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Case Number CR 2020-001747

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (Ch D)

IN THE MATTER OF ASSET LAND INVESTMENT PLC

AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986

Royal Courts of Justice

7 The Rolls Building

Fetter Lane

London

EC4A 1NL

Date: 19/01/2022

Before:

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

Between:

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Claimant

-and-

1.MR NIGEL JONATHAN ROBERT LORD

2. MRS VICTORIA ELISABETH GRACE

3. MRS BRONWEN BANNER-EVE

Defendants

- -

Mr Christopher Buckley (instructed by The Insolvency Service) for the Claimant

Mr Daniel Lewis (instructed by Sylvester Amiel Lewin & Horne LLP) for the First Defendant

Hearing dates: 2, 3, 4 November 2021

- -

Approved Judgment

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

Deputy I.C.C. Judge Greenwood:

Introduction

1.

This is an application made under section 6 of the Company Directors Disqualification Act 1986 ("the CDDA") by the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") for disqualification orders against the Defendants by reference to their conduct as directors of Asset Land Investment plc ("the Company"). Proceedings were commenced by Claim Form issued on 11 March 2020.

2.
On 29 October 2021, shortly before the trial was due to begin on 2 November 2021, the Second and Third Defendants, respectively Mrs Victoria Grace and her mother, Mrs Bronwen Banner-Eve, both gave 3 year disqualification undertakings which were accepted by the Secretary of State under section 7 of the CDDA. The trial therefore proceeded substantively against only the First Defendant, Mr Nigel Lord, represented by Mr Daniel Lewis of Counsel; the Secretary of State was represented by Mr Christopher Buckley of Counsel.

3.
Section 6(1) of the CDDA provides:

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

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

(b) that his conduct as a director of that company (either taken alone or taken together with his conduct as a director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company."

4.
By virtue of section 6(4), if an order is made, the minimum period of disqualification is 2 years, and the maximum is 15.

The Requirements of Section 6(1)(a)CDDA

5.
As to Mr Lord, there was no issue in respect of the requirements of section 6(1)(a): he was a director of the Company, and it has become insolvent.

6.
The Company was incorporated on 26 April 2005, with the name "Asset Land Associates Limited"; it was re-registered as a public limited company and its name was changed to "Asset Land Investments plc" on 13 January 2006; its current name was adopted on 14 July 2006. Mr Lord was appointed as one of its directors on 17 March 2006, and he resigned on 1 May 2012. Its other directors were Mr David Banner-Eve, who was appointed on 26 April 2005; Mrs Grace, who was appointed on 1 February 2008, and resigned on 14 November 2014; and Mrs Banner-Eve, who was first a director between 9 January 2006 and 31 January 2008, before being re-appointed on 20 May 2008, and resigning on 4 November 2014. Mr and Mrs Banner-Eve were married, and Mrs Grace is Mrs Banner-Eve's daughter.

7.
The Company's shareholders are Mr Banner-Eve, who holds 23,750 ordinary shares (47.5% of those issued), Mrs Banner-Eve, who also holds 23,750, and Lord Associates Taxation and Business

Consultants LLP (“LATBC”), of which Mr Lord is a designated member, which holds 2,500 (the remaining 5% of those issued).

8.
As I have said, Mr Lord resigned as a director on 1 May 2012. Subsequently, almost five years later, on 15 March 2017, a winding-up order was made against the Company by Mr Registrar Baister, on a petition presented by the Financial Conduct Authority (“the FCA”) on 25 January 2017. The FCA’s petition was presented on the basis of an unpaid interim payment order in the sum of £1,270,000 made against the Company by Andrew Smith J. on 22 March 2013, in proceedings (“the FCA Proceedings”) commenced on 14 June 2012 by the FCA against the Company, Mr Banner-Eve and others, although not against Mr Lord.

9.
By virtue of the FCA Proceedings, and following unsuccessful appeals by the Company and Mr Banner-Eve to both the Court of Appeal (dismissed on 10 April 2014) and the Supreme Court (dismissed on 20 April 2016) it was established, amongst other things, that in contravention of section 19 of the Financial Services and Markets Act 2000 (“FSMA”) in relation to plots of land at South Godstone in Surrey, and Liphook in Hampshire, the Company had operated what is sometimes referred to as a “land banking scheme” which comprised a “collective investment scheme” within the meaning of section 235 of that Act without being either an authorised or an exempt person. In respect of the regulation of collective investment schemes - described by Lord Sumption in his Judgment in the FCA Proceedings (at [65], [2016] UKSC 17) as being “one of the more problematic features of the United Kingdom’s system of statutory investor protection” - the case against the Company was the first to reach the Supreme Court.

10.
Also as a result of the FCA Proceedings, Mr Banner-Eve was held to have been “knowingly involved” in the Company’s contravention of section 19 of FSMA. He was ordered by Andrew Smith J. to pay £10,000,000 to the FCA. Having not done so, and again, following the appeals referred to above, he was made bankrupt on 21 April 2017, on the FCA’s petition presented in the Cambridge County Court. On 30 September 2019, the Secretary of State accepted a 14 year disqualification undertaking from Mr Banner-Eve, on the basis that he had “caused or allowed” the Company to operate an unauthorised collective investment scheme, and “caused or allowed” it to make misrepresentations to the public, such that customers had paid £5,910,677, but were unlikely to see any return on their investment, “the Local Councils having described the land obtained by [the Company] as unlikely for future development, this being contrary to what the customers were told before making their purchase”.

11.
In addition to the FCA Proceedings, there were also criminal proceedings brought against Mr Banner-Eve, as well as against Mr Stuart Cohen and Ms Susan Siggins (both of whom were also defendants to the FCA’s claims) - but again, not against Mr Lord. I was shown and told very little about the criminal proceedings, but from a report in the “Newbury Weekly News” (exhibited to the evidence in support of the Secretary of State’s case) it seems that the trial lasted 48 days, that the defendants were accused of a “conspiracy to defraud” (that they “conned” investors “into putting £20m into a land banking scheme”), but that the prosecution was unsuccessful (the defendants having denied that “they set out to rip off customers, blaming the wild claims about potential profits on unscrupulous brokers out to boost their commission”).

12.

In respect of Mr Lord's professional background, experience and expertise, as described in his evidence, and in respect of the circumstances of his appointment as a director of the Company, there was no real dispute.

12.1.
Mr Lord's professional career began in June 1982 with HM Inland Revenue, as a direct-entrant Executive Officer. He worked at the East Ham Tax Office until leaving the civil service in December 1985. In January 1986, he became a Tax Senior at the City of London office of Frazer Whiting, Chartered Accountants (as they then were), where amongst other things he managed a portfolio of personal tax returns and computations, and attended to HMRC enquiries. In November 1988, he moved to the City of London office of Neville Russell, Chartered Accounts (as they then were) again as a Tax Senior, with similar responsibilities, and in May 1989, he moved to the Woodford Green office of Haslers, Chartered Accountants, as a Tax Manager. He passed the Chartered Institute of Taxation AAT examination, and again, managed a portfolio of companies and other bodies, specialising in tax consultancy work. In June 1998, he moved to the City of London office of Ernst & Young as a Senior Tax Consultant. In January 2001, he became the Head of Taxation in their Jersey office. Having left Ernst & Young in 2001, after a period of ill health, he decided to establish a bespoke boutique tax consultancy (LATBC) which within five years of formation had about twelve personnel and a turnover of about £1 million per annum. His involvement with clients was, he said, in a "high level tax planning role".

12.2.
Mr Lord met Mr Banner-Eve in about 1993/1994, when working at Haslers. Mr Banner-Eve became a client. In 2003, Mr Lord was contacted by Mr Banner-Eve who asked for his professional assistance to establish a structure for a new property investment and development business called "Crown Central" and from about that time, LATBC advised Mr Banner-Eve on his personal and business taxation matters.

12.3.
In 2005, Mr Lord was contacted by Mr Banner-Eve to discuss the proposed venture that in time became the business of the Company. Mr Lord told him that although he, Mr Lord, had no experience of property investment (other than in respect of tax planning) the business model might fall within the scope of the financial services regulations, and he recommended (as I set out further below) that legal advice be taken.

12.4.
At about the end of 2005, or the beginning of 2006, Mr Banner-Eve asked Mr Lord to advise whether the Company should become a public limited company, and if so, what would be the consequences. On Mr Lord's advice, the Company was re-registered on 13 January 2006, as set out above. It was also agreed, at that time, between Mr Banner-Eve and Mr Lord that Mr Lord would become a "non-executive director" of the Company. Whether or not that was because (as Mr Lord said in his witness statement) "there was no other obvious candidate", makes no difference to the duties imposed on Mr Lord by virtue of his directorship, or to the case before me.

12.5.
In his witness statement in these proceedings, Mr Lord said of his appointment, that "It was agreed that my role would be limited to providing taxation and fiscal consultancy advice to the business via LATBC, and that I would have no management role within the business nor any involvement in acquiring, promoting or selling land." On any view, it is plain that Mr Lord was given and took

particular responsibility for those matters that fell within his specific expertise and professional experience, and it was not to that extent suggested that he failed to so competently.

The Requirements of Section 6(1)(b)CDDA & the Secretary of State's Allegations of Unfitness

13.
In Secretary of State for Business, Innovation and Skills v Chohan [2013] EWHC 680 at [170]-[171], having said that the test for unfitness under section 6 has been the "subject of analysis, exploration, elaboration and refinement in a multitude of cases", Hildyard J. stated the following propositions, which I understood to be accepted by both parties, and which in any event, I do accept:

"(1) The court is required by s.[12C] of the CDDA to have particular regard to the matters mentioned in Sch.1 to that Act.

(2) However, Sch.1 to the CDDA is not exhaustive: the court is entitled to take into account other conduct in order to determine the question of unfitness: any misconduct of a person exercising the powers of a director may be relevant.

(3) "Unfitness" is ultimately a question of fact, or, as Dillon LJ stated in Re Sevenoaks Stationers (Retail) Ltd [1991] Ch. 164 … "what used to be pejoratively described in the Chancery Division as 'a jury question'": but, as the authorities demonstrate, a less pejorative and possibly more accurate description may be a "value judgment" (see Re Grayan Building Services Ltd [1995] Ch. 241 at 255D …). As such, that determination of unfitness involves a comparison with a standard of behaviour against which the conduct complained of may be measured.

(4) Accordingly, as explained by Hoffmann LJ (as he then was) in Re Grayan at 254G …:

"The judge is deciding a question of mixed fact and law in that he is applying the standard laid down by the courts (conduct appropriate to a person fit to be a director) to the facts of the case."

(5)
It being a major concern of the CDDA to raise standards and to protect those who deal with companies which have the benefit of limited liability from directors who have in the past departed from such standards, a finding of unfitness does not depend upon a finding of lack of moral probity: the touchstone is lack of regard for and compliance with proper standards, and breaches of the rules and disciplines by which those who avail themselves of the great privileges and opportunities of limited liability must abide (see per Henry LJ in Re Grayan).

(6)
Equally, ordinary commercial misjudgement is in itself insufficient to demonstrate unfitness (see per Browne-Wilkinson V-C (as he then was) in Re Lo-Line Electric Motors Ltd [1988] Ch. 477, 486 …): risks that have eventuated may in retrospect, and with the wisdom of hindsight, appear to have been taken wrongly, but the purpose of limited liability is to provide some protection from risk-taking, subject to proper standards of care and compliance with duty.

(7)
As, again, Hoffmann LJ put it in Re Grayan, the court:

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

(8)
Although the touchstone of unfitness should reflect the public interest in promoting and raising standards amongst those who manage companies with the benefit of limited liability, the test is always whether the conduct complained of makes the defendant unfit, and not whether it is more generally in the public interest that a person be disqualified: thus, for example, the question is whether the present evidence of the director's past misconduct makes him unfit, not whether the defendant is likely to behave wrongly again in the future.

(9)
In each case the court must consider the director's personal responsibility: it is his personal conduct which is in issue, and it is not sufficient to assume responsibility for some departure from required standards in the management of the company from the fact of his being a director.

(10)
Nevertheless, a "broad brush" is not inappropriate (see Re Barings Plc (No.5); Secretary of State for Trade and Industry v Baker [1999] 1 B.C.L.C. 433, 483, approved by the Court of Appeal [2001] B.C.C. 273, 283), and "responsibility" is not confined to direct executive responsibility for the particular misconduct, and a failure to engage in proper supervision, review or scrutiny of the activities of delegates or fellow directors may suffice (see Re Skyward Builders Plc; Official Receiver v Broad [2002] EWHC 2786 (Ch) at [393]).

(11)
The court must consider any allegations of misconduct both individually and in the round: Secretary of State for Trade & Industry v McTighe [1997] B.C.C. 224 (CA)."

14.
In respect of the requirements of section 6(1)(b) - that Mr Lord's conduct renders him "unfit to be concerned in the management of a company" - at paragraph 9 of the 1st Affidavit of Mr Michael Smith (a Deputy Chief Investigator in the Insolvent Investigations North Directorate of The Insolvency Service) made on 10 March 2020 in support of the Secretary of State's application, it is said, under the heading "Statement of Matters Determining Unfitness", that:

"… during the period 17 March 2006 to 1 May 2012, the date he resigned as a director, [Mr Lord] allowed [the Company] to operate a collective investment scheme without being authorised, in breach of the provisions of[FSMA] …. and

During the period 17 March 2006 to 1 May 2012, the date he resigned as a director, [Mr Lord] allowed [the Company] to make misrepresentations to the public in respect of [the Company's] land banking scheme whereby customers contributed £4,583,199 and are unlikely to see any return on their investment. The Local Councils having described the land obtained by [the Company] as unlikely for future development, this being contrary to what [the Company's] customers were told before making their purchase."

