ltd ('***BlackStar***') for distribution to persons authorised to receive the company's information memorandum dated January 2015 (IM)." It states that the brochure should be read with the IM and the risks warnings in the IM and that whilst BlackStar is authorised and regulated by the FCA, "neither Dolphin Trust or any associated group company of Dolphin Trust is authorised or regulated by the FCA in the UK". It also states:

> "…any person that chooses to consider the Dolphin Trust opportunity must satisfy themselves that they can afford to absorb the risks involved as set out in the IM and to fully understand that this opportunity involves the provision of secured loan capital that is then used for the purposes of investments in selected German Listing Building projects…
>
> No business undertaken by any Lender directly with Dolphin Trust or a Group Company is covered by the UK Financial Services Compensation Scheme or the Financial Ombudsman Scheme and consequently applicants will not be eligible to apply for any compensation from the FSCS."

41. The IM, which Mr McHale confirmed he was given, contains, amongst other matters, the following statements:

> "2. Introduction – German Listed Building Investment Opportunity
>
> …

The contents of this Information memorandum, all of the key information related to contracts and process and all associated promotional materiasl have been examined by Kevin Smith of Honister Partners, Birmingham, as an authorised person within the meaning of the …FSMA, for the purposes of s21 FSMA. Kevin Smith has approved the investment opportunity as a legitimate and compliant Financial Promotion, as required by the … FSA

Any person choosing to invest in Dolphin Capital GmbH may expose themselves to losing all the funds invested.

If you are in any doubt about the action you should take in relation to the investment opportunity or you do not fully understand the detail of this investment opportunity and especially the contents of this Information Memorandum, you are advised to contact your Accountant, Solicitor, Bank Manager, Stockbroker an Independent Financial Advisor or any other professional authorised under the FSMA who specialises in advising on investment into the disciplines of Real Estate, Secured Lending and Bridging Finance

This investment opportunity is not regulated by the Financial Services Authority and investors may not have the benefit of the Financial Services Compensation Scheme and other protection afforded by the FSMA or any of the rules and regulations made thereunder.

…

4. Authorised Introducers

A carefully selected number of introducers have been authorised by Dolphin (under strict service level agreements) to provide information to prospective clients in connection with this investment opportunity.

Authorised Introducers will be paid appropriate commissions on all investments amounts placed with Dolphin…The level of commission payable to Introducers has been set to ensure that Dolphin International Group is competitive in the UK marketplace for raising Private Funds…

…

10. Risk Factors

Dolphin will take great care to only share the investment opportunity with those who accept that they have the ability to absorb the risks associated with the investment.

> This investment has been structure in a manner so as to make it attractive to holders of small Self-Administered Schemes (SSASs) and retail money…However, Investors should be aware that they will be required to bear financial risks of the investment. Investors should understand the risks and satisfy that this type of investment is suitable for their personal circumstances and financial resource.
>
> Potential risks
>
> - Removal of the Tax Break inventive by the German Government
> - A major fall in German property prices, making sale to German investors difficult
> - The collapse of the Euro currency …
> - Past performance is not necessarily a reliable indication of future performance.
>
> Dolphin minimise the risks, regarding the development and renovation of a property, through the completion of an in depth Due Diligence and analysis process…"

42. In addition, Mr McHale confirmed that he received and read a pack of "due diligence" documents, including a Due Diligence Report on Dolphin Capital dated July 2012 ('**the Due Diligence Pack'**). The pack includes notes stated as being prepared by named leading counsel dated 11 April 2013 and 18 September 2013 and by a firm of solicitors dated 5 June 2013 concerning the regulatory implications to Dolphin of marketing the proposed loan notes to investors in the UK. Those notes include confirmation, in the view of the authors, that (a) the loan notes may properly and lawfully be marketed to investors provided that the relevant promotional material has been approved by an authorised person (s21(2)(b) FSMA) and (b) the issue of the loan notes would not constitute a collective investment scheme within the meaning of s.235 FSMA, nor be classified as a non-mainstream pooled investment. The note from the firm of solicitors also advised on means of marketing to investors to comply with regulatory requirements. The Due Diligence Pack contained a series of purported testimonials from individuals. Mr McHale's evidence was that the Due Diligence Pack, including testimonials, had formed part of his decision to invest in the Dolphin Trust.

43. On 1 February 2016 Mr Lockington sent a WhatsApp message to Mr Dunlop setting out the text of a message which he says he sent to Mr McHale which, amongst other matters, suggested that Mr McHale could be paid £30,000 as an "introducer deal" on a £300,000 investment and provided predictions as to the growth of his pension in 5 years. The text is set out at [138] below.

44. Mr Dunlop's client note starts on 10 February 2016 and indicates that he spoke to an accountant, Robert Henry, on that day about setting up a company on Mr McHale's behalf for the SSAS. The note gives details of Mr McHale's pensions and that the defined benefits and transfer values would be discussed with Mark Mitchell, an independent financial adviser ('**IFA**'), prior to submission to Rowanmoor. On 12

February McHale Management Services Limited ('**MMSL**') was incorporated. According to Mr Dunlop the company was set up, on his instructions, by Mr Henry.

45. Mr Dunlop and his wife met up with Mr McHale and his wife on 12 February 2016. It seems to have been largely a social occasion, but Mr McHale says that Mr Dunlop went through the Dolphin Trust investment opportunity again.

46. Mr Dunlop and Mr Lockington met up with Mark Mitchell of Mitchell Prockter, on 17 February 2016 to discuss Mr Mitchell providing advice to individuals in respect of pension transfers to an SSAS.

47. An application form to set up an SSAS with Rowanmoor as the independent trustee was completed by Mr Dunlop, dated 23 February 2016, and sent to Rowanmoor. The form includes a box entitled "trustee adviser details" which states "Please give the details of the adviser who will provide advice on the scheme to the member trustee"; the box has been completed to identify the adviser as "Andy Dunlop, Chetwode Limited". The box asks for details of who the adviser is "regulated by" and for the "authorisation number"; both have been left blank. The "adviser fee agreement" box identifies a sum of £500 as "arrangement fee" and the "ongoing fee" as £327.00 p.a. The form also states that investments by the SSAS will be with Dolphin Trust. It contains a statement that "You should seek financial advice, from a suitably qualified adviser, before making any transfers or assignments". The application form, including the boxes containing pension details, was signed by Mr McHale. Mr Dunlop submitted the SSAS application form to Rowanmoor, along with two other applications, by email on 23 February 2016, the email is signed off as "Andy Dunlop, Chetwode Limited".

48. Mr Dunlop's position is that he and Chetwode were named on the application form as advising Mr McHale on the establishment of the SSAS and not in respect of any proposed investments by the SSAS, and a fee was paid in the sum of £500 to Chetwode Limited. In cross-examination he accepted that his role in setting up the SSAS went beyond his role as an introducer to Dolphin Trust, but he said that he also acted as an introducer to Rowanmoor.

49. On the morning of 29 February 2016 Mr Dunlop emailed Mr Mitchell, copying in Mr Litchfield, to ask him whether he had had further thoughts "*on the question of your fees for multiple DB/FS scheme cases for our client Mr McHale who you are seeing at 2.30pm later today*".

50. That afternoon, Mr McHale and Mr Lockington met Mr Mitchell at Mitchell Procktor's offices. Mr Dunlop did not attend. An eighteen-page financial questionnaire form was signed by Mr McHale. The form states that Mr McHale is an FX trader at Vision Wealth Capital, that he earns £140,000 per year with a 30% bonus, has a property valued at £550,000 and has £500,000 cash in the bank. None of those statements were true. At this stage Mr McHale was between jobs, had sold his house and did not own a property and his evidence was that he did not have £500,000 cash in the bank. Mr McHale was not able to explain the inaccuracies. He accepted that Mr Mitchell asked him various questions about financial issues, but that the writing on the form was not his, other than his signature. He denied providing inaccurate details to Mr Mitchell and suggested that he might have signed a blank form to "help with the paperwork". His evidence was that other aspects of the questionnaire were accurate and, for example, that the section entitled "your objectives" correctly identified that he wished to take control of his final

salary pension schemes. He agreed that it accurately reflected his appetite for risk. In response to the question "how would you rate the degree of risk that you are willing to take in your financial affairs" the answer "high risk" was circled. The question "I am prepared to forego potentially large gains if it means that the value of my investments is secure" was marked "I disagree". The responses also indicated that he was willing to take make high risk investments in comparison to other people, that he usually focused on the potential gains rather than the risk and that he wished to take a "large amount of risk with large potential returns" in respect of his future financial decisions. The statement "I can tolerate the risk of large losses in my investments in order to increase the likelihood of achieving high returns" was marked "I agree". The questionnaire identified the new Rowanmoor SSAS and stated that £140,000 in cash was "going to Dolphin Fund".

51. On 1 March 2016 Mr Mitchell emailed Mr McHale, copying in Mr Lockington (not Mr Dunlop) and attaching a retail client agreement, a fee agreement form, and letters of authority. The fee agreement was structured so that £1,000 was chargeable "on production of a report relating to the feasibility of transferring your retained benefits to a personal arrangement" with a further £5,000 being payable "if the recommendation is to transfer the retained benefits to an alternative pension arrangement". In other words, the fee structure meant that it would be in Mitchell Prockter's financial interests to recommend the pensions be transferred to the SSAS.

52. Mr Dunlop's evidence was that he met up with Mr McHale at Beaconsfield motorway services on 14 March 2016 and that at this meeting Mr McHale signed a Rowanmoor trust form, an Expression of Interest form in respect of investing £260,000 in Dolphin Trust loan notes and a self-certificate of high net worth. Mr Dunlop could not explain why the Expression of Interest from was for £260,000 rather than the sum of £140,000 noted as the proposed investment on the Mitchell Prockter questionnaire of 29 February. Mr McHale did not dispute signing the forms, but had no recollection of meeting up with Mr Dunlop at Beaconsfield services. In his witness statement he states that he believes he saw Mr Dunlop at the Landmark Hotel to sign the forms. The "high net worth investor statement" is dated 3 May 2016. Mr Dunlop says he put this date on it subsequently. It contains the following:

> "I make this statement so that I can receive promotional communications which are exempt from the restriction on the promotion of non-readily realisable securities. The exemption relates to certified high net worth investors and I decare that I qualify as such because at least one of the following applies to me:
>
> - I had, throughout the financial year immediately preceding the date below, an annual income to the value of £100,000 or more
>
> - I held, thought the financial year immediately preceding the date below, net assets to the value of £250,000 or more…
>
> I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me to seek

> advice from an authorised person who specialises in advising on non-readily realisable securities."

53. Mr McHale said in cross-examination that he thought that the statement that he had net assets of £250,000 was probably correct at that time, following the sale of his house. His earnings in the proceeding year would not have exceeded the £100,000 figure, but he pointed out that only one of the two statements needed to be applicable.

54. On 26 March 2016 HMRC approved the setting up of the SSAS. Mr McHale's position is that Mr Dunlop opened an account with Metro Bank in the name of MMSL for the SSAS. Mr Dunlop's position is that the MMSL Metro account was opened by Rowanmoor as part of the setting up of the SSAS. On 14 April 2016 the first of Mr McHale's pension funds were transferred to the MMSL Metro account, being £23,217 from Scottish Equity.

55. Mr Mitchell emailed Mr McHale on 26 April 2016 (intending to copy in Mr Dunlop but making a mistake with his email address) to say that: "I've done the critical yield calculation. On a single life it is 7.2% and on a joint life it's 8.7%. This is pretty high but as a high risk sophisticated investor I am happy to run with it given the death benefits are far superior post transfer". The following day Mr Mitchel forwarded his report recommending the transfer of Mr McHale's defined benefits pension into the Rowanmoor SSAS. The report identified the potential benefits of the transfer as: keeping all pensions together, enabling Mr McHale to exercise substantial control as a member and as a trustee over the choice of investments because an SSAS is not restricted to the investment choice of one provider, and enabling benefits to be taken at any time from 55 years of age. The report noted that "we discussed your knowledge and experience of financial products and investments. You confirmed to me you are a 'sophisticated' investor with great experience and a long history of investing across all product types and markets. You are a 'professional' investor working within the financial services industry as an FX trader for Vision Wealth Capital Trust". The report noted that "the investment risk of transfers of this nature is measured by calculating the 'critical yield', being the measurement of the investment growth required over the period to retirement to provide benefits equivalent to those being given up… The FCA state that the critical yield should not be the overriding factor when make decisions [sic] and if this were the case, I would have to say that the figure at age 60 is fairly high. However, given the increased flexibility, death benefits and your investment knowledge/risk this is acceptable in the circumstances". The summary of the reasons for the recommendation to transfer included the following, amongst other factors: "although the investment growth required to match the ceding scheme benefits has been calculated as high, in your professional opinion as a market trader it is achievable over the longer term". The report also included a statement, under the heading "Our Service Proposition, as follows: "Once I have given advice on the transfer of your retained benefits I will have no further involvement with the SSAS. On going servicing will be dealt with by Chetwode who advise the trustees on investment decisions".

56. On 4 May 2016 Mr Lockington sent a WhatsApp message to Mr Dunlop in suggesting a payment of £12,560 to Mr McHale by way of his share of commission. It is clear to me from this message that Mr Lockington understood that Mr McHale was struggling to find financially rewarding employment within his FX work at that time. Mr Dunlop responded to say "Let's do 20/20/12 in the first round", that is, suggesting that Mr

McHale should receive £12,000, or 23%, of the total commission. During cross-examination Mr Dunlop sought to maintain the position set out in his Defence that he had agreed to split his commission with Mr Lockington on a 50/50 basis and that it was a matter for Mr Lockington as to what part of his share he decide to give to Mr McHale. When pressed, he accepted that this WhatsApp message indicated that he was taking it on himself to say how much commission Mr McHale would be paid.

57. Mr Dunlop also accepted that if Mr McHale's earnings were lower than stated on the Mitchell Prockter questionnaire (as Mr Lockington's message might suggest) then this might have affected Mr Mitchell's assessment (if any) of whether it was suitable for Mr McHale to be investing into Dolphin Trust.

58. On about 6 May 2016 Mr McHale met up with Mr Lockington and signed the Mitchell report to say that he had received the report and that it was a fair reflection of the conversation. He also signed a Dolphin Trust Loan Note offer with a stated investment amount of £260,000. The witness of the signature is stated to be a Niall Bamford, who Mr Lockington was meeting that day. Mr McHale denies meeting Mr Bamford and denies that he witnessed his signature. He accepts that he signed the Loan Note offer, but speculates that Mr Bamford's details, as the purported witness, were completed after he signed the form.

59. Monies from Mr McHale's transferred pensions were paid into the MMSL Metro Account on 23 May 2016 (£56,529) and 1 July 2016 (£252,199). On 6 July Mr McHale sent an email to Dolphin Trust, Mr Dunlop, Mr Lockington and Rowanmoor to say that the transfer of "GBP 250,000 PLUS" from the MMS account to Dolphin Trust "IS NOT WHAT I SIGNED UP FOR IN ANY WAY!". In the email he said that he would instruct Metro not to transfer the monies. The MMSL Metro account shows that the sum of £260,000 had already been paid out from that account on the previous day.

60. Rowanmore responded to Mr McHale by email on 7 July 2016 to explain that they had received a "risk letter" (see [63] below) and the loan note offer signed by him which provided them with authority to process the investment with Dolphin Trust. The email explains that Dolphin Trust had, however, agreed to return the funds. The full sum of £260,000 was subsequently returned to the Metro account.

