Neutral Citation Number: [2023] EWHC 1886 (Ch)

Case No: BL-2021-001116

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building
Fetter Lane
London, EC4A 1NL

27 July 2023

Before :

MR JUSTICE RICHARDS

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Between :

OLD PARK CAPITAL MAESTRO FUND LIMITED
(a Cayman Islands company, in liquidation)

Claimant

- and –

(1) OLD PARK CAPITAL LIMITED (in liquidation)
(2) MR. HUGO VAN KUFFELER
(3) MR. BRUNO PANNETIER

Defendants

Mr Jonathan Cohen KC and Mr Luka Krsljanin (instructed by **Greenberg Traurig LLP**) for the **Claimant**

Mr William Edwards and Ms Pia Dutton (instructed by **Fieldfisher LLP)** for the **Second Defendant**

The **Third Defendant** appeared in person

The **First Defendant** did not appear and was not represented

Hearing dates: 16th May 2023 – 25th May 2023; written submissions: 5 June 2023

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment is handed down remotely by circulation to the parties' representatives by email, The National Archives and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00 PM on 27 July 2023.

Mr Justice Richards:

1. The Claimant (the "Fund") is a corporate investment fund incorporated in the Cayman Islands. The First Defendant ("OPC") was the investment manager of the Fund. The Second Defendant ("HVK") was the chief operating officer of OPC and a director of the Fund. The Third Defendant ("BP") was a director of OPC.

Defendant	**Claims asserted**
OPC	i) Breach of contractual and other duties owed to the Fund as the Fund's investment manager ii) Misapplication of assets of the Fund held on trust
HVK	i) Breach of contractual duties owed to the Fund under a Director Services Agreement ii) Breach of fiduciary duties owed as a director of the Fund under Cayman law iii) Common law deceit: misrepresenting to the Fund what its investment strategy would be. (The Fund abandoned a claim based on s2(1) of the Misrepresentation Act 1967 in closing).
BP	i) Inducing OPC's breaches of contractual and other duties owed to the Fund ii) Engaging in an unlawful means conspiracy (with OPC) to injure the Fund as a necessary means to BP's advantage iii) Dishonest assistance in OPC's breach of trust iv) Common law deceit - misrepresenting to the Fund what its investment strategy would be

2. The present proceedings arise out of investments that the Fund made in 2015 in commercial paper ("KAM CP") issued by a company called Kingsway Asset Management Ltd ("Kingsway" or "KAM"). Kingsway failed to repay in full three tranches of the KAM CP and the Fund accordingly suffered a significant loss on its investment. The Fund asserts that the investment in the KAM CP was not in accordance with its investment strategy and was made as part of an undisclosed and improper arrangement involving the Defendants and a consortium of businesses (the "Consortium") connected with Mr Trevor Price ("TP"). The Fund's claims are summarised in the following table:

3. A list of issues was prepared for the Pre-Trial Review. However, none of the parties structured their submissions by reference to that list. I will not do so either, though I have referred to the list as a cross-check when making findings and considering the claims.

Witness evidence

4. I had evidence of fact from the following witnesses:

   i) Mr Martin Trott, an insolvency practitioner and liquidator of the Fund.

   ii) Mr Russell Burt and Mr Eric Bertrand who, together with HVK, comprised the board of the Fund.

   iii) Mr James Sherwin and Ms Clare Ludgate, who provided advice to one of the Fund's main investors ("Montsol"), in connection with its investment.

   iv) Mr Gabriel Collin, the head of Hedge Fund Research at Active Advisors, who provided investment advice to another of the Fund's investors ("Alpha").

   v) HVK

   vi) TP

5. I had expert evidence from Mr Dominic Powell who had expertise on the management of credit portfolios.

6. BP did not give evidence. He made an application, which I considered at the beginning of the trial, for relief from sanctions so as to enable him to rely on a late witness statement of his own. I refused that applications for reasons that I have given separately.

7. Little needs to be said about the evidence of Mr Trott, Mr Burt, Mr Bertrand, Ms Ludgate and Mr Collin. They were honest and reliable witnesses and no-one suggested otherwise.

8. Mr Powell strayed somewhat outside his expertise in his expert report by offering an opinion on the proper construction of the Fund's offering memorandum. However, that aside, his expert report was dispassionate and scholarly and I have accepted his opinion evidence.

9. Mr Sherwin is funding this litigation. Moreover, in his oral evidence he showed flashes of the anger that he feels at what he perceives to be BP's dishonesty in the way he managed the Fund. Mr Sherwin, therefore, was not a disinterested witness. I am satisfied, however, that he gave his evidence honestly.

10. TP's witness statement was largely drafted by BP. Accordingly, TP's witness statement was not written in his own words. I have approached TP's evidence with a degree of caution as I was concerned that, in places, it involved an uncritical advancing of BP's case. That concern was, to an extent, allayed in TP's oral evidence which involved him giving largely straightforward answers to questions put to him. However, ultimately I have been unable to accept TP's evidence on certain issues, including the question of whether he arranged for Kingsway to pay expenses of the KP (Hull) project, described in more detail below, after the Fund launched.

11. During HVK's cross-examination, it became clear that various assertions in his witness statement were not true. The Fund helpfully set these matters out in a Table of Admissions (that also extended to admissions said to have been made by TP). I will not deal with each instance alleged. The headline point is that HVK was wrong to deny, in his witness statement, the existence of an arrangement or understanding, made prior to launch of the Fund, for the Fund to invest in KAM CP. He was also wrong to deny his knowledge of that arrangement which was laid bare in contemporaneous emails put to him in cross-examination. The Fund has invited me to conclude that HVK was an untruthful and unreliable witness. I have considered the matter carefully but, having regard to the totality of his evidence, I will not make that finding.

12. It was clearly not to HVK's credit that he made untrue statements in his witness statement. Moreover, he did initially defend those statements in cross-examination. However, once he was shown emails that showed the inaccuracy of his witness statement, he accepted the inaccuracies. That necessarily meant that there was some inconsistency in his evidence, but I consider that the Fund overstates matters when it says that most of the nine indicators of unsatisfactory witness evidence that Lewison J identified in *Painter v Hutchison* [2007] EWHC 758 (Ch) were present. HVK has given full disclosure of a large number of documents. While his answers to some questions in cross-examination were long, I did not consider him to be evasive or argumentative. When his answers were long, that was often because of the difficulty that he had in being invited to draw conclusions from a small cross-section of the emails that he had received at the time. If anything, he was on occasions too ready to accept propositions that were put to him.

13. Ultimately, I have concluded that the untrue statements in HVK's witness statement were a result of what Mann J described as "litigation wishful thinking" in *Tamlura NV v CMS Cameron McKenna* [2009] EWHC 538 (Ch). The Fund's case that OPC entered into a pre-existing arrangement to invest in KAM CP did not chime with HVK's recollection of the position at the time, or what he hoped the position was, and so he asserted that the Fund's position was wrong. That was unwise, but not dishonest. Some allowance is appropriate for the sheer quantity of emails that HVK received. Nearly 400,000 documents were extracted from HVK's data sources, reduced to 20,000 for the purposes of disclosure. The pre-existing arrangement for the Fund to invest in KAM CP featured in just a few of the emails that HVK received. He could well have overlooked those emails, or their significance, when preparing his witness statement.

PART A – OVERVIEW OF THE FUND AND ITS INVESTMENT IN KAM CP

BP, OPC and the Maestro Strategy

<u>BP's experience and background; OPC's early days</u>

14. I will not make findings as to the detail of BP's professional career not least because I have had no first-hand evidence from him. It suffices to note that, in a presentation in November 2013, BP was described as having by then over 15 years' experience in creating investment solutions using the sophisticated financial techniques. The presentation described highlights in BP's career including a role as Head of Structuring and Trading at a subsidiary of Credit Mutuel, the fourth largest bank in France, and a role as Senior Managing Director and Global Head of Structuring and Product Development at Bear Stearns.

15. At some point in BP's career, he developed a method of trading in exchange-traded index futures which came to be known as the "Maestro" strategy. In overview, Maestro

was an arbitrage strategy which sought primarily to take advantage of the fact that equities that form a constituent of the EuroStoxx 50 index traded on underlying equity markets between 9 am and 5.30 pm CET on each business day, but equity futures referencing those constituents could be traded between 8 am and 10 pm CET. The strategy involved the taking of very short-term overnight positions in equity futures that would be closed out shortly after the cash equity markets reopened the next day. Importantly for the purposes of this judgment, the Maestro strategy involved short-term transactions in highly liquid exchange-traded financial instruments.

16. BP ceased his career in investment banking in around 2009 to join OPC on its inception. OPC had a much smaller business than that of the investment banks at which BP had previously worked. By 2015, there were just three individuals authorised by OPC to trade on its behalf.

17. At OPC, BP was responsible for developing and implementing the Maestro strategy. BP worked with another OPC employee, Mr Karim Laidi, in this regard. Like BP, Mr Laidi had a background in derivatives trading. Initially, OPC offered investors the opportunity to participate in the Maestro strategy by way of "managed accounts". That involved investors depositing money into an account beneficially owned by them, but giving OPC authority to manage that account by making investments that were in line with the strategy. OPC also offered clients the opportunity to participate in the Maestro strategy by purchasing a certificate issued by the well-known bank UBS whose return was linked to the performance of the Maestro strategy.

HVK's experience and background and his role at OPC

18. HVK had a very different financial services background to that of BP. After graduating from university in 1996, HVK worked at Jupiter Asset Management until 2001. He performed, primarily, a marketing role that involved collating research provided by others. He obtained the "Registered Representative" qualification in 2001 that gave him some permission to discuss the broking of securities transactions with clients.

19. Between 2001 and 2002, HVK worked on the corporate broking desk at a stockbroker, Durlacher, which merged with Panmure Gordon in 2005. This job certainly provided HVK with a good level of general knowledge as to how the financial services industry worked. However, it did not provide him with any expertise in investment management or in the kind of trading strategies that comprised Maestro.

20. Between 2002 and 2012, HVK was not working in the financial services industry at all. From 2002 to 2004, he worked at a business that tried, unsuccessfully, to establish a women's wear clothing brand. From 2004 to 2006, he worked in a political publishing business. From 2006 to 2012, he worked with his sister in a business that included the production and publication of a magazine that covered matters ranging from leisure interests, residential property, lifestyle, country profiles and foreign affairs.

21. HVK joined OPC in October 2012, by which time he had been out of the financial services industry for some ten years. Initially, OPC paid HVK no fixed remuneration and HVK was paid only by way of commission for introducing investors to OPC's managed accounts. In May 2013, HVK was ostensibly promoted and given the title of "Chief Operating Officer" of OPC. However, HVK's remuneration remained modest, at least judged by the standards of the financial services industry. He was guaranteed a payment of just £3,000 per month although if the commission due to him under the previous "commission-only" arrangement was more than £3,000 per month, he would receive the higher figure.

22. The title of "Chief Operating Officer" sounded more grand than it actually was. His duties were partly administrative: he would arrange meetings with potential clients and service providers and order stationery and office equipment. OPC was not a highly successful business that had the luxury of employing lots of staff with specialised job descriptions. It was struggling financially and HVK was expected to help out on whatever needed doing from marketing the Maestro strategy to making tea and coffee for meetings.

23. HVK continued to market the Maestro strategy. Even though he did not understand the full detail of that strategy, and was not equipped to make the kind of trading decisions that would be necessary to implement it, he was able to explain it in clear terms to potential investors. Neither before nor after the formation of the Fund did HVK have any involvement in either (i) trading decisions made to implement the Maestro strategy or (ii) the selection of investments whether made in the managed accounts or by the Fund. That was for at least two reasons. First, within OPC it was BP and Mr Laidi who were tasked with making investment decisions, reflecting their skill and expertise in the area which HVK lacked. Second, and relatedly, even if HVK had made investment suggestions, neither BP nor Mr Laidi would have given those suggestions weight since they would not have been grounded in any investment management, or financial trading, expertise.

<u>The emerging rationale for the establishment of the Fund</u>

24. By 2013, it was becoming clear that there was some appetite among investors for the opportunity to invest in the Maestro strategy through an investment fund vehicle. To that end, the Fund was incorporated on 27 September 2013. It took the form of an exempt company established under the law of the Cayman Islands, a vehicle that is common for hedge funds. The intention was that OPC would act as the Fund's investment manager. However, that required OPC to obtain a variation to its regulatory approvals with the Financial Conduct Authority (the "FCA"). That took some time to come through but was ultimately forthcoming in the middle of April 2014.

25. In October 2013, HVK, Mr Burt and Mr Bertrand were appointed as directors of the Fund and they were directors at all times material to this dispute. Mr Burt and Mr Bertrand are both chartered accountants, with extensive backgrounds in the investment funds industry. Mr Bertrand was a founder and director of Centaur Fund Services Limited ("Centaur") who were ultimately appointed as the Fund's administrator.

The launch of the Fund

26. Work on the Fund's Offering Memorandum started in around September 2013 and, as is typical, was a collaborative effort involving various service providers to the Fund. I infer that most of the drafting of the Offering Memorandum was undertaken by the Fund's lawyers (Cummings Law as to matters of English law and Mourant as to the law of the Cayman Islands). However, that drafting reflected information provided by the Fund's various service providers. For example, on 20 September 2013, HVK sent Mr Bertrand a copy of the Offering Memorandum asking him to "insert any changes or clauses relating to Centaur". That made perfect sense: Mr Bertrand was best placed to provide information on Centaur that needed to be included in the Offering Memorandum and, if necessary, the drafting he provided could be finessed later together with the lawyers.

27. I infer that a similar approach would have been followed as regards the description of the Fund's proposed investment strategy. BP, the individual at OPC who would ultimately be responsible for implementing the Fund's investment strategy, took the

lead on the drafting of the sections of the Offering Memorandum setting out the Fund's investment strategy and approach. BP's drafting was reviewed as necessary by the Fund's legal team.

28. HVK had some involvement in the drafting of the Offering Memorandum but had little input into the description of the Fund's proposed investment strategy since that was BP's province. HVK also helped with the administrative task of circulating the Offering Memorandum to interested parties and seeking their comments. On 20 September 2013, for example, HVK sent a draft of the Offering Memorandum to Mr Bertrand for comment. On 19 November 2013, Mr Burt sent comments on the Offering Memorandum to HVK.

29. Mr Bertrand and Mr Burt, as directors of the Fund, were kept periodically updated on iterations of the draft Offering Memorandum. I was not taken through the various drafts that were sent to Mr Bertrand and Mr Burt. However, I infer that these drafts would have evolved over time. At some point in the process, the description of the Fund's proposed investment strategy would have become final and so corresponded to the final version of the Offering Memorandum that is considered in more detail later in this judgment.

30. Mr Bertrand and Mr Burt were conscientious directors. They did not seek to comment on, or influence, the description of the investment strategy in the Offering Memorandum since that was BP's area of expertise rather than theirs. However, they read the description of the investment strategy so that, as Mr Burt explained in cross-examination, they could check that there were no "unusual terms in there that investors would not like or would be seen to be odd".

31. BP realised that the evolving description of the Fund's investment strategy that he was preparing in the Offering Memorandum would be shown to Mr Bertrand and Mr Burt in their capacities as directors of the Fund. He would also have realised that Mr Bertrand and Mr Burt would be reviewing the Offering Memorandum generally and would, in performing that review, take the description of the investment strategy he had prepared as evolving into something that was both complete and accurate.

32. The Fund launched on 31 July 2014 on which date the Fund's directors passed board resolutions at a meeting (the "Board Meeting") including to approve the Offering Memorandum, to enter into an investment management agreement (the "IMA") with OPC and to appoint various service providers: Grant Thornton as auditor, Goldman Sachs International ("Goldman Sachs") as the Fund's prime broker and Centaur as the Fund's administrator. (Strictly what I have described as the "Board Meeting" was two separate meetings designed to accommodate the fact that Mr Burt and Mr Bertrand were not available at the same time, but it is not suggested that this is material to the analysis).

The Fund's investments

33. The equity futures that were traded as part of the Maestro strategy could be traded through a prime broker "on margin". Typically, a prime broker would require a person purchasing equity futures through a prime brokerage account to deposit "margin" in the form of cash or highly liquid securities of around 10% of the exposure to equity futures acquired. Therefore, if the Fund wished to acquire an exposure of £100 to a particular equity future, it only needed to deposit margin to the value of £10. If fluctuations in the value of the equity future meant that the Fund's exposure increased to £200, it would be required to deposit further margin of £10. This feature meant that the Fund did not need to deposit all of its assets with Goldman Sachs (its prime broker) in order to implement

the Maestro strategy on any given day. The Fund, therefore, had an issue as to how it should invest funds that were not actively needed at any given time to pursue the Maestro strategy (the "Cash Management Issue").

34. The extent to which the Fund invested in the Maestro strategy and the overall performance of that strategy is not agreed, but is relatively unimportant. What all parties agree to be important is that, in addition to implementing the Maestro strategy, the Fund's cash management strategy resulted in it investing in six tranches of KAM CP. KAM repaid three tranches of that commercial paper in full with interest, but it defaulted on the other three tranches. The Fund's investments in KAM CP are summarised in the following table:

Investment date	CP Maturity Date	Amount	Paid/Unpaid
9/12/14	9/12/15	£1,480,000	Paid
12/01/15	10/7/15	£1,666,352	Paid
10/7/15	27/1/16	£1,835,534	Unpaid
31/7/15	30/10/15	£270,667	Paid
25/9/15	29/12/15	£2,136,633	Unpaid
15/12/15	29/12/15	£159,627	Unpaid

Kingsway, the KAM CP and events following Kingsway's default

35. Kingsway is a private limited company incorporated in England and Wales. The identity of the ultimate beneficial owners of Kingsway, and of its directors at various times, is not entirely clear. It suffices to say that, at the time the Fund subscribed for the various commercial paper described in the table above, Kingsway was under the substantial control of TP. However, between December 2015 and March 2016, TP lost control of Kingsway and Mr Jonathan Bowles gained control.

36. In 2011, OPC helped TP and Kingsway to establish a Euro commercial paper programme (the "ECP Programme") under which Kingsway could issue short-dated commercial paper. In the Information Memorandum for the ECP Programme, Kingsway described its business as involving the provision of "a wide ranging professional service to the healthcare sector". OPC was appointed a dealer under the ECP Programme which meant that OPC would obtain a financial reward for enabling Kingsway to issue debt under the ECP Programme. However, OPC's role as dealer under the ECP Programme ceased in July 2014 (at or around the time that the Fund was launched). Therefore, OPC was not a dealer at the time the Fund subscribed for the KAM CP.

37. The KAM CP was not listed on any stock exchange. It was not rated by any recognised rating agency. It was at the lower end of the liquidity spectrum as demonstrated by the fact that, for the purposes of ASC 820, a US accounting standard, the KAM CP was treated as falling within Level 3, the least liquid level.

38. In mid to late 2015, the Maestro strategy performed poorly. The Fund's terms and conditions permitted investors to request redemption of their investment on two business days' notice. Montsol, by then one of the two remaining investors in the Fund, submitted a request for redemption of its shares on 21 October 2015. The Fund did not have sufficient liquid assets to honour that redemption request within the stipulated two business day window. It had to hope that Montsol would be patient and Kingsway would meet its obligations to pay redemption proceeds on the KAM CP which fell due for payment at the end of December 2015. However, this coincided with the period

during which Mr Bowles was in the process of taking control of Kingsway from TP. Moreover, the KAM CP fell due for payment at a time when Kingsway itself was in financial difficulties.

39. By March 2016, Mr Bowles had secured control over Kingsway. He, and his lawyers, had some discussions with the Fund and initially explained Kingsway's failure to redeem the KAM CP on a delay in Mr Bowles becoming a signatory to Kingsway's bank account following the change of control. However, his position soon changed. He informed the Fund that Kingsway could not pay the full amounts due. He threatened to place Kingsway into administration unless the Fund reached some accommodation. On 9 May 2016, the Fund issued a winding up petition against Kingsway on the basis of the debt it claimed to be due under the KAM CP.

