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Case No: CR-2017-000310

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

Rolls Building
7 Fetter Lane
London
EC4A 1NL

Date: 28/02/2019

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between:

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Claimant**
- and -	
ANTHONY JON DOMINGO ARMSTRONG-EMERY **XAVIER CHARLES CLAUDE WIGGINS**	**Defendants**

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- -

TIRAN NERSESSIAN (instructed by **HOWES PERCIVAL LLP**) for the **CLAIMANT**
THE FIRST DEFENDANT NOT APPEARING
THE SECOND DEFENDANT IN PERSON

Hearing dates: 18, 19, 20 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

1. The Secretary of State for Business, Energy and Industrial Strategy (the "Claimant") seeks a disqualification order against Mr Anthony Armstrong-Emery (recorded at Companies House as Mr Emery ("Mr Emery")) and Mr Xavier Wiggins ("Mr Wiggins") pursuant to section 6 of the Company Directors' Disqualification Act 1986 (the "Act"). The proceedings relate to two companies. The first is EcoHouse Developments Ltd ("Developments") and the second EcoHouse Group Developments Limited ("Group"). Mr Emery was a director of Developments. Mr Wiggins was a director of Group only.

2. In this judgment I shall set out the legal principles applicable to disqualification and then the structure shall take the following form:

   2.1. The rise and fall of Developments.

   2.2. The purpose of Group.

   2.3. Promotional material.

   2.4. The allegations made by the Claimant.

   2.5. The defence of Mr Emery.

   2.6. The defence of Mr Wiggins.

   2.7. Witnesses of fact.

   2.8. Disqualification.

   2.9. Period of disqualification.

Legal principles

3. I start with the legislation. s6(1) of the Act provides:

   "The court shall make a disqualification order against a person in any case where, on an application under this section, it is satisfied-

   (a) that he is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently), and

   (b) that his conduct as a director of that company … makes him unfit to be concerned in the management of a company."

4. The requirements of sub-sections (a) and (b) of s6(1) must be satisfied for the court to make a disqualification order. Where the requirements are met such an order is mandatory. A disqualification order is defined in s1(1) of the 1986 Act as being:

   "… an order that he shall not, without leave of the court-

   (a) be a director of a company, or

(b) be a liquidator or administrator of a company, or

(c) be a receiver or manager of a company's property, or

(d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for a specified period beginning with the date of the order."

5. By virtue of s6(4), if the court makes a disqualification order under s6, the specified period is between two and 15 years.

6. It is settled that each case must turn on its own facts and a "failure to appreciate or observe the duties attendant on the privilege of conducing business with the protection of limited liability is likely to lead to a disqualification order: *Re Stanford Services Ltd* (1987) 3 BCC 326, 336. On the other hand, Sir Nicholas Browne-Wilkinson V-C explained in *Re Lo-Line Electric Motors Ltd* (1988) 4 BCC 415, 419:

"Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate."

7. I am not sure if there is a difference between "gross negligence" and "total incompetence" but the overall meaning is clear. For a disqualification order to be made something more than a failure to act with due care and skill is required. Some courts have said that there needs to be a "high level" of incompetence: *Secretary of State v Hollier* [2007] BCC 11. In *Re Bath Glass Ltd* (1988) 4 BCC 130 Peter Gibson J preferred to say that the court must find a serious failure:

"To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability."

8. If the failure is serious it matters not whether it was deliberate or through incompetence. If deliberate the period of disqualification may be greater. It is perhaps useful to see how incompetence was treated in *Re Continental Assurance Co of London Plc* [1996] BCC 888, 896 where Chadwick J (as he was) considered the duties of directors and observed:

"Those in the position of Mr Burt, being senior employees of major banks, who accept appointment as directors of client companies of those banks, are lending their name and the respectability associated with their employer to the board of directors of that client company. Those dealing with the client company *are entitled to expect external directors appointed on the basis of their apparent expertise will exercise the competence required by the Companies Act 1985…..The competence required by the 1985 Act extends, at the least, to a requirement that a director who is a corporate financier should be prepared to read and understand the statutory accounts of the holding company of the company of which he is a director…."* (my emphasis)

9. An allegation of causing or allowing may be treated as if it is an allegation of incompetence: *Re Continental Assurance Co of London Plc* 896 D-E. Relevant to the

allegations in this case is the treatment of marketing material designed to induce investors. In *Re Walter J Jacob & Co Ltd* [1989] BCLC 345 the Secretary of State authorised an officer of the Department of Trade and Industry to examine the books and records of the company which resulted in a petition to wind up. The affidavit alleged that the company had been giving investment advice in a way that was misleading in that it gave the impression that the company was giving disinterested advice on shares whereas it was the owner of the shares. Nicholls LJ said (p359):

"In the present case I am in no doubt that the method by which the company sought to persuade, and did persuade, investing members of the public to purchase shares in ESPI and Magnacard was unacceptable. The more unusual and speculative the investment, the heavier is the burden resting on a vendor of shares to ensure that the contents and get-up of his sales literature are not misleading, either as to the nature of his interest in the shares, or as to the absence of any unusual restrictions affecting the shares, or as to his connection with the company in question, or otherwise."

10. Mr Nersessian submits that it was incumbent upon the directors of Group and Developments to ensure that any promotional material used was accurate and did not mislead. He rightly takes the court to *Re Grayan Building Services Ltd (in liq.)* [1995] Ch 241, and the judgment of Hoffmann LJ, with whom Neill and Henry LJJ agreed:

"It must decide whether that conduct, viewed cumulatively and taking into account any extenuating circumstances, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

11. In the same case Neill LJ commented (258C):

"Those who trade under the regime of a limited liability and who avail themselves of the privileges of that regime must accept the standards of probity and competence to which the law requires company directors to conform."

12. As a disqualification order carries significant consequences for a defendant, not only in respect of the business reputation of the director but also as a serious interference with the freedom and ability of the director to pursue a business career, it is important to have in mind that it is for the Claimant to discharge the evidential burden of proof: *Re Hollier*, cited above.

13. As to any period of disqualification, if the Court considers that the conduct of a director merits a disqualification order it must disqualify him for between 2 and 15 years. The leading case on disqualification period is *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164. Dillion LJ gave guidance on period dividing the period between 2 years and 15 years into brackets of seriousness:

    13.1. the top bracket – over 10 years, reserved for particularly serious cases;

    13.2. the middle bracket – 6-10 years, for serious cases that do not merit the top bracket; and

    13.3. the minimum bracket – 2-5 years, for cases that are not, relatively speaking, very serious.

14. In *Re Westmid Packing Services Ltd (No. 2)* [1998] B.C.C. 836 the Court of Appeal reiterated that that the primary purpose of disqualification is to protect the public against the future conduct of companies by persons whose past records show them to be a danger to creditors and others. Other factors may also come into play in the wider interests of protecting the public, such as a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned. The period of disqualification must reflect the gravity of the offence. Matters of mitigation may also be taken into account, such as including the former director's age and state of health, the length of time that he has been in jeopardy, whether he has admitted the offence and his general conduct before and after the offence.

The rise and fall of Developments

15. Developments was incorporated on 28 May 2010, began trading later that year, ceased trading in November 2014 and entered insolvent liquidation on 15 January 2015. Mr Emery was a director between August 2010 and May 2012. Mr Macnamara was appointed as a director in May of that year but acted through powers of attorney as a nominee of Mr Emery. It is not contested that Mr Emery continued to act as director until Developments entered insolvent liquidation. Mr Emery describes himself as an entrepreneur who had worked in the property development industry while living in Spain. He moved to Brazil in 2006 and worked for a property developer. While living and working in Brazil the Federal government announced a large-scale public housing programme aimed at low income families in urban areas. The programme was called Minha Casa Minha Vida (My House My Life) ("MCMV"). Contracts for construction of the properties were awarded by Caixa, a government-owned bank responsible for managing a number of federal programs. Caixa also funded mortgages enabling the purchase of property by lower income families. Mr Emery saw an opportunity in the MCMV programme.