15.
I shall refer to these allegations respectively as the "First Allegation" and the "Second Allegation".

16.
In his Skeleton Argument, and in his Opening, Mr Lewis described both allegations, and the evidence advanced in support of them, as being "deficient in significant respects", and suggested (although no variety of formal application was made) that there was no case to answer in respect of either; in any

event, Mr Lord denied the allegations of unfitness. I shall deal below in greater detail with the content of the allegations as ultimately advanced by Mr Buckley at trial, and whether and/or the extent to which they are open to the Secretary of State. At this stage I will set out the relevant principles of law, and some of the boundaries of the allegations relied upon.

17.
As to the principles, there was no real dispute between the parties. Amongst other things, Mr Buckley referred me to the discussion at paragraphs 7-104 to 7-107 of "Directors' Disqualification & Insolvency Restrictions", Walters & Davis-White QC (3rd Edition), which states, in particular, three important points.

17.1.
First, that the basis of the requirement that allegations of unfitness be made clear, is one of natural justice: the defendant must know the case he has to meet.

17.2.
Second, any summary of allegations (such as set out above, at paragraph 14) is not to be read as if it were an indictment or as being subject, by analogy, to the inflexible rules applicable to indictments; the court will look at the substance of what is being alleged.

17.3.
Third, the claimant is limited to the evidence and to the case made. The court can only consider that case in determining whether unfit conduct is established. In the context of the present case, that is an important principle.

18.
To much the same end, Mr Lewis cited various authorities, including:

18.1.
Official Receiver v Atkinson (sub nom Re Keeping Kids Company)[2021] 2 BCLC 181 at [4]-[10], where it was emphasised by Falk J. that the claimant's affidavit in disqualification proceedings serves the purpose of a statement of case and in the same way (at [7]):"…must mark out the parameters of the case advanced, identify issues and the extent of the dispute and make clear the general nature of the case … It must set out the essential facts relied upon."

18.2.
Secretary of State for Business, Innovation and Skills v Chohan[2012] 1 BCLC 138, which happens also to have concerned an unauthorised collective investment scheme, and in which David Richards J. summarised the authorities and in particular the need for the claimant's supporting affidavit to identify the evidence relied upon (at [6]-[10], referring to Re Sutton Glassworks Limited[1996] BCC 174 and Re Finelist Limited[2004] BCC 877). The alleged grounds of unfitness in that case were summarised at [13] of the judgment, and included an allegation that the defendant had "caused or allowed" the company to operate a land banking scheme which the Financial Services Authority considered to be an unauthorised collective investment scheme. The Judge then set out the criticisms of the formulation of the grounds of unfitness at [19]: "Having set out or referred to the most salient parts of Mr Burns' affidavit as it relates to the case against Mr Walter on the main charge, there are serious criticisms which can be made of the formulation of the grounds of alleged unfitness in paragraphs 27 to 29 of the affidavit. What was required, as it seems to me, was a statement of the grounds containing the following elements: (i) a clear allegation that the second land bank scheme was marketed or operated in a way which made it a collective investment scheme; (ii) by reference to

the statutory definition of a collective investment scheme those aspects of the scheme's marketing or operation which, it is alleged, rendered it a collective investment scheme; (iii) references to the particular evidence contained later in the affidavit relied on in support of the allegation of such marketing or operation; (iv) a statement of the manner in which it was alleged that Mr Walter as a director or de facto director caused or allowed the company to market or operate the scheme in a manner which caused it to be an unlawful collective investment scheme; (v) an allegation that Mr Walter knew or ought to have known that the scheme as marketed or operated was a collective investment scheme and the grounds and evidence relied on in support of such an allegation. This would have allowed Mr Walter and the court to see clearly the way in which the case was put and would have made Mr Burns' rather cumbersome affidavit (much of which is taken up with a chronological recital of correspondence) a more useful document".

19.
As to the boundaries of the Secretary of State's case, at the trial:

19.1.
it was not alleged that Mr Lord knew or ought to have known that the Company's business was, as a matter of law, a collective investment scheme within the meaning of section 235 of FSMA (the question having only been finally determined by the Supreme Court in 2016, 4 years after he resigned); neither was it alleged that he specifically knew or ought to have known of all the particular features of the business as in fact it was operated (as explained below) that supported and were necessary to that conclusion;

19.2.
similarly, it was not alleged that Mr Lord specifically knew or ought to have known of the particular alleged "misrepresentations" relied upon;

19.3.
instead, "in essence" (as Mr Buckley put it in Opening) it was argued that Mr Lord was guilty of a "total abrogation" of his duties and responsibilities as a director (or was, at least, guilty of an abrogation of his duties, if not in respect of the Company's whole business, then in respect of those aspects or parts of its business which ultimately caused it to be a collective investment scheme and/or which involved the making of misrepresentations);

19.4.
in that regard, in Opening, Mr Buckley referred me in particular to various well-known (and uncontroversial) passages in Re Park House Properties Ltd[1997] 2 BCLC 530, where Neuberger J. (as he then was) said, at 554d-g, "Directors have duties, and if, having knowingly been appointed a director, a person does nothing, he is likely to be in breach of his duties, and if the company is involved in inappropriate activity, he risks associating himself with, and taking some responsibility for, that inappropriate activity. …. As a matter of principle, it appears to me that it cannot be right that a director of a company involved in activities which justify a disqualification order against the director directly responsible for those activities can escape liability simply by saying that he knew nothing about what was going on. The court must inquire whether in the circumstances the failure to discover what was going on was attributable to ignorance born of culpable failure to make inquiries or, where inquiries were made, of culpable failure to consider or appreciate the results of those inquiries: if such culpability is established, then the court would have to go on to decide whether, in all the circumstances, the culpability was sufficient to justify the conclusion that the conduct of the person concerned was such as to make him unfit to be concerned in the management of a company."

19.5.
and to similar effect, again uncontroversially, to Official Receiver v Stern (No 2)[2001] BCLC 305 at [197]-[199], where Lloyd J., as he then was, said:

"… the collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them.

A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but not total abrogation of responsibility. A board of directors must not permit one individual to dominate them and use them, as Mr Griffiths plainly did in this case.

…

It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are inescapable personal responsibilities. The appellants may have been dazzled, manipulated and deceived by Mr Griffiths but they were in breach of their own duties in allowing this to happen."

19.6.
it was not said what difference, if any, it would have made had Mr Lord taken any or any specific step, and in any event, it was not in any detail said specifically which step or steps he ought to have taken, but did not: Mr Buckley submitted that it was not necessary for the Secretary of State to adduce evidence or make submissions or advance any positive case at all in either respect.

The Witness Evidence

20.
In support of the case against Mr Lord, the Secretary of State called six witnesses. In addition to Mr Smith (who made three affidavits, including one comprising in terms a response to affidavits made by Mrs Grace and Mrs Banner-Eve, but nonetheless relied on against Mr Lord) were five of the Company's former investor customers, Mr Nicholas Lipman, Mr Paul Whelan, Mr Martin Francis, Mr Jonathan Atherton and Mr Kim Wisker, each of whom made an affidavit in these proceedings, confirming the contents of their respective witness statements made (in 2012) in the FCA Proceedings in support of the FCA's case.

21.
According to the Judgment of Andrew Smith J. (at [15], [2013] EWHC 178 (Ch)), of the investor witnesses, all but Mr Whelan gave oral evidence at the trial of the FCA's claims. At [18] of his Judgment, in respect of these (and other) witnesses, the Judge said, "I consider that all these witnesses gave honest evidence. Some investors were uncertain about such details as when they spoke with Asset Land and with whom they spoke, and they were not always entirely accurate about exactly what they were told. Subject to that I consider that all the witnesses called by the FSA gave reliable evidence, and I accept it in all significant respects."

22.
Before me, although Mr Smith was cross-examined, the investor witnesses were not: their evidence was unchallenged. As I have said, Mr Smith is a Deputy Chief Investigator in the Insolvency Service; he was not himself involved in, or witness to, any of the material events, and he was unable to give

direct evidence in respect of those events; the purpose of his evidence was to put relevant documents before the court, and to set out the Secretary of State's case. In the event, he was asked certain questions about the process of investigation into Mr Lord's conduct, and about the pre-action correspondence (albeit neither was he significantly involved in any of that). I found him to be an entirely straightforward and honest witness, who did his best to assist the court.

23.
In opposition, Mr Lord himself made a witness statement, and was cross-examined. In addition, he called two other witnesses, Mr Ian Philip and Mr Edwin Neary, both of whom were colleagues of Mr Lord, and both of whom were involved to some degree in the conduct, in particular, of the Company's accountancy and tax affairs. In addition, between 9 January 2006 and 15 August 2013, Mr Philip was the Company's appointed secretary. Neither Mr Philip nor Mr Neary was cross-examined; their evidence was unchallenged by the Secretary of State.

24.
In Closing, Mr Buckley submitted that I should treat Mr Lord's oral evidence with "caution". He supported that submission by reference to what he described as a significant difference (or at least, "change of tone") between what Mr Lord had said on various occasions before the trial, both in writing and orally, and what he said during cross-examination, about the nature and extent of his role in the business and management of the Company. Centrally, it was upon that issue that the Secretary of State's case came to rest. Accordingly, Mr Lord's evidence, and the extent to which I accept it, is more appropriately considered below, in the context of the evidence about the allegations themselves.

The Company, its Business and the FCA's Enquiries

25.
Between February 2006 and October 2007, the Company bought three adjoining parcels of greenfield land at South Godstone in Surrey with a view to consolidating them into a single site. The object, certainly at the outset, was to increase the value of the site by persuading the local authority to re-zone it for housing development. The site would then be sold as a whole at a profit to a developer. Shortly after acquiring the first parcel the Company began to subdivide it into plots and to offer the plots for sale to investors. Ultimately, the consolidated site was divided into 319 plots. Subsequently, another site was acquired at Liphook in Hampshire. A Panamanian company called Asset LI Inc ("ALI-Panama") acquired further sites at Newbury, Lutterworth, Harrogate and Stansted. The additional sites were acquired with the same object and were treated in the same way.

26.
On 3 April 2007, Ms Penni Cornelius, on behalf of the FCA (in fact, at that time, the "Financial Services Authority", but to which I shall nonetheless refer as "the FCA") wrote to the Company's directors, saying that "our attention has recently been drawn to your company", and expressing concern that it might have established and be operating a collective investment scheme without authorisation and so be contravening FSMA. The letter referred to the issued guidance on land investment schemes in the FCA's Handbook, to which it provided a link. In conclusion, "to enable the [FCA] to consider if any issues … arise" it requested that the FCA be given "full details of the scheme showing, in particular, how the planning process on the plots of land operates. Please also provide copies of all promotional and contractual documents used in the sale of the land, and detail any covenants applied to the plots of land". From the Company's perspective, receipt of this letter marked the opening of the FCA's enquiries.

27.

In order to advise and to assist in its response, the Company retained solicitors, SJ Berwin LLP ("SJB"), and in the course of the following period, until about November 2008, employed (and paid for) SJB's services on a significant scale. There is no criticism of SJB in these proceedings, or of any advice given by SJB; it is not (and could not be) said that SJB was not an appropriate firm to retain.

28.
In his witness statement, Mr Lord said that together with Mr Banner-Eve he attended an initial meeting at SJB's offices, and was "advised that, in the absence of any case law, it had never been established in law that land investment fell within the statutory prohibition; however the [FCA's] considered view was that it did. [SJB's] view for what it is worth, was that it did not". It was not in dispute that soon after SJB had been retained, Mr Banner-Eve asked Mr Lord to communicate and deal with them on behalf of the Company. Although Mr Lord, in his statement, describes having agreed to act as an "intermediary", "via LATBC's role as consultants", it was not in issue that he did as he had been asked, and that he continued to do so until the FCA's enquiries closed in November 2008 (albeit they were later recommenced, in 2011, leading to the FCA Proceedings in 2012). It was therefore not in issue that Mr Lord, from about April 2007, and throughout the period of the FCA's enquiries in 2007 and 2008:

28.1.
knew of the FCA's concerns that the Company's business might comprise an unauthorised collective investment scheme;

28.2.
knew of the course and content of the correspondence between the FCA and SJB on behalf of the Company, and was involved in instructing SJB on behalf of the Company, to enable SJB to advise and respond;

28.3.
knew of the advice given to the Company by SJB, and again, certainly on some occasions, was directly involved in receiving and understanding that advice on behalf of the Company, and responsible for communicating it to others at the Company, including Mr Banner-Eve.

29.
Despite the scale on which SJB seem to have acted, there was only one document in evidence (an email sent by Mr Andrew Northage (of SJB) on 14 May 2007, to Mr Banner-Eve, copied to Mr Lord) comprising or containing any part of their advice to the Company (although their advice is reflected to some extent in their correspondence with the FCA). In particular, that email contains SJB's comments, and suggested changes, "following our review of" the Company's website. Particular changes were suggested in respect of various specific parts of the website - the "Land Reports section", "FAQs", and the "Pdf press reports" - and in addition, certain recommendations were made in respect of "general matters", including in respect of the Company's stated "disclaimer", as to which a recommended draft was included. Under "general matters", SJB recommended that "you take care to ensure that any claims made or implied on your website (or in any marketing documents) are accurate and can be substantiated and that source information is held by you to confirm these matters (and preferably is disclosed in the website/document). It is also important that opinion is not portrayed as fact (or could be interpreted as being such) so, in order that the documents are clear, fair and not misleading, we would recommend that where possible you include source information alongside the relevant facts and statistics throughout the documents. We note that in general you have done this but mention it for completeness."

