Neutral Citation Number: [2026] EWHC 2559 (BP)

Case No: LM-2025-000146
AND LM-2025-000130

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 09/10/2026

Before :

Miss Recorder Bignell KC sitting as a Deputy High Court Judge

- -

Between :

SHMUEL AND ELISHEVA MOLLER & OTHERS	**Claimants**
- and -	
ONE TOUCH SOLUTION LIMITED (IN CVL) (1)	**Defendants**
HISCOX INSURANCE COMPANY LIMITED (2)	
Between	
MOIRA BYERS	
And	
ONE TOUCH SOLUTION LIMITED (IN CVL) (1)	
HISCOX INSURANCE COMPANY LIMITED (2)	

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SIMON JOHNSON AND MAIRI INNES (instructed by **HFW LLP**) for the **Claimants**
SIMON WILTON KC AND HENRY BANKES-JONES (instructed by **Browne Jacobson LLP**) for the **First Defendant**

Hearing dates: 24-27 February, 2-3 and 10 March 2026
Further written submissions: 10, 12 and 13 August 2026
Judgment circulated in draft: 24 September 2026

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JUDGMENT

Recorder Bignell KC:

Introduction

1. This is my judgment on liability in mis-selling claims brought by the Claimants in these two consolidated actions against the First Defendant, One Touch Solution Limited (in creditors voluntary liquidation) ("One Touch"). Between September 2017 and March 2019, each Claimant bought the same product through One Touch: a lease of a room or "unit" in luxury residential care homes that were to be developed and operated by companies in The Care Home Group Limited (in administration) ("TCHG"). TCHG is also known as the Carlauren Group.

2. Twenty-seven of the twenty-eight Claimants are individuals, and one is a Swiss family company. They purchased their units through One Touch using their own personal monies, including retirement savings or the proceeds of inheritance. Many of them are spouses or family members. They are all either retired or had professions outside property investing. Thirteen of them lived abroad.

3. During the period from early 2017 until April 2019 One Touch marketed the off-plan care home rooms on behalf of TCHG in return for commission on sales due pursuant to a contract between TCHG and One Touch. One Touch sought to attract purchasers through online advertising, the One Touch website, and at in-person events One Touch ran or attended in locations such as South Africa. It also sought to attract purchasers in Israel through the appointment of its exclusive sub-agent operating in that country, Galon Invest Limited ("Galon").

4. In all, One Touch sold 93 TCHG units with 39 further sales made through One Touch's sub-agents during this period. This would have generated commission

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for One Touch of well into seven figures. By mid-2019, all the TCHG care home development schemes had failed. In 2019 and 2020 all the companies within TCHG entered administration or insolvency procedures. At some locations the redevelopment works to properties had never been commenced by TCHG. At others works were not completed and the care homes never entered operation.

5. The Claimants (along with many others) have lost all, or substantially all, of the monies that they had invested. The gross sums paid by the Claimants to TCHG were:

C1	Mr Durnford (UK)	£82,456.20
C2 & C3	Mr and Mrs Funk (South Africa)	£71,229
C4	Hoffelder Holdings GmbH (Switzerland)	£162,494
C5	Mrs Moller (Israel)	£126,609
C6	Mr Moller (Israel)	£77,423.90
C7 & C8	Mr and Mrs Morrell (UK)	£91,693.40
C9	Mr Motala (South Africa)	£293,438
C10	Mr Uruthiran (UK)	£101,456.20
C11	Mr Hickson (UK)	£524,168.60
C12	Ms Hutchison (South Africa)	£100,679
C13	Ms Orupabo (Nigeria)	£87,463.90
C14	Mr Roberts (South Africa)	£91,679
C16-A	Mr Spier (Israel)	£441,837
C17 & 18	Mr and Mrs Heneghan (UK)	£137,248
C19	Mr van der Merwe (Namibia; Canada)	£424,320
	Total	**£2,814,195.20**

The Claimants' case in overview

6. The Claimants claim that at all material times One Touch held itself out to the Claimants to be an experienced property investment intermediary. One Touch marketed itself to them as a specialist professional organisation providing tailored recommendations to meet the needs of individual purchasers and as an organisation which had undertaken due diligence, which described the Claimants as its "*clients*", which told them it put its client's interests first, which

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made an effort to understand their financial and other goals and was making recommendations and giving advice to them about the TCHG products in that context. They say that the objective reality of the role One Touch played in their decisions to invest cannot be reconciled with the one-dimensional role of a mere sales agent for TCHG as now advanced by One Touch.

7. The Claimants claim that One Touch assumed contractual and / or common law duties to them as evidenced by the factual statements about the role it was assuming for them as its *"clients"* and the representations and advice which they allege were given to them about the investment through the One Touch mailshots, brochures and documentation, and orally, over the telephone and in person, and by email about the TCHG purchase proposition, with the intention that those statements would induce them to enter into the contractual arrangements with TCHG.

8. The core theme was that buying units from TCHG was a fail-safe, armchair investment for them. The specific misstatements they assert were made to each of them individually adopt a number of common forms relating to One Touch's description of the investment proposition. They are set out in a Schedule provided by the Claimants' Counsel as their Schedule 2, which I annexe as Schedule 1 to this judgment. These include that there would be a fixed or continuing income stream, for example "*10% yield guaranteed over 10 years*"; buyback arrangements, for example "*multiple buyback options*"; statements regarding insolvency scenarios, for example "*there is no way for your yield to drop*"; that care homes were operational, "*we have seen the care homes up and running and occupied at a 100% occupancy, we feel very confident*";

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development status, for example "*he told me that a large part of the development was up and running and St Austell was an operational entity, but that some units needed to be refurbished*" (Mr Motala); tax liability, for example, "*Mr Rana had told me that I would not be liable to tax on my returns, given that I was based abroad*" (Mr Motala).

9. The Claimants emphasise that One Touch is not sued by them as an investment adviser in the sense of an independent financial adviser. Contrary to One Touch's characterisation of their claim they say they do not allege that One Touch effectively adopted a wide-ranging advisory role in relation to every aspect of a Claimant's purchase decision or finances. Only with respect to those matters identified.

10. The Claimants plead that the terms of the deemed agency contract which they allege came into existence between One Touch and the Claimants included that:

    i) One Touch would provide information, documents and advice to the Claimants on the investment opportunity with the reasonable care and skill to be expected of an experienced investment intermediary, which One Touch held itself out to be; and

    ii) One Touch was not simply repeating what it had been told by TCHG without checking the position for itself, but it carried out its own due diligence to verify such information, documents and advice.

11. In tort, and to identical effect, the Claimants allege that by making statements concerning the TCHG units and the purchase arrangements which One Touch knew the Claimants would rely upon and would not independently verify or

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have the means independently to verify, One Touch assumed a common law duty to the Claimants to exercise the reasonable care and skill to be expected of the experienced investment intermediary which it held itself out to be when making such statements.

12. The Claimants allege that where One Touch provided information or documents including brochures which emanated from TCHG to the Claimants, One Touch adopted and is liable in law for the contents of such information or documents. The contractual duty and the common law duty of care pleaded applied thereto. They say One Touch's obligation to carry out its own due diligence before recommending TCHG to them as potential investors is well made out on the facts.

13. On the basis that such contractual and/or tortious duties are found to exist, the Claimants submit that the answer to the question whether One Touch breached its duty is straightforward. All of them say that OneTouch made representations of fact or representations of opinion about the TCHG investment product which implied that facts existed to justify the opinions expressed. They relied upon these representations and /or statements of opinion when making their purchase decisions. They contend such representations were materially incomplete and therefore misleading or simply false. Further or alternatively, in so far as they constituted statements of opinion, the statements were not supported by reasonable grounds and/or facts which reasonably justified the opinions expressed. Accordingly, the statements constituted breaches of the contractual and common law duties to exercise reasonable care and skill. Further or alternatively again, given the difference between the position stated by One

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Touch and the true position, it is to be inferred that One Touch did not carry out any or any adequate due diligence and thereby breached the contractual duty set out at paragraph 10(ii) above. Accordingly, that One Touch is liable for negligent misstatement and damages as a result.

14. Further or alternatively, the Claimants plead that One Touch engaged in multiple commercial practices which are prohibited under the Consumer Protection from Unfair Trading Regulations 2008.

15. The Claimants say that it is now apparent that One Touch's central concern was earning commission rather than the accuracy of what it said to the Claimants to persuade them to buy TCHG units. This is exemplified by One Touch pressing on with new sales to individual Claimants regardless of its knowledge of issues with, and complaints about, TCHG from mid-2018 through to the spring 2019.

One Touch's Defence in overview

16. One Touch denies each element of the Claimants' causes of action. It pleads that its role was solely as a marketing agent and adviser for TCHG as set out in a General Service Agreement dated 1 February 2017, with all promotional material emanating from TCHG itself. It says the terms of this Agreement are not a promising context for the contention One Touch was contractually engaged by the Claimants or that it owed any advisory duty to the Claimants.

17. One Touch says that all that it did was introduce investment opportunities of potential interest to persons who visited its website or received marketing information of a generic character emanating from TCHG which it circulated or who attended an event at which it marketed these opportunities. It says it dealt

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with inquiries to that end and provided such further information as individual Claimants might request. It did no more than pass on statements for which TCHG is alone responsible as a matter of law. It therefore has no liability to the Claimants because it did not owe any contractual or tortious duty to them.

18. Further or alternatively, One Touch denies that it breached any duty in any event and denies that the Claimants can establish reliance and causation. It contends that the harm suffered by the Claimants flowed from a latent fraud by the controller of TCHG, Sean Murray, which was not within the scope of One Touch's duty, such that the consequential losses are not therefore attributable to anything One Touch got wrong.

19. It denies that it is liable to the Claimants under the 2008 Regulations.

20. In addition, in respect of some claims in respect of certain investments purchased by the Second, Third, Ninth, Nineteenth, Twentieth and Twenty First Claimants, One Touch pleads its Defence without prejudice to its position that these claims are time-barred under the Limitation Act 1980. It also pleads its Defence without prejudice to its position that the First and Tenth Claimants' claims are precluded by res judicata because of the alleged full and final settlement of their complaints as a result of decisions of The Property Ombudsman (and made this same unpleaded argument at trial in respect of the Seventeenth and Eighteenth Claimants). It also contends One Touch is not liable in law for any advice that Galon gave to the Claimants based in Israel for whom it had contracted to act.

The Aronex Claim

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21. The Seventeenth and Eighteenth Claimants pursue an additional claim against One Touch based upon their purchase of a lease of an hotel room marketed and sold by One Touch on behalf of a different developer, Aronex Developments Limited. The Claimants say their claim in respect of this purchase properly forms part of this Claim because it was the same kind of product and that the same type of representations were made to them about it by One Touch. One Touch says there is no proper pleaded case for it to answer in relation to this purchase, and it has not been brought before the court in a proper form. As will become apparent, very little of the evidence presented related to Aronex.

The Proceedings

22. The Claim brought by 27 of the Claimants was issued on 21 November 2023 and served on 20 March 2024 (the "Main Claim"). One Touch served a Defence on 15 May 2024. The Claimants served a substitute Common Particulars of Claim ("the CPOC") with One Touch's consent on 30 August 2024. The CPOC sets out the allegations made by all the Claimants and includes individual schedules for each Claimant / couple / family group. A fresh Defence was served on 6 December 2024, and the Claimants' Reply was served in January 2025. The Claim brought by Mrs Byers ("the Byers' Claim") is essentially identical and only proceeded separately initially through an accident of timing.

The Hearing

23. By order dated 11 April 2025, HHJ Pelling KC directed a split trial of liability, to be followed, if the claims succeeded, by a trial of coverage and quantum issues against the Second Defendant, Hiscox Insurance Company Limited ("Hiscox"). Hiscox provided a professional indemnity policy to One Touch and

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is joined as the Second Defendant pursuant to section 1(2) of the Third Parties (Rights Against Insurers) Act 2010.

24. Hiscox funds One Touch's defence of the claims, albeit under a reservation of rights regarding three coverage matters. I am told that at the coverage / quantum trial, one of the principal issues will be the operation of an exclusion clause in the Policy which concerns the provision of "*investment advice*" or "*financial advice*". Nothing in this judgment is intended to support either side's position, or comment, on the operation and effect of that clause, which I have not seen.

25. The Claimants' claims are advanced on the basis that a number of Claimants will give credit against such damages as One Touch is ordered to pay them for any relevant sums recovered in a claim against their former solicitors, Private Office Legal Services LLP ("POLS"), to which not all Claimants who instructed POLS were party, and which was compromised on confidential terms, and/or under an unsatisfied judgment obtained by 3 Claimants against Galon in Israel.

26. At trial, the Claimants were represented by Simon Johnson and Mairi Innes. One Touch was represented by Simon Wilton KC and Henry Bankes-Jones. I thank all Counsel for their written and oral submissions. I also thank them for the co-operation between them to assist in the smooth running of the trial within a tight timetable, including evidence given by video-link from Claimants located in South Africa, Israel and Nigeria.

27. As a result of that tight timetable, I was asked to read relatively extensive materials after the hearing to which there was no time to take me during opening or closing. In addition, I received only brief written submissions at trial on issues including limitation and res judicata as these were prepared on the basis that

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Counsel intended to develop their respective cases orally in opening and/or closing. Unfortunately, in the event, time did not fully allow for this. I have, therefore, followed through the references I was provided with in respect of each these matters since the hearing; including those additional materials and authorities which were first provided with, or handed up during, closing submissions. This process resulted in me identifying further questions in respect of the parties' respective cases on the res judicata issue specifically. Counsel made further written submissions to me in accordance with an agreed timetable.

Key Participants in the Relevant Events

The Claimants

28. The First Claimant, Mr Stephen Durnford, purchased Studio 16 Winchester from TCHG on 6 March 2019 with a mixture of an inheritance and savings. Mr Durnford retired in 2017 having previously worked in IT as a designer for a fund management business. Apart from Studio 16, and the purchase of his own homes, Mr Durnford's only previous property dealings had been in 2017 when he rented out a flat he had lived in previously via an estate agent. Like many of the Claimants, Mr Durnford was introduced to One Touch through the One Touch Website. In common with several other Claimants, Mr Durnford thought the concept of a luxury care home was a good idea because of his own previous disappointing experience trying to find a suitable standard of care home for his parents. His One Touch Investment Consultant was Mr King.

29. The Second Claimant, Mr Walter Funk and his wife, the Third Claimant, Mrs Elke Funk, purchased Care Studio 4 Park Avenue, Hartlepool on 5 December 2017. They live in South Africa. Mr Funk is a mechanical engineer and was the

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Managing Director of a company he owns which designs and constructs brewing plants for clients in Africa. Mrs Funk is a housewife. In 2013, Mrs Funk had invested via a different London firm in student accommodation in Bolton. Mr Funk initially received a direct mailing from One Touch. In common with most of the Africa-based Claimants, Mr Funk was introduced to One Touch's services in person by Mr Kerkvliet and Mr Thornton at one of the events One Touch regularly hosted at upmarket hotels in South Africa. He corresponded with Mr Kerkvliet. His Investment Consultant was Mr Thornton.

30. The Fourth Claimant, Hoffelder Holdings Gmbh ("Hoffelder"), purchased Bancourt 25 and 26 on 4 May 2018. Hoffelder is a Swiss holding company started by Mr Funk's late father. Mr Funk became the ultimate beneficiary in 2003 on his father's death. At the time of the purchase, Hoffelder had not invested in property previously. Mr Funk says Mr Iso Lenzlinger, a Swiss lawyer, was running the administration of Hoffelder on behalf of the family and acted on Mr Funk's instructions in making the purchases.

31. The Fifth Claimant, Mrs Elisheva Moller, lives in Israel and was working as an English teacher when she purchased 22 Lindors Country House, Lydney on 14 November 2018. She used the proceeds of an inheritance from her mother. Mrs Moller had previously purchased flats in Israel for her children with the proceeds of an inheritance from her father. Mrs Moller came across Galon on-line and signed a contract with Galon to act for her. She had limited direct dealings with Mr Dillon of One Touch.

32. The Sixth Claimant, Mr Shmuel Moller, is Mrs Moller's husband. He lives in Israel. He is an air conditioning technician by profession but could not work due

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to illness at the time he purchased Winchester 13, Sandown, Isle of Wight on 6 March 2019. He purchased the unit mainly with the proceeds of his own inheritance from his mother. As he put it in cross examination, "*basically, my first big investment*". Mr Moller met Galon during a meeting about his wife's investment but then dealt with Mr Thornton at One Touch about Winchester 13 before proceeding on that property with Galon.

33. Mr Michael Morrell, the Seventh Claimant, and his wife, Mrs Elcedita Morrell, the Eight Claimant, purchased care studios 16 Bancourt House, Torquay, Devon on 4 May 2018 and Arbour 2, Barmouth, South Wales on 1 October 2018. Mr Morrell works as an aircraft electrician at a manufacturing facility. Mrs Morrell was working as a manufacturing operative in a food company and a packing operative in a pharmaceutical company at the time of the investment. Mr Morrell was introduced to One Touch through the One Touch website. The couple spent Mr Morrell's life savings of £91,000 on the two investments they made. They had not invested in property other than their own home before. Their One Touch Investment Consultant was Mr Thornton.

34. Mr Ebrahim Motala, the Ninth Claimant, purchased Rosewell 43, Bristol on 29 June 2017, care studio 8 St Austell, Truro, Cornwall on 6 December 2017, and Bancourt 3, Torquay, Devon on 4 May 2018. His claim is only concerned with the latter two properties. Mr Motala lives in South Africa. He originally qualified as a chartered accountant and then moved into banking, eventually becoming head of an Africa corporate banking franchise. He has a personal investment portfolio of equities. Mr Motala was told about One Touch by a friend and then attended One Touch's in-person presentations led by Mr

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Kerkvliet in South Africa. In common with all the other Africa based Claimants, Mr Motala was attracted to offshore investment in the United Kingdom because of the weak local currency. The Consultant for his first purchase was Mr Feroz Rana. Thereafter he dealt with Mr Thornton.

35. Ms Sumithradevi Suganathan is substituted as the Tenth Claimant as the Executor of her late brother, Mr Jeyaruban Uruthiran. Mr Uruthiran died in 2024. Mr Uruthiran purchased Unit 18 The Winchester, Sandown on 6 March 2019. Mr Lisco, Mr Uruthiran's husband, acted on Mr Uruthiran's behalf at all material times. Mr Uruthiran was a teacher, and Mr Lisco was a probation officer. Mr Uruthiran and Mr Lisco had previously dealt with One Touch in 2015 when they purchased a studio apartment in student accommodation in Liverpool. That purchase proved problematic when promised returns were not paid on time. In 2018, they asked One Touch to sell the apartment for them and One Touch introduced them to the TCHG proposition. Mr Uruthiran proceeded to invest the sale proceeds and his pension savings in the purchase of Winchester 18. Their Investment Consultant was Mr Thornton.

36. The Eleventh Claimant, Mr Richard Hickson, was employed as a Sales Marketing and Surveying Executive for a wood burning stove installation company at the time he purchased his TCHG units. He is now retired. He was introduced to One Touch through the One Touch website. Together with his sister, Mrs Felicity Danby, Claimant Eleven B, he purchased care studios 9 and 23, 11 Millpond Avenue, Hayle, Cornwall on 29 September 2017, and care studios 39 and 41 Sandown, Isle of Wight on 17 November 2017. Together with his wife, Mrs Rebecca Hickson, Claimant Eleven A, he purchased care studio

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20 Paignton, Devon on 16 January 2018 and care studio 33 Bancourt House, Torquay, Devon on 4 May 2018. The family had additional capital available to invest due to the recent death of Mr Hickson and Mrs Danby's father. Mr Hickson had not invested in property before, and their only investments were a small SIPP. He was introduced to One Touch through the One Touch website after researching care homes for his mother. Their Consultant was Mr Thornton.