16. The evidence of Mr Emery that there were three construction projects in Natal Brazil in which Developments was involved is not disputed. The first was the Arco Iris (Rainbow) comprising approximately 300 homes. The second was Casa Nova (New House) comprising 515 homes. The third was Bosque Da Andorinhas (Forest of Andorinhas) which was to be developed in nine different phases with a capacity to produce over 2,000 homes.

17. Mr Emery incorporated a Brazilian company known as EcoHouse Brazil Construcoes Ltda ("EcoHouse Brazil") to undertake the construction. Mr Emery did not obtain public funding but sought funding from private investors. Developments "was the vehicle through which investors in the Arco Iris project would invest money for the purpose of ensuring the project had the liquidity to allow us to build the units". As investors gave their money more land was purchased. To facilitate the transfer of the properties to the end purchaser Mr Emery "incorporated Arco Iris Residencial" which was a company in whose name each completed home was purportedly registered with the Brazilian land registry before they were transferred to the ultimate Brazilian purchaser.

18. Investors were promised a 20% return on their money within 12 months. The money would be transferred to an escrow account. The investors entered a sale and purchase agreement containing the following terms:

18.1. The Buyer and Seller have agreed that the Reservation Fee shall be held in an Escrow account (“escrow account”) by the escrow agent which is a firm of English solicitors who are retained solely for the purpose of maintaining the escrow account.

18.2. Upon receipt of the Reservation Fee from the Buyer, the escrow agent shall pay into a separate designated ledger in its client account ("Account") to hold the same in escrow as a stakeholder on the terms set out in this Agreement.

18.3. The escrow agent shall only be authorised to release funds from the Account ("Funds") in compliance with the terms of the Pre-Contract Reservation Agreement or in accordance with written joint instruction from the Buyer and Seller or pursuant to any Court Order in connection with the Funds.

18.4. Upon receipt by the Escrow agent of the reservation fee from the Buyer and a certified copy of the '”Alvara de Construcoo/licenca Simplificado” (the official document issued by a Notary in Brazil verifying and certifying that the seller/developer has complied with all the prerequisites and obtained all the necessary permissions to enable it to commence the Project), the Escrow agent shall release to the Vendor an amount of the total consideration received by it which shall be equal to 25% of the Unit[s] Reservation Fee, for the purposes of marketing, commissions and any other legitimate expenditure required to be paid out by the Vendor, to enable it to commence the building and construction of the project.

18.5. The balance 75% retained by the escrow agent shall be released to the Vendor by the escrow agent on the basis of a certificate produced by an independent Accountant [Hereinafter "Accountant"] being a member of a recognised Body of "Contadores" (Accountants), that he has received from the Vendor legitimate receipts and invoices for those amounts expended, on a monthly basis in arrears; such amounts having been expended for the benefit of the whole Project and such reimbursement to be equal to the amount invoiced and paid out by the Vendor.

18.6. The escrow agent shall receive a non-refundable fee ("the Escrow Fee") in the sum of £650.00 plus VAT (£780.00). The sum shall be paid simultaneously with the original sums paid into the escrow agent's account for the services set out within this Agreement. In the event that the Reservation Fee is refunded to the Buyer under the terms of the Pre-Contract Reservation Agreement or under the discretion of the escrow agent then the Seller shall reimburse the escrow agent the Fee within 7 days thereafter.

19. There is evidence of some certificates having been provided by an independent accountant before the 75% was released, but the records are incomplete. Overall the evidence is that certificates were not provided for a substantial number of fund releases.

20. The land for the Casa Nova project was purchased or transferred into EcoHouse Brazil. Mr Emery thought “that EcoHouse Brazil, a company owned by me, associated by name with the EcoHouse brand, would be a more appropriate vehicle for ownership of the Casa Nova land”. He accepts that the land could have been registered in the name of Developments but states that “I was also advised by Brazilian lawyer Andre Elali to use EcoHouse Brazil”. The Casa Nova project was partially completed but Mr Emery puts the failure of Developments (and the other companies bearing the name EcoHouse (the

"EcoHouse companies") down to the Bosque De Andorinhas development. The development was said to consist of 9 phases of 224 units in each phase and Mr Emery says that by a combination of poor relationships, unfortunate events and being overstretched the EcoHouse companies failed. Some of the unfortunate events included a strike at Caixa causing delays with payments; the world cup event increased the cost of materials due to demand and a senior project manager died. It appears that the EcoHouse companies were also attracting adverse publicity by the middle of 2013. Websites were carrying e-mails entitled "EcoHouse Brazil the biggest scam in overseas property. Beware". Mischon de Reya were engaged to threaten legal proceedings against the publisher.

21. Mr Emery accepts in his evidence that the land was not held by Developments. He says there was good reason for that being the case "it cannot be disputed that EcoHouse Brazil was the registered owner of the land in Casa Nova and also owned the land or rights to the land in the Bosque developments. In any event, it made sense for the land to be registered in the name of EcoHouse Brazil in respect of those investors who contracted with EcoHouse Brazil." A due diligence report produced by Andre Elali, a Brazilian Notary, confirms the understanding that EcoHouse Brazil owned the Casa Nova land. Mr Emery claims that the bulk of investors in the Bosque development were from Singapore and they contracted with the land owner in Brazil. They received what they bargained for. He reasons that "the Development investors were the investors in the Arco Iris project. There were some Canadian and UK investors in Casa Nova/Bosque who invested through Developments but this was very much the minority and ownership of the land was not an issue". Inconsistent with this acceptance, he states later in his evidence that "I do not accept that Developments did not own or that it did not have an interest in the land being developed".

22. Mr Emery introduces other aspects of the relationship between the EcoHouse companies. He explains that Developments "had signed the Overarching Contract with EcoHouse Brazil which incorporated within it the terms of contracts between Developments and investors, thus passing on the very same obligations under those contracts to EcoHouse Brazil. We felt that investors were protected both by the escrow arrangements….and the Overarching Contract. EcoHouse Brazil and Developments were in the same common ownership. I was a director of EcoHouse Brazil and the latter was obliged under the Overarching Contract to provide Developments and the escrow agents, who were lawyers, with copies of permits, planning permissions and title documentation as reasonably required….". The overarching contract does not give Developments a right to compel EcoHouse Brazil to transfer the land.

23. In her affidavit, Cheryl Lambert for the claimant, chief examiner in the investigation's directorate of the Insolvency Service, explains that there were escrow agreements and sale and purchase agreements (or reservation agreements). The escrow agreements stated that the "vendor" was Developments but for the overseas investors the reservation agreements stated that the "vendor" was "Echo House Brazil Construcoes Ltda incorporated in Brazil". The overarching contract referred to by Mr Emery provides that Developments would "introduce the funds of investors under the contracts to EcoHouse Brazil for the sole purpose of construction if units under the …[MCMV] scheme and that EcoHouse Brazil shall pay Developments the initial capital introduced…plus the minimum of the percentage return to an investor under the contracts." It also provided that Developments "shall deal with and carry out all marketing and promotion of the said

projects and pay and discharge the costs of the same from the funds released to it under the terms of the contracts." Although Developments had contracted to "deal with and carry out all marketing and promotion" it was Group that later became engaged in these activities.

24. The estimated statement of affairs on 15 January 2015 shows that Developments' deficiency as regards creditors was £21,443,255.41.

The role of Group

25. Mr Wiggins was approached by Mr Emery in or about March 2012 to be a director of a new company. Mr Wiggins, through solicitors acting for him at the time, has explained, the role of Group "was [to act as] a service company providing marketing services to Developments". Before the approach by Mr Emery, Mr Wiggins had specialised in the marketing of overseas properties and among other things, owned a trade media called Overseas Professional Properties, founded an industry association, and ran consumer magazines and exhibitions. Mr Emery suggested that he could be a director of the marketing company and focus on the marketing and promotion of the Brazilian property investments.