40. The Fund itself was placed into liquidation on 25 July 2016 and two joint liquidators were appointed. The Fund's liquidators encountered significant difficulties in making progress with its winding-up petition against Kingsway. Kingsway took the point, in resisting the Fund's petition, that all commercial paper issued under the ECP Programme was constituted by a global note, in bearer form, that was held by Citibank NA ("Citibank") as common depository for the Euroclear and Clearstream clearing systems. Accordingly, Kingsway's position was that Citibank was the true creditor under the KAM CP with the result that the Fund itself had no standing to present a winding-up petition. In 2017 the Fund's liquidators abandoned the winding-up petition. On 24 December 2021, having persuaded Citibank to replace the global note with definitive notes (registered in the Fund's name), the Fund issued a claim form on 24 December 2021 (just before the expiry of the limitation period). However, that claim form was not served on Kingsway within the requisite four-month period.

41. The Fund has received no payment on the three tranches of KAM CP on which Kingsway defaulted.

PART B - FINDINGS ON SPECIFIC DISPUTED MATTERS

The "Consortium"

<u>The pleading point</u>

42. In its Re-Re-Re-Amended Particulars of Claim (the "POC"), the Fund pleaded the following matters:

    i) TP established the Consortium which included businesses in which TP had a financial interest. Both OPC and Kingsway were members of the Consortium. Kingsway's role in the Consortium was, at least in part, to act as a "cash outflow" vehicle by raising money and channelling that money to members of the Consortium.

    ii) OPC was to generate capital by establishing the Fund and providing that capital to cash-outflow vehicles in the Consortium (including Kingsway). That result was to be achieved by the Fund subscribing for KAM CP.

    iii) In paragraph 10A(h) of the POC, the Fund pleads that:

    > *[OPC] would self-evidently not have entered into the Consortium or agreed to be the funder of the Consortium's operations unless it was to*

receive a significant financial reward for doing so, and the Fund infers that [OPC] had agreed terms with [TP] pursuant to that end.

iv) In paragraph 10B of the POC, the Fund pleads that in consequence, although the Fund was marketed to prospective investors by reference to the Maestro strategy, its true and predominant purpose, undisclosed to investors or the directors of the Fund (other than HVK who was well aware of it) was to obtain money from investors which would in turn be used to purchase the KAM CP and fund the Consortium's operations. In paragraph 10B of the POC, the Fund described this purpose as the "Undisclosed Purpose" and I will use that term in that sense in this judgment. That was also the way in which the Fund opened its case saying, in paragraph 6 of its written skeleton, that "what OPC intended to do, and did, was lend money on an unsecured basis, to Kingsway. Kingsway would then use the money to fund activities of the Consortium". At trial the expression of a purpose to "cash flow the Consortium" was used to capture the same concept.

v) For completeness, I note that, in its Replies to the Amended Defences of HVK and BP, the Fund asserted in response to HVK's and BP's denials, that both realised that at least one of the purposes of the Fund was to invest in KAM CP. I do not read that as extending, or restricting, the scope of the pleaded "Undisclosed Purpose". However, the pleading in the Replies is of significance since the existence or otherwise of a scheme or arrangement for the Fund to invest in KAM CP, and BP's and HVK's awareness of any such scheme, sheds a light on whether the Undisclosed Purpose is present.

43. In its closing submissions the Fund invited the Court to conclude that the pleading in paragraph 10A(h) of the POC was made good because OPC subscribed for the KAM CP knowing that Kingsway would use the proceeds to fund at least two "BPRA Schemes" (so called because they sought to obtain tax benefits in the form of the "business premises renovation allowance") from which OPC stood to benefit because it was a promoter and an investment manager/developer of those schemes.

44. HVK made no objection when this case was explored with witnesses during the Fund's cross-examination. However, in his closing submissions, HVK objected that the case being advanced was unpleaded. He argued that paragraph 10A(h) of the POC only referred to a "corrupt" payment, agreed between TP and OPC in return for OPC agreeing to subscribe for the KAM CP, and did not extend to an ordinary commercial payment, such as an investment management or promotion fee, that OPC received for work done in connection with the BPRA Schemes.

45. I do not accept HVK's argument. The basic point advanced in paragraph 10A(h) is that OPC must have been receiving some benefit in return for advancing money to Kingsway and that it was the existence of this benefit that made OPC's agreement "to cash flow the Consortium" with the Fund's money objectionable. Certainly paragraph 10A(h) of the POC would cover a "corrupt" payment. However, it is not expressly limited to payments made corruptly.

46. HVK argued that it was significant that the breaches of duty alleged against him contain no reference to OPC's receipt of commercial fees for the promotion or management of BPRA Schemes. I regard that as being of little significance. A pleaded allegation against HVK is that he knew of the "Undisclosed Purpose" but nevertheless failed in his duties both by helping to make arrangements for the Fund to invest in the KAM CP and by failing to warn the Fund. As I have explained, the pleaded "Undisclosed Purpose" embraced both the receipt of "corrupt" payments and reward for the management and promotion of BPRA Schemes.

47. HVK also points out that, paragraph 27(d)(ii) of the POC contains an assertion that the KP (Hull) scheme (a particular example of a BPRA Scheme) was a "commercial venture which was designed to benefit [BP]". That pleading, he argues, is inconsistent with an assertion that there was anything objectionable in OPC (as distinct from BP) receiving professional fees in connection with the KP (Hull) project. I do not consider that this paragraph, just one in a lengthy pleading, justifies the inference that HVK seeks to draw from it. Perhaps, with hindsight, paragraph 27(d)(ii) could have been better expressed as a reference to BP and/or "associates" of BP receiving a benefit (a formulation that was used in paragraph 28(a)). However, even worded as it is, I do not accept that paragraph 27(d)(ii) supports the interpretation that only "corrupt" payments were within the scope of paragraph 10A(h).

48. There is a deficiency in the drafting of paragraph 10(h) of the POC. The Fund pleads that OPC must have agreed terms with TP. Yet the particular investment management and promotion fees that the Fund objects to came from KP (Hull). If HVK had taken that objection on receipt of the Fund's written opening, or even during cross-examination itself, I could have made an immediate ruling on it of the kind that Tomlinson LJ considered important at [40] to [43] of *Hawksworth v Chief Constable of Staffordshire and Another* [2012] EWCA Civ 293. No doubt the Fund would have submitted that the point was of no significance and simply represented a minor inaccuracy in the drafting of a paragraph whose meaning was otherwise clear. HVK might well have wished to argue that the precise legal entity from whom the payments were said to have received made all the difference. Importantly, had the challenge been made earlier than closing, the Fund could, if the issue went against it, have applied to amend its pleading. My overall conclusion is that, read as a whole, the Fund's objection is that OPC was obtaining any benefit from the investment of the Fund's money in KAM CP rather than a benefit paid by any particular person or legal entity. That point could have been drafted with more precision. Perhaps the Fund could at an earlier stage in the dispute have been asked to give particulars of the precise payments that it had in mind. However, since I regard the overall meaning as clear, and given the late stage at which the objection has been raised, I will not decline to consider the Fund's arguments based on receipt of fees in connection with BPRA Schemes.

What, if anything, was the "Consortium"?

49. A good deal of the evidence and argument during the trial concerned the issue of whether OPC's involvement in the "Consortium" caused it to procure the Fund to invest in the KAM CP. That in turn raised questions as to the extent of BP's and HVK's knowledge of the activities of the "Consortium". However, quite strikingly, the parties were far from agreed as to whether a "Consortium" even existed or, if it did, what form it took.

50. The term "Consortium" was coined by TP. He used the term "Park Alpha Consortium", sometimes spelled "Parc Alpha Consortium", to refer to a collection of businesses, some under his control and some not. The Consortium was not a partnership. It did not involve the constituent businesses sharing profits with each other.

51. Some of the constituent businesses in the Consortium were (i) Langland Securities Limited ("Langland"), a company controlled by TP that undertook property development operations; (ii) Kingsway; (iii) "Capital Stackers", a peer-to-peer lending business; (iii) KP (Hull) LLP ("KP (Hull)"), also known as Kidzplus, a BPRA Scheme operated through a limited liability partnership ("LLP") whose purpose was to develop (through Langland) and operate a leisure centre in Hull; and (iv) OPC itself. There was

a dispute as to whether another BPRA Scheme (called "Kinsale") ever closed successfully to as to become a member of the Consortium.

52. My conclusion as to the nature of the Consortium lies somewhere between the respective formulations that the parties put forward:

    i) I do not accept BP's submission that the Consortium was "an informal forum where the individual firms were playing their own roles, an exchange of knowledge with no commitments". There was more to the Consortium than a mere "exchange of knowledge". Activities of the Consortium were undertaken with a view to obtaining well-defined business advantages, particularly as regards securing funding for the businesses comprised within the Consortium. For example, on 20 September 2013, a "Consortium" event took place at which BP and TP were represented. That event involved BP and TP presenting "Parc Alpha opportunities" to independent financial advisers ("IFAs"). The products covered included BPRA Schemes and the "Capital Stacker" product.

    ii) HVK is closer to the mark in describing the Consortium as "a disparate collection of business and investment ideas being presented to a broader potential investor base than each held individually, in order to market a broader range of opportunities than if they did so in isolation". This summary captures the "outward facing" nature of the Consortium's marketing activities. However, it does not capture the symbiotic aspects of the Consortium that gave OPC the prospect of earning fees in connection with businesses that were being conducted by other Consortium members. OPC had at least three attributes that were of benefit to other Consortium members, particularly those engaged in BPRA Schemes. First, OPC's investment advisory business meant that it had access to a network of IFAs. Those IFAs in turn had relationships with investors who might be induced to invest in BPRA Schemes. Second, OPC had a regulatory approval with the FCA that entitled it to solicit investment in BPRA schemes. Third, OPC (through BP) had a financial sophistication that could be brought to bear in structuring means by which BPRA Schemes could raise money. That symbiotic relationship meant that OPC could realistically expect to obtain an investment management fee, and a promotion fee, in connection with BPRA Schemes that successfully attracted investors.

    iii) The Fund overstates matters when it characterises the Consortium as resulting in a level of financial inter-dependence between its various members. There was some degree of financial independence, but that was "transactional" in the sense that it resulted from particular and specific transactions rather than "structural" in the sense of forming part of the whole basis of the Consortium. As I will explain later in this judgment, the only instances of OPC having a level of financial inter-dependence with a member of the Consortium arose out of OPC's entitlement to investment and management fees from the KP (Hull) project and, relatedly, Kingsway's own funding of the KP (Hull) project.

53. In cross-examination of HVK, the Fund explored some instances in the contemporaneous documentation which suggested a broader economic link between OPC and Kingsway than my conclusion in paragraph 52.iii) would suggest. For example, in December 2013, OPC was in discussions with the Charities Trust about a proposal for charities to invest surplus cash in the Maestro strategy to obtain a better return than they could by simply holding it on deposit. To make the proposal more attractive, OPC offered the Charities Trust some form of guarantee which would mean that, even if the Maestro strategy yielded less than a 3% annual return, the Charities

Trust would still obtain a return of 3%. At some point in the discussions, it was suggested that the guarantee might be provided by Kingsway. When the Charities Trust queried why Kingsway would be prepared to provide such a guarantee, HVK told BP that he had given the following explanation to the Charities Trust :

> *I explained that we had a strategic relationship with KAM that means that OPC's success is linked to KAM's.*

54. I have concluded that the above statement was nothing more than a broad brush answer of the kind that salespeople sometimes give when they do not know the answer to a question on a point of detail. HVK was in no position himself to speak of a "strategic relationship" since the custodian of the relationship between OPC and Kingsway was BP. Moreover, Kingsway and OPC were independent businesses under different control. There had to be some reason why Kingsway would be prepared to take the risk of the Maestro strategy producing a return of less than 3%. The actual reason was that, in return for agreeing to insulate the Charities Trust from "downside" risk, Kingsway was seeking some share of the "upside" if the Maestro strategy performed better than expected. That arrangement was complicated and evolving. As a result, HVK did not understand it properly and so gave a broad brush answer. I do not agree with the Fund that it was suspicious that HVK subsequently backtracked on his answer by reassuring the Charities Trust that "neither KAM nor OPC's success is reliant on the commercial success of the Euro commercial paper". He simply realised that his previous broad brush answer was not quite accurate.

55. Nor do I regard emails from TP referring to links between OPC and the Consortium as inconsistent with my conclusion in paragraph 52.iii). TP's emails are characterised by a high degree of optimism about projects that he had in the pipeline. For example, on 3 May 2013, TP sent an email to HVK congratulating him on his promotion to Chief Operating Officer of OPC saying that "with the funds we are structuring together, it is certain we will be close colleagues for the foreseeable future". HVK picked up on the optimistic tone of TP's correspondence, writing in an email of 27 July 2013 to Mr Jonathan Bowles, who had just been appointed a director of Kingsway, that the next few months would be exciting "with all the projects on the horizon".

56. These emails and others that I was shown are not inconsistent with a "transactional" relationship between OPC and the Consortium. TP at the time was obviously optimistic that projects would be developed to the mutual advantage of OPC (who could earn an investment management and promotion fee) and other members of the Consortium. However, TP's optimism does not mean that such projects actually materialised. Nor does his email of 15 October 2014 sent to various members of the Consortium indicating that all addressees were "to varying extents dependent on the fund flow through KAM to underpin the launch of our various important projects". Rather, the email indicates that Kingsway thought it might come into some money as a consequence of the issue of the KAM CP which it would consider on-lending to other Consortium members. It does not mean that the projects closed, or that OPC had an interest in them.

57. Organisational charts were prepared showing divisions of the Consortium. One example shows an "Investment" division (involving BP at OPC), a "Real Estate" division involving TP and Langland and a "Banking/Real Estate Finance" division involving Mr Steve Robson, Kingsway and "Capital Stackers". However, I conclude that these organisational charts do not demonstrate any "structural" financial inter-dependence between OPC and the Consortium moving beyond the transactional arrangement that I have identified. In my judgment the organisational charts are

reflective of a marketing strategy rather than legal or financial relationships between OPC and other members of the Consortium.

The arrangement before 31 July 2014 that the Fund would invest in KAM CP

58. In his submissions on behalf of the Fund, Mr Cohen KC requested factual findings on what he described as the "commitment factor", namely that even before the Fund was launched, BP and HVK had entered into arrangements which committed the Fund to invest in KAM CP. I have reached the following factual conclusions which I will go on to explain in the remaining paragraphs of this section:

    i) Well before 31 July 2014, when the Fund was launched, there was already in place an arrangement or understanding to the effect that the Fund would invest in KAM CP. That arrangement or understanding was reached between BP and TP. HVK was not involved in its formation.

    ii) The arrangement or understanding fell short of a binding commitment between OPC and Kingsway. However, at no point was there any real suggestion that there were any obstacles to bringing the arrangement to fruition.

    iii) HVK was, however, aware of the arrangement or understanding from more or less the time that it was reached. He was, therefore, aware of it well before the Fund launched.

    iv) In his administrative capacity, HVK took steps after the Fund was launched to ensure that the Fund could invest in KAM CP in accordance with the arrangement.

59. The existence of the arrangement or understanding is amply demonstrated in contemporaneous emails. I will refer to just a few in the interest of brevity.

60. On 23 December 2013, by which time the Fund had been incorporated, but the necessary regulatory approvals to launch it were not yet in place, TP sent an email to Mr Bowles. In that email, TP updated on progress towards the establishment of the Fund in the following terms:

> *The fee has now been paid to the FCA by Bruno hence the registration is on schedule for the end of the year. The fund can then take the investment from [anticipated initial investors] … As soon as this is in the account then Bruno will be flipping KAM's portion straight across and we are in business!*

61. Mr Bowles forwarded this email to HVK on 29 December 2013 saying that he had "no idea what, if anything will distil out of this - any ideas?". On 30 December 2013, HVK replied saying:

> *I am not q sure what Trevor is referring to here unless this is a reference to the Cayman fund investing in KAM paper as part of the Treasury investments it would make (in money market instruments such as Euro Commercial Paper).*
>
> *However, the fund has not been launched because we are still awaiting FCA authorisation (Bruno paying the fee does not mean we have been granted authorisation).*

Secondly and more importantly, the [initial investors] are not confirmed due to the delay. We need to embark on further marketing in January.

Whilst TP's interpretation is how we hope the investment process will play out for OPC's Cayman Fund and KAM, this is still some weeks away.

62. This is an important email exchange, all the more so because it is contemporaneous and took place at a time when the parties to it were speaking frankly to each other with no motivation to hide their true intentions. Significantly, HVK's immediate response to Mr Bowles' email was to refer to the "Cayman fund investing in KAM paper". He did not suggest that TP had misunderstood the position, and that no such arrangement existed and therefore HVK's email confirms both the existence of the arrangement and his own awareness of it. That conclusion is only strengthened by the remainder of the email which emphasises that HVK was aware that the Fund intended to invest in Kingsway's commercial paper with the difficulties identified being that the Fund was not yet ready with the result that the initial investors might be lost.

63. The arrangement was still extant on 23 April 2014, because on that date HVK emailed TP to tell him that OPC had been granted the FCA approval necessary for the Fund to launch . That prompted TP to email BP on 6 May 2014 to say:

Tony is now preparing the notification note for Citi relating to the first £1 million tranche to KAM.

64. The arrangement or understanding between OPC and Kingsway was not formed by HVK or at his instigation. BP rather than HVK was the custodian of the relationship with TP and so with Kingsway.

65. The arrangement or understanding was not a legally binding commitment. Therefore, conceptually, the Fund might not have invested in KAM CP if Kingsway had not been prepared to offer the kind of interest rate that BP thought was appropriate. By the same token, if BP had demanded an interest rate that TP regarded as plainly excessive, Kingsway would not have issued commercial paper to the Fund. Regulatory requirements meant that the Fund needed to hold KAM CP through a custodian. If no custodian could be found, the Fund would not have been able to acquire the KAM CP. However, these obstacles were more apparent than real. TP was in no position to drive a hard bargain on the applicable interest rate because Kingsway was delighted at the prospect of obtaining significant funding from the Fund. BP had no incentive to make unreasonable interest rate demands of Kingsway given the prior business relationship between BP and TP and BP's own need to deal with the Cash Management Issue. HVK was largely responsible for resolving the difficulty in obtaining a custodian by securing the agreement of Jefferies Bank ("Jefferies") to act.

Whether OPC would derive an economic benefit from KAM investing in Consortium projects

66. Mr Cohen referred to this as the "conflict factor" in his submissions. In essence, the argument is that the reason why it was arranged for the Fund to invest in KAM CP, was so that Kingsway could use the money it received to invest in projects from which OPC would benefit. That argument was put generally but, the Fund made particular reference to Consortium projects, both of which were BPRA Schemes namely (i) the KP (Hull) project and (ii) the Earlswood Kinsale Hospitals.

OPC's entitlement to fees in respect of the KP (Hull) projects

67. KP (Hull) was incorporated on 9 November 2011. Some time before 5 April 2013 (perhaps in or around August 2012), KP (Hull) issued an Information Memorandum by which it sought to raise some £6.89 million in order to acquire and redevelop an old supermarket building in Hull. KP (Hull) proposed to raise £3.24 million of that sum (i.e. 47% of the total needed) by way of loan, with high net worth individuals being invited to provide the balance by subscribing for interests in KP (Hull).

68. The Information Memorandum stated that KP (Hull) hoped to raise all of the funds needed by 5 April 2013. However, it left open the possibility of further investment being sought in the 2013/2014 tax year. The Information Memorandum stated that it was expected that the fund-raising would close on 31 October 2013. The Information Memorandum stated that, if insufficient funds were raised to enable KP (Hull) to meet its obligations to Langland, the developer of the project, KP (Hull) would borrow the shortfall from Kingsway.

69. The Information Memorandum stated that OPC was the Manager and Promoter of the scheme. In return for OPC's work on the project, it was to receive (i) an up-front fee equal to 2.25% of the total sums raised from external investors and (ii) an ongoing annual management fee of the higher of 1% of the "value of the asset" and £50,000, plus VAT. Having regard to the terms of the Management Agreement described in paragraph 70. I infer that the value of the "asset" (or the "Property" as it was described in the Management Agreement) was something different from the amount subscribed by investors in KP (Hull). The only "hard" figure I have as to the value of something that might be described as the "Property" is the target of £6.89 million sought to be raised. I infer that OPC was entitled to an annual management fee of £68,900 plus VAT.

