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[2020] EWHC 3643 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)

Nos. BL-2019-MAN-000092
BL-2019-MAN-000117
BL-2020-MAN-000073

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Thursday, 5 November 2020

Before:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

B E T W E E N :

VARIOUS ANGELGATE & BALTIC HOUSE CLAIMANTS — Claimants

- and -

(1) KEY MANCHESTER LIMITED
(2) OLIVER & CO SOLICITORS LIMITED
(3)174 LAW SOLICITORS LIMITED — Defendants

J U D G M E N T

(via Microsoft Teams)

A P P E A R A N C E S

MR DAVID McILROY and **MR LLOYD MAYNARD** (instructed by **Penningtons Manches Cooper LLP**) appeared on behalf of the PMC Claimants (BL-2019-MAN-000092)

MR NEIL BERRAGAN (instructed by **Walker Morris**) appeared on behalf of the WM Claimants (BL-2019-MAN-000117)

MR OLIVER McENTEE (instructed by **Walker Morris**) appeared on behalf of the WM Claimants (BL-2020-MAN-000073)

MR GLENN CAMPBELL (instructed by **Caytons Law**) appeared on behalf of the First Defendant.

MR MICHAEL POOLES QC and **MR SIMON WILTON** (instructed by **BLM Solicitors**) appeared on behalf of the Second Defendant.

THE THIRD DEFENDANT was not present and was not represented for this part of the hearing

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JUDGE HODGE QC:

1 This is my extemporary judgment on the third of the matters that I have to determine at this case management hearing in relation to the litigation concerning the Angelgate development in Manchester. The same issue arises in relation to the Baltic House litigation. This issue concerns an application by the PMC claimants to amend their claim to plead that both developments amounted to an unregulated collective investment scheme for the purposes of s.235 of the Financial Services and Markets Act 2000; that the defendant solicitors, Oliver & Co, acted in breach of the prohibition against carrying on a regulated activity; and that this entitles the PMC claimants to invoke the remedies of repayment and compensation which are available under s.26 of the Financial Services and Markets Act 2000. Caytons, who act as the solicitors for another of the solicitor defendants in the Baltic House litigation, Key Manchester Limited (formerly Amie Tsang & Co.), have consented to the amendment. Caytons also act for that solicitor's practice in the North Point Pall Mall litigation and they have also consented to the amendment in that action as well.

2 In view of the reliance placed on the conduct of Oliver & Co in the course of acting for buyers in relation to North Point Pall Mall, I should record that none of the PMC claimants involved in that litigation has sued Oliver & Co. I am therefore not directly concerned with the North Point Pall Mall Development for the purposes of this amendment application. The relevant respondent to the request for an amendment in that litigation has already consented and that amendment has therefore taken effect.

3 The counsel involved in the amendment application are Mr David McIlroy, who appears with Mr Lloyd Maynard, for the PMC claimants, who are the applicants, and Mr Michael Pooles QC, leading Mr Simon Wilton, who appear for Oliver & Co, as the respondent opposing the application to amend. The application is formally brought by way of an application notice issued by the PMC claimants on 22 October 2020. It is supported by the second witness statement of Mr David Joseph O'Brien, a solicitor and partner in PMC, dated 22 October 2020, together with exhibit DJO2. The evidence in opposition is contained in the witness statement of Mr Jason Nash, a solicitor and partner in BLM, Oliver & Co's solicitors, dated 30 October 2020, together with exhibit JN2. Evidence in reply is to be found in the third witness statement of Mr O'Brien, dated 3 November 2020, together with exhibit DJO3.

4 The applicant's arguments in support of the amendment application are deployed at paragraphs 11 through to 49 of the skeleton argument of Mr McIlroy and Mr Maynard on the Angelgate case management hearing, although they also rely, by way of background to the claims, on the matters set out at paragraphs 4 and following in that skeleton. Those arguments were developed in oral submissions for about an hour and ten minutes yesterday afternoon and in reply for about 15 minutes.

5 The arguments for the respondent's solicitors are set out in a discrete skeleton argument solely directed to the amendment application. They were developed in oral submissions by Mr Pooles QC over about 40 minutes yesterday afternoon.

6 It is common ground that the appropriate procedural test for this amendment application is whether the amendments are properly arguable and have a real prospect of success. On the substantive law, under the Financial Services and Markets Act 2000, reference was made in the skeletons to a number of authorities but two are of particular relevance. The first in point in time was the decision of Hamblen J (as he then was), sitting as a judge of the Commercial Court, in the case of *Brown v. InnovatorOne PLC* [2012] EWHC 1321 (Comm). The other is

the decision of the Supreme Court in the case of *Financial Conduct Authority v. Asset Land Investment Inc* [2016] UKSC 17, reported at [2016] Bus LR 524.