37. Ms Sandra Hutchinson, the Twelfth Claimant, was living in South Africa when she purchased care studio 32 Bancourt House, Torquay on 4 May 2018. She worked as the Chief Information Officer for an insurance broker running their IT systems. She had three residential investment properties near her home which she had purchased through an agent in South Africa and which she let and managed herself. She learnt of One Touch through an article in the South African edition of the Sunday Times and was then introduced to One Touch through the One Touch website, followed by an in-person meeting. Her Investment Consultant was Mr Thornton.

38. Ms Sopreye Orupabo, the Thirteenth Claimant, lives in Lagos, Nigeria. She was working as a Geoscientist for an oil and gas company in Nigeria when she purchased care studio 7, The Winchester, Sandown, Isle of Wight on 7 March 2019. She was introduced to One Touch through the One Touch website. Her Investment Consultant was Mr King.

39. Mr Peter Roberts, the Fourteenth Claimant, lives in Johannesburg, South Africa. He was working as a consultant for a gas company in the business development department when he purchased care studio 42 Bancourt House, Torquay, Devon on 4 May 2018. In Autumn 2016 he had previously purchased a student rental

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property in Nottingham through an agent, and in August 2017 he jointly invested in two student properties in Stoke on Trent and Huddersfield respectively, via the same agent. He previously had rental properties in South Africa. Mr Roberts met the One Touch team in person in South Africa when he attended a One Touch presentation given by Mr Kerkvliet. His Investment Consultant was Mr Thornton.

40. Mr Jochanan Spier, Claimant Sixteen A, lives with his family in Israel. He worked in marine construction and owned a share in a medium sized Environmental Consultancy company. He was aged 75 and retired when he and his wife, Varda Spier, Claimant Sixteen B, an environmental consultant, purchased care studio 32 Windlestone Hall, Durham on 9 February 2018. Mr Spier had sold some Israeli property and had some money he could invest. They made their purchase through Galon. Mr Yossi Galon was a longstanding acquaintance.

41. Mr Spier subsequently purchased 55 Windlestone Hall through Galon in the names of his son, Mr Shai Spier, the Fifteenth Claimant, and his daughter in law, Mrs Anat Spier, the Sixteenth Claimant, on 23 May 2018. Shai Spier has an MBA in economics and was a businessman. Anat Spier was a teacher.

42. After Mr Spier met Mr Kerkvliet at the One Touch offices during a trip to London, Mr Spier purchased Langdon Court 21, Plymouth through Galon in the names of his other son, Mr Ori Spier, Claimant Sixteen C, and his wife Mrs Yael Spier, Claimant Sixteen D, on 20 December 2018. Ori Spier was an electrical engineer, and Yael Spier was a social worker.

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43. Mrs Min Zhao Heneghan, the Seventeenth Claimant, and her husband, Mr Michael Heneghan, the Eighteenth Claimant purchased 40 Bay View, Morecambe, Lancashire on 3 December 2018 and their Aronex investment, 208 Devon Bay Hotel, Ilfracombe, Devon, on 20 December 2018. Mrs Heneghan was working as a Chinese language teacher and is not a native English speaker. Mr Heneghan was a retired civil service case worker. They invested their joint life savings. Their only previous property purchase was their home in 1998. Their Consultant was Mr King.

44. Mr Petrus Van Der Merwe, the Nineteenth Claimant, purchased 4 units within a 6-month period: care studio 8 Ocean View, Sandown, Isle of Wight on 17 November 2017; care studio 3 St Austell in the name of his wife, Mrs van der Merwe, the Twentieth Claimant, on 1 December 2017; Unit 39 Blackpool in the name of his son, Mr Martinus Van Der Merwe, the Twenty First Claimant, on 24 May 2018; and Unit 30, Blackpool for his recently widowed family friend, Mrs Margaret Bester, the Twenty Second Claimant, on 31 May 2018. Mr and Mrs van der Merwe lived in Namibia until 2003 when they emigrated to Canada but were in the process of returning to Namibia. Mr van der Merwe was a retired cattle farmer and Mrs van der Merwe was a child support worker. They had no investments. Mr van der Merwe's brother had previously invested with One Touch. Mr van der Merwe viewed the One Touch website then travelled to London for an in-person meeting with Mr Kerkvliet and Mr Thornton at the One Touch office before deciding to invest. He invested the proceeds of the sale of the farm in Canada and their total savings. The Consultant was Mr Thornton.

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45. Mrs Moira Byers is the Claimant in the Byers Claim and Mr Michael Byers is her husband. Mrs Byers purchased care studio 29 Paignton on 25 October 2018. Mr Byers was introduced to One Touch through the One Touch Website during the period when they were moving from Zambia to the United Kingdom, having previously lived in South Africa. Mrs Byers was a housewife at the date of the purchase. Mr Byers was temporarily unemployed after his contract as a regional sales manager for a Brewery in Zambia came to an end. Mr Byers funded the purchase from savings. Mr Byers' previous investments were three flats he owned in South Africa and stocks and shares. The Consultant was Mr Thornton.

One Touch

46. One Touch was incorporated on 26 June 2008 by Arran Kerkvliet and two others, who were de jure directors. Mr Kerkvliet describes One Touch in his witness statement as an "*online estate agent*" specialising in investment rental properties and development opportunities. These included care home suites, student accommodation, hotel room investments and buy to let properties sold off plan for small scale investors. As Mr Kerkvliet describes the company, it was market leading with a track record of making successful investment properties across these industries, with stellar reviews on websites such as Trustpilot, and recognition at industry awards, including Best Student Property Investment Provider in 2017, for its excellence in marketing in its chosen sectors.

47. Mr Kerkvliet says One Touch "*operated in an innovative segment*" of the property market. Its business model was to identify sectors of the property market that were popular or generating a lot of interest in the media due to their

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positive fundamentals: typically, markets with a growing demand and undersupply. He says: "*To generate revenue from this, we would seek out developers who were actively developing properties in that market*." He also says One Touch received approaches from developers.

48. Mr Kerkvliet says One Touch "*required developers to have a good track record of development delivery in similar markets and reputation for good business practice*". Once One Touch agreed terms with a developer, it would receive marketing information and brochures from the developer to advertise their property investments online, discuss these opportunities at trade shows and events and advertise to its own network of potential investors who had registered their interest in similar developments.

49. About 9 people worked with Mr Kerkvliet at One Touch. Mr Brian Dillon and Mrs Jale Kerkvliet were the Partner Managers. There was a marketing team which generated leads enquiring about property sectors or projects. The sales team comprised two levels of staff. The Senior Investment Consultants, including Mr Thornton and Mr Stuart Cowie, who Mr Kerkvliet had worked with for some time, and more junior Investment Consultants, including Mr Rana and Mr King. Mr Kerkvliet says in his witness statement the team were trained to be approachable and informed so that they could effectively engage with sophisticated individuals and promptly identify their investment interests.

Mr Kerkvliet

50. Mr Arran Kerkvliet has a degree from the University of South Africa in Economics and Property Valuation. He also has a Certificate in Property Development Strategies from the Royal Institution of Chartered Surveyors. He

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became the controller of One Touch in 2010 and was the Managing Director of One Touch from 1 March 2013 until the company was put into creditors' voluntary liquidation in 2024. Except for a single share held by Mrs Kerkvliet since 2014, Mr Kerkvliet was the sole shareholder at relevant times.

51. Mr Kerkvliet says he was responsible for managing the One Touch business and building relationships with developers. He hosted One Touch "*seminars*" or speaking events and attended trade shows in the UK and overseas. These were mostly in South Africa, which One Touch visited on a quarterly basis in and after 2017. Mr Kerkvliet was particularly interested in the South African investor market as he is South African and still has family there. He says he felt comfortable pitching into this market and understood there was material interest from investors for investing outside of South Africa, given its political and economic situation, particularly in more stable countries like the UK.

52. The One Touch South African seminars would normally revolve around a particular topic, such as the growth of the market in a particular sector in the UK. If an investor was interested, there would be the opportunity for a one-to-one discussion with him and/or Mr Thornton. Several of the Claimants were introduced to One Touch at these seminars and through these discussions.

53. Mr Kerkvliet says in his witness statement that he did not speak to "*investors*" on a day-to-day basis. His role was to provide some senior support in relationships that were difficult or where the presence of the Managing Director "*might prove advantageous in providing credibility*". Notably, Mr Kerkvliet did have meetings at the One Touch offices in the City of London with Mr van der

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Merwe and Mr Spier when they travelled from Namibia and Israel respectively to London.

Mr Benjamin Thornton

54. Mr Thornton has worked in sales since he completed his A levels in 2004. He joined One Touch as an Investment Consultant in 2015 and was promoted to Senior Investment Consultant soon after joining.

Mrs Jale Kerkvliet

55. Mrs Kerkvliet is the wife of Mr Kerkvliet. In Mr Kerkvliet's witness statement he described the role of Mrs Kerkvliet and Mr Dillon as Partner Managers who managed relationships with the developers and supported the overseas agents, including Galon. Mrs Kerkvliet also chased TCHG for outstanding commission payments. It is apparent from the disclosure that Mrs Kerkvliet had a broader role than that described by Mr Kerkvliet. Specifically, it is clear from multiple examples of email correspondence across the claims of those Claimants who retained POLS as their conveyancing solicitors that Mrs Kerkvliet was copied into most correspondence which was sent to and from POLS. This included POLS' client care letters to the Claimants; the draft legal documentation supplied to the Claimants, and POLS' confidential Reports on Title addressed to the Claimants as purchasers of the TCHG investments.

Mr Feroz Rana and Mr Nathan King

56. One Touch's evidence contains no information about the qualifications of their employees Mr Rana and Mr King. Mr Rana dealt with Mr Motala on his first sale, including providing Mr Motala with some tax advice on the dividend return

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given his position as an overseas investor. Mr King dealt with Mr and Mrs Heneghan, Mr Durnford and Ms Orupabo in late 2018/2019.

Galon

57. One Touch and Galon concluded an Introducer Agreement in September 2017 whereby One Touch appointed Galon to act as an agent in Israel. The terms are set out at paragraphs 806-811 below. Galon was owned and run by Mr Yossi Galon and his sons. Mrs Moller, Jochanan Spier and Varda Spier were involved in litigation against Galon in Israel and have received judgments in their favour.

Private Office Legal Services ("POLS")

58. POLS acted as the conveyancing solicitors for many of the Claimants. Mr Jonathan Sara ("Mr Sara") was the solicitor routinely recommended by One Touch to the Claimants and, in some instances, the Claimants say, effectively insisted upon by One Touch. Mr Kerkvliet had worked with Mr Sara before, but Mr Kerkvliet's witness statement suggests that One Touch had an arms-length relationship with POLS, who was "*their* [the Claimants'] *lawyer*". It became clear in cross examination that this was not the entirety of the picture. One Touch was copied into correspondence between the Claimants and POLS.

59. After the TCHG companies entered insolvency most of the Claimants initiated complaints against POLS. These resulted in confidential settlement agreements.

TCHG

60. TCHG was established in 2016. The group comprised a network of companies to own, develop and operate care homes, the most relevant of which are

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described below. TCHG promoted 22 different care home developments at a rapid rate between late 2016 and the spring of 2019 before collapsing into insolvency.

61. TCHG was controlled by Mr Sean Murray. In January 2020, an interim freezing order was obtained against Mr Murray by the Joint Administrators of TCHG for £40 million. In proceedings with CRO No 11023151 under the Companies Directors Disqualification Act 1986, Mr Murray gave an undertaking and accepted disqualification as a director for a period of 10 years with effect from 12 May 2022. I am informed by Mr Johnson that these proceedings related to Windlestone Hall, one of the TCHG properties, including planning matters.

62. The other key individuals at TCHG included Mr Paul Murphy and Mr Bishop.

The TCHG Scheme and the Realities of the Scheme

63. TCHG identified sites suitable for development as care homes, often former hotels. An exception was Latimer Lodge, which operated as a residential care home prior to TCHG's purchase and refurbishment. One Touch did not sell units in Latimer Lodge, and it is not a subject of the Claims.

64. Each of TCHG's development sites was acquired by a different special purpose vehicle company controlled by TCHG ("the SPVs"). In respect of these Claims, the relevant SPVs were: Carlauren Resort 18 Ltd for Bay View; Carlauren Resort 21 Ltd for The Winchester, Sandown; CHHF 17 Ltd for the Arbour Hotel; CHF 5 Ltd for Park Avenue; CHF 6 Ltd for Ocean View, Sandown; CHF 7 Ltd for Caring Communities Paignton; CHF 8 Ltd for St Austell; CHF 9 Ltd for Windlestone Hall; CHF 13 Ltd for Bancourt House; CHF 14 Ltd for Queen's

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Promenade; CHF 16 Ltd for Lindors, and Heritage Hotels Ltd for the Langdon Court Hotel. TCHG undertook the back office, sales and marketing functions. 5 Star Care Home Management Limited, later renamed Caring Communities, was identified by TCHG as the intended operator of each of the care homes.

65. Before development works started on a site, and during any development works, long leases of individual rooms or units were marketed by TCHG to potential investors. The TCHG marketing documents described three different purchase models. Under option 1 a purchaser would "own" the room as a landlord and take the income generated when refurbishment was finished and the room was occupied by a care home resident. Under option 2 the purchaser / investor would sub-let the off-plan room it acquired from the SPV under a back-to-back transaction for 10 years to a TCHG management company, which would immediately begin to pay the purchaser a fixed monthly return of (generally) 10% from the date of their investment. The return was payable irrespective of whether the building works at the development were complete, the care home was in operation, or the room acquired was occupied by a paying resident. Under option 3 a purchaser would occupy the care home room themselves.

66. All the units sold on TCHG's behalf by One Touch were sold under option 2. Option 2 was structured as follows, and all the Claimants entered materially similar contractual arrangements with TCHG through One Touch or Galon:

    i) the relevant SPV and the purchaser entered a contract entitled "agreement for lease" which provided for the SPV to sell and the purchaser to buy a 125-year leasehold interest of the individual room within the intended care home "off-plan" for a single premium payment

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to TCHG ("the Contract"). The premium payment made to TCHG was generally between £70,000-£110,000;

ii) simultaneously with and pursuant to the contracts, the relevant TCHG SPV granted the purchaser a lease of (normally) 125 years in respect of their unit ("the Leases");

iii) simultaneously with and pursuant to the contracts, the purchaser entered an underlease for 10 years in respect of their unit(s) ("the Underleases") with Care Home Freehold Limited, later re-named Accordiant Limited, ("Accordiant"). Accordiant was another company under the control of TCHG;

iv) Accordiant:

a. assumed an obligation in the underleases to pay amounts equal to the sums due from the purchaser to the relevant SPV under the Leases directly to the SPVs (including rent and insurance charges). These sums were due and payable to the SPVs from the outset under the leases before the care home was developed and entered operation; and

b. assumed the immediate obligation to pay the purchaser investor their guaranteed fixed monthly revenue each month;

v) the purchaser was entitled under the lease to require the relevant SPV to buy back their leasehold interests at a premium of 10% (equivalent to 110% of the purchase price) in the 5th year after purchase or at a premium

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of 25% (equivalent to 125% of the purchase price) in the 10th year after purchase (the "Buyback Guarantees");

vi) the SPVs were entitled under the leases to buy back the leases at any time over the entire 125-year term at a premium of 10% (the "Buyback Options").

67. In summary, this meant:

i) the freehold of each care home property was to be held in the name of a single newly incorporated SPV responsible for honouring the Buy Back Guarantees;

ii) the care homes were to be operated by a separate company;

iii) there was no formal contract between Accordiant, the SPV or the operating company;

iv) Accordiant's ability to honour its dual obligations to the purchaser / investor and the SPV was necessarily of critical importance to a purchaser investor if they were to receive their guaranteed returns from the point of investment through to the expiry of the Underlease.

68. As a result of TCHG's development programme Accordiant was to become the undertenant of approximately 780 units across TCHG's 22 sites before TCHG collapsed into insolvency. At that stage, as recorded in the Joint Administrators' Report, only one care home, Latimer Lodge had ever entered operation.

69. The terms of the General Services Agreement concluded between TCHG and One Touch are set out at paragraphs 150-151 below.

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Preliminary comments in respect of the evidence

70. Given the highly fact-sensitive nature of the issues concerning both the existence and scope of One Touch's alleged duties to the Claimants, I shall provide a detailed summary of the documentary and witness evidence which appears to me to be particularly relevant to the issues I have to determine in each of the individual Claimants' cases. The parties agree that the key issue of whether One Touch entered an agency contract with the Claimants or assumed a duty of care to the Claimants in their purchases of care home units under TCHG Option 2 turns principally upon an objective assessment of communications crossing the line between the parties during the period 2017 to 2019.

71. Before turning to the evidence presented, I must reflect on several significant matters regarding the available evidential picture.

Missing Evidence

72. One Touch's disclosure represents only part of One Touch's original primary documentation which should have been available for consideration at trial to determine the relevant facts and issues as between the Claimants and One Touch. On disclosure, One Touch's solicitors informed the Claimants' solicitors that following the issue of proceedings, at about the time One Touch entered creditors' voluntary liquidation on 28 March 2024, Mr Kerkvliet had removed a number of documents stored on One Touch's systems. They said Mr Kerkvliet assumed given the passage of time and the fact the matter had been dormant the proceedings would not continue and that there were cost implications for retaining large amounts of historical data. Some data relating to the matters

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identified within the list of issues in the Claims was lost and the full extent of the losses were not known.

73. The nature of those losses which can be identified is serious and significant. They include the loss of the email account of Mr Thornton when the licence for the relevant software was not renewed by Mr Kerkvliet and Mr Kerkvliet's separate deletion of the email inboxes for Mr King, Mr Rana and Mr Dillon.

74. In cross examination Mr Kerkvliet agreed that he was made aware by One Touch's solicitors of the duty of parties in litigation to preserve documents in the parties' control that may be relevant to any issue in the proceedings: Practice Direction CPR 57 para 3.1, but "*I didn't fully comprehend it*". He agreed it was "*correct*" that Mr Thornton was a very important person if one wanted to understand the documentary record. Mr Thornton dealt with 17 of the Claimants and was the most prolific of the One Touch sales force: "*because he used to come with me to South Africa*." He said he had not understood that a decision not to renew the software licence would result in the loss of the data. He said Mr Rana had left One Touch "*ages before*" in 2017 and he thought Mr King had left "*sometime in 2019*": "*so we didn't keep those*". No further explanation was given in respect of Mr Dillon's records. Mr Dillon was one of the two most senior employees alongside Mrs Kerkvliet.

75. It is evident that when Mr Kerkvliet took these decisions, he also knew that there was no comprehensive documentary fall-back record in the form of the One Touch's "*Client Relationship Management Log*" ("CRM") which One Touch used internally to record interactions and information about relevant "*clients*" such as the Claimants. Pages have been disclosed from the CRM relating to 12

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of the Claimants but Mr Kerkvliet says not all interactions were captured on the CRM in practice; the tracking feature was not enabled for Senior Investment Consultants such as Mr Thornton; and Mr Thornton was not required to capture his emails on the CRM in totality anyway.

76. Mr Kerkvliet's actions were in clear breach of CPR 57 para 3.1. No material has been adduced to the court to suggest that One Touch's disclosure obligations were not explained to him properly by solicitors in readily comprehensible and clear terms. He is an educated man. Although it is possible that he may have been cavalier in failing to consider the consequences of not renewing a software licence, his decisions to delete the email inboxes of Mr Rana, Mr King and Mr Dillon were deliberate ones. Given the fact he knew the CRM did not record each of Mr Thornton's important interactions, his decisions to destroy these inboxes therefore undermines the credibility of his explanation as to the loss of Mr Thornton's email records. The other losses occasioned are unknown.