70. There was an unsigned version of a Management Agreement between KP (Hull) and OPC in the hearing bundle. I infer that the final version of this agreement was substantially similar to the unsigned version. It provided for the 2.25% fee to be paid "as soon as reasonably practicable after closing". It provided for the annual management fee to be paid in advance as soon as reasonably practicable after the beginning of each tax year with the first payment to be made as soon as reasonably practicable after 5 April 2013. The Management Agreement provided that if the LLP "terminates during the course of any given year" the management fee was to be due and payable on a pro rata basis with OPC being obliged to refund to KP (Hull) any amount overpaid.

71. In its partnership tax return for the year ended 5 April 2013, submitted on 14 October 2013, KP (Hull) claimed BPRAs of £811,379.27. The same tax return stated that KP (Hull) had raised £437,773 by way of subscription for interests in the LLP (out of a total it hoped to raise of some £3.65 million). It allocated the resulting tax loss among 12 or 13 named individuals who had become members of KP (Hull). I conclude, therefore, that KP (Hull) did succeed in raising some money from external investors before 5 April 2013.

72. The sums that KP (Hull) raised fell far short of its target. I accept TP's explanation in his oral evidence that in part the lack of investor appetite was due to an emerging perception within HMRC that BPRA Schemes were being used as a vehicle for tax avoidance. OPC was the promoter of the scheme and HVK was deployed to try to generate some interest from OPC's network of IFAs. However, on 4 April 2014 (the

day before the deadline for investments to be made so as to qualify for relief in the 2013/2014 tax year) HVK reported to BP that "feedback is not great".

73. I conclude that OPC's entitlement to the 2.25% up-front fee was crystallised prior to 30 July 2014 when KP (Hull) secured the investments mentioned in its tax return for 2013 referred to in paragraph 71., together with such, if any, further investments that it secured prior to 30 July 2014. Because there was little investor appetite in April 2014, I infer that KP (Hull) secured no further equity investment after then and so there was no further equity investment in KP (Hull) after the Fund launched. I will make findings as the extent of OPC's entitlement to the 1% annual management fee after dealing with some points of dispute as to what happened to the KP (Hull) project after the Fund launched in the next section.

The Kinsale Project

74. BP's case is that, although this project was discussed as an idea at, for example, the IFA meeting on 20 September 2013 at Stoke Park, the project never took off. More specifically, BP submits that OPC had no entitlement to receive any fee by reference to management or promotion of the Kinsale project. However, there are indications in the evidence that something happened with the Kinsale project because, in his witness statement, TP referred to Kingsway receiving a "settlement sum" in respect of a loan of £1 million made to Langland in relation to the Kinsale project.

75. The project at Kinsale was to involve the development of a psychiatric hospital in North Wales. TP had considerable experience of that kind of development project. Moreover, a development project of this type did not need BPRAs: private hospitals have been built in this country long before tax incentives in the form of BPRAs were introduced in 2007. OPC would have little expertise to add to a "straightforward" development of a hospital, but as with the KP (Hull) project, had both expertise and an FCA authorisation that could be of assistance in the marketing of a BPRA Scheme for the development of the Kinsale hospital. It follows, therefore, that the mere fact that Kingsway advanced money to Langland in connection with a hospital in Kinsale does not compel the conclusion that OPC was involved in that project or was entitled to any fees in connection with it.

76. At some point in 2013, TP considered the possibility of the Kinsale hospital being financed by way of a BPRA Scheme. That is why the Kinsale project was on the agenda at the Stoke Park IFA event on 20 September 2013. However, the proposal to finance the Kinsale hospital through a BPRA Scheme was much less far forward than the KP (Hull) BPRA Scheme. As I have noted in paragraph 71. above, by 5 April 2013, KP (Hull) had succeeded in raising at least some external investment. However, on 8 January 2014, an Information Memorandum promoting the Kinsale hospital development as a BPRA Scheme was still in draft.

77. Even if the draft Information Memorandum relating to Kinsale had been finalised on 8 January 2014, that would have resulted in investors being sought for a BPRA Scheme not dissimilar to the KP (Hull) scheme at a time when, as HVK's experience with KP (Hull) demonstrated, investor demand was weak. Moreover, if a Kinsale BPRA was actively being marketed with OPC as promoter and investment manager, it would have been natural for HVK to be involved in the push to find investors. Yet, while I was shown emails demonstrating that HVK was trying to find investors for the KP (Hull) scheme, I was shown no emails demonstrating similar efforts to sell a Kinsale BPRA Scheme.

78. The Fund has referred to an extract from the cross-examination of HVK in which he accepted that, if any of the projects referred to at the Stoke Park event succeeded in the sense of attracting investment, OPC would be rewarded. However, that passage sheds little light on whether the BPRA Scheme succeeded. Having weighed up the competing indications, my conclusion on a balance of probabilities is that the proposal to attract investment for the Kinsale hospital through a BPRA Scheme did not "succeed" in the sense requisite for OPC to obtain any promotion or management fee in connection with that project.

Other projects

79. Given my finding that any financial interest that OPC obtained would have been "transactional" rather than "structural", I would expect any other financial interest that OPC had in Consortium projects to be set out in documents such as the KP (Hull) Information Memorandum or Management Agreement. Since I was not shown any such documents for any project other than KP (Hull) I conclude that OPC had no financial interest, after the Fund's launch, in any business in the Consortium other than (i) its interest as lender to Kingsway under the KAM CP and (ii) its interest in the KP (Hull) project that I have just described.

80. The Fund has throughout been critical of the level of disclosure that BP provided both in terms of the quantity of documents that BP has provided and his claim to have no "known adverse documents". I have, therefore, considered carefully whether the reason for an absence of direct evidence of OPC's financial interest in the activities of other projects carried on by the Consortium is simply that relevant documents have not been disclosed.

81. I have concluded, on balance, that this is not the reason. Even though BP appears to have disclosed relatively few documents, HVK has disclosed a large number. The large quantity of documents that HVK has disclosed, together with my finding in paragraph 22., indicates that if anything needed doing at OPC, other than pure trading or investment management for which BP was responsible, there was a good chance that HVK would be asked to lend a hand. If OPC truly was deriving a financial benefit from activities of the Consortium, it would have had to do some work to derive that financial benefit and would have asked HVK to help out. Yet HVK, who is advised by solicitors who can be expected to be aware of his disclosure obligations, has provided full disclosure of documents which can be assumed to provide little direct evidence of OPC's financial involvement in multiple Consortium projects, since they were not put to him in cross-examination.

Kingsway's involvement with the KP (Hull) project after 31 July 2014

82. As noted in paragraph 68. above, the Information Memorandum which was issued before 5 April 2013 stated that Kingsway would make a loan to KP (Hull) sufficient to enable it to meet its payment obligations to Langland, as developer of the project, if KP (Hull) did not raise sufficient funds from third party investors. At the trial, this arrangement was referred to as Kingsway acting as "lender of last resort" to KP (Hull). The Fund's position is that, since KP (Hull) failed to achieve its target investment from third parties, Kingsway must have acted as lender of last resort by advancing funds to KP (Hull) after 31 July 2014 when the Fund launched. However, both HVK and BP argue that the relationship between Kingsway and KP (Hull) changed following a power struggle between TP and a Mr Ken Fellows over the direction of the KP (Hull) project with the result that, despite the statement in the Information Memorandum, Kingsway never advanced any funds to KP (Hull).

83. I was not provided with much information on the nature of the dispute between TP and Mr Fellows over the KP (Hull) project. However, the dispute seems to have centred on the question of who should act as operator of the KP (Hull) project and not the question of who should be the developer or how that development should be undertaken. For example, in an email sent on 16 January 2014, BP made an "offer" to Mr Fellows that he could act as the operator "with full control of the operating business". He assured Mr Fellows that he would have no involvement with TP, but that TP would "remain involved in the development site in collaboration with the contractors".

84. Mr Fellows emerged victorious from the power struggle with TP. On 22 January 2014, TP sent an email to various addressees including BP and contractors to the project ("Avert") stating that he had reluctantly to admit that "Ken had won". However, the suggestion that TP had lost only the role as operator, but would continue to be involved in the development side and finance side was emphasised in the following paragraphs of that email:

> *… Also, I recognise that if I am going to lose on the KidZplus Hull front there is no point in losing other than graciously. I will therefore throw my whole weight behind the consequent requirements of this decision.*
>
> *I propose to:*
>
> ** support [BP] … in getting the [KP (Hull)] funding relaunched*
>
> **facilitate the development process in collaboration with Bill Bailey and Feruccio Brevliglieri of Avert*
>
> **structure the required debt funding to underpin the BPRA funds through Kingsway Asset Management together with OPC and CapitalStackers.*

85. In his oral evidence, TP explained that he had a long relationship with Avert based on many previous projects. The relevant individuals at Avert were Mr Ron Bailey (who also went by the nickname "Bill") and Mr Feruccio Brevliglieri, who went by the nickname "Fudge". I have concluded that TP would not want to let them down by, for example, requiring them to go unpaid for work done before TP lost his power struggle with Mr Fellows.

86. In closing submissions, BP argued that it was clear from January 2014 that Kingsway would not be providing any further funding for the KP (Hull) project. He pointed to an email exchange between him and Mr Fellows on 16 January 2014 in which BP outlined a proposal under which KP (Hull) borrowed the shortfall through a separate debt facility concluded once the equity capital raising was complete. In that email, BP indicated that a coupon of around 10% would be necessary and that he already had investors interested in acquiring such debt if the terms were sufficiently attractive. That, he argued, was inconsistent with any proposal that Kingsway would continue to provide funding.

87. However, even after January 2014, TP was proceeding on the basis that he, or a company that he controlled, would be providing funds necessary for the KP (Hull) project. On 23 April 2014, TP emailed HVK, explaining that Avert had been in contact with TP to enquire about the launch of the Fund. TP asked HVK to provide Mr Bailey with an update on progress and HVK duly did so. The clear implication of this email exchange is that TP had provided Mr Bailey and Avert with assurances that they would be paid out of money received by the Fund on its launch and that Avert wanted to hear, direct from OPC when that launch would take place.

88. HVK provided Mr Bailey with an update, but Mr Bailey kept pressing for more specifics. On 25 April 2014, BP emailed Mr Bailey to indicate that the Fund was expected to launch within the next two weeks and that it was expected to start with around $15m of cash, rising quite quickly to $35m over the following few weeks. BP expressed his email to Mr Bailey as being sent "to help your discussions with Trevor". Again, the implication is that TP was telling Mr Bailey that money from the Fund would flow to Avert. BP followed that email up with a further email to Mr Bailey, at 14.50 on 25 April 2014 in which BP wrote:

> *Further to my email this morning, to clarify, I can confirm that this is my intention, as a fund manager to direct the Cayman Fund to invest in KAM's Euro commercial papers.*

This did not satisfy Mr Bailey who continued to press for more specific details as to when he could expect to receive money (see, for example, an email of 29 April 2014).

89. In the light of these, and other contemporaneous emails, I am unable to accept BP's submission set out in paragraph 86. above. By the end of April 2014, TP obviously considered that he had some residual obligation to provide funding sufficient to pay Avert sums due in connection with the KP (Hull) project. That is why he was providing assurances to Mr Bailey which Mr Bailey was seeking to verify direct with BP and OPC. Moreover, the email traffic from April 2014 reveals a clear understanding between BP, HVK and TP that the Fund would invest in KAM CP, with Kingsway using some of the proceeds to pay Avert perhaps via Langland. I am not satisfied that this arrangement involved Kingsway lending money to KP (Hull) direct (despite the statement in the KP (Hull) Information Memorandum). The Fund argues that TP accepted in cross examination that Kingsway lent money to KP (Hull) after July 2014, but I do not agree: read as a whole, TP was simply accepting that the KP (Hull) Information Memorandum referred to the possibility of such loans being made. The contemporaneous email discussion concerns Kingsway making payments to Avert (perhaps via Langland) rather than to KP (Hull).

90. I understood BP to argue in closing that, there was an arrangement or understanding of the kind set out in paragraph 89. at the end of April 2014, it was overtaken by events. I was referred to an email sent on 7 July 2014 by Mr Bailey to BP, which was copied to TP. That email referenced a meeting between Avert and TP on 4 July 2014 which seems to have been a significant meeting since Mr Bailey noted that BP would "obviously" be aware of that meeting. In his email, Mr Bailey wrote:

> *at the meeting Trevor said that "ultimately, OPC would be raising the funds to cover monies outstanding on the Holderness Road development [i.e. where the Kidzplus project was to be located], that OPC would be raising funds to purchase the property on Holderness Road and further, OPC would raise the funds to finish the development entirely"…*
>
> *Can you therefore confirm this is the case and that the fund will be in a position to purchase Holderness Road, cover liabilities to date & have funds sufficient to recommence the development during July 2014?*
>
> *I think you know by now that we at Avert will work with you in an effort to sort this out but we do need your undertaking to feel comfortable with the situation taking account of the history with this development to date*

91. BP argues that TP must have told Avert for the first time during their meeting on 4 July 2014 that Kingsway would no longer be providing funding for the KP (Hull) project. Therefore, BP interprets this email as indicating that Avert now realised that money

would not be coming from Kingsway (via the Fund) after all and that instead OPC was trying to orchestrate some further capital raising from third party investors in KP (Hull) with a view to obtaining the necessary funding. I accept that there are hints of this in the email. If Mr Bailey truly was thinking that the arrangement was the same as that current in April 2014, he might have been expected to continue his previous theme of asking for updates on the Fund's formation and when money might be expected to flow to him. However, against that if Mr Bailey was being told that previous assurances that Avert would shortly be paid out of the Fund's money no longer held good, his email might have struck a very different tone.

92. Later correspondence sheds a light on this issue. For example, on 15 October 2014, TP asked for HVK's comments on a proposed email to BP in connection with the imminent issue of the first tranche of KAM CP. TP wrote:

> *... I have handed the transaction to Tony and the team to deal with from this point on. They will liaise on whatever is necessary for the ECP issuance and anything else that is required. They will also then deal with the funding arrangements for the healthcare sites etc to progress to the next stage with the development of the REIT [a proposal to form a real estate investment trust]. This is to enable me to concentrate on the positive move forward in various respects, including the next phase structuring to clear the decks on KP (Hull) LLP.*

93. I have concluded that this email is not consistent with TP believing that his obligations to pay Avert for work done in connection with KP (Hull) had ceased. The reference to "clear [ing] the decks on KP (Hull) LLP" is to TP's intention to pay Avert sums due in connection with that project. I am only reinforced in this conclusion by the fact that, after Langland was placed in liquidation, its joint liquidators identified that it had paid £98,000 to Avert. My conclusion is that this sum represented TP's attempts to "clear the decks on KP (Hull) LLP".

<u>Conclusions on the "conflict factor" and the "Undisclosed Purpose"</u>

94. My conclusion on the "conflict factor" relevant to OPC is as follows:

    i) OPC's 2.25% "up-front" fee for its work on KP (Hull) was entirely crystallised before the Fund launched (see paragraph 73. above). However, OPC did have an ongoing financial interest, after the Fund's launch, consisting of an entitlement to the annual 1% fee of £68,900 per year plus VAT. The fee for the 2014/2015 tax year was payable on or around 6 April 2014, before the Fund was launched. Nevertheless, it amounted to an interest of OPC in KP (Hull) after the Fund was launched since, if the KP (Hull) project was discontinued during the 2014/15 tax year, the fee payable due in advance on 6 April 2014 would be scaled back.

    ii) OPC had no financial interest in any Consortium business other than KP (Hull) after the Fund launched.

    iii) Ultimately, the Fund did not press a case that OPC, HVK or BP (or their respective associates) received any "corrupt" payments from TP or Kingsway to serve as an inducement to procure that the Fund invested in the KAM CP (hence the "pleading issue" discussed above). I find that no such corrupt payments were made.

    iv) Both BP and HVK knew, before the Fund was launched, that there was an arrangement or understanding that (i) the Fund would invest in KAM CP and (ii)

Kingsway would in all probability use some of that money to pay Avert sums incurred in connection with KP (Hull).

v) Kingsway's payment of sums to Avert could not increase OPC's entitlement to the 2.25% fee which had already crystallised before the Fund launched. However, it did provide OPC with a benefit in relation to the 1% fee since Kingsway's payment of sums to Avert could reasonably be expected to extend the life of KP (Hull). That, in turn, raised the prospect that OPC's 1% fee would be payable for a longer period or, to the extent that it had been paid in advance for the 2014/2015 tax year, reduce the risk that OPC would have to refund a proportion of that fee on early termination.

vi) BP submitted, in closing, that positive steps were taken prior to the Fund's launch, to ensure that possible conflicts of interest were addressed by ensuring that none of the money that the Fund invested in KAM CP found its way to KP (Hull). That assertion was unevidenced, and I do not accept it. That said, I have not found that Kingsway did pay any of the proceeds of issue of the KAM CP to KP (Hull): rather some of the money was paid to Avert.

95. It was further suggested that BP had two personal conflicts of interest. First, it was pleaded that Kingsway loaned $1.6 million to a company called Tremont Capital UK Ltd ("Tremont"). It was pleaded that Tremont was, at material times, an appointed representative of OPC and that BP appeared on Tremont's website. This point scarcely featured in the Fund's closing submissions. Even if Kingsway did lend $1.6 million to Tremont, I am not satisfied that BP derived any personal benefit from that loan.

96. In a similar vein the Fund pleaded that BP received $93,000 personally from Kingsway. In his closing submissions BP referred to two invoices that he submitted to Kingsway in January 2014 totalling $93,000 in relation to the work that he had done in 2011 setting up ECP Programme. I am satisfied that the invoices are genuine and that, accordingly Kingsway incurred this liability to BP well before the Fund launched or invested in the KAM CP. If Kingsway had not paid this $93,000 before OPC decided to procure the Fund to invest in KAM CP, there would have been a conflict between BP's personal interests and those of the Fund since the Fund's investment in the KAM CP could reasonably be expected to enable Kingsway to discharge a liability owed to BP personally. However, I was shown no evidence to suggest the sum remained unpaid by the time the Fund launched. If BP personally was owed a relatively large sum for work done in 2011, that might be expected to sour relations between BP and TP, but relations between them were warm. Moreover, BP might have mentioned to HVK that a sum was owing and HVK might have commented on that when making the adverse comment about TP referred to in paragraph 108.. I have concluded that the sum was not unpaid and so did not present a conflict of interest.

97. Next, it was suggested that OPC's relationship with the Consortium resulted in conflicts of interest for HVK personally. The Fund argues that HVK was "trapped" at OPC: he was underpaid and even his relatively modest compensation was not always paid on time, but as his unsuccessful applications for other jobs showed, he was not able to move elsewhere. Therefore, it submits, HVK had a personal interest in OPC making money from other business lines by procuring the Fund to "cash flow the Consortium" so that OPC's financial fortunes would improve and with them those of HVK. I reject that proposition. I accept that HVK was paid relatively little and not always on time. I also accept that he made unsuccessful job applications. However, the rewards that OPC could expect to obtain from the Consortium which I have summarised in paragraph 94. above are insufficient to produce the kind of conflict that the Fund alleges since, with

those rewards being so modest, HVK could not realistically have thought that any of those rewards would convert into a benefit to him personally. I also find that OPC did not pay any part of the benefit described in paragraph 93. over to HVK and HVK was remunerated throughout on the basis described in paragraph 21..

98. In his opening submissions on behalf of the Fund, Mr Cohen invited me to find that OPC was "hopelessly conflicted" and was putting money into Kingsway, on behalf of the Fund, "because it was to Old Park Capital's advantage". My overall conclusion is that this submission significantly overstated matters. The only benefit that OPC, as distinct from the Fund, would obtain from the Fund investing in the KAM CP was the benefit summarised in paragraph 94.v). It is not straightforward to estimate the value of that benefit since it depends on a calculation of how much longer the KP (Hull) arrangements were able to continue as a result of Kingsway discharging liabilities owed to Avert. One difficulty is that I have not even been told when the KP (Hull) project came to an end, although I note that it closed a bank account through which a good sum of money had passed on 24 November 2015. I infer, however, that the benefit to OPC was modest. In April 2014, the KP (Hull) project was in a poor situation as demonstrated by its inability to attract outside investors. I am not prepared to accept that, even looking at matters in April 2014, an understanding that Avert would be paid would, of itself, have prolonged the life of that project materially.