7 In the course of his submissions, Mr Pooles indicated, in response to submissions by Mr McIlroy, that in *Asset Land (*as I will refer to the Supreme Court decision) the *Brown* case had been referred to without any criticism and that, had the Supreme Court intended any criticism of Hamblen J's restrictive approach to collective investment schemes and the relevant provisions of the Financial Services and Markets Act, then they would, no doubt, have been articulated by Lord Sumption. It is appropriate, therefore, to record that, as I read paragraphs 91 and 94 of Lord Sumption's judgment, he did disagree with the opinion of Hamblen J in the *Brown* case that the requirement that investors should not have the "day-to-day control" of the management of the property was directed to "actual control". Lord Sumption would appear to have rejected the notion that the test depends on what happens after the arrangements have been made or the actual exercise of control. He would appear to have preferred a test founded on the identity of the person in whom control would be vested if it were required. However, nothing turns on that for the purposes of the present application; and, subject to that qualification, I would otherwise agree with Mr Pooles's submission that there was no criticism of Hamblen J's views in the *Brown* case made by the Supreme Court in *Asset Land*.

8 Mr McIlroy also advanced the submission that, since Hamblen J had dismissed the claim on the facts, his comments on the scope of the relevant statutory provisions were strictly obiter. That may be so; but I am satisfied that, apart from the qualification made by Lord Sumption in his judgment in the *Asset Land* case, I should follow Hamblen J's observations. Indeed, in his reply, Mr McIlroy made it clear that he accepted what Hamblen J had said at paragraphs 1235 and 1236 of his judgment about the need for relief to be directed to the contractual counterparty. I accept the correctness of what is said at paragraph 1236 that, when s.26(2) is referring to the "other party's right to recover money or property or compensation", it is naturally to be read as referring to a right to recover it from the counterparty to the agreement referred to in s.26(1). This is reinforced by the reference to the right being to recover money paid "under the agreement". It is also reinforced by s.28(8) which provides that if property transferred under an agreement to which s.26 applies has passed to a third party, then references in that section, and s.28, to property are to be read as a reference to its value at the time of its transfer under the agreement: this suggests that third parties are outside the scope of s.26. Further reasons for that construction, which seem to me to be convincing, were advanced at paragraphs 1237 and following of Hamblen J's judgment.

9 I turn then to the application. By way of overview, Mr McIlroy submits that Oliver & Co were integral to the seller's scheme, going beyond what was necessary to the usual activities of a conveyancing solicitor. He says that they therefore carried out unauthorised financial services activities in breach of the general prohibition in s.19 of the Financial Services and Markets Act. Mr McIlroy emphasises that the amendments have been made before disclosure and, therefore, without the PMC claimants having sight of the documents passing between Oliver & Co and the seller and the seller's solicitors. He advanced the submission that the emails so far available to the PMC claimants represent merely the tip of the iceberg. He submits that representatives of Oliver & Co attended meetings with the PMC claimants in Hong Kong at which those solicitors are said to have provided *ad hoc* advice to the PMC claimants concerning the viability of the developments. A schedule of such advice is appended to each PMC conveyancing particulars of claim. The PMC claimants claim that the buyers' solicitors made various representations as to the security of the buyers' funds, and the likely success of the development, and they also represented that they were to be directly involved in the success or failure of the claimants' purchases, because their principals might be appointed directors of the buyer companies for each development.

10 Mr McIlroy also emphasised that the question whether Oliver & Co were carrying on a regulated activity, either by establishing or operating a collective investment scheme within Article 51ZE, or by managing investments in circumstances involving the exercise of a discretion in breach of Article 37, involves a factual enquiry requiring factual findings about Oliver & Co's involvement in the scheme. He also emphasised that Mr Nash's evidence was based upon information from Kay Cook of Oliver & Co, and not from Mr David Sewell, who was the solicitor principally involved in the developments. He submitted that the court ought to be very slow, without any statement from, or based upon evidence from, Mr Sewell, to conclude that there is no real prospect of showing that Oliver & Co was involved in carrying on a regulated activity.