26. Mr Wiggins did not jump at the suggestion but by December 2012 was ready to join the venture. Group was incorporated on 11 December 2012 with Mr Wiggins and Mr Jason Purvor appointed directors. Mr Wiggins says that even though he was a director there was no doubt that Mr Emery "operated the company as a de facto director throughout Group's trading life" and that all decisions in relation to Group were directed through Mr Armstrong-Emery, who maintained a tight control over the company's operations". This version of Group's management was challenged in cross-examination, but I have no reason to doubt Mr Wiggins' version of events. Mr Wiggins explains that "Group was after all a part of Mr Armstrong-Emery's 'EcoHouse group' of companies". The reason why Mr Wiggins uses quotation marks around EcoHouse group is because he recognises that there was no group in the technical sense.

27. Mr Wiggins was a director until 4 September 2014. In evidence he says that he tried to resign in March 2014, but Mr Emery persuaded him to stay because Group needed to replace him with another director. He said that he had lost or was losing "confidence in Developments" because there was a "growing number of late payments to investors and suppliers" and that Mr Emery was becoming disengaged. He says "ultimately, no credible answer came back, and I tendered my resignation as director in June 2014". Mr Wiggins was challenged about his resignation attempt in June 2014 in cross-examination, but again I have no reason to doubt Mr Wiggins' version of events. He had no documents to support his position at trial but the day after the trial finished Mr Wiggins sent an e-mail to Howes Percival LLP acting for the Claimant, with an attachment of an e-mail that supports his live evidence. He eventually did resign when Mr Emery was able to appoint Deenesshwar Bissessar as director. Group entered insolvent liquidation on 16 February 2015 with a deficiency as regards creditors of £186,286.

28. The context in which Mr Wiggins agreed to be a director of Group is an important part of his defence. He explains that when he became a director of Group he considered that Developments was an established developer in a difficult overseas property market. He had "been aware of Mr Armstrong-Emery within the industry for many years and

considered Mr Armstrong-Emery to be extremely well-regarded, both personally and professionally. He and Developments were gaining their highest profile yet in the build up to my deciding to join due to the apparent success of the social housing business they were carrying out. Accordingly, upon joining Group, I was in no way immediately suspicious of Mr Armstrong-Emery or his established commercial operations under what he referred to as the "EcoHouse group". I had no reason not to take him at his word or to demand that he substantiate each and every assertion or representation to a higher level of proof than one might ordinarily expect." I am satisfied that he took on the role as marketing director in Group although he did "from time to time carry out tasks that were not in fact part of my day to day remit for Group, these tasks were usually carried out at the specific request of a colleague, usually Mr Armstrong-Emery, in assisting Group in its day-to-day function".

29. Mr Wiggins says that he was shown a letter from a firm of solicitors who operated the escrow account, Sanders & Co, dated 11 January 2013 in which they confirmed, on behalf of Developments, "that £2,028,413 had been repaid to 80 of Developments' clients in respect of the Arco Iris project pursuant to the various escrow agreements with those same clients". This gave him confidence in the enterprise. I shall return to other matters that Mr Wiggins says, taken together, made it reasonable for him to conclude that Group was producing credible and accurate marketing material when I deal with his evidence.

The promotional material

30. Marketing comprised brochures, YouTube videos and attendances at exhibitions. The brochures include the company history of Developments, why an investor should invest in Brazil, the social housing scheme, the various different investment opportunities such as Casa Nova or Bosque and a section concerning exit and returns and a frequently asked questions section. Taking one brochure, from the disclosed documents, as an example, the section 'Company History' reads: "EcoHouse Developments is a provider of a government-backed social housing programme Minha Casa Minha Vida. We own the land, we are fully registered with the Brazilian Government, have all building permits in place and our investors' money is fully backed by Brazil's largest bank CAIXA and Lloyds (London)." In the section concerning the investment opportunities it states that for investors there is a "low entry level product; 20% return in just 12 months; Lloyds TSB provide an Escrow facility to protect investors funds which is managed by UK solicitors; clear and defined Government backed exit strategy". As for "Investment Security" the brochure states that "the worst case scenario for our clients in this project is all monies are returned directly from the Escrow facility if the project does not go ahead for whatever reason. This is an extremely unlikely scenario given that we are working fully within a government backed social housing program within one of the most dynamic economies in the world." Other marketing material claimed that in a "worst case scenario" the investor will "own and control an asset with a value exceeding the amount invested."

31. On "Exit and Returns" one brochure states "in the unlikely event the project does not go ahead your funds will be returned by the Escrow Lawyer from your Escrow Account". In the 'Frequently Asked Questions' it is stated:

    31.1. "Q: If the developer goes bust part way through the project, what safeguards are in place to protect the investors' money?

31.2. A: This is usually a valid question with most developments but the risk of this to our clients is zero. Your funds are placed in the Escrow account with Lloyds TSB in the UK and are used solely for the build of your property. EcoHouse cannot request your funds until the UK Escrow lawyer receives payment against certification of authorised expenditure for your unit, so the only two possibilities you will be faced with are; 1) your funds will still be in the Escrow if the project does not go ahead. 2)Your unit will be built with the funds in the Escrow account."

32. A different brochure provided to Howes Percival LLP by Mr St John Rowntree ("Mr Rowntree"), who made his first investment in January 2013, includes an introduction from Mr Emery as "CEO EcoHouse Developments Ltd" but does not make any representations about the ownership of the land. In a brochure provided to Howes Percival LLP by Mr Marc Palmen headed "Bosque - Investing In Your World", the "frequently asked questions" section includes a statement that "EcoHouse is the developer, constructor, real estate agent and land owner in Brazil".

33. Some brochures also carry with them the Olympic logo and bear the standard kite mark ISO9001. This is an international standard that specifies requirements of quality management systems. It is accepted that Developments did not, and neither did Group, have an ISO 9001 and there was no permission to use the Olympic logo.

34. The Claimant identifies a reservation agreement with an investor, Mr Lawrie, which was entered into on 4 March 2013. It provides an example of how an investor is led to believe that Developments owned the land. The agreement is between Developments (defined as the "Vendor") and Mr Lawrie (defined as the "Buyer") Recital A states, "The Vendor owns the land in Natal, North East Brazil, upon which it intends to construct a Social Housing Project…". The agreement set out the terms of the investor's purchase of housing units. Clause 11 states, "The parties to this agreement understand that this contract is unenforceable in Brazil or under Brazilian law."

Allegations made by the Claimant

35. The Claimant's case is that Mr Emery is unfit to be a director for the following reasons relating to his role as a director of Developments. During the period January 2013 to the date of liquidation he:

35.1. caused Developments to make misrepresentations to potential investors as follows:

35.1.1. Developments stated in marketing material and legal documents that it owned the land that would be developed when it did not own such land;

35.1.2. Developments stated in marketing material that it was an approved supplier of housing under a Brazilian Government Scheme when it was not;

35.1.3. Developments stated in marketing material that funds invested in projects offered by Developments were secure when they were not;

35.1.4. Developments displayed the Olympic logo on marketing material notwithstanding that permission had not been obtained from the International Olympic Committee or the British Olympic Association;

35.1.5. Developments stated that it had been awarded ISO 9001 accreditation when it had not;

35.2. with the result that investors claimed in excess of £21m in Developments liquidation.

36. He is also alleged to have caused or allowed Developments to fail to maintain, preserve or deliver up accounting records that were adequate.

37. It is claimed that Mr Emery is also unfit by reason of the same matters, save for inadequate accounting records, in relation to Group.