30.
Four days later, on 18 May 2007, SJB replied to the FCA's letter of 3 April 2007; this was the Company's first substantive written response. Although the first two pages of that letter were in evidence, and appeared to comprise the main part of the document, the remainder was not; the copy was incomplete. From what I was shown, SJB said that they had been asked by the Company's directors to respond (and I note that they used the word "directors", not "director"), and that amongst other things:

30.1.
they had been asked to review the Company's business model and associated documentation, including its website, with a view to ensuring that its business did not constitute a collective investment scheme;

30.2.
the Company had "always been sensitive to the question of whether its activities could amount to regulated activities under FSMA", and so had "specifically sought, and acted in accordance with, legal advice on this point"; that before receipt of the FCA's letter, it had "received legal advice from other firms of solicitors and consulted counsel specialising in financial services regulation" and had been given "very clear and firm advice that its land banking business model would not amount to" a collective investment scheme;

30.3.
they could "see that some elements of the website's content may have led the FSA to conclude that the activities described could involve [the Company] operating a collective investment schemein breach of section 19 of FSMA";

30.4.
they had advised the Company "that any risk that [its] activities may constitute the operation of acollective investment schemecan be avoided if all planning applications made by it relate only to that portion of a site that is owned by the Company. In addition, plot owners will not be required to grant [the Company] an option to purchase their plot from them following the land being re-zoned or planning permission being granted in respect of it";

30.5.
that the website and marketing materials were being amended with a view to ensuring that the scheme was not within section 235 of FSMA, and that "in my view" (the letter having been sent apparently by Mr Adrian Brown, of SJB) in those circumstances, the requirements of that section would not be satisfied;

30.6.
the Company proposed to restructure the business for the future (although in fact, as was not in dispute, those proposals were never implemented);

30.7.
letters would be written to "existing customers" giving them three options: inviting them to keep their plots on the basis that the Company would not apply for planning permission in relation either to individual plots or to the site as a whole (and on other terms designed to prevent the scheme being a collective investment scheme) or to transfer their plots to a special purpose vehicle (under the proposed restructuring) or to sell their plots back to the Company.

31.
It is clear from the language of that letter (and unsurprising) that SJB had given advice to the Company in addition to that contained in Mr Northage's email of 14 May 2007. As I have said, the content of that advice was not directly found or recorded elsewhere in the documentary evidence. Nonetheless, it appears (and I find) that subject to making the advised changes, SJB advised the Company that its business would not comprise a collective investment scheme, or at least, that there would be a serious prospect of avoiding that conclusion. Mr Brown would not otherwise have said to the FCA either that SJB had advised the Company "that any risk that [its] activities may constitute the operation of acollective investment schemecan be avoided", or that that "in [his] view", in those circumstances, the requirements of section 235 would not be satisfied.

32.
Mr Lord said, in his evidence, that following a short suspension of the Company's business immediately after (and as a result of) its receipt of the FCA's letter of 3 April 2007, its business recommenced. In my judgment, in those circumstances, it is more probable than not that the question whether or not to continue to trade was raised and actively considered by and with SJB, and that the Company was not advised to cease trading (even if it was also told, which is possible, that there remained some degree of risk in doing so). In that respect, I cannot find that the Company acted contrary to advice. Moreover, there is no evidence of the FCA having (during 2007-2008) asked the Company to cease trading.

33.
As stated, Mr Brown's letter referred to "legal advice from other firms of solicitors and counsel specialising in financial services regulation", and to "very clear and firm advice that its land banking business model would not amount to" a collective investment scheme. At the trial, there was an issue as to whether any such advice was received, and if so on what basis, and to what effect.

34.
As to that, again, the documentary record was manifestly incomplete, albeit impossible to say to what extent. Mr Lord exhibited:

34.1.
a letter dated 15 June 2005, from James Thorburn-Muirhead at Thorburn & Co Solicitors (to Mr Lord, beginning "Dear Nigel"), which refers to a meeting (of which there is no written record) and says that "I think all we can do at the start is to prepare some basis (sic) documents. It has to be conceded that these may well be changed in different circumstances but at least we will have something to work on." The letter does not contain any advice or reference to advice about FSMA, but refers to seeking the assistance of Counsel in respect of the sale agreement and "option (or sub-option)" to be registered at the Land Registry.

34.2.
a formal written Advice in respect of compliance with FSMA, obtained from Counsel in October 2006 (after the Company had commenced trading). That Advice however - concluding that the arrangement under consideration "does not constitute" a collective investment scheme - related to a markedly different business structure from that in fact being operated at that time (or at any time) by the Company (for example, in fact, and unlike the "structure of the scheme" as set out at paragraph 3 of the Advice, prospective purchasers did not become members of a management company).

35.

Otherwise, in his statement, Mr Lord said that in 2005, having been contacted by Mr Banner-Eve in respect of his “proposed new business venture” (the venture that became, in time, the business operated by the Company) he explained that the business (because it involved the sale of investments) “might potentially fall within financial services regulations and … therefore recommended that legal advice should be sought from a suitably qualified financial services and property lawyer”; that he went to two meetings at Thorburn & Co’s offices; that opinions were sought from two barristers “about the regulations that the new venture must conform to”; and that “no independent advice was provided suggesting that the proposed business model could possibly transgress” the relevant provisions of FSMA. He described the written Advice of October 2006, as having “confirmed” the original advice.

36.
Also, although not made in these proceedings, and although Mr Banner-Eve was not called as a witness in these proceedings, my attention was drawn to his (or certainly one of his) witness statements in the FCA Proceedings, made on 1 October 2012, in which he referred to having instructed “two counsel via a solicitor … one to draw up the contracts, the other to review the contracts” to ensure that “purchasers’ rights would be protected and the integrity of the project was secure” and also, to having received “extensive legal advice on setting up the business and the correct sales documentation”. I note also that Andrew Smith J. recorded (without finding) at paragraph 83 of his Judgment, that Mr Banner-Eve had given evidence that “when the business started” the Company took legal advice, and that its documentation had been “drafted and reviewed by counsel”.

37.
The evidence on this issue is therefore incomplete and unsatisfactory. It relates to advice that may or may not have been given, some 16 years ago, to a person (the Company) not party to the proceedings. In those circumstances:

37.1.
I consider it more probable than not that advice was sought and given to the Company in or about 2005 (before the advice given by SJB) in respect of FSMA and the application of its provisions to the Company’s proposed business; that conclusion is supported by the evidence of SJB’s letter of 18 May 2007, and by Mr Lord’s own evidence, and it is at least consistent with Mr Banner-Eve’s statement and evidence in the FCA Proceedings;

37.2.
I accept that I cannot know or find precisely the basis upon which that advice was sought or given, and I cannot know with any precision what was its content;

37.3.
however, in their letter to the FCA on 18 May 2007, SJB said that the Company had “specifically sought, and acted in accordance with, legal advice on this point”, and had “received legal advice from other firms of solicitors and consulted counsel specialising in financial services regulation”, and had been given “very clear and firm advice that its land banking business model would not amount to” a collective investment scheme; it was not put to Mr Lord that he (or indeed anyone else) had misled SJB; it seems to me unlikely that SJB would have said what they did, particularly in writing, without having some reasonable basis upon which to say it; moreover, their letter was written at a time far closer than these proceedings to the time of the disputed advice;

37.4.
it therefore seems to me more probable than not that whatever the precise content of the advice, it was not to the effect that the Company and/or its directors would be in breach of FSMA by virtue of

the proposed business; in any event, I am not willing to find that the Company acted in breach of any such advice, and/or failed to implement any recommendations it may have contained.

38.
Returning to the course of the correspondence between SJB and the FCA in 2007: in response to SJB's letter of 18 May 2007, the FCA wrote on 27 June 2007, commenting on the various proposals that had been made, and continuing the debate in respect of the various issues arising out of the description of the business provided by SJB, and the application of the provisions of FSMA.

39.
On 29 August 2007, SJB replied, further explaining the proposals, and saying that "[the Company] will not be lobbying for a change in designation in relation to any of its sites and does not make representations or give indications to its customers that it will lobby on their behalf". By letter dated 19 October 2007, the FCA made further comments, and again, continued to debate the application of FSMA (and to express some disagreement with views expressed by SJB).

40.
Apparently at that point, for reasons that were neither apparent nor explained to me, neither SJB nor the FCA pursued the matter (at any rate, in correspondence) until 18 July 2008 - almost nine months later - when SJB sent the FCA an "update" relating to existing customers of the Company: there were, said SJB, a total of 64 plot owners and customers who had been informed by telephone and a follow-up letter that "it was necessary to alter the previous arrangements and that [the Company] wasnot able to apply for planning permission. Plot owners were offered the choice of exchanging their existing plot for a plot that was larger in size and had access to services and roads, which would make it possible for a plot owner to apply for planning permission in respect of their individual plot (an "enhanced plot"), or selling their existing plot back to [the Company] for the price paid". SJB continued, that of the 64 owners, one had chosen to sell his plot back and the other 63 had opted for an enhanced plot. They explained that the telephone script and the letter sent to investors did not make it clear to plot owners that they might have rights under section 26 of FSMA and that it was therefore proposed to send a further letter.

41.
On 12 September 2008, the FCA sought further information about how the Company intended to operate in the future and criticised the letter to investors, specifically that what it described ("the fact that [the Company] was no longer able to apply for planning permission in respect of [the investor's] plot") was an "over simplification of the arrangements the participants are required to have day to day control over". The FCA said that in its view, it would be enough, for example, "if participants in a scheme expected that the operator would do these things" or would "do these things for the operator's own plot in circumstances in which the participant could reasonably expect that the result would be re-designation or granting of planning permission for the participants' own plots…". The debate thus continued, unresolved. Finally, the FCA asked for a variety of documents and information relating to the "current scheme", "before it is able to comment on whether the scheme, as briefly described by you, amounts to an unauthorisedcollective investment scheme".

42.
On 8 October 2008, SJB responded (albeit, again, the final page of the copy of the letter in evidence was missing), saying amongst other things, that "the company does not retain land at sites where it sells plots other than that required for roads, services and communal areas"; that the Company did not impose any restrictive covenants that would amount to arrangements within section 35 of FSMA;

and that it did not hold options over plots it sold. In addition, in respect of the "current arrangements", SJB enclosed revised contractual documentation (which was also not in evidence) and responded to the questions set out in the FCA's letter of 12 September 2008. SJB also said that the Company "believes it has a strong arguable case that it has not breached the general prohibition on the basis of the defence available under section 23" (which at that time provided, by subsection (3), that "In proceedings for an authorisation offence it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence").

43.
In the event, on 15 November 2008, the FCA replied, in terms that are important in the context of the present proceedings. Its letter stated as follows:

"… From [your letter dated 8 October 2008] and previous correspondence we note that [the Company] has contacted all existing plot holders and:

(a)
offered them a choice to either exchange their current plot for 'enhanced plot' or sell their existing plot back to [the Company] for the price paid plus interest;

(b)
advised all existing plot holders that [the Company] was unable to apply for redesignation on their plot; and

(c)
restructured its activities in an attempt to take its activities outside the definition of a collective investment scheme.

On the basis of your explanation of the current activities of [the Company] and the information currently in the [FCA]'s possession on this matter, we accept that [the Company] may be unlikely to have breached the general prohibition in section 19 or the financial promotion restriction of section 21 of the Act. For these reasons, and based solely on the information currently in our possession, we do not propose to seek any further information from you in this matter.

In order to continue not to be in breach of sections 19 and 21 of the Act it is fundamental that [the Company] adheres to the description of its activities which you have provided us and that no expectation is given to any of the plot holders that [the Company] will in any way have any involvement in:

(a)
seeking designation of the land for development; or

(b)
obtaining planning permission by plot holders, either individually or collectively; or

(c)
the management of the plots of land owned by the other plot holders.

In writing to you in this manner, the [FCA] reserves the right to make further enquiries should new information come to our attention suggesting that [the Company] may have acted, or be acting, in breach of the Act…".

44.

In respect of the FCA's concerns, from the perspective of the Company and Mr Lord, matters rested there until 13 June 2012, when the FCA (having formally commenced an investigation on 21 June 2011) obtained without notice freezing orders and other relief.

45.
In the meantime, on 13 October 2008, separately and apart from the enquiries pursued by the FCA, an Insolvency Service Investigator - Mr Gavin Marsden of the Companies Investigation Branch - was authorised, pursuant to sections 447(3) and 453A of the Companies Act 1985, to investigate the affairs of the Company. During November 2008, Mr Marsden corresponded by email with Mr Lord (who provided him with various responses and information) and interviewed both Mr Lord and Mr Banner-Eve on 17 October 2008, at the offices of SJB. Mr Lord's evidence was that as in respect of the FCA's enquiries, he was asked by Mr Banner-Eve to act as an "intermediary" and "to handle the enquiry", which is what he did.

46.
A copy of Mr Marsden's report of the investigation (dated 5 December 2008) was in evidence (although it was confidential at the time of its production, and was therefore not seen at that time by the Company or Mr Lord). From that report, and according also to Mr Lord's evidence, Mr Marsden met Mr Lord on 23 October 2008, at the Company's telesales office in Brighton. Mr Marsden records that he was "provided with answers to my questions and given the documents I requested". In cross-examination, Mr Lord said (and I accept) that although he had gone with Mr Marsden to the Brighton office and had remained there throughout his visit, he had allowed Mr Marsden to listen and speak freely to staff members, as he chose, and unaccompanied.