61. Mr Dunlop visited Mr and Tara McHale at home on 8 July 2016. According to Mr Dunlop's file note, Mr McHale agreed to invest £100,000 in 2-year loan notes and £100,000 in 5-year loan notes at this meeting. Mr McHale does not recall the details of the meeting but says that it is possible that this is what he agreed. He says that Mr Dunlop "went on at some length about how good Dolphin was". He says that he was impressed at the speed with which Dolphin Trust had returned the £260,000 and that he "had the impression that they were a professional and slick operation".

62. WhatsApp messages between Mr Dunlop and Mr Lockington at this time reveal that Mr Lockington was evidently extremely irritated by Mr McHale's actions in demanding the return of the £260,000 investment. In a WhatsApp message to Mr Dunlop on 20 July 2016, Mr Lockington stated: "the sole objective now is to bag £10,000 each (minimum). I want to push him for a £100k 5 year. Alternative is a fee paid by the SSAS for £20,000 (plus vat!!!)? I've got the family card to play with Tara… if he starts to fuck around on the minimum investment it's going to get dirty."

63. Rowanmoor sent a "risk letter" dated 12 July 2016 to Mr McHale at his home address in respect of the proposed purchase of Dolphin Trust loan notes. Mr McHale makes no mention of the risk letter in his witness statement, but he accepted that he received it. The reference to a signed risk letter in Rowanmoor's email of 7 July 2016 (see [60] above) indicates that Mr McHale may previously have been sent and signed a similar risk letter in respect of the initial proposed investment of £260,000, but that document has not found its way into the trial bundle. The risk letter of 12 July contains the following:

> "We understand that you wish to use funds held by the Pension Scheme to purchase loan notes offered by Dolphin Trust …
>
> As you will be aware, an investment of this nature carries a high risk: it is highly speculative and there is no recognised secondary market for this investment. Investors must have no need for liquidity, and be able to withstand a total loss of investment. The loan notes are non-transferable and you will not be able to transfer your holding or sell it to a third party during the investment term. Whilst we are able to give you our opinion as to the eligibility of such an investment under current pensions legislation … we do not endorse or recommend any particular investment structure or provider, nor can we advise on the suitability of, and risks attached to, the proposed investment…
>
> You should note that as this investment is not regulated by the Financial Conduct Authority, most of the protections afforded under the UK financial services regulatory system do not apply to this investment and that compensation under the Financial Services Compensation Scheme may not be available.
>
> As with all complex investments, we would strongly recommend that before proceeding with this investment you take appropriate legal and other professional advice in the matter, as this may prevent issues going forward, and reduce the possibility of incurring unnecessary costs in the future. In particular we would also remind you that in accordance with the provisions of the Pension Act 1995, the Trustees of the Scheme are required to take investment advice before making any investment…"

64. The risk letter ended with a section headed "Members Declaration" which bears Mr McHale's signature and is dated 4 August 2016. The declaration reads:

> "I have read your letter. I understand that there are risks inherent in the proposed transaction and that Rowanmoor Group will not be liable on the basis stated above.
>
> I ~~do~~/do not wish to appoint legal advisers in this matter (Please delete as appropriate.)

> I/~~we~~ have considered taking out life assurance and ~~will~~/will not be taking out cover (Please delete as appropriate.)
>
> I confirm that I have taken investment advice in accordance with the requirements of the Pension Act 1995."

65. By an email on 27 July 2016 Mr McHale informed Mr Lockington and Mr Dunlop that he would invest £75,000 in 2-year loan notes and £75,000 in 5-year loan notes *"... nothing more ... nothing less.* Y*ou have my permission to go forward and complete*". A further high net worth investor statement dated 28 July 2016 and bearing Mr McHale's signature is in the bundle.

66. A WhatsApp exchange between Mr Dunlop and Mr Lockington on 27 July 2016 celebrated the fact of Mr McHale's decision to invest and outlined further plans:

> Lockington: "Seen nicks email. Least we will make a bit".
>
> Dunlop: "10,800 each for starters…".
>
> Lockington: "We are bloody good".
>
> Dunlop: "Need to do a new EOI [expression of interest] … the new loan notes to be signed, witnesses and sent to DT [Dolphin Trust] and RM [Rowanmoor] … Then need to move him to Oakleaf, close his Ltd Co & change the trustee to Oakleaf in the loan note (I can do that)… Why? So we can use the other £200k on Chetwode Capital… (skinning cats and all that)".

67. According to Mr Dunlop's notes he met with Mr McHale at home on 4 August 2016 and obtained his signature on the Rowanmoor risk letter of 12 July (see [63] above) and on the two loan note offers and a further self-certification of high net worth.

68. On 8 August 2016 Mr Lockington sent a WhatsApp to Mr Dunlop setting out a message received from Mr McHale about the commission he understood that he was due on his investment. Mr Dunlop's response suggests a strategy which takes advantage of Mr McHale's ignorance of the commission payable by Dolphin Trust. The following day, 9 August 2016, Mr Lockington sent Mr Dunlop a copy of the reassuring reply he had sent to Mr McHale about commissions. The messages are considered at [193] below.

Events following the initial investment – August 2016 to January 2018

69. On 30 August 2016 Mr McHale emailed Mr Lockington and Mr Dunlop asking, amongst other matters, about the payment of the "cut" he was due on commission. He emailed again on 13 September 2016 asking: "Do I get a cut in my monies I invested into Dolphin?". He also asked about getting commission if a contact which he introduced invested in Dolphin Trust; he said this about that potential investor: *"*he has plenty of cash so… But if he invests I want to be 100% guaranteed a cut…"

70. At about this time Mr McHale was considering investing some of his pension savings in a Mercury Forex fund and he emailed Mr Lockington (not Mr Dunlop) with some details of that potential investment on 14 September 2016. Mr Lockington forwarded that email to Mr Dunlop and there was correspondence between Mr Dunlop and Rowanmoor about whether Mr McHale could invest £40,000 from his pension in a Mercury Forex fund. Mr McHale decided not to proceed, apparently because of the amount of administrative work involved in responding to a number of requests for information from Rowanmoor.

71. On 21 September 2016 Mr Lockington sent Mr McHale an email, copying in Mr Dunlop saying: "Attached is the commission and payment schedule due on your two investments. I've spoken with Andy and he has agreed equal share split with us". The attached schedule then showed 3% commission (£2,250) paid over 2 years in respect of the 2 year loan notes and 9% commission (£6,750) paid over 5 years in respect of the 5 year loan notes, showing a total of £9,000 commission being paid over 5 years, with £3,000 being shown as going to each of Mr Dunlop, Mr Lockington and Mr McHale. In his witness statement Mr Dunlop said that the commission schedule showed how commission would be split in accordance with the arrangement Mr Lockington had made with Mr McHale. Mr Dunlop's oral evidence was that the total commission was 10% commission on the 2-year loan note (£7,500) and 20% commission on the 5-year loan note (£15,000). He was slow to accept that the commission schedule sent by Mr Lockington falsely represented that £9,000 total commission was being paid by Dophin Trust, but he ultimately accepted that the schedule did not provide an accurate account of the total commission payable. Mr Dunlop was copied in on that email and did not seek to correct the false impression that only £9,000 was payable by way of total commission, nor the false impression that the total commission was being split equally three ways.

72. Mr McHale chased for payment of his commission by emails dated 16 December 2016 and 3 January 2017. Mr Lockington replied on 3 January saying that he had suggested that Mr Dunlop should pay Mr McHale his commission in cash and that he was arranging to meet up.

73. In his statement Mr McHale alleges that "I was repeatedly told by Andy Dunlop in 2017 (in meetings and telephone calls) that the Dolphin Trust was doing well. He said it was as safe as the Bank of England". Mr Dunlop denied making any statement to the effect that the Dolphin Trust was as safe as the Bank of England.

74. On 22 February 2017 Mr McHale emailed Mr Lockington and Mr Dunlop in respect of a letter he had received from Companies House concerning an overdue statutory confirmation statement (Form CS01) regarding MMSL. Mr McHale stated in his email: "… I've told them you are my agents and they are expecting you to sort it." His email also complained, yet again, about the fact that he had not received the commission due to him. Mr Dunlop replied to say: "I have lost track of the number of times I have tried to contact you to sort this out. Its quite simple really, if you can make the time to meet with me then I'll be able to sort things for you mainly to save you from ongoing costs. Also, for the avoidance of doubt it is not down to me it is down to you…". Mr Lockington sent a further email on the same day saying "I'll talk you through what needs to be done on the company. You don't need it so its best to close it. You need to think about moving the ssas admin over to heritage as this is now a cheaper option and gives you more freedom…."

75. On 22 March 2017 Mr McHale emailed Mr Dunlop and Mr Lockington to complain about sums of money taken from the Metro account in the past to pay Rowanmoor, Chetwode and Mitchell Procktor and which, he said, had been taken without his authorisation. He refused to pay Rowanmoor's annual fee and complained about having to make payments to Companies House. He complained, again, that he had been paid no commission. On 31 March 2017 Mr McHale emailed Companies House to say that Mr Dunlop was his agent in respect of MMSL.

76. On 10 April 2017 Mr Dunlop sent an email to Mr McHale, copied to Mr Lockington, attaching a non-disclosure agreement. The email said that there were "significant developments taking place very soon with Dolphin Trust and before I can speak to you about them I'll ask you to kindly read through the attached NDA and if you're completely happy with it, sign and return to me…" It seems that Mr McHale did not sign the NDA.

77. At some stage Mr McHale thinks he met Mr Dunlop at the Landmark Hotel and was given about £400 in cash by way of commission. Mr Dunlop's notes indicate that a meeting took place at the Landmark Hotel on 13 April 2017 between Mr Dunlop, Mr Lockington and Mr McHale. Mr McHale also thinks he was also given some cash on another occasion.

Second tranche of investment: December 2017 to March 2018

78. On 2 December 2017 Mr McHale messaged Mr Dunlop to ask whether it was possible to invest some of his pension pot in Mercury FX, the company he was working for at the time. Mr Dunlop responded to say that this was possible and asked some further questions. According to Mr Dunlop, Mr McHale also contacted him in around December to say that he wanted to invest a further £50,000 into Dolphin Trust.

79. A further Expression of Interest form, a high net worth investor statement and a Dolphin Trust 5-year Loan Note Offer form for £50,000, all dated 28 February 2018, were signed by Mr McHale and witnessed by Mr Dunlop. The pension provider is stated to be "Oakleaf SSAS". Mr Dunlop completed a Dolphin Trust form entitled "Appropriateness and Client Categorisation Questionnaire" stating that Mr McHale was a "certified High Net Worth Individual". The bottom of the form states "Name of Firm" which Mr Dunlop has completed as "Chetwode Limited". He has signed a statement saying: "I have assessed the suitability of the Investor named above in respect of their proposed investment in the Bonds and that I have satisfied the criteria in COBS 10 of the FCA Handbook or equivalent". It was not suggested by Mr McHale that he was aware of this statement by Mr Dunlop to Dolphin Trust. Mr McHale could not recall, when giving evidence, whether he had received any further advice from Mr Dunlop in respect of any investment into Dolphin Trust in 2018.

80. By 14 March 2018 a new account with Metro had been opened in the name of Oakleaf Pensions Ltd and on that date Rowanmoor transferred the full balance which it held (just over £172,533) to the new account. A sum of £50,000 for the loan notes was paid from the Oakleaf Metro account on 15 March 2018.

81. On 18 April 2018 Mr Dunlop sent a WhatsApp message to Mr McHale saying: "Let's talk about getting you more interest on that balance as its not working hard enough for you mate". Mr Dunlop messaged again on 29 April to say "I'd like to chat through

what you can do with the cash in your SSAS…". The point was repeated by Mr Dunlop on 18 June 2018: "we need to pick up from our last conversation and get those funds earning some interest for you".

82. The Dolphin Trust 2-year loan note from August 2016 matured on 12 August 2018. On 4 September 2018 Mr McHale messaged Mr Dunlop to say "I still havn't received anything which is worrying as my 2 year should of all been sorted by end of July??". Mr Dunlop responded: "I'll check tomorrow and revert. You need to move all your funds under one account mate to avoid double charging. The Hargreaves account should be transferred to your Metro account with Oakleaf. That way you can control all the funds easier". That last reference was to the possible transfer of a separate Phoenix SIPP which Mr McHale held with Hargreaves Landsdown.

The third and final tranche of investment: October 2018

83. On 22 October 2018 Mr Dunlop messaged Mr McHale to inform him of "imminent changes to the Dolphin Trust Loan Note… the rates of the return for the investor will be reducing. This will be for business written on or after 1/12/18".

84. A further 5-year Dolphin Trust loan note offer form for £120,000 dated 29 October 2018 was signed by Mr McHale and a high net worth investor statement was signed and dated the same day. A further loan note for this sum was issued on 1 November 2018.

Events following that third and final tranche of investments

85. On 21 January 2019 Hargreaves Landsdown emailed Mr McHale setting out concerns in respect of his request to transfer the SIPP he held with Hargreaves Landsdown to his SSAS. Those concerns included "the investment company you intend to use offer unregulated, high risk investments which are unlikely to be suitable for most investors or for a significant part of any investor's portfolio" and that "[y]ou have told us you have taken advice but were unable to provide details of who gave this advice meaning we have been unable to check whether they are FCA regulated…". The email also expressed concerns whether MMSL was genuinely set up to provide pension benefits to employees and stated that they had written "to HMRC for confirmation that they do not have concerns that the Scheme is being used to facilitate pension liberation". It concluded by saying "I would strongly recommend you take independent financial advice from a financial adviser authorised by the Financial Conduct Authority…". Mr McHale accepted that he did not name Mr Dunlop when being asked by Hargreaves Lansdowne to provide details of who had given him financial advice.

86. On 24 May 2019 the BBC ran an on-line report about concerns in relation to the Dolphin Trust. The following day Mr McHale contacted Mr Dunlop, referring to the BBC report, and asking for the money he had invested in Dolphin Trust to be transferred to Hargreaves Landsdowne. In a WhatsApp message he asked "Is my money safe????". Mr Dunlop's response was "In a word …yes".

87. Mr McHale says that he received a call in late 2019 from a company called Simple Claims Assistance Limited offering to help him get his money back in respect of the Dolphin Trust investments and that he subsequently discovered that Mr Dunlop and his

wife were shareholders in Simple Claims Assistance. Mr Dunlop accepted that he had an interest in the company.

88. Mr McHale continued to communicate with Mr Dunlop in an attempt to recover his investments. The direct communications I have seen end with a WhatsApp message from Mr McHale of 8 March 2021 setting out Mr Dunlop's home and work addresses and suggesting a meeting with "a few of my Irish uncles". In cross-examination Mr McHale denied that this was intended as a threatening communication. It is clear to me that Mr McHale's intention was to send a threatening message to Mr Dunlop.

89. At some stage Mr McHale raised a complaint with Michell Prockter. I have not seen the communications setting out the complaint. Mitchell Prockter replied on 16 April 2021 and summarised the complaint as including: "(1) You believe that we recommended the transfer of a guaranteed investment within your final salary pension into an unregulated investment (Dolphin Trust) via a SIPP and (2) You also state that the transaction was not aligned with your attitude to investment risk." Mitchell Prockter denied liability saying that they had advised on the transfer of benefits into the SSAS but not on the underlying investments and offered no advice on investing within the Dolphin Trust.

90. On 28 October 2022 a voluntary liquidator was appointed in respect of Chetwode. Mr Dunlop's evidence was that he no longer needed the company.

91. In his witness statement Mr McHale said that he had been approached by a firm to make a claim in the Dolphin Trust (GPG) insolvency proceedings in Germany. His statement said that he had not signed up with this firm, but in cross-examination he confirmed that he had done so prior to the date of his statement, which had apparently been drafted some time before it was signed.