The need for a specific disclosure order

77. On disclosure, One Touch failed to make proper disclosure of directly relevant primary materials relating to One Touch itself. One Touch's failure to disclose the existence of its website or any online materials and online historic materials at the appropriate stage of the Claims in accordance with its obligations under the order for disclosure is remarkable. It was only due to the fortuitous discovery by the Claimants' solicitor *after* witness statements had been exchanged of some of One Touch's contemporaneous materials online that the Claimants were able to make an application for the specific disclosure of these materials.

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78. The relevant context here is that Mr Kerkvliet describes One Touch in his witness statement as an "*online estate agent*" i.e. a company that operates through a website. In Mr Kerkvliet's written evidence, which was prepared and exchanged when the website had not been disclosed, he states that a "*large majority*" of the One Touch investors came from "*online advertising*" (paras. 18 and 25) and "*online advertisements*" (para. 26). The website was receiving 2,500 hits a month on a regular basis. Many of the Claimants were first introduced to One Touch's business through its website or referred to it. Mr Kerkvliet confirmed during cross examination that the website was "*an extremely important tool*" to advertise what One Touch was doing. Mr Thornton agreed that the website was important in respect of what he did himself.

79. Despite the clear relevance of the One Touch website, when the Claimants made their application for specific disclosure of One Touch's online materials One Touch contested the application. This meant the application for disclosure was only granted as late as 10 December 2025 at a hearing before HHJ Pearce. The Judge ordered that One Touch must disclose material extracted from its company website, including historic versions where appropriate, and videos from the You Tube Channel associated with One Touch by 4pm 9 January 2026.

80. The import of One Touch's failure to disclose its own website and then to decide to contest the application for specific disclosure is underscored when it is considered that by the time the parties' witness statements came to be exchanged the content of an element of the undisclosed website pages had already come to play a more prominent part in its own defence of the Claims.

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81. When One Touch served its Defence dated 6 December 2024 it had pleaded that its Terms and Conditions were "*provided*" to all the Claimants (Main Claim paras. 16, 17, 21, 22). This was a central part of One Touch's defence as it is One Touch's case that it operated pursuant to Terms of Business which clearly explained One Touch's role and support a relationship of limited scope with the Claimants as a marketing agent for TCHG only. One Touch quoted paragraphs 7 and 12 of the Terms in full in its Defence (paras. 16, 22) and annexed a copy of the entirety of the 20 Terms and Conditions to the Defence (para. 22):

*"7 **Purchaser's Responsibility**: It is your responsibility to confirm that you are in a position to obtain financial products and services to proceed with any property purchase. "OTS" acts as a property sourcing agent only and is not responsible for the arranging of or assisting purchasers with the arrangement of any loans or financial products. We strongly advise all purchasers to seek proper financial and legal advice before proceeding with any purchase and to make sure that any financial products are available to you. Reservation fees, property sourcing fees and fees associated with costs which are paid to OT by purchases or non refundable for any reason and as such should not be paid until you have carried out full due diligence for each investment and have satisfied yourself as to your ability to purchase any property sourced by OT. All investment figures and deal structure examples contained within the OT marketing materials are indicative and meant for guidance and marketing purposes only. It is your responsibility to source and secure any financial product or mortgage required or deemed necessary in order to complete on a property purchase. We can introduce you to companies to assist you with all aspects of property investment but it must be understood that such introductions are made in good faith only and you will enter into separate contracts with those companies that are introduced. Property deals may offer incentives or special offers by third party companies such as property development companies etc. It is your responsibility to carry out your own property valuation, due diligence and any other legal or financial research and diligence required in order to assess the benefit of any special offer or incentives such as discounts or contributions or rental guarantees or any other incentive offered by any third party company"*

*"12. **Limitation of Liability**: The sole liability of OTS in respect of any defect in, or failure of any goods or services supplied or for any shortage in the quantity of goods delivered or for any loss, injury attributable directly or indirectly thereto (other than in respect of death or personal injury) is limited to i) making good …*

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One Touch Solution Ltd and their partners, affiliates, officers, employees, agents, contractors, successors and assigns do not accept any liability for any investment decisions made on the basis of, arising out of, or in any way related to, the use of information contained the emails provided or information presented on their website (sic).

The information and services provided by [OT] do not constitute financial, investment or tax advice and should not be taken as such. [OT] employees are not licenced investment advisors or licenced estate agents.

[OT] Employees are not authorised by the Financial Conduct Authority to provide investment or financial advice. We encourage you to obtain professional advice before proceeding with any investment. We present information in good faith from the source from which it is provided but we cannot vouch for its accuracy nor can we be held responsible if such information is deemed to be inaccurate" ….

"These terms of business are not set out to stifle you but to offer you and our business protection and offer clarity in our dealings together".

82. In the Claimants' Reply, the Claimants denied that One Touch had "*provided*" them with the Terms as alleged. Against this background, by the time witness statements were exchanged, Mr Kerkvliet's Witness Statement dated 3 October 2025 contained no evidence to support One Touch's plea that the One Touch Terms had been "*provided*" to every Claimant. Instead, over five paragraphs, Mr Kerkvliet relied upon the fact he said the Terms and Conditions were located on the (undisclosed) One Touch website. Although the Defence has never been amended, Mr Kerkvliet accepted at trial that nobody, including the Claimants, was ever provided directly with a printed (or printable) copy of One Touch's Terms and Conditions prior to purchase.

83. In Mr Kerkvliet's witness statement he also gave evidence in support of the further allegation in the Defence (as did Mr Thornton) that *all* the Claimants had signed a One Touch Reservation Form containing the text: "*I / We have* "*read the terms and conditions set out on the OTS [One Touch] website*:

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[address]" (para. 101). He said "*The pertinent section of the Terms and Conditions*" were pleaded in the Defence and re-quoted these in full (para. 102).

84. One Touch accepted at trial that the plea in One Touch's Defence and the evidence in Mr Kerkvliet's and Mr Thornton's witness statements that all the Claimants had completed a One Touch Reservation Form was incorrect. Only nine of the Claimants signed a One Touch Reservation Form. This featured heavily at trial and the relevant text reads in full:

> "*I / We Have read and agree to the terms and conditions of OT. I / We have completed my / our own due diligence on the above property and have not taken advice from OT, or their associates. I / We understand that the reservation fee will be transferred to the developer / vendor and is non-refundable. I / We understand that OT is not a financial advisor, legal firm or mortgage broker and is not responsible for or having seen as given financial advice with regards to the purchase. I / We have read the terms and conditions set out on OT's website [and there is an address in the form for the website] and are proceeding with this purchase in full acknowledgement and acceptance of the contents thereof.*"

85. Returning to disclosure, at the date when One Touch complied with the Order for specific disclosure its solicitors explained that not all historic One Touch website pages were now available. The historic versions disclosed in January 2026 are individual page captures taken at various times by the Wayback Machine. Some of these are said not to reflect the true formatting or presentation of information on the website at the relevant time. No webpages exist any longer relating to the properties in which several of the Claimants purchased units: Millpond View, Paignton; Park Avenue, Hartlepool; Bancourt House; Arbour Hotel; Langdon Court Hotel and Queen's Promenade, Blackpool; Lindors Country Estate, and the Winchester Sandown.

86. Following specific disclosure, the content of the One Touch website and Mr Kerkvliet's own You Tube videos describing the company and its services are

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now front and centre of the Claimants evidential case. Mr Johnson said that if this material had been disclosed by One Touch originally, and not some 6 weeks before trial, the Claimants would probably have been able to present their case differently.

The Absence of Expert Evidence

87. One Touch itself contended for the first time in its Skeleton Argument for the trial that a preliminary and fundamental reason why it submits the Claimants cannot prove that One Touch owed or was in breach of the duties alleged is that the Claimants have not adduced any expert evidence either as to the duties owed or as to what an "*investment adviser*" owing such duties would have to do to comply with the corresponding standard of care or as to whether One Touch acted in such a way as "*no reasonably competent investment adviser*" could have done in the circumstances. Mr Wilton says that in the absence of opinion evidence from an expert within this field of advisory activity, the court cannot establish any duties owed and can have no confidence as to where lines are to be drawn to lead to a safe conclusion if any of the alleged breaches are in fact breaches of a professional duty in contract or the tort of negligence.

88. Mr Wilton acknowledges that not every professional liability case requires expert evidence but submits that is not this case. He submits that the Claimants' case, assuming any duty is owed, raises questions as to what due diligence should have been done, what risks should have been identified, and as to how those risks should have been evaluated, and whether the approach taken by One Touch was one no reasonably competent investment intermediary could have adopted. He says all such questions are matters on which expert evidence is

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required and refers to Jackson & Powell at 6-006-6-011; *Pantelli v Corporate City Developments No 2 Ltd* [2010] EWHC 3189 (TCC), [2011] PNLR 12 [16-19]; *ACD Landscape Architects Ltd v Overall* [2012] EWHC 100 (TCC), [2012] PNLR 19 [14-16]. He also draws upon *Sansom v Metcalfe Hambleton and Co* [1998] PNLR 542 at 549, where Butler-Sloss LJ said:

"*… A court should be slow to find a professionally qualified man guilty of a breach of the duty of skill and care towards a client (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard*."

89. Mr Wilton also asked: what of the actual decisions of The Property Ombudsman, an Ombudsman with specialist experience in assessing the competence of selling agents' work. In the 3 cases in which TPO made an Award (Mr Durnford, Mr Uruthiran and Mr and Mrs Heneghan), TPO did not consider that One Touch was responsible for the complainants' financial losses. He asks how one can reconcile that with the suggestion that One Touch's duties extended to protecting the Claimants from such losses.

90. Mr Johnson submits that there is no need for expert evidence here. The Claimants say that the nature of One Touch's role and the existence of One Touch's duties and their breach are clearly established. In any event, there is no absolute requirement for expert evidence. Whether it is desirable and proportionate will depend upon the circumstances of the case at hand: *ACD (Landscape Architects) Ltd. v. Oversall* [2012] EWHC 100 (TCC), [2012] PNLR 19, [16]. Both parties stated in their Directions Questionnaires that expert evidence was not necessary. This was an agreed position at the CCMC. If One Touch had changed its mind about that before trial, it was incumbent upon One

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Touch to adduce such evidence, having sought and obtained permission to do so. It was too late to raise the need for expert evidence in opening submissions.

91. In my judgment, in circumstances where there was no disagreement between the parties at Directions that expert evidence was not necessary for the determination of the Claim, it is surprising that One Touch's stance at trial was that the lack of expert evidence cuts across the issues to be determined and the court should be reticent to determine the issues now placed before it. If One Touch was in any doubt as to the nature of the duties the Claimants pleaded, a Request For Further Information could have been made. If it considered that expert evidence needed to be adduced by the Claimants in order for the case to proceed properly at trial, or to enable the court to reach substantive decisions, or it wished to rely on expert evidence itself to defend the Claim as pleaded on the basis that no experienced property intermediary would undertake any due diligence in any event, or that such due diligence as an experienced property intermediary would reasonably undertake would take a certain limited form, One Touch could, and should, properly have advanced its arguments at the Case Management Conference in accordance with the overriding objective in CPR Part 1. That is before the trial date for this multi-day witness action involving these 29 Claimants was set and the costs of this trial were incurred. Thereafter, any such contention could still have been communicated to the Claimants and to the court at any stage prior to the exchange of Skeleton Arguments, including when the Claimants' Application for Specific Disclosure was the subject of the contested hearing before HHJ Pearce. That did not happen.

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92. No application was made to me to adjourn the trial for such evidence to be obtained at this stage. However, given the particular facts and circumstances of these Claims, I do not consider expert evidence would have been desirable and/or proportionate.

93. The starting point is that the court must first determine what role One Touch played or adopted as regards the Claimants during their dealings. Did One Touch present itself in its dealings with the Claimants as a property investment intermediary who independently assessed the merits of the TCHG products from the prospective investors' point of view to advise them these were suitable investments in which they should invest to meet their requirements, or was it simply acting as TCHG's sales agent and the Claimants knew that to be the case?

94. The Claimants' case is that the services which they allege One Touch contracted to provide and/or the nature of the duty of care it assumed on the facts, the scope of that duty, and whether or not One Touch breached that duty, are all legal questions which are framed and answered here by reference to One Touch's own bespoke description of its business and services as an experienced property investment intermediary and in the publicity which it provided to them presenting itself as such. That is not a matter of what duties a property investment intermediary generally owes to a client and whether those duties were broken.

95. As regards the conclusions of TPO, discussed further in the final section of this judgment, those were based upon paper representations within TPO's process.

My Approach to the Evidence Presented

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96. The events in question unfolded between 8 and 10 years before trial. In the circumstances, it is necessary to bear firmly in mind the frequently cited observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15] to [22] with regards to the unreliability of memory, and his caution to place limited, if any, weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

97. Of particular concern in circumstances such as these is the ability of a witness, in seeking to recall events that took place some time ago, to falsely do so, but with genuine conviction and belief that the recollection is accurate. As Leggatt J cautioned in *Gestmin* at [22]: "… it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth." Coupled with this is a concern that a witness seeking to recall events over a significant period of time is liable in reconstructing those events in their own mind, to do so in a way that inaccurately recalls those events in their own favour, and to exaggerate perceived advantages to their own case, and do so without deliberately giving false evidence.

98. Nevertheless, I take into account the importance stressed by the Court of Appeal in *Kogan v Martin and others* [2019] EWCA Civ 1645 and *Bannister v Freemans* [2020] EWHC 1256 QB, for example, of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each.

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99. In testing what has been said by a witness, it is plainly appropriate to do so as against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions.

100. I also remind myself that the content of the parties' important interactions over the telephone and in person at meetings can only be assessed by reference to the parties' own evidence. Apart from the limited and incomplete notes relating to 12 Claimants on the CRM log, there is no written record. Together with the website and the flyers, it was these conversations which formed the Claimants' introduction to the One Touch business and One Touch's introduction to the Claimants of the merits of the TCHG products. Similarly, there are no real notes of the conversations which took place subsequently up to the point of investment. When considering the content of the emails and the CRM Log, I therefore bear well in mind that these limited records evidence only a small part of the dialogue that actually took place.

101. In my judgment, when weighing the oral evidence, the Court obtains the best and safest guide in this case from the way in which One Touch described itself contemporaneously in the newly disclosed materials that it published and made available on-line on its website and You Tube throughout the relevant period. These describe in One Touch's own words the nature of its business and the service that it said it provided for the benefit of prospective property investors who chose to purchase property investments offered to them by the company.

The oral evidence

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102. At trial, the time for the entirety of the Claimants' evidence was divided equally such that there was a limited period for each witness. This meant the oral evidence of those who gave live evidence was necessarily focussed on specific issues only. Mr Durnford, Mr Funk, Mrs Moller, Mr Moller, Mr Hickson, Mrs Heneghan, Mr Morrell, Mr Spier, Ms Hutchison, Mr Motala, Mr van der Merwe, Mr Lisco, Ms Orupabo, Mr Roberts and Mr and Mrs Byers all gave evidence on their own behalf and/or on behalf of their spouse or family member or friend in those cases where they handled the transaction for other Claimants. One Touch accepted this was an appropriate course to adopt in each case other than that of Hoffelder. Mr Funk gave evidence not only on his own behalf and that of Mrs Funk but also Hoffelder, his family company.

103. Mr Kerkvliet gave evidence on behalf of One Touch. Following an application by One Touch on the first day of the trial for a witness summons to be issued and served on Mr Thornton, it was confirmed on the afternoon of the fourth day of the trial that Mr Thornton would attend to give evidence for One Touch.

104. I summarise the witnesses' evidence as part of my chronology of relevant events, and then individually regarding certain specific issues which fall to be determined, before making my findings as to the facts and their credibility as witnesses based on the entirety of the evidential picture.

The Documentary Evidence

The One Touch Website

105. The One Touch website "onetouchpropertyinvestments" represented the consistent public face of One Touch's business during the period when the

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nature of the relationship between the Claimants and One Touch requires to be objectively assessed. The website describes the nature of the company, its business and services as One Touch wished to present itself.

106. As I have already mentioned at paragraphs 46 and 78 above, Mr Kerkvliet described One Touch as an "*online estate agent*" business and Mr Kerkvliet (and Mr Thornton) confirmed in cross examination that the One Touch website was "*an extremely important tool to advertise what One Touch was doing*". Mr Kerkvliet's written evidence explains One Touch spent a considerable amount to be in the top three positions on Google for what he described as the "*relevant search terms*" they used to draw potential investors to visit the website. Searches such as "*how to invest in care homes*", "*hotel room investment*" and "*high yield property investments UK*".

107. The company name, "One Touch Property Solutions", features prominently, of course. Whilst names and labels are in no way conclusive, it is not followed by any description of One Touch as an online estate agent or as a marketing or sales agent for named developers. Rather, it is immediately apparent that the services, or property solutions, which One Touch advertised that it provided on its website were directed towards the potential investors in the property products in which it dealt. Throughout the website, One Touch described the investors to whom it offered the products it had sourced as One Touch's "*clients*". That is not the terminology one would expect to be used for the counterparty of its principal if solely acting as the principal's agent.

108. The website pages from 2017 to 2019 include numerous statements by One Touch about the nature of its own business as an investor focussed specialist

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"*property investment company*"; the specific services which it provided to potential or actual investors when matching people to its property investments to meet their goals; and the ways in which it sought to differentiate itself from other property investment companies. The following are some typical examples.

109. Under the heading "Property Investment Company":

One Touch is a Property Investment Company

We are a property investment company that sources a wide range of property including student accommodation investments, high yield property such as hotel rooms and buy-to-let investments for people looking for income producing investments. We are approachable and informed. Unlike many other property investment companies, we love sharing our expert knowledge to help you take empowering decisions with confidence and ease. Our property specialists have been in business for at least a decade and have a wealth of information to share, whether you're a first time investor or a property connoisseur. At One Touch we have an extensive portfolio of property opportunities and well-researched investments that provide you with the safety and protection you need to reach your lifestyle and financial goals." *(my emphasis)*

110. Under the heading One Touch Property Sourcing:

"Sourcing property is a time consuming activity that requires a rigorous due diligence process to ensure that the very best outcomes are achieved for our clients. One Touch property sourcing team drives the length and breadth of the country to visit each of the off plan property developments … that we present to our clients.

Our clients include first time property investors that may need guidance in identifying the most suitable property to meet their investment objectives. An experienced investment consultant is assigned to each person who has made an inquiry. "It is important that a member of the One Touch team speaks with you about your investment goals" says investment director Aaron Kerkvliet "everyone is different; some of our older clients are seeking higher monthly income to supplement their income in retirement. Whereas busy professionals may prefer to invest with a lower deposit and value building a property portfolio over immediate income".

We also source property for institutional investors and high net worth individuals … Our long term relationships with credible developers have been a key driver in creating joint venture opportunities that come to fruition.

"We are your partner in prosperity".

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If you are considering buying investment property, it starts with a conversation. If we understand what you are looking for we are in a better position to help you achieve your goals and save you time by recommending the most suitable property." (my emphasis)

Under the heading "Services Overview":

"Property Investment Service

Our aim is to help you find the right investment by sharing the knowledge we have gained through many years in the industry.

111. Importantly, under the heading Due Diligence:

"We conduct due diligence research on all developers we work with. We ensure that your investment has minimal risks attached, and that the developers have a solid record delivering on their [missing word]. We conduct background checks on company directors and make use of details stored by Companies House. We also conduct site visits to ensure we feel comfortable recommending the development to our clients.

We aim to look after our clients throughout the entire investment process, and beyond. If our client decides to sell their unit in the future, we can help with the resale.

Here at One Touch, we put our clients and their interests first. Visit our testimonials page to see what our clients have been saying about our property."