47.
In passing, I note that (in further support of the conclusion reached above at paragraph 37) Mr Marsden recorded that he was told by Mr Banner-Eve that legal advice had been sought by the Company prior to the commencement of business.

48.
In the event, no action was taken against the Company or its directors as a result of Mr Marsden's report, and it contained no serious criticisms (that my attention was drawn to). Moreover, there was nothing in the evidence to suggest that any of SJB or the FCA (in 2007-2008) or the Insolvency Service, told the Company, or advised or suggested to it, that its business, as presented and explained to the FCA, was manifestly unviable. Nonetheless, according to Mr Lord, soon after receipt of the FCA's 15 November 2008 letter, Mr Banner-Eve asked to meet him, "as he was considering the future of the business", and as a result, in about "late January/early February 2009" he met with Mr Banner-Eve, "who advised me that he no longer considered it to be commercially practicable for [theCompany] to continue operating due to the constraints on land promotion agreed with the [FCA]", and that the business would be wound down "immediately", after (and only in the meantime) completing any extant business. Mr Lord said that he was unaware of any new contracts entered into after March 2009, although he also accepted that there may be "some confusion regarding timescales as by their very nature, land transactions often take many months to be concluded". According to Mr Lord, from that time, following completion of those outstanding contracts, the Company became "entirely dormant".

The FCA Proceedings

49.

As mentioned, on 13 June 2012, freezing orders and interim injunctions were made against the Company, connected companies and various individuals, including Mr Banner-Eve, but not Mr Lord. That relief was continued by Peter Smith J. on 22 June 2012, and on 14 June 2012, the FCA Proceedings were issued, seeking (amongst other things) a declaration that in connection with the sites at South Godstone and Liphook the Company had established and/or operated a collective investment scheme, and breached sections 19 and 21 of FSMA; an injunction; and a restitution order under section 382 of FSMA. Mr Banner-Eve was alleged and ultimately found to have been "knowingly involved" in the Company's breach of FSMA. Judgment was given on 8 February 2013, following an 11 day trial in October-December 2012, at which both the Company and Mr Banner-Eve were represented by leading and junior counsel (as they were subsequently, in both the Court of Appeal and the Supreme Court).

50.
At the beginning of the trial before me (and until Mr Lewis' Closing, on the final day) it appeared that in respect of the First Allegation, there would be an issue between the parties as to whether the Company had operated an unauthorised collective investment scheme, and/or if so, on what basis. In his Skeleton Argument, Mr Lewis said, "There are no particulars as to those aspects of the Company's operation which, it is alleged, rendered it a CIS …. It is appreciated that the Company was found to have operated a CIS in the [FCA Proceedings], but Mr Lord was not party to those proceedings which were res inter alios acta, and no findings made in them can be binding on him."

51.
In response, Mr Buckley cited the decision of Briggs J. (as he then was) in Secretary of State for Business, Innovation & Skills v Potiwal [2012] EWHC 3723, in which it was decided (on the Secretary of State's application) to strike out part of Mr Potiwal's evidence, in opposition to an application under section 6 of the CDDA, on the grounds that it would be an abuse of process to allow him to relitigate (without adducing any fresh evidence) an issue regarding his knowledge of a "complex MTIC fraud" which had been "fully and fairly investigated by an experienced tribunal", albeit in proceedings to which the Secretary of State was neither party nor privy. The Judge held that it would be "manifestly unfair" to impose the cost of relitigating that issue on the Secretary of State, and would "bring the administration of justice into disrepute, in the eyes of right thinking people."

52.
There was force in Mr Buckley's submission. In the event however, in Closing, Mr Lewis accepted that (on a basis I shall explain below) there was no issue regarding the characterisation of the Company's business as a collective investment scheme. In those circumstances, whilst not necessary for the purposes of these proceedings to consider every aspect of the various Judgments in the FCA Proceedings, it is necessary to set out certain important findings that were made by Andrew Smith J.

53.
At the trial of the FCA's claims, the court heard evidence from 14 investors in the Company (including Mr Atherton, Mr Wisker, Mr Lipman and Mr Francis, each of whom has provided uncontested evidence in these proceedings) and/or in ALI-Panama (which was the First Defendant) which was found to be linked to Mr Banner-Eve. Between 2008 and 2011, ALI-Panama acquired and sold plots of land at sites in Lutterworth in Leicestershire, Newbury in Berkshire, Harrogate in Yorkshire and Stansted in Essex, and in his Judgment, in many places, the Judge referred to both companies, without distinction, as "Asset Land" (and I will adopt that reference for the purposes of this Judgment).

54.

ALI-Panama was not represented at the trial before Andrew Smith J., and took no active part in the FCA Proceedings. The Judge found that its business was a collective investment scheme, and made orders against it in the same form as those made against the Company, albeit, (i) in respect of different sites ("the Panama sites", being those referred to at paragraph 53 above) and (ii) as to the interim payment, in a different sum (£10,337,000, rather than £1,270,000). It is important to record that in the current proceedings, the Secretary of State did not rely on any allegations against Mr Lord in respect of ALI-Panama, or concerning any knowledge of its business or operation, or involvement in its management.

55.
Mr Banner-Eve gave evidence in his own defence, and on behalf of and for the Company, but neither he nor the Company called any other witnesses. At [22] of his Judgment, the Judge concluded that Mr Banner-Eve was a "deliberatelydishonest"witness. In particular, he rejected his evidence that he was not involved in the business of ALI-Panama.

56.
It is also worth recording (given the nature of the misrepresentations alleged by the Secretary of State in the present case) that at [27], the Judge said that the trial was "notaboutwhether in general terms the defendants dealt fairly with those who bought plots, nor about whether the purchasers were given unreasonably inflated expectations about the likely returns on their investment, nor about whether they were misinformed about the risks involved, nor about whether some or all of them might have a claim for damages for deceit or some other common law claim. The FSA alleges breach of the 2000 Act, and the case is about that allegation and the consequences if it is established."

57.
The Judge found (as set out at [62]-[63] and [67] of his Judgment) that Asset Land sold plots as follows: a representative telephoned the potential investor, often by way of a cold call; there generally followed several telephone discussions between the Company and the investors; they were given extravagant expectations about the profit that they were likely to make from a short term investment, often within no more than a year or two; some potential investors were sent a brochure; if the investor agreed to invest in a plot, they paid a "deposit" generally of 10% of the price; only after the investor had paid the rest of the price were they were sent two copies of the contract; no investors were encouraged to seek legal or other professional advice.

58.
Despite certain differences between the investors' evidence, it was clear, said the Judge (at [73]), that Asset Land's brokers "consistently told investors that they would not need to deal with the planning authorities, and that the scheme was that the value of their plots should appreciate from an enhanced planning status without them having to do anything themselves". Investors also, (i) "essentially … understood" that Asset Land "would arrange the sale of all the plots in a site to a developer" (at [74]), and (ii) "that, when developers bought the site, they would each receive part of the proceeds" (at [75]). The Judge inferred that other investors who dealt with Asset Land (in other words, other than those from whom he heard evidence) shared those understandings (at [76]). Overall he said, at [71], that the investors' evidence showed that they:

"shared a consistent understanding of the structure of the scheme:

i)
That Asset Land would seek to progress planning procedures with a view to the sites being used for housing.

ii)
That Asset Land would then procure their sale, probably to developers.

iii)
That the investors who sold the plots at the site would be paid a share of the total consideration paid by the purchaser."

59.
In his Judgment in the Supreme Court, Lord Sumption (at [68]) referred to these as "the core representations", as shall I, in the remainder of this Judgment. The core representations were a fundamental part of the basis upon which the business of Asset Land was held to comprise a collective investment scheme, albeit that notwithstanding they were found to have been made, there were nonetheless serious issues in respect of the FCA's case.

60.
At [109]-[110], the Judge considered whether or not the Company had made changes to its operations after receipt of the FCA's letter of 3 April 2007. He found that some changes were made: "from the summer of 2007 Asset Land used different documentation designed to achieve this purpose. It entered into contracts with investors in the simplified form that I have described, it required investors to complete the check-box form when they did so, it displayed on its letter paper the disclaimer in the footer and its brochures and other literature included the kind of information that I have set out at paragraph 62 above. I also accept that it sold "enhanced" plots with rights of way and the intention was that Asset Land should retain only land to provide such rights of way and other "communal" areas, all the plots being sold to investors."

61.
However, he also found that, "when marketing plots Asset Land's representatives still led investors to believe that it would work to enhance the prospect that the planning authorities would allow housing development on the sites, and often they encouraged investors to think that Asset Land would either apply for planning permission for the site itself or arrange for applications by others such as Greenwood Bell. It also led investors to think (as might be supposed from the nature of the plots) that the whole site would be sold together and the proceeds distributed: that was the obvious way for the plots to be sold and Asset Land's representatives confirmed that this was what would happen."

62.
At [114]-[141], the Judge held that the Company could not rely on the various disclaimers on its website and in its documentation ("the representations clause" and the "services clause"). As to that, on appeal, in the Court of Appeal, Gloster LJ said at [98], "The judge was perfectly entitled on the facts of this case to find that, in reality, the essential features of the "arrangements" were those represented in the oral sales pitch to investors, and not the artificial and misleading picture that Asset Land sought to present in the footers to certain of its brochures and its contractual documentation."

63.
The Judge also rejected the argument that the core representations were made without Asset Land's authority, and in doing so, said, amongst other things (at [148]), that "No written instructions to brokers or other representatives are in evidence and no such instructions are alluded to in documents that are in evidence. There is no reliable evidence of oral instructions. Mr. Banner-Eve said that he believed that there were written instructions "as to what they should or should not say", and that they were produced "Prior to [the Company] initiating [their] relationship with the brokers and then they would have been reviewed as different things happened with [SJB] and the [FCA]". I reject that

evidence: it was vague and given for the first time in cross-examination, and had it been true the instructions would have been reflected in the documents."

64.
In the circumstances as he found them to be, the Judge therefore concluded that despite the language of the website, of the contractual documentation, and of its brochures and sales literature, the Company's scheme came within section 235 of FSMA, and that it was therefore in breach of the general prohibition in section 19 of FSMA, and also in breach of section 21 of FSMA, having through brokers or other representatives, communicated invitations and inducements to participate in the schemes. As to his reasoning, briefly:

64.1.
at [157] he said, "… the brokers (or other sales representatives) of Asset Land and investors with Asset Land made arrangements when plots were marketed and investors paid a deposit that they should acquire land at a site, and that the object of the arrangements (as evinced in the exchanges) was that Asset Land should achieve a sale of the site (or a substantial part of it) after it had sought to enhance its value and so the price that it would attract by improving the prospects for housing development (through the site being re-zoned, if not granted planning permission), the price paid for it being shared between the owners of the land. Such arrangements are covered by section 235."

64.2.
and at [168]-[173] he said that investors "did not have day-to day control over the management of the property", and that "Whether the "property" be each site or each plot", the arrangements were such that the property was managed as a whole by or on behalf of the operator".

65.
Finally, at [180]-[185], the Judge rejected the argument that the FCA was estopped from advancing certain allegations by virtue of representations made in its letter of 15 November 2008, for two reasons: "[The Company] did not offer all those who had bought a plot by November 2008 the choice stated in the letter; it offered the choice to the 64 investors who had bought by April 2007 (when the [FSA] first wrote to [the Company]), and by November 2008 many more had bought … I conclude that this was a genuine mistake … and as a result [the Company] did not comply with the first condition of the [FCA's] letter. Nor, as I have concluded, did it comply with the second condition." The reference to the "second condition" was to the continuation of the business according to the description given to the FCA by SJB. He held that the Company was in beach of FSMA both before and after its receipt of that letter.

66.
The Company and Mr Banner-Eve both appealed, and their appeals were dismissed. In the Supreme Court, in short:

66.1.
Lord Carnwath (with whom the other JSCs agreed) upheld the Judge's reasoning; and,

66.2.
Lord Sumption (with whom the other JSCs, save for Lord Carnwath, also agreed) upheld the Judge's reasoning in respect of subsections (1) and (2) of section 235, but reached his conclusion in respect of section 235(3)(b) by different means, relying on the Judge's finding that "the arrangements embodied in the core representations could not work if the investors exercised the rights that they theoretically possessed".

67.
In his Closing (in addition to his argument that it would be an abuse to dispute, without fresh evidence, the allegation that the Company's business comprised a collective investment scheme) Mr Buckley submitted that by reference to the investor customers' uncontested evidence in these proceedings, I should, (i) find that the core representations were made, and (ii) that having done so, I should adopt the reasoning of the Courts (ultimately the Supreme Court) in the FCA Proceedings, and thus hold that the Company operated a collective investment scheme. In the event, on the basis that the core representations were made on behalf of the Company, Mr Lewis did not contest the point. Ultimately therefore, it was common ground:

67.1.
that the core representations were made on the Company's behalf; and,

67.2.
that the Company operated an unauthorised collective investment scheme.

The Alleged Misrepresentations

68.
In Mr Smith's First Affidavit, at paragraph 75, under the heading, "Misrepresentations of [the Company's] land banking scheme", he set out the following alleged "key facts … regarding the land investment opportunity in respect of the land at South Godstone".

68.1.
"From 2 February 2006 [the Company] made a total of £430,500 in payments for three purchases of land that comprised the South Godstone site."

68.2.
"The land at South Godstone was divided into 319 plots with estimated sales of £3,850,997 and a gross profit of £3,420,497."