38. As regards Mr Wiggins it is said that "in his role as international marketing director for Group" he was "responsible for the EcoHouse marketing brochures that were issued". The exact same allegations are made against him in respect of his role as a director of Group (there is no allegation about accounting records in Group).

39. Mr Nersessian agreed in closing that the heart of the allegations against Mr Emery and Mr Wiggins is the failure to accurately represent the land ownership in marketing material sent to investors.

The Defence of Mr Emery

40. Mr Emery has sworn an affidavit in support of his defence. I have mentioned that his written evidence is somewhat inconsistent in terms of land ownership. Having read the totality of his evidence I shall work on the basis that he does not dispute, or clearly dispute that Developments did not own the land. In my view his evidence demonstrates an indifference as to who owned the land. I say indifference as his evidence is "it would [not] have made any difference if the literature had said that either EcoHouse or myself owned the land."

41. The evidence also demonstrates a failure to understand that Developments and Group had a responsibility to be transparent and honest with investors. He says that he always considered the land to be held for the "investment project and the investors" and that he could have registered the completed units in the name of Developments, but that it simply did not occur to him to do so. That may be the truth and supports the view that he did not understand his duties to investors of the companies in which he was a director. He argues that he always considered that the land was held for Developments and the ultimate investors in the project and could have transferred the land in Casa Nova to Developments at any point because he was beneficially entitled to the land. He has relied in part on the overarching contract, but as I have mentioned there is no right in that agreement for Developments to compel EcoHouse Brazil to transfer the land.

42. For the purpose of determining unfitness it is unnecessary for the Claimant to demonstrate loss as a result of the allegations. However, Cheryl Lambert in her affidavit exhibits questionnaires and responses from 120 investors. Five investors responded that it would have made no difference who owned the land as Mr Emery contends. Five investors said they would have carried out further due diligence; nine that they probably would not have invested and ninety-nine definitely would not have invested if they had known the truth. As regards loss to Developments, Mr Nersessian rightly argues that the

liquidator will have no recourse to the land or any buildings on the land which will result in a diminished return to creditors.

43. Further there is no evidence that any of the other representations made in the promotional material I have mentioned above was accurate or true. Developments was not the construction company (EcoHouse Brazil was the builder); there is no evidence that Developments was "entrusted by the Brazilian government"; or a provider of "the government backed social housing programme"; or in fact the "only UK authorised company; or that there was any kind of "government backed exit". There is no evidence that any funds paid by any investor was "secure" in the period Developments held or purported to hold the funds.

The defence of Mr Wiggins

44. Mr Wiggins was bound to accept that it was unsustainable to claim that Developments was the land owner, supplier of housing under a Brazilian Government Scheme security, or provided security to investors. His position is that Mr Emery not only persuaded investors to invest on the basis of these representations but also persuaded him that they were accurate representations. He was not involved in the first brochure, Bosque Residencial, as it predated the incorporation of Group. That brochure included representations concerning the escrow facility, a clear and defined "Government backed" exit strategy, the return of money if the project did not proceed or an option to have "the title of the unit transferred to you" in the event that the project proceeds, but the "unit" does not sell, and that the investment is "secured". The second brochure merely repeated the first with some minor amendments and any subsequent marketing material merely repeated the same representations but in a different way.

45. Mr Wiggins says that he believed Mr Emery and his belief was not blind. In his witness statement (which evidence he consistently repeated in live evidence) he says that he visited Brazil on three occasions in the 21 months he worked for Group and:

    45.1. met with a set of property owners who had moved in and were being interviewed by journalists.

    45.2. saw hundreds of workers wearing an "EcoHouse" uniform.

    45.3. saw a significant amount of signage around the various developments bearing the name "Eco House".

    45.4. saw Mr Armstrong-Emery interviewed again and again on the issues raised in these proceedings.

    45.5. saw letters of support from government bodies and saw letters from solicitors confirming their involvement and satisfaction with the legal arrangements.

    45.6. saw significant interest from reputable media and government officials, even before joining Group.

    45.7. saw repeated explanations from staff at Group and Developments, which supported Mr Armstrong-Emery's explanations regarding the nature of the investments and the legal security of those investments.

45.8. was given the additional confidence in the security of the investment by the fact that solicitors had created the same and were working alongside Developments in order to ensure that the funds received from investors were correctly protected and distributed in line with the investors' expectations.

46. In her second affidavit Cheryl Lambert accepts that Mr Wiggins did carry out some due diligence and challenged some documentation (for example the use of the ISO 9001 was challenged by Mr Wiggins, but Mr Emery insisted that it be kept in the brochure, giving him a plausible reason for doing so). Notwithstanding that acceptance it is said that Mr Wiggins had actual knowledge that Developments did not own the land from January 2013 and was aware of negative press from at least June 2013. The negative press should have put him on inquiry. Cheryl Lambert says that there is no evidence to suggest that Mr Wiggins did anything to contact sales agents or third parties to correct the position or issue a revised brochure to state that the land was not held by Developments.

47. In his helpful and well-structured skeleton argument Mr Wiggins states that "Group is unlikely to have produced the marketing material". The skeleton argument goes onto say that "even if [Group] did, the Second Defendant believed, on reasonable grounds, the representation to be true". He argues that the due diligence he undertook was adequate or not so inadequate to justify a finding of unfitness.

48. The Olympic logo appears on the first brochure before the incorporation of Group. Mr Wiggins' argument is that he did not know that the use of the logo was anything but legitimate.

Witnesses of fact

49. David Chubb is a partner in PricewaterhouseCoopers and the liquidator of Developments and Group. He was not in the witness box for long as no questions were asked of him. He gave evidence of the debts owed by Developments amounting to some £21million. He explains that had Developments owned the land he would have taken steps to realise it for the benefit of creditors. Although Mr Emery has said that he would cooperate with the liquidator to realise assets Mr Chubb says that he has "made no attempt to assist me". I accept his evidence.

50. Renata Nogueira De Sa of Brazil Property Lawyers gave evidence and was asked a few questions. She is a qualified Brazilian and Portuguese lawyer, registered as a European lawyer in the UK. She acts for investor claimants based in Singapore who are seeking redress and has read the documentation sent to those investors including the legal documentation. Her evidence is that the Singaporean investors (and she understands non-Singaporean investors) entered contracts that generally operated in the following manner:

50.1. An individual would make an investment, linked to a specific unit on a development (for example £23,000 for a unit in the Bosque Residencial development);

50.2. The investor should have received a set percentage on the investment in addition to the return of the £23,000 given in the example above. The return was to be paid on the first annual anniversary;

50.3. The arrangements between the parties were governed in each case by (a) a sale and purchase agreement between EcoHouse Brazil and investors and (b) an escrow

agreement entered into by the particular firm of solicitors who handled the escrow agreement, the investors and EcoHouse Brazil.

51. Ms Sa explains that she has seen no evidence that Developments was an approved supplier of social housing under the MCMV scheme and the escrow agent could not be verified. Some of the Singaporean investors and a number of non-Singaporean investors entered into a sale and purchase agreement with Developments. Her evidence is that as Developments was not registered with Recieta Federal it was not able to own any assets in Brazil. Not only could it not own any assets in that country but it could not have rights to assets under any private contractual agreement. Her researches discovered, among other matters, that none of the licences issued for building were issued in the name of EcoHouse Brazil. Further there are issues with environmental licences, independent accountant certificates for the release of the 75% investor money held in escrow and declarations of investment. She has found that the "trigger documents submitted did not comply with the escrow agreement requirements. The independent accountant should have received from the vendor legitimate receipts and invoices for those amounts expended for the benefit of the whole project and such reimbursements should have been equal to the amount invoiced and paid out by the vendor". Further some of the declarations were not notarised. She concludes that EcoHouse Brazil has never been registered as a provider; never been the legal owner of the Bosque Residential phases 1 to 8; it never had the benefit of environmental or building licences; the possession of the land was never assigned and funds were released from the escrow account based on documents where the authenticity and lawfulness can not be verified, and there has ben no notarisation as required by local law.