11 Mr McIlroy submits that, under s.235 of the Financial Services and Markets Act, the key questions are, under subsection (2), whether the investors had day-to-day control over the management of the property and, if not, under subsection (3)(a), whether the contributions and - Mr Pooles would emphasise - the profits or income out of which payments were to be made to them were pooled or, under subsection (3)(b), whether the property was managed as a whole by or on behalf of the operator of the scheme.

12 Mr McIlroy refers to the ultimate question identified by Lord Sumption in the *Asset Land* case as being whether the scheme was a collective investment scheme; and that is dependent upon what was objectively intended at the time and not on what later happened, if that was different. It was, I think, common ground that the proper approach to the question of establishing or operating a collective investment scheme is to be found in the guidance provided by HHJ McCahill QC, sitting as a Judge of the High Court, in the unreported case of *Financial Conduct Authority v. Capital Alternatives Ltd* in 2008 at paragraph 708. There the judge interpreted "establishing" a collective investment scheme as setting it up, and "operating" it as running or managing it. He recorded that there appeared to be no dispute over the law concerning the definition of those two elements. I propose to adopt Judge McCahill QC's approach in the present case.

13 The PMC claimants allege that there were two respects in which their investments fell within the definition of a "collective investment scheme". First, the buyers had no day-to-day control over the development, which was managed by the seller (who was the operator of the scheme), thereby satisfying s.235(2) and (3)(b). The buyers purchased in the expectation of realising a profit when they sold their investments once construction was complete. Secondly, after the development had been constructed, it was to be managed by a management company on behalf of the seller and, in practice, the income which the buyers would receive would be pooled, thereby satisfying s.235(2) and both subsections (3)(a) and (3)(b).

14 The reason why the first of those respects falls within the definition of a "collective investment scheme" is simple: Like a land-banking scheme, the development was a collective investment scheme because the buyers could only expect to realise their investment if the promised development was completed. Furthermore, unlike a land- banking case, it was the buyers' own funds which were being pooled to fund the development of the property.

15 The reason why the second aspect falls within the definition of a "collective investment scheme", according to Mr McIlroy, will require the court, at trial, to look at the substance of the transaction into which each of the PMC claimants had entered. Each buyer is said to have been acquiring a unit which they could, on the strict wording of the agreement for sale, market and let individually once the development was completed. That is said to have been the formal position; but the reality was very different. Once the development was completed, in practice

the apartments would be marketed and let by the management company. The claimants were almost all Hong Kong investors to whom the units had been deliberately marketed by the seller; but they were purchasing overseas apartments as buy-to-let investments. The reservation forms that they signed gave them the option to appoint the management company to manage their unit; and the sales process was so designed that the claimants invariably did so. That management company was one associated with the seller and would manage the units on behalf of the seller (and thus on behalf of the operator of the scheme). The claimants were incentivised to appoint the management company to manage their units by the promise that they would receive a guaranteed rent during the assured rent guarantee period (of two, three or five years) and offering a return of between 7% and 9% per annum. Moreover, they would not have to pay the service charge during that period provided they appointed the management company to manage their unit.

16 I was taken to documents at pages 1061 and 1079 of the Angelgate hearing bundle which demonstrated how the Angelgate Development was marketed. The buyers were promised a guaranteed income during the assured rent guarantee period. That income was fixed. It was independent of whether or not any particular buyer's unit was let (or at what rate it was let) during the assured rent guarantee period. Some buyers were also promised an up-front payment on completion of the development of "advanced assured rent" for one or two years. The effect of the assured rent was that the management company would pool rents received during that period and then pay the assured rent out of that pool. Alternatively, money was to be set aside to meet the guaranteed rental payments in the event of any rental shortfall. On completion, the seller was to retain a fund of £400,000 to safeguard the buyers against its obligations to pay assured rent during the assured payment period. The rental assured fund was to be "stake held" with the seller's solicitor; and the management company was to draw upon the rental assured fund for any shortfall during the assured payment period. That fund, Mr McIlroy submits, could only have come from moneys provided by the contracting buyers, given the corporate structure of the companies involved in the development. Mr McIlroy points out that so certain were the sellers that the buyers would enter into the management agreement that that agreement was included as standard in the draft agreements for sale. Mr McIlroy also points to the fact that, in the Baltic House case, there was the additional feature that the development was to be let and managed as student accommodation, involving a greater degree of collective management and marketing, including the allocation of particular flats to individual students by the management company. That meant that the returns achieved by the investors would be dependent on the effective marketing and management of the block of accommodation as a whole rather than being affected, to any meaningful extent, by the way in which the individual flats were to be dealt with.