F. The relevant law concerning the claims in negligence

92. The duty of care alleged is that the Defendants "assumed the duties of reasonable care and skill, good faith to be expected of a financial adviser acting within the Code of Conduct under FSMA". The alleged duty, therefore, is that Mr Dunlop assuming duties of care *qua* financial adviser. The alleged breach of duty concerns the alleged recommendation to invest in Dolphin Trust, rather than the provision of any inaccurate information or any negligent misstatement about the Dolphin Trust. It is not now alleged that the Claimant entered into any contract with either of the Defendants, any claim in contract having been abandoned. Nor are any claims now advanced for breach of statutory duty, whether arising under FSMA or otherwise.

FISMA and the regulatory regime

93. Common law duties may be informed and supplemented by the relevant regulatory framework and associated guidance. The editors of Jackson & Powell on Professional Liability, 9th ed, Chapter 15, Financial Practitioners, at 15-012, provides the following summary:

> "In analysing claims in a financial context, the first main issue that needs to be addressed is one of regulatory application. Does any statute-based or other regulatory regime apply? If so, which?

> What is its impact, taking into account the regulatory classification of both claimant and defendant, the nature of the services provided, and the relevant contractual arrangements? Does it give rise to any duties and liabilities? To what extent, if at all, does it modify what would otherwise be the common law position? What is the significance, if any, of the regulatory regime for common law liabilities?"

94. The provision of financial services is highly regulated by statute, including FSMA, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('**the RAO**'), and the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 ('**the FPO**'). Although there is mention of the "Code of Conduct under FSMA", said to be intended to refer to the FCA Handbook, the alleged duty of care is not pleaded by reference to any particular provisions of the regulatory regime or of the FCA Handbook.

95. By way of skeleton argument, Mr Bredemear referred to certain Principles set out in the FCA Handbook, including (with defined terms in italics):

1. Integrity: A *firm* must conduct its business with integrity
2. Skill, care and diligence: A *firm* must conduct its business with due skill, care and diligence

…

6. Customers' interests: A *firm* must pay die regard to the interests of its customers and treat them fairly

…

8. Conflicts of interest: A *firm* must manage conflicts of interest fairly, both between itself and its *customers* and between a *customer* and another *client*
9. Customers: relationships of trust: a *firm* must take reasonable care to ensure the suitability of its advice and discretionary decisions for any *customer* who is entitled to rely upon its judgment.

The term "*firm*" is defined as "an *authorised person*", which term is defined, in accordance with s.31 FSMA, as a person who has a "*Part 4A permission"* to carry on one or more regulated activities. It was common ground that Mr Dunlop was not an authorised person at any relevant time, but the effect of the Claimant's case is that Mr Dunlop should be held to the same standards as an authorised person if Mr Dunlop claimed to be regulated by the FCA and/or advised Mr McHale to invest in the Dolphin Trust.

96. Whilst Mr Bredemear drew my attention to the issue of self-incrimination in respect of s.19 and s.21 FISMA in the context of Mr Dunlop giving evidence, it is no part of the Claimant's pleaded claim that Mr Dunlop contravened any provision of FSMA or of the FPO or the RAO and nor did I hear argument in relation to such matters.

97. In support of the Claimant's case that Mr Dunlop went beyond the role of a mere "introducer" to Dolphin Trust and, in doing so, assumed a duty of care in tort, Mr Bredemear took me to the definitions of "introducer" in the FCA Handbook, which provides (with defined terms in italics, some of which definitions have been amended over time) that:

> "*Introducer*: an individual appointed by a *firm*, an *appointed representative*, or where applicable, *a tied agent*, to carry out in the course of *designated investment business* either or both of the following activities:
>
> (a) Effecting introductions
> (b) Distributing *non-real time financial promotions"*
>
> An "*introducer appointed representative*" is an "*appointed representative* appointed by a *firm* whose scope of appointment is limited to (a) effecting introductions; and (b) distributing *non-real time financial promotions*".
>
> A *financial promotion* includes "an invitation or inducement *to engage in investment activity* that is communicated in the course of business."
>
> A *non-real time financial promotion* is a financial promotion which is not *a real time financial promotion*.
>
> A *real time financial promotion*, in accordance with article 7(1) of the FPO, is a financial promotion which is "made in the course of a personal visit, telephone conversation or other interactive dialogue".

98. Ms Wookey took issue with any reliance on the definitions of "real-time" and "non-real time" financial promotion in circumstances in which Dolphin Trust was not an authorised person and so not a "firm". Her skeleton emphasises that the promotion of unregulated investment schemes to certain investors (sophisticated, high net worth or professional investors) is not restricted by FSMA in certain circumstances (e.g. pursuant to Articles 48, 50, 50A of the FPO) and that it was no part of the Claimant's pleaded case that Mr Dunlop was acting in breach of any regulatory provision or guidance by providing information to Mr McHale about Dolphin Trust in face-to-face meetings. Ms Wookey, rightly, emphasised that the Claimant must not be permitted to raise unpleaded allegations as to the regulatory control of the provision of financial services of which the Defendants without notice and in circumstances in which elections have been made, based on the pleadings, not to seek permission to adduce expert evidence.

99. In response Mr Bredemear clarified that he was not seeking to advance an unpleaded allegation that Mr Dunlop acted in breach of any regulatory requirement or guidance, but that he prayed in aid the FCA Handbook definition of an "introducer" as an indicator that an "introducer" may run a risk of being fixed with a duty of care as a financial adviser if they do in fact engage in real-time financial promotions by direct in-person communications.

100. I was also provided with a copy of an extract from Chapter 10 of the FCA's Conduct of Business Sourcebook Rules ('**COBS 10'**) relating to the assessment of appropriateness of a *client* by a *firm* which arranges, or deals in, certain financial products. As set out at [79] above, at least in respect of the £50,000 investment of February 2018, Mr Dunlop had completed a Dolphin Trust form entitled "Appropriateness and Client Categorisation Questionnaire" and signed to say that he had "satisfied the criteria in COBS 10 of the FCA Handbook or equivalent" regarding the suitability of Mr McHale in relation to the proposed investment. There was no

evidence that Mr McHale had seen this form or was aware of any certification by Mr Dunlop as to his appropriateness and the relevance, if any, of COBS 10 was not explored in detail at trial.

101. There are, of course, limits as to the extent to which a regulatory regime can be relied upon as informing the existence and scope of a common law duty of care. In this regard, Ms Wookey relied the analysis of Hamblen J, as he then was, in ***Brown v InnovatorOne*** [2012] EWHC 1321 (Comm), at [652], [1273 – 1277] as to why no freestanding action for breach of statutory duty arises in respect of breach of s.19 or s.21 of FSMA and why the attempt in that case to frame a cause of action in negligence on the basis of a duty of care to "comply with the FSMA regulatory regime" must fail. At [1276] Hamblen J said this:

> "[i]t is plain that an attempt to create a duty of care to comply with "the regulatory regime" would undermine the scheme of civil liability carefully created by the Act and be contrary to the jurisprudence referred to above which precludes a claim for a "free-standing" breach of statutory duty from arising in circumstances where, as here, it is plain from the relevant Act that the drafters had considered and expressly defined those provisions within the Act that could give rise to such a claim. Given these powerful policy reasons for not imposing a duty of care, there is no basis upon which the imposition of such a duty of care could satisfy the requirement that it be "fair, just and reasonable."

102. In summary, the Claimant's claims were advanced without any detailed exploration of the relevance, if any, of the wider regulatory regime to the existence, or scope, of the duties of care and fiduciary duties alleged to arise in this case, let alone any expert evidence concerning such issues. The following analysis therefore addresses the alleged duties in the absence of detailed consideration of the regulatory framework and associated guidance.

General principles

103. The authorities to which I was referred by the parties in relation to the claim in negligence mainly concerned the general principles to be applied in respect of establishing whether a duty of care to prevent economic loss arises and, if so, the nature and scope of such duty. The authorities I was invited to consider, and have considered, in this regard included: ***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** [1964] AC 465 ('***Hedley Byrne***'), ***Caparo Industries Plc v Dickman and Oths*** [1990] 2 AC 605 ("***Caparo***"), ***BCCI (Overseas) Ltd (in liquidation) v Price Waterhouse & Anor*** [1998] B.C.C 617, ***Customs and Excise Commissioners v Barclays Bank plc*** [2007] 1 A.C. 181, ***Manchester Building Society v Grant Thornton UK LLP*** [2021] UKSC 20; [2022] A.C. 783 ('***Manchester***'); ***Khan v Meadows*** [2021] UKSC 21; [2022] A.C. 852 ('***Khan***'), and ***Benyatov v Credit Suisse (Securities) Europe Ltd*** [2023] EWCA Civ 140.

104. Whilst *Hedley Byrne* concerned a representation in the form of a reference, the concept of an assumption of responsibility has been extended to provide a remedy for the

recovery of damages in respect of economic loss caused by the negligent performance of services generally (see, for example, ***Williams v Natural Life Health Foods Ltd*** [1998] 1 W.L.R. 830 at 834F).

105. Lord Oliver, in *Caparo*, at p638 C-E provided the following summary of the circumstances in which a duty of care may typically be held to exist:

> "(1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment."

106. Lord Wilson noted in ***NRAM Ltd v Steel*** [2018] UKSC 13; [2018] 1 W.L.R. 1190 that, in *Hedley Byrne*, the requirement of reasonable reliance by the claimant "lies at the heart of the whole decision". He said this, at [19]: "If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct."

107. The principles arising in respect of the existence and scope of a duty of care in respect of pure economic loss and the importance (if any) of distinguishing between "advice" cases and "information" cases have arisen for consideration in a number of cases, including by the House of Lords in ***Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd; South Australia Asset Management Corpn v York Montague Ltd*** [1997] AC 191 ('***SAAMCO***') in relation to recovery of damages for economic loss and by the Supreme Court in ***Hughes-Holland v BPE Solicitors*** [2017] UKSC 21; [2018] AC 599 ('***Hughes-Holland***') in respect of legal advice and, more recently, in *Manchester* and *Khan.*

108. The appeals in *Manchester* and Khan, heard by the same panel, concerned the application of the concept of scope of duty in the tort of negligence as illustrated by the decision in *SAAMCO*. The speech of Lords Hodge and Sales in *Manchester*, setting out the majority opinion, provided a summary, at [4], and at [6], an analysis of the location of the "scope of duty question" by way of a six-stage approach, to which I have had regard. Of particular importance in the present case is the warning provided in respect of "advice" and "information" cases at [18] to [22] and which includes the following:

> 18. The distinction drawn by Lord Hoffmann in *SAAMCO* between "advice" cases and "information" cases has not proved to be satisfactory. Put shortly, as explained by Lord Sumption in *Hughes-Holland* at paras 39-44, the distinction is

too rigid and, as such, it is liable to mislead. In reality, as Lord Sumption emphasises at para 44, the whole varied range of cases constitutes a spectrum. At one extreme will be pure "advice" cases, in which on analysis the adviser has assumed responsibility for every aspect of a transaction in prospect for his client. At another extreme will be cases where the professional adviser contributes only a small part of the material on which the client relies in deciding how to act. In some cases (such as those involving valuers) it is readily possible to say that the purpose of the advice given is limited and that the adviser has assumed responsibility under a duty the scope of which is delimited by that purpose, which Lord Hoffmann called an "information" case. However, Lord Sumption observed (para 44), "[b]etween these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated".

19. In our view, for the purposes of accurate analysis, rather than starting with the distinction between "advice" and "information" cases and trying to shoe-horn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant: see section (ii) above. Ascribing a case to one or other of these categories seems to us to be a conclusion to be drawn as a result of examination of that prior question.

20. This also corresponds with Lord Sumption's explanation at paras 40 and 41 of what is involved in an "advice" case and an "information" case, respectively. In an "advice" case, the adviser's duty "is to consider all relevant matters and not only specific factors" (and what counts as a relevant matter for the adviser is determined by the purpose for which he has agreed to give advice: see para 44). Where the adviser is responsible for guiding the whole decision-making process, the adviser's responsibility extends to the decision…

21. By contrast, in an "information" case (*Hughes-Holland*, para 41), the adviser contributes a limited part of the material to be relied on, "but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client" (emphasis added), and in such a case "the defendant's legal responsibility does not extend to the decision itself"; the result then is that the defendant is "liable only for the financial consequences of [the information] being wrong and not for the financial consequences of the claimant entering into the transaction so far as these are greater".

22. We welcome Lord Leggatt's proposal (para 92) to dispense with the descriptions "information" and "advice" to be applied as terms of art in this area. As Lord Sumption points out in *Hughes-Holland*, para 39, both "advice" and "information" cases involve the giving of advice. For the reasons we give, we think it is important to link the focus of analysis of the scope of duty question and the duty nexus question back to the purpose of the duty of care assumed in the case in hand."

109. In addition to the cases to which I was referred by the parties, it seems to me that the Court of Appeal's judgment in ***Spire Property Development LLP and another v Withers LLP*** [2022] EWCA Civ 970 [2023] 4 W.L.R. 56 ('***Spire***') provides useful guidance on the concept of "assumption of responsibility" as well as assistance on the

decisions in *Manchester* and *Khan*, albeit in the context of professional negligence claims against solicitors. The claimant developers had retained a firm of solicitors, Withers LLP ('***Withers***'), in respect of the purchase of two high-value properties in 2012. The developers then contacted Withers in 2014 with queries relating to the post acquisition discovery of extra-high voltage electric cables running under the two sites. The developers claimed against Withers in contract and/or in negligence for failing to make sufficient searches or enquiries to identify the electric lines in 2012 and for failing to investigate and advise adequately in 2014. The developers succeeded on both claims at first instance. The appeal, which succeeded, was limited to the finding in respect of the 2014 claim that Withers owed a tortious duty of care to advise the developers as to their rights and remedies at that stage. Having summarised the principles which apply in the case of a solicitor's contractual duties under a retainer, Carr LJ (as she then was) provided the following summary of the principles to be applied when ascertaining whether there has been an assumption of responsibility by a solicitor where there is no retainer:

> 59. Where there is no retainer, different considerations arise. The concept of assumption of responsibility as identified in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") remains the foundation of the tortious liability (see *NRAM plc (formerly NRAM plc) v Steel* [2018] UKSC 13; [2018] 1 WLR 1190, para 24 followed in this jurisdiction by the Supreme Court in *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43; [2019] 1 WLR 4041 (at para 7)). The reference to "voluntary" assumption in *Hedley Byrne* (at pp 529 and 530) must not be taken to mean that the solicitor needs to consent to the claimant placing responsibility on them. Rather, the doing of the act implies a voluntary undertaking to assume responsibility…
>
> 60. Whether any responsibility is assumed, and the extent of any such assumption, is to be judged objectively in context and without the benefit of hindsight. Thus, an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the claimant (see *Henderson v Merrett Syndicates Ltd* , at para 181, endorsing *Caparo Industries plc v Dickman* [1990] 2 AC 605, 637). The primary focus must be on exchanges which cross the line between the solicitor and the claimant (see for example *Williams v Natural Life Health Foods* [1998] 1 WLR 830 ("Williams") , 835G). A fact-sensitive enquiry in each case is necessarily required.
> …
> 64. …. As set out above, the question of scope of the duty assumed by the solicitor has to be assessed as a matter of objective construction. The touchstone of liability is not the state of mind of the defendant (see *Williams* at p 835G). This is both principled and fair. As to principle, whether or not a duty of care is exacted on the facts, and the scope of that duty, is a question of law. As to fairness, the person requesting the advice should be entitled to proceed on the basis that the solicitor has assumed responsibility for that which, on an objective basis, the relevant communications suggest that they have..."