99. Nevertheless, there was some conflict of interest, even though it yielded OPC a modest benefit. In my judgment, BP would have been aware of that conflict before the Fund launched. If BP had wished to establish otherwise, he could have given evidence to this effect, but he has not done so. As a director of OPC, he knew the detail of OPC's entitlement to fees in connection with the KP (Hull) project. He therefore had available to him the information necessary to work out the existence of the conflict of interest that would arise as a consequence of OPC choosing to invest the Fund's money in KAM CP, knowing that Kingsway proposed to use some of that money to pay Avert. BP is obviously a highly intelligent man and a professional fund manager who could be expected to be alive to conflicts, both subtle and obvious, that can arise whenever an investment is made with another person's money.

100. By contrast, in my judgment, HVK had no knowledge of the conflict of interest before the Fund invested in the KAM CP. While he was aware, in general terms, that OPC would obtain fees in connection with the KP (Hull) project, he lacked the detailed understanding of those fees to be able to piece together the conflict of interest that I have described. While HVK had been involved in trying to market the KP (Hull) project, that work involved him calling up IFAs and would not have given him the detailed understanding of KP (Hull)'s fee structure to understand the conflict of interest. Moreover, he did not have the level of investment management experience that BP had. The Fund is correct to note that HVK knew of the importance of avoiding conflicts of interest, but that awareness did not of itself give him the wherewithal to identify the conflict that actually arose. Nor do I accept that HVK accepted in cross-examination that he realised, at the time, that there was a conflict of interest. His answers to questions on this issue were occasionally confusing but, read as a whole, I consider he was accepting, in the light of what he knows <u>now</u>, that there was some conflict, or a risk of perceived conflict, in 2014.

101. Finally, I conclude that the fact that BP, HVK and OPC had no interest in Consortium businesses beyond that identified in paragraph 94.v) coupled with the nature of the Consortium demonstrates that there was no "Undisclosed Purpose" of the kind pleaded. BP and HVK would simply not have gone to the considerable trouble of setting up the Fund as a front for an operation to "cash flow the Consortium" given that both they and

OPC stood to gain so little from their involvement with the Consortium. For similar reasons, none of BP, OPC or HVK regarded investment in KAM CP as an end in itself such that it could be described as a "purpose" of the Fund. As explained in paragraphs 178. and 179. below, BP who was the architect of the decision to invest the Fund's money in KAM CP, regarded the investment as a means of preventing the Cash Management Issue from diluting returns from the Maestro strategy.

The "risk" factor

The risk viewed objectively

102. I have concluded, both from the expert evidence of Mr Powell, and from the general characteristics of the KAM CP, that the KAM CP was, viewed objectively, a risky investment. It was highly illiquid. Accordingly, a holder wishing to sell KAM CP could have no confidence at any point that there would be a buyer willing to purchase it either at all, or at any price the seller might consider attractive. A holder of the KAM CP could well have to rely simply on Kingsway's promise to redeem the KAM CP at its stated maturity. Kingsway's covenant strength was low. It was such a small company that it was not even required to produce audited annual accounts. The KAM CP had no credit rating from any of the recognised rating agencies.

103. Even if Kingsway had been a strong credit, the KAM CP's lack of liquidity would have posed an existential threat to the Fund. The Fund made its first investments in the KAM CP in December 2014 and January 2015. Centaur's Administrator's Report for the period 1 November 2014 to 31 January 2015 shows that, over this period, there was a single investor in the fund. Centaur's spreadsheets recording the calculation of net asset value show that, as at 28 February 2015, over a third of the Fund's net assets were invested in KAM CP.

104. The Fund promised investors that they could redeem their investment on just two business days' notice. If the single investor in the Fund requested a redemption of more than two-thirds of its investment, the Fund would be relying on its ability to sell, within two days, unrated unlisted commercial paper issued by a company that was so small that it did not even need to file annual audited accounts. If it could not do so, the Fund could be put into liquidation. This is precisely the risk that materialised when Montsol, after a period when the Maestro strategy performed poorly, sought to redeem its investment in the Fund.

105. Viewed objectively, the KAM CP was a high risk investment. In the remainder of this section, I address the Fund's arguments as to the knowledge of BP and of HVK of that risk and its argument that both realised that the KAM CP was a "bad" investment but procured the Fund to invest in it anyway because of a conflict of interest.

A necessarily bad investment because of TP's character and business dealings?

106. The Fund points to BP's and HVK's knowledge of TP's business dealings and personal qualities as demonstrating that they would have realised that any investment in Kingsway (which TP controlled) would necessarily be bad. I will not make such a finding.

107. TP is certainly a strong character. He did not mind expressing himself in occasionally intemperate language in his business dealings. Mr Fellows made allegations against TP of "misappropriation of funds" during his dispute as to who should operate the KP (Hull) project. On 12 January 2014, HVK was told that Kingsway had not paid £250,000 that Broadcliff Capital Partners ("Broadcliff") considered to be due. On 20

November 2013, Mr Bowles sent an email to HVK expressing concern as to whether TP would remain solvent so as to enable the KP (Hull) project to complete.

108. Those were certainly indicators of risk. However, I am not satisfied that they would have caused either HVK or BP to conclude that an investment in KAM CP would obviously be bad. There were indications that there was a dispute as to whether Broadcliff was owed anything. The fact that HVK occasionally expressed critical personal opinions of TP (describing him for example as a "hand grenade" and a "complete clusterf@ck") does not lead me to a different conclusion. These were not dispassionate assessments of the risk of KAM CP, which HVK was in any event not equipped to make, but rather expressions of annoyance that people sometimes experience with business colleagues.

BP's knowledge and belief of matters going to risk

109. BP knew TP better than HVK and so would have been even more alive to any incremental risk revealed either by TP's character or his other business dealings. However, in my judgment, BP would have realised only that the KAM CP was risky. He did not conclude that it was obviously a bad investment in the sense that its risks outweighed its rewards. I note the difficulty in making findings as to BP's subjective intentions and beliefs in circumstances where he has not given evidence. However, while investment managers generally can make investments that turn out to be bad, it would be exceptional for an investment manager to make an investment knowing or believing that it was a bad one (in the sense that it would be likely to lose money). There would need to be some reason for BP to adopt such a course in this case.

110. The Fund has argued that the "Undisclosed Purpose" provides the reason. I do not accept that argument, primarily because I have found the Undisclosed Purpose, as pleaded, not to be present. BP was aware that the Fund's investment in the KAM CP gave rise to a conflict of interest. However, the effect of that conflict of interest on OPC's revenues was modest, as explained in paragraph 98. above. It does not, in my judgment, set out a reason why BP would take the unusual step of making an investment knowing or believing it to be bad, or not caring whether it was good or bad.

111. Moreover, as I will explain in more detail later, BP's motive for procuring the Fund to invest in KAM CP was to enable him to produce the eye-catching returns that he had promised investors the Maestro strategy could deliver. That intention is consistent with BP holding the belief that, risky though it was, the KAM CP would perform. It is inconsistent with BP having prior knowledge, or a belief, that the KAM CP was a poor investment.

112. Finally, as an experienced investment professional, BP would have been well aware of the liquidity risk summarised in paragraph 103.. However, in my judgment for reasons similar to those I have just given, he simply hoped that risk would not materialise and that, in practice, investors would not make redemption requests of sufficient size to cause the lack of liquidity to be a problem.

HVK's knowledge and belief of matters going to risk

113. I consider that HVK would have been aware of the objective factors that made the KAM CP a risky investment for the Fund. However, he lacked the investment management experience to make any informed judgment as to whether the KAM CP was a good investment or a bad investment in the sense that reward outweighed risk or vice versa. I have concluded that HVK believed that BP would deploy his investment management experience in deciding whether the Fund should invest in KAM CP. HVK

was not in a position to gainsay any decisions that BP made in this regard because of HVK's lack of investment management experience, his relatively junior position in the OPC hierarchy and the fact that BP, and not him, was tasked with making investment management decisions.

The discovery that the Fund had invested in KAM CP

The discovery by Mr Burt and Mr Bertrand and their reactions to it

114. In advance of each board meeting of the Fund, Centaur prepared an Administrator's Report for consideration by the board. Each Administrator's Report covered a period that ended a month or so before the date of the relevant board meeting.

115. The first board meeting at which Mr Burt and Mr Bertrand were shown an Administrator's Report that referred to the Fund holding any investments in commercial paper took place on 24 February 2015. Neither Mr Burt nor Mr Bertrand raised any concern, minuted or otherwise, that the Fund was investing in commercial paper.

116. The Administrator's Report for a board meeting on 19 May 2015 covered the period from 1 February 2015 to 30 April 2015. That report also stated that the Fund held unlisted securities consisting of commercial paper. Neither Mr Burt nor Mr Bertrand expressed a concern, minuted or otherwise, to the effect that the Fund should not be investing in commercial paper. However, during a board meeting, Mr Burt asked the representative of Centaur who was present to ensure that, going forward, the Administrator's report included a confirmation as to whether the Fund held any Level 3 investments (as defined in the ASC 820 accounting standard that I have mentioned in paragraph 37. above).

117. The Administrator's Report for the board meeting of 13 October 2015 covered the period from 1 February 2015 to 31 August 2015 and noted that the Fund was invested in unlisted commercial paper. Mr Burt's request from the previous meeting had been overlooked as the Administrator's report did not mention that the assets concerned fell within "Level 3". However, during the meeting on 13 October 2015 itself, Mr Burt asked Centaur's representative at the meeting, a Mr Frias, what the position was. Mr Frias was able to consult records during that meeting and confirmed to the board that 80% of the Fund's assets were invested in "Level 3" investments consisting of the KAM CP.

118. Mr Burt reflected on the matter further after the board meeting of 15 October 2015. He emailed HVK, copying Mr Bertrand, expressing surprise that such a large percentage of the Fund was invested in illiquid Level 3 investments. He requested confirmation from HVK that the KAM CP was "short term commercial paper" that fell within the definition of "money market instruments". He asked HVK whether investors had previously expressed any disquiet about the presence of such a large Level 3 holding and wondered whether Jefferies might be able to offer other liquid investments which "fit better without reducing yield". That email exchange led Centaur asking Grant Thornton whether the KAM CP really was a Level 3 investment for the purposes of ASC 820 and Mr Bertrand recorded Grant Thornton's response as follows:

> *please note that this has been discussed with [Grant Thornton] and they are level 3 assets but the not the [sic] type of level 3 assets that investors should be worried about.*

119. I accept that the initial reactions of Mr Burt and Mr Bertrand suggests that neither thought that the investment of the Fund's money in illiquid assets was prohibited. However, I am unable to accept HVK's suggestion that their reaction demonstrates a lack of concern about the Fund's precise investment objectives. Nor am I able to accept his suggestion that their reaction demonstrates that they would have been quite content to be directors of the Fund even if they had known from the beginning that it would be investing in the KAM CP. Mr Burt, in particular, clearly did have concerns about the KAM CP. The fact that, presented with a *fait accompli*, those concerns were allayed following some kind of discussion with Grant Thornton says relatively little about how he or Mr Burt would have responded if, right at the beginning, they had been told that the Fund proposed to invest a significant proportion of its assets in the high-risk, illiquid commercial paper.

Whether either HVK or BP sought to hide OPC's relationships with Kingsway or the Fund's investments in KAM CP?

120. I have concluded that there was no attempt to cover up the fact of the Fund's investments in the KAM CP from the point at which they were made. OPC made Centaur aware of the Fund's investment in KAM CP, as demonstrated by the preparation of Administrator's Reports showing holdings of illiquid commercial paper. Nevertheless, the Fund argues that both BP and HVK hid their relationship with TP and the Consortium because they wished to hide their ulterior purpose for procuring the Fund to invest in KAM CP.

121. On 15 October 2014, TP sent an email to Mr Gavan McGuire of Centaur. In that email, TP referred to his perception that Mr McGuire was "working with Hugo Vankuffeler from OPC to facilitate a money market cash movement program to work with us through the issuance programme we have with Citibank". TP explained that the money he hoped to receive would be used to secure hospital sites to be placed in a real estate investment trust ("REIT"). TP suggested that he and Centaur might have opportunities to work together, and closed his email by hoping that the money market instrument could be "in place PDQ".

122. With hindsight, it is clear that the email was referring to TP's expectation that the Fund would be investing in KAM CP. However, Mr McGuire found the email confusing, and emailed HVK to ask how it related to the Fund. HVK's response was as follows:

> *He has got totally carried away and caused a bit of confusion. The money market instruments for the Cayman Fund could potentially be replicated by Trevor's REIT… I am not q sure what he is talking about here either! He is a 'character'.*

123. The Fund characterises HVK's response as misleading. I do not agree. TP's email was rambling. HVK could be forgiven for not understanding what business opportunities TP saw for Kingsway and Centaur to work together. Importantly, HVK did not deny the possibility that the Fund might invest in commercial paper issued by Kingsway. On the contrary, his email referred to "money market instruments for the Cayman Fund" which, when read together with TP's email confirmed that the Fund was considering an investment in KAM CP. There would have been no point in hiding this from Centaur given that Centaur would inevitably find out about any investment in KAM CP for the purposes of calculating the Fund's net asset value.

124. I attach little significance to a further "cover up" the Fund alleges. As noted in paragraph 118. above, when Mr Burt discovered that 80% of the Fund's net asset value was in Level 3 investments, he asked HVK whether investors had previously expressed

any concerns about this issue. The Fund argues that HVK's answer, to the effect that investors had raised no issues was disingenuous because HVK must have known that investors had not been told about the KAM CP. I reject that interpretation as applying undue hindsight to an email in which HVK simply answers a question that Mr Burt put to him.

125. The Fund also supports its allegation of a cover-up with discussions that HVK had with Fleming Family and Partners on or around 26 November 2015 about a possible investment in the Fund. On this date, Montsol had submitted its redemption request (see paragraph 38. above) but the Fund had not met that request since it was relying on Kingsway paying redemption proceeds on the KAM CP that fell due at the end of December 2015. Following that email, HVK sent an email to BP recording some questions that he had been asked:

> *There were a number of questions around the short-term money market instruments that the fund invests in which we have previously described is completely liquid. As per the recent redemption requests (have the October redemptions in the fund been completed?), Is it fair to say that they are not as liquid as the index futures we trade? If so do we know the true liquidity of KAM?*
>
> *KAM was not discussed but just that the fund's cash was invested in short-term European debt but it occurred to me that if there is a disparity between the liquidity of KAM and the liquidity of the index futures we trade, do we need to state this in the marketing of the fund? In fact is it not fair to say that the liquidity of the short-term debt is the only liquidity that is relevant to investors?*

126. The Fund argues that HVK's statement that "KAM was not discussed" was intended as a reassurance to BP that he had not mentioned a topic that was sensitive and secret. It also argues that HVK crafted the email carefully to give the impression that he had previously been unaware that the lack of liquidity of the KAM CP was such a problem. I do not draw either conclusion from this email. I interpret the statement that "KAM was not discussed" as simply indicating that the discussions with Fleming Family and Partners took place at a general level and were not concerned with specifics. I also take the email at face value as demonstrating that HVK was only then starting to be aware (perhaps in the light of the overdue Montsol redemption request) of the real problems posed by the fact that the Fund was so heavily invested in the illiquid KAM CP. That interpretation is consistent with HVK's experience of investment funds, liquidity and related issues growing over time.

127. After Kingsway defaulted in its obligation to redeem tranches of the KAM CP, Mr Burt and Mr Bertrand became suspicious that there might be some concealed relationship between BP and Kingsway. On 30 May 2016, Mr Bertrand emailed BP to ask if there were any "contracts, agreements, arrangements, guarantees, commitments, loans or payments between [BP]… Trevor Price, KAM and/or any other associated or related parties to the aforementioned with you, Old Park Capital Ltd and/or the Fund which have not been disclosed to the Board?". BP responded with a simple confirmation: "No, there aren't any".

128. The Fund argues that BP should, in response to this email, have disclosed the arrangement for the Fund to subscribe for the KAM CP and the Consortium. However, Mr Bertrand asked his question on 30 May 2016. By that time, any arrangement or understanding that the Fund would invest in KAM CP had been overtaken by the actual investments, some of which had defaulted. BP could quite reasonably have taken the

email to be asking about current arrangements, rather than previous ones. Since KP (Hull) was in a poor situation in April 2014, I have inferred that it was unlikely to be any material source of fees to OPC in May 2016. I do not consider that there was any "concealment" in BP not referring to that project in his response. As I have concluded, there were no other projects involving the Consortium from which OPC would derive a benefit, so I do not consider that there was a "cover-up" in BP failing to mention the Consortium.

129. In a similar vein, the Fund criticises HVK for failing to be "forthright and inform his fellow directors what he knew" after Mr Bertrand started asking his questions. That criticism was made by reference to specific emails in which, it was said, HVK did not give a full account of what he knew. However, there is a danger in taking exchanges such as this out of context and viewing them through the prism of hindsight. A number of the emails relied upon were dealing with specific issues and it is not clear that they were inviting or requiring HVK to share his own impressionistic observations on the extent to which BP knew, or dealt with, TP. In any event, HVK did inform Mr Bertrand that BP had strong relationships with "the past and present directors of Kingsway" (which would have included TP)..

130. Therefore, there was no "cover-up" of the kind discussed in this section. That is consistent with my conclusion that there was no "Undisclosed Purpose" to cover up. That said, there was an omission, in the Offering Memorandum issued before the Fund's launch consisting of an absence of any reference to Kingsway or the proposed investment in the KAM CP. The nature and consequences of that omission are considered later in this judgment.

The proper construction of the Offering Memorandum

131. Page 3 of the Offering Memorandum contained a paragraph in bold and in block capitals making it clear that investment in the Fund carried risk with a specific reference to a "Risk Factors" section.

132. After a section that listed the various service providers to the Fund, and a section that set out defined terms used throughout the Offering Memorandum, there was a section headed "Summary". Three paragraphs of that summary were grouped under the heading "Investment Objective and Strategy" and read as follows:

> *The investment objective of the Company is to provide investors with good absolute returns over the medium term. There is no guarantee that the Company will meet this objective.*
>
> *Subject to the Investment Restrictions and Guidelines set out herein, the Company will carry out its investment objective via the Maestro Investment Strategy, which is a systematic trading program that arbitrages the daily variation in the valuation of highly liquid exchange-traded index futures over a number of time zones. More specifically, the Maestro Investment Strategy aims to exploit the opportunities created by the extended trading session for futures contracts i.e. the fact that futures contracts trade during a longer time period of the day than the underlying markets.*
>
> *The Company will only invest in liquid exchange traded futures and money market instruments. It will trade foreign exchange instruments, both spot and forward, solely for the purpose of hedging exchange rate and currency risk.*

133. It is common ground that commercial paper generally (and so the KAM CP specifically) answers to the definition of a "money market instrument". The debate between the parties on the meaning of the Offering Memorandum involved, in large part, a disagreement as to the meaning of the last paragraph quoted above. The Fund argues that, in the first sentence, the adjective "liquid" must relate both to "exchange traded futures" and to "money market instruments" with the result that the Fund simply was not permitted to invest in any illiquid money market instrument. BP and HVK argue that the word "liquid" applies only to "exchange traded futures" with the result that investment in an illiquid money market instrument is permitted.

134. That debate cannot be resolved simply by reading the three paragraphs that I have quoted, not least since the Offering Memorandum itself makes it clear that the summary is derived from, and must be read in conjunction with, the full text of the Offering Memorandum. However, before considering inferences that can be drawn from the remainder of the Offering Memorandum, I consider indications that can be drawn from the three paragraphs that I have quoted.