112. One Touch consistently promoted its services using the words of previous clients in the form of the following website testimonials:

WHAT INVESTORS SAY ABOUT US

- *Buying a property in a foreign country is a very daunting prospect, no matter how much prior research one does. One Touch Property changed that for us. From our initial first contact, we were well looked after and guided through the purchasing process, being given expert guidance and amazing support every step of the way. A big thank you to Arran Kerkvliet and his team, as well as to all their property partners throughout the UK for their exceedingly professional service, guidance and support. Never once did we feel pressurised or off track, and they introduced us to the perfect properties in our property search. I can only give my highest recommendation to One Touch Property and will definitely be using them again in the future. Kind regards, John French, based in Cape Town, South Africa, purchasing in the UK.*

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- *Hi as a first time buyer I believe I could not have been given a better service from a housing agent (One Touch propertys (sic) staff member Feroz Rana once I made my decision really helped me throughout the process, communication and response time was perfect and great advice big thank you ...Ahmed Salah*

- *"... One Touch Property, they have been a reliable and honest broker for the investments I have purchased through them, I am likely to use One Touch property (sic) again as I trust them, which means everything to me." Graham Broadhead ...*

- *Recommend One Touch Property Investment. I just wanted to thank your company for helping me buy my airport parking space. I have never invested before so was quite nervous. One Touch Property helped me through each part of the process, and answered all my questions even though they may have been a bit basic. They explained everything fully and gave me the confidence to invest. ... Thank you again. Janet Hope."* (my emphasis)

113. Beneath a photograph of Mr Kerkvliet on the website:

"*One Touch is your first point of contact for property investments in the UK because we uncover areas with the highest capital growth and strongest rental demand. What's more, we even provide you with your own personal investment consultant to guide you through the process*."

114. Under the heading "Investment Fundamentals":

"*The fundamentals of property investing ... Residential property prices in the UK typically double every seven to ten years. Use the banks' money to make money. It makes sense, in most cases, to use bank loans to improve the profitability of your investment. For example, if you purchased a property worth £200,000 with a £50,000 deposit and the property price went up 10% in two years. You would actually make a 40% return on investment (ROI) ...".*

115. Under the heading "Legal Representation in the UK when investing in property":

"*UK has one of the fairest and transparent legal systems in the world. English law is one of the oldest and most respected of the legal systems in the world, and investors can rest safely that their interests will be adequately protected. ...*

Investors feel confident in the protection provided by the UK legal system to invest here.

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Here at One Touch Property Investment we have selected a panel of solicitors specifically chosen to represent you and ensure the transaction proceeds swiftly and without a problem.

116. Importantly again, under the heading "*Sourcing Property: Property Investment Due Diligence Process*":

"*We source property investments in the UK for first time buy to let investors, busy professionals and high net worth investors looking to build a property portfolio. If so, it is wise to start off with property investment due diligence.*

We realise that our investors are looking for investments that provide a good return on investment and capital protection. However, it's even more important that our clients do not experience capital [missing word] developments that do not take place. No one wants to see their hard earned cash wasted on poor investment [missing word].

When we choose to work with a new developer; we conduct a background check on the company directors and track record for the business by making use of Companies House records and National Federation of builders to see if they had there any defaults or negative feedback. Once the developer has passed the first stage of our property sourcing process, we will arrange a visit to the site location. It is vital that we visit each project site in order to understand if it is the type of property or investment that we would be comfortable in recommending to our prospective clients. Upon the site visit, we meet with the project management team and major contractors to establish if the timelines that the developer has mentioned can be implemented within according to plan and budget. Ideally, we aim to also visit previous projects of the quality of finish that we would expect.

After meeting the developer, we get in touch with our independent solicitors for them to review the proposed purchase agreement to establish if there is anything in the fine print that could be to our clients' detriment.

We do not move ahead with the marketing of any project where we do not have a good feeling about the development team, or the suitability of the investment."

117. The website stressed One Touch's focus was success for both their investor "*clients*" through assisting them to achieve their goals, and with whom they were in a "*partnership in prosperity*", and the developers, who they described as "*partners*" and not as clients. It positioned One Touch as the link in a "*joint venture*":

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"*One Touch property professionals are truly passionate about property investing and helping clients realise their goals. Our brand is not about a one-time sale. We are focussed on long term success for clients and partners.*

"We are your partner in prosperity"

If you would like to experience working with a trusted, award winning property investment company, register your interest today. You will have a no obligation consultation with your personal investment consultant."

118. The website always included a Property News UK section, containing links to articles on property investment and the state of the UK property market, including care home investments. It quoted reputable sources such as the Royal Institution of Chartered Surveyors. Pages were devoted to "*Property Investment Strategies*" and the "*principles of good property sourcing*". The messaging focussed on One Touch's specialist knowledge and research. As an example, a surviving website page shows how One Touch introduced investment in TCHG's Isle of Wight Ocean View and Sandown properties within the context of an article entitled "*What high yield investment options are available?":*

"*Banks are still offering rock-bottom interest rates. Investors in the UK and EU, who are thinking of keeping their money in a savings account will be hard pressed to find banks offering more than 2.5% interest according to the latest figures from moneysupermarket.com. Obviously, this will be a disappointing return for those who have worked hard all their lives and want to build a nice retirement fund. Blue chip defensive stocks also only have interest rates of around 3% in companies such as Unilever and Diageo PLC. This rather paltry return is not exciting for those with savings; neither option is. ...*

Older investors may already own their own home outright. According to census data from 2011, 3/4 of those aged 65 and over own their own home, 72% of which right three bedrooms or more. Some of these owner occupiers may be looking for retirement income to supplement their pension and ensure a more comfortable life and may be eager to downsize to a more manageable property. With the additional equity that can be released individuals may consider investing in more property.

Bearing this option in mind, what are some high yield investment options? Retirement property investments - high yielding property and a hands-off environment

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Retirement property investments offer high yearly returns of more than 8%, for a guaranteed number of years. These are ideal for overseas investors who cannot afford the time to perform general maintenance tasks associated with more traditional buy to let properties as they are operated by a management company. The process involves the investor buying a unit in the retirement home, and then leasing it back to the management company for a yearly cost. [A photograph of a large white painted period building with "Caring Communities" above the entrance]

Retirement homes such as Ocean View on the Isle of Wight offer investors returns of 10% for 10 years, with buyback options in year 5 for 110 percent and year 10 for 125%. Income is paid monthly, and investors have the flexibility to choose how they receive it. ...

These types of investments have been extremely well received by investors, and the developers previous projects have sold out rapidly. Suites in Ocean View Sandown [a TCHG property] *are available for purchase from £89,950 and investors can reserve a unit from just £2000. Retirement home investments are resistant to economic or political changes as it's not possible to suppress an ageing population and their requirements. An older person needing assistance with personal tasks is not going to be stifled by Brexit negotiations. ...*

Property: a stable investment option?

... These properties are exempt from stamp duty if the price does not exceed £150,000, making them a great option for people wanting to achieve strong rental yields.

One Touch is a property investment company, providing property investment advice to individuals on suitable options that will allow them to achieve their financial goals. Contact us to discuss your requirements and available projects today."

119. It is to be noted that this final example states in express terms that One Touch provided "*property investment advice*" to potential investors on suitable options for the individual investor. A contemporaneous statement which is entirely at odds with One Touch's current pleaded characterisation of its relationship with prospective investors, such as the Claimants, as simply that of a marketing agent for TCHG.

One Touch's You Tube Channel

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120. The One Touch You Tube videos which were disclosed under the Order for specific disclosure were made by Mr Kerkvliet in early 2018. Mr and Mrs Byers viewed videos on One Touch's You Tube channel. In my judgment, it is a reasonable assumption that these videos provide the best evidence of the contemporaneous message which Mr Kerkvliet was delivering orally about One Touch and their services at the One Touch seminars he presented in South Africa with Mr Thornton and during the face-to-face investment consultation meetings held with Claimants during this period.

121. Mr Kerkvliet described One Touch as follows in his film posted on 26 February 2018:

> "*One Touch Property are a property investment company in London*. We've been recognised for our due diligence process, which we typically follow, *and that is to do a background search on the developer's track record, credit check on their background, and to search the Builders Federation as well as Companies House to ensure that they are not in default or have anything untoward against their name. Thereafter, our property sourcing manager will visit the site as well as inspect some of their previous projects to ensure that the level of specification meets our clients' demands as well as those of tenants in the local area, to thereby ensure that it's a really good rental investment opportunity. Once we've signed that off, our solicitors or a panel of independent solicitors will check the fine print of each document to ensure that there's nothing untoward about the contract that could be to the client's detriment. So if you wish to explore how our property sourcing strategy could help you, do register on [website address]*."

122. In a One Touch publicity film posted on 27 February 2018 Mr Kerkvliet said:

> "*One Touch Property are your partner in prosperity. We're a property investment firm based in London, and we source high yield investments for people looking for hands-off, steady passive income. We typically source student buy to let and retirement term investments from reliable developers in which you can trust, and, you know, you'll find that we're very approachable. And our typical investment consultant has over 10 years of experience, which they will gladly share with you, that will help you to take an investment decision with confidence and ease. And once you've taken a decision, we have a team of legal professionals and tax experts who will help you through every step of the process. So if you register on our website, [address], together we can explore*

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how our investment opportunities will help you achieve your personal and financial goals."

123. These were effective endorsements by One Touch itself of the property investments which One Touch said that it had selected for offering to its investor clients. They were "*a really good rental investment opportunity"* from the point of view of investor clients with "*nothing untoward about the contract that could be to the client's detriment"*. They could be assured about this because One Touch had undertaken the "*due diligence*" described. A due diligence process for which One Touch promoted it had been recognised.

Other Contemporaneous Documentation

124. One Touch used newspaper "advertorials" to advertise its business in countries such as South Africa. That is how Ms Hutchison first came across the company. In an advertorial entitled: "*The Power of Property: Increasingly, investors are looking for alternative options to increase returns, such as investing in these 3 popular UK asset classes* (including retirement property)", One Touch described itself as follows:

"*One Touch Property is a London-based company that provides UK property investment advice to South Africans seeking high yield investments that will allow them to achieve their financial goals and act as an income producing Rand hedge. The team visits South Africa every three months to meet existing clients*."

125. Again, One Touch specifically described itself as providing "*investment advice*", "*UK property investment advice*", intended to allow the individual investor to achieve their personal financial goals, this time with the intention that income would be generated for the overseas investor to protect them against fluctuations in the value of the Rand. Its explicit role as an adviser providing such advice, and the image that it portrayed of itself as a long-term adviser who

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met its existing clients regularly, bear no relationship to its defence that it was no more than a sales agent for TCHG and other developers in its dealings with potential investors.

One Touch's Pro Forma Emails

126. The documentary evidence includes multiple copies of standard format emails sent by One Touch and commonly received by the Claimants. When a prospective client made a One Touch website enquiry, they would receive an automatic email welcoming them to the One Touch community and concluding:

"*One Touch Property Investment is your Partner in Prosperity. We source investment rental property ... for people looking for income producing investments. We are approachable and informed, sharing our expert knowledge to help you take empowering decisions with confidence and ease.*"

One Touch included this same text, with its focus on the investor, within the repeated emails it sent to many of the Claimants regarding the TCHG investment opportunities throughout the course of its dealings with them, constantly reinforcing its key messaging.

127. Examples of One Touch's further automated replies were:

"*Thank you for your interest in investment property. One of our investment consultants will be contacting you shortly to discuss your requirements. One Touch Property Your Partner in Prosperity*."

"*You recently submitted an inquiry through our website: investing-for-income.org for high yielding investment property. Please could you advise us of a phone number to contact you on, to discuss investment options further with you?*"

128. Emails from the Investment Consultant assigned by One Touch to follow up the enquiry, in the example below, Mr Thornton, took the following form:

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"*Hi, may I introduce our company,*

One Touch Property is a property investment consultancy that has been trading since 2008. We source investment rental property including … high yield property such as care home apartments … for people looking for income producing investments. We are approachable and informed … sharing our expert knowledge to help you take empowering decisions with confidence and ease. Bringing you high growth property and well researched investments that provide you with the safety and protection you need to reach your lifestyle and financial goals. Some of the investments that we have available are:

… TCHG Care Home investment with 10% Income for 10 years [hypertext link].

We are located in the City of London, 288 Bishopsgate. We are not financial advisors and do not sell regulated investments. For your peace of mind, we are regulated by The Property Ombudsman …

Here is our company director's profile [link to Mr Kerkvliet's profile]

We hope that we can work together to provide assistance in the purchase of UK investment property. [Mr Thornton's standard email footer]." (my emphasis)

129. One Touch's first direct communications with an individual Claimant who had been introduced to the company through the website therefore made clear to them that they were a "*property investment consultancy*", language redolent of a business which provides property investment advice to those who consult with it. It sourced property investments for investors which were "*well researched*" to provide them "*safety and protection*". It would work with them to assist in making a suitable purchase which met their own lifestyle and financial goals. It was not a financial adviser.

130. Mr Kerkvliet, Mr Thornton and Mr King all used identical One Touch email formats when communicating with the Claimants: each with a photograph, their One Touch title and the slogan "*Your partner in prosperity*". In Mr Thornton's case his title was "*Senior Investment Consultant*". In Mr Kerkvliet's case his title was Managing Director. In Mr King's case his title was "*Investment Consultant*".

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The Purchase Chronology: Background Narrative

131. Against the background of One Touch's published materials and the uniform format of its documents, I have taken the surviving physical documents as my chronological framework. I have included evidence from the witness statements and the oral evidence of the individual Claimants and One Touch. Where any admission or concession is recorded it should be taken to be a finding of fact.

One Touch's "due diligence" and its decision to contract with TCHG to market the TCHG scheme

132. In Mr Kerkvliet's witness statement he says that in October 2016 Mr Greenway of TCHG contacted One Touch about marketing TCHG's care home proposals. He says that contact was made through the One Touch website, thus suggesting that TCHG was aware of the way in which One Touch described its business there.

133. Mr Kerkvliet says he asked TCHG to send a credit report and a business plan for review. These documents have not been disclosed. Mr Kerkvliet says it was "*clear from the documents*" that TCHG "*did not have a track record or a completed project to their name*". He rejected TCHG's approach.

134. Mr Kerkvliet says One Touch's Senior Investment Consultant Mr Stuart Cowie subsequently told Mr Kerkvliet that Mr Greenway had been replaced as business development manager of TCHG by Mr Paul Murphy. Mr Cowie had previously worked for Mr Murphy at "*another investment company in the property space*". He "*vouched*" for Mr Murphy and told him One Touch should entertain a meeting to discuss TCHG's development proposals. Mr Murphy said Mr Sean

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Murray had made his money from a telecommunications business which he had sold. Mr Murray had taken some time off to explore his passion for sailing but was keen to start a new business venture. This was where TCHG came from.

135. It is therefore apparent that One Touch well-knew that TCHG did not have a background or track record as a care home developer or operator. Nor did Mr Murray or Mr Murphy.

136. At about this same time, TCHG completed works to Latimer Lodge, a property which had previously operated as a care home under different ownership. Latimer Lodge was registered with the Care Quality Commission in December 2016 and in operation by January 2017.

137. On 13 January 2017 Mr Kerkvliet held a meeting with Mr Murray and Mr Murphy. They discussed Latimer Lodge. TCHG told him that it had had other projects under way. They discussed TCHG's further development proposals. No further detail about this conversation has been provided by Mr Kerkvliet.

138. In Mr Kerkvliet's witness statement he says he "*checked out*" TCHG online to understand more about the company and its offering. He found details of the company online, information on their developments, and reviewed their filings with Companies House, including their financial accounts. He says there was "*nothing out of the ordinary*" in the material online that would provide cause for concern about TCHG. In Mr Kerkvliet's supplemental witness statement he adds there were no outstanding judgments against TCHG. There was nothing adverse online about the people running it and:

"*We also looked into their model and did some rough calculations to see if this stood up as financially viable. In broad terms this seemed viable. …. Moreover,*

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it is my understanding from my time in the sector that the receipt of money pre-occupancy would provide more than enough to get refurbishments done and the property up and running operationally."

139. In the absence of any disclosed online documents, and against a background where TCHG had just started in business and opened a single refurbished development, it is unclear how much information could have been available online about TCHG's track record to form a satisfactory view. Mr Kerkvliet also does not say that he conducted any "*background checks on company directors*" in accordance with the "*due diligence*" described on the One Touch website or that he researched the corporate track record of Mr Murray or Mr Murphy online. He did not give the names and expertise of the persons included in his reference to "*we*" in terms of his evidence about checks or calculations. None of the materials, checks or workings, or the input values which Mr Kerkvliet says he used to reach his conclusions have been disclosed or were explained.

140. I note Mr Kerkvliet's use of the words "*rough calculations*" and "*in broad terms*". This suggests that such exercise as was carried out was not in reality any kind of well-researched, thorough or detailed financial viability review to "*ensure*", in the words of the website, that an investment had "*minimal risks attached*", or to stand in place of a "*solid record*" of delivery.

141. Mr Kerkvliet says he understood that TCHG intended to use monies received during development to fund "*refurbishment and to get a property up and running*". Mr Kerkvliet does not state in his written evidence that he reached any conclusions about the actual funding of the costs of the purchase of the individual properties by TCHG as part of the scheme, or that he considered the

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adequacy of the monies received to fund any works to a property beyond a "r*efurbishment*". He did not seek to explain what kind of costs he considered to "*get … the property up and running operationally*" as a care home.

142. Mr Kerkvliet says in his witness statement that he had a good understanding of the care home sector himself from One Touch's previous involvement with developers and the information he had gained from reading market reports, such as the Knight Frank reports on care home occupancy. No further detail was provided. However, it was on this basis that Mr Kerkvliet says it was clear to him "*that TCHG's proposition could be viable with an operating margin around 20%, if managed properly*". I note the degree of equivocation in Mr Kerkvliet's conclusion. Similar equivocation is not suggested to have been repeated in any contact with investor clients.

143. Mr Kerkvliet did not seek to explain in his witness statements how, if at all, he reflected or weighed the relevance of each of the separate companies in the TCHG structure and their own income and obligations when considering the viability or safety of the scheme for marketing to potential investors.

144. Mr Kerkvliet was taken in cross examination to some figures attached to an email sent to One Touch later in 2018 by a potential client. Mr Kerkvliet identified these figures as from TCHG's accounts to December 2016. These showed cash of £32,000, current assets of £388,000, a net worth of negative £141,000 and total current liabilities of £661,000. Mr Kerkvliet said that when One Touch started marketing for TCHG it "*hadn't generated the sales*" but had laid out money to buy Latimer and Tyndale and was "*going to have negative*

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balances then because they had made commitments to the pre-existing investors and their own staff".

145. No reference was made by Mr Kerkvliet in either his witness statement or supplemental witness statement to the specific figures in these accounts or any prior draft accounts. At face value, figures of this kind do not provide strong support for Mr Kerkvliet's conclusion "*that the receipt of money pre-occupancy would provide more than enough to get refurbishments done and the property up and running operationally*". TCHG's ambitious development programme involved the purchase and launch of further new development sites beyond Tyndale from the beginning of 2017 onwards. Prior to One Touch's initial meeting with TCHG, an internal One Touch email dated 11 January 2017 from Stuart Cowie to Mr Kerkvliet recorded: "*12 units available – 6 Hurst Manor 6 Tyndale*". To One Touch's knowledge, TCHG therefore already had at least one further site to be developed simultaneously, Hurst Manor.

146. I note that whilst neither Latimer Lodge nor Tyndale were marketed by One Touch to the Claimants, as early as 2 February 2017 an investment in Hurst Manor was offered to Mr Funk by Mr Kerkvliet and Mr Thornton during their first in person consultation with him.