52. I asked Ms Sa whether her investigations revealed if Developments had ever owned the land it promised to convey in the promotional material. She answered:

"I can confirm that Developments could never own any properties in Brazil because they are not registered in Brazil. For you to own a property in Brazil you must have the registration number. The company needs to apply first for the CNPJ, which is the tax number for foreign entities based in Brazil for them to acquire it. Neither [has] EcoHouse Brazil, I have done all the diligence myself. What they had between themselves were joint venture agreements, but there was just a private banking agreement between two parties. Those agreements were never registered. As you see I have a document written in Portuguese, which is the certificate of land, and the land, for instance Bosque Residencial, is registered to Bosque Residencial North which was the company that made these joint investment agreements with EcoHouse Brazil. But they have never actually had any legal rights. It is not correct to say they had ownership. The only way they can transfer ownership is by registered title deed and within the notary." (sic)

53. There followed several more questions about ownership:

Judge Briggs: please can you clarify, did [EcoHouse Brazil] own any of the land

A. No

Judge Briggs: did it have a right to acquire the land under a contract?

A. They didn't have the right because the contract was not registered-

Judge Briggs: The contract has to be registered?

A It has to be registered and this never happened.

Judge Briggs: Mr Wiggins do you have any questions arising out of that?

Mr Wiggins: No.

54. Mr Wiggins had no questions to ask of Ms Sa. It follows that her evidence was not undermined and I accept the evidence she gave.

55. Cheryl Lambert gave evidence and was cross examined by Mr Wiggins. The aim of Mr Wiggins' cross examination appeared to be to elicit an acceptance that he had done all that was reasonable to verify (or has he put it, undertake due diligence) the claims made in the promotional material. These he said were claims made by Mr Emery on behalf of Developments. As Mr Wiggins was not used to being in a court forum, he found formulating questions difficult. His questions were often statements. After explaining what he had done to satisfy himself that the representations made in the promotional material was accurate he asked what more a reasonable director should do. Cheryl Lambert's evidence was that he can not sustain a defence based on proper or reasonable due diligence because he knew or should have known that Developments didn't own the land and would have been aware of the misrepresentations. The reason why Mr Wiggins is said to have known is that in August 2013 he raised questions of Group's accountant as to the treatment of VAT. He received a response by e-mail informing him that Group "is technically an estate agent" and that the land is "owned by the Brazilian company". Mr Wiggins asked whether she accepted that "I placed importance, a lot of importance, on legally binding, as I was assured, agreements between Construcoes and developments as I reasonably expected that to mean the they were extensions of each other". Ms Lambert responded that the promotional material said that Developments owned the land. Mr Wiggins referred to the agreement between EcoHouse Developments and EcoHouse Brazil dated 3 January 2012 where the recital states:

"Echo House UK is engaged in property development consultancy and sale of retail property in Natal, North Eastern Brazil and owns the right to effect the transfer of land and is in the course of building projects for the purposes of social housing…."

56. Eco House UK is a definition given to Developments in the Agreement. Ms Lambert did not think the agreement spoke of Developments owning the land and said she has seen no evidence of Mr Wiggins asking solicitors to clarify land ownership. Ms Lambert accepted that Mr Wiggins would often seek Mr Emery's approval for marketing material before it was sent out. She also accepted that there was only one example within the company records that supports her view that he dealt directly with the public. Mr Wiggins explains that there was only one occasion that he sent documents to a member of the public because his colleague asked him to since his colleague was not in the office at the time, "I stepped in to help a colleague as I might have done in anything". Another question asked by Mr Wiggins of Ms Lambert I repeat here as it summarises his defence to the allegations made by the Claimant:

"I'd just like to ask a question around how I formed my overall understanding and opinion and that does just need some background. I'd like to talk about my visits to Brazil to help you further understand my position. When in Brazil, I saw hundreds of houses

built and being built. I saw hundreds of EcoHouse staff in the office and on the projects. I met with government officials. I saw community initiatives such as the local hospital support. I saw and heard from owners who had purchased EcoHouse property under the Mina Casa Minha Vida programme. I visited a dedicated MCMV exhibition at which EcoHouse were exhibiting. I saw the demand and heard about the demand at previous MCMV exhibitions rom people pre-approved for MCMV mortgages. I also saw with my own eyes bank strikes, queues outside banks as they reopened and poverty to reinforce why EcoHouse went to private individuals for funding rather than banks and why normal people on not afford homes without MCMV mortgages. I saw massive positive local interest and coverage in and for the company. I was not just sitting behind a desk in Richmond. Do you understand how my visits to Brazil helped to create an understanding that EcoHouse was not a company that was misleading about the basics on which the material were created? Do you understand how I formed that opinion?

57. Ms Lambert was not able to answer the questions posed but accepted that she had "no contemporaneous knowledge of that or no evidence that that's what he did. That's what he says he did", and Q. "so you accept that is what he did". A. "Yes". Mr Wiggins wanted to ensure that there was no hidden allegation that Developments or Group were involved in a fraud. Ms Lambert confirmed "we're not making an allegation about the first phase." Ms Lambert also accepted that it was not unreasonable for Mr Wiggins to forward a query made in September 2013 about (i) the connection between the various companies (ii) land ownership and (iii) the contractual arrangements between the selling company and the investor, to the UK lawyer instructed by Developments. There was no evidence that the lawyers engaged by Developments communicated with Mr Wiggins to give comfort that the promotional material was accurate.

58. Ms Lambert's written evidence is very thorough. It was ambitious of Mr Wiggins to cross-examine her on so much material, but he acted with courtesy and calmness and sought to put across his carefully constructed case foreshadowed by his skeleton argument.

59. Cheryl Lambert's live evidence was given in a straight forward manner and was consistent with her written evidence which itself was firmly anchored in documentary material. Her concessions were appropriate. I find that her evidence was honest and reliable.

60. Mr Emery did not attend court. I have read the second witness statement of Morris Corker-Peacock of Howes Percival LLP. He explains that notice of the proceedings was sent to Mr Emery on 12 December 2016 by e-mail and post. He did not respond immediately but later responded to say that he had appointed counsel to act on his behalf. This provides evidence that he had received the notice of proceedings. Hassans solicitors were engaged and correspondence ensued. An e-mail was sent from the court to solicitors acting for all parties on 11 January 2018 informing them of the trial date. An e-mail from Hassans dated 25 July 2018 confirmed that Mr Emery had been informed of the trial dates. It appears that Mr Emery had instructed leading and junior counsel. The trial was listed for 6 weeks. Howes Percival LLP sought to reduce the court time by reducing investor witness attendance. An application concerning the number of investor witnesses was made and heard on 20 November 2018 and solicitors attended confirming that Mr Emery had received the application. By an order the court gave Mr Emery an opportunity to cross examine all investor witnesses but he was to serve notice within a specified time.

Many of the investor witnesses were travelling from abroad. Mr Emery did not give notice. On 10 January 2019 a trial bundle was sent to Mr Emery and on 16 January notice was given that he was to attend court for cross-examination. Mr Emery has not responded and did not attend court. I am satisfied that he has known of the trial date since 11 January 2018, he received notice to attend to be cross-examined and received the trial bundle. There has been no communication with the court. I infer that he chose not to attend to defend the claim.