17 Mr Pooles QC, I think, conceded that each development fell within the strict technical requirements of a collective investments scheme during the construction phase but not, he said, thereafter. His submission was that the requirements of s.235(2), and neither limb of 235(3), were met once the development had been built out and the purchases of individual flats had been completed. That was the stage which it was hoped would deliver an income profit by renting out each flat, or a capital profit on the resale of the completed flat. He submitted that, whilst one could contend that the purchasers of individual flats did not have day-to-day control of the management of the development, as a whole, or of individual flats, or of the purchase moneys, during the construction phase, it was not possible to say that they had surrendered control over the development as a whole, or of their individual flats, thereafter; nor was there to be any pooling of funds at that stage in respect of which the purchasers did not have control over their management. He submitted that, once the construction phase was complete, the property was not being managed as a whole by or on behalf of the operator of the scheme, and nor were participants' contributions, or the profits

or income out of which payments were to be made to them, being pooled. In his oral submissions, Mr Pooles contended that, on Mr McIlroy's argument, any off-plan development, where a deposit was paid to the developer, would be a collective investment scheme.

18 I agree that that cannot have been the intention of the legislature. The overarching requirement of any collective investment scheme is set out in s.235(1). It requires a purpose, or an effect, of enabling the persons taking part in the arrangements to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. It seems to me that it is not sufficient just to look at the construction phase. One has to look at what is to happen once the construction works are complete.

19 In the typical case where, on completion, the buyer assumes complete control of, and the freedom to deal with, his or her individual apartment, then, clearly, the requirements of a collective investment scheme are not satisfied. But I accept that, in the present case, and depending on the facts found at trial, it is at least arguable, with a real prospect of success, that, because of the existence of a rental assured fund during the assured payment period, the requirements of a collective investment scheme were satisfied. Arguably, both contributions, and the profits or income out of which the payments were to be made to participants, were being pooled, and the property was being managed as a whole, by or on behalf of the operator of the scheme, through the management company set up by the operator, whom the participants were incentivised to use by the combined attractions of an assured payment period, during which there would be a rental assured fund as a safeguard against the obligation to pay the assured rent during the assured payment period. I would therefore accept Mr McIlroy's submission, and reject the contrary submission of Mr Pooles, that it is at least arguable that the developments at Angelgate and Baltic House amounted to a collective investment scheme, and that such argument has a real prospect of success.

20 Even on the footing that this was, arguably, a collective investment scheme, however, Mr Pooles disputes both that Oliver & Co was engaging in any prohibited activity of the kind alleged and that its retainer, or any trust upon which it held the claimants' funds before paying them over as instructed, were agreements made in the course of carrying on a regulated activity. He also disputes that the PMC claimants can recover their payments, or compensation for their losses, pursuant to s.26 of the Financial Services and Markets Act.

21 Mr McIlroy contends that Oliver & Co established or operated a collective investment scheme and that they were managing the claimants' investments. It is necessary to see how Mr McIlroy puts the PMC claimants' case in that regard. At paragraphs 58B and following, it is pleaded:

> "58B The Defendant went beyond what was necessary to provide the usual services of a conveyancing solicitor in that:
>
> 58B.1 the Defendant promoted the Development by attending sales, road shows, including in Hong Kong with the Developers and/or Introducing Agents, and by informing prospective buyers at such roadshows that the features of the scheme included the appointment of officers, employees or agents of the Defendant as directors of the Angelgate Buyer Co;

58B.2 As is pleaded at paragraphs 46 to 47, the Defendant was responsible for the management and operation of the Development, and of the Claimants' units, through the acceptance by David Sewell of the office of director of the Angelgate BuyerCo and his activities as a director of the Angelgate BuyerCo.

58C In the premises, the Defendant carried out a regulated activity:

58C.1 of managing investments belonging to another person, within the meaning of Article 37 [of the Regulated Activities Order]. The solicitors who were directors of the Angelgate BuyerCo purported to exercise their discretion to approve payments out of funds held by their firm, and or by the Angelgate BuyerCo and or to the Angelgate BuyerCo's order; and or

58C.2 of establishing or operating a collective investment scheme, within the meaning of Article 51ZE [of the Regulated Activities Order].

58D The Defendant carried out the activities listed in paragraph 58C above by way of business, in that it did so in the expectation that, as a result, it would continue to receive the financial benefit of being recommended as panel solicitors for buyers to use.