147. In neither Mr Kerkvliet's witness statement nor his supplemental statement did he give any evidence that as part of the "*due diligence*" undertaken before One Touch agreed to market the TCHG investment scheme initially, or before proceeding to market the various individual development schemes which it proceeded to market subsequently to the Claimants, One Touch undertook the "*vital*" site visit to each development project described on the One Touch

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website "*to understand if it is the type of property or investment that we would be comfortable in recommending to our prospective clients*." In cross examination he accepted One Touch made no such visits at all.

148. It therefore follows that none of the meetings on each site with the project management team and major contractors to establish the timelines "*that the developer has mentioned can be implemented within according to plan and budget*" described as part of One Touch's due diligence on the website took place. The impression created, however, was that One Touch was privy to the developers' plans and budget for each investment project and that it had checked these matters on site with those actively involved in bringing each individual project to fruition in order to establish these important matters to investors.

149. In neither Mr Kerkvliet's witness statement nor his supplemental statement did he give any evidence that as part of the "*due diligence*" process he undertook before One Touch agreed to market the TCHG investment scheme initially, or any individual developments they subsequently marketed, that they asked their independent solicitors to consider the "*fine print*" of TCHG's agreements and "*review the proposed purchase agreement to establish if there is anything in the fine print that could be to our clients' detriment*". That is, that One Touch followed the course that it expressly stated that it took on its website and in its You Tube videos before recommending any investment to their prospective purchaser "*clients*" such that they could be assured these kinds of legal checks had already taken place for their own benefit. In cross examination he accepted One Touch did not do this. The most he hazarded was that he may have asked Mr Jonathan Sara of POLS to have a look when he popped into the office.

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Whether true or not, this is not the due diligence check the website described. It does, however, reflect the relationship between Mr Sara and One Touch.

The TCHG General Sales Agreement

150. Just two weeks after the only meeting Mr Kerkvliet says took place with TCHG at this point, One Touch entered the General Sales Agreement dated 1 February 2017 to market and sell units in TCHG care homes. One Touch was to provide services consisting of: "*Sale of Care suites, recruitment of sub-agents to assist in the sale of care home suites … and also any other tasks which the Parties may agree on*." The arrangement was exclusive in respect of South Africa; non-exclusive elsewhere. One Touch was to be rewarded by the payment of a commission of 12.5% if a sale completed. No payment was due when a property was reserved. One Touch was not to benefit from the reservation fee.

151. TCHG would:

> "*Provide the marketing information, colour photographs, brochures, financial projections, draft leases and draft purchase agreements on each of the care homes that [TCHG] wishes the agent to sell … the information provided therein will be relied upon, in good faith, by the agent as being an accurate and true representation of each care home and the financial projection of returns that each care suite can deliver for purchasers*."

The TCHG training and the role of Accordiant

152. In Mr Kerkvliet's witness statement he says that TCHG provided "*some training*" to One Touch's sales staff "*to increase our familiarity with the developments*". They did this alongside the content of the TCHG Care Home Guide that provided key information related to the care home sector in the UK and the opportunities available. In re-examination, Mr Kerkvliet said that Mr Murphy of TCHG conducted the staff training. Mr Murphy told One Touch:

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"*Accordiant was the … tenant management company and they were responsible for directing the funds generated from that property*".

153. In cross examination, he said One Touch's "*understanding was that, although they [Accordiant] were obligated under the underlease, [Accordiant] were getting the income, from what Carlauren [TCHG] said to them, from each individual freehold company*".

154. Mr Kerkvliet said that it was on all the brochures that One Touch used that Accordiant was "*doing the leasehold management*". However, when taken to a sample brochure he was forced to agree that there was no mention of Accordiant there. He agreed that the One Touch Care Guide which was distributed by One Touch did not mention to clients which company would be paying their "*critical*" 10% guaranteed investment return or that this would be Accordiant.

155. Mr Kerkvliet asserted in cross examination that the fact the One Touch staff did not later mention to the Claimants that the 10% payments were all the liability of Accordiant does not mean that the staff did not understand the TCHG scheme they were marketing. In contrast to the professions of expertise and recommendations of "*well-researched*" investments on the website, he said:

"*But, you know, the inner workings between those two was not something that we looked at in very much detail, because this was the way that we explained it, and it's a lease and a sub lease, and it becomes quite complicated for us. So we thought, "OK, fine. Although they've got the obligation to pay, the income's only coming from the specific SPV that the people bought into. So that's the way that I understood it*."

156. Seemingly, it was only after entering into the General Services Agreement with TCHG that Mr Kerkvliet visited Latimer Lodge in or around February 2017 to see the sole operational TCHG scheme. He said in his statement he found it refurbished and in operation successfully, apparently well-run and popular. A

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year later, Latimer Lodge, which still remained the only operational TCHG care home, won an award in 2018.

One Touch's Dealings with the Claimants

157. On 2 February 2017, the very day after the General Sales Agreement was signed, Mr Kerkvliet and Mr Thornton met Mr Funk at a One Touch event in Johannesburg and introduced One Touch in discussion with him. They provided him with a copy of a TCHG Investment Brochure and discussed the TCHG scheme. Mr Kerkvliet emailed Mr Funk that day, subject "*Does a non-resident need to pay UK income tax*":

"*Herewith the information on the inheritance and income tax [website links] …. Therefore, you should only have to pay income at 20% tax on the portion above the personal allowance. For example, if you went ahead with two units of £75,000 with 10% net income: £15,000 income, £11,000 allowance, £4,000 taxable at 20% = £800 tax. Does that make sense? … Non resident landlords can apply to receive their rent with no tax deducted on the basis that either: their UK tax affairs are up-to-date, they have not had any UK tax obligations before they applied, they do not expect to be liable to UK income tax for the year in which they apply. Please see the links below for further information. [HMRC links]. No VAT is payable on rental income.*"

158. Mr Funk replied: "*I checked my German account and have EUR 50,000 free right now. If my wife will go 50:50 with me, we could do the investment at Hurst Manor. Was that the one in Somerset that you suggested? Is the price 90,965?"*

Mr Thornton responded by return:

"*I have attached the reservation form if you can fill it out and send it back to me then I can arrange for your preferred unit to be taken off the market … Just to keep you informed unit no 1 has been sold so looking at the list I would suggest buying unit 9 priced at £97,695 or alternatively unit 17 priced at £104,695*."

159. On 6 February 2017 Mr Thornton followed up asking if there were any questions: "*If not you already have the form you can send back over*". On 8 February 2017 he emailed there was only one unit left: "*so I would recommend sending the form back to get it reserved for you*." When Mr Funk replied that

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he could not get the funds together quickly enough and was about to travel, Mr Thornton suggested he could "*put the £2,000 deposit on Hurst Manor and the balance of the funds are not needed for another 28 days."* Alternatively, "*we can go for another one when you get back"*.

160. In an email on 15 February 2017 Mr Thornton told Mr Funk Hurst Manor had now sold, but there was "*good news*" TCHG had released a new site:

"*Rosewell Care Home Somerset - 10% net for 10 years ... Investment Fundamentals 10% net income per annum for 10 years; 110% buyback option in year 5; 125% buyback option in year 10; units priced at £85,000; hands off investment; luxurious amenities on site …*".

161. Mr Funk replied on 19 February 2017: "*I'm still on the road. ...What are the payment terms on the investment option*?" He needed to sort out his "*liquidity*". He asked Mr Thornton: "*What are the implications of ownership via a Swiss based company?"* He also asked about the freehold / leasehold structure. On 20 February 2017, Mr Thornton replied:

"*The payment terms would be £2000 deposit followed by the full balance within 28 days. When you complete you will start earning the income straight away. You are buying in a Swiss company so personal name has no effect on the purchase process or legal standing of the investment (sic). Either way as long as you have all the paperwork for the Swiss company then it's all the same. You are buying the leasehold so you will own the physical property. You are not investing into the company that runs the care home. <u>The difference is that the company runs the care home and whether they're 50% full or 100% full you still get your 10% net income, so even if the municipal fees go up, due to inflation or supplies etc, you will not be affected. You will simply get 10% net income of your purchase price</u>*." (my emphasis)

162. In answer to Mr Funk's further questions, including confirmation "*the income will be constant at 10% return*", Mr Thornton replied:

"*Yes, the income starts straight away. From the day you complete you will receive your first payment 14 days after. There are no charges for you. <u>The business simply operates the business and then pays you 10% of the purchase price. This way there is no way for yield to drop</u>*." (my emphasis)

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163. In cross examination Mr Thornton was taken to these emails. He denied that he was misleading in referring to "*the company*" because this suggested the company running the care home was responsible for the 10% payment. However, he agreed with the proposition that he knew that the company running the Care Home was Caring Communities, that the developer was Carlauren Limited, that the freeholder of each site was an SPV, and that the undertenant, "*who was the key aspect of the arrangement from the purchaser's perspective*", was Accordiant. He agreed that he understood they were all separate companies.

164. Only once Mr Thornton was re-assured that he was not being accused of intentionally misleading was he willing to say this about his explanation of the TCHG purchase proposition: "*I will concede its very shortened … but that's more an overview of how it works." "I think is far too simplified, I would agree, but I just object to the word "misleading"*. He accepted in cross examination that his statement that income would be received by an investor regardless of occupancy was "*looking back at it now … absolutely oversimplified*". He ultimately agreed that there was also "*absolutely a way for the yield to drop … completely right. . .. I think its oversimplified and, yeah, I'm wrong*."

165. Mr Funk proceeded to ask Mr Thornton questions about non domicile and property tax. Mr Funk suggested to Mr Thornton that the only risk he could see was if the Rosewell Care Home "*did not get filled and had to liquidate*". A question which confirms he understood Mr Thornton to have told him that it was the care home operator company which was to pay his fixed return. A matter which Mr Thornton again failed to correct. Mr Thornton replied:

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"even with your income tax you will have an allowance of £11,000 each of income before you will have to start paying tax. ...

The relationship would be a sale and leaseback scenario, i.e. you are buying the property and leasing it back to them so they can operate it as a care home.

Yes, you are exactly right, regardless of what happens to the Care Home Group you are still the legal owner of this property so if they were to fall into financial trouble you would simply have to find a new operator. But again this would be the worst case scenario".

166. In cross examination Mr Thornton disagreed that he had provided reassurance to Mr Funk or stated opinions "*off his own back*". He said these were examples "*where I'm oversimplifying and comforting." "That was my understanding at the time which now turns out not to be true*". He would not agree that this illustrated his general approach to all purchasers: "*I'd need to see more evidence to say that. ... I'd need to see an email that says I said this or I said that*."

167. On 27 February 2017, Mr Thornton told Mr Funk:

"*Some good news for you. [TCHG] are coming to the end of their book financial year so they're offering a promotion of free legal services for all purchases in February. I know it's short notice but if you can get me the form back by tomorrow then it will save you 12,000 Rand. Let me know*."

168. Mr Funk asked whether Mr Thornton knew:

"*About the inheritance tax law that is changing on the 6th April. It looks as if non domicile property owners will also have to pay the same 40% inheritance as domiciled property owners. Even if the property is held in a trust. That could be a problem for us in the future. So putting the properties into a Swiss company's name might not serve any purpose in the long run*."

Mr Thornton confirmed that he was aware of the legislative change and care and nursing homes were specifically excluded. He attached an article from the Government's website about the change.

169. Mr Thornton chased Mr Funk on 22 March 2017:

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"*Just to keep you in the loop with this care home property there are only 6 units left. If you can I would really recommend securing one of the units ASAP. We're coming out again next week* [i.e to South Africa] *if you need to go over anything else but in the meantime I would suggest taking a look at the doc attached and selecting a unit*."

170. When it was put to Mr Thornton in cross examination that he was applying his professed expertise to produce recommendations and advice to Mr Funk "*who is your client, yes?*", he said that he was "*repeating what was there and ... totally concede oversimplifying it and it not becoming true, but yeah*." I note that nowhere in Mr Thornton's emails did he suggest he was purely responsible for marketing these units for TCHG. Nor that he was the incorrect person to explain the detail of the structure of the TCHG investment. Nor that he required any further information from TCHG to be able to respond accurately or at all to any questions about the structure of the scheme. He also did not say he was the incorrect person to answer Mr Funk's questions about the inter-relationship of a purchase and his personal tax position or the use of his Swiss trust to purchase. Nor did he ever recommend to Mr Funk that he should take legal advice on any of these matters before reserving, nor take any additional financial advice of any kind before making the decision which Mr Thornton "*really*" recommended and urged upon him to invest in one of the remaining units in the TCHG development and to proceed to complete and return the reservation form even if he had some remaining questions for Mr Thornton afterwards.

171. On 3 May 2017, Mr Thornton followed up again with Mr Funk. Mr Funk replied he had to pay some money into the Swiss trust first but should be ready to invest later in the month.

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172. In the meantime, on 8 March 2017 Mr Rana emailed Mr Motala with details of the Rosewell investment identical to those Mr Funk received. Mr Motala asked to speak to one of One Touch's South African directors or Mr Rana. Mr Motala reserved Rosewell 43 that same month. Mr Kerkvliet was copied into the conveyancing correspondence between POLS and Mr Motala.

173. On 30 June 2017 One Touch sent Mr Hickson and Mr Roberts (amongst others) an email mailshot: "*Which investments can withstand political uncertainty*?" including links to "*read more*", "*Contact us today to discuss investment options that can work for you*". The email included One Touch's standard Company information.

174. On 3 July 2017 Mr Hickson made a One Touch website enquiry and received the automated website replies. On 4 July Mr Thornton emailed him regarding Millpond View, Hayle: "*Cornwall care home investment - 10% yield for 10 years … Investment fundamentals: units priced from £89,400, reserve a unit for £2,000, 110% buyback in year five. 125% buy back in year 10. 10% net return for 10 years*." Mr Thornton also enclosed a TCHG brochure:

> "*receive a 10% fixed monthly income by using a lease management company, such as our preferred supplier Care Home Freehold Limited [Accordiant]… this will safeguard income regardless of whether the studio is occupied or not*"; "*sit back and enjoy a hassle free investment*"; "*choose a managed service provider to manage your studio and ensure a regular monthly return*"; "*enjoy continuing returns through buyback: guaranteed 110% buyback in Year 5 and 125% in year 10*".

175. The brochure, together with others TCHG produced, carried the following message on the cover. This was in a smaller font than the rest of the wording:

> *"The content of this promotion has not been approved by an authorised person within the meaning of the Financial Services Market Act 2000. Reliance on this promotion for the purpose of engaging in any investment activity may expose*

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an individual to significant risk of losing all the property or other assets invested." ("the Warning").

176. Mr Hickson wrote to Mr Thornton asking for a project timescale, when they would start receiving income, about any extra purchase costs and fees, and "*what happens if the home closes down for whatever reason? What security do I have? Could I sell before the 5 / 10 year if I wanted to? How?*" Mr Thornton responded the same day. He said the building was built but still needed to be renovated to a high standard. It was expected to take 4 to 6 months before the first resident would move in. Income would start from the day the purchase completed. The whole purchase process normally took about 28 days. There was no stamp duty. Solicitors' fees would be about £1,200 including disbursements. Mr Hickson could sell whenever he liked and he could do that privately or he could come back to One Touch who could re-market for him to "*their own database of clients*". One Touch had done this many times before.

177. Mr Thornton wrote:

"You are buying the physical property, not investing into the company, so if the home closes down you will have to find a new operator to run it, as a hotel, care home, apartment, residential home. Looking at the business model and the locations they have chosen we believe that would be unlikely." (my emphasis).

178. Mr Thornton's answer can also only be understood as confirming to Mr Hickson that One Touch had appraised TCHG's business model and the suitability of the locations which TCHG had chosen for their developments and that they had reached an informed opinion that it was "*unlikely*" the home would close. The reference to the potential for a re-sale evidences the independent long-term relationships which One Touch sought to foster with investors.

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179. Mr Hickson replied to Mr Thornton asking how an income could be paid after 28 days if the project was not complete and running and what would happen if the room was vacant. Mr Thornton responded:

> "*The way it works is that your tenant is "the Care Home Group" they're the people that run the care home and they will be paying you the 10% return, as they are your tenant and not Mrs. Smith (the elderly lady that lives there) the 10% is a flat figure regardless whether your room is vacant for a week or month etc. You can choose to get the market rents [i.e. option 1] but depending on occupancy the returns could be 15% or 2%, for us that is too risky and we would always advise clients to go with the 10% fixed option. All of those care homes are completely sold out, the only other care home we have is one that will be fully completed in three months time but the whole idea works the same way*."

180. Throughout this series of questions and answers Mr Thornton focused on the position of the care home operator and failed to identify or explain to Mr Hickson that it was Accordiant that was obliged to fund the payment of the return. Mr Thornton again misdescribed the TCHG scheme structure.

181. Mr Thornton clearly advised Mr Hickson against investing using TCHG option 1 and positively recommended that Mr Hickson should invest using TCHG option 2. He expressly provided what he himself termed as advice on the basis that One Touch believed option 2 was the safer option for its clients, i.e. safer for investors such as Mr Hickson.

182. These emails were followed up by a telephone call. Mr Hickson said in his written evidence that Mr Thornton told him that TCHG had other sites up and running which were going very well and that One Touch monitored each of the sites and gave feedback to investors as to their process. Mr Hickson was told One Touch inspected the sites and the residents were very happy. Given that only the Latimer Lodge site was in operation, and in circumstances where One Touch had not visited any of the actual development sites it was asked to market,

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this was either untrue or exaggerated. I do not accept Mr Kerkvliet's suggestion that Mr Hickson must be confused about this. Mr Kerkvliet was not party to the conversation.

183. On 11 July 2017 Mr Thornton emailed Mr Hickson to tell him that 5 units had now been reserved, building work would start in the next few weeks, and as discussed, the income would start from the completion date. Mr Hickson asked whether it would be possible to obtain a better price if they bought 2 of the units. Mr Thornton told him the prices were already well priced, but if Mr Hickson wanted to select 2 units he would go and ask the question for him.

184. Mr Hickson viewed the site externally at Millpond View. On 13 July 2017 he reserved 2 units over the phone with Mr Thornton. Four days after Mr Hickson had already reserved these units, One Touch sent Mr Hickson a One Touch Reservation Form on 17 July 2017. No signed One Touch Reservation Form exists.

185. In July 2017, Mr Thornton emailed Mr Roberts following up on a meeting after Mr Roberts had completed a website enquiry form. He said One Touch would be in Johannesburg on 25-29 September 2017 and he thought it might be worth them meeting up again to go through things face to face.

186. On 18 July 2017 a One Touch mailshot was sent to Mr Roberts (amongst others): "*Scandal and Corruption. How can you safeguard your assets?"*. One Touch's suggested solution was to invest in a TCHG property. It featured the Millpond View Luxury Care Home investment, describing it as: "*10% net rental assured for 10 years; ROI up to 125%; Hands-off investment; Care home asset*

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class predicted to withstand political uncertainties. Priced at £85,400. Read more."

187. This was followed by a One Touch mailshot to Mr Roberts and others on 25 July 2017:

"*How to maximise income from your buy to let property. Can investors still make money in the buy to let's property market? It is understandable that both new and seasoned investors alike might be put off from investing in property. There are various solutions available that can help you maximise profits and ensure that you are getting the best value for money. Click read more to see our suggestions that can help you make money from your buy to let property*." "*Commercial property under £150,000 is not subject to stamp duty charges, which means they can often offer a higher return on investment. See our commercial property investment options below*."

One Touch's "*suggestions*" to help investors maximise profits and ensure best value for money again featured Millpond View.

188. On 8 September 2017 Mr Roberts received a One Touch email entitled "*UK property consultations - learn how secure your Rands: SA Credit Rating Uncertainty – time to invest in stability?*" inviting him to a personal consultation with a One Touch investment consultant in Cape Town or Johannesburg (on one of seven dates), who would tailor their "*advice*" to his own requirements:

"*The UK has a stable property market. Find out how you can invest to secure the value of your savings*." "*UK property investment consultations: one to one property presentations with investment specialists who will tailor advice to your requirements. Over 8 years' experience in the property investment industry. Sharing advice on .... luxury retirement home investments. Yields of up to 10% achievable. Limited spaces - book today to confirm your spot. Invest from £59,950. [Book]*". (my emphasis).