110. Carr LJ considered the decisions in *Manchester* and *Khan* as follows:

> 70. The decisions in *Manchester* and *Khan* addressed the concept of scope of duty in the tort of negligence as illustrated by the decision of the House of Lords in …[*SAAMCO*]. The majority opinion was set out in the speech of Lords Hodge and Sales. The majority suggested a six-stage analysis as a useful (though non-prescriptive) approach to placing the scope of duty principle in the tort of negligence: see *Manchester* at para 6; *Khan* at para 28. The second question asked what were the risks of harm to the claimant against which the law imposes on the defendant a duty to take care. It held (at para 4) that the scope of that duty was "governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given" ("the purpose test") and at para 17 that "in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk".
>
> 71. Although, as set out above, the Developers argue that the decisions in this respect support their position, I consider that the purpose test is inapposite to the question arising here, namely the content of the duty owed by the professional as a matter of conduct. By contrast, the purpose test was formulated in order to address the recoverability of damages; to that end it is relevant to ask whether the scope of the professional's duty extended to certain risks in respect of activities which the professional was required to perform. The purpose test addresses the question of scope of duty in law (and the *SAAMCO* principle), rather than the extent of the duty in the first place. Indeed, the purpose test was formulated for a different exercise and on the assumption that the professional's obligation to advise fell within the scope of duty (as reflected for example in the use of the words "negligent advice" in para 17 of Manchester)…"

111. At [72] Carr LJ identified "the central question" in that case as "the scope of the assumption of responsibility on the facts" before then turning to a detailed analysis of the relevant factual matrix.

112. The potential difficulties of trying to identify a clear dividing line between information and advice had previously been considered in a number of financial investment cases, including ***Walker v Inter-Alliance Group plc*** [2007] EWHC 1858 (Ch), [2007] Pens LR 347 ('***Walker***'). That issue was considered further by the Court of Appeal in ***Adams v Options UK Personal Pensions LLP*** [2021] EWCA Civ 474; [2021] 3 WLUK 561 ('***Adams***'), which concerned the provision of information/advice in respect of financial services in the context of series of linked transactions. The claimant contacted an unregulated broker, CLP, in response to an advert about releasing cash from a pension. He claimed that CLP advised him that he could transfer his existing personal pension plan and invest it, via a SIPP, into long leases of storage pods and that, acting on the information and assurances given to him and with the benefit of a cash-back inducement, he arranged for CLP to transfer his pension to a SIPP provided by the Defendant, an authorised person. His subsequent investment in the storage pods performed poorly. He claimed against the defendant SIPP provider on the basis, amongst other claims, that his agreement with the defendant was unenforceable pursuant to s.19 and s.27 FSMA as the actions of CLP amounted to carrying on a regulated activity in contravention of the general prohibition. He was unsuccessful at first instance. On appeal he succeeded on the claim under s.19 and s.27 FISM on the

basis that CLP had breached the general prohibition by carrying on activities specified in articles 25 and 53 of the RAO, namely, arranging deals in investments and advising on investments. Newey LJ, with whom Rose LJ (as she then was) and Andrews LJ agreed, explained, at [66 to 68], that whilst advice on a SIPP exchanging assets was not a regulated activity when neither of the assets was a specified investment, advice on unregulated investments can potentially be material to whether advice is being given on specified investments. Reference was made, at [67] to Ouseley J's description in *R (TenetConnect Services Ltd) v Financial Ombudsman* [2018] EWHC 459 (Admin), [2018] 1 BCLC 726] of a "single braided stream of advice" being given about a series of investments. Newey LJ then considered the issue of what constitutes "advice on merits" for the purposes of article 53 of the RAO setting out the analysis of Henderson J in *Walker* and of Judge Havelock-Allan QC in *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB), [2012] PNLR 7 before summarising the position, at [75], as follows:

> "It is plainly the case that the simple giving of information without any comment will not normally amount to "advice". On the other hand, I agree with Judge Havelock-Allan QC that the provision of information which "is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient" is capable of constituting "advice". I also agree with Henderson J that "any element of comparison or evaluation or persuasion is likely to cross the dividing line…"

113. Whilst Mr McHale's claims have not been advanced against any regulated entities, nor by reference to the regulatory implications, if any, which can sometimes arise in respect of the provision of services in the context of regulated and unregulated investments, the cases of *Walker* and *Adams*, which were not cited to me in argument, provide illustrations of the complexity of the issues which can arise concerning the provision of information/advice on financial investments particularly in "single braided stream of advice" cases.

114. In summary, I have found the overview provided by Carr LJ in *Spire* to be of particular assistance in the present case and I draw heavily from that guidance. This is a situation in which no contract or retainer is alleged. In such a case, the foundation of liability in tort remains the concept of assumption of responsibility. The question is whether responsibility should be held to have been assumed by the defendant to the claimant in respect of the relevant task or service, assessed objectively on the facts, rather than by reference to the defendant's state of mind, and without the benefit of hindsight. It is a fact sensitive enquiry. The focus should be to ascertain the true content of the duty owed by the defendant, that is, the scope of the assumption of responsibility by the defendant, on the facts. The defendant's duty may extend to some types of economic loss, but not others and so consideration must be given to both whether a duty of care exists and, if so, whether the scope of that duty encompasses the type of economic loss claimed.

115. I also keep in mind, as made clear in *Manchester*, that information/advice cases constitute a spectrum or a continuum and that seeking to pigeon-hole a case into a binary classification of "information" or "advice" at the outset is unhelpful. It seems to me that this remains true and highly relevant in the present case even if, as explained by Carr LJ in *Spire* at [71], the discussion of the advice/information distinction in

Manchester was in the context of a wider consideration of the "purpose test" which was itself formulated for the different exercise of addressing the recoverability of damages. Even a so-called "information" case involves the giving of advice (*per* Lord Sumption in *Hughes-Holland,* at [39] and see *Manchester* at [21] – [22]).

116. As illustrated by *Adams* in the context of information/advice relating to financial investments, it may be relevant to consider whether the provision of "information" is the product of a selection process and thus of a value judgment and/or whether it constitutes an express or implied comparison or evaluation or an element of persuasion. It may also be relevant to stand back and consider whether the information/advice should be considered in the context of a particular transaction or whether it formed part of a "single braided stream of advice" relating to a series of interconnected transactions.

117. The issue of reasonable reliance requires consideration both of whether it was reasonable for the claimant to have relied on the representation or advice given by the defendant and also whether the defendant should reasonably have foreseen that the claimant was likely to do so.

G. The relevant law concerning the fiduciary claims

118. The Claimant's case was put by Mr Bredemear as being a case of a "half-secret" commission in circumstances in which Mr McHale knew that commission was payable to Mr Dunlop, but not the amount of the commission, and that, following ***Hurstanger Ltd v Wilson*** [2007] 1 WLR 2351, [2007] EWCA Civ 299 ('***Hurstanger***'), it was necessary for the Claimant to demonstrate that Mr Dunlop owed a fiduciary duty. He submitted that the relevant fiduciary relationship arose because Mr Dunlop acted as Mr McHale's agent in various respects and because Mr Dunlop stepped outside the role of an introducer and was offering advice that Dolphin Trust was a suitable product to invest his pension in.

119. Bowstead & Reynolds on Agency, 23rd ed (2023), ('***Bowstead***'), identifies different types of agency, at paragraph 1-001, including:

> (1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation…
>
> ….
>
> (4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.

As to the fourth category identified above, *Bowstead* says this, at 1-020, under the heading "Incomplete agency – the "canvassing" or "introducing" agent, and other intermediaries":

> Article 1(4) seeks to achieve completeness by taking in a well-established type of intermediary who makes no contracts and disposes of no property, but is hired, whether as an employee or independent contractor, to introduce

> parties desirous of contracting and leaves them to contract between themselves, or otherwise performs some function relevant to a proposed transaction but does not effect a contract between the parties. In effecting and performing such introductions or limited functions the intermediary is often remunerated by commission, which may sometimes be taken from both parties….
>
> …
>
> In the result, parties with a role in assisting a principal to enter into contracts, but no authority actually to make a contract, are a difficult category about which to generalise. Some do little or nothing more than effect an introduction. They have no express authority to alter their principals' legal relations, and advice and loyalty are not things they offer, nor are those things expected of them. Hence, where acting for purchasers, the introducer may be showing other purchasers the same property, hoping in order to maximise commission that the others will pay a higher price. In such circumstances, fiduciary duties are likely to be very limited (but the taking of commission from the vendor could well involve a breach of duty unless consented to). Much turns on the degree of trust that the parties understand and accept is being placed in the intermediary by the principal."

120. At 6-034, Bowstead, says this in relation to the duties of a fiduciary:

> "The essence of the duties owed by a fiduciary has been expressed in the following statement:
>
> "[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."
>
> The footnote to the above quotation says this:
>
> *Grimaldi v Chameleon Mining NL (No.2) (2012) 287 A.L.R. 22* at [177]; *Lehtimaki v Cooper [2020] UKSC 33; [2022] A.C. 155* at [47]; *Ensign House Ltd v Ensign House (FEC) Ltd [2023] EWHC 1563 (Ch)* at [590]. See too *Arklow Investments Ltd v Maclean [2000] 1 W.L.R. 594 PC* at 598: "In the present context, the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal".

121. At 6-039, headed "Disclosure and consent", *Bowstead* provides the following summary:

> "The fiduciary duties not to profit and to avoid conflicts have been said to be purely negative duties. They forbid the agent from having a conflict and from profiting from position, but impose no positive obligations. However, as a matter of practicalities, it will often be in the principal's interests as much as the agent's that the conflict exists or the profiting takes place.

> In such circumstances, it becomes essential that the agent fully informs the principal of all relevant facts and then obtains consent to the conflict or profiting. Those duties of disclosure and obtaining consent, albeit arising only secondarily, are positive duties. In other words, the fiduciary duties are not outright prohibitions, but merely proscribe profiting and conflicts that have not been consented to by the principal. What constitutes a fully informed consent is a question of fact and "there is no precise formula which will determine all cases". Consent must be positively shown, but it can be inferred if the principal is plainly fully aware of all the facts and raises no objection. The burden of proving full disclosure of a conflict of interest and of obtaining consent lies on the agent. It is not sufficient for the agent merely to disclose the existence of an interest or to make such statements as would put the principal on inquiry nor is it a defence to assert that had the agent asked for permission it would have been given. In that regard, it is no answer for an agent who has not obtained consent to a conflict or undisclosed profit to show that the principal was content with the deal the agent had obtained. It is possible that the consent itself may be recalled if obtained by undue influence, duress or misrepresentation. Consent may be given in advance or retrospectively. In some circumstances it may not be necessary for the agent to give details of the amount of a commission being paid by a third party where the principal knows that the remuneration will be received and the commission is at a rate standard in the industry."

122. Millet LJ provided the following, often cited, guidance on fiduciary duties in ***Bristol and West Building Society v Mothew*** [1998] Ch 1 at page 16C:

> "Despite the warning given by Fletcher Moulton L.J. in *In re Coomber; Coomber* v. *Coomber* [1911] 1 Ch. 723, 728, this branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty."

His analysis of the nature of fiduciary duties included the following, at 18A:

> "…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. ….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."

The "duty of good faith" was considered, at page 19D, as follows:

> "…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... 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."

123. Professor Paul Finn, writing in *Commercial Aspects of Trusts and Fiduciary Obligations*, edited by Ewan McKendrick, 1992, 1st edition, section 1, headed "*Fiduciary Law and the Modern Commercial World*", at page 9, has suggested the following description:

> "A person will be a fiduciary in his relationship with another when and in so far as that other is entitled to expect that he will act in that other's interests or (as in a partnership) in their joint interests, to the exclusion of his own several interest".

In the next section, headed "The Adviser/Information Provider", page 10, Prof Finn makes the following "general observations":

> "1. …it is clear that so diverse are the circumstances in which, and reasons for which, information, opinion and advice are exchanged in commercial and business dealings, that no instructive generalization can be made other than 'the mere giving of advice does not convert a business relationship …into a fiduciary relationship'.
>
> 2. The expectations that can be had of an information provider/adviser may vary widely. These, for the most part will be unrelated to any consideration of loyal service: they will demand no more than honesty, frank disclosure, care and skill or accuracy; and, if they attract consequential legal responsibilities at all, these will ensue from doctrines in tort, contract or equity which are quite unrelated to fiduciary law.
>
> 3. The expectation required to found a fiduciary finding requires a "crossing of the line" from that merely of honesty, care and skill and the like. It requires a factual matrix which can justify both the entitlement to expect that the adviser is acting, and the consequential obligation that he must act, in the other's interest in giving the advice, information etc.

> 4. That expectation will be found, ordinarily as of course, where the function the adviser represents himself as performing, and for which he is consulted, is that of counselling the advised party as to how his interests will or might best be served in a matter which our society considers to be of importance to the advised' personal or financial well-being, and in which the adviser would be expected to be disinterested (save for his remuneration if any) and to be free of adverse responsibilities…
>
> 5. That expectation, ordinarily, should not be found where in the circumstances the *adviser* is reasonably entitled to expect that (a) the other party, because of his position, knowledge etc, will make his own evaluation of the matter including the information or advice given and will in consequence exercise an independent judgment in his own interests in the subject of decision; or (b) the other is assuming the responsibility for how his own interests are to be served in the matter, howsoever incompetent in this he may in fact be….
>
> 6. The problematic case for fiduciary law relates to the person who proffers advice or information but who has, and who is expected to have, a manifest personal interest, or else an adverse agency role for another, in the matter. To illustrate this brief reference will be made to dealings between banker and customer/guarantor and dealings with another's known agent…"
>
> As to the position of dealing with another's known agent, Prof Finn suggests (original emphasis), at page 13:
>
> "… it clearly is possible, because of the manner in which he conducts himself in his relationship with a third party, for the adviser to be held that party's fiduciary. The one obvious instance where this commonly occurs is where the adviser, notwithstanding the adverse representation, invites or appears to invite, accept or appears to accept the third party's reliance upon him as that party's adviser in the proposed dealing – the classic case of dual representation. But beyond this, the circumstances must be distinctive indeed in which a fiduciary, rather than a mere 'neighbourhood' relationship, could realistically be found at least where the adviser is known by the third party to be representing the interests of the other party in the proposed dealing…"

124. In ***Hurstanger Ltd v Wilson*** [2007] 1 WLR 2351, [2007] EWCA Civ 299 the defendants applied, through a broker, to the claimant firm for a loan. The loan agreement included a broker's fee of £1,000 and a pre-contractual document signed by the defendants contained a statement that "in certain circumstances this company does pay commission to brokers". As well as paying the broker the agreed arrangement fee of £1,000, the claimant lender also paid him a commission of £240. The Court of Appeal

allowed the appeal against the finding that the claimant had not paid the broker a secret commission. Tuckey LJ, with whom Jacob LJ and Waller LJ agreed, said the following:

> "36. There is some doubt as to whether the agent's duty of disclosure requires him to disclose to his principal the amount of the commission he is to receive from the other party. *Bowstead & Reynolds* says, at para 6-084:
>
> "where [the principal] leave the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise particulars of the amount paid. Such situations often occur in connection with usage and custom of trades and markets. Where no usage is involved, however, the principal's knowledge may require to be more specific."
>
> … Here I think the requirement is more special. Borrowers like the defendants coming to the non-status lending market are likely to be vulnerable and unsophisticated. A statement of the amount which their broker is to receive from the lender is, I think, necessary to bring home to such borrowers the potential conflict of interest.
>
> …
>
> 38. Obviously if there has been *no* disclosure the agent will have received a secret commission. This is a blatant breach of his fiduciary duty but additionally the payment or receipt of a secret commission is considered to be a form of bribe and is treated in the authorities as a special category of fraud in which it is unnecessary to prove motive, inducement or loss up to the amount of the bribe…
>
> 39. But "the real evil is not the payment of money, but the secrecy attending it": Chitty LJ in the leading case of *Shipway v Broadwood* [1899] 1 QB 369, 373. Is there a half-way house between the situation where there has been sufficient disclosure to negate secrecy, but nevertheless the principal's informed consent has not been obtained? Logically I can see no objection to this. Where there has only been partial or inadequate disclosure but it is sufficient to negate secrecy, it would be unfair to visit the agent and any third party involved with a finding of fraud and the other consequences to which I have referred, or conversely, to acquit them altogether for their involvement in what would still be breach of fiduciary duty unless informed consent had been obtained."