58E By reason of the matters aforesaid:

58E.1 the Defendant was carrying out regulated activities in respect of which it was not an exempt person, in breach of the general prohibition in s.19 Financial Services and Markets Act;

58E.2 the Defendant's retainer with each Angelgate claimant was therefore an agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition for the purposes of s.26 Financial Services and Markets Act; and

58E.3 further or alternatively, the trust upon which the Defendant received, held and paid out each Angelgate claimant's pre-completion payments was itself an agreement made by a person in the course of carrying on a regulated activity in contravention of that general prohibition for the purposes of s.26 Financial Services and Markets Act."

22 Mr McIlroy contends that Oliver & Co established a collective investment scheme through Mr Sewell of that firm designing the scheme together with Mr Roberts of the seller's solicitors, and through the endorsement that Oliver & Co gave to the scheme by promoting it to the buyers at events in Hong Kong. Further, or alternatively, Oliver & Co operated a collective investment scheme through Mr Sewell's actions in respect of the Angelgate Buyer Company and in respect of the Baltic House Buyer Company. The PMC claimants allege that Oliver & Co failed to take any, or any reasonable, steps to ensure that the Angelgate claimants' funds could not be paid out without the express and specific authorisation of one or more persons acting in the Angelgate buyers' interests as a director of the Angelgate Buyer Company.

23 Mr McIlroy points out that Mr Sewell was a statutory director of the Baltic Buyer Company with effect from 15 October 2015. His clients anticipate that disclosure may reveal that he had acted as a shadow director of the buyer company prior to his formal appointment, but they do not yet have access to the documents to be able to particularise such an allegation.

24 In respect of the Angelgate Buyer Company, pending disclosure the PMC claimants do not have sufficient information to be able to particularise that allegation further by pleading whether Mr Sewell acted as a shadow director of the Angelgate Buyer Company prior to his formal appointment on 5 July 2016, or whether he took a decision, contrary to what he had represented to buyers, and contrary to the terms of the sale agreement, to abrogate the responsibilities he should have exercised as a director of the Angelgate Buyer Company. The PMC claimants rely on the same facts that they say will show that Oliver & Co was operating as a collective investment scheme as showing that that practice was also managing the claimants' investments.

25 Mr McIlroy referred me to paragraph 24.1 of the particulars of claim (in its unamended form) which makes it clear that the sale agreements stated that:

> "(1) The Angelgate Buyer Company would have directors who would represent the interests of the buyer and the seller;
>
> (2) The directors of the Angelgate Buyer Company may be partners/directors from solicitors representing the buyers (or some of them) and the seller respectively."

26 He also referred me to paragraph 46 of the unamended particulars of claim identifying the duties allegedly owed by the officers, employees or agents of Oliver & Co who had acted as directors of the Angelgate Buyer Company.

27 In his submissions, Mr Pooles emphasised that it is clear that "establishing" a scheme means setting it up (although he acknowledged that more than one person might do so), and that "operating" a scheme meant running or managing it, the court being concerned to identify the person or persons (of whom there might be more than one) who were responsible for managing the property as a whole, albeit that person or persons might act by agents, and bearing in mind that a mere facilitator is something different from someone fulfilling a managerial role.

28 Mr Poole submits that it is hopeless to say that Oliver & Co was establishing or operating any collective investment scheme; rather it was acting as a conveyancing solicitor, and thus in a facilitative role only, and then only up to and including completion of the purchase. It would have no role whatsoever in relation to the investment thereafter.

29 In his oral submissions, Mr Pooles directed me to what was said at paragraph 1212 of *Brown*, where the solicitor acting for the operator of the scheme was exonerated from any role in establishing or operating the scheme or managing the investments. Hamblen J made it clear that the relevant solicitor, acting in his capacity as such, had never done any deals in investments, whether on behalf of the claimants (for whom they were not acting) or the developer. Any role that the solicitor had played in relation to the investments that the claimants had made was an administrative role, undertaken as agent for the sellers or the developer. Any acts or steps taken were not done by the solicitor on its own account and did not themselves bring about the transaction to which any arrangements related.

30 Mr Pooles emphasised that the solicitor exonerated in that case had been acting for the operator of the scheme and so was in a much closer position to the scheme than Oliver & Co in the present case, who were acting for the buyers rather than the operator of the scheme.