135. It is significant that the second paragraph of the summary is describing the Maestro strategy. However, as I have pointed out in paragraph 33., it was not possible for the Fund to pursue Maestro on its own. That was because pursuing the Maestro strategy necessarily brought with it the Cash Management Issue. It was, therefore, common ground that, in referring to "money market instruments" in the third paragraph of the summary, the Fund was referring to the investment of surplus cash which the Fund describes as the "essential plumbing" that lay behind Maestro. Accordingly, the fact that the Maestro strategy (described in the second paragraph of the summary) involved only "highly liquid" instruments does not compel the conclusion that the "money market instruments" described in the third paragraph would similarly be liquid or highly liquid. That conclusion is reinforced by the fact that the Offering Memorandum was addressed to sophisticated investors. Such investors would, as Mr Powell accepted in cross-examination, have well appreciated that a fund pursuing the Maestro strategy would have to address the Cash Management Issue as well.

136. The Fund makes three points in support of its argument that the Offering Memorandum permitted investment only in liquid money market instruments:

    i) It argues that this is the only reasonable reading of the third paragraph. In his submissions on behalf of the Fund, Mr Cohen argued that, if a greengrocer advertises "fresh fruit and vegetables" a customer would not expect mouldy potatoes. However, that does not advance the debate greatly. Mr Cohen's hypothetical customer would not expect either the fruit or vegetables to be mouldy. Yet in the present case, as Mr Powell agreed in cross-examination, some "money market instruments" are, quite legitimately, not liquid. As a matter of ordinary language, therefore, the word "liquid" could qualify only "exchange traded futures" or it could relate also to "money market instruments". Both meanings are possible so context and other indications determine which meaning is to apply in this situation.

    ii) It argues that it would be nonsensical for the Offering Memorandum to promise, with the right hand, liquidity in respect of exchange traded futures but then to take that away with the left hand by permitting investment in illiquid money market instruments. That is just another way of making the argument summarised in paragraph i) above. Whether the outcome is as "nonsensical", as the Fund argues, reduces to an analysis of the same considerations of context as are identified in that paragraph.

iii) The Fund's strongest argument is that the question of construction has to be determined in the context of a Fund that was promising investors the ability to redeem their entire investment on just two business days' notice.

137. There is a difficulty even with the Fund's strongest argument. It would not be impossible for the Fund to offer investors the right to redeem on just two business days' notice even if it held some illiquid money market instruments. If, for example, the Fund had 20 investors, investing £500,000 each, there would not necessarily be a liquidity issue if the Fund invested £10,000 in a highly illiquid money market instrument. Certainly, there might be an issue if all investors requested a return of their investments within a short period of each other, but that might be considered unlikely.

138. Of course, the profile of the Fund's investments and investors was very different from the example I have given. There were periods during which the Fund had either just a single investor or a handful of investors. The Fund's investments in the KAM CP came to represent a large percentage of its total assets. However, the question of construction of the Offering Memorandum cannot be determined by events that took place after the Offering Memorandum was issued.

139. I do not consider that it would be "nonsensical" if the word "liquid" did not apply to "money market instruments". Mr Powell accepted in cross-examination that the word "liquid" would be understood by a skilled investor as referring to investments that are regularly traded in sufficient volume that a person going to market wishing to buy or sell that instrument could be assured of the ability to do so. There was a compelling reason why the "exchange traded futures" needed to be "liquid" in that sense. The whole point of the Maestro strategy was to deal extremely frequently and over a very short-term, with financial futures. Accordingly, it was not enough for the financial futures to be "exchange traded" since even exchange traded instruments can be illiquid (for example certain shares listed on the Alternative Investment Market). By contrast, there was no logic for providing that every investment in a money market instrument, however small, had to be "liquid" since the function of those money market instruments was to address the Cash Management Issue. The Fund could operate, even with some investments in illiquid instruments, provided that the liquidity profile of its investments was carefully monitored, a point made in the following extract from the Offering Memorandum:

> *to the extent required by the AIFM Regulations, the Investment Manager shall employ an appropriate liquidity management system and adopt documented procedures to enable it to monitor the liquidity risk of the Company and seek to ensure that the liquidity profile of the Company's investments enable the Company to meet redemption requests in normal circumstances.*

140. Moreover, as Mr Powell's expert evidence demonstrated, "money market instruments" can include instruments that are "illiquid" in the sense he identified. Many make up for this lack of liquidity by having a short maturity: giving a holder confidence that, even if the investment cannot be sold, it is due to be redeemed soon. A restriction to investment in "liquid" money market instruments might, therefore, exclude short-dated but entirely untraded instruments. That might produce a rather counter-intuitive outcome of excluding an "illiquid" but "cash like" investment. There were many ways of restricting the scope of eligible money market instruments without invoking the concept of "liquidity". For example, a maximum duration might be specified, or commercial paper required to have a particular credit rating.

141. There were indications in the Offering Memorandum that illiquid investments were permitted. In a section dealing with risk factors, the Offering Memorandum stated that the Fund "may invest some or part of its assets in investments which may be or become illiquid". This, therefore, was addressing a risk that an investment might "be" illiquid from the moment that it was made, as well as a risk that a previous liquid investment might "become" illiquid. Such a warning would be redundant if the Fund simply was not permitted to invest in illiquid securities at all.

142. The Offering Memorandum contained methodology dealing with how the net asset value of the Fund should be calculated to the extent that investments include "securities which are not freely transferable, or which are not regularly traded, or which for any other reason are subject to limited marketability". That provides a similar indication to that set out in paragraph 141.. However, the indication is of less force, since it might be needed even if the Fund could not invest in securities that were illiquid at the time of investment, to deal with the situation where a previously liquid investment ceases to be freely transferable or regularly traded.

143. Having weighed up the competing indications, I have concluded that there was no absolute bar on the Fund investing in illiquid money market instruments. However, the Fund was obliged to have due regard to the requirement to meet redemption requests on two business days' notice. The Fund was, therefore, required to use judgment when making such investments, or when deciding to continue to hold them, with a view to ensuring that redemption requests could be met.

PART C – THE CLAIM IN DECEIT

The applicable legal principles

144. It is common ground that the following conditions must be satisfied for the Fund to make a successful claim in deceit (see [251] of the judgment of Rix LJ in *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601

    i) HVK and/or BP must have made a representation to the Fund;

    ii) that representation must be false;

    iii) that representation must be dishonestly made;

    iv) the person making the representation must have intended it to be relied on and the representation must have, in fact, been relied upon; and

    v) the Fund must have suffered loss in consequence.

The existence or otherwise of a "representation"

145. The Fund's case advanced in its closing submissions is that HVK and BP made the following representations on the following occasions:

    i) During the launch Board Meeting, HVK represented to the Fund that the relevant passages in the Offering Memorandum "accurately and completely described the Fund's investment objectives and the investment approach that the Fund would adopt".

    ii) Although the words set out in paragraph i) above were spoken by HVK at the Board Meeting, at which BP was not present, those words nevertheless

constituted representations made by BP because BP had substantially settled the drafting of the Fund's investment objectives and investment approach in the Offering Memorandum and knew that the Offering Memorandum was to be presented for approval at that board meeting.

iii) In addition, the acts of BP in drafting the sections of the Offering Memorandum dealing with investment strategy and investment approach, knowing that those drafts would be shared with, and ultimately approved by, the directors of the Fund constituted a representation to the effect that the description he drafted was both accurate and complete. HVK's act in sharing drafts of the Offering Memorandum with directors constituted a representation to similar effect.

iv) All of the representations that I have summarised in paragraphs i) to iii) above concern the investment strategy and approach of the Fund as set out in the Offering Memorandum. I will refer to them together as "Investment Strategy Representations" without distinguishing, unless necessary, between representations said to have been made by HVK and representations said to have been made by BP.

v) Both before and during the Board Meeting, both BP and HVK confirmed to Mr Burt and Mr Bertrand, in their capacities as directors of the Fund, that the Fund would pursue only the Maestro strategy. They did so either at meetings with Mr Burt and Mr Bertrand or by causing them to receive drafts of the Offering Memorandum which referred only to the Maestro strategy without mentioning what the Fund describes as "Undisclosed Purpose". I refer to these representations as the "Maestro Only Representations".

vi) In addition, both BP and HVK caused the Offering Memorandum to contain a statement that the Fund's money would be used only for the purchase of money market instruments that were "liquid". By doing so, they made a representation to the Fund which I will describe as the "Liquidity Representation".

146. The representations on which the Fund relies were made at a time when BP was an employee of OPC. There was some debate as to whether HVK was an employee of OPC or whether he was a self-employed contractor. However, that does not matter greatly since in either case HVK clearly had some authority to act as OPC's agent. If other torts were in issue, it might be necessary to consider whether BP or HVK made any representations as OPC's agent rather than in their own personal capacities. However, it was common ground that, in the case of a claim in deceit, nothing turns on that question. Even if HVK and BP were acting as agents of OPC when they made any representations, that would simply raise the question of whether OPC is <u>also</u> liable (whether vicariously or as principal) for any misrepresentation that they made. Even if both HVK and BP were acting as agents for OPC when they made fraudulent misrepresentations, that would not save them from personal liability. As Lord Hoffmann said at [22] of *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43:

> *no one can escape liability for his fraud by saying, I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.*

<u>The Investment Strategy Representations</u>

147. For the following reasons, I have reached the conclusion that, at the Board Meeting, both HVK and BP made the following representation to both Mr Burt and Mr Bertrand

in their capacities as directors of the Fund and thereby made those representations to the Fund itself:

> *The relevant passages in the Offering Memorandum accurately and completely described the Fund's investment objectives and the investment approach that the Fund would adopt*

148. Paragraph 20 of the minutes of the Board Meeting record that a number of draft documents, including a draft of the Offering Memorandum were produced to the meeting and that the Directors considered those documents and reviewed them in detail. Paragraph 20.7 records that the directors noted the responsibility statement in the Offering Memorandum. The directors also noted the requirement to ensure that the Offering Memorandum contains all information necessary to enable investors to make an informed decision as to whether or not to invest.

149. Paragraphs 20.8 and 20.9 of the board minutes are central to the Fund's case on Investment Strategy Representations and I quote them in full:

> *20.8 It was noted that the Company proposes to invest its assets in future contracts, foreign exchange instruments, both spot and forward and money market instruments via the Maestro Investment Strategy which is a systematic trading program that arbitrages the daily variation in the valuation of highly liquid exchange-traded index futures over a number of zones.*
>
> *20.9 The Directors then proceeded to review the entirety of the Offering Memorandum carefully. In particular, they noted the investment objective, the description of the investment approach and the investment restrictions. It was noted that Mr. van Kuffeler who is a principal of the Investment Manager had confirmed that he was satisfied that the referenced descriptions accurately and completely described the investment objectives of the Company and the investment approach which will be adopted. The Directors discussed the investment approach in detail. The Directors also reviewed in detail the risk factors and it was confirmed that each of the risk factors was appropriate. to the investment objective and approach of the Company and that there were no other risk factors which ought reasonably be brought to the attention of potential investors.*

150. Following the discussion and review minuted in paragraphs 20.8 and 20.9, the directors of the Fund passed several board resolutions. Significantly for the purposes of the Fund's claims in deceit, they resolved to approve and issue the Offering Memorandum and to appoint OPC as investment manager under the terms of the draft IMA that had been produced to the meeting.

151. It was not suggested that paragraphs 20.8 or 20.9 were anything other than an accurate record of proceedings at the Board Meeting. The natural and ordinary reading of the third sentence in paragraph 20.9 is that it contains a representation made by HVK to the effect that the description of the investment objective, investment approach and investment restrictions contained in the draft Offering Memorandum was both accurate and complete. HVK does not describe the confirmation that he gives as being a mere forwarding on of a confirmation given by BP. Nor could the representation reasonably be read in that way. The whole point of the representation is that it is given by HVK as a "principal of the Investment Manager" who was in a position to know about the relevant matters. The statement recorded in the third sentence of paragraph 20.9 was, accordingly, a representation made by HVK.

152. HVK argues that statements set out in the Offering Memorandum are incapable of amounting to representations made by him to either the Fund or its directors since the whole point of the Offering Memorandum is that it contains representations made by the Fund to investors in order to solicit investment. I will consider that argument further later in this judgment since HVK deployed it in connection with other representations he is said to have made. However, this argument does not vitiate the conclusion I have set out in paragraph 151.. That is because the representation identified is not contained in the Offering Memorandum at all. Rather, it is a representation to the effect that statements that are contained in the Offering Memorandum are both accurate and complete.

153. The minutes of the Board Meeting were, as is common, prepared in advance. HVK would, therefore, have seen that he was being asked to give a confirmation as to the completeness and accuracy of the description of the Fund's investment strategy and approach. In advance of that meeting, HVK would have checked with BP that the confirmation could be given. I infer from the fact that HVK gave his confirmation at the Board Meeting that BP told him the confirmation could properly be given. I consider these inferences to be correct for the following reasons:

    i) HVK had no investment management experience of his own and nor did he understand the detail of how the Maestro investment strategy would be implemented. He would not have given a confirmation that strayed outside his area of expertise without checking with BP.

    ii) HVK's pleaded case set out in paragraph 14B of his Re-Amended Defence was that he genuinely believed that the Fund's strategy would be as set out in the Offering Memorandum and that he relied on BP's professional judgment to the effect that an investment in KAM CP was proper. If BP wished to assert that HVK gave the assurance at the Board Meeting without obtaining any confirmation from BP, he should have raised it either in his own evidence or in cross-examination of HVK. He did not do so.

    iii) BP's defence to the deceit claim involves no denial that he made a representation to the Fund. His case is that the representations were true.

154. No doubt the principle would be differently expressed in a modern judgment, but the following statement of Page Wood V-C in *Barry v Croskey* (1861) 2 J & H 1, at 23, remains good law:

> *Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss.*

155. Therefore, in my judgment both BP and HVK gave Investment Strategy Representations at the Board Meeting. HVK gave the representation by speaking the words at the Board Meeting. BP gave the representation by confirming to HVK that HVK could give the confirmation that was to be sought at the Board Meeting knowing that the Fund would act on that confirmation. (See also the later discussion below on "intention to induce".)

156. For completeness, I find (again noting that BP's pleaded defence does not involve any denial that the Investment Strategy Representations were made) that BP's continued work in providing drafting for the Offering Memorandum setting out the Fund's

investment strategy and approach constituted a representation, made to the Fund, of both the accuracy and the completeness of what was being said in the Offering Memorandum. That follows from the fact that both BP and the Fund knew that the Offering Memorandum was to be used to solicit investments from third parties. Neither the Fund nor BP could have expected that an incomplete or inaccurate description in the Offering Memorandum would be sufficient. Since it does not matter for the purposes of the remaining discussion whether BP's Investment Strategy Representations were those given at the Board Meeting or those given by conduct during the course of preparing the Offering Memorandum, I will simply refer to both his and HVK's representations compendiously as "Investment Strategy Representations" in the analysis that follows.

Maestro Only Representations

157. To a significant extent, the asserted Maestro Only Representations overlap with the representations that I have found to be made as outlined in paragraph 147. above. The Offering Memorandum noted that, subject to the Investment Restrictions and Guidelines, the Fund would carry out its investment objective "via the Maestro Investment Strategy". Therefore, if the Fund proposed to engage in an investment strategy other than Maestro, the description of the investment strategy set out in the Offering Memorandum would not be "complete" and so the Investment Strategy Representation would be incorrect for that reason.

158. While noting that overlap, I conclude that neither HVK nor BP made any separate Maestro Only Representation. I reach that conclusion because pursuing the Maestro strategy necessarily brought with it the Cash Management Issue. For that reason, the concept of "Maestro only" was not sufficiently well defined to be the subject of a representation since pursuing Maestro inevitably required the Fund to pursue a strategy that addressed the Cash Management Issue as well. Accordingly, any Maestro Only Representation would have been focused on the quite nebulous concept of whether the additional strategy in question was sufficiently linked to Maestro or not. I am not satisfied that BP or HVK made any such representation.

159. Moreover, as Mr Powell accepted in cross-examination, anyone with the sophistication necessary to consider an investment in the Fund would realise that the Cash Management Issue was a by-product of Maestro that needed to be addressed and I have concluded that both Mr Bertrand and Mr Burt would have realised this as well. Accordingly, neither Mr Bertrand nor Mr Burt could have concluded that HVK or BP were making any separate Maestro Only Representation. Nor did the Offering Memorandum contain any such free-standing representation although it did contain the same assurance of completeness and accuracy as that HVK and BP gave when making the Investment Strategy Representations.

Liquidity Representations

160. I have concluded that neither BP nor HVK made any Liquidity Representations. As I have explained, the Offering Memorandum permitted the Fund to invest in illiquid money market instruments. Therefore, to make the Liquidity Representations, BP and HVK would need to confirm that, despite the power afforded by the Offering Memorandum, the Fund would not invest in illiquid money market instruments.

161. By the Investment Strategy Representation BP and HVK confirmed that statements in the Offering Memorandum were true and complete and described what would happen in practice. The Liquidity Representation, if given, would have been inconsistent with

the Investment Strategy Representation since it would involve a confirmation that a facility afforded by the Offering Memorandum would not be followed in practice.

162. The Fund has sought to establish that, whatever the Offering Memorandum said, HVK believed, and represented, that the Fund would invest only in liquid money market instruments. However, the evidence for that proposition was slender. I was shown a Due Diligence Questionnaire, prepared by OPC to assist third parties in undertaking due diligence on OPC in connection with an investment in the Fund. Paragraph 1.6.8 of that document referred to investments that the Fund would make including "Euro Stoxx 50 futures traded on Eurex", "money market" instruments as including "short-term treasury bills and high quality ECP". The document goes on to say that the Maestro investment strategy utilises only the "investment instruments (specified above)". HVK prepared this document, but it is equivocal. It can be read simply as confirming the instruments that would be involved in implementation of the Maestro strategy (as distinct from the instruments to be employed in "cash management"). I am not satisfied that it was given to the directors of the Fund. Moreover, the document lacks any clear statement that, even though the Fund had power to invest in illiquid money market instruments, it would not exercise that power.

163. Moreover, there was no reason for HVK to give a Liquidity Representation prior to July 2014. As the "dawning realisation" email that I have referred to in paragraphs 125. and 126. makes clear, HVK was only starting to realise in November 2015 that the lack of liquidity in the KAM CP could be problematic. It would not make sense for him to be giving Liquidity Representations in July 2014 to reassure the Fund's directors on a problem of which he was not then aware.

164. The witness evidence of Mr Sherwin, Ms Ludgate and Mr Collin contained some suggestions that BP and possibly HVK may have made statements to them as to the "liquidity" of the Fund. However, the Fund has not invited me to conclude that BP and HVK made Liquidity Representations to potential investors and so must have made the same representations to the Fund. No doubt that was because the evidence from Mr Sherwin, Ms Ludgate and Mr Collin on this issue was equivocal. In cross-examination on behalf of HVK, Mr Sherwin seemed at first to suggest that BP told him that the Fund would address the Cash Management Issue by holding liquid T-bills and gilts, but accepted in cross-examination by BP that the Cash Management Issue was never discussed. Ms Ludgate had not read the Offering Memorandum and so could not say whether she had been told that, despite the provisions of the Offering Memorandum, the Fund would not invest in illiquid money market instruments. Mr Collin's contemporaneous analysis of what went wrong with the Fund did not include any suggestion that it had impermissibly invested in commercial paper.

165. I have concluded that BP made no Liquidity Representation to the Fund either. That is essentially because there was no reason for him to think he needed to. While I have rejected the proposition that Mr Burt and Mr Bertrand were "entirely unconcerned" with the Fund's investment objectives (see paragraph 119.) I conclude that they did not suggest that they needed to be assured that the Fund would invest only in liquid money market instruments. That is consistent with the way in which Mr Burt and Mr Bertrand reacted on discovering that the Fund was heavily invested in illiquid Level 3 instruments: neither suggested that they had been lied to. BP's ends were appropriately advanced, as I will describe later in this judgment, by ensuring that the Fund had power to invest in KAM CP. He did not need to take an additional step of saying that this power would not in practice be exercised to achieve his aim.

Falsity

166. I consider the question of falsity by reference only to the Investment Strategy Representations set out in paragraph 147. above since those were the only representations I have found to be made.