68.3.
"Customers informed the FCA that plots of land were purchased on the basis of oral representations stating that planning permission and onward sale of the whole site to a developer would be managed by [the Company] even though printed documentation said otherwise."

69.
Similarly, at paragraph 106, in relation to the Liphook site, Mr Smith set out further alleged "key facts regarding the land investment opportunity misrepresented to the public", including that, "Customers informed the FCA that plots of land were purchased on the basis of oral representations that planning permission and onward sale of the whole site to a developer would be managed by [the Company] even though printed documentation said otherwise."

70.
In respect of both sites, Mr Smith's Affidavit then set out at some length various parts of the (uncontested) evidence of Mr Wisker, Mr Lipman, Mr Atherton, Mr Whelan and Mr Francis. As might have been expected by reference to the "key facts" alleged at paragraphs 75 and 106 of his Affidavit, much of the investors' evidence referred to and explicitly set out by Mr Smith was about the representations concerning the Company's future involvement in the process of obtaining planning permission and managing onward sales (in other words, the core representations upon which the FCA's case succeeded). To the extent that the Second Allegation was based on the Company having

made the core representations, it was materially the same as (or was at least part of) the First Allegation.

71.
At the trial however, in respect of the Second Allegation, and despite the terms of Mr Smith's First Affidavit, the Secretary of State relied only on the investors' evidence of what they were told (falsely, it was said, or without any reasonable grounds) about the prospects of rezoning, and/or planning permission, and the likely (but grossly exaggerated) returns that would be made on their investments – in substance, an allegation of "misselling" (as Mr Buckley put it, though Mr Smith, in his evidence, did not) going beyond the breach of FSMA, and not therefore raised or determined in the FCA Proceedings (as noted above at paragraph 56).

72.
The parts of the investors' evidence specifically relied upon were as follows.

72.1.
Mr Lipman's evidence that in respect of calls between July 2007 and January 2008:

"… they assured me that these were carefully picked plots of land where development was imminent."

"… they offered to sell me Greenbelt land that they said would imminently be re-designated for building residential housing."

"'The Asset Land representatives I spoke to claimed the land would increase in value and give me a return of 4 to 8 times the purchase price I paid when it was sold to developers. They said this would happen within 3 or 4 years."

"They told me that the water, mains and sewerage services on the site [at South Godstone] had already been upgraded to prepare for development. They said it was a good location because it was near to an industrial estate and the land would be soon re-designated for building residential properties, then sold to a developer. They told me I would receive a return on my investment within 3 years."

72.2.
Mr Lipman was subsequently told, in March 2008, in respect of the Company's site at Moreton Pinkney, was that he "would receive a return on [his] investment within 2 years".

72.3.
Mr Whelan's evidence relating to a telephone call in September 2008:

"He told me that [the site at Liphook] was due to be developed very shortly, but definitely within two years. Vince told me that although the Liphook site was greenbelt land, it would definitely be developed as the surrounding land had already been built on so there would be no difficulty in getting the land converted to brownfield status."

"When the site was sold on to developers to build houses on, the value of each plot of land would be guaranteed to triple."

72.4.
Mr Francis' evidence relating to calls in July 2008:

"… Rupert informed me that Asset Land had a site at Liphook which they conservatively estimated would deliver returns of 5 to 7 times my initial investment … he felt sure there was every chance the investment could even deliver returns of 8 to 10 times my investment."

"Jason had mentioned at the outset it would be 3-5 years before I saw a return on the Liphook site …"

72.5.
Further, Mr Francis received a letter from the Company dated 7 July 2008, enclosing a brochure, which stated, "The Grade 1 premier land is in a prime location and, based on past figures, is expected to increase in value between 5 times the initial purchase amounts when released for development."

72.6.
Mr Atherton's evidence relating to a call in July 2009:

"… he told me that he could offer me an investment that would see me get 3 or 4 times my money back in 6 to 12 months and certainly no longer than 18 months."

"Jason told me that there were parties already interested in acquiring both the Lutterworth and Godstone sites … In the case of South Godstone Jason told me that the site was close to a National Trust property and that the local authority was interested in turning the site into a car park to service the needs of the National Trust property."

72.7.
Mr Wisker's evidence relating to a telephone call in August 2007:

"They told me they had existing ongoing negotiations with property developers and planning specialists."

"I was told the land at South Godstone would need to be held for approximately 9-24 months."

73.
The Secretary of State's position was that the Company had no evidence to support any such claims and that they were false and/or unfounded. Mr Smith referred to a report prepared for the FCA in March 2013, which concluded as follows:

73.1.
that the value of the South Godstone site as at 1 March 2013 was £226,560;

73.2.
that the value of the Liphook site as at 1 March 2013 was £76,560; and,

73.3.
that both sites had "Currently little prospect of development".

74.
Those conclusions were at least consistent with the views expressed by the relevant local authorities. As to that, at paragraph 105 of his First Affidavit, Mr Smith set out evidence that in 2011, Tanbridge DC had confirmed to the FCA that there had been no planning application in respect of South Godstone since 1998, and that the "site is unlikely to receive planning permission for residential development in the near future"; and at paragraph 127, that in 2012, East Hampshire DC had informed the FCA, in respect of the Liphook site, that the "only circumstances that residential development may be acceptable in this rural location is if it is essential to house a full-time worker in

agriculture, forestry or other enterprise who must live on the site rather than in a nearby settlement. Based on current information available to this authority no such justification exists."

75.
Mr Lord adduced no evidence to support or justify the claims made on behalf of the Company to those investor customers who gave evidence, and I understood Mr Lewis to accept that they were not true, or at least, that they were made without any substantial foundation.

76.
In the FCA Proceedings, Andrew Smith J. accepted that the experience of the investors whose evidence he heard and accepted was typical of other investors, and therefore found that the core representations were made on behalf of the Company, effectively to all or a sufficient number of its customers to mean that they were an element of the business which it operated. Mr Buckley submitted that I should take the same approach in respect of the evidence of misselling adduced and uncontested in the present proceedings.

77.
On balance, I accept Mr Buckley's submissions in respect of the alleged misrepresentations.

77.1.
First, the evidence was that sales of plots at the South Godstone site (bought by the Company for £435,000) generated revenue of £3,850,970, and at the Liphook site (bought by the Company for £105,000) generated revenue of £732,202 (accepting, as I do, that the evidence of Mr Banner-Eve in the FCA Proceedings, as to the revenue in respect of Liphook, is likely to have been correct). It follows that an investment return was only possible if the land were to be rezoned or the subject of a successful application for planning permission, and for that reason, it is probable that investors were told that one or other of those was a genuine and substantial prospect. Otherwise, it is unlikely that as many would have agreed to buy/invest. It seems to me therefore that the experiences described in the evidence in the current proceedings are likely to have been reasonably typical, and I was not shown any evidence to the contrary.

77.2.
Second, I was shown no evidence to suggest any real possibility of development at either South Godstone or Liphook, whether in 2007/2008, or subsequently, and nothing to contradict the evidence that development was unlikely.

78.
Against that background, I turn first to the issues of fairness and clarity in the Secretary of State's case as advanced at trial.

The First Allegation: Fairness

79.
As to the First Allegation, in his First Affidavit (and in addition to the summary statement at paragraph 9, set out above at paragraph 14), Mr Smith said:

79.1.
at paragraph 129, "Mr Lord had knowledge of [the Company's] trading and allowed Mr Banner-Eve and [the Company] to operate an unauthorised collective investment scheme." Although I record that paragraph, Mr Buckley attached no weight to it as an elaboration or explanation of the First Allegation.

79.2.
at paragraph 131 (paragraph 130 having referred to the FCA's letter of 3 April 2007), "Mr Lord did not seek confirmation that [the Company] continued to be compliant with FCA regulations despite his knowledge of the FCA's concerns regarding [the Company's] trading practices." It was this paragraph in particular, that Mr Buckley relied on in support of his argument that the First Allegation, as argued at trial, was fairly open to the Secretary of State on the evidence.

79.3.
at paragraph 132, "Mr Lord dealt with the Insolvency Service's investigators in November 2008. He stated to the investigators that [the Company] had changed its operational practices, but in reality, [the Company's] sales operation continued in a manner that breached the provisions of FSMA. …"

79.4.
at paragraphs 149, 152 and 154, Mr Smith referred to various parts of Mr Lord's responses to the draft disqualification allegations made against him in correspondence.

80.
By way of context, in contrast to the summary statement of the allegations made against Mr Lord, Mr Smith summarised the allegations against Mrs Grace and Mrs Banner-Eve (in his First Affidavit, at paragraphs 10 and 11) in terms of each having "abrogatedherduties as a director of [the Company] by failing to exercise independent judgment and failing to exercise reasonable care skill and diligence by … allowing others to" operate the collective investment scheme and make the alleged misrepresentations. Although Mr Buckley was not able say whether or not there was any intended significance in the differences between the summary formulations of the case against Mr Lord and against Mrs Grace and Mrs Banner-Eve, those difference would at least tend to suggest that as against Mr Lord, the Secretary of State was alleging a greater degree of direct personal involvement in and/or responsibility for the stated outcomes. Whereas Mr Lord was alleged to have "allowed" the Company to act in certain ways, the other Defendants were alleged to have "abrogated their duties", and "allowed others" to act in those ways.

81.
In his witness statement, amongst other things, Mr Lord referred to his involvement with SJB and the course of the FCA enquiry in 2007/2008 and said, at paragraph 38, that "As the [Company] had taken the advice of a leading City law firm at the cost of several hundred thousand pounds, had advised the sales team, altered their scripts and revised all of its contractual and marketing documentation, I would contend that I, as a non-Executive Director, had taken all prudent and reasonable steps to ensure that the [Company] was fully compliant with the Regulations."

82.
An allegation that a person has "allowed" the occurrence of a certain outcome - as stated in the summary of the First Allegation in Mr Smith's First Affidavit - would ordinarily be understood to mean that the person knew about that outcome, or ought to have known about it, but failed to prevent it from happening.

83.
In this case however, as I have said, it was not said that Mr Lord knew about the collective investment scheme, or ought to have known about it, or that he knew or ought to have known about the facts which comprised the collective investment scheme, particularly the core representations. Instead, it was alleged:

83.1.
that Mr Lord knew of the advice given to the Company by SJB, and of assurances given, or implicitly given by the Company to the FCA about the Company's business model in October 2008;

83.2.
that Mr Lord knew of the risk of the Company's business being characterised as a collective investment scheme if SJB's advice was not properly implemented and/or the assurances not honoured;

83.3.
but that nonetheless, he did nothing to ensure that advice was implemented and/or assurances honoured (or more realistically, did not do enough) - and that he therefore failed to supervise or attend sufficiently to those aspects of the Company's business, which he could not simply "leave to Mr Banner-Eve" and/or others.

84.
There was at one stage an attempt to suggest that Mr Lord ought to have inferred or known of a particular or heightened risk of the core representations being made because of the very nature of the business, and it is right that to some extent (see paragraph 61 above) Andrew Smith J. relied on similar reasoning to support his finding that those representations were (more probably than not) made. But in this case: (i) the core representations were admitted to have been made, so there was no need to support that finding by reference to some innate feature of the business; (ii) those features were not particularised or evidenced in Mr Smith's Affidavits; and (iii) it was not said in the Secretary of State's evidence that Mr Lord should have known of those features, and/or drawn certain conclusions from them, and if so, what conclusions. It is not possible to know how Mr Lord would have responded in his evidence, and on advice, and more generally in his response to this case, had that allegation been set out plainly in the evidence. It would not have been fair to allow it to be pursued, and ultimately it was not.

85.
In the circumstances, the summary statement of the First Allegation in Mr Smith's First Affidavit is not an accurate summary of the more refined allegation as in fact advanced. Moreover, the Secretary of State's evidence in respect of the First Allegation was far from exemplary. However, the question is whether, by reference to the principles set out at paragraphs 17-18 above, it would be fair, and the Court should allow, the refined allegation to be advanced.

86.
In my judgment, on balance, it was open to the Secretary of State on the evidence, at least in principle, to make the allegation as in fact advanced and stated above at paragraph 83. In reaching that conclusion, in addition to the statements at paragraphs 131 and 132 of Mr Smith's First Affidavit, I rely in particular on Mr Lord's own written evidence specifically in opposition to the allegation, to the effect that because professional legal advice was taken and followed, he satisfied his duties as a non-executive director; that he thereby took "all prudent and reasonable steps to ensure that the [Company] was fully compliant with the Regulations." There is no unfairness to Mr Lord in allowing the Secretary of State to challenge that case, and Mr Lord must in substance have understood it to be in issue.

87.
Having said that, despite the references in Opening, referred to above at paragraph 19, the First Allegation as advanced was not in substance one of "total abrogation" of Mr Lord's duties and responsibilities as a director (such as was found in Re Park House Properties Ltd for example, where

Neuberger J. said, at [1997] 2 BCLC 530, 540h, that “Mrs Carter played no part whatever in the affairs of the company. When asked what his reaction would have been if Mrs Carter had raised some question over breakfast about the preparation or filing of annual accounts or the payment of VAT, Mr Carter said that he would have choked on his corn flakes”). Neither was it an allegation that Mr Lord’s conduct was dishonest or fell below requisite standards of commercial probity. Instead, it was in substance an allegation of incompetence, or culpable failure to take all appropriate steps. In those circumstances, Mr Lewis made two further points.