It concluded with the standard "*Company Information*" describing One Touch's service. Mr Roberts booked and attended a consultation.

189. Mr Thornton was asked about the content of this email in cross examination. He agreed that the description accurately reflected the nature of the meetings he

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had with people in South Africa, including Ms Hutchison and Mr Roberts. An admission that One Touch was offering tailored "*advice*" during consultations to meet investors' requirements.

190. In August 2017 Mr van der Merwe browsed One Touch's website following a discussion with his brother. He received an email from Mr Kerkvliet, cc Mr Thornton, on 27 August 2017. Millpond View was fully reserved, but he suggested an alternative: the TCHG development in Sandown, Isle of Wight: "*Investment Facts, returns from 10% paid monthly*; *5 year 110% and 10 year 125% buyback*, *… reserve a unit for just £2,000."* Mr Kerkvliet sent a flyer and spoke to Mr van der Merwe on the telephone on 4 September.

191. On 4 and 5 September 2017 Mr Thornton emailed Mr Hickson, Mr Funk and Mr van der Merwe One Touch's "*Investment Facts*" for Sandown, including TCHG's brochure (which contained an almost identical description to that for Millpond View). The brochure stated: "*At the end of the 2017 summer season, [TCHG] will refurbish and remodel the property to provide luxury sea front accommodation*".

192. Mr van der Merwe decided any decision to invest was so important that he needed to come to London from Southern Africa to visit One Touch at its offices and speak to Mr Kerkvliet and Mr Thornton about the TCHG scheme himself. Mr Thornton emailed Mr van der Merwe directions to the One Touch office from Heathrow and a link to a hotel. In the meantime, he told him that to reserve units he could either make an online payment to One Touch's client account or pay by credit card: "*let me know if you want me to reserve any specific units as so far 19 of the 54 have sold in 2 days*".

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193. Mr van der Merwe replied on 6 September 2017: "*Please reserve units 13 and 17 for me. Will it be okay to pay you on Monday or would you like to have my credit card information*." Mr Kerkvliet replied these units were reserved for other buyers but if Mr van der Merwe did not like the other units available they would "*give you the first choice of units in the Taunton development*." Mr Thornton suggested three specific Sandown units which were available and briefly described their individual attributes: "*If you let me know I will log on from home and reserve them for you*." On 10 September 2017, Mr van der Merwe emailed Mr Thornton that he intended to reserve at least 2 units and would pay cash for anything he reserved.

194. On 12 September 2017 Mr van der Merwe met Mr Kerkvliet and Mr Thornton at One Touch's office. One Touch's CRM records this was a "*good meeting*". During the meeting Mr van der Merwe reserved 2 units and signed a One Touch Reservation Form for his first purchase at Sandown 8. As to the second unit, Mr van der Merwe paid a reservation fee "on account" for the next suitable property to become available. In the event, this was St Austell 3, bought in the name of Mrs Esme van der Merwe. Mrs van der Merwe signed a One Touch Reservation Form in Namibia on 16 October 2017 in her husband's absence. The day after the meeting, Mr van der Merwe visited Latimer Lodge and Tyndale Lodge (on their shared site) with Mr Kerkvliet and Mr Thornton.

195. In cross examination Mr Kerkvliet agreed it was "*correct*" that Mr van der Merwe's transactions were a working example of One Touch connecting people with properties as described on the website. He agreed "*all the information*" Mr van der Merwe used to make his decision to reserve two TCHG units and to buy

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into the purchase proposition came through One Touch. Taken to emails between Mr Thornton and Mr van der Merwe regarding the other 3 units which Mr van der Merwe went on to purchase as chosen by Mr Thornton, Mr Kerkvliet agreed it was "*correct*" that his witness statement was quite wrong when he stated: "… *the choice of whether to make an investment or not was made independently from One Touch – and we did not provide advice on investments*".

196. With regards to Mr van der Merwe's signature of 2 One Touch Reservation Forms, Mr Thornton said he did not remember ever discussing the One Touch Reservation Form or the One Touch Terms and Conditions with any clients. If he had done so, he "*probably*" would "*not*" have drawn out individual clauses, such as clause 12. If the client wanted to go ahead, they would "*hopefully read*" the Reservation Form, but "*I'm not telling anyone anything*". He could not recall that he ever told purchasers they were expected to do their own due diligence.

197. In his supplemental statement Mr Thornton had said he did not believe he would have provided a value-based assessment of the terms of the TCHG unit investments to Mr van der Merwe. Cross examined that it was very likely he must have done so to persuade Mr van der Merwe to purchase within about a fortnight based upon what One Touch had told him, he said: "*I specifically remember not doing that across my five years working at the company, not in this particular - I'm not saying I remember the exact conversation with Peter*." When taken to his correspondence with Mr van der Merwe, he conceded this did show he "*was requested to pick what I considered to be the best units, and this is what I've done*". Mr Thornton agreed Mr van der Merwe trusted him to select what he thought was in Mr van der Merwe's best interests for purchase.

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198. When it was put to Mr Kerkvliet that he had made up evidence in his statement that the van der Merwe family understood business risks he did not seek to defend his comment and said it was "*assumption*". In Mr Thornton's statement he said Mr van der Merwe was "*very wealthy and I understand he had a huge estate of forest - hundreds acres - in Canada and was also a debt buyer - someone who invests in uncollected debt for a percentage of the price of the overall debt*". When told that Mr van der Merwe was not a debt buyer and had not owned Canadian forest he accepted it was possible he was mistaken.

199. On 18 September 2017 Mrs Kerkvliet emailed Mr Hickson about Sandown and that only 8 units were left. Following up on Mr Hickson's enquiry as to whether there may be better terms if he purchased 2 units, Mr Thornton said that if he invested in 2 units his stamp duty would be paid and he would be provided with cashback: "*I hope this all sounds good to you, if so can you send back the attached reservation form and make the deposit so we can secure the units for you ASAP*." Again, there is no Reservation Form signed by Mr Hickson.

200. On 26 September 2017 Mr Thornton emailed Mr Funk that he and Mr Kerkvliet were in Johannesburg. Mr Funk asked for more information about Sandown: "*we have EUR 80,000 available immediately? The Wight investment starts at EUR 103000*." Mr Thornton replied by return there was another new project "*that will be starting at just under £70,000 they would work out quite perfectly*." He said it was also TCHG with the same offer of 10% for 10 years and buybacks. He would send the information and "*try and reserve you one of the best £70,000 units if you would like*". A £2,000 deposit would take the unit off

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the market for him. The balance would be due about 28 days later: "*You would then start earning from that date*".

201. Mr Kerkvliet and Mr Thornton met Mr Roberts again during this visit to South Africa. Mr Thornton agreed in cross examination that when he prepared his witness statement he could not accurately remember what Mr Roberts did for a living. He accepted the evidence in his witness statement that Mr Roberts was a "*former banker from Bank of China*" who "*at that time worked for fun*" was wrong. It was purely based on an assumption about the meaning of the initials BOC. Mr Roberts worked for the British Oxygen Company and not in banking.

202. On 28 September 2017 Mr Thornton emailed Mr Funk the Sandown brochure. On 30 September 2017 Mr Funk sent Mrs Funk the details. He asked her to check things out and "*do some serious detective work!!*" In cross examination, he said this was light-hearted, hence two exclamation marks. He did not think she was actually the person who could do that. He suggested they ask their daughter, who worked for Investec in London.

203. On 2 October 2017 Mr Funk wrote to Mr Thornton, copied to his wife:

> "*Have been looking into [TCHG] and see that it is very young company, having started in 2014. Then they have only completed 2 projects to date: Latimer lodge and Tyndale House. Hurst Manor, Rosewell and Shanklin are in the process of being completed. Then Sandown on the Isle of Wight would be another new project. Being such a new company would presumably be one of the main reasons that they're offering such an attractive investment. It would be good to see some financials on the company before we invest are these available? Also, a bit of concern is that the first project, Latimer Lodge, has not been inspected by the Care Quality Commission yet. It was registered with the CQC on 6 December 2016, but hasn't been inspected yet. So they don't have the CQC the "seal of approval" yet after being in operation for 10 months now. Can you please provide more information on the company. As it clearly says right at the top of the Sandown investment brochure: "[TEXT OF THE WARNING]"* (my emphasis).

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204. Mr Thornton replied by return:

> "*Yes, you are correct, they have not been around as long as other companies and when they approached us two years ago we said we needed to see the properties up and running, now we have seen the properties they have up and running and occupied at 100% occupancy, we feel very confident about the investment as a whole. To put it into perspective the Sandown property is currently operating as a hotel and running on a 13% profit margin so even though they are confident they can increase that by changing the layout and amenities, if they didn't they could still afford to pay you the 10% returns as well as making money from developing the property and running it. I have attached some financial information provided to us on each project, hopefully this will detail a little more about how the financials will work. I will need to get back to you about the inspection, as I do not know the reason why they have not been able to visit yet, I can only imagine that as it is a luxury care home and is full of able bodied / minded tenants they do not see it as a priority (sic) over the other care homes (dementia etc) but again I will get clarification on that as I need to be 100% sure. With regards to the risk, yes there are risks involved with any investment, however with this investment you buying a property in a great location, you will be the legal owner of the property and leasing it back to The Care Home Group to run and pay you an income. I hope this answers your questions*." (my emphasis)

205. This is an example of Mr Thornton providing direct re-assurance to a Claimant about the degree of risk of the TCHG investments. Mr Thornton downplayed the Warning which Mr Funk had drawn to his attention. He expressed One Touch's own opinion that One Touch was "very confident" in the TCHG scheme. No independent material has been disclosed by One Touch to verify the figures or analysis One Touch gave to Mr Funk.

206. He enclosed TCHG's "Projected Annual P&L TCHG Current Developments". This gave projected figures for each named development: a revenue figure based on 92% room occupancy; a figure for weekly care home fees, expenditure on labour to staff the care home etc; an operating profit figure; a figure for "*guaranteed investor return*"; and a figure for "*remaining operator profit*".

207. In circumstances where none of the projected figures related to Accordiant, the company which One Touch knew was to be responsible for payment of the 10%

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return, the provision of this document painted a falsely reassuring picture in purporting to address Mr Funk's identified key concerns, namely the security of the investors' guaranteed return and any risks to return in deciding to invest.

208. On 3 October 2017 Mr Funk wrote to Mr Thornton asking questions about the various TCHG investment options; ownership; property taxes and what would happen if something happened to TCHG. Mr Thornton replied by return:

> "*It's called leasehold and that means that you will still own the property and legally no one can take that off you. The only difference is someone else will own the land underneath, from a practical point of view it will not make any difference to the investment or even if it was your residential property*."
>
> "*Regardless of what happens to The Care Home Group you are still the owner of the property so if they were to fall into financial trouble you would simply have to provide a new operator. But again this would be the worst case scenario*".
>
> "… *if the worst were to happen and they went bust (although looking at the figures we feel it would be unlikely) you would still be the legal owner of the property so you could choose to do something else with it or sell it on as a unit to another hotel group or care home or anyone that is looking for such a property. Using the Isle of Wight property as an example you would have a prime piece of property right on the sea front that many other business [sic] would be keen to talk to you about*."

209. Again, on a natural reading, One Touch expressed its own opinion to Mr Funk about the merits of investing with TCHG in the TCHG scheme and said it was "*unlikely*" to go bust. Mr Thornton did so on the explicit basis that One Touch had formed its view "*looking at the figures*". One Touch's view was that the unit would be a "*prime piece of property*" that others would be interested in and Mr Funk would readily be able to deal with it or sell it on.

210. Mr Thornton explained the freeholder was part of TCHG and TCHG would be responsible for paying the fees and return:

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"*They will be legally bound to pay the ground rent and all fees to ensure you receive your 10% net. So if you bought a unit priced at £80,000 you would receive £8000 per annum as an income, this would be bound on the contract so there can be no financial surprises*."

He failed to identify the role of Accordiant, or that the freeholder was an SPV and this would be its sole asset.

211. On 6 October 2017 Mr Funk emailed that whilst looking at the One Touch website Mrs Funk had noticed a Liverpool investment for £65,000 that would be "*nicely within our budget*". The return was less at 8% but for 25 years. He asked Mr Thornton how he would compare this investment to the upcoming TCHG scheme. Mr Thornton replied:

"*To compare the two is chalk and cheese, one is a luxury retirement village and the other is focused on dementia care and more serious health issues, however they both make for a strong investment as the fundamentals on both markets stack up*."

212. Asked to accept in cross examination that he provided a general value-based assessment to Mr Funk here, at least because One Touch's view was they both were "*strong investments*" and the "*fundamentals*" stacked up, he said "*Yeah, I did say that*". He had endorsed the TCHG scheme as a "*strong investment*".

213. On 10 October 2017, Mr Funk emailed Mr Thornton to ask why Carlauren Developments was listed as dormant. He asked if they were the freeholder. Mr Thornton replied:

"*They are only listed as dormant because Companies House is talking about the previous year, when they release the next year's accounts this will be reflected. But to make things clear Carlauren has no obligation to you anyway, if you look at the previous attachment with regards to the balance sheet for each unit, you can see the developments make money on an ongoing basis so the contractor is not the company that pays you*."

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This is a further example of an oversimplified explanation of the scheme in response to a Claimant's question directed to risk, again wrongly suggesting that it was the operating company running the care home that would be making or funding the investors' return.

214. In the meantime, on 29 September 2017 Mr Hickson completed on Millpond View 9 and 23 bought in the joint names of himself and his sister Mrs Danby.

215. On 12 October 2017, Mr Motala had a meeting with Mr Thornton at the Capital Hotel Johannesburg. Mr Thornton provided the One Touch Investment Facts and TCHG brochure for the St Austell development. Mr Thornton provided further information by email on St Austell to Mr Motala that day. The next day Mr Motala signed a One Touch Reservation Form for St Austell 8.

216. Mr Thornton was taken to a passage in his second witness statement where he expressed surprise to see that some Claimants, including Mr Motala, "*claim that they would not have invested if they had known that these properties were under construction*". Mr Motala had said Mr Thornton did not mention this in respect of Rosewell and St Austell at the date of their discussion. Mr Thornton said he does not recall the discussion. In cross examination, he said: "*It's possible I did say it; It's possible I didn't say it*." He agreed he had mis-remembered Mr Motala's identity when describing Mr Motala as based in Zambia and investing in a restaurant, neither of which was correct.

217. On 12 October 2017, Mr Thornton telephoned Mr van der Merwe to tell him he had applied the second reservation fee Mr van der Merwe had paid at their London meeting towards a unit in a development he had chosen for him, St Austell 3: *("good unit with 2 windows – priced at £99,400 paying a 10% net*

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yield as per the last investment"). … *We already have the reservation form in your name (I have already reserved it under yours as the whole development sold out in 3 hours*)". On 16 October 2017, Mr Thornton sent Mr van der Merwe an email explaining this investment included: "*110% Buy back in year 10*" and "*10% net return for 10 years*". The TCHG brochure he enclosed included the statement: "*During 2017-2018, [TCHG] will transform St Austell into a luxury care community offering 34 care studios*".

218. On 19 October 2017, Mr Thornton emailed Mr Funk a brochure for Park Avenue, Hartlepool:

> *"Sorry for emailing so late but I understand this is rather urgent. I have attached the availability from June as you can see it was always priced at £69,950. It came back on the market as the current buyer couldn't get his hands on the money. If you want me to secure it, I will need your full address and the names of the buyers*".

219. On 20 October 2017, Mr Funk completed a TCHG reservation form and paid the reservation fee for Care Studio 4, Park Avenue. The TCHG Reservation Form does not mention One Touch or its Terms and Conditions.

220. One Touch introduced Mr Funk to POLS. On 31 October 2017, both Mr Thornton and Mrs Kerkvliet were copied into POLS' email to Mr Funk which attached the agreement for lease, headlease, underlease, lease plan, their Report on Title and a completion statement.

221. By October, Mr Byers had been on the One Touch mailing list since March 2017 after making a website enquiry. Having failed to meet at a One Touch event in South Africa, Mr and Mrs Byers met Mr Thornton in London on 24 October 2017. The CRM log records "*really liked the sound of the [care homes]*". After meeting, Mr Thornton emailed them about the TCHG Paignton

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development launching that day: "*Investment fundamentals*": *10% net returns over a 10 year commercial lease; income paid monthly; hands-off investment; located in Devon – the most popular county with retirees*."

222. On 24 October 2017 Mr Thornton emailed Mr Hickson regarding Paignton. On 25 October 2017 he emailed Mr Hickson and Mr van der Merwe about a TCHG development in Torquay. One Touch's 1 November 2017 emailing to its mailing list featured these TCHG English Riviera Luxury Retirement developments: 10% net rental income over a 10-year commercial lease; hands off investment; fully managed; income paid monthly. It was entitled "*UK care bed shortage. How can investors help?*" and "*87% of Councils will run out of care beds by 2022*." One Touch quoted Which? Research and a Knight Frank estimate.

223. In October 2017 Ms Hutchison saw an advertisement mentioning One Touch in South Africa, viewed One Touch's website, then made an online enquiry. She received an email response and initial call from Mr Thornton. The CRM log for Ms Hutchison shows that Mr Thornton spoke to her first on 5 October 2017. In her written evidence she said he told her what One Touch did in general terms. He was going to be travelling to South Africa and suggested they met in person.

224. Ms Hutchison and Mr Thornton met for a one-to-one investment consultation in November at an hotel where One Touch was hosting a seminar. During her consultation Ms Hutchison says Mr Thornton told her about One Touch, what it did, and its reputation in the UK. He asked her what her needs were, what she had to spend, what she wished to get out of it, and why. She explained that she was looking for a secure investment in a stable currency to protect her money and her purpose was to build a retirement portfolio. Mr Thornton discussed a

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few options, starting with the student property which she had enquired about when she made her enquiry. She says he told her that she should rule this out: it was a high-risk investment as there would be risks in dealing with students. Care homes were "*great investments and [he] took great pains to explain why*".

225. Mr Thornton agreed in cross examination that "*quite possibly*" he had told Ms Hutchison the best solution for her would be care home units "*out of what we laid in front of her, if it matched her goals*". Mr Thornton accepted that this was an example of One Touch providing tailored property investment advice and a recommendation during an investment consultation. This was against a background where Ms Hutchison says she was asked to explain her financial situation and investment goals.

226. The CRM log shows that Mr Thornton called Ms Hutchison 9 times (and sent an email) during October, November, December and January 2018, without his calls being accepted or returned after their November meeting. It also shows that Mr Thornton eventually called Ms Hutchison on 23 January 2018 from a withheld number. She answered. Mr Thornton agreed in cross examination that he had used the withheld number because he thought she was avoiding his calls and knew she would not know who was calling before she answered. Both One Touch and he considered that it was important to get clients on the phone.

227. Mr Hickson says that in around November 2017 Mr Thornton told him that there were other TCHG care home developments which had come to fruition and were now occupied. As a matter of fact, there were no other TCHG care home developments in operation. On 12 and 13 November 2017, Mr Thornton emailed Mr Hickson details about a Paignton development, including the stock

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list and a TCHG brochure. The investment details were very similar to those for Millpond View. Mr Thornton told Mr Hickson there were 9 units left and that they could even beat the last offer: offering increased rental revenue at 12% and covering legal fees. They would not be able to offer this moving forward.

228. Mr Hickson asked Mr Thornton which unit he believed was the most attractive. Mr Thornton replied with two suggestions and confirmed: "*12% income for the first year 10% thereafter (9 years) no buyback for the first three years as agreed with Paul [Murphy]. Also free legal services from Jonathan Sara*". Four days later, Mr Hickson reserved Paignton 20.