167. The Offering Memorandum did not "completely" describe either the investment objectives of the Fund or the investment approach that it would adopt. The description in the Offering Memorandum was incomplete because it failed to mention that the Fund would, in practice, invest in KAM CP. That the Fund had the power to invest in illiquid money market instruments generally is no answer to this falsity. Viewed objectively, the Offering Memorandum was not just setting out a list of investments that the Fund could in theory acquire. Its function was also to inform investors of what would happen in practice. For the description of the "investment approach" set out in the Offering Memorandum to be "complete" it needed to refer to all material investments that it was contemplated the Fund would actually make. That is particularly the case given that the KAM CP was of such a different character from the equity futures that would be bought and sold as part of the Maestro strategy.

Dishonesty

168. The parties were agreed that the test of dishonesty is that set out in *Derry v Peek* (1889) 144 App. Cas. 337. The requisite "dishonesty" will be present if BP or HVK made their representations either (i) knowing that they were false or (ii) recklessly, not caring whether they were true or not. Provided either of these requirements is met, there is no separate requirement for BP or HVK to have an "intention to deceive". Such an intention might well be present if a person gives a representation dishonestly with the intention that the recipient should rely upon it, but it is not a separate ingredient of the tort of deceit.

169. Perhaps inevitably given the nature of this dispute, the Fund has made a number of criticisms of the integrity of BP and of HVK. It is, however, important to bear in mind that the court's task is not to conduct a general review of the defendants' conduct. Rather, the focus should be on their state of knowledge as to the truth or otherwise of the specific representations that they made. No doubt aspects of their wider behaviour can shed a light on that state of knowledge. However, that state of knowledge, rather than their conduct generally, is the target of the court's enquiry.

Dishonesty or otherwise of HVK

170. I have concluded that HVK did not make his Investment Strategy Representation dishonestly. That is because he had a genuine, if mistaken, belief that the Offering Memorandum said everything that needed to be said about the Fund's investment strategy and approach.

171. The sections of the Offering Memorandum dealing with the Fund's investment strategy and approach were drafted by BP (see paragraphs 22. and 28. above). HVK was therefore confronted with a description of investment strategy and approach drafted by BP, who had expertise on investment management and trading that HVK lacked. That description permitted the Fund to invest in illiquid money market instruments such as commercial paper. HVK knew that the Fund had specific commercial paper, to be issued by Kingsway, in mind but the description in the Offering Memorandum did not give any detail on that commercial paper. I am quite prepared to accept, and find as a fact, that HVK genuinely believed that, since BP had not found it necessary to refer to the KAM CP when drafting the relevant provisions of the Offering Memorandum, the

KAM CP did not need to be mentioned. That genuine belief is inconsistent with dishonesty.

172. The Fund argues that I should infer that HVK gave his representation dishonestly from a combination of other factors. First, it is said that HVK was involved in concealing the fact that the Fund was investing in the KAM CP or the relationship between OPC and Kingsway. However, as I have explained in paragraph 130. above, I am not satisfied that HVK was involved in "concealment" of this kind.

173. Next, the Fund argues that HVK knew of what it describes as the "Undisclosed Purpose" and, realising that it gave rise to a wholly inappropriate conflict of interest, did not mention the glaring omission of anything to do with Kingsway in the Offering Memorandum. In paragraphs 98. and 100. above, I have explained why, in my judgment, HVK was not aware of the conflict of interest in question and why the pleaded "Undisclosed Purpose" was not present. HVK was aware, as I have found, of the arrangement that the Fund would invest in KAM CP. However, I have explained in paragraph 171. why this awareness did not cause his representation to be given dishonestly.

174. The Fund also submits that HVK knew that BP had a habit of hiding inconvenient truths and so could not have relied on any perception of BP's probity in drafting the Offering Memorandum. Reference was made to situations in which, after the Fund launched, to HVK's knowledge BP stopped sending investment updates to investors in the Fund during periods when the Maestro strategy was not performing well. It was suggested that HVK knew BP was telling investors that OPC had more assets under management ("AUM") than it actually had in order to attract investors. There was an email on 9 March 2015 in which HVK commented to a friend of his that BP had "never been anyone to deliver anything with integrity or in a timely manner".

175. I agree that BP, on occasions, overstated OPC's AUM and sought to downplay bad news. However, I am not satisfied that HVK's awareness of this tendency would have caused him to doubt the accuracy or completeness of the description of the Fund's investment strategy and approach that BP had set out in the Offering Memorandum. Even though there were occasions on which HVK realised that BP's behaviour was flawed, BP remained the investment professional who knew what should be set out in an Offering Memorandum. HVK deferred to that expertise. HVK said in cross-examination that, despite his differences with BP, he would have trusted BP to invest his money sensibly. I believe that evidence. HVK's conscious deferring to BP's expertise also explains why the representation was not given recklessly: HVK did care that his representation be true and took BP to be providing reassurance that it was.

Dishonesty or otherwise of BP

176. For the reasons that follow, I have concluded that BP knew that the Offering Memorandum did not completely and accurately describe the investment approach that the Fund would adopt. I have therefore concluded that he made the Investment Representations dishonestly.

177. BP was marketing the Maestro strategy to potential investors as producing high returns as demonstrated by an analysis that Ms Ludgate prepared on 16 October 2014 for the purposes of helping Montsol to decide whether to invest. Moreover, while hedge funds often limit the frequency with which investors can redeem, the Fund was not imposing such a limit, instead offering investors the chance to redeem on two business days' notice. That was a bold and attractive sales pitch.

178. The difficulty, however, was that the size of the position that the Fund could take when implementing the Maestro strategy was constrained. It was precluded by its investment guidelines from taking on leverage through borrowings. Therefore, it could only invest 100% of its net assets in the Maestro strategy. To achieve that level of investment, the Fund could trade on margin and so invest 10% of its assets in financial futures through a prime broker that gave it exposure of around 10 times the amount invested. The remaining 90% or so of the Fund's assets had to be "cash managed". The problem that BP faced was that, if that 90% was invested in highly liquid money market instruments, they would provide little by way of return. In his oral evidence, Mr Powell explained that liquid money market investments were, at the time, producing a virtually nil return. A cash management strategy that involved liquid money market instruments therefore ran the risk of diluting the eye-catching returns BP had indicated would be available.

179. For that reason BP concluded that the Fund would have to invest in assets that were more high-yielding for the purposes of its cash management strategy. He alighted on Kingsway as a possible issuer because of his previous dealings with TP. He ensured, when drafting the Offering Memorandum, that the Fund had power to invest in illiquid money market instruments. As I have explained earlier, BP knew that an investment in KAM CP would be high risk, but hoped that, risky though it was, it would not default and would provide the Fund with a level of return that did not dilute the returns from Maestro. That, in turn, he hoped would result in OPC earning investment management fees.

180. I have had witness evidence from Mr Sherwin, Ms Ludgate and Mr Collin that has demonstrated to me that the kind of investors that BP was seeking were not interested in investments that involved low liquidity or high risk lending to unrated issuers. Mr Collin put it neatly in his oral evidence when he explained that he viewed a fund that invested materially in illiquid commercial paper as a "credit fund" (in which he was not interested) rather than a "futures strategy fund" (in which he was).

181. BP has considerable experience in the financial markets. He must have known that investors such as Montsol would not be looking to OPC to supply an investment in a credit fund. In cross-examination, it was suggested that the investors had failed to read the Offering Memorandum carefully enough and should have realised that the Fund had power to invest in illiquid money market instruments. I do not need to decide that since, whether they read the Offering Memorandum carefully enough, BP knew what his target investors were interested in and that did not include KAM CP. Therefore, when the Offering Memorandum did not mention Kingsway, I am satisfied that this involved more than a mere oversight on BP's part. Instead, it represented a conscious decision designed not to deter investors by mentioning a feature that he knew would be unattractive to them.

182. It follows that, when BP gave the Investment Strategy Representation, which included a statement that the Offering Memorandum contained a <u>complete</u> description of the investment approach that the Fund would adopt in practice, BP knew that statement was untrue.

183. In an application for permission to appeal submitted before this judgment was handed down, but while the parties had a draft embargoed judgment, BP argued that the conclusions set out in paragraph 177. to 179. represented the court's own "third man" theory, which had not been pleaded by either party. I did not read that as being a suggestion that the judgment was inadequately reasoned (of the kind described in paragraph [51] of Smith LJ's judgment in *Darren Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002). However, in case that was an aspect of BP's criticism, I will

address it. The reasons why BP procured the Fund to invest in KAM CP are clearly relevant to the various claims that the Fund is advancing. The Fund's case was, in part, that the reason was BP and OPC's wish to "cash-flow the Consortium". I have rejected that explanation for reasons I have given earlier. The rejection of that theory left open the question of what BP's and OPC's true motivations were. BP, the individual who selected the investment, has not given witness evidence and, accordingly, necessarily his reasons have to be determined by inference from other available facts. I cannot speculate on what evidence BP might have given of his own motivations and intentions. BP's own case was that, with his knowledge of Kingsway's business, he thought the KAM CP was a good investment. There was ample evidence from investors in the Fund that the returns BP was offering were "eye-catching" since they were high and, unlike other hedge funds, the Fund was offering redemption on just two business days' notice. There was evidence from Mr Powell that returns from liquid money-market instruments at the time were almost non-existent. In circumstances where (i) BP's motivations are relevant (ii) the Fund's theory as to those motivations has been rejected but (iii) BP gave no witness evidence, I have inferred that BP procured the Fund to invest in KAM CP because he thought it would help the Fund to achieve the eye-catching returns whereas an investment in liquid money-market instruments risked diluting those returns. In any event, whatever BP's motivations for procuring the Fund to invest in KAM CP, I have concluded for the reasons given in paragraph 181. above that BP knew his Investment Strategy Representation was untrue when he gave it.

184. In his submissions, BP has not referred to material that suggests that the absence of material on Kingsway in the Offering Memorandum was an oversight. Rather, BP's case on the Offering Memorandum was that the Offering Memorandum permitted investments in illiquid money market instruments with OPC's task being to ensure that the liquidity profile of the Fund's investments was appropriately managed. I have largely accepted that case on the proper construction of the Offering Memorandum. However, it does not, in my judgment prevent BP's Investment Strategy Representation from being dishonestly given.

Reliance/inducement

185. In order for the requisite "reliance" to be present, the following conditions must all be satisfied:

    i) the representor must have intended the representee to act on the representation in the manner which resulted in the damage claimed.

    ii) the representee must, as a subjective matter, have understood and acted upon the representation in the sense in which it was false (see the judgment in the Court of Appeal in *Arkwright v Newbold* (1881) 17 Ch. D 301).

The intention to act on the representation

186. During the trial, there was a clear difference of opinion between the parties on the satisfaction or otherwise of this condition. HVK argued that statements in the Offering Memorandum were not capable of inducing directors or the Fund to act in any way. On the contrary, statements in the Offering Memorandum were representations made by the Fund and by the Directors with a view to introducing investors to acquire shares in the Fund.

187. Strictly, I do not need to consider this question in relation to HVK since I have found that he did not make any dishonest representation with the result that the question of inducement does not arise. BP did not, in his closing submissions, advance any similar

argument. However, since I have heard argument on the point and I can dispose of it relatively quickly, I will do so.

188. The only actionable misrepresentations that arise in this case are the Investment Strategy Representations. By those representations, BP and HVK confirmed the accuracy and completeness of statements in the Offering Memorandum. Those representations were made in the run-up to the Board Meeting at which OPC was seeking to be appointed as the Fund's investment manager. In my judgment, both BP and HVK intended the directors of the Fund to act upon the Investment Strategy Representations. That was implicit in the very structure of the Board Meeting. The Investment Strategy Representations were specifically referred to as a prelude to the Fund passing a number of resolutions (listed in paragraph 21 of the board minutes) that included the appointment of OPC as investment manager. I am satisfied that both BP and HVK intended the Fund to rely on the Investment Strategy Representations when making that appointment. It would, after all, make perfect sense for the Fund to wish to know the investment strategy and approach that OPC intended to adopt before appointing it as investment manager.

189. BP has argued in his recent closing submissions that he could not have made any Investment Strategy Representations to the Fund since Clause 9.2 of the IMA included representations, made by the Fund to OPC, going to the accuracy of the statements made in the Offering Memorandum. That submission fell outside the scope of BP's pleaded case: as I have noted, BP did not, in his defence to the claim in deceit, deny making representations with the requisite intention to induce, but asserted that the representations he made were true. I will not, therefore, permit BP to advance this argument. In any event, I regard it as weak. The fact that, once it had entered into the IMA, the Fund confirmed the accuracy of certain statements in the Offering Memorandum is not inconsistent with the Fund being induced to enter into the IMA by the Investment Strategy Representations.

190. In closing HVK suggested that the Investment Strategy Representations were given to directors in their personal capacities with a view to assuring them that they could safely undertake the personal responsibility for the contents of the Offering Memorandum that was set out in a "responsibility statement" at the beginning. Accordingly, it was argued that the Investment Strategy Representations were not intended to induce the Fund to act in any particular way. I reject that submission. I quite accept that Mr Burt and Mr Bertrand wanted to be reassured about matters going to their responsibility statement. However, ultimately they could only have that responsibility if the Fund passed the resolutions at the Board Meeting offering shares for sale and investing the proceeds of issue. The Investment Strategy Representations were intended to give the Fund comfort that it could safely pass those resolutions.

191. HVK correctly noted that the minutes of the Board Meeting were prepared in advance. However, I do not accept his argument that the board minutes were a "pre-scripted piece of drafting by the Fund's lawyers" with the result that BP and HVK cannot have intended any reliance to be made on statements contained in those minutes. I am satisfied that the board minutes reflected what happened at the Board Meeting which was a significant event in the Fund's life.

192. Nor do I consider it of great significance that the board minutes record each director as reviewing the risk factors in the Offering Memorandum and confirming that those risk factors were appropriate to the investment objective and approach. HVK argued that this demonstrated that each director was bringing his own independent mind to bear on the question rather than relying on assurances from BP or HVK. I do not accept that

argument. I accept that each director needed to consider the adequacy of the risk factors in the Offering Memorandum. That does not alter the fact that the Fund still needed to be told how OPC proposed to exercise its power to make investments in practice before deciding whether to appoint it as investment manager.

Whether the Fund acted on the Investment Strategy Representations

193. This issue also gave rise to a good degree of debate during the trial. HVK (though not BP) submitted that the Fund cannot have been influenced by the Investment Strategy Representations since the Fund's directors would have been content to act as they did whatever the precise investment strategy OPC proposed to follow. That prompted the Fund to argue that it was not permissible, as a matter of law, to have regard to the hypothetical question of how the Fund would have acted if it had been told the truth. The Fund relied on, for example, a passage of the judgment of Hobhouse LJ in *Downs v Chappell* [1997] 1 WLR 426, 433D-F:

> *The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to act to their detriment and contract*

194. I do not consider that there is a broad principle of law of the kind for which the Fund argues. In *Downs v Chappell*, the judge at first instance had found, as a matter of fact, that the requisite "inducement" was present. However, the judge went on to conclude that the requisite causation was not present because the claimant would have acted as he did even if told the truth. Therefore, the proposition of law set out above deals with the first instance judge's determination of a causation question in the circumstances of the case before him.

195. In my judgment, the correct position is set out in the judgment of Longmore LJ at [32] of his judgment in *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises Inc* [2020] QB 551

> *In the light of these authorities it seems to me that the law at the end of the 19th century had assimilated the requirement of inducement in the tort of deceit and in actions for rescission for fraudulent misrepresentation and could be stated as being that the representee had to prove he had been materially "influenced" by the representations in the sense that it was "actively present to his mind" to use Bowen LJ's phrase; that, whereas there is a presumption that a statement, likely to induce a representee to enter into a contract, did so induce him, that is merely a presumption of fact which is to be taken into account along with all the evidence. There was no requirement as a matter of law, that the representee should state in terms that he would not have made the contract but for the misrepresentation but the absence of such a statement was part of the overall evidential picture from which the judge had to ascertain whether there was inducement or not.*

196. The passage that I have quoted formed part of Longmore LJ's survey of 19th century authorities in the area. However, his overall conclusion at [43] of his judgment was that the more modern authorities "do not add much to the conclusion is that I drew from the Victorian authorities". Therefore, I consider that the statement that I have quoted in paragraph 195. is an accurate statement of the current law.

197. I am satisfied that the directors of the Fund were materially influenced by the Investment Strategy Representation. That conclusion follows from the minutes of the Board Meeting. The directors were being asked to approve a number of transactions including the Fund entering into the IMA. Before appointing OPC as investment manager, Mr Burt and Mr Bertrand received representations as to what the investment strategy of the Fund was and what its approach would be in practice. I am quite satisfied that they had these representations in mind when voting in favour of the resolution to appoint OPC. Mr Burt and Mr Bertrand constituted a majority of the Fund's board of directors, it follows that the Fund had the representation in mind as well.

198. In closing, HVK submitted that the requisite inducement was not in place because of some answers to questions given in cross-examination that suggested that Mr Bertrand and Mr Burt did not pay close attention to the precise terms of the Offering Memorandum dealing with investment strategy and approach. BP did not expressly adopt this submission, but I will deal with it nonetheless.

199. I agree that Mr Burt and Mr Bertrand did not pay a high degree of attention to the description of the investment strategy and approach in the Offering Memorandum. That was entirely appropriate since ultimately the Fund was paying OPC to act as investment manager. However, I reject HVK's submission that this meant the description of investment strategy and approach in the Offering Memorandum and the Investment Strategy Representations were "actively uninteresting" to the directors. Mr Burt did not say in cross-examination that he ignored the Offering Memorandum altogether. Mr Burt's actions on becoming aware that the Fund was heavily invested in Level 3 assets showed that he was rightly concerned with the treatment of investors (see paragraph 119.). He was obviously satisfied that the drafts of the Offering Memorandum that he reviewed did not contain anything "odd". However, that conclusion would be undermined if either the description of investment strategy and approach in the Offering Memorandum did not tell the whole story or if, in practice, OPC was planning to manage investments in a different way from that set out in the Offering Memorandum. Both of these issues were addressed by the Investment Strategy Representation and I am satisfied that Mr Burt had that representation in mind when voting in favour of resolutions at the Board Meeting. I see no reason why the position with Mr Bertrand would be any different.

Causation

200. Perhaps inevitably given the nature of the claim in the tort of deceit, the Fund's submissions sometimes elided concepts of "inducement", "causation" and "quantification of damages". The trial revealed a disagreement between the Fund and HVK as to the precise test that should be applied to the question of causation and, specifically, the extent to which it is permissible to consider how the Fund might have acted if it had been told about the investment in KAM CP before launch.

201. However, BP did not join in that debate. His argument was that the maximum loss that was caused by any misrepresentation was the principal amount of the KAM CP that was not repaid. In fact, he argues, that maximum sum should not be due because of limitation issues and because of a failure to mitigate loss which I will consider later on in this judgment.

202. I do not consider that I need to resolve the debate between the Fund and HVK on the precise principles applicable to causation for two reasons. First, given my earlier conclusions, HVK is not liable to the Fund in the tort of deceit. Second, I consider that

much of the debate falls away in any event because of my earlier findings on the nature of the Investment Strategy Representation and the actions of the Fund that it induced.

203. A broad principle governing the causation issue is set out in the speech of Lord Steyn in *Smith New Court Securities Limited v Citibank NA* [1997] AC 254 at 284H:

> *the development of a satisfactory theory of causation has taxed great academic minds… But, as yet, it seems to me that no satisfactory theory capable of solving the infinite variety of practical problems has been found…. But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact. What has further been established is the "but for" test, although often yields the right answer, does not always do so. That has led judges to apply the pragmatic test whether the condition in question was a substantial factor in producing the result. On other occasions judges assert that the guiding criterion is whether in common sense terms there is a sufficient causal connection. There is no material difference between these two approaches. While acknowledging that this hardly amounts to an intellectually satisfying theory of causation, that is how I must approach the question of causation.*

204. In my judgment, this broad principle deals with the question of causation. The incorrect Investment Strategy Representation induced the Fund to enter into the IMA appointing OPC as investment manager. OPC invested some of the Fund's money in KAM CP. It did so partly because of the existence of the prior relationship between BP and TP. I do not consider that if the Fund had appointed a different investment manager, that investment manager would have chosen KAM CP for investment. It is doubtful that any investment manager other than OPC would have realised even that Kingsway had commercial paper on offer given Kingsway's low profile and the absence of any rating of its commercial paper. Therefore, whether the question is approached as an application of a "but for" test, a "substantial factor" test or as a "sufficient causal connection" test, there can in my judgment be only one answer. Loss that the Fund suffered in connection with the KAM CP was caused by the Investment Strategy Representation.