87.1.
First,he cited Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker and others (No 5)[1999] 1 BCLC 433, pp.483i-484b, where Jonathan Parker J. said, “Where, as in the instant case, the Secretary of State’s case is based solely on allegations of incompetence (no dishonesty of any kind being alleged against any of the respondents), the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates incompetence of a high degree. Various expressions have been used by the courts in this connection, including ‘total incompetence’ (see Re Lo-Line Electric Motors Ltd [1988] BCLC 698 at 703, [1988] Ch 477 at 486 per Browne-Wilkinson V-C), incompetence ‘in a very marked degree’ (see Re Sevenoaks Stationers (Retail) Ltd [1991] BCLC 325 at 337, [1991] Ch 164 at 184 per Dillon LJ) and ‘really gross incompetence’ (see Re Dawson Print Group Ltd [1987] BCLC 601 per Hoffmann J). Whatever words one chooses to use, the substantive point is that the burden on the Secretary of State in establishing unfitness based on incompetence is a heavy one. The reason for that is the serious nature of a disqualification order, including the fact that (subject to the court giving leave under s 17 of the Act) the order will prevent the respondent being concerned in the management of any company.” I accept that to be an accurate summary of the relevant principles.

87.2.
Second, he said that given that this is not a “total abrogation” case (or to the extent that in relevant respects Mr Lord took some steps, rather than none) the Secretary of State must explain what Mr Lord ought to have done, what step/s he ought to have taken and/or enquiries he ought to have made, but did not, in order to explain the respects in which he is said to have fallen below the standards expected. As to that, I am not prepared to accept that the Secretary of State’s failure to do so is necessarily and as a matter of principle fatal to the allegation, such that there is no case to answer. However, I do accept that it affects the Secretary of State’s ability to prove his case on unfitness: there must, after all, be some coherent and reasoned criticism of what Mr Lord has done or failed to do, and his conduct must be measured by reference to some standard of what was required; implicit in doing something but failing to do “enough”, is failing to do something else which is identifiable (or something falling within an identifiable range). It is not sufficient simply to prove that Mr Lord was a director at a time when the Company acted in some unlawful or improper way, which of course, ex hypothesi, he “failed to prevent”; there must be, even if on a “broad brush basis”, some personal responsibility for the outcome, as stated in the 9th proposition of Hildyard J. set out at paragraph 13 above.

88.
In conclusion therefore, as to the First Allegation, I am willing, despite the departure from the language of the summary at paragraph 9 of Mr Smith’s First Affidavit, to allow the Secretary of State to advance a case in the terms set out above at paragraph 83. That conclusion necessarily limits the allegation to a certain period of time, because SJB was not instructed until after the FCA’s enquiries of the Company began in April 2007, and relevant assurances about the Company’s business model were

not given to the FCA until October/November 2008; furthermore, the Company ceased to trade actively in and from about January-March 2009, which is approximately when ALI-Panama seems to have commenced in business.

89.
Finally, it is convenient to deal here with an issue that arose in respect of the significance or otherwise of the legal advice taken before the retention of SJB in April/May 2007. As I have found and set out above, prior to Mr Lord's appointment as a director, and prior to receipt of the FCA's letter in April 2007, on Mr Lord's recommendation, some advice at least was taken by the Company in respect of compliance with the provisions of FSMA. Mr Buckley submitted that this was not advice upon which Mr Lord can now "rely", because apart from anything else (as I have accepted) it is not known upon what basis it was given. Similarly, he said that no reliance can be placed on the written Advice of Counsel obtained in October 2006, because (again as I have accepted) it was based on a different business structure from that in fact operated.

90.
However:

90.1.
as I have held, in respect of the First Allegation, the Secretary of State is entitled to advance a case that Mr Lord failed properly to supervise the implementation of the advice given by SJB, from about April/May 2007;

90.2.
it was therefore not necessary for Mr Lord to establish precisely the content of the earlier advice, in order to "rely" on it to meet some substantiated criticism; it was for the Secretary of State to set out clearly an allegation of conduct requiring a disqualification order in the respect of the period prior to intervention of the FCA - but he did not do so;

90.3.
I would in any event be reluctant to find any support for a complaint in Mr Lord's "failure" to find and obtain documentary evidence of the advice given in 2005, in proceedings commenced 15 years after the event, in circumstances where, apart from anything else, he was not its intended recipient (and the Secretary of State has not himself taken any steps, of which I was made aware, to obtain details of that advice);

90.4.
it was not submitted that the Company and/or Mr Lord knew or ought to have known in the period before April/May 2007, that the Company's business comprised a collective investment scheme; as noted above, certainly at that time, there was considerable uncertainty surrounding the application and effect of the relevant provisions;

90.5.
in any event, before the FCA became involved, and before SJB were retained and advised, I have found that the Company and/or its directors (on Mr Lord's recommendation, and certainly to his knowledge) sought and were given some advice in respect of FSMA, but not advice to the effect that they would be in breach of its provisions by virtue of the proposed business; as stated, I am not willing to find that the Company and/or Mr Lord disregarded or acted in breach of any such advice;

90.6.

accordingly, there is no question of any finding of unfitness in respect of Mr Lord's conduct prior to the beginning of the FCA's enquires in April 2007.

The Second Allegation: Fairness

91.
As to the Second Allegation, again, there are serious issues of clarity and fairness, relating to both the scope of the particular misrepresentations relied upon, and the alleged conduct of Mr Lord in respect of those misrepresentations.

92.
In Mr Smith's First Affidavit, at paragraph 140, under the heading, "Allowing Misrepresentations to be made", he said, "Mr Lord was aware that [the Company] was making sales to the public. After November 2008, [the Company] continued to make sales of £1,824,288 in respect of plots of land sold at Liphook and misrepresentations continued to be made." At paragraph 141, he said, "Mr Lord failed to take steps to ensure that such sales by [the Company] to the public were not based on misrepresentations made by [the Company]". In the remainder of his Affidavit, he recited various parts of the correspondence before action, but without stating any more particularised case in respect of the Second Allegation.

93.
At trial, as I have said, the Secretary of State relied on some of the "misrepresentations" described by Mr Smith, but not others, and in this respect at least, advanced a broad case of "total abrogation" in respect of the Company's affairs.

94.
In the circumstances, by reference to the principles set out at paragraphs 17-18 above, for the following reasons, I do not consider that the allegation as advanced at trial fell within the case as stated and contained in the Secretary of State's evidence, and I do not consider that it was fairly open to the Secretary of State.

94.1.
Although the misrepresentations ultimately relied upon were amongst those referred to in Mr Smith's lengthy rehearsal of the investors' evidence, it seems to me that they were not amongst those which were highlighted at either paragraph 75 or paragraph 106 of his Affidavit, in his explanation of the "key facts". A more natural reading of those paragraphs is that they were intended to refer to (mis)representations that planning permission and sale would be managed by the Company, despite what was said in its contractual and other documentation. I do not accept Mr Buckley's submission that Mr Lord ought to have understood (or even could reasonably have understood) from Mr Smith's Third Affidavit (made specifically in response to the evidence of Mrs Grace and Mrs Banner-Eve) that the Second Allegation had been refined to refer only to the misrepresentations ultimately relied upon. Apart from anything, that is not what it says, although it does contain evidence material to the allegation of misselling.

94.2.
Further, the statement at paragraph 140 of Mr Smith's First Affidavit, by explicit reference to November 2008 (when the FCA wrote to SJB, accepting the legitimacy of its business model) also tended to suggest that the Second Allegation was aimed at the features of the business material to its character as a collective investment scheme, rather than any unfounded or exaggerated claims of profit. In my judgment, on an ordinary reading of Mr Smith's evidence, the real gist of the Second

Allegation was, or was intended to be, that Mr Lord allowed the Company to make the core representations (which caused significant losses to customers).

94.3.
Although of course it must be read in the context of the whole case, and all the evidence, the summary statement of the Second Allegation at paragraph 9 of Mr Smith's First Affidavit is not an accurate summary of the allegation as ultimately advanced. As in respect of the First Allegation, the allegation as advanced at trial was not one of having "allowed the Company" to act in the usual sense of the word "allowed", because it was not alleged that Mr Lord ought to have known that the Company was making the misrepresentations - it was not alleged that there was any particular connection between Mr Lord's conduct and the misrepresentations.

94.4.
As said above at paragraph 80, the differences between the summary of the case against Mr Lord, and the summary of the case against the other Defendants, tended to suggest an allegation that Mr Lord had a greater degree of direct responsibility for the misrepresentations, rather than that he was guilty, as alleged at trial, of a total abrogation of his responsibilities.

94.5.
Had the Secretary of State's case been a broad case of "total abrogation" of duty in respect of the Company's whole business and management, he ought to have said so unambiguously in the evidence (and advanced grounds) and had he said so, Mr Lord's response might have taken an entirely different course; it was that broad case however that Mr Buckley sought to advance at trial, saying for example in his Skeleton Argument, that "it appears that Mr Lord personally took no steps to supervise or control the Company's trading, including …. the manner in which sales were being made to members of the public and what claims were being made …" and that "Mr Lord could not, consistently with his duty to supervise and control the Company's affairs, simply leave all these matters to Mr Banner-Eve"; those broad allegations do not appear in the Secretary of State's evidence; there is a real difference between an allegation that a director took no part at all in the management of a company's business (as in Re Parkhouse, for example) and an allegation that he failed to supervise, whether at all or sufficiently, the management of a particular aspect or specific risk.

94.6.
Moreover - unlike in respect of the First Allegation, and the collective investment scheme, in respect of which Mr Lord admittedly knew of the risk that the Company might be acting in breach of FSMA - it was not said in Mr Smith's evidence that Mr Lord ought to have appreciated that there was any particular risk of the relevant misrepresentations being made. Although Mr Buckley sought to raise that case on the grounds that the Company's sales agents were acting on a commission basis (and therefore, presumably, were more likely to misrepresent the truth – a suggestion described by Mr Lewis, as "recondite", and for which there was no evidence) and/or that it must or should have been obvious to Mr Lord that customers would not have invested without being told of some prospect of making significant profit, meaning that he was under a particular obligation to enquire into and/or supervise what was being said, those bases are not sufficiently clearly referred to in the particulars of the case against Mr Lord (and that is unaffected by my findings at paragraph 77 above); all that Mr Smith said, at paragraph 140 of his First Affidavit was that "Mr Lord was aware that [the Company] was making sales to the public" (which of course, he was) and that it continued to do so, and to make misrepresentations after November 2008, and at paragraph 141, that he "failed to take steps to ensure that such sales … were not based on misrepresentations …". As I said above, as a matter of

natural justice, the Secretary of State is limited to the evidence and case in fact made, and the court can only consider that case in determining whether unfit conduct is established.

95.
In my judgment, in all the circumstances, the Secretary of State's case in respect of the Second Allegation has changed over time, but without those changes being made clear and explicit; it is and has been diffuse and confusing, and in my judgment, in the broad terms in which it was advanced at trial, it was not properly evidenced or fairly advanced. I agree with Mr Lewis, that it is "deficient in significant respects" - it is not for a defendant to disqualification proceedings to search through the evidence in order to assemble the elements of a case that might be alleged. Nonetheless, in case I am mistaken in that regard, I shall consider the evidence, such as it is, in respect of the question whether Mr Lord was guilty of a "total abrogation" of his duties in respect of the Company's business and affairs, as was alleged.

Mr Lord's Role & Responsibilities

96.
Central to the case against Mr Lord are the nature and extent of his role in management, and the responsibilities that were given to him specifically. As I have said, he was appointed as a "non-executive" director, and in any event, for specific purposes and because of specific professional expertise and experience. As he said in his statement, and as I set out above, his particular sphere of responsibility was in respect of taxation and fiscal matters. It was not suggested that he failed to give sufficient attention to those matters that fell within the scope of his particular expertise, or to fulfil those responsibilities competently.

97.
In cross-examination, a consistent theme of Mr Lord's evidence was that whilst the conduct of the Company's "day to day business" (the "land banking" business itself) wascontrolled by Mr Banner-Eve (as I note was said by Andrew Smith J. at [4]of his Judgment, and was not in issue), his own was a "dual role" which comprised not only giving advice and assistance based on his professional experience and expertise (the narrow role which Mr Buckley suggested he undertook, understood and to which he was confined) but also participating in making at least some decisions at Board level, as well as acting as a director on behalf of the Company in various other respects, for example, in respect of the FCA enquiry which began in 2007, and in respect of the legal advice taken by the Company in respect of that enquiry. He said that his assistance as a director was on an ad hoc basis; that even the Company's tax affairs were ultimately the responsibility of the board; and that in any event, he did not recall any disagreements between himself and Mr Banner-Eve, at Board level.

98.
Mr Buckley submitted that Mr Lord's oral evidence about the extent of his participation in decision making and management ought not to be accepted. He submitted that the substance of Mr Lord's words and evidence before he gave evidence at the trial was that his role consisted of "giving advice", and acting as a "consultant", but not as a director, by reference to the different and specific duties falling upon a director. He said that I should therefore treat with "caution" what was said in cross-examination, suggesting any greater degree of involvement, and that in effect, I should disregard it as inconsistent with what was said previously (and thereforewhat he "thought at the time"). He submitted that all material decisions were taken by Mr Banner-Eve alone, even if in some cases on advice given by Mr Lord or with his professional assistance (which, said Mr Buckley, might equally

have been provided by Mr Lord, in his capacity as a “consultant”) or with his passive acquiescence. He referred to the following.

99.
On 22 May 2017, Mr Lord was interviewed by Mr Peter Joicey (a Deputy Official Receiver and Senior Examiner at the Insolvency Service) under section 235 of the Insolvency Act 1986. A written record of the interview, signed by Mr Lord, was in evidence, as was the written “interview plan” containing the questions put by Mr Joicey. My attention was drawn to various passages.