125. Tuckey LJ concluded, at [43], that secrecy was negated by the provision of notice that some commission was payable, but, at [44], that the defendant's informed consent to the commission was not obtained. The information provided about the commission

"could and should have been clearer and informed the defendants that a commission was to be paid and its amount and done so in terms which made it clear that the defendants were being asked to consent to this". Tuckley LJ also considered that a warning, as recommended by the Office of Fair Trading in relation to Non-Status Lending, should have been given to the effect that the payment of the commission might mean that the broker had not been in a position to give unbiased advice. At [47] it was explained that the remedy for breach for fiduciary duty is equitable relief and the court has a discretion as to whether or not to grant recission. The broker could have been required to account to the defendants for the £240 commission he received from the claimant, but that no such claim had been made against the broker. Instead, the defendants' claim for equitable compensation against the claimant's for procuring the broker's breach of fiduciary duty succeeded and defendant was awarded £240 plus simple interest; the court declined to exercise its discretion to order recission as the agreement and charge were fair and enforceable.

126. The issue of "half-secret" commissions was considered further by the Court of Appeal in ***Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd*** [2019] 2 All ER 959 ("***Medsted***") . The claimant introducing broker claimed against the defendant investment institution for unpaid commissions and rebates. The trial judge found that the claimant was only entitled to nominal damages because it owed fiduciary duties to the introduced investors, which it had breached by failing to provided them with full details of the commission and rebate and so, on policy grounds, should be denied substantial damages.

127. Longmore LJ, with whom Peter Jackson LJ and Asplin LJ agreed, said this, at [42], under the heading "scope the of duty":

> "…even if the relationship of Medsted and its clients was a fiduciary one, the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. As Bowstead and Reynolds say, if the principal knows this, he cannot object on the ground that he did not know the precise particulars of the amount paid. He can, of course, always ask and if he does not like the answer, he can take his business elsewhere…"

In the same paragraph he determined that there was no issue of vulnerability in *Medsted* as the trial judge had found that the clients were wealthy and likely to be experienced investors.

128. The amount of the commission payable was found to be less "secretive" than in ***Hurstanger*** as the clients knew that all commission was coming from the defendant and there was no element of any extra commission payable. In the circumstances, it was held that there was no duty on Medsted to disclose the amount of the commission it was due. It was also noted, at [45] that the statement of principle as to a fiduciary's duty by Millet LJ in *Bristol and West,* set out at [122] above, *"does not absolve the court from deciding the scope of the fiduciary's obligations… It is the scope of the obligation that is important, not the fact that he may correctly be called a fiduciary."*

129. In ***Wood v Commercial First Business Ltd*** [2021] EWCA Civ 471; [2022] Ch 123, the Court of Appeal considered two separate appeals concerning loans arranged by brokers who received an undisclosed commission from the lender. In both cases it was held that the broker owed a fiduciary duty to the borrower. One of the issues on appeal was whether a fiduciary duty was a necessary precondition to relief against the lender. David Richards LJ, as he then was, summarised the policy of the law underpinning the approach to secret payments as inducements, including, at [43], the fact that "the meaning of bribe, for the purposes of civil remedies, extends well beyond its popular connotations of a corrupt payment, to include any payment or gift made as an inducement to an "agent" and not disclosed to the "principal"…"; the court does not inquire into the payer's motives, and the court will presume in favour of the principal that the agent was influenced by the payment. He said this, at [48], [50] and [102]:

> "48. To ask in cases of this kind whether there is a fiduciary relationship as a pre-condition for civil liability in respect of bribery or secret commissions is, in my judgment, an unnecessarily elaborate, and perhaps inaccurate, question. The question, I consider, is the altogether simpler one of whether the payee was under a duty to provide information, advice or recommendation on an impartial or disinterested basis. If the payee was under such a duty, the payment of bribes or secret commissions exposes the payer and the payee to the applicable civil remedies. No further enquiry as to the legal nature of their relationship is required."
>
> …
>
> [50] ….While it may sometimes be appropriate to describe a duty to give disinterested advice or information as "fiduciary", it is not necessary to do so. It is the content of the duty, not the label attached to it, that matters. This, as it appears to me, is in accordance with the authorities as well as with principle.
>
> ….
>
> [102] …in cases such as the present where an "agent" providing advice, information or recommendations has received or been offered a bribe or secret commission, the question that the court should ask and focus on is: did the "agent" owe a duty to be impartial and to give disinterested advice, information or recommendations? If the answer is "yes", the remedies discussed above are available. Courts have, principally in recent cases, characterised this as a fiduciary duty of loyalty. While this may be accurate, it does not mean that in such cases courts need involve themselves in complex analyses of the nature of a fiduciary relationship or the duties which may be associated with a fiduciary relationship. It would be better to avoid doing so. It is enough just to ask the straightforward question stated above."

130. At [100], David Richards LJ noted that the discretion to set aside a transaction in the case of a half-secret commission was held, in *Hurstanger,* to be available only in the case of a breach of a fiduciary duty.

131. In summary, therefore, the fact that commission is payable, but not the amount of commission may constitute partial disclosure such as to negate secrecy, but may still constitute a failure to obtain informed consent in breach of a fiduciary duty and amount to a so-called "half secret" commission. Such a breach may be actionable and give rise to equitable remedies, including payment of the undisclosed commission.

132. In respect of secret commissions it was held, in *Wood*, that it was the "content of the duty" rather than the label attached to it that matters and that the key question was whether the "agent" owed a duty to be impartial and give disinterested advice, information or recommendations, and that it was not necessary to engage in a complex analysis as to whether a fiduciary duty *per se* was owed. Whilst I can see that, by much the same logic, it may be arguable that a fiduciary duty is not necessarily required in a half-secret commission case, the Court of Appeal in *Wood* did not expressly consider this issue and it was noted that in *Hurstanger* the right to set aside a transaction in a case of a half secret commission was only available in cases of breach of fiduciary duty. It is conceded by Mr Bredemear that a fiduciary duty must be established in a case of a half-secret commission.

133. The issue of whether a fiduciary duty arises will depend on a detailed consideration of the facts. A key question will be whether the defendant has undertaken to act for or on behalf of the claimant in a particular matter in circumstances which give rise to a relationship of trust and confidence and in respect of which the distinguishing obligation is the obligation of loyalty. The scope of any fiduciary duty will also fall to be considered on the facts of the case. In the case of a vulnerable principal the agent may need to provide full information and full consent in relation to the quantum of the commission in order to comply with their fiduciary duty so as to bring home the nature and extent of the potential conflict of interest, as in *Hurstanger*, whereas the scope of the duty may not extend so far in the case of a principal who is a sophisticated investor, as in *Medsted*.

H. Analysis of the claims in negligence

134. The core issue is whether, on the facts, Mr Dunlop should be held to have voluntarily assumed a duty of care to Mr McHale in respect of the provision of advice in relation to investing in Dolphin Trust loan notes, judged objectively and without the benefit of hindsight and, if so, the scope of that duty.

135. The facts and matters relied upon in the Particulars of Claim as giving rise to a duty of care can be divided into five categories. I consider each of these below and make findings of fact on the evidence in respect of those facts and matters, before stepping back and looking at the overall position. First, however, it is necessary to consider the wider context and (a) the position before Mr McHale met Mr Dunlop and (b) the role played by Mr Lockington.

The position prior to meeting Mr Dunlop and role played by Mr Lockington

136. Mr Lockington is not mentioned in the Particulars of Claim. The Defence squarely alleges (a) that Mr Lockington was acting as a financial adviser to Mr McHale for the purposes of his investments, including in relation to the Dolphin Trust investment opportunity and (b) that prior to meeting Mr Dunlop for the first time, Mr McHale had already decided that he wanted to invest in the Dolphin Trust. It is said that Mr Lockington introduced Mr McHale to Mr Dunlop so that Mr Dunlop could then introduce Mr McHale to the various third parties who would be required to enable Mr McHale to "fulfil his wish". Mr Dunlop's evidence was consistent with that pleaded position, albeit that he emphasised that he did not know what advice Mr Lockington gave when he was not present.

137. Mr McHale's witness statement largely confirms the veracity of Mr Dunlop's pleaded case in this regard. He accepts that prior to meeting Mr Dunlop, he had been told by Mr Lockington that Dolphin Trust was "doing very well" and, further, that he had already told Mr Lockington that he was "looking to put some money into this". In his oral evidence he accepted that he had decided to invest in Dolphin Trust before meeting Mr Dunlop in Chinatown, assuming "everything was good". I take that to mean that he had made the decision to invest provided that whatever else he learned was consistent with what Mr Lockington had told him and that the necessary transfers of his pension funds could be undertaken. From the evidence before me, it is apparent that Mr McHale had decided, in principle, that he would invest in Dolphin Trust from his pension funds prior to meeting Mr Dunlop. It is also clear that this decision was based on whatever Mr Lockington had told Mr McHale.

138. As to the last point, Mr Lockington was not called to give evidence and I have not seen the text or WhatsApp messages passing between Mr Lockington and Mr McHale. The details of the information or advice provided by Mr Lockington are therefore not documented in the evidence before me. From the evidence that is before me, however, it is clear that Mr Lockington did provide some form of financial advice to Mr McHale, including in respect of Dolphin Trust. This can be seen from the message of 1 February 2016 from Mr Lockington to Mr Dunlop setting out his earlier message to Mr McHale; there was no suggestion that Mr McHale had not received a message in such terms. The text read:

> "Nick,
>
> Hope you don't mind this message but I only want you to do this if you believe it's right for you. Interestingly I had lunch today with two director at Hoares bank (been around since 1662). They mentioned two of their family offices invest into Dolphin. We have a number of regulatory sign offs for your pension especially the final salary to ensure it is suitable for dolphin. Assuming it is then the value is circa £300,000. Your personal pension will grow by £180,000 over next 5 years.
>
> Plus, you and Tara will be paid £30,000 on our introducer deal.
>
> But, only if its right for you and Tara. Nick if its not or you are uncomfortable or focused on other opportunities it won't offend

> me mate. Andy and I are ploughing ahead. Love you to earn with us.
>
> Lockers".

139. This message from Mr Lockington contained an implicit endorsement of Dolphin Trust, if only by reference to his purported knowledge of the assessment made by other investors. Secondly, it purported to advise Mr McHale that the purpose of the "regulatory sign off" (to be provided by Mr Mitchell) was to ensure that it was suitable for him to invest his pension funds in Dolphin Trust, rather than merely advising on transfer of those funds to the SSAS. Thirdly, it provided advice as to how much the pension would grow in 5 years if invested with Dolphin Trust, without any qualifications. In addition, it held out an inducement of a £30,000, or 10%, commission being paid to Mr McHale, thus presenting the commission as an ancillary benefit.

140. Mr Bredemear suggested that Mr Dunlop was working in concert with Mr Lockington as part of a joint enterprise and that Mr Dunlop should be fixed with responsibility for acts and omissions of Mr Lockington. The problem with this submission, however, is that the Particulars of Claim make no reference to Mr Lockington and no case of joint enterprise, or similar, has been pleaded. This is a matter which would, in my view, have to be pleaded and properly particularised, not least in circumstances in which the Defence avers that Mr Lockington, not Mr Dunlop, was acting as the Claimant's financial adviser. Had the Claimant pleaded a case of joint enterprise then it is to be anticipated, as Ms Wookey emphasised, that Mr Lockington may have been called to give evidence by one of the parties.

141. In summary, I am satisfied on the evidence before me that Mr Lockington did assume a role of providing Mr McHale with financial advice including in respect of the Dolphin Trust. Mr McHale considered Mr Lockington to be a friend and knew that he had been an IFA with St James's Place. He claims to have believed that Mr Lockington was still regulated by the FCA and ICA (see [27 above]). I also note that it was to Mr Lockington (not Mr Dunlop) that Mr McHale turned when seeking advice on investing in Mercury Forex (see [70] above). It seems to me that he trusted Mr Lockington's ability to give him financial advice and trusted him as a friend. It is also evident, from Mr McHale's own evidence, that whatever Mr Lockington told Mr McHale about the Dolphin Trust investment opportunity was sufficient to lead Mr McHale to decide, in principle, to invest at least some proportion of his pension funds in Dolphin Trust loan notes prior to meeting Mr Dunlop.

The FCA-regulation and financial advice allegations

142. The first pleaded facts relied upon by Mr McHale as founding the alleged assumption of responsibility are the allegations that at the initial meeting in January 2016 Mr Dunlop "stated that he was regulated by the FCA" and that the Mr McHale "understood this to mean that he was authorised to give, and would be giving, financial advice". Mr McHale's witness statement alleged that Mr Dunlop claimed that both he and Mr Lockington were "FCA registered". These allegations form a central plank of the Claimant's pleaded case.

143. On the evidence before me, I do not accept Mr McHale's evidence that Mr Dunlop stated that he was "regulated by the FCA" and/or that he claimed that both he and Mr

Lockington were "FCA registered" and/or that Mr Dunlop otherwise held himself out as being an IFA regulated by the FCA. Nor do I accept Mr McHale's contention that he understood that Mr Dunlop was authorised by the FCA to give financial advice and would be giving financial advice. I make these findings for the following six reasons.

144. First, Mr McHale, as a FX trader, had been FCA registered prior to 2013. He had held controlled functions at various times (CF30, customer facing, and CF21, investment adviser) and had received training in respect of these controlled functions. He was therefore familiar with the details of FCA regulation and the meaning and significance of different controlled functions. Had Mr Dunlop merely said that he was "regulated by the FCA", without more, then I would have expected a man of Mr McHale's familiarity with the regulatory regime to ask for clarification as to what he meant by this. Without such clarification (for example, that he held a CF21, investment adviser function, or a CF24, pension transfer specialist function, or similar) Mr McHale would not, in my judgment, have jumped to the conclusion that Mr Dunlop "was authorised to give, and would be giving, financial advice".

145. Second, Mr McHale's evidence was that he did "some due diligence" on Mr Dunlop and Mr Lockington (paragraph 7 of his statement) through "family and friends and including a contact in the Police" (see [37] above). Had Mr McHale genuinely understood Mr Dunlop to be suggesting that he was an IFA or an approved person carrying out controlled functions CF 21 or CF 30 or similar, then the most obvious due diligence check would have been to carry out an on-line search of the FCA register to confirm the position. Mr McHale accepted that he could and should have carried out such a check. He could not explain why he did not do so and why, instead, he had chosen to carry out due diligence by talking to friends, family and a "contact in the Police". His evidence is not credible on this issue in my judgment. It seems to me that the most likely explanation as to why he did not check the FCA register is that he had no reason to do so because he had not been told by Mr Dunlop that he was "regulated by the FCA" and did not believe him to be an independent financial adviser.