61. Mr Wiggins gave evidence explaining that his expertise was marketing, not selling. He had known Mr Emery in a professional capacity for some time. In respect of the EcoHouse companies he gave evidence that he had seen the brochures produced by Developments prior to taking up the office of director in Group. Group was incorporated because Developments had largely sold its investments through agents. In his evidence Mr Wiggins says that "Developments' core marketing messages of a socially responsible enterprise marrying high yield and secured investment in an area in which demand far exceeded supply, were established long before Group was incorporated and our intention was to ensure that the various marketing materials remained consistent and accurate." Mr Nersessian asked "at the time you joined [Group] did not appraise yourself of what it was at that moment that EcoHouse was sending out?" Mr Wiggins responded that he did but that he was not aware of "absolutely everything that was being distributed". He accepted that it was his responsibility to create and produce brochures from the date of his appointment in January 2013 "with approval". This meant the approval of Mr Emery as "there was absolutely a requirement to get him to sign off on marketing materials". Mr Wiggins explained in cross examination that when he agreed to take his post in Group it was on the basis that others would run the company and he would be the "part-time marketing director". I should mention that the reference to "part-time" is reference to the fact that Mr Wiggins remained involved in Overseas Professional Property, which was a trading name of RGG Limited; a company in which Mr Wiggins was a director and 50% shareholder (with his wife). RGG Limited provided services to Developments and Group for which it received £618,517 from those two companies in the period 4 October 2011 to 20 August 2014. Cross examination by Mr Nersessian took the following course:

Q. In your evidence there isn't even any suggestion that when you joined Group, here are the questions you asked, and this is what you were told in response?

A. I don't accept that I didn't ask the questions of the key fundamentals of the proposition. I needed to build an understanding. I did absolutely ask questions.

Q. did you ask about the ownership of the land?

A. That would have been one of my questions.

Q. why did you ask about that?

A. Because I needed to understand – I needed to understand it.

Q. Well, had you read the expression in the brochure of Developments owning the land?

A. I would have done, yes, I believe.

Q. Well do you recall doing it?

A. Yes, I think I did.

62. Mr Wiggins accepted that he understood the importance of the "ownership representation". He was asked about deferring to Group's solicitor in respect of land ownership and the intercompany organisation. He said that he didn't answer because others could articulate the answers better: "Developments was Anthony [Mr Emery] and Charles the lawyer and they were the people that structured the whole thing." As his time as director progressed, he saw negative blogs and press. He was asked about what steps he took to ensure that the negative publications were wrong:

"I saw negative comments or even comments that challenged my understanding, I would address them and ask for clarification. And usually receive that clarification verbally and be reassured. I go back to my mention earlier of taking the phone out of Richmond Green and regularly, its one of my overriding memories of my time there, was seeing something that jarred me or a negative mention on a forum and going out, making a phone call and seeking reassurance on that point to make sure that the company was right and that the investor, or whoever it was that made the comment, was not."

63. His evidence was that when he learned of negative articles or blogs about Group or Developments, he sought reassurance not only from Mr Emery, but also from Deen Bissessar and Jason Purvor. He preferred to speak with Mr Emery but he was not available at all times. As regards being an approved scheme provider Mr Wiggins thought that if people could obtain mortgages through the government backed banks, for the purpose of purchasing a property under the MCMV, that Developments were building the properties on the land that was available for the MCMV, it was logical that the projects that were promoted were approved schemes. If, as he saw it, properties were being built for social housing, mortgages were obtained by families eligible for loans from Caxia, and those families were moving into those properties (which he saw on his visits), he had no reason to question Mr Emery.

64. In assessing Mr Wiggins as a witness, I would ordinarily have regard to consistency with contemporaneous documents or correspondence, but there are few such documents that evidence his purported knowledge that Developments did not own the land. This is mostly due to the nature of the allegations and defence. By their very nature conversations had between Mr Emery and Mr Wiggins are not documented. No-one has suggested that they were recorded. There are of course the legal documents and brochures but there is no argument from Mr Wiggins about what they said or their meaning (save that he thought that the overarching agreement gave a right to Developments). There are a few e-mails and in particular I have dealt with the August 2013 e-mail which Ms Lambert relies upon to assert that Mr Wiggins had actual knowledge that Developments did not own the land. The e-mail read in context of that particular chain relates to whether Group should be registered for VAT. The accountant was stating that as the supply of land was in Brazil and the land is owned by a Brazilian company any commission received by Group would not be subject to value added tax. Read in context Mr Wiggins may easily have missed the significance of the critical words for the purpose of disqualification proceedings issued many years later "owned by a Brazilian company…." There is the e-mail chain in September 2013 where Mr Wiggins referred the questions of company structure to the lawyer. His correspondence with Mishcon de Reya observed caution. He was keen to get to the root of the ISO 9001 issue and took the precaution of withdrawing mention of the ISO from the promotional material until he was told by Mr Emery to

reinstate it. Other e-mail traffic has been exhibited by Ms Lambert as evidence of Mr Wiggins' directorship until he resigned and his involvement in marketing. These last matters are not in dispute.

65. Mr Nersessian cross examined Mr Wiggins on consistency. That is consistency with his testimony, his written evidence and an approved transcript of an interview he had with the insolvency service in April 2016. In interview he was asked about land ownership. He responded that he was unsure whether the purchaser was Mr Emery, Developments or EcoHouse Brazil. He said that he did not see any paper work relating to ownership, and that he had no direct dealings with the investors. It was put to him that his present position of having seen the escrow agreement and other documents was inconsistent with his earlier account.

66. In my judgment he answered the charge of inconsistency by giving an honest account of his dealings. He was doing the best he could in the circumstances and trying to remember events that happened a long time ago. He simply added that he could not comment on his earlier statement with any assurance. I take account of the fact that human memory is frail and bear in mind that a statement should not be over analysed when given several years after the fall of a company, most probably under stress, with comparatively few documents.

67. It was put to him that he had been inconsistent with his account about knowledge of the information contained in the brochure concerning ownership. His response was that he would have preferred the wording in his witness statement to have been better. It is right to say that there is a conflict of sorts between what was said in the 2016 interview and Mr Wiggins' witness statement. I say of sorts as Mr Wiggins has never said that he had seen "ownership documents". It would be remarkable if he had. The interview note does not disclose if Mr Wiggins was taken to any documents, but he describes the escrow agreement earlier in the interview. This demonstrates that he had seen the agreement. The escrow agreement is one of the legal documents he relies upon for having a reasonable belief that Developments owned the land. Consistency of his position can also be measured by his e-mails to Morris Peacock in August 2016 where he responds to several questions and explains that he was "very reliant on [Mr Emery] for anything marketing wise pertaining to information from Brazil, including land ownership."

68. When reading through the approved note of the 2016 interview it is the overall consistency with his evidence at trial that stands out. He has consistently said that Mr Emery was in charge; that Mr Emery signed off on the marketing, "nothing went out without AEs approval"; how he had been to Brazil and seen the development; he had seen people occupying the houses built by the EcoHouse companies; he heard an interview with a new owner; and that he tried to resign from Group in early 2014, tendering his resignation by way of e-mail in June 2014 because he did not agree with how Group was being managed. The control by Mr Emery is evidenced by e-mails sent by Mr Emery to Mr Wiggins in connection to the use of the ISO9001. The interview also demonstrates Mr Wiggins' straight forward approach to the investigations carried out by the Claimant. One example is that he was asked whether Group had permission to use the Olympic rings on the promotional material. He simply responded that it did not have permission. This response is, in my judgment, consistent with his demeanour while giving evidence. He was cautious, wanted to put his story across, appropriately conceded on issues put to him by Mr Nersessian, and gave his evidence without gloss.

69. Next, I consider the inherent likelihood that Mr Wiggins was convinced the land was owned by Developments, and convinced by actions and inactions of Mr Emery. Such a likelihood must be seen in the context of Mr Wiggins' role in Group and his involvement in its corporate governance. His role in Group was as a part-time marketing director. His description of his role has been consistent throughout the proceedings and it is as he described it in the 2016 interview. That is not to say that Mr Wiggins was solely concerned with marketing. He accepts in his evidence that he became involved in other aspects of the corporate work such as chasing fees and even providing cashflow spreadsheets to Mr Emery. He said that at times it was "all hands to the pump". These activities are to be viewed through the prism of Mr Emery's ownership of Group which was incorporated to undertake the marketing for another company owned by Mr Emery, namely Developments.