31 I accept Mr Pooles's submissions. I do not consider that, on the facts that are proposed to be pleaded by way of the amended particulars of claim, there is any arguable case, with a real prospect of success, that Oliver & Co were carrying on any regulated activity, either in the sense that they were engaged in establishing or operating a collective investment scheme, or in managing investments in circumstances involving the exercise of a discretion. I accept Mr Pooles's submissions that, on the evidence presently available, there is nothing to indicate that Oliver & Co's attendance at any sales roadshow in Hong Kong was anything other than in the course of acting as solicitors, or prospective solicitors, for actual or potentially interested buyers. Under the terms of the sales agreement, all that was envisaged was that a representative of Oliver & Co might become a director of the buyer company. Even though Mr Sewell did, ultimately, become a director of the Angelgate Buyer Company, that was in July 2016, at a relatively late stage; and, in becoming a director, he was accepting an office as director of the buyer company which was personal and not fulfilling any role on the part of Oliver & Co.

32 I accept Mr Pooles's submission that the reality is, simply, that Oliver & Co were merely acting as conveyancing solicitors for those who wished to proceed with their purchases and that that was a facilitative, and not a managerial, role or a role that amounted to establishing or operating a collective investment scheme.

33 In the case of Baltic House, although Mr Sewell had become a director of the Baltic House Buyer Company on 15 October 2015, it was not the buyer company that was holding any funds as stakeholder, unlike the case with Angelgate. It was the seller's solicitor, in the case of Baltic House, that was acting as stakeholder; so the directorial role assumed by Mr Sewell in October 2015 gave him no direct involvement in approving payments. Further, if and insofar as the Angelgate Buyer Company was involved in approving any payments to the developer, or to its order, that cannot properly be characterised as the discretionary management of any of the PMC claimants' assets as the funds were merely being disbursed in accordance with the pre-arranged scheme in the agreements for sale.

34 I would therefore reject the proposed amendments on the grounds that they do not give rise to any properly arguable case, with any real prospect of success, that Oliver & Co were carrying on any regulated activity.

35 Assuming I am wrong in that, however, I would accept Mr Pooles's alternative submission that the claimants are not properly entitled to say that they have an arguable claim, with any real prospect of success, to be entitled to any remedy under s.26, either to recover the payments made to Oliver & Co or compensation for their losses due to parting with their money.

36 Mr McIlroy accepts that such a remedy only lies against the counterparty to an agreement under which money or property is paid or transferred which is unenforceable by reason of breaches of the Financial Services and Markets Act. Hamblen J in *Brown* rejected the submission that s.26 remedies could be enforced not just against such a counterparty, but also against any other recipient of the property or money in issue.

37 I accept Mr Pooles's submission that the claimants cannot claim compensation or restitution under s.26 from Oliver & Co, even if it was a collective investment scheme, and even if Oliver

& Co were engaged in regulated activity in relation to it, because the operative agreement was the agreement for sale, in respect of which the relevant counterparty was the developer and not Oliver & Co. I reject Mr McIlroy's submission that the contract of retainer between Oliver & Co and each PMC claimant can be considered as the relevant contract for the purposes of s.26. It is the sale agreement, pursuant to which the PMC claimants' moneys were paid away on exchange of contracts and subsequently, so as to participate in the collective investment scheme, if that is what it was, that is the relevant agreement for present purposes. It is that agreement, and not the contract of retainer with Oliver & Co, which would be rendered unenforceable by reason of any breach of the Financial Services and Markets Act. I accept Mr Pooles's submission, contrary to that of Mr McIlroy, that the contract of retainer of Oliver & Co, and the trust of the client moneys which existed whilst Oliver & Co held them in its client account, were not the operative agreements for the purposes of s.26. The payments to Oliver & Co were not required by the terms of either the retainer or the trusts. Those arrangements were not constitutive of the collective investment scheme. It is not these that were rendered unenforceable by reason of any breach of the Financial Services and Markets Act. I did not understand Mr McIlroy to challenge Hamblen J's conclusion in *Brown* (at paragraphs 1270 and following) that there was any freestanding action for breach of statutory duty available to the PMC claimants, or any other common law obligation to comply with the statutory regime.

38 For those reasons, therefore, I would dismiss the amendment application. Whilst I accept that it is properly arguable, with a real prospect of success, that there was a collective investment scheme, even after the completion of the development, because of the unusual existence of the assured rental payments and the fund out of which they were to be paid, I am satisfied that there is no properly arguable case, with any real prospect of success, that Oliver & Co were carrying on any regulated activity or that any remedy is available against Oliver & Co under s.26 even if they were.

CERTIFICATE

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Tel: 020 7831 5627 Fax: 020 7831 7737
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