146. Third, I consider that it is highly unlikely that Mr Dunlop, who strikes me as a man of intelligence and generally careful in the way he expresses himself, would have run the obvious risks involved in claiming to be an independent financial adviser regulated by the FCA. Mr Dunlop would have known from a very early stage that Mr McHale was an FX trader and so likely to be familiar with FCA regulatory matters, likely to carry out some due diligence, and likely to check the FCA register. Mr Bredemear suggested that Mr Dunlop may have considered that he could describe Chetwode as "regulated by the FCA" as it was an Appointed Representative of Openwork, an authorised firm. Given Mr McHale's professional background, I do not consider it likely that Mr Dunlop would have claimed to Mr McHale that either he or Chetwode was regulated by the FCA and, if I am wrong on this, I would in any event have expected Mr McHale to have been aware of authorisations for specific purposes and to have sought clarification.

147. Fourth, Mr Dunlop had no good reason to pretend to be an IFA; he could act as an introducer to Dolphin Trust and procure his commission on any investment made by Mr McHale without misrepresenting his regulatory status. Moreover, Mr McHale accepts that he had already told Mr Lockington that he had decided to invest in Dolphin Trust, so it is difficult to believe that Mr Dunlop would have considered there to be any need to claim to be an IFA. This is in circumstances in which, as I have found (see [141]

above), Mr Lockington was trusted by Mr McHale as a friend and was providing him with financial advice.

148. Fifth, as noted at [142] above, in his witness statement Mr McHale said, at paragraph 4, that Mr Dunlop told him at the first meeting in Chinatown that "both he and Lockington were FCA registered"; it strikes me as improbable that Mr Dunlop would have said anything about Mr Lockington's regulatory status at a meeting attended by Mr Lockington, when Mr Lockington and Mr McHale were friends, and when he knew that the meeting had only arisen because Mr Lockington had already discussed Dolphin Trust with Mr McHale. Mr McHale's recollection of the details of meetings and of what was said or done at each meeting was generally vague and lacking in precision, I found his assertion about what he was told as to the regulatory status of Mr Dunlop and Mr Lockington unconvincing against the backdrop of such general uncertainty.

149. Sixth, when Mr McHale was subsequently invited by Hargreaves Landsdowne to identify the name of the FCA regulated adviser who was advising him (see [85] above), it appears that he did not give Mr Dunlop's name. Had he truly believed that Mr Dunlop was an IFA "regulated by the FCA" then I would have expected Mr McHale to name him as his adviser. The fact he did not is consistent with him knowing that Mr Dunlop was not an IFA and inconsistent with his case that he believed Mr Dunlop to be "FCA registered".

150. In my judgment, Mr McHale knew from the outset that Mr Dunlop worked as an "introducer" for Dolphin Trust. I am satisfied that Mr McHale knew that Mr Dunlop, like Mr Lockington, had a background as a financial adviser at St James's Place, but that Mr Dunlop was no longer "regulated by the FCA", whether with controlled functions CF 21, CF30 or otherwise. He also knew, as he accepted in evidence, that Mr Dunlop would earn commission on any investments made with Dolphin Trust as part of his role as an "introducer".

Dolphin Trust information/advice allegations

151. Mr McHale alleges that at one of their meetings Mr Dunlop gave a detailed presentation about Dolphin Trust and showed Mr McHale a brochure and charts depicting its performance and made various representations, including that Dolphin Trust "had been run since 2006" and offered 'fantastic returns'..." and "was a very good company which was regulated in Germany not the UK which has been achieving very good results for years", had "assets in the billions", and that it was issuing 2 year and 5 year loan notes with a fixed rate of interest and which were "secured by first legal charges on property". At subsequent meetings Mr Dunlop is alleged to have repeatedly advised Mr McHale that the investments were "good and suitable investments and that Dolphin was a strong and safe company to invest in". Mr McHale's evidence also included assertions that Mr Dunlop continued, in meetings and telephone calls, to describe the Dolphin Trust in similar terms in 2017 and 2018, including that it was "doing well", was "regulated and safe", "backed by the German Government", and "as safe as the Bank of England" (allegedly said in 2017).

152. Mr Dunlop's evidence is that he provided the information contained in the Brochure and stuck to the information in the Brochure. He also explained how pension funds could be moved to an SSAS to facilitate an investment in Dolphin Trust Loan Notes. He does not recall having said that the Dolphin Trust was "regulated in Germany", but

in any event the Brochure states clearly that "Dolphin Trust is a company incorporated and regulated in Germany". Similarly, the Brochure states that "the Loan Note is secured with a Registered First Legal Charge on the underlying asset class, which is German Listed Buildings".

153. Mr McHale claimed in his witness statement that Mr Dunlop told him at the January 2016 meeting that Dolphin Trust was "buying and refurbishing blocks of flats and properties in Germany to let out". Mr Wookey put to him in cross-examination, that there is no evidence that Dolphin Trust had any business plan to "let out" properties. His response was that he did not remember whether Mr Dunlop had said that.

154. In his witness statement Mr McHale says he was told that the Dolphin Trust was not regulated in the UK, but yet he suggested, in cross-examination, that in 2016 he believed that Dolphin Trust was regulated by the FCA. His attempt to explain this was that BlackStar (which, according to the Brochure had approved the contents of the Brochure) was regulated by the FCA and he thought that it was a "subsidiary" of Dolphin Trust. Mr McHale did not explain how or why he might have believed that Blackstar was a subsidiary of Dolphin Trust or that somehow Dolphin Trust was regulated as a result. The Brochure makes clear that the Dolphin Trust is not regulated by the FCA, as does the "risk letter", which he received (see [63] above). Mr McHale was familiar with the concept of regulation by the FCA and I do not believe that he was genuinely confused by the role said to be played by Blackstar in approving the Brochure.

155. Mr McHale also alleges that Mr Dunlop advised him that the Dolphin Trust investments were "good and suitable investments" and that Dolphin Trust "was a strong and safe company to invest in", achieving "very good results for years", with "assets in the billions". The Brochure asserts that Dolphin Trust had been trading since 2008 and that it "has a strong track record". The Due Diligence Pack, which Mr McHale said he read, contained information which purported to set out its accounting and financial statements.

156. Insofar as Mr McHale maintained that Mr Dunlop went beyond what was stated in the Brochure in respect of the regulation of Dolphin Trust and/or as to it being backed by the German government and/or as to whether such investments were "suitable" for Mr McHale and/or that it had "assets in the billions" and/or "fantastic returns", or "good and suitable investment", or "strong and safe" then such evidence was, in my view, unreliable and I do not accept it. Nor do I accept Mr McHale's evidence that at an unidentified meeting on an unknown date in 2017 Mr Dunlop described the investment as "as safe as the Bank of England". I found Mr McHale's evidence as to what he was told by Mr Dunlop about Dolphin Trust at the January 2016 meeting and thereafter, as opposed to what he might have been told by Mr Lockington separately and/or by Mr Mitchell and/or which he might have read in, or inferred from, the Brochure, to be inconsistent and not reliable. When pressed on his assertions as to what he was told about Dolphin Trust letting out properties he accepted that he could not recall whether he had been told this. His evidence was inconsistent between his statement and his oral evidence in terms of what he understood about the regulatory position of Dolphin Trust and his purported explanation of that inconsistency by reference to BlackStar was, in my judgment, not credible.

157. Mr Dunlop had signed an agreement with Dolphin Trust which required him to stick to the scope of the Brochure (see [30] above) and he had received some training in this regard. Given his background in financial services, he is likely to have appreciated that going beyond the Brochure might expose him to risk. Mr McHale had already decided, in principle, to invest at least some of his pension in Dolphin Trust and so it would have been unnecessary for Mr Dunlop to 'sell' the investment opportunity by going beyond the scope of the Brochure. I accept Mr Dunlop's clear evidence that he stuck to the content of the Brochure at the first meeting and at other times when explaining the nature of the Dolphin Trust investment opportunity. Conversely, I conclude that Mr McHale has little, if any, independent recollection of what he was told orally by Mr Dunlop about Dolphin Trust and his claims that Mr Dunlop made oral statements which went beyond the information set out in the Brochure are not reliable. These findings are subject to one important caveat in respect of commission, where it is evident that Mr Dunlop went beyond the scope of the information contained in the Brochure; this is considered further in section I below.

The SSAS allegations

158. Mr Dunlop is alleged to have performed various roles/services in respect of the setting up of the Rowanmoor SSAS including:

i) Taking details of Mr McHale's assets and pension funds and explaining that he would arrange to transfer Mr McHale's pensions to an SSAS with the intention of those funds then being invested in Dolphin Trust loan notes and that a company with a bank account would be set up for this purpose.

ii) Asking Mr McHale to sign documents:

a) To enable the creation of the SSAS, including the SSAS application form;

b) Creating MMSL, setting up the SSAS Metro account, and for the transfer of existing pension funds;

c) Relating to his Westpac pension and advising him that because it was a defined benefits policy it was necessary to get another adviser, Mark Mitchell, to "sign off" before the funds could be transferred" and arranging for Mr Mitchell's report.

159. In large part the "SSAS allegations" were common ground and summarise the nature of the work that was undertaken by Mr Dunlop or by third parties introduced by Mr Dunlop, including Mr Henry, Rowanmoor and Mr Mitchell, once Mr McHale had confirmed his intention to invest some his pension funds in Dolphin Trust loan notes.

160. Mr McHale relies on the fact that the SSAS application form dated 23 February 2016 contains a box for "trustee adviser details" which was completed by Mr Dunlop, naming himself as the contact name and naming his company as Chetwode. Mr Dunlop ticked the box for correspondence to be sent to him as "the adviser". The boxes which asked for details of who the company was regulated by and the authorisation number were left blank. The form also provides for an "adviser fee agreement" with an "arrangement fee" of £500 and an "on going fee" of £327 p.a. The form states: "The arrangement fee

is a one-off payment in respect of advice on the establishment of the SSAS. The ongoing fee, if applicable, is payable each year for advice and ongoing involvement in the operation of the SSAS…". Mr Dunlop's evidence was that the "trustee adviser details" related solely to the setting up and operation of the SSAS and that he/Chetwode was acting only for these purposes, not for the purpose of providing any advice in relation to investment decisions. It is common ground that he was paid the initial £500 fee. I have not seen evidence to suggest that he was paid any on-going fee.

161. There is room for confusion, on the face of the SSAS form, as to what role Mr Dunlop and/or Chetwode were playing and whether they were purporting to provide advice on investments. However, in my view, it seems tolerably clear from the form, which was dealing with the setting up of the SSAS, that Mr Dunlop (via Chetwode) was identifying himself as advising on the setting up of the SSAS and, if required, on its continued operation, rather than as providing advice on which investments the SSAS should invest in once established.

162. Mr Bredemear relies upon the Mitchell Prockter report (see [55] above) which stated that "Once I have given advice on the transfer of your retained benefits I will have no further involvement with the SSAS. On going servicing will be dealt with by Chetwode who advise the trustees on investment decisions". Whilst Mr Dunlop did not attend the meeting between Mr Mitchell and Mr McHale, he was provided with a copy of Mr Mitchell's report and did not take issue with the contents of the report. Further, Mr Dunlop accepted that Mr Mitchell would have had gained this understanding either from Mr Lockington or from him. This was in circumstances in which Mr Dunlop is likely to have known that Rowanmoor would require some form of confirmation that investment advice had been taken in accordance with the requirements of the Pensions Act 1995. The fact that Mr Mitchell's report presented Mr Dunlop as providing investment advice to Mr McHale does not, of course, mean that Mr Dunlop did in fact provide such advice or that Mr McHale understood that he was providing such advice. This is considered further at [176] below.

163. The Mitchell Procktor form identified that Mr McHale's intention was to invest £140,000 of his pension funds in Dolphin Trust. In oral evidence Mr McHale was clear in his belief that Mr Mitchell, who he knew was an IFA, advised him that investing in Dolphin Trust was a "good option" for his pension fund and that any funds so invested "were regulated and safe". His evidence on this point was in marked contrast to the Particulars of Claim which averred that Mr Mitchell's role (consistent with Mr Mitchell's report) was limited solely to the issue of whether the funds in Westpac should be transferred to the then pre-existing SSAS and not to advise what the funds should thereafter be invested in. Mr McHale made this point more than once. From the evidence I have heard, and I have not heard from Mr Mitchell, I accept that Mr McHale understood and believed Mr Mitchell to be advising him that it was a good option to invest some of his pension funds in Dolphin Trust.

164. There was a difference between the parties as to whether Mr Dunlop set up MMSL and opened the Metro account or whether these steps were taken by others, Mr Henry and Rowanmoor. Nothing, to my mind, turns on the distinction. I am satisfied that once Mr McHale had decided to move his pension funds to an SSAS, insofar as was possible, then he authorised Mr Dunlop to oversee the necessary processes to achieve this outcome and to instruct third parties on his behalf, as required, to do so.

The "transfer allegations" and the "loan note documentation" allegations

165. The Particulars of Claim rely on the fact that at meetings between Mr McHale and Mr Dunlop after 29 February 2016, Mr Dunlop obtained Mr McHale's signature on various documents required to enable the four investments to be made in Dolphin Trust loan notes and that Mr Dunlop "prepared and delivered all necessary documents for the investments to take place and gave instructions to Metro Bank and/or the Trustees of the SSAS to make payments totalling £320,000 for the Dolphin Loan Notes". It is common ground that various of Mr McHale's pension funds, including the Westpac pension funds, were transferred into the Rowanmoor SSAS and that four separate investments were made by Mr McHale, in three tranches, into Dolphin Trust via the purchase of loan notes totalling £320,000 in three tranches between 2016 and 2018. It is clear that Mr Dunlop was instrumental in facilitating the transfer of those pensions and Mr McHale's acquisition of the loan notes.

166. The documents upon which Mr McHale's signature "were procured" included the relevant High Net Worth Certificates, such as those dated 28 July 2016 and 29 October 2018. Mr McHale's evidence was that he believed that when he signed these certificates (or at least the first) it was accurate because he thinks he did have assets exceeding £250,000, having sold his house. There is no issue that Mr McHale misunderstood what he was signing or why he was signing the certificates. There was a suggestion, not pleaded, that Mr McHale may not have signed one of the certificates and that a previous certificate may have been re-submitted by Mr Dunlop with a revised date. Mr Dunlop denies this. For his part, Mr McHale's evidence is that he would generally have signed what was needed to put his decisions into effect. Whilst the certificates look to be very similar, there has been no expert evidence on the point I am not satisfied that the later certificate was not signed by Mr McHale.

167. Although not expressly pleaded, it is clear that Mr McHale's final investment, of £120,000 on about 1 November 2018, was after the date on which the August 2016 2-year loan note should have been repaid. As set out at [82] above, Mr McHale was aware of this fact and had chased Mr Dunlop for details about repayment. Mr McHale's decision to invest a further sum of £120,000 was made after Mr Dunlop had informed him that the interest rates payable on future investments were going to be reduced by Dolphin Trust. It is nevertheless striking that Mr McHale was prepared to invest further substantial sums in Dolphin Trust notwithstanding the fact that the August 2016 2-year loan note had not been repaid.

The "undisclosed commission" allegations

168. The claim in respect of commission is pursued as a breach of fiduciary duty and is considered in section I below.

Did Mr Dunlop's owe Mr McHale the alleged duty of care at common law to prevent economic loss?

169. Having set out each of the alleged facts and matters relied upon as giving rise to an alleged duty of care and summarised the evidence in respect of those matters, it is necessary to stand back and consider the relevant evidence as a whole in relation to Mr McHale's case that by "acting as alleged" (namely the alleged facts and matters considered above) Mr Dunlop assumed "duties of reasonable care and skill, good faith

to be expected of a financial adviser acting within the Code of Conduct under the FSMA". The issue for determination is the existence of any duty of care and the scope and content of any such duty.