PART D: CLAIMS RELATING TO OPC'S BREACH OF CONTRACT

OPC's breach of contract itself

205. The Fund claims that OPC breached the following provisions of the IMA:

    i) the obligation in Clause 3.1.1 to "effect the proper and efficient management and safekeeping of all investments and other assets of the Fund"

    ii) the obligation in Clause 4.2 to observe and comply with the provisions of the Offering Memorandum dealing with investment strategy and investment objective;

    iii) the obligation in Clause 13.1 to "use commercially reasonable best efforts, judgment and due care in exercising the duties and the authority granted to it".

206. In my judgment, OPC breached the obligations in Clause 3.1.1 and 13.1 identified above. That breach arose because OPC failed to exercise due care when deciding to invest the Fund's money in the KAM CP. Its failure was negligent with the result that the limitations of liability set out in Clause 13.1 of the IMA did not apply.

207. In paragraphs 103., 104. and 112. I have explained the significant risk that the Fund was running in holding such a large percentage of its assets in the KAM CP and BP's awareness of that risk. OPC's decision to hold a material proportion of its total assets in illiquid commercial paper when it had a small number of shareholders any of whom could redeem the entirety of their investment on just two days' notice exposed the Fund to a wholly unreasonable level of liquidity risk. At one point, some 80% of the Fund's assets were invested in commercial paper of a company so small it was not required to produce regular accounts. BP, who was in charge of selecting the Fund's investments, has given no evidence from which I can conclude that this was "proper and efficient management" or that "due care" was exercised in making the decision to invest in the KAM CP in such circumstances.

208. The closest that BP has come to showing that OPC was complying with its obligations under the IMA came from passages of his cross-examination of the Fund's witnesses. BP suggested that an investment manager could reasonably have regard to the likely future pattern of redemption requests in deciding the proportion of assets that are invested in relatively illiquid securities. The implication of this line of questioning was that, if OPC had sufficient confidence that investors would not submit redemption requests, or would do so on a relatively small scale, it would be reasonable for a large proportion of the Fund's assets to be invested in KAM CP. In his closing submissions, BP pointed to documents that suggested that the Fund's initial single investor was highly "loyal" to the Maestro strategy as demonstrated by the fact that it had invested in the UBS certificate in April 2012 and only decided to redeem that investment in March 2014 pending the launch of the Fund.

209. However, neither BP nor OPC have put forward any evidence, as distinct from submissions, as to projections made at the time about likely investor redemptions. Still less has there been any evidence advanced that suggests that such projections as were made would have satisfied a reasonable fund manager that such a large proportion of the Fund's assets could safely be held in such illiquid securities. It was not enough for BP to make assertions in his closing submissions about investors' likely attitudes since he could not be cross-examined on those matters. Moreover, the fact that an investor was "loyal" between 2012 and 2014 does not demonstrate that they would necessarily be loyal in 2015, or could reasonably be expected to remain loyal if the strategy was not performing well.

210. BP referred in his submissions to OPC having a good knowledge of Kingsway that suggested that, despite its small size, 80% of the Fund's assets could safely be invested in KAM CP. However, no evidence was given to demonstrate that this belief was reasonable and I will not conclude, therefore, that any reasonable investment manager would have invested the Fund's money in KAM CP.

211. Against the lack of evidence from BP and OPC, there is ample evidence suggesting that the risk that OPC took was unreasonable. A single redemption request by a single investor in October 2015 could not be honoured because the KAM CP was insufficiently liquid. Moreover, Kingsway defaulted. The combination of these events led to the Fund being placed into liquidation. "Proper and efficient management" would not have resulted in a single redemption request having such an outcome.

The claim against BP for procuring OPC's breach of contract

The legal landscape

212. I take the parties to be agreed that BP can be liable in the economic tort of procuring OPC's breach of the IMA if all of the following conditions are present (see the speech

of Lord Hoffman at [38] to [44] of *OBG Ltd v Allan* [2007] UKHL 21):

i) OPC must actually have breached the IMA.

ii) BP must have performed an act that amounted to inducing or procuring OPC to breach that contract.

iii) BP must have been aware of the IMA and that his actions were inducing a breach of it. It would not be enough for BP simply to be know that he was procuring an act which, as a matter of law or construction of the contract, would amount to a breach by OPC. BP must actually realise that his actions would have the effect that OPC breached its contract.

iv) BP must have had the requisite intention to procure a breach of contract. That intention will be present if the breach of contract was an end in itself or a means to some further end. It will not be present if BP merely foresaw that his acts would result in a breach of OPC's contract (see [42] of Lord Hoffman's speech in *OBG Ltd v Allan*).

v) If the conditions set out above are satisfied, the presence of a "lawful justification" for BP's actions could nevertheless supply a defence.

213. BP was, at material times, a director of OPC. Ultimately, companies can only act through human agency. Therefore, some care is needed to determine whether the acts that are said to involve BP procuring a breach of OPC's contract are, in reality, to be attributed to OPC. If they are, then they are aspects of OPC's breach of contract which would not give rise to personal liability for BP.

214. BP himself made no submissions as to the boundary between situations in which OPC would alone be liable for its own breach of contract and situations where BP would have a separate liability for inducing OPC's breach of contract. I asked the Fund for its submissions on the principles and have drawn the following conclusions from the judgments of Lane J in *Antuzis & others* v *DJ Houghton Catching Services Ltd & others* [2019] EWHC 843 (QB) and of Eyre J in *IBM United Kingdom Limited v LZLabs GmbH and others* [2022] EWHC (TCC):

i) The general rule is that where a director acting *bona fide* within the scope of authority procures or causes a breach of contract by the company, the director does not thereby become liable in tort to the company's counterparty whose contract has been broken.

ii) If the director is not acting *bona fide* and within the scope of authority, then the director's acts are capable of giving rise to liability in tort to the company's counterparty.

iii) The enquiry as to whether the director is acting *bona fide* and within the scope of authority is to be determined by considering the director's duties to the company as distinct from duties owed to a third party (such as the company's counterparty).

iv) The nature of the company's breach of contract can inform the analysis of whether the director was acting *bona fide* and within the scope of authority. The question needs to be analysed in the circumstances of each particular case. For example, in *Antuzis*, the directors' acts involved deliberate and repeated breaches of statutory obligations and the exploitation of vulnerable employees with a view

to maximising profits from which the directors alone stood to benefit. Those acts were held not to have been undertaken *bona fide* and within the scope of the directors' authority. In a similar vein, in *Antuzis*, Lane J canvassed a hypothetical example of a director of a restaurant company who decides that the company should supply customers of the chain with burgers made of horse meat instead of beef on the basis that horse meat is cheaper. He suggested that, in such a case, it might be possible to infer that the director is not acting *bona fide* and within the scope of authority because, when the situation comes to light, the reputational damage to the restaurant company might be catastrophic.

215. That, in turn raises the question of what it means for a director to act "*bona fide*" or "in good faith". The Fund argues, and BP has not submitted otherwise, that the test is the same as that set out in s172 of the Companies Act 2006. I have had few detailed submissions on the precise scope of that duty, perhaps because the Fund proceeded on the basis that BP's acting in accordance with the "Undisclosed Purpose" was a paradigm instance of a lack of good faith. The problem with that is that, having concluded that no Undisclosed Purpose was present, the precise scope of the concept of "good faith" was relatively unexplored.

216. I have concluded that, in the context of a fiduciary obligation, such as that of a director, the requirement of "good faith" is in essence a requirement not to act in "bad faith". That requires an examination of BP's subjective motivations and whether he genuinely believed he was acting to further the interests of OPC. Non-exclusive examples of "bad faith" would include a director acting for personal benefit, or being motivated by caprice or spite. (See paragraph 10-019 of the 34th Edition of *Snell's Equity*).

Analysis

217. It is important to focus on the precise acts of BP that resulted in OPC breaching the terms of the IMA. Those acts consisted of BP procuring the Fund to invest in the KAM CP despite the risks of that investment. The breach of contract that resulted was a breach of OPC's duty to effect proper and efficient management of the Fund's investments.

218. No difficulty arises with the requirement of paragraph 212.i) that there be a breach of OPC's contract since that is the conclusion that I have reached in paragraph 206. above.

219. BP clearly knew about the existence of the IMA. I have explained in paragraphs 179. to 181. why BP acted as he did in ensuring that there was no reference to Kingsway or the KAM CP in the Offering Memorandum. BP's acts in procuring the Fund to invest in KAM CP were undertaken for similar reasons. He needed a solution to the Cash Management Issue that produced higher returns than ordinary money market instruments would produce so as to avoid diluting returns from the Maestro Strategy. I am prepared to accept that he hoped the KAM CP would perform and produce the high returns that he sought. However, BP was an experienced investment professional. The risk posed to the Fund of investing 80% of its net asset value in illiquid KAM CP when the Fund had just a handful of investors, each of whom was entitled to request redemption at any time, was obvious. Put simply, BP knew that his acts would involve a breach of the IMA but hoped, first that the KAM CP would not default and second that investors in the Fund would not seek to redeem their investments. The requirement of paragraph 212.iii) is met. BP's actions in procuring the breach of contract were a means to his end of producing the returns that OPC had offered to investors, satisfying the requirement set out in paragraph 212.iv).

220. In support of its arguments on the test set out in paragraph 214., the Fund referred to what it submitted were breaches of regulatory duties that BP owed in his capacity under the FCA's Code of Practice for approved persons. I consider the Code of Practice to be of relatively little assistance. Of course, if BP was acting in bad faith as regards the Fund, he might well also have been guilty of regulatory breaches. However, the focus of the test set out in paragraph 214. is on the nature of BP's conduct as regards the Fund. I am not satisfied that any act that BP performed that involved a breach of the Code of Practice would necessarily fall outside the scope of his authority. Nor do I consider that the presence or absence of regulatory breaches itself determines whether BP was acting in bad faith.

221. Much of the Fund's case on that question is based on the proposition that BP was acting in his own self interest (or that of the Consortium) because of the "Undisclosed Purpose". However, as I have found above, the pleaded Undisclosed Purpose is not present and so much of this argument falls away. There was, as I have found, a conflict of interest associated with the Fund's investment in KAM CP. However, the sums involved were not significant. I do not consider that this conflict is indicative of BP acting in bad faith, or outside the scope of his authority when procuring the Fund to invest in KAM CP.

222. Next the Fund argues that BP's actions placed OPC's very future at risk since, if and when investors or the Fund discovered the substantial investments in the KAM CP, OPC's reputation would be seriously damaged. I agree, but in my judgment, this simply emphasises the consequences of OPC's breach of contract. It does not, of itself, demonstrate that BP was acting in bad faith or outside the scope of his authority as a director.

223. BP's authority, as director of OPC, extended to taking risks with the Fund's money. The risk he took was unreasonable. Ultimately the risk did not pay off. However, I have explained in paragraphs 109. to 111. why, in my judgment, BP genuinely believed that the risk would not materialise. Since the belief was genuinely held, and since I have rejected the concept of the pleaded "Undisclosed Purpose", I have concluded that BP was not stepping outside the bounds of his authority when procuring the Fund to invest in KAM CP.

224. For similar reasons, BP was not acting in bad faith (from the perspective of duties owed to OPC) in procuring the Fund to invest in the KAM CP. After all, BP hoped that the Fund investing in the KAM CP would result in benefits for OPC in the form of investment management fees. Accordingly, I conclude that the claim against BP for procuring OPC's breach of contract fails.

The claim in unlawful means conspiracy against BP

225. The Fund advanced no separate argument on this claim in its closing submissions. During oral submissions, Mr Cohen said, on behalf of the Fund, that it was unlikely to add anything to the claim for inducing a breach of contract. Since that claim has failed, I conclude that the claim in unlawful means conspiracy similarly fails.

PART E – CLAIMS AGAINST HVK FOR BREACH OF DIRECTORS' DUTIES

The Cayman Islands legal landscape

226. The claims against HVK relating to his alleged breach of duty as a director of the Fund are based on the following:

i) a director service agreement (the "DSA") dated 31 July 2014 between HVK and the Fund. The DSA is governed by the law of the Cayman Islands;

ii) duties owed by HVK to the Fund as a director under the law of the Cayman Islands.

227. The DSA contains a clause by which the parties to it submit to the non-exclusive jurisdiction of the Cayman Islands courts. It was common ground that all parties have for a long time submitted to the jurisdiction of the courts of England & Wales to determine the claims for breach of duty so I say nothing further about jurisdiction.

228. It is common ground that HVK owed the Fund the following duties both under the DSA and applicable provisions of the law of the Cayman Islands on directors' responsibilities:

i) a fiduciary duty to act in good faith, in the way he considered would be most likely to promote the success of the Fund for the benefit of its members;

ii) a duty to exercise reasonable skill, care and diligence;

iii) a fiduciary duty not to permit his own interests to conflict with the interests of the Fund.

229. It is common ground that in trying those claims, I should proceed on the basis that the law of the Cayman Islands relating to the existence of, or breach of, the above duties, is identical to the principles of common law and equity applicable in England and Wales. No party has suggested that expert evidence on Cayman Islands law is needed. No party to these proceedings has referred me to the statute law of the Cayman Islands. Nor does any party suggest that UK statutory provisions that set out duties of directors have any bearing on the claim against HVK.

230. Clause 9.2 of the DSA contains the following provision that operates to limit HVK's liability:

> *The [Fund] further acknowledges that the Director has relied upon, inter alia, the specific matters set out in clause 9.1 above when deciding to enter into this Agreement and that the Director shall not be liable for any damages, losses, costs or expenses whatsoever to or of the [Fund] at any time from any cause whatsoever unless caused by the Director's dishonesty, wilful default or fraud in the performance of the Director's duties.*

231. Article 154 of the Fund's Articles of Association provides as follows:

> *…No such Director or officer shall be liable to the [Fund] for any loss or damage in carrying out his functions unless that liability arises through the actual fraud or wilful default of such Director or officer. References in this Article to actual fraud or wilful default mean a finding to such effect by a competent court in relation to the conduct of the relevant party.*

232. Neither the Fund nor HVK suggested that there were material differences between the provisions of Clause 9.2 of the DSA and Article 154. The Fund takes no point to the effect that Article 154 is contained in its Articles of Association, rather than in any separate contract between itself and HVK. It was common ground that both provisions had contractual effect and were capable of excluding any liability that HVK might

otherwise have had to the Fund by virtue of the duties set out in paragraph 228.. I therefore refer to the two provisions together as the "exoneration clauses".

233. Both of the exoneration clauses refer to the concept of "wilful default". It was common ground that this concept should be interpreted in accordance with the judgment of Romer J in *Re City Equitable Fire Insurance Co. Ltd (5)* [1925] Ch 407. Romer J held that there are two limbs to the concept of "wilful default". The first limb is present if a person "knows that he is committing, and intends to commit" a breach of duty. The second limb is present if the person is "recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty". Satisfaction of either limb amounts to wilful default.

234. The Fund argues that these exoneration clauses are not capable of protecting HVK from liability for breaches of what it terms the "irreducible core" of his fiduciary duties to the Fund. The Fund categorises HVK's duty to "avoid a conflict between duty and interest, and duty and duty" as a facet of his core fiduciary duty to act with single minded loyalty. Accordingly it argues that any breach of such duties falls outside the scope of the exoneration clauses as a matter of Cayman Islands law.

235. The Fund relies on the judgment of Smellie CJ, sitting in the Grand Court of the Cayman Islands in *Re Bristol Fund Ltd* [2008] CILR 317. In that case, an auditor (EYCI) who owed fiduciary duties to the companies that it audited, was entitled to be indemnified for damages that EYCI had to pay in connection with that audit. The companies who gave EYCI that indemnity were in liquidation and the question arose as to the extent to which those companies had to provide for contingent liabilities under their indemnities. Smellie CJ said, at [70]:

> *at this stage, the only guidance I think I can properly give is that the liquidators should not need to provide for amounts of damages to which EYCI may become liable based on its "wilful default or wilful neglect, fraud or dishonesty" as such liabilities are excluded, either expressly (as in the case of the indemnity within BHM's articles) or implicitly because of the nature of what has been termed in another context the "irreducible core" of a fiduciary's obligations; that is the duty to always act in honesty and good faith (see* Armitage v Nurse *[1997] EWCA Civ 1279).*

236. As Smellie CJ noted, by his use of the words "in another context", *Armitage v Nurse* did not determine the extent of any "irreducible core" of fiduciary obligations that were incapable of being excluded by exoneration clauses. That is clear from Millett LJ's statement in *Armitage v Nurse* that:

> *Accordingly, much of the argument before us which disputes the ability of a trustee exemption clause to exclude liability for equitable fraud or unconscionable behaviour is misplaced. But it is unnecessary to explore this further, for no such conduct is pleaded.*

237. *Armitage v Nurse* decided a more limited and specific question, namely the extent to which a trustee could exclude liability for gross negligence in connection with a (non-fiduciary) duty to exercise skill and care. The Court of Appeal held that in principle a trustee could exclude liability in those terms, but that has little bearing on the extent of "irreducible core" obligations liability for which cannot be excluded.

238. The Fund points out, correctly, that a director owes a fiduciary duty to avoid conflicts of interest (see, for example, the judgment of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18B). However, the fact that Millett LJ described

avoiding conflicts as a "core liability" of a fiduciary does not mean that he was concluding that this fiduciary duty was incapable of being the subject of an exoneration clause. In *Bristol and West*, Millett LJ was not drawing any distinction between fiduciary obligations that could be exonerated and those that could not. Rather, he was drawing a distinction between fiduciary duties and non-fiduciary duties.

239. Accordingly, it is necessary to look to the Cayman Islands authorities for guidance on the issue. The extract from the judgment of Smellie CJ that I have set out in paragraph 235. states only that an exoneration clause cannot go so far as to exclude liability for wilful default, wilful neglect, fraud or dishonesty. It provides no support for the Fund's argument that the fiduciary obligation to avoid conflicts is inherently incapable of being the subject of an exoneration clause.

240. The Fund submits that its position is supported by paragraph [41] of the judgment of Cresswell J sitting in the Grand Court of the Cayman Islands in *Cesar Hotelco v Ryan* [2012] 2 CILR 164. However, this paragraph is a summary of submissions made by the claimant in that case. The court made no finding that the submissions recorded in paragraph [41] were correct as a matter of Cayman Islands law. Nor do I consider that the judgment of Foster J, sitting in the Grand Court of the Cayman Islands in *Renova Resources Private Equity Limited v Gilbertson and others* [2009] CILR 268 supports the Fund's conclusion. At [55] to [58], in the context of an express trust, the court formulates the irreducible core of fiduciary obligations that cannot be excluded as being "performing the trusts honestly and in good faith for the benefit of the beneficiaries". Of course, a fiduciary who acts in his or her own interest might well be acting otherwise than in "good faith for the benefit of the beneficiaries" (see paragraph 215. above). However, Foster J does not go as far as saying that the duty to avoid conflicts is inherently incapable of being the subject of an exoneration clause. I conclude that the exoneration clauses are capable of excluding HVK's liability for breach of the fiduciary duty to avoid conflicts of interest.

241. No party has made specific submissions as to what the concept of "honesty" means for the purposes of the exoneration clauses. Since the parties have asked me to assume that the law of the Cayman Islands is materially identical to that of England and Wales, I will adopt the meaning set out in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391. I will, therefore, examine HVK's subjective state of mind when performing the acts that are criticised. I will then ask whether his conduct was honest or dishonest by applying objective standards of ordinary decent people.