99.1.
As to his “role and responsibilities”, Mr Lord said that when Mr Banner-Eve proposed the new business, he “consulted me on structure which is what I do for a living … I provided advice structure and advised him to take legal advice. I attended two meetings with a suitably qualified solicitor and we obtained barrister’s opinions in 2005 specifically on whether the company was contravening any regulations”. Subsequently, “I was asked to become a non-executive director. From point (sic) my role was I was not an employee and my role was advisory to [Mr Banner-Eve] as he was the only principle (sic) of the business and I never had any decision making powers, so I just provided strategic business consultancy advice, which is my profession and I assisted the company when the FCA enquiry took place”.

99.2.
Asked who had responsibility for the Company’s tax affairs, Mr Lord said that “the real answer was DBE because he had responsibility for everything but I advised him on the structure. Then there were external accountants and agents. My firm may have been the agents for Preston’s”.

99.3.
Mr Lord said that he had “never had any involvement in the trading of the company”, and that as to the cessation of trade, in the “early part of 2009 I had a meeting with DBE to discuss the future of the company and he advised he had already made the decision to cease trading”.

99.4.
In response to the question, the Official Receiver “isconcerned that you have allowed [the Company] to carry out regulated activities … without being an authorised person or an exempt person … What is your comment on this?”, Mr Lord said that he “had no involvement or authority over the business activities of the company.” And in response to the further question, “The Official Receiver is concerned that you have caused or allowed [the Company] to make misrepresentations to its customers …… What is your comment on this?”, Mr Lord said, “I had no involvement with the sale of the land or making the misrepresentations to anybody as I did not deal with customers”.

100.
Second, on 4 May 2018 (almost a year after the interview referred to above above), Mr Joicey wrote to Mr Lord, and asked for his comments (by 25 May 2018) on allegations (very briefly stated, and barely particularised) that he had “caused and/or allowed” the Company to operate a collective investment scheme without authority, and make misrepresentations (in the period from 17 March 2006 to 31 December 2010 – not the period stated in the summary of the First Allegation in Mr Smith’s First Affidavit, or indeed, the period principally relied on in submissions, and even at the time of the letter, concerning events that took place 12 years earlier).

101.

In response, Mr Lord wrote on 23 May 2018. He referred (correctly) to the short time which he had been given in which to respond; he said (again correctly) that he had not been given and had no access to many relevant documents; he said (again, with good reason) that the proposed allegations made against him, and their grounds, were unclear; he asked for a clear statement of the alleged grounds, and an itemised summary of all instances, if any, where it was suggested that he had any "personal involvement in any alleged criminal activity, or any form of misconduct".

102.
The letter continued (and Mr Buckley relied on these passages): "Based on the limited information currently available, I anticipate that the following areas will be relevant to this contention" – "my role as a non-executive Director was entirely advisory. At no time did I ever exercise any control over any material decision made by the Company. At no time did I ever have any involvement with the company's land banking business, or the purchase, management, promotion of (sic) sale of any land. At no time did I ever have any involvement in the control or management of any of the Company's internal or external sales employees, consultants or brokers."

103.
Third, Mr Buckley also referred to various passages in Mr Lord's witness statement in these proceedings, including in particular where he said:

103.1.
that when appointed, he agreed that his "role would be limited to providing taxation and fiscal consultancy advice to the business via LATBC, and that [he] would have no management role within the business nor any involvement in acquiring, promoting or selling land";

103.2.
that in connection with the FSA enquiry, he acted as the "intermediary" between the Company and SJB, but "all decisions regarding [SJB's] advice were take solely by Mr Banner-Eve";

103.3.
that his role "never extended to any accountancy matters relating to the Company other than reviewing management accounts at a headline level and providing high level tax advice" and that "All decisions regarding the purchase, promotion and sale of land and all associated marketing material were made by Mr Banner-Eve without my involvement";

103.4.
that his "non-Executive Directorship was extremely limited in scope. I had a full time business to run with over 200 clients and a dozen staff and would only rarely attend the company premises as and when was required. At the most, this would have been on average about half a dozen occasions per annum. These visits were restricted to consultancy meetings with Mr Banner-Eve and attending occasional board meetings. As I had no knowledge of any form of land investment, promotion or sales, I was not involved with any aspect of the running of the company's business other than within the remit of my very limited role outlined above."

104.
For the following reasons, in respect of Mr Lord's oral evidence, and in respect of the words he (undoubtedly) used, wrote and spoke before the trial (upon which the Secretary of State now relies) I do not entirely accept Mr Buckley's submissions, and I am unwilling to attach to Mr Lord's words the full extent of the significance suggested by Mr Buckley.

105.
First, it was common ground that the documents in evidence in these proceedings comprise only part (and I infer a comparatively small and incomplete part) of those that once existed (and may still exist) albeit not within the control of the parties. For example, although Mr Lord was unable to recall how much, in aggregate, had been charged by SJB to advise and assist in connection with the FCA's enquiries, he speculated that it might have been as much as £200,000 (which I note to have been the sum referred to by Mr Banner-Eve, when asked about this at his interview under section 235 of the Insolvency Act). In any event, Mr Lord told me - and I accept as more probable than not - that it would have been a substantial sum. Nonetheless, in the evidence in these proceedings, there was only one document (the single short email from Mr Northage sent on 14 May 2007, and referred to above at paragraph 29) containing advice given by SJB to the Company, and even the correspondence between SJB and the FCA was not complete. Similarly, there were very few contemporaneous documents evidencing the conduct and management of the Company's business. As to the present whereabouts of those documents, if indeed they still exist, I was not given any clear answer, although it was suggested that they had been seized by the FCA and/or by the Trading Standards Authority in or about 2012.

106.
It follows that the documentary evidence adduced by the Secretary of State is manifestly incomplete as a record of material events. For example, other than by reference to the email of 14 May 2007, I cannot say exactly what advice SJB gave the Company, or when it was given; I cannot say to whom at the Company it was provided, and whether orally or in writing; I have no documents by reference to which to understand the reaction of those to whom it was provided, or the means by or to whom it was communicated within the Company; I have no means of knowing, by reference to any documents, the means by which the Company's revised contractual documents and other written materials were produced and disseminated, and why to some extent they did not reflect the advice given. Similarly, I was shown no documents, and the Secretary of State adduced no evidence, to explain the Company's management structure, or the roles of various other employees, such as Mr Cohen, who was found in the FCA Proceedings to have been knowingly involved in the breach of FSMA.

107.
As to the stark absence of relevant documents, it is right that Mr Lord could, in principle, have taken steps to find and obtain them, if indeed they still exist, but ultimately the burden of proof rests on the Secretary of State, and their absence is capable of affecting his ability to satisfy that burden, as Mr Buckley in principle accepted.

108.
Second, although these proceedings were commenced on 11 March 2020, and therefore within the 3-year period provided for by section 7(2) of the CDDA (albeit by less than a week), it must be recognised that the Secretary of State's allegations concern conduct and events which took place beginning in 2006/2007, some 15 years ago. It is commonplace to observe (and readily understandable) that not only is it difficult for witnesses to remember accurately what happened or what was said some number of years ago, but also that witnesses can easily persuade themselves that the accounts they now give are correct. Equally, the civil litigation process itself subjects the memories of witnesses to powerful biases. That must be all the more so in a case where the documentary evidence is sparse or incomplete.

109.
Inevitably, if for no other reason than the long passage of time, and the absence of documents, I must approach Mr Lord's evidence with a degree of caution, and to that extent I do accept Mr Buckley's

submission. But equally, in all the circumstances, it becomes more difficult and potentially unfair to criticise Mr Lord for some of the inconsistencies in what he has said over the course of years, or even to attach particular weight to certain words said on certain occasions in support of the case now advanced against him.

110.
Third, in any event, it is right to assess what has been said by Mr Lord in the context in which he said it, and in particular, in the context of the allegations then being made against him, or the questions he was then being asked. Those allegations have undoubtedly changed or been refined from to time to time - even in some respects at trial, as I have explained - and have not invariably been clearly stated or particularised.

111.
Furthermore, prior to the trial itself, the allegations put to Mr Lord have tended to imply or even make explicit a positive causal connection between Mr Lord's conduct and the fact of the unauthorised collective investment scheme and/or the alleged misrepresentations, a connection which at trial was not suggested (or said to be necessary). At times certainly, Mr Lord was responding to (and seeking to defend himself against) the suggestion that there was such a positive causal connection, or that there was direct involvement.

112.
For example, the interview under section 235 of the Insolvency Act 1986 took place in May 2017. The recorded statements were not made in evidence to this Court, and Mr Joicey has not appeared as a witness. The questions put by Mr Joicey were not (at least, by reference to the interview plan in evidence) particularly precise. Moreover, the questions tended to suggest direct personal responsibility for the various wrongs – for example, "The Official Receiver is concerned you have allowed [the Company] to carry out regulated activities during the period March 2006 to 15 November 2009 without being an authorised person or an exempt person …. This has resulted in a claim against [the Company] for £5,810,69 being made on 22 March 2013. What is you comment on this?"

113.
In those circumstances, it would be understandable had Mr Lord emphasised the undoubted "advisory" aspects of his non-executive role - it must be borne in mind that during 2012-2016 there were serious civil and criminal proceedings in respect of the Company's business. Whether or not that reflects credit on him (and Mr Buckley said that if true it did not) it is part of the context, and is material to an assessment of what Mr Lord said, and what weight ought to attach to it. Nonetheless, even then, Mr Lord's answers to Mr Joicey were not inconsistent with the proper discharge of his functions as a non-executive director. Having "no involvement" in, for example, "business activities", is capable of bearing a range of meanings, including that he was not directly involved in the conduct or management of the land banking business, for which Mr Banner-Eve was principally responsible.

114.
I should add that it was to a significant degree in respect of Mr Joicey's role that Mr Lewis cross-examined Mr Smith, his purpose being to suggest that Mr Joicey had acted unfairly in his desire to secure Mr Lord's disqualification (ultimately affecting the fairness of the Secretary of State's case). He referred for example to Mr Joicey asking Mr John Edwards at the FCA in May 2017, "Why was Mr Lord not targeted for recompense or bankruptcy? Could you explain how/why the FCA viewed Mr Banner-Eve as more culpable than Mr Lord? The consequences of a disqualification order against Mr

Lord would be devastating for him as a finance professional." Mr Lewis suggested that these words displayed an unbalanced approach to the enquiry in respect of Mr Lord – an improper desire to "target" Mr Lord because the consequences would be "devastating". However, I did not hear evidence from Mr Joicey, and on the material in these proceedings, I am unable to reach any conclusions (adverse to Mr Joicey) about the conduct of his enquiries or the meaning or intent of his various emails, and I do not do so. In any event, the case against Mr Lord is to be decided by reference to the evidence adduced against him, rather than by reference to the process by which it was decided to seek an order.

115.
Ultimately, in my judgment:

115.1.
it is plain, and was indeed effectively common ground, that in certain respects, Mr Lord's role was "advisory", or had an "advisory" aspect: as he himself said, he was appointed as a result of his professional expertise and experience as a consultant in taxation and fiscal matters, not as a result of any knowledge of the particular business carried on, and he was appointed as a "non-executive director".

115.2.
however, it is equally plain that in certain respects, Mr Lord also participated in decision making or directly in management to a much greater degree. For example, there is no doubt or even dispute that he was significantly involved in dealing with SJB (and through SJB, the FCA) and with the advice received from SJB; there is no doubt or dispute that Mr Lord dealt with the enquiries made by Mr Marsden, and the Insolvency Service, and that he accompanied Mr Marsden to the Company's telesales offices in Brighton in October 2008. Both SJB and Mr Marsden are very likely to have dealt with and treated Mr Lord as a director.

115.3.
in his witness statement, at paragraph 27, Mr Lord said that his role as a director "included the following duties: Creating-tax efficient business structure. Interpreting headline management accounting reports prepared by the Company's accountants for the benefit of Mr Banner-Eve. Providing strategic planning advice. Attending designated board and audit meetings". It was not said that Mr Lord failed to fulfil any of these responsibilities qua director.

115.4.
given the Company's ownership, and his predominant position within the business, it seems to me likely that Mr Banner-Eve did, certainly in the first instance, reach certain decisions that Mr Lord was told about and agreed or did not dispute - for example,as to the cessation of trade in 2008/2009. But I do not find necessary support in that for the proposition that Mr Lord played no part in management, or abrogated his responsibilities entirely. For example, in respect of the cessation of trade, he was, after all, told of Mr Banner-Eve's view, and it was not suggested that he had any reason or need to dispute it. Furthermore, that decision was not executed without his knowledge, or without any reference to him; he was not excluded from the process, or simply ignored; Mr Lord was describing a management hierarchy, and different spheres of responsibility, as I have found existed.

116.
Taking Mr Lord's evidence in the round, it is not inaccurate to characterise his involvement as comprising a "dual role", and I do not consider that he was wrong to do so, although I do consider that he is likely, whether or not deliberately, to have emphasised one aspect or the other, depending

on what he was being asked, or was responding to, on a given occasion, and I do treat his oral evidence with a degree of caution both for that, and for the other reasons explained above.

117.
In any event however, certainly in respect the First Allegation, it is important to bear in mind that the question is not whether Mr Lord abrogated his duties generally, it is whether he failed to supervise a specific aspect of the Company's business and affairs, which is a narrower and more particular question.