70. The chronological context is a factor when considering inherent likelihood. Mr Wiggins joined what appeared to be a successful enterprise. He knew about the Acro Iris development. No allegations are made in respect of this development, and the success or otherwise of the Arco Iris project forms no part of the Claimant's case. Mr Wiggins said in evidence that his own enterprise (about which he is passionate) was not achieving the results he would like as the overseas property market had softened considerably in 2012. He had worked for Mr Emery as a contractor and seen the publicity surrounding the Brazilian projects extending back to 2011. Marketing material produced prior to the incorporation of Group (March 2012) expressly refers to Developments owning the land and "we are registered with the Brazilian government". The marketing included statements about security for investors. The Bosque Residencial brochure appears to have been in circulation prior to January 2013. Mr Wiggins' evidence was that previous brochures would from time to time be tweaked by sales staff. There is no evidence that there was adverse publicity at that time or that the claims made in the marketing material prior to Group's incorporation had been challenged.

71. Lastly, when assessing the evidence of Mr Wiggins, I have regard to the consistency with other witnesses' testimony. As a result of Mr Emery's failure to attend court he was not cross-examined on his witness evidence by the Claimant or Mr Wiggins. I therefore have to conduct this assessment by reference to his affidavit only.

72. Mr Emery states in his affidavit that "I have reason to believe for the reasons explained above Developments, owned [and] I retained ultimate beneficial ownership in the land in Brazil but EcoHouse Brazil were also contractors constructing the homes". The statement maybe confusing to a lawyer, but it provides a good indication of the assurance received by Mr Wiggins in relation to ownership of the land. Furthermore, it is consistent with Mr Wiggins' evidence.

73. In respect of the Arco Iris project Mr Emery's evidence is "I purchased the land and, with investment through Developments, had houses constructed on the plots. As each house was due to be sold, the land would be registered in the name of a company owned by me, and then title transferred to the ultimate purchaser. There was no point in registering ownership prior to that point……..As far as I was concerned, I considered myself holding that land on behalf of Developments and the underlying investors who invested the money". I make the same observations in respect of this evidence as were made in the previous paragraph. Mr Emery accepted in his evidence that the land upon which houses in the Casa Nova project were built was purposely held in EcoHouse

Brazil, but in respect of the Bosque project "I believe that ownership and the right to build on the land was acquired by Developments and by EcoHouse Brazil."

74. Mr Emery also relies on the overarching agreement and advice from Sanders & Co. He explains:

"It is true that I could have registered the completed units in the name of Developments and not Arco Iris Residencial or EcoHouse Brazil for no or nominal consideration but it simply did not occur to me to do so. The advice from lawyers was to do things this way and that is what I did. However, I always considered that the land was held for Developments and the ultimate investors in the project. All of the investment money at this early stage was put through Developments, which was central to the investment venture. Developments could have called for the land to be registered in its name at any point."

75. Mr Emery's evidence is confused as he seeks to make the point that it did not matter who owned the land as "EcoHouse Brazil and Developments were in the same common ownership."

76. In 2016 solicitors acting for Mr Emery responded to the allegations that were made against him in a letter to Howes Percival LLP. I infer that these solicitors responded on the instructions of Mr Emery. In respect of land ownership they stated:

"The promotional material for Developments that was made available to investors was and always has been readily available both online and from Developments should it have been needed. At all times our client and Developments endeavoured to be as transparent as possible in all of the documentation produced. Before launching and preparing any marketing and contractual material, Developments made sure that it obtained legal advice in relation to the same……It is true that a minority of investors signed contracts with Developments on EcoHouse Group letter head, which states that Developments owned land in Brazil. Developments, however, had a back to back contract with EcoHouse Brazil. It is highly doubtful whether the identity of the contracting party within the EcoHouse Group would have made any difference to investors and it is certainly not an issue on which disqualification proceedings should be based."

77. The reiteration of ownership in the form of a back-to-back contract by lawyers for Mr Emery in connection with these proceedings is consistent with Mr Wiggins's account. It may be misguided in law, but that is a different issue. Failures of a director have to be considered in the context of their role in a company. I have little doubt that Mr Wiggins' understanding about the legal ownership of the land in Brazil changed during his time at Group and was dependent upon which version Mr Emery wanted to give. He may have had different advice from Sanders & Co, the accountants, Mr Purvor and Mr Emery, but I accept they all gave him comfort in his understanding that the promotional material was not wrong in substance.

78. I accept Mr Wiggins' evidence that he relied in large part on Mr Emery's assurances. The overall picture is that Mr Wiggins's evidence is consistent with the documentary evidence and the affidavit of Mr Emery. He had good reason to rely on Mr Emery as the EcoHouse companies were Mr Emery's brain child. He had been financially and emotionally engaged in the Brazilian enterprises, had established contacts in Brazil and was the controlling mind of Developments and EcoHouse Brazil. The chronology of events

demonstrably establishes that that Mr Wiggins adopted a position that had been established before the incorporation of Group and before his involvement as a part-time marketing director. At some point prior to June 2014 he may have understood that questions were being asked about land ownership but was assured that the brochures were not misrepresenting the position to potential investors.

79. I reach the conclusion that in my judgment it is inherently likely that Mr Wiggins' account is correct. He was concerned to market a product that was established, and understood that land ownership was a complex matter dealt with by Mr Emery and Sanders & Co. I accept his evidence that he did ask about land ownership when he began working at Group; that he was told (initially at least) that Developments owned the land; he reasonably relied on Mr Emery to appraise him of the position; he may later have come to the conclusion through third party sources, or have been told that Mr Emery owned some of the land personally or other companies bearing the name EcoHouse owned the land; he is unlikely to have known that Mr Emery purported to hold land on trust for Developments; but did understand that insofar as Developments did not own land, it had contractual rights to the land upon which the properties were being built and genuinely held the belief (as he was told) that Developments had the right to have the land conveyed. His observations on the ground in Brazil reinforced his understanding and gave him no cause for concern. His mistakes were honest mistakes based on reasonable inquiry giving rise to a reasonable understanding for a director in the post of part-time marketing director.

80. I accept the evidence of Mr Wiggins as summarised in his skeleton argument at paragraph 43, that he believed the representations were true.

Disqualification

81. The evidence against Mr Emery is overwhelming. His defence to the allegation that he caused or allowed Developments to fail to maintain, preserve or deliver up accounting records is inadequate. It amounts to a submission that "I was not in the UK during any of the period in question and I was not running the English Companies. These were not matters which were within my competence as I spent most of my time at ground zero in Brazil". It is insufficient to abrogate responsibility generally but in particular it is insufficient for Mr Emery to avoid responsibility by stating that it was not within his competence. If the function was delegated it was his responsibility to supervise the delegation. In other words, as director he was responsible for ensuring that the books and records were preserved and produced. The responsibility goes hand in hand with the privileges attendant of trading through companies with limited liability. The requirements to preserve and adequate accounting records are statutory and their importance are emphasised by section 387 of the Companies Act 2006 which provides that where a company fails with any provisions of section 386, every officer of the company in default commits a criminal offence unless he shows he acted honestly and that in the circumstances in which the company's business was carried on the default was excusable. On his own evidence Mr Emery has been "totally incompetent" as he has failed to appreciate his duties as a director. It may be that he deliberately failed in his duty, but the case put by the Claimant does not make this allegation. I accept the evidence of Cheryl Lambert that as a consequence of his failures it is not possible to carry out a proper investigation into where and why money left the Company.