Analysis of the breaches of duty alleged

242. In its closing submissions, the Fund asserted that HVK committed the following breaches of duty:

    i) He actively helped BP to procure the Fund's investment in the KAM CP by "inducing" the Fund to enter into the IMA, helping to prepare some of the issuance documents for the KAM CP and arranging for Jefferies to act as the custodian for the Fund to invest in the KAM CP.

    ii) He failed to speak up or prevent the Fund from investing in the KAM CP despite his knowledge of the conflict and the sheer riskiness of the KAM CP as an investment.

243. In his closing submissions, HVK focused much of his analysis on his arguments to the effect that the exoneration clauses operated to prevent him from having any liability to the Fund. No doubt HVK took that position considering there to be no point in

performing a detailed analysis of the scope of the particular duties that he owed the Fund, followed by a similarly detailed analysis of whether those duties were breached, if the exoneration clauses would clearly operate. The Fund criticised this approach, arguing that HVK should have explained his defence to the allegations of breach before applying the exoneration clause. I see nothing objectionable in HVK's approach and, since it is the way he has advanced his case, will apply it myself. Given the conclusions that I have expressed in paragraph 240. above, liability for all of the breaches of duty alleged is capable of being excluded by the exoneration clauses.

244. In opening, but not in closing, the Fund argued that HVK "made no attempt, or at least no serious attempt" to perform his duties as director with the result that any breach of duty would necessarily fall outside the scope of the exoneration provisions under the principle set out by Jones J, sitting in the Grand Court of the Cayman Islands in *Weavering Macro Fund v Peterson* [2011] 2 CILR 203 at 17. I do not accept that. HVK was aware of his duties, and sought to comply with them.

Assisting BP to procure the Fund to invest in KAM CP

245. One of the acts of assistance that the Fund referred to in its closing submissions involved the assertion that HVK "induced the Fund to enter into the IMA with OPC at the 31 July 2014 board meeting". This allegation is, of course, fundamental to the claim in deceit against HVK. However, I am not satisfied that it formed part of the Fund's pleaded case against him as regards his breach of directors' duties.

246. The breaches pleaded were set out in paragraphs 19 to 21 of the POC. Those breaches focused on the assertions that HVK (i) "joined with" BP in making the investments in the KAM CP in accordance with the "Undisclosed Purpose"; (ii) failed to warn the Fund of the Undisclosed Purpose or of its investment in KAM CP; and (iii) failed to prevent the Fund from investing in the KAM CP.

247. Nevertheless, the point can be dealt with briefly. The only "inducement" from HVK was the Investment Strategy Representation that he gave at the Board Meeting. Even if giving that representation did amount to a breach of duty, that breach did not constitute fraud, wilful default or dishonesty. That is for the same reasons that I have given in connection with the claim in deceit. HVK did not know the Investment Strategy Representation was wrong when he gave it. Nor did he give it recklessly (see paragraph 175.).

248. HVK's acts of assistance are said to conflict with his fiduciary duty to avoid conflicts, self-dealing and unauthorised profits. I have already explained in paragraphs 94.iii) and 97. why, in my judgment, HVK obtained no personal benefit from the Fund's investment in the KAM CP. However, OPC, a company of which HVK was either an employee or a consultant, did obtain the benefit that I have described in paragraph 94.v) above.

249. HVK was not a shareholder or director of OPC. He may not even have been an employee and instead might have provided his services to OPC as an independent contractor. As I have found in paragraph 97., OPC did not share any part of the benefit with HVK. In those circumstances, I do not consider that the fact that OPC was to receive a benefit involved HVK in breaching his fiduciary duties to avoid conflicts, self-dealing or unauthorised profits. However, even if that is not correct, and the fact that OPC was receiving a benefit caused HVK to be in breach of his fiduciary duty to avoid conflicts, the exoneration clause would operate. As I have found, HVK was not aware of the precise conflict that arose by virtue of the Fund investing in KAM CP in circumstances where Kingsway was going to use the money to discharge liabilities

associated with the KP (Hull) project. Nor, in my judgment, did HVK assist in the making of the investments in KAM CP recklessly, not caring whether he was breaching his duties or not. As I have explained, the conflict that arose was of a subtle nature. At most, HVK's mistake was not to ask the right questions so as to deduce, from his knowledge of OPC's relationship with Kingsway, that the Fund's investment in KAM CP gave rise to a conflict of interest. In my judgment, that satisfies neither the first limb nor the second limb of the concept of "wilful default". Nor does it involve fraud or dishonesty.

250. The Fund also argues that HVK's acts of assistance breached his duty to exercise reasonable skill and care on the basis that he should have known of the conflict to which the Fund's investment in the KAM CP would give rise. However, for reasons similar to those set out in paragraph 249., even if there was a breach of that duty, it would involve negligence or carelessness rather than dishonesty, wilful default or fraud.

251. Finally, the Fund asserts that, by undertaking the acts of assistance, HVK was not exercising good faith. Given the findings that I have made as to HVK's state of knowledge of the conflict of interest I am satisfied that HVK was acting in good faith when he assisted the Fund's investment in KAM CP even if he had failed to make sufficient enquiries as to the extent of that conflict.

Failure to "speak up" or to "prevent"

252. The Fund argues that HVK was in breach of his fiduciary duties by not preventing the Fund from investing in KAM CP or not notifying the Fund that the investments were proposed, or had been made, in circumstances where he knew that the investments were risky and he knew that they were being made in circumstances that might involve a conflict of interest.

253. I am not satisfied that HVK had any duty to "prevent" the Fund from investing in the KAM CP. Even if he did, the exoneration clauses would apply to excuse him from liability for any failure to prevent the investments. That is because HVK had no power to prevent the Fund from investing in the KAM CP. The power to make investments on behalf of the Fund resided with BP. There was nothing that HVK could do to stop the investments being made other than "speak up", a topic that I address in more detail below. Any failure to "prevent" therefore involved no fraud, dishonesty or wilful default.

254. I am reinforced in that conclusion by my findings as to HVK's knowledge. He did not know or believe that the KAM CP was a bad investment. Nor did he think that BP would deploy anything other than usual investment management criteria in deciding whether the Fund should invest in the KAM CP (see paragraph 113.). That state of mind is consistent at most with negligence and is inconsistent with HVK being guilty of fraud, dishonesty or wilful default even if there were a duty to "prevent" the Fund from investing in the KAM CP.

255. The Fund has a stronger case on its allegation that HVK was in breach of duty by failing to "speak up" by telling the Fund and his fellow directors what he knew about the KAM CP and the relationship between OPC and Kingsway. HVK had knowledge that the other directors did not. The Fund is correct to observe that, at the Board Meeting, HVK was in a position analogous to that of a fiduciary transacting with his principal. In his capacity as director of the Fund, he was voting on a board resolution to approve the terms of a transaction between the Fund and OPC. Moreover, at the Board Meeting, HVK was representing OPC by giving the Investment Strategy Representation. In those circumstances, as explained in *Mothew*:

> *In such a case [the fiduciary] must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction. The rule is the same whether the fiduciary is acting on his own account behalf or on behalf of another.*

256. In my judgment, HVK breached that duty. He did not explain that, if appointed as the Fund's investment manager, OPC was likely to procure that the Fund made investments in Kingsway, with which OPC had some business relationship by virtue of the KP (Hull) project. Even though, as I have found, HVK was not aware of the precise conflict of interest to which this relationship gave rise, he nevertheless should have told his fellow directors, and the Fund, what he knew about that business relationship so that they could judge for themselves whether they considered it to give rise to a conflict.

257. However, I consider that liability for this breach of fiduciary duty is excluded by the exoneration clause. I do not consider that HVK dishonestly or fraudulently hid the information. Nor do I consider that he was guilty of wilful default. Rather, I am satisfied that he did not mention what he knew because he did not think it mattered since (i) he believed that investments in KAM CP were permitted pursuant to the terms of the Offering Memorandum; (ii) he believed and trusted that BP would apply investment skill and judgment before deciding whether to invest the Fund's money in KAM CP and (iii) being unaware of the precise nature of the conflict that arose, he did not think there was anything that needed to be disclosed to his fellow directors before the Fund acquired the KAM CP.

258. The Fund also argues that HVK committed a breach of duty in failing to speak up about the risks associated with the KAM CP ("red flags" as the Fund put it in its closing submissions). I do not consider that there was any such breach of duty. HVK had no investment management experience of his own. Therefore, while he knew of features of the KAM CP that made them "risky" (see paragraph 113. above) he had insufficient professional expertise to evaluate whether they made the KAM CP a bad investment. Moreover, the Fund was proposing to engage OPC to make investments on its behalf, and BP was the individual at OPC with the requisite investment management expertise to do so. In my judgment, HVK was under no duty, whether fiduciary or otherwise, to "speak up" on matters relating to the riskiness of the KAM CP on which he had no professional expertise.

259. Even if that is wrong and HVK was under a duty to warn the Fund and his fellow directors about features of the KAM CP that made it risky, I do not consider that any failure to do so involved fraud, dishonesty or wilful default. HVK did not know or believe that the KAM CP was a bad investment and he trusted BP to make a proper investment management decision before investing the Fund's money in it. That state of mind is inconsistent with dishonesty, fraud or the first limb of "wilful default". Moreover, his belief that BP would make a sound investment management decision on the merits of the KAM CP is also inconsistent with recklessness for the purposes of the second limb of the concept of "wilful default".

PART F – OTHER CLAIMS

OPC's breach of trust

260. The Fund's case is that OPC was a "quasi trustee" of the Fund's money and breached that trust by, as the Fund put it in its written closing submissions, "mis-applying the Fund's money to the Consortium, a business venture in which it was interested". The Fund's claim against OPC for breach of trust is therefore rooted in the assertion that

OPC breached the duty of a trustee to avoid conflicts and also breached its duty to avoid "self-dealing" because it retained a benefit from the Fund's investment in the KAM CP.

261. Money belonging to the Fund was held in a bank account in the Fund's name. OPC had a mandate on that account and was therefore authorised to pay sums into the account and also to withdraw sums. OPC was not constituted as a trustee of the Fund's assets since OPC did not hold legal title to the assets concerned. However, I conclude that OPC was a "quasi trustee" of the Fund's money on the basis of the trust and confidence imposed in it.

262. I find that OPC breached its fiduciary duties arising under that "quasi trust" by investing the Fund's money in the KAM CP. Although I have rejected the general assertion that this investment was made in accordance with the Undisclosed Purpose, I have found that the investment gave rise to a conflict of interest which resulted in OPC obtaining a modest benefit. Modest though the benefit was, it involved a breach of trust.

The claim in dishonest assistance against BP

263. This claim is based on the assertion that BP dishonestly induced or assisted the breach by OPC of the trust considered in the previous section. Understandably since the Fund's main focus was on its other claims, it has said little about the central question of whether BP's assistance in that breach of trust was "dishonest". The full extent of its submission on that issue was that BP's conduct was dishonest because "he acted for his own advantage, hoping for OPC to make a side-profit from the activities of the Consortium which was undisclosed to the Fund".

264. OPC did make some "side-profit" from the Fund's investment in KAM CP, but it was modest in amount (see paragraph 97. above). I have concluded that BP knew that the side-profit would be obtained (see paragraph 99. above). However, that knowledge is not on its own "dishonest" and I have determined the question of dishonesty by considering whether BP's conduct was dishonest according to the standards of an ordinary honest person (see Snell's Equity 34th Edition at 30-079). BP did not suggest that I should apply any different test.

265. The Fund's case on BP's dishonesty was based on its assertion that BP was acting in accordance with the much larger "Undisclosed Purpose". Had that Undisclosed Purpose been present, I might well have concluded that BP's assistance was dishonestly given. However, the Fund's submissions have not (understandably) explained why BP's conduct was dishonest viewed in the light of the relatively modest side-profit that OPC obtained. Without the benefit of detailed submissions on the point, I will not conclude that the assistance that BP gave was "dishonest". An ordinary honest person might have concluded that the benefit that OPC received was so subtle in nature, and of a sufficiently modest amount, that it did not matter greatly in the scheme of things. That conclusion would not, of course, restrict OPC's obligation to account for the side profit, but would vitiate the conclusion that BP was dishonest.

PART G – LIMITATION

266. BP, but not HVK, advances a limitation argument which has to be understood in the context of the procedural background to the pleadings.

267. On 26 January 2023, the Fund applied to amend its then current pleadings in order to introduce the claim in deceit. The Fund justified that application on the basis that it was

only following disclosure (that took place in late 2022 and early 2023) that the Fund realised that BP and HVK had made fraudulent misrepresentations. HVK did not object to the Fund's application to amend. BP did object. His sole ground of objection was that the Fund sought, after expiry of the relevant limitation period, to add a new cause of action which did not arise out of the same facts or substantially the same facts as were already in issue (i.e. that, using a familiar shorthand, the deceit claim did not "relate back" to the previous claim). Accordingly, BP argued that the Fund's application to amend should be refused in consequence of CPR 17.4(2)(b).

268. By his order of 10 February 2023, Master Brightwell gave the Fund permission to amend so as to bring the claim in deceit. However, paragraph 1 of that order reserved to the trial judge the question whether the deceit claim "related back" to the Fund's original claim and the question of whether the limitation period for the deceit claim had expired. Before me, the argument coalesced into a single issue, namely whether on 10 February 2023, when Master Brightwell made his order, the limitation period for the deceit claim had expired. If it had expired, then it was common ground that the deceit claim should fail and the Fund did not mount a secondary argument to the effect that it could be "related back" to the Fund's original claim.

269. Section 32(1) of the Limitation Act 1980 provides as follows:

> *Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> > *(a) the action is based upon the fraud of the defendant; or*
> >
> > *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
> >
> > *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*

270. The Fund's claim in deceit is "based upon the fraud of" BP for the purposes of s32(1)(a). That is because fraud (in the sense that BP made representations knowing that they were untrue, or not caring whether they were true or not) is an essential ingredient of the claim. Accordingly, a central question is when the Fund discovered the fraud or could, with reasonable diligence, have discovered it.

271. BP argues that the Fund has known since "early 2016" of the relationships between OPC and entities controlled by TP. For example, BP argues that the Fund knew by "early 2016" that OPC had been a dealer under Kingsway's ECP programme. He submits that information to the effect that OPC had an involvement with KP (Hull) was in the Fund's own disclosure, demonstrating that the Fund knew about this in "early 2016".

272. I reject BP's limitation defence. Central to the Fund's claim against BP in deceit is its proposition that BP was party to an arrangement or understanding, formed before the Fund's launch, to the effect that the Fund would invest in KAM CP. It was the presence of that arrangement that the Fund asserts made the Investment Strategy Representations untrue, to BP's actual knowledge. BP has not referred to any documents provided before disclosure was given in late 2022 which could be said to have demonstrated the existence of the pre-existing arrangement. Nor has he set out any basis for his argument that the Fund could, with reasonable diligence, have discovered the pre-existing

relationship before 10 February 2017 (being six years before Master Brightwell's order).

273. Mr Trott, the Fund's liquidator, has explained in his witness statement that he only found out about the connections between BP, HVK and TP from documents disclosed after the litigation was commenced in 2021. I accept that evidence. Mr Trott would have known snippets of this information before proceedings were commenced. For example, I am prepared to accept BP's assertion that the Fund knew in "early 2016" that OPC had some involvement in the KP (Hull) project. However, I do not accept BP's argument that these snippets were sufficient to notify the Fund of the pre-existing arrangement to invest in the KAM CP. Nor do I consider that reasonable diligence applied to the snippets that the Fund had would have disclosed the existence of that pre-existing arrangement.

PART H – QUANTUM AND MITIGATION

Mitigation

274. BP, but not HVK, argues that the Fund has failed to mitigate its loss. He puts his argument in the following way:

    i) In May 2016, Kingsway obtained repayment of a secured loan of USD 1.6 million that it had made in connection with a social housing development demonstrating that it had financial substance at that point.

    ii) Both before the Fund went into liquidation (when it was being managed by its directors) and after the commencement of winding-up (when the Fund's liquidators were in charge) efforts to enforce repayment of the KAM CP were inadequate.

    iii) Those inadequate efforts resulted in an absurd situation in which a debt claim was issued against Kingsway only on 24 December 2021, just a few days before the limitation period expired. By then it was too late for the Fund to obtain any recovery. Moreover, the Fund's liquidators compounded their failures by neglecting to serve the proceedings properly on the Fund within four months of the claim form issued.

275. In its opening submissions, the Fund advanced two propositions of law on the extent of its duty to mitigate loss:

    i) First, it submits that the burden is on BP to establish not only that the Fund acted unreasonably, but that if it had acted reasonably, its loss would have been reduced. The Fund supports that proposition by reference to paragraph 21-043 of the First Edition of *Mumford and Grant on Civil Fraud* and the authorities footnoted in that paragraph.

    ii) Second, it submits, by reference to the speech of Lord Browne-Wilkinson in *Smith New Court,* that no duty to mitigate arose until the fraud was discovered. As discussed in the previous section, the Fund did not discover the fraud until after these proceedings were originally commenced in 2021. Only unreasonable conduct after that point is capable of reducing the Fund's damages.

276. BP made no submissions calling into question these propositions of law. In my judgment the proposition set out in paragraph 275.i) is a complete answer to BP's

assertion of a failure to mitigate loss.

277. BP has given no evidence of his own. Therefore, his case on a failure to mitigate could involve only him making submissions as to Kingsway's financial substance by reference to documents in the bundle and such, if any, material as he could draw from witness statements.

278. Ultimately, there was little foundation in the evidence to support a proposition that, even if the Fund had secured an immediate judgment against Kingsway in 2016, any material amount of the KAM CP would have been repaid. The most that BP was able to say in his submissions was that Kingsway had told him, in May 2016, that it had received repayment of USD 1.6 million on a secured loan. There are a number of problems with that submission. First, BP's statements involved submission only rather than evidence. Second, even if "Kingsway" told BP that it had been repaid USD 1.6 million, that does not necessarily mean that it was repaid that amount. Third, it is not clear who BP means by "Kingsway" in this context. BP's relationship was with TP. However, TP ceased to be a director of Kingsway in April 2015 and so could not speak authoritatively about the Fund's financial position in 2016. Fourth, the statement that BP relays says little about Kingsway's other liabilities. If, for example, it owed liabilities of USD 1.6 million to creditors ranking senior to the Fund, its receipt of USD 1.6 million would have no effect on the Fund's likely recovery.

279. BP's submission that Kingsway must have had economic substance because, if it did not, there would be no reason for TP and Mr Bowles to fight for control does not come close to discharging the burden set out in paragraph 275.i).

280. For all of those reasons, there is an insufficient basis in the evidence for me to conclude that, even if the Fund had obtained judgment against Kingsway immediately on its default, it would have received any better recovery than it ultimately secured. BP's arguments are based on a failure to mitigate loss are accordingly rejected.

Disposition and Quantum

281. For the reasons set out above, the Fund's claim in deceit against BP succeeds, but all other claims against BP fail. All of the Fund's claims against HVK fail. I have made findings sufficient to determine that the Fund's claims for breach of trust and breach of contract against OPC would succeed (although I have not determined quantum). I will not, however, enter judgment on the claims against OPC since the Fund agrees that, as matters stand, its claim against OPC is stayed pursuant to s130(2) of the Insolvency Act 1986 and the Fund has not applied to lift that stay.

282. I have explained in paragraph 204. above why losses that the Fund suffered on its investments in the KAM CP were caused by BP's deceit. The only question remaining is as to the amount of those losses. It is common ground that the Fund received none of the redemption proceeds due on the KAM CP on which Kingsway defaulted. Accordingly, I conclude that those redemption proceeds forgone are recoverable damages for BP's deceit.

283. The Fund has also pleaded a claim for consequential loss based on its assertion that, if it had not invested in the KAM CP, it would have invested in assets that yielded a return of 2.24% (compounded monthly) being the rate of return that BP and HVK had claimed the Maestro strategy could produce. I have heard little, if any, argument on that aspect of the Fund's pleaded loss. I will therefore invite the parties, as well as agreeing an order to give effect to the decisions on the various claims made in this judgment, to

agree directions for the consequential loss element of the Fund's claim to be determined if it still needs to be.