The First Allegation:Discussion

118.
As stated above at paragraph 83, I have allowed the First Allegation to be advanced in the following form:

118.1.
that Mr Lord knew of the advice given to the Company by SJB, and of assurances given, or implicitly given by the Company to the FCA about the Company's business model in October 2008;

118.2.
that Mr Lord knew of the risk of the Company's business being characterised as a collective investment scheme if SJB's advice was not properly implemented and/or the assurances not honoured;

118.3.
but that nonetheless, he did nothing, or not enough, to ensure that the advice was implemented and/or the assurances were honoured - and that he therefore failed to supervise or attend sufficiently to those aspects of the Company's business.

SJB's Advice and its Implementation

119.
As explained, when the FCA's enquiries began, Mr Banner-Eve asked Mr Lord, who agreed, to deal on behalf of the Company with its solicitors, SJB, and through SJB, with the FCA. It is clear and undisputed that he did as asked, and I infer that he would have devoted considerable time to the fulfilment of that responsibility, and to that of dealing with the Insolvency Service investigation that began in October 2008. At any rate, this is indicative of Mr Lord having taken (and having believed himself to be participating in) a serious, careful and appropriate approach to the problems raised by the FCA. He would have known that SJB's legal fees were sizeable, and known they were being paid, and that too would have contributed to a reasonable belief that the Company was approaching the problem responsibly, as would the fact of it having taken advice in 2005 and 2006.

120.
Furthermore, and again this was undisputed, as a result of the advice given to the Company by SJB, and in accordance with that advice, certain significant changes were made to its contractual documentation, its sales and advertising literature, website and brochures. I accept Mr Lord's evidence in that respect, which is consistent with the evidence before Andrew Smith J., and with his findings. In any event, some or all of those revised materials were sent to the FCA on 8 October 2008, although because the copy of SJB's letter adduced in the evidence was incomplete, I cannot say exactly what was enclosed with it. It was on the basis of SJB's letter and those materials that the FCA closed its enquiries (until 2011) and it was, in part, by reference to the Company's contractual and other documentation that it was argued in the FCA Proceedings, presumably with at least some force

and prospect of success, that its business was not a collective investment scheme, despite what was being said to customers by members of its sales team.

121.
As to the revision of documents:

121.1.
I reject Mr Buckley's submission that there is "no evidence that SJB revised the advertising material" - there is the evidence of Mr Lord, which in this respect I accept. Having (at some cost) revised other documents, including the website, on the Company's instructions, it is inherently probable that other relevant written material would have been similarly amended by SJB or with their assistance; there would have been be no sense in excluding some extant written materials from that process of amendment.

121.2.
As to the website, as I have said, on 14 May 2007, SJB made various suggestions, all of which I understand to have been adopted, but for the suggested inclusion, in the proposed disclaimer, of the words, "We recommend that you seek independent legal and financial advice before buying from Asset Land". There is no evidence that enables me to find whether or not that omission was deliberate, although in any event, I recall the finding of Andrew Smith J. referred to above, that none of the investors were "encouraged to seek legal or other professional advice about the investment, and those who spoke of using a solicitor were told by Asset Land that it was unnecessary to do so". Given that the core representations were in any event contrary to the Company's written materials, it would be unsurprising were the omission accidental. In any event, it was not suggested that Mr Lord knew of the omission, or brought it about.

121.3.
As to "sales scripts" – referred to by Mr Lord at 37 of his witness statement - although a script was drafted and provided to the FCA, it related only to the telephone call to be made to existing investors telling them that the Company could no longer itself pursue planning permission, and informing them of their various options (of a refund or "enhanced" plot). In addition, a script existed for the use of those making initial contact with potential customers. However, I accept Mr Buckley's submission that there was otherwise no script for the use of sales teams, and in particular, no script for the use of those whose role was to conclude a sale. That conclusion is supported by: (i) paragraph 62 of Mr Marsden's Report where he records having been told by both Mr Banner-Eve and Mr Collins, the supervisor at the Company's call centre in Brighton, that "salespersons do not work to a set script but talk the prospective customer through the brochure/website and refer him or her to press releases and government papers"; and (ii) Andrew Smith J.'s finding that contrary to the evidence of Mr Banner-Eve, no instructions were given to the sales team as to what they should or should not say. To the extent that in his evidence Mr Lord referred to the existence of "sales scripts" intending thereby to refer to anything other than the two varieties of script that I have found existed, I reject that evidence.

122.
Although there was, as it transpired, an inconsistency between, on the one hand, the revised documents and business as (presumably) advised by SJB and (certainly) described to the FCA, and on the other, the business as in fact it was conducted, and particularly, the making of the core representations, the amended documents were, on the face of things, consistent with a lawfully operated business (at least, it was not submitted otherwise). Mr Lord knew that the documents had

been revised, and knew that they had been disclosed to the FCA, and knew that they had been accepted by the FCA. He knew therefore that expensive, appropriate professional advice which he had been instrumental in obtaining, understanding and communicating to others within the Company, had to that extent been acted on, and to that extent he cannot be criticised for having failed to supervise or see to its implementation.

123.
In those circumstances, in respect of the FCA's enquiries, SJB's advice, and the communications with the FCA, it cannot sensibly be said that Mr Lord "completely abrogated" his responsibilities as a director, and indeed, in respect of the First Allegation, and for that reason, Mr Buckley explicitly accepted that the circumstances were "not quite the same as" those considered in Re Park HouseProperties Ltd, for example, where there were findings of "sheer" and "completeinactivity" and "uninvolvement".

124.
Furthermore, as explained above, I cannot say when much of SJB's advice was given, or even what exactly was its content or basis, and I cannot say what they were asked. It follows that I cannot say for how long, or even in what respect/s exactly, it was or was not implemented by the Company. To the extent that it was implemented, because there are so few contemporaneous documents, I cannot say precisely by whom or by what means. Equally, to the extent that it was not, there are no documents that cast any light on why not. What I can say however, is that there was a relatively short gap between the correspondence in October/November 2008 between SJB and the FCA, and the conversation between Mr Lord and Mr Banner-Eve which resulted in the cessation of active trade (involving sales to new customer investors) at about the beginning of 2009. No allegations were made in respect of the business of ALI-Panama, which seems to have started to trade at about that time, and any case against Mr Lord in respect of the period after the Company ceased to trade actively (and the business of ALI-Panama began) remained undeveloped. In any event, it cannot be said that from the point of cessation, the Company traded in a fashion inconsistent with SJB's advice, or the model presented to the FCA – it seems from that point to have been substantially dormant.

The Respective Roles of Mr Banner-Eve and Mr Lord

125.
In the context of the Company's management, as a non-executive director, with particular responsibility for taxation and fiscal matters, in which he had professional expertise and experience, there was a substantial structural distance between Mr Lord's particular sphere of responsibility and the specific circumstances which caused the business to be a collective investment scheme, in particular, the making of the core representations.

126.
It was not in dispute that Mr Banner-Eve controlled and had particular responsibility for the management of the Company's day-to-day, or "executive" activities, and that this was known to Mr Lord – in effect, it was part of an agreed distribution of responsibility. As Lloyd J. said in OR v Stern (No.2) as set out above, "a proper degree of delegation and division of responsibility is of course permissible, and often necessary …". It follows that beyond the revision of the Company's various documents, the further implementation of SJB's advice, and the everyday conduct of business in a manner consistent with those revised documents, would have been a matter primarily for Mr Banner-Eve, and within his particular sphere of responsibility. That is reflected in the findings made against

Mr Banner-Eve in the FCA Proceedings, and in the fact that the FCA did not proceed against Mr Lord, and that he was not a defendant to the criminal prosecution.

127.
Moreover, Mr Buckley acknowledged that if Mr Lord had asked Mr Banner-Eve about the further implementation of the advice, and in response, Mr Banner-Eve had lied to him, this would have been "a different case". But he submitted that there was no evidence of Mr Banner-Eve having been asked by Mr Lord, or of enquiries having been made of Mr Banner-Eve, and he submitted therefore that Mr Lord cannot suggest that he was misled.

128.
This seems to me to be unrealistic. In circumstances where:

128.1.
Mr Banner-Eve certainly knew of the advice, and I infer, must certainly have known of the changes made to the various documents;

128.2.
Mr Banner-Eve was (at least, according to the findings made by Andrew Smith J.) knowingly involved in the breaches of FSMA, but Mr Lord was not, and is not alleged to have been; and,

128.3.
Mr Banner-Eve must on that basis have known that the Company was acting contrary to the advice given, and contrary to the terms of its own documents;

it seems to me to follow (at least) that Mr Banner-Eve did not tell Mr Lord what he knew. There must be at least a prospect that he did that deliberately. In any event, it was Mr Lord's evidence, which I accept, that as far he understood, Mr Banner-Eve accepted (and gave the impression to Mr Lord that he accepted) SJB's advice. To have done that, but then to have been complicit in acting otherwise without telling Mr Lord, was to mislead Mr Lord, who was allowed to proceed under a serious misapprehension; he had no reason to suppose that Mr Banner-Eve would act in that way. Moreover, there is no evidence of either SJB or the FCA having suggested, advised or required the Company to cease trading before it did so, at about the beginning of 2009, or having suggested that its revised business model was unviable.

Overall

129.
A disqualification order has serious consequences entailing a substantial interference with the freedom of the individual, sometimes described as penal or "quasi-penal"; the burden of proof lies on the Secretary of State, as claimant. In the present case, I also remind myself of the long passage of time since the material events, of the paucity of relevant documents, and of the consequent significant difficulties of proof. Moreover, the issue is not whether Mr Lord's conduct was impeccable or exemplary; it is a "value judgment" - whether Mr Lord's conduct renders him "unfit to be concerned in the management of a company" within the meaning of section 6 of the CDDA.

130.
In all the circumstances, on the evidence before me, even if some criticism of Mr Lord's conduct might in retrospect be made, I cannot find in favour of the Secretary of State, either:

130.1.

that Mr Lord abrogated entirely his duties as a director in respect of the implementation of the advice received from SJB (and/or in respect of compliance with the assurances given to the FCA) – manifestly he did not, as I have said above; or,

130.2.
that any partial failure to do so was such as to render him unfit to be concerned in the management of a company under section 6(1)(b) of the CDDA. In that respect, I rely in particular on my findings concerning: (a) Mr Lord's specific role in the Company's management and business, and that of Mr Banner-Eve, and the division of responsibility between them; and (b) the fact of Mr Banner-Eve's knowledge of the advice given by SJB, and his (and the Company's) apparent agreement and acceptance of it, and of its implementation. Moreover, I accept Mr Lewis' submission that in circumstances where Mr Lord is criticised for not having done enough to supervise or see to the implementation of legal advice, it should be possible to particularise and show what (even if within a range of possibilities) he ought to have done, and that at any rate the failure to do so in advance of trial affects the cogency of the allegation. As I have said, however broad the brush, a defendant's responsibility for a company's departure from required standards of management cannot be assumed from the mere fact of that person being a director; it is his personal (mis)conduct which is in issue, and which must be proven, and where in substance the allegation is one of incompetence or negligence, rather than a complete abrogation of duty or acting without appropriate probity, the (proven) conduct complained of must demonstrate incompetence to a high degree; in this case, it does not;

130.3.
although I acknowledge that the absence of sales scripts referred to above at paragraph 121.3 might to some extent have increased the risk of a sales representative making an inaccurate or misleading representation, or departing from the approved business model, that is not enough to change my conclusion in respect of the allegations against Mr Lord, particularly in circumstances where representatives would presumably have known about and had access to some or all of the Company's revised documents, and therefore known about the revised business model.

131.
In my judgment therefore, the Secretary of State's case on the First Allegation fails.

The Second Allegation: Discussion

132.
At trial, as explained above, the Second Allegation became, or was ultimately advanced as, an allegation that certain misrepresentations were made on behalf of the Company, amounting to misselling, and that Mr Lord (although not said that he knew of those misrepresentations or ought to have known of them) had "totally abrogated" his responsibilities in respect of the conduct of the Company's business.

133.
At paragraph 77 above, I have found the alleged misrepresentations to have been made on the Company's behalf, but for the reasons explained at paragraphs 94-95 above, have concluded that the allegation that Mr Lord totally abrogated his responsibilities as a director is not fairly open to the Secretary of State.

134.

In circumstances where the allegation advanced and responded to in the evidence was not that advanced at trial, there is an obvious difficulty in reaching relevant conclusions, but in any event:

134.1.
as I have also found, and set out above, Mr Lord did participate and was involved, significantly so, in certain aspects of the Company's business, acting as a director, for example, in dealing with SJB, the FCA and the Insolvency investigation, and in other respects acting in what he reasonably described as a "dual role", albeit with a sphere of particular responsibility in respect of which the Secretary of State did not criticise his conduct;

134.2.
I agree with Mr Lewis, that once the Secretary of State's allegation became one of "total abrogation" - detached from any particular connection with or responsibility for the misrepresentations - Mr Lord's evidence in respect of the First Allegation responded also to the Second Allegation;

134.3.
Mr Lord cannot be said therefore to have abrogated his duties totally – this is not a case in which he could be accused of "sheer inactivity", as in Re Park House Properties Ltd - there was a management hierarchy, and a division and different spheres of responsibility;

134.4.
finally, I refer again to the circumstances described above: the long passage of time since the alleged conduct, and the unexplained absence of much contemporaneous documentation significantly affects and undermines the ability of the Secretary of State to prove a case (and indeed, obstructs the ability of the defendant to meet it).

135.
In all the circumstances, on the evidence in these proceedings, I would not in any event be willing to find that Mr Lord was guilty of a total abrogation of his duties as a director such as to render him unfit to be concerned a company's management.

136.
In conclusion therefore, I will dismiss the application made against Mr Lord.

Order Accordingly