229. On 17 November 2017, Mr Hickson completed on Sandown 39 and 41 bought in the joint names of himself and his sister Mrs Danby. No Reservation Form, in draft or signed, has been disclosed for these units. On 17 November 2017 Mr van der Merwe completed on Sandown 8. On 1 December 2017 Mrs van de Merwe completed the purchase of St Austell 8. On 4 December 2017 Mr and Mrs Funk completed the purchase of Care Studio 4, Park Avenue, Hartlepool. On 6 December 2017 Mr Motala completed on St Austell 8.

230. One Touch's 10 December 2017 mailshot received by Mr Roberts and others featured St Austell:

> "*The appeal of Cornwall – 10% returns: high yield investment opportunity*". "*Invest in the robust luxury retirement sector: 10% net rental assured for 10 years. Income paid monthly. Prices start from £85,400. 125% Buy back in year 10. Hands off investment. Located in*
>
> *one of the most popular English counties with retirees [read more]*."

231. On an unknown date in the second-half of 2017 Mr Galon held an informal meeting with Mr Spier acting on his own behalf and on behalf of the family

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members in whose names he later purchased units. Mr Spier says that Mr Galon explained the investment model offered by TCHG. Investors would purchase a leasehold interest in a unit of a care home for a 10-year term which would yield an annual return of 10% and guaranteed by back. The investment was hands off. He says Mr Galon told him the care sector in the UK had become very profitable as care home tenants typically paid approximately £5000 a month for their accommodation. It was a very safe investment. Mr Galon had invested in the care sector for a decade with great success. He says he was told TCHG was one of the oldest and largest companies in England which had a large portfolio of care homes in the country. Details were provided for TCHG's Windlestone Hall scheme. Mr Spier was told this formed part of TCHG's flagship project.

232. On 15 January 2018 Mr Thornton emailed Mr Roberts to say that he would be coming to Johannesburg on 12 to 16 February and asked to meet. Emails were exchanged at this time between Mr Thornton and Mr Funk on further opportunities. On 16 January 2018 Mr Hickson completed on Paignton 20, bought in the joint names of himself and his wife Mrs Hickson. No signed Reservation Form for this unit has been disclosed.

233. On 28 January 2018 Mr Morrell consulted One Touch's website and filled out the enquiry form. He received One Touch's standard emails and an email from Mr Thornton relating to the development in which he had expressed interest, The Shires in Nottinghamshire: "*The existing care home development will undergo a sympathetic refurbishment to transform it into a luxury care community offering 42 care studios*." "*Investment Fundamentals*" *prices start from £69,950; 10% net rental over a 10 year commercial lease; income paid*

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monthly; hands-off, fully managed investment; new buy back options with improved flexibility. In year 5&6 at 110%, 7&8 115%. Year 9 120%. Year 10 125%". Mr Thornton emailed Mr Morrell the next day that there were 2 units available. They were "*reserved on the list but were available for a couple more days*". He also sent Mr Morrell details of a new development.

234. On 1 February 2018 Mr Thornton telephoned Mr Morrell. The CRM log notes "*sounded kinda off at first but then said he was really interested in the new [care home] coming out (wants to be the first in*)". Mr Thornton said he remembered "*very little*" of his interactions with Mr and Mrs Morrell. He was taken back to his supplemental witness statement where he said he wished to address Mr Morrells' statement that Mr Thornton told him "*it would be better to buy in these [retirement] villages, than keep my money in the bank*." He said in cross examination he did not recall the discussion or recognise the phrasing but: "*I can't be certain I did or didn't say 7 words in a conversation seven years ago.*" Based on Mr Morrell's evidence, this was advice that an investment with TCHG would provide a better return for Mr Morrell than the bank.

235. On 7 February 2018 Mr Thornton sent Mr Morrell a TCHG flyer for Bancourt House, Torquay "*coming soon*": purchase from £79,400, returns from 10% paid monthly, year 5&6 at 110%, years 7&8 115%, year 9 120%, year 10 125% buyback. "*Contact your agent to register your interest in this luxury care resort*." Mr Morrell said in his oral evidence that he understood *his* "*agent*" to be One Touch. Mr Kerkvliet agreed in cross examination that One Touch was that "*agent*". He knew this was how One Touch was being described to prospective purchasers. This was an admission from Mr Kerkvliet that One

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Touch was content to be portrayed by TCHG itself to investors as their agent: not TCHG's.

236. On 8 February 2018, Mr Thornton emailed Mr Morrell "*just got the brochure through*". The TCHG Bancourt brochure had the Warning on the cover. It described TCHG Option 2 as: "*Receive a 10% fixed monthly income by using the lease management company, such as our preferred supplier Care Home Freehold Limited [i.e. Accordiant]. This will safeguard income regardless of whether the bedroom is occupied or not*."

237. The brochure displayed the One Touch name and logo on the rear cover. Mr Kerkvliet was asked in cross examination if this was an example of what had been described as buying a "*One Touch endorsed opportunity*". He agreed: "*Yeah, it can appear that way*". Eventually, "*Yes*", it was right that when One Touch circulated a brochure like this with its details on it One Touch was adopting and endorsing the contents of the TCHG brochure.

238. Mr Thornton was asked about the One Touch branded TCHG Bancourt House investment proposal as he had attached it to his witness statement. He confirmed this same endorsed form of brochure was handed out and emailed to any prospective client and to anyone who showed interest. He said that more than one of the TCHG documents used had the One Touch logo. Mr Roberts, Mr Hickson, Mr Funk, Ms Hutchison and Mr Motala purchased in Bancourt House.

239. On 13 February 2018 Mr Thornton emailed Mr Morrell a One Touch Reservation Form. "*If you can fill it in and send it back over to me I can get this reserved for you*." Mr Morrell signed the form and paid the reservation fee. In cross examination Mr Kerkvliet agreed that it was "*correct*" the CRM log

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showed Mr Morrell buying on the strength of things said to him by One Touch. There was just over a fortnight between Mr Morrell's initial website inquiry and his completion of the Reservation Form.

240. On 13 February 2018, Mr Thornton provided further details to Mr Hickson about Bancourt, including the TCHG endorsed brochure.

241. On 13 February 2018 Mr Thornton met Mr Funk again in Johannesburg, then emailed him details and a brochure for Bancourt. Mr Funk emailed Mr Lenzlinger at Hoffelder Holdings:

> "*Below please find information on the potential property investment I would like to do for Hoffelder Holdings. I already own a similar retirement unit myself and all is working quite well with regards to the income received from the investment. They pay out every month. It also has a decent buy back options who are not locked in forever and have struggled sell the units. I'm thinking of getting 2 units to start with at GBP 69,950 each. What are your thoughts on this investment? I will check on possible tax implications on the British side, but I don't believe there are any*."

The details provided were the One Touch email describing the flexible, hands-off investment; 10% net rental over a 10 year commercial lease; income paid monthly; prices starting from £69,950; multiple buyback options in year 5&6 at 110%, 7 & 8 at 115%, year 9 at 120%, year 10 at 125%. The email described the proposal and the rapidly growing pool of senior citizens in Devon. It included the address of the One Touch website and the One Touch company information. Mr Lenzinger replied that day that it seemed to be a good investment for Hoffelder.

242. Mr Funk asked Mr Thornton about the deposit and to send a Reservation Form. Mr Thornton told Mr Funk that if he needed longer to make the final payments One Touch could arrange that "*no problem. The main thing is getting the units*

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reserved." On 14 February 2018 Mr Funk wrote to Mr Thornton about which 2 units would be purchased for Hoffelder. Mr Thornton told him by email that all the units he had selected "*are great*", but personally, he would "*go for one of each*" and have a south facing unit. He attached the Reservation Form "*so you can fill it out and get it signed for us. If you can send it back with the company names etc then I can get that put into the system and get these units taken off the market for you*."

243. The same day, Mr Funk sent the Reservation Form to Mr Lenzlinger. He told Mr Lenzlinger that he was in the process of sorting out which units he would take and was now looking at a higher price bracket. He would get the details for the top section of the Reservation Form, i.e. identifying the unit, and asked "*could you please fill in the second section with the company and your details and signature, and send a scanned copied to me*." He requested the reservation fee. He informed Mr Lenzlinger "*they will take them off the market as soon as they receive the signed reservation forms*."

244. Around 13 February 2018, Mr Thornton met Ms Hutchison at the Capital Hotel, Sandton and introduced the Bancourt House development, amongst others. On 14 February 2018, Ms Hutchison signed the One Touch Reservation Form for Bancourt 32.

245. On 15 February 2018 Mr Motala attended a further One Touch seminar in Johannesburg. On 17 February 2018 Mr Thornton emailed the details of Bancourt including the TCHG brochure. Mr Motala signed the TCHG Reservation Form that day.

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246. On 16 February 2018 Mr Roberts met Mr Thornton in Johannesburg and Mr Thornton introduced the Bancourt development. He emailed Mr Roberts the brochure and a reservation form: "*If you can fill out the reservation form and pay the £2,000 then I will get that unit taken off the market for you. As soon as I hear back from the developer re the deduction I will let you know*."

247. Mr. Roberts replied: "*I will complete the reservation form and pay the deposit tomorrow*". He then emailed again: "*attached please find the property reservation form for 42 Bancourt as discussed. I will pay the deposit tomorrow morning and email you the proof of payment*." Mr Thornton responded: "*Perfect, great news I've just managed to get one year by deduction (they said no at first as it's selling so quick). In short for a £90,400 unit you will pay £81,369 and receive no income for the first year. Is that possible?*" Mr Roberts replied this would work well.

248. This is an example of Mr Thornton presenting One Touch as negotiating with TCHG to obtain more beneficial investment terms for one of the Claimants and telling them it had persuaded TCHG to do this. It also again shows that One Touch sought completion of a Reservation Form at a time when the terms were still being negotiated and before they had been accepted. That the role of the Reservation Form was, as consistently described by Mr Thornton to various Claimants, simply to get the unit taken off the market.

249. The next day Mr Thornton emailed Mr Sara, copied to Mrs Kerkvliet and Mr Roberts:

"*Hi Jonathan, I have a new instruction for you, Peter Roberts is purchasing unit 42 Bancourt House. He's paid the £2000 deposit to us directly. The Care Home*

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Group have also agreed that he will not get any income for the first year but have that money taken off the purchase price."

250. In cross examination Mr Thornton was taken to the Joint Administrators' report to investors after TCHG collapsed where it says Bancourt House was "*badly damaged*" in a fire in 2017. This post-dated his discussions with the purchasers but estimates the costs to complete Bancourt House were £1.1 million; described the property as a non-trading hotel; states that it was badly damaged by fire in 2017 and had not opened since; that it was in poor condition and had little security and the local council had expressed concern with potential (by that stage) for enforcement proceedings.

251. Asked again whether he remembered telling the Claimant purchasers about the fire or whether his statement just contained something he thinks he would have said, Mr Thornton answered:

"*I think we would have spoke about the renovations - sorry, the refurbishment / renovations. I will concede I don't concretely remember saying, "hey, there was a fire there that had X damage," but I just know for a fact I would not be going around saying, "this has already been done"*.

252. Mr Thornton's written evidence was that he did not recall telling Ms Hutchison Bancourt House was only due for a minor refurbishment. He said in cross examination:

"*Again, anything's possible. I'd need to look at what actual state it was comment where it was in the - whether it was up for refurbishment. I don't remember the exact details of that*."

253. He said he would not have told Mr Roberts that refurbishment works had already been completed if that was not the case. He denied that in his eagerness to get a sale over the line he may have exaggerated or skirted over the fact there had been a big fire, or that he was motivated by his commission to make the

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property seem more desirable than it actually was when speaking to each of Mr Morrell, Mr Roberts, Ms Hutchison and Mr Motala. All of Mr Roberts, Ms Hutchison and Mr Motala say in their evidence that Mr Thornton did not inform them there had been a major fire when describing the investment to them.

254. During February 2018 Galon was in touch with Mr Spier about TCHG. On 1 February 2018 it provided Mr Spier with information about opportunities with TCHG and Windlestone Hall. This included the TCHG "*5-star luxury care accommodation: Investment Overview*", summarising the TCHG options and returns. The email included the TCHG "*Projected Annual P&L*" for TCHG assuming a 92% occupancy rate for each development. Galon did not mention that only the Latimer Lodge site was in operation. Shortly afterwards, on 9 February 2018, Mr Spier completed on Windlestone 32 as a joint purchase in the names of himself and his wife Mrs Spier. No signed Galon Reservation Form for this unit has been disclosed.

255. On 5 March 2018 Mr Thornton emailed Mr van der Merwe that he had not heard from him in a while: "*if you wanted to give me all the details for the purchaser ie your son or friend then I can reserve them as soon as they hit the market rather than keep missing out*." He enclosed a flyer for the "Queens Promenade", Blackpool:

"*The former New Hacketts hotel will be transformed into a luxury lifestyle resort of c. 70 studios*";

"*Returns from 10% paid monthly*";

"*5-6 year 110%, 7-8 year 115%, 9 year 120% percent and 10 year 125% buyback*".

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256. Mr van der Merwe replied asking Mr Thornton to reserve 2 units. He would pay the £4,000 as soon as he got to a proper town as he was in the "*boonies*" and gave the names of the purchasers. Mr Thornton emailed by return that he would reserve as soon as they were released and asked Mr van der Merwe about price, saying: "*Of course they will be the best ones of the price bracket*".

257. Mr van der Merwe replied that he would handle the correspondence. He would send the reservation fee no later than the following Tuesday: "*The price doesn't really matter as long as the units are some of the prime ones*." Mr Thornton replied the brochure and plans would be ready for the launch the next day. The best units would be the top price with sea views. He had 4 confirmed reservations for that price range and would proceed to reserve 2 units for him.

258. This correspondence whereby the selection of the units for reservation was wholly left to Mr Thornton's discretion before a TCHG brochure was even available, where Mr van der Merwe was told that he was being treated as a favoured client and the best units could be reserved for him pre-launch, together with the implicit pressure to act speedily and the rapid pace of the consequent decision to purchase, evidence the relationship of trust Mr Thornton had built up, and the faith that Mr van der Merwe says that he reposed in Mr Thornton to act for him in his best interests. It evidences that Mr Thornton knew that Mr van der Merwe would not be in a position to undertake any additional research or due diligence of his own and would not do so. Additionally, it shows that the completion of a Reservation Form was not required and no Form was provided. The One Touch Reservation Form was not treated by One Touch as an important document in practice and it was happy to reserve units without one.

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259. On 8 March 2018, Seth Bishop, CEO of Accordiant, emailed purchasers including the Claimants regarding the change of name / branding to "*Accordiant Limited*". Mr Motala queried the position with One Touch and Mr Thornton reassured him there was nothing to worry about. On 9 March 2018 Mr Thornton also emailed Mr Funk to reassure him in relation to the change of name. These are examples of the continuing post-purchase relationships between One Touch and the Claimants. Mr Motala and Mr Funk immediately reverted to One Touch when they required advice about the investments they had made through them.

260. On 14 March 2018, POLS emailed Mr Roberts, copied to Mrs Kerkvliet. The e-mail enclosed an agreement for lease, a head lease, and under lease, and lease plan. Instructions were provided for execution, and a client care letter was enclosed. The report on title would be provided once replies to enquiries from the seller's solicitors were received. In readiness for completion, POLS asked for the signed documents and a transfer of funds.

261. On 27 March 2018, Mr Roberts raised minor queries with POLS, copying his email to Mrs Kerkvliet and Mr Thornton. POLS replied to the queries. Mr. Roberts then asked Mr Thornton to phone him about the "*landlord buyback issue"* he had asked POLS about. Mr Thornton replied on 28 March 2018. He said the answer he set out was provided because it was clearer than the response given to him by POLS. In cross examination, Mr Thornton agreed this showed him sending alternative legal advice to one of the Claimants after POLS was instructed. Similarly, Mrs Bester emailed One Touch during the conveyancing process asking them, and not POLS, to explain "*tenant rather than owner"*.

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The information identified by the Claimants as "Red Flags" to One Touch and One Touch's and Galon's Further Sales to Claimants

262. At this stage, the Claimants identify the first "red flag" which they say should have caused One Touch to question TCHG further about its investment proposals and reconsider the way One Touch marketed them. The disclosure contains emails from Mr Kerkvliet to TCHG relating to the problematic planning position at Windlestone Hall, the development in which Mr Spier had already invested through Galon. The chain begins with an email sent by Mr Kerkvliet to Mr Murray and Mr Murphy on 10 April 2018 after One Touch had been contacted by a journalist regarding TCHG's Windlestone project. The evidently critical article mentioned has not been disclosed, but Mr Kerkvliet wrote:

"*We understand that Windlestone is an existing building and the internal works do not require planning permission. However to maximise income as a care home / later living a state, there needs to be a change of use, right? Can you please show me an application for use or letters from the Council confirming that subject to certain parameters, they are happy to grant the change. I sent your team the journalist's details but he claims that no one called. He undermines the project by saying that no planning application has been made (link to an article in The Northern Echo). I'm just worried that if people do their research it would make us both look bad*."

On 20 April he chased: "*look forward to 1) the comfort letter from the Council and 2) the planning application*".

263. On the 3-4 May 2018 Mr Motala's purchase of Bancourt 3 completed. On 4 May 2018, the following purchases completed: Hoffelder Holdings' purchase of Care Studios 24 and 25, Bancourt House; Mr Hickson's purchase at Bancourt 22; Ms Hutchison's purchase of Bancourt 32; Mr Robert's purchase of Bancourt 42; Mr Morrell's purchase of Bancourt 16.

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264. On 4 May 2018 Mr Kerkvliet wrote to TCHG:

> "*Hi Adam, When I spoke with Sean on the 11 April he said that he would delegate "obtaining a comfort letter from the council to someone at the office". Paul informed me that said that you were handling that. Could you please update me on your progress? It is important for us to be able to show our investors that … the council are on board with your plans."*
>
> Mr Bishop, the CEO of TCHG, replied:
>
> "*We are VERY confident in the planning process but can't get any kind of letter before we send in a pre-planning proposal*."

265. On 23 May 2018, during the period when One Touch was aware of these unresolved planning issues at Windlestone Hall, completion took place on Windlestone 55 in the joint names of Shai Spier and Anat Spier. On 24 May 2018 Martinus van der Merwe completed on the purchase of Blackpool 39. On 30-31 May 2018 Mrs Bester completed on the purchase of Blackpool 30.

266. On 18 June 2018 Mr Kerkvliet emailed TCHG again about Windlestone Hall: "*May I please have the outline planning application number and an update of how the meeting went?"* In cross examination Mr Kerkvliet agreed: "*I was concerned about it for sure*". He did not get confirmation that he could recall.

267. It was put to Mr Kerkvliet that One Touch was selling Units in Windlestone Hall throughout this period, including through its agents Galon, and that Mr Spier had bought one in February 2018 and another in May 2018 at a time when One Touch knew there was a big question mark over planning. He said: "*We just requested information about planning. It wasn't to say that it wasn't going to be forthcoming*." He agreed One Touch did not pause sales or sound a note of caution to ensure that what he had told TCHG One Touch needed for their investors had been obtained. He denied this was to secure commissions.

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268. In July 2018 Mr Motala attended another One Touch seminar at the Capital Hotel, Sandton, Johannesburg. In July to August 2018, Mr Motala complained to Mr Kerkvliet about his liability for 20% withholding tax on letting returns. He told him that this was not the tax advice previously received from Mr Rana.

269. On 24 July 2018 Mr Thornton emailed Mr Morrell about the Arbour Hotel, enclosing a TCHG brochure. In cross examination, Mr Thornton was asked about the denial in his witness statement that he had told Mr Morrell that the Arbour Hotel would be a "*lucrative investment*". He said: "*Anything's possible, for the record, … Absolutely, I don't remember categorically saying I did not say those words to anyone*." Based on Mr Morrell's evidence, this was a further value-based assessment and recommendation by One Touch to invest.