170. I accept Ms Wookey's submission that, in considering this issue, care needs to be taken not to permit the Claimant's case to stray beyond the scope of the pleaded case, particularly when the pleading out of such allegations might have had an impact on the factual or expert evidence called. An important example of the need for care in this regard arises in relation to any suggestion that Mr Dunlop should be fixed with responsibility for acts or omissions of Mr Lockington (see [140] above).

171. The context of the first meeting in January 2016 is, in my view, of significance. Mr McHale accepted that, with a long career in the FX markets, he considered himself to be a sophisticated, professional, investor who was qualified to take, and able to take, his own decisions on his own pension investments. That was also consistent with how Mr Mitchell' report says that he described himself (see [55] above). As I have found, at [141] above, prior to meeting Mr Dunlop, Mr McHale had already decided that he wanted to invest some of his pension funds in Dolphin Trust loan notes and that, in coming to that decision, he was influenced by whatever Mr Lockington told him about the investment opportunity. Having taken that decision, in principle, Mr Lockington set up a meeting to introduce Mr McHale to Mr Dunlop.

172. As I have found at [143] above, Mr Dunlop did not present himself as an independent financial adviser regulated by the FCA, contrary to the allegations advanced by Mr McHale. Mr McHale, who had himself been authorised in controlled functions (CF21 and CF30), understood the nature and duties of an IFA regulated by the FCA. Mr McHale knew that Mr Dunlop was not an IFA offering independent advice on the suitability of a particular investment from a range of possible investment opportunity options. Rather, Mr McHale knew that Mr Dunlop was concerned solely with trying to obtain investments in Dolphin Trust because he would receive commission on such investments.

173. Considered objectively, it is evident to me that Mr McHale was not agreeing to meet Mr Dunlop because he believed that Mr Dunlop was an IFA who would provide independent advice in compliance with FCA requirements on a range of investment opportunities for his pension funds; he was meeting Mr Dunlop because he had already decided, in principle, to invest some of his pension funds in Dolphin Trust and he wanted Mr Dunlop, as an introducer for Dolphin Trust, to help him put his wish into effect. In my judgment, Mr McHale was not looking for advice from Mr Dunlop on the relative merits of acquiring loan notes in Dolphin Trust as against other investment opportunities; rather, he was looking to Mr Dunlop to execute his own investment decisions. Mr McHale based his investment decisions on his own professional experience, but it also seems clear to me that he was influenced to some extent by whatever advice Mr Lockington, who he trusted both as a friend and a former IFA, provided to him.

174. Mr Bredemear submitted that Mr Dunlop stepped beyond the role of an "introducer" as defined by the FCA Handbook (see [97] above), not least in engaging in face-to-face meetings with Mr McHale of the type which are categorised as "real time financial promotions" by the FCA Handbook. I accept the general proposition that an 'introducer' who engages in face-to-face meetings is at risk of being taken to have

provided financial advice and to have assumed duties of care in this regard. Mr Dunlop clearly provided information to Mr McHale in relation to the Dolphin Trust scheme and how it operated. In undertaking the role to provide such information and advice, Mr Dunlop assumed a duty to use reasonable skill and care to provide information which was consistent with, and did not go beyond, the information contained in the Brochure and which, according to the Brochure, had been approved by Blackstar, an entity said to be approved and regulated by the FCA, and/or in the IM, which was said to have been approved by Kevin Smith of Honister Partners, again said to be an authorised person. For the reasons set out at [157] above, I do not accept that Mr McHale has any clear or reliable recollection of Mr Dunlop going beyond the scope of the information contained in the Brochure, save in respect of information concerning the commission. Similarly, there is nothing in the documentary evidence which I have seen to indicate that Mr Dunlop did, in fact, go beyond the "script" provided by the Brochure when describing the investment opportunity presented by Dolphin Trust, save in respect of commission.

175. Mr Bredemear further submitted that Mr Dunlop stepped outside the role of an introducer by providing a range of other services and, in so doing, assumed tortious duty of care to the Claimant. He relied upon the steps taken by Mr Dunlop in arranging for MMSL to be incorporated, preparing and submitting the application to Rowanmoor, arranging for Mr Mitchell to provide advice on the transfer of funds to the SSAS and raising the issue of Mr Mitchell's remuneration, and, potentially, arranging for the MMSL Metro account to be set out. It is clear, and was accepted by Mr Dunlop in cross-examination, that he did go beyond the role of an introducer to Dolphin Trust in providing services to Mr McHale to facilitate Mr McHale's investment in Dolphin Trust. In providing such services and acting as Mr McHale's agent in dealing with third parties such as Mr Henry or Rowanmoor, Mr Dunlop owed duties of care and/or fiduciary duties to Mr McHale. However, for the reasons I have given, the scope of such duty did not, in my view, extend to the provision of advice on the suitability of the Dolphin Trust as an investment opportunity or whether Mr McHale should or should not invest any part of his pension funds in Dolphin Trust on the facts of this case. Nor, in my judgment, did Mr McHale understand Mr Dunlop to be providing financial advice in this regard as an IFA, whether in accordance with the FCA Handbook or otherwise. The evidence does not support the contention that Mr McHale either sought advice from Mr Dunlop, or understood Mr Dunlop to be providing the type of independent advice to be expected of an IFA, as opposed to advising on the logistics of how to make investments into Dolphin Trust and undertaking the work necessary to enable such investments to be made.

176. It is apparent that Mr Dunlop was prepared to allow Mr Mitchell to understand, and record in his report, that he/Chetwode was advising "the trustees on investment decisions" (see [55] above). Prior to hearing the oral evidence of Mr McHale and Mr Dunlop, that statement struck me, *prima facie*, as an indication that Mr Dunlop may have held himself out to Mr McHale as providing investment advice. However, having heard the evidence of the parties, I do not consider that that would be an accurate conclusion to reach on the totality of the evidence. Whilst Mr Dunlop may have allowed Mr Mitchell to present it in this way in his report, it did not, in my judgment, reflect the reality of the position of the parties. As set out above, the reality was that to the extent that Mr McHale looked to anyone for financial advice, he looked to Mr Lockington as

a trusted friend and, in any event, he understood that Mr Dunlop was not an independent financial adviser offering advice impartially on the most suitable investments.

177. There came a point in time in about early 2017 when the disclosed WhatsApp messages between Mr Dunlop and Mr Lockington stop and there are more direct communications between Mr Dunlop and Mr McHale. From these direct communications it seems that Mr Dunlop took it upon himself to flag up the poor returns Mr McHale was receiving on uninvested funds sitting in the Metro account (see [81] above) and suggested those funds should be put to better use. On 4 September 2018 ([82] above) Mr Dunlop also suggested that Mr McHale should move his remaining pension funds from a Hargreaves Landsdown SIPP to the SSAS. These, however, stand out as exceptions to the norm in the documentary evidence and, in any event, are not relied upon in the Particulars of Claim, presumably because they do not relate (at least directly) to any advice in respect of investing in Dolphin Trust loan notes.

178. I have noted above (at [167]) that it is striking that Mr McHale made a further investment in Dolphin Trust loan notes after August 2018, given that his 2016 2-year loan note should have been repaid by this stage. I emphasise that there is no pleaded allegation that Mr Dunlop knew, or should have known, that Dolphin Trust was in difficulties at this time, nor that he owed a duty of care at this stage, or later, to provide advice to Mr McHale in respect of the apparent delay in repaying the 2016 2-year loan note.

179. The issue of the COBS 10 certification (see [79] above) does not take matters further in my view. Mr Dunlop may have owed certain duties to Dolphin Trust as an introducer and, for example, in providing certifications to Dolphin Trust. The fact that Mr Dunlop may have owed certain duties to Dolphin Trust does not, in my judgment, assist Mr McHale to establish his pleaded case as to the specific duties alleged to have been owed by Mr Dunlop to him.

180. I am mindful of the guidance provided by Lord Sumption in *Hughes-Holland* at paragraphs 40-41 and by the Lords Hodge and Sales in *Manchester* at paragraphs 18-22 (see [108] above) as to the distinction between "information" and "advice" cases being liable to mislead. The reality is that there is a spectrum and that even so-called "information" cases will generally entail the giving of advice. Mr Dunlop certainly did assume duties to provide both information and advice on certain issues and he assumed duties in respect of various services be performed for Mr McHale. On an objective analysis, however, I am satisfied that the scope of the duty of care owed by Mr Dunlop to Mr McHale did not encompass the provision of advice (whether in accordance with the FCA Handbook or otherwise) on the suitability of investing Mr McHale's pension funds in Dolphin Trust and he is not to be fixed in law with owing such a duty of care. In short, Mr Dunlop did not assume a duty of care to advise, *qua* independent financial adviser, on the merits or suitability of the Dolphin Trust investment opportunity. Rather, on the evidence before me, in circumstances in which Mr McHale had already decided, in principle, to invest some of his pension funds in Dolphin Trust prior to meeting Mr Dunlop and on the basis of whatever Mr Lockington had told him, the scope of the duty of care owed by Mr Dunlop was more limited, namely: to provide information on the Dolphin Trust in accordance with the information provided by Dolphin Trust in the Brochure and/or the IM and/or the Due Diligence Pack, to advise on the logistics concerning the transfer of Mr McHale's pension funds to an SSAS, and to take the

necessary steps to enable those pension funds to be used for the purpose of acquiring Dolphin Trust loan notes.

181. Accordingly, Mr McHale has failed to establish his pleaded case that Mr Dunlop owed him the duties "of reasonable care and skill, good faith to be expected of a financial adviser acting with the Code of Conduct under the FSMA" in respect of advising him on investments into the Dolphin Trust.

Alleged breach

182. It is alleged at paragraph 15 of the Particulars of Claim that the Defendants "failed to use reasonable care and skill or comply with the Code of Conduct by putting their own interests above those of their client by recommending [the Dolphin Trust] because of the high commission it paid and did so whilst carrying on business". No further particulars of negligence are provided. No details are given as to which provisions of the FCA Handbook (referred to as the "Code of Conduct") are alleged to have been applicable or are alleged to have been breached.

183. In light of my findings that Mr Dunlop did not owe the alleged duty of care to provide financial advice to Mr McHale in respect of his investment in Dolphin Trust, it is not necessary to consider the issue of breach. Nor, in my view, is it appropriate to do so in circumstances in which any consideration of breach would necessarily depend upon the factual findings made as the nature and scope of any alleged duty of care. In the circumstances, I will limit my observations on the issue of breach to the following points.

184. Where a person has assumed a duty to provide independent financial advice as to the suitability of a particular option from a range of possible options, then a "recommendation" may be fairly readily inferred from the fact that a particular option was selected (see, for example, *Adams* at paragraph 75). In my view, this is not such a case. Mr Dunlop did not present a range of options to Mr McHale and Mr McHale did not expect him to do so; both parties knew that Mr Dunlop was only "promoting" a single option and that he had would benefit financially, as a result of commissions payable, if Mr McHale invested in Dolphin Trust. I am not satisfied, on the evidence before me, that Mr Dunlop made any specific recommendation that Mr McHale should invest some or all of his pension funds in the Dolphin Trust, as opposed to presenting it as an investment opportunity and leaving it for Mr McHale to decide what sums he wished to invest in circumstances in which Mr McHale had already taken a decision, in principle, to make some investment.

Would the Claimant have invested in Dolphin Trust even if Mr Dunlop had properly performed his duty?

185. Again, the issue does not arise for determination in light of my findings that Mr Dunlop did not owe a duty of care to provide the type of advice to be expected of a financial adviser acting in accordance with the requirements of the FCA Handbook. I will therefore confine myself to a few observations in respect of reliance and causation.

186. The Particulars of Claim are silent on the issue of both reliance and causation. It is not pleaded, in terms, that Mr McHale relied upon the alleged recommendation to invest in the Dolphin Trust. Nor is it pleaded, in terms, that the alleged breaches of the alleged

duty of care caused the loss and damage claimed. The difficulties inherent in Mr McHale's pleaded case on reliance and causation were reflected by Mr McHale's equivocal and unconvincing oral evidence on these issues. Mr McHale gave inconsistent answers as to whether he would have invested in Dolphin Trust but for the alleged statements/representations by Mr Dunlop. Initially he said that he would, in any event, have invested in Dolphin Trust from what he had read; then he disagreed that he would have invested; then, when pushed by Ms Wookey, he accepted that his first answer was correct and that even if Mr Dunlop had said nothing about the performance of Dolphin Trust, he would still have invested. In his oral evidence he was clear in his belief that Mr Mitchell, who he knew to be an IFA regulated by the FCA, advised him to invest in the Dolphin Trust.

187. As I have found, I am satisfied that Mr McHale trusted Mr Lockington to provide him with financial advice both as a friend and as a former IFA and that Mr McHale had already taken the "in principle" decision to invest in Dolphin Trust as a result of his initial discussions with Mr Lockington prior to meeting Mr Dunlop. In my judgment, it is probable that Mr McHale placed substantially more weight on the advice of his trusted friend, Mr Lockington, than on anything which he alleges Mr Dunlop said. Further, with his background in financial services it seems to me that it is probable that Mr McHale placed more weight on what he understood to be a recommendation from Mr Micthell, as an IFA, than on anything which he alleges was said by Mr Dunlop who, as I have found, he knew was not an IFA and had a financial interest in securing investments in Dolphin Trust loan notes.

Contributory negligence

188. The issue of contributory negligence does not arise as a result of the findings which I have made.

I. Analysis of the fiduciary claims

In respect of the claims for undisclosed commission, did Mr Dunlop owe Nicholas McHale a fiduciary duty?

189. The Particulars of Claim fail to mention that Mr McHale had been promised a split of the commission payable. The Particulars of Claim also do not plead the existence of a fiduciary duty in terms. Mr Bredemear relied on the reference to a duty of "good faith" in paragraph 14 of the Particulars of Claim, together with the claim for "an account of undisclosed commission received" by the Defendants in paragraph 16. The Prayer also seek "an account of undisclosed commission received in respect of Dolphin Loan Notes and an order for payment with interest and costs". In short, whilst the Particulars of Claim make clear that a claim for undisclosed commission is being advanced, little detail is provided as to the basis on which the claim is advanced.

190. I note that Millet LJ used the label of a "duty of good faith" to describe an important aspect of a fiduciary duty in *Bristol and West Building Society v Mothew,* at 19D. It is tolerably clear, in my view, from the combination of the allegation of a duty of "good faith" with the claim for an account of undisclosed (in fact, partially disclosed) commission that a claim for breach of some form of fiduciary duty is advanced on the pleadings.

191. In circumstances in which Mr McHale was aware that Mr Dunlop was receiving commission from Dolphin Trust, but not the details of the percentages payable, Mr Bredemear's position was that this was a case of a 'half-secret' commission and that, following *Hurstanger*, it was necessary for there to be a fiduciary relationship in such cases.

192. The first reference in the documents to commission being payable was contained in Mr Lockington's WhatsApp message of 1 February 2016 which he apparently sent to Mr McHale and in which he said: "Plus, you and Tara will be paid £30,000 on our introducer deal"; this was on an investment of £300,000 (see [139] above). Thus, at this stage, Mr McHale was being enticed by the prospect of a cash payment of 10% of his investment by way of an "introducer deal", or commission.