82. The Claimant's evidence concerning the allegation of false marketing has not been rebutted by Mr Emery. I am unable to give real weight to Mr Emery's evidence as he did not attend court. His evidence has not been sworn in and it has not been exposed to cross-examination. In his written evidence he partly relies on advice given by Sanders & Co but there is no written advice to support his position and although Sanders & Co no longer exists as a firm, neither Mr Macnamara nor his daughter gave evidence to support his case. I find that on the balance of probabilities he knowingly stated in marketing material and legal documents that Developments owned land when it did not. He caused Developments and Group to produce material that was inaccurate, misleading and untrue. Similarly, I find that he misled investors that the housing was approved by the Brazilian government and provided a secure investment. There was no point in time when the land could have been transferred to an investor by Developments. As the managing director of Developments, and Brazil EcoHouse, a substantial shareholder in the EcoHouse companies and the driving force behind these companies, Mr Emery knew this to be the case. Mr Emery was the only individual who as director was in control of all the facts concerning each of the companies. I find on the balance of probabilities that he misled Mr Wiggins about all of these matters. I find that he gave directions to Mr Wiggins in terms of the marketing to be carried out through Group and insisted that the ISO9001 accreditation be added to marketing material despite Mr Wiggins' protestations.

83. Although of itself the use of the Olympic logo may not have been enough to make a disqualification order without aggravating features, the Claimant correctly included the allegation. A failure to respect the property of others exposes a company to the risk of a claim. This is inconsistent with a duty to promote the success of a company.

84. I am satisfied that Mr Emery has been guilty of a series of deliberate serious failures in respect of Developments as set out by the Claimant. In my judgment the conduct of Mr Emery, viewed cumulatively, has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

85. I take a different view about Mr Wiggins. The Claimant has accepted that there are different roles as regards the two different companies under consideration and that the marketing material produced by Group were representations made on behalf of Developments. As the evidence of Cheryl Lambert and Ms Sa have not been undermined I have little doubt that the representations, the subject of the allegations, made by Group on behalf of Developments were not true. I have also accepted the evidence of Mr Wiggins. Accordingly, I accept that Mr Emery operated Group as a de facto director and all decisions in relation to Group were directed through Mr Emery, who maintained tight control.

86. The evidence of Mr Emery is in my view indicative of the information given to Mr Wiggins. Each time Mr Wiggins asked Mr Emery about the representations Group were making or challenged the marketing material he would have received one of the confusing responses set out in Mr Emery's affidavit. I accept Mr Wiggin's evidence that he "had no experience in land ownership matters in North East Brazil". Cheryl Lambert also accepts this to be the case and states in her second affidavit "The Secretary of State does not contend that Mr Wiggins failed to make any due diligence enquiries or that he did not challenge the documentation that he saw". The Claimant is right not to make the challenge. In my judgment there was nothing unreasonable in the actions or inactions of

Mr Wiggins in January 2013. In the circumstances of the case it was reasonable to rely on the marketing material used by Developments before his appointment.

87. The Claimant states that Mr Wiggins should have, during his appointment as director, responded to sign-posts such as negative press or blogs. The Claimant argues that such blogs or negative press alerted (or ought to have alerted) Mr Wiggins to the problems with the structure of the investment and caused him to scrutinise the accuracy of the representations being made to investors and that, if he could not satisfy himself of that accuracy, he should have resigned. I have accepted that Mr Wiggins sought the assurances he claimed to have sought. Without being an expert, he believed a due diligence report from a Brazilian lawyer even if he misunderstood its meaning; he understood (and was told by Mr Emery) that the overarching contract was sufficient in the circumstances as Developments was simply an extension of EcoHouse Brazil; and received assurances directly or indirectly from an English firm of solicitors which he had no reason to doubt. His understanding as set out in the marketing material was reinforced by visits to Brazil. One of the sign-posts was said to be an e-mail sent to Mr Wiggins and Mr Purvor from a Singaporean sales agent, Mr Russell. A sales seminar had taken place in Singapore and the potential investor asked if the investment was tantamount to an unsecured loan being provided to Developments. Mr Wiggins responded that he was concerned in marketing only. Mr Russell was put in touch with Jason Purvor, a director of Group bearing the EcoHouse name, to answer the question. Mr Purvor explained in response that the investment would be secured and that the investor would have the right to "clean title" if "EcoHouse is unable to sell the unit to a local purchaser". In my judgment this reinforced Mr Wiggins' understanding as represented to him by Mr Emery and was not a sign-post that should have tipped him off that all the representations made in the marketing material were untrue. Similarly, later in the year Marco Castelli asked Mr Wiggins (Mr Wiggins described himself as Marco's line-manager in Group) in an e-mail about the relationship between the various companies and how the ownership of land is linked to all the companies. Mr Wiggins referred him to the English solicitors for an answer. Cheryl Lambert did not think, in cross examination, that it was unreasonable for Mr Wiggins to pass on the inquiry. If that was not unreasonable, I infer that it was not unreasonable to rely on Mr Emery and the lawyers who had been instrumental in devising the corporate structure, purchasing land, constructing the homes and liaising with local government authorities The sign-posts are nothing more than evidence of Mr Wiggins' reluctance to second guess Mr Emery or the solicitors that were engaged by the various companies.

88. It could be said that Mr Wiggins did not act with perfect care and skill. That is not the test for disqualification. In my judgment his actions (causing) or inactions (allowing) were not serious failures when considering his role, expertise, the chronology of events, Mr Emery's part in the companies bearing the name EcoHouse, and the role of third-party agents such as Sanders & Co. In my judgment Mr Wiggins did not act with "total negligence" or "gross negligence". The allegations have not been made out.

89. The Claimant has accepted that the inclusion of the Olymic logo and the use of the ISO 9001 are not in themselves sufficient to warrant an order for disqualification. In any event I find that Mr Wiggins correctly challenged the use of the ISO 9001.

Period of Disqualification

90. The conduct of Mr Emery I have found to fall below the standards required of a company director. I must therefore make a disqualification order. The minimum period of disqualification is two years and the maximum 15 years. The Claimant seeks an order that Mr Emery be disqualified for a period that comes within the top bracket in the Sevenoaks scale. In my judgment Mr Emery's conduct cannot be said to be not serious. I agree with the Claimant that neither can it be said to be a middle bracket case as there are serious consequences resulting from the failure of Developments and Group. There is a deficiency in both companies but the deficiency in Developments is in excess of £21 million. The Claimant's investigations have established that the vast majority of investors would not have taken the risk of investing with Developments if they had known the truth. I have no doubt that a lack of candidness on behalf of Mr Emery, who would have known about land ownership and would have known about the operation of the escrow account, led to a considerable amount of loss.

91. There is no defence to the allegations about a failure to comply with the Companies Act 2006 requirement to keep and preserve books and records.

92. In my judgment his knowledge about what was being represented to investors and his continued insistence to those who asked that land was held or as good as held by Developments, that investors' money was secured and that the worst outcome would be that an investor would have a property in Brazil or it would be returned from the escrow account is an aggravating feature. He was responsible for not just mispresenting the truth but for perpetuating the misrepresentations. He persuaded his agents and employees of the misrepresentations that form the basis of the Claimant's allegations, and when an opportunity arose, he failed to rectify the misrepresentations.

93. I take account of Mr Emery's conduct after Developments entered insolvent liquidation. Mr Chubb states in his evidence that Mr Emery said that he would cooperate with the liquidator to realise assets. Mr Chubb says that he has "made no attempt to assist me".

94. The conduct I have found lacks probity and falls below the required standard of a director. In my judgment the conduct warrants an upper bracket disqualification and is sufficiently serious to justify a disqualification period at the upper end of the upper bracket. In my judgment Mr Emery should be disqualified for a period of 14 years. This reflect the gravity of the conduct I have found and is in keeping with the policy to protect the public against such future conduct while possessing a deterrent quality. The period of disqualification must reflect the gravity of the offence.

95. Order accordingly.