193. Following the August 2016 loan note investments, Mr McHale sent numerous messages seeking confirmation that he would he paid commission, including his message to Mr Lockington on 8 August 2016 saying "Am I still part of the percentage split ie a third on my investment up front?". The exchanges between Mr Lockington and Mr Dunlop discussing this message are revealing and concerning. Mr Dunlop's reply to Mr Lockington was as follows:

> Dunlop: "It's quite simple really …. He doesn't know how or when we get paid. Dolphin use to pay comms over 2 years … Half up front then half 12 months later. Then they reduced the return for investors so remember Nick's knowledge of the facts is not like ours. We wait until the money is with Dolphin, cleared and we have invoiced AND been paid then we will talk to him. I have more work to do for him and I won't be doing that for nothing. Anway, we hold the Aces for now at least … Keep powder dry & refer him to me in everything to do with comms as I have the agency (and you work for me if ya follow) … Your conversation with him 'Nick, Andy controls all comms as its his agency so speak to him I have no control' sleep on it … It will look different in the morning …"

194. Mr Lockington replied to Mr McHale and forwarded his response to Mr Dunlop the following day:

> Lockington: "FYI just sent this to Nick….
>
> … For clarity. You are definitely in for a share of the comms as that was agreed. What I don't know is what we are due as the deal is different to the original. Andy d is totally straight and will sort us both out when he gets back from hols…"

195. It is clear, in my view, that Mr Dunlop's strategy was to make full use of Mr McHale's lack of information, to Mr McHale's disadvantage. Mr Lockington acted on that strategy by sending his reply. His reply was not truthful. Mr Dunlop and Mr Lockington both knew the commission that would be paid; they just did not wish to share that information with Mr McHale. It was also untruthful in presenting Mr Dunlop as being "totally straight" when, in fact, Mr Dunlop's strategy was to deceive Mr McHale.

196. As set out at [71] above, on 21 September 2016 Mr Lockington sent Mr McHale an email attaching a schedule which purported to set out a schedule of the commission due on Mr McHale's investments. That email was copied to Mr Dunlop. It indicated that only 3% commission and 9% commission would be paid on 2-year and 5-year loan notes respectively. The schedule then purported to show that £9,000 was payable by way of the total commission, resulting in £3,000 being payable to each on an equal three-way split. I have not seen any accurate commission schedules, but Mr Dunlop's evidence was that 10% was paid on the 2-year loan notes (£7,500) and 20% on the 5-year loan notes (£15,000), resulting in £22,500 in total and £7,500 each on a three-way split. It is apparent that Mr Lockington's schedule was seriously misleading as to the total commission payable and, therefore, as to the payment which would be due to Mr McHale on an equal three-way split.

197. I do not accept Mr Dunlop's attempts in his Defence and in his written statement to suggest that he had an agreement to split the commission 50/50 with Mr Lockington and that Mr Lockington then had a separate agreement with Mr McHale to split his own share of the commission with Mr McHale. It is clear from the evidence before me that Mr McHale had been promised that the commission payable by Dolphin Trust would be split equally three ways, as Mr McHale's message of 8 August 2016 had indicated, and that Mr Dunlop and Mr Lockington purported to reconfirm this agreement in September 2016. In cross-examination Mr Dunlop ultimately accepted that Mr Lockington's email and schedule purported to present a three-way share of the total commission payable and that he was copied on that email. Mr Dunlop was copied in on that email and he knew that Mr McHale was being deliberately misled by that email in accordance with his strategy, set out in his message of 8 August, to take full advantage of Mr McHale's lack of knowledge about the commission structure.

198. The number of messages from Mr McHale pressing for payment of his commission (see, for example, [69], [72], [74], [75] above) indicates that the commission, or "double bubble" (as Mr McHale said Mr Dunlop described it), was a matter that weighed heavily in Mr McHale's mind. Mr Lockington and Mr Dunlop knew that the commission was a significant issue for Mr McHale. This is apparent from by Mr Lockington's WhatsApp message to Mr Dunlop of 4 May 2016 in which he suggested paying Mr McHale £12,560 of an anticipated commission of £52,000 (24%); he explained that there was "no calculation" behind this figure but the "psychology is good" in circumstances where he apparently believed that Mr McHale's FX work was not performing well and that the McHales needed income.

199. For the reasons set out in section H above, I do not accept that Mr Dunlop took on the role of providing financial advice to Mr McHale in respect of the prudence of investing in Dolphin Trust loan notes, nor that he owed a duty of care *qua* financial adviser in this regard. However, that does not mean that he owed no duties to Mr McHale. As set out at [180] above, Mr Dunlop owed Mr McHale a duty to ensure that the information he provided was in accordance with the information available to him from the Brochure so as to enable Mr McHale to form his own conclusions. The Brochure made clear that commission was payable to introducers, but not the amount of that commission. Mr Dunlop, however, elected to go further than the Brochure in terms of the information which he provided about the commission payable. He elected to inform Mr McHale that substantial commission was payable on any investment and he agreed to share the resulting commission three ways.

200. It seems to me that there are at least two ways of analysing the nature of the duties assumed by and attaching to Mr Dunlop on the unusual facts of this case. One is to analyse the duties, as Mr Bredemear proposed, in accordance with the "half-secret commission" approach adopted in *Hurstanger* in respect of Mr Dunlop's failure to provide full disclosure of the totality of the commissions payable on the Dolphin Trust investment opportunity. Another approach is to consider the duties arising in respect of the investment opportunity which Mr Dunlop actually purported to offer to Mr McHale, namely the Dolphin Trust investment opportunity combined with an "enhanced" offer of an equal share of the introducer commission. Both approaches seem to me to lead to the same ultimate conclusions albeit by slightly different routes.

201. Taking the second approach first, in my judgment, in taking the additional step of electing to share the commission payable by Dolphin Trust with Mr McHale, Mr Dunlop changed the nature and content of the investment opportunity presented to Mr McHale. The investment opportunity which Mr Dunlop presented to Mr McHale was not the standard opportunity to buy Dolphin Trust loan notes available to any qualifying investor; the opportunity proposed by Mr Dunlop was enhanced and (apparently) bespoke and exclusive. It was an offer of an opportunity to profit not merely from the interest payable by Dolphin Trust on the loan notes, but also by a share of the substantial commission, calculated on a percentage basis, payable to Mr Dunlop as an introducer. That was the "enhanced" package actually offered to Mr McHale.

202. Mr Dunlop calculated, correctly, that the "double bubble" enhanced package would be deeply attractive to Mr McHale and would impact his analysis of the benefits of the risks and benefits of the investment opportunity. Further, such an apparent openness and generosity would encourage Mr McHale to put trust and confidence in him. As Mr Lockington identified (see [198] above) an apparently generous approach to the sharing of commission might well have a psychological effect on Mr McHale; it was calculated to encourage trust as well as providing an additional financial incentive.

203. One of the consequences of electing to offer the "enhanced" investment opportunity to Mr McHale was that Mr Dunlop can properly, in my judgment, be said to have taken on a role as an agent for Mr McHale in respect of the commission payable under the enhanced package. In doing so, Mr Dunlop is, in my judgment, properly to be fixed with fiduciary duties in this regard. Mr McHale was entirely dependent on Mr Dunlop to honour and fulfil the obligations which Mr Dunlop assumed under the enhanced investment opportunity. This included providing accurate information about the commission payable, ensuring that he properly accounted to Mr McHale for the one third share of that commission, and acting in Mr McHale's interests in this regard. In assuming such a role, Mr Dunlop undertook to act for Mr McHale in circumstances which give rise to a relationship of trust and confidence of the type described by Millet LJ in *Bristol and West BS v Mothew* (at 16C) and he assumed a duty of "good faith" to Mr McHale in the sense that Millet LJ used that term (at 19D) (see [122] above). It was a breach of that duty to misrepresent the amount of commission payable and to fail to account fairly to Mr McHale for his share.

204. The unusual relationship which arose from Mr Dunlop's conduct might properly be considered to give rise, in relation to the commission element of the "enhanced" investment opportunity, to the types of considerations described by Prof Finn (see [123] above) in "the classic case of dual representation" where a party (Mr Dunlop) who is an agent of another (Dolphin Trust) nevertheless conducts himself in his relationship

with a third party (Mr McHale) such as to becomes that third party's fiduciary by inviting the third party's reliance upon him as that party's adviser (or, I would add, information provider or agent) in the proposed transaction.

205. In the circumstances of this case, therefore Mr Dunlop, in my view, came under fiduciary duties to account honestly to Mr McHale in respect of the commission payable under the "enhanced" investment opportunity which Mr Dunlop, in fact, offered to Mr McHale. Mr Dunlop acted in breach of those fiduciary duties by adopting and implementing a strategy deliberately to misinform Mr McHale of the true commission payable to him and by then failing to account properly to Mr McHale in respect of the commission payable to him.

206. The same end point is reached if one analyses the duties owed by reference to the *Hurstanger* approach to half-secret commissions. The point can be put simply as follows: by acting in the way he did, Mr Dunlop kept the true quantum of his commission secret from Mr McHale in circumstances in which he had put himself in a position in which he came under a fiduciary duty to declare the true quantum of that commission. Mr Dunlop assumed a fiduciary duty to Mr McHale, which included a duty to act in good faith, in respect of the provision of information about the commission payable by Dolphin Trust in circumstances in which Mr Dunlop had, by his own actions in offering to share one third of that commission, come under a duty to provide Mr McHale with an honest account of the quantum of the commission.

207. In *Hurstanger* the Court of Appeal held, at [36] that the facts of that case required the principal's knowledge to be "more special" than the mere fact that some commission was payable because the defendant borrowers were vulnerable and unsophisticated; as a result, there needs to be transparency as to the amount of the commission payable to bring home the potential conflict of interest. Mr Bredemear submitted that Mr McHale's financial experience was limited to the highly specialised FX markets and that, in reality, he should be treated as "vulnerable" when it came to dealing with his own financial affairs. I agree that Mr McHale might be said to have shown a somewhat surprising lack of attention to some of the details concerning the investment of his pensions into Dolphin Trust loan notes, but I do not accept that the evidence suggests that he should be considered "vulnerable" or "unsophisticated" in relation to his own financial affairs. Mr McHale's professional background was such that, as he accepted, he understood risk and reward in financial investments, the regulatory regime, and the importance of diversification of investment portfolios. Whilst he was "not a know-all" (in his words), he considered that he was a sophisticated investor and able to take his own decisions.

208. On the facts of this case, however, I do not consider that Mr McHale is under any obligation to demonstrate that he was vulnerable or unsophisticated. In *Medsted* Longmore LJ noted, at [42], that if the principal knows that commission is payable, but not the particulars of the amount payable, then "he can, of course, always ask and if he does not like the answer, he can take his business elsewhere". Here, Mr McHale was promised a third share of the total commission and he (repeatedly) asked about the commission payable. Such facts clearly give rise, in my judgment to "more special" obligations on Mr Dunlop honestly to disclose the true quantum of the commission payable. The problem was that the answer given to him was deliberately false and Mr Dunlop knew that the answer was false and had intended it to be false.

209. Accordingly, insofar as it is necessary, following *Hurstanger*, to be satisfied that a fiduciary duty is owed in order to found a claim for a 'half secret' commission, I find that a fiduciary duty was owed by Mr Dunlop to Mr McHale to provide an honest account of the total commission payable by Dolphin Trust.

210. In summary, where, as here, the investor is presented with an investment opportunity which the "introducer" has enhanced by promising to pay one third of his own commission to the investor, then it seems to me that the "introducer" comes under a fiduciary duty to provide an honest and truthful account of the total commission payable. The same ultimate conclusion is reached if one approaches the analysis as akin to a half-secret commission case following *Hurstanger*.

Did Mr McHale give fully informed consent to Mr Dunlop receiving commission of 20% in respect of investments into the Dolphin Trust?

211. The claim for breach of fiduciary duty has been advanced on the basis that the appropriate relief is an account of the commission paid, rather than any more extensive remedy.

212. On the evidence before me, it is clear that Mr McHale was not given accurate information as to the level of commission which Mr Dunlop was receiving in respect of any investments made by Mr McHale into the Dolphin Trust. To the contrary, Mr Dunlop followed a strategy deliberately to misled Mr McHale as to the true details of the level of commission payable by the Dolphin Trust, which strategy was set out in his message of 8 August 2016 (see [193]) and implemented by Mr Lockington's email of 21 September 2016 (see [71] above) which provided false information about the commission payable.

213. If and to the extent that it is appropriate to analyse the facts of this case, following the approach in *Hurstanger*, by reference to whether there has been fully informed consent, I am satisfied that Mr McHale was not in a position to give fully informed consent to Mr Dunlop receiving commission of 20% (or 10% on 2-year loan notes, if that is the true position) in circumstances in which he was deliberately misled as to the true commission payable and a substantial part of the commission payable therefore remained undisclosed. On the alternative analysis, identified at [200] above, the issue is whether Mr Dunlop acted in breach of his fiduciary duty to provide an honest account to Mr McHale of the commission payable by Dolphin Trust in accordance with the promise to share one third of that commission with Mr McHale. Again, and for the same reasons, Mr Dunlop breached that duty by adopting and implementing a strategy deliberately to mislead Mr McHale as to the commission payable.

214. Accordingly, I am satisfied that Mr Dunlop has acted in breached of fiduciary duty by pursuing a strategy deliberately to provide false information to Mr McHale as to the commission payable by Dolphin Trust and which resulted in false information being provided. This conclusion, in my view, is reached on both of the two approaches identified at [200] above. For the purposes of the analysis of the half-secret commission claim, the effect of the strategy pursued, and the false information provided, was that Mr McHale was not in a position to provide fully informed consent in respect of the substantial undisclosed element of the total commission payable.

What remedy is Mr McHale entitled to?

215. In *Hurstanger,* where the commission was sufficiently disclosed to negate secrecy, but insufficiently disclosed to obtain the borrowers' informed consent, the resulting contract was not voidable at the election of the borrowers, but, given the broker's breach of fiduciary duty, the court held that it had a discretion to award the most appropriate remedy which could, but would not necessarily include, recission (see also the summary on this issue in *Wood,* at [128]). The Court of Appeal held that rescission would be unfair and disproportionate irrespective of whether the defendants could make counter-restitution.

216. The remedy sought in the Particulars of Claim for breach of fiduciary duty (or, as it is put in the pleading, a breach of the duty of good faith) is an account of undisclosed commission received and an order for payment with interest; no other remedy was sought. I consider that the appropriate remedy has been claimed on the facts of this case and that Mr McHale is entitled to the remedy sought on the findings I have made as to both the scope of the fiduciary duty and the breach of that duty by Mr Dunlop.

217. The commission claimed in the Particulars of Claim was put at "not less than 10%". Mr Bredemear suggested that the commission should be deemed to be 20% on the basis that 20% was the figure set out in the Defence. This was, however, in response to the pleaded allegation that Mr Dunlop had received a secret (not half-secret) commission and the focus of the Defence was on the averment that Mr McHale knew that commission was being paid, rather than the precise details of the commission payable. Ms Wookey relied on the evidence from Mr Dunlop that the commission was 10% on 2-year loan notes and 20% on 5-year loan notes.

218. In circumstances in which Mr Dunlop deliberately mislead Mr McHale as to the total commission payable and I have not seen documentary evidence of the commission actually paid, the appropriate relief, in my judgment, is for an account to be taken of the total commission paid to Mr Dunlop and for Mr McHale to be awarded the commission paid, with interest, in accordance with the relief sought in the Particulars of Claim.

J. Conclusions

219. For the reasons set out above, my conclusions are:

i) The Claimant's claim for damages in respect of the alleged provision of negligent financial advice on the part of the Defendants is dismissed.

ii) The Claimant succeeds on his claim against Mr Dunlop for breach of fiduciary duty in respect of the commission paid to Mr Dunlop, together with interest, and an account is to be taken of the total commission paid.

220. I am very grateful to both Counsel for their helpful and detailed written and oral submissions in relation to this matter.