270. In July 2018 there was an important exchange of correspondence between One Touch and TCHG. The content raised a further red flag in the Claimant's submission. On 26 July 2018, Mr Kerkvliet emailed Mr Bishop and Mr Murray requesting the link where weekly development update pictures and descriptions were being added to the server. If there were no descriptions, he asked for the most up-to-date spreadsheet with development progress and project completion dates instead. These were not for One Touch's own due diligence purposes. He said: "*I have to update some clients and partners today*".

271. Mr Bishop replied that the matter was being actioned that day and there would be weekly updates to the main server for reference. Mr Kerkvliet responded: "*We believe in what you are doing. We just need some pics on completed sites so that we can sell more. Which are the ones closest to being ready? Can't you get a few snaps of builders hard at work*?"

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272. Mr Bishop replied: "*We have been doing a LOT OF developments at the same time. We will have five more open by the end of the year as well as 3 operational hotels with care services*." Mr Kerkvliet replied:

> "*A significant number of clients are saying that they feel two open and operational care homes is too few for the number of projects launched. Words such as "Ponzi scheme" are starting to be used and some of our repeat buyers are sitting back until they see some progress. It would be really helpful if you could send an update with some pictures of some of the sites that are nearly complete. Could you please whip something up for … the Auckland Hotel*?"

273. When it was put to Mr Kerkvliet in cross examination that One Touch never did receive any positive proof of works being completed and of the photographic evidence across the developments, he said he did not recall. He said he went to the Auckland Hotel and took some investors there. Put to him that he had asked for basic photographic evidence of progress across the care home developments and that he was being fobbed off, he suggested Mr Murphy "*might have sent me them individually, but I can't recall*". Put to Mr Kerkvliet, that this was a "*massive red flag even in July 2018, that you should have been very concerned about*", and he was instead prioritising sales and his commission entitlement, he said: "*No. I mean, with these things, you basically can ask for information, and I don't know if I got it, so I can't comment on something that I don't recall*." There is no evidence in the disclosure of any material of this kind.

274. Fundamentally, this evidences that Mr Kerkvliet knew by mid-2018 that a *"significant number*" of One Touch clients were concerned that developments were not being completed and opened by TCHG. Some were already suggesting to One Touch that the TCHG scheme that One Touch was selling was a Ponzi Scheme. The emails evidence that Mr Kerkvliet's focus was not due diligence and the reliability of TCHG, but purely that One Touch should be able to make

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further TCHG sales. They display no thought about the risks for investors in the units One Touch had marketed, and was still actively marketing, across all the plainly incomplete TCHG schemes.

275. Rather, Mr Kerkvliet's request to TCHG was simply that TCHG should send him some photographs so he could use them to reassure clients all was well and keep making sales. An inadequate response given the very serious nature of the "*clients'*"" concerns that he identified and the service that was described on the One Touch website. He did not visit the developments that One Touch had sold or was selling to see how matters stood for himself or seek the re-assurance of further financial information. He did not re-consider the viability of TCHG's repeated development releases which it was marketing or the consequences of the fact TCHG was overstretched and failing to meet deadlines.

276. It is significant that these exchanges again evidence Mr Kerkvliet's own contemporaneous use of the word "*clients*" to describe One Touch's prospective investors when dealing directly with TCHG. They also show Mr Kerkvliet obtaining the information which he required to brief the One Touch sub-agents, such as Galon, who were marketing the TCHG units like Windlestone Hall.

277. Mr Kerkvliet's witness statement does not discuss this July correspondence. He just says there that it had been suggested One Touch knew TCHG was failing but continued to market the properties and "*I can say that is not the case"*.

278. He says in his statement that it was true that there were delays in TCHG paying One Touch's commission at times:

"[The] "*first major delay occurred on 23 August 2018 where a relatively modest amount of £53,061 was three weeks overdue. TCHG had been very good at*

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paying our invoices within 10 days of invoicing and they had also been very good at paying investors on time. I wrote to Mr Murray of TCHG and he explained that there was fraud by one of their contractors in his email reply. Mr. Murray and TCHG brought the payments up to date shortly thereafter and there was no reason to doubt that the contractor issue had been resolved. Developers frequently have contractor disputes, so this was nothing else the ordinary."

279. However, if one reads the actual content of Mr Kerkvliet's own email to Mr Murray of 23 August 2018, it is evident that the situation was more serious. Mr Kerkvliet had spoken to Mr Murray about his concerns as to TCHG's cash flow situation. Importantly, it is also evident that Mr Kerkvliet was aware by August 2018 that the sales made by TCHG were dependent upon future sales being made by TCHG to fund payments. He wrote:

"*I mentioned to Paul that I'm worried about the cash flow of the Carlauren group. It appears that recently, past sales are depending on future sales in order to pay our commission. We always pay our agents from the commission that we receive - not on future sales - that way we stay out of trouble*."

280. He mentioned matters that were outstanding and matters falling due the next day and:

"*three of the five deals are through our sub-agent. We have to pay them out of our own cash to keep their confidence levels up. If they were to find out that you currently can't afford to pay us that will impact how they feel about future sales. We want to keep them happy and active*."

Mr Kerkvliet asked TCHG for £53,061 to be paid the next day.

281. In cross examination Mr Kerkvliet confirmed that his only concern was indeed One Touch's own commission. He was asked and answered as follows:

Q: "*But doesn't it follow, Mr Kerkvliet, that if your commissions are being paid out of future sales, so is income that is being paid to purchasers being paid out of future sales?*

A: *I'd have to draw lines between those. It's not immediately evident. All I can take on is what's happening with my business, which is dealing with Carlauren Lifestyle Resorts, not with Accordiant, you know, and the investors had been*

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paid on time, so I was complaining about my commission because I spent a lot of money on advertising and I had to pay my sub agents. … I couldn't draw a parallel with Accordiant."

282. He said that he had worked with lots of developers over the years and sometimes "*they'll use you as a short term funding gap, and that's I think, what happened here*". He denied that this was not an honest answer, and he had turned a blind eye to the obvious conclusion that investor clients' returns would be coming out of future sales.

283. In common with other elements of his cross examination, in seeking to advocate for One Touch's own case, he disclosed that he knew that the TCHG model involved the acquisition of about 2 new homes every month, implicitly recognising the overall funding demands this schedule imposed on TCHG:

"*They had to acquire 2 new homes, pretty much per month, which is a lot of funding. So that's what I just thought, not that there was a problem with the Accordiant. If I'm stupid and didn't figure it out, then I'm sorry about that, but it wasn't, you know, directly obvious to me."*

284. On 5 September 2018, Mr Kerkvliet sent an email to Mr Bishop:

"*Hi Adam, I trust that you are well. A client sent us this company report. Do you have any better looking reports? Or can you suggest which of the group companies they should be looking at?".*

The company check document attached was the document referred to at paragraph 144 above. This showed TCHG had total current liabilities of £661,000 to December 2016. In cross examination Mr Kerkvliet agreed that in asking TCHG for "*better looking reports*" he did not engage with the substance of the client's question as to whether or not TCHG could honour its investment obligations.

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285. In September 2018 Mrs Moller saw an online advertisement for Galon regarding One Touch's properties. She met Ilay and Etay Galon who introduced her to the opportunity.

286. In September 2018 Mrs Heneghan viewed One Touch's website and then called One Touch on 5 September 2018 to discuss the TCHG schemes. She spoke to Nathan King and he supplied her with the One Touch "Care Guide". On 10 September 2018 Mr King emailed Mrs Heneghan with details about the Bay View development and they spoke again to discuss the purchase proposition. The same day, Mrs Heneghan emailed Mr King about the Warning on the brochure. She asked: "*that means I could stand to lose my investment money as my investment is not guaranteed?*".

287. Mr King replied on 11 September 2018:

> "*the Carlauren group have to put this statement in as the [sic] you are not buying a financial product you are purchasing a property. Once you have purchased a room you own it and the contracts in place will protect you from losing (sic) this asset or your money."*
>
> Mrs Heneghan said in re-examination: "*It's this email made us decide to go ahead". "It really really mattered to us*".
>
> A further example of One Touch downplaying the Warning if asked about it.

288. Mrs Heneghan told Mr King that their solicitor was happy to deal with the matter for them. Mr King replied on 17 September 2018:

> "*We can't allow our investors to use a solicitor who hasn't done this type of transaction before I am afraid. Jonathan Sara is our recommended independent solicitor who represents our clients because he has conducted these types of transactions lots of times and is very thorough and efficient in explaining information for first time investors like yourself ... we highly recommend him due to our experience with dealing with him. If it makes you feel more comfortable I can arrange for you to have a telephone conversation with him?*"
>
> They went on to instruct Mr Sara.

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289. On 26 September 2018 Mr Thornton emailed Mr Byers with regard to the Paignton development. He replied:

"*Once I've had your answers to above I will decide whether to give you a deposit. Do you think [investor as landlord] or [option 2 is better] - obviously higher returns on the high risk option, but what is their occupancy rate like? It seems there is more demand than supply so surely [investor as landlord] is best? Look forward to hearing from you?*".

Mr Thornton replied by return:

"*I would pick option 2. The property is not fully refurbished yet so it makes sense to go with option 2 (for now) and depending on occupancy you can change the option 1 … option 1 has slightly more risk as it's completely dependent on occupancy whereas option 2 is guaranteed at 10% net*."

290. In cross examination Mr Thornton did not agree that this amounted to advising Mr Byers to pick option 2:

"*I'm telling him what I would do … if I was investing in a property, I would pick that. If you think that's advice, I'm not going to argue with you about it. That's my view*."

291. On 1 October 2018 Mr Morrell completed on Arbour 2.

292. On 3 October 2018 Mr Motala complained to One Touch about Accordiant and the scheme:

"*Still no response to my request for a reconciliation. I find this extremely unprofessional and type of behaviour or lack thereof further compounds my fears that the group in question are running a pyramid scheme*."

293. On 3 October 2018 Mrs Byers signed a One Touch Reservation Form for Paignton 29. POLS was instructed. Mr Sara sent the client care letter to Mr and Mrs Byers, copied to Mrs Kerkvliet.

294. In cross examination Mr Thornton agreed the correspondence showed he answered questions and had conversations with Mr Byers or Mrs Byers about

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matters raised with them by POLS. Similarly, when Mr Funk had raised questions on POLS Report on Title with Mr Thornton, Mr Thornton had replied on 20 March that he had liaised with Mr Sara: "*I needed some clarification from Jonathan as I am not a solicitor but his response is ...*".

295. On 10 October 2018 Mrs Moller signed a Galon Reservation Form and paid a reservation fee for Unit 22, Lindors Country House.

296. On 13 October 2018 Mr Motala wrote to One Touch and asked them to sell his 3 properties for him. This was an instruction from Mr Motala to act on his behalf. He expressed his concerns to Mr Kerkvliet and Mr Thornton about Accordiant:

> "*… An organisation can't get to the basics right, experiences high staff attrition rate, has a poor accounting systems and controls where clients have to pick up on errors and missing payments then this certainly raises a red flag which one cannot ignore*."

297. Mr Thornton was asked in cross examination why there was no evidence that he had done anything in response. Mr Thornton said he would have left it to Mr Kerkvliet to speak to TCHG and find out more that was happening with them. Put to him that he considered it appropriate to continue to sell to Mr Morrell, Ms Hutchison and Mr Uruthiran without any qualification on the "blandishments" in the One Touch literature given the issues some investors had receiving returns, he said: "*That wasn't really my place in the company*".

298. On 23 and 29 October 2018, a surveyor requested actual photographs of Lindors for Mrs Moller. Mr Dillon provided photographs from a brochure. Mr Dillon emailed Mrs Moller that Galon was a sub agent of One Touch.

299. On 25 October 2018, Mrs Byers completed on Paignton 29.

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300. On 1 November 2018, Yosi Galon emailed One Touch asking for a letter to confirm the exclusive nature of the agency role carried out by Galon for One Touch in Israel. One Touch provided the letter.

301. On 12 November 2018 Mr Uruthiran and Mr Lisco instructed One Touch to sell their unit at the Lightbox. Mr Thornton sold it for them for £57,000.

302. On 14 November 2018 Mrs Moller's purchase of unit 22 Lindors Country House completed. On 20 and 29 November 2018 emails were exchanged between Galon, One Touch and Mr Moller regarding Sea Bank, Torquay.

303. On 29 November 2018, Mr Spier was in London and met Mr Kerkvliet at One Touch's offices. Mr Spier says Mr Kerkvliet told him they had nothing to worry about. TCHG was a good safe investment and he agreed with everything that Mr Galon had told them. Mr Spier says that it was based on this meeting with Mr Kerkvliet that he purchased unit 21 in Langdon Court on 20 December 2018 in the names of Ori and Yael Spier. He did so because there were no more units left at Windlestone Hall. In Mr Kerkvliet's supplemental witness statement he says that he did not use the word "*safe"* and did not provide investment advice.

304. On 3 December 2018, Mr and Mrs Heneghan completed on Bay View 40. No signed Reservation Form is in evidence, although an unsigned form has been disclosed. On 4 December 2018, having consulted the website again, Mrs Heneghan emailed Mr King to reserve Devon Bay 80. This was a development by Aronex. She completed an Aronex Reservation Form. On 20 December 2018 Mr and Mrs Heneghan completed on Devon Bay 208.

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305. On 20 December 2018 Ori and Yael Spier completed on Langdon Court 21. The Galon Reservation Form was used.

306. In January 2019 Mr Durnford came across the One Touch website. He looked at the website and the "Carlauren" website and then made a website enquiry to One Touch. He received the standard email reply on 17 January 2019 from Mr King. When Mr King telephoned, Mr Durnford says he asked some questions about the TCHG schemes and about Mr Murray:

> "*I recall that everything was very, very positive from their side. I recall being told that Mr Murray was a very successful businessman and entrepreneur and that there had been no problems with the Company."*

307. Mr Durnford says Mr King mentioned that One Touch had carried out a site visit to one of the TCHG schemes on the Isle of Wight and *"that it was all operating quite well*." The statement that One Touch had visited an Isle of Wight scheme was incorrect.

308. Mr Durnford enquired about another Carlauren scheme and was told it had sold out: "*Mr King advised me to invest in The Winchester … stating it was selling out fast*". Mr King followed up immediately with an email: "*Good news, Abbott Hall is currently operational.*" Mr Durnford looked at the property online and found that it was currently operating as a hotel rather than a care home.

309. Mr Durnford telephoned a different TCHG scheme and spoke to a member of staff who said it was operating successfully with minor refurbishment about to start. He says that he looked through all the reviews on the One Touch website and the statements about due diligence and reliable developers and sustainable property sectors. He looked at Mr Murray's history as a company director and found nothing untoward.

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310. On 21 January 2019, having previously contacted One Touch online, Ms Orupabo received information about investing in care homes from Mr King. She said in her written evidence that she told him she wanted student property, but he told her that care homes were a "*better investment*". From her point of view, this was "*her agent giving her advice on the property market in the UK*". She knew about student accommodation but had no idea about the care home market.

311. On 22 January 2019 Ms Orupabo signed a One Touch Reservation Form for a Unit in the Yeovil development. This purchase did not proceed. On 23 January 2019 Mr King emailed Ms Orupabo with details for The Winchester development and a brochure.

312. On 23-24 January 2019 Mr Thornton emailed Mr Moller with details about Winchester 13. Galon followed up with a brochure. On 24 January 2019 Mr Moller's evidence is that he completed a reservation form, which he returned to One Touch. An unsigned One Touch reservation form is in evidence, but no signed version. An unsigned TCHG reservation form is also in evidence. Mr Moller paid the reservation fee to purchase via Galon. On 25 January 2019 Mr Thornton told Mr Moller that Galon was a sub agent of One Touch.

313. On 29 January 2019 Mr King emailed Mr Durnford with details of The Winchester scheme and what Mr Durnford described as 3 "*glowing testimonials from other investors*". Mr King confirmed:

> "*10% yield guaranteed over 10 years. You will receive FULL ownership with Title Deeds to the property from Land Registry. You will receive your income within 14 days of completion. Exchange of contracts usually takes 2/ 3 weeks. Multiple buyback options in Year 5 & 6 at 110%, 7 & 8 115%, year 9 120%, year 10 125%*".

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314. Mr King's note of a call with Mr Durnford recorded Mr Durnford was going to run it by his accountant before proceeding but hopefully he would progress and:

> "*Happy with the investment financial situation has changed slightly so can't invest £125k wants to invest £60-70K may get him on to hotels no particular rush said he would rather he gets back to me*."

Mr King concluded his note on the CRM Log "*need to create urgency*".

315. Mr Durnford said in his evidence that he did not say he was going to run the merits of the TCHG investment scheme by his accountant. His accountant only handles his tax return.

316. Mr King's next note of a call with Mr Durnford on 29 January 2019 recorded:

> "*seriously considering bonds instead said he doesn't want to rush into anything likes to make his own decision. Likes how bonds have several contingencies to prevent him losing money and is more diversified*."

Mr King concluded his note on the CRM Log "*need to explain how secure care homes are*."

317. It is apparent that Mr Durnford therefore identified to One Touch that he was concerned that he did not lose money. It is also apparent that Mr King recognised that Mr Durnford was concerned about risk and was looking at other options rather than investing through One Touch. Mr King's note to himself records that he needed to allay Mr Durnford's concerns. This was self-evidently to persuade Mr Durnford of the safety of the TCHG investment so that he would invest, and quickly.

318. Mr King's note of a further call with Mr Durnford on the same date recorded: "*wants to reserve unit 16 [Winchester]. Holding units now and he will transfer the £2,000*". Mr Durnford says he had written to Mr King to confirm that he

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wished to proceed with 13 The Winchester but was told it had already been sold. He therefore agreed to purchase Winchester 16. On 4 February 2019 Mr Durnford reserved the unit and paid the reservation fee of £2,000. Mr Durnford signed a TCHG reservation form.

319. On 30 January 2019, Mr Thornton forwarded Mr Kerkvliet an email which he had received from Mr Murphy at TCHG:

"*Hi Mate, See attached ownership model. The problem at this stage is we have no financials to back this up*."

The brochure explained TCHG was seeking to introduce the use of cryptocurrencies for the purchase of care home units. It was put to Mr Kerkvliet in cross examination that this was another "red flag" and One Touch should have been "*running a mile by this point*?" He said, "*I don't know "running a mile". I did try and ask Sean about the coin model, but it was more towards March time."*

320. In cross examination Mr Kerkvliet was taken to an email dated 4 February 2019 from Mr Murphy attaching TCHG's "proforma Unaudited Consolidated Results" for 2017 showing a loss for TCHG for the year of £4.1 million and a negative position of £4.8 million on the balance sheet. At the date Mr Kerkvliet received these results One Touch had sales yet to complete to Mr Durnford, Mr Uruthiran, Mr Moller and Ms Orupabo. The following exchange ensued:

"*Q: So, I put it to you that Mr Dunford, Mr Uruthiran, Mr Moller and Ms Orupabo were just being ripped off. You knew this company was a busted flush, but you were still selling. What's your response to that?*

A: I think that, you know, I don't want to comment on that, no.

[Directed to answer the question]

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Q: You are being told with this financial due diligence report, giving the 2017 figures, that Carlauren is balance sheet insolvent. Rather than ceasing sales at that point, you do absolutely nothing. In fact, you go on to sell to Mr Durnford, Mr Uruthiran, Mr Moller and Ms Orupabo, and what I'm putting to you is that You were ripping those people off because you knew that Carlauren was not good for the money, not in a position to service its obligations, and all you were interested in was your commission. Do you accept that or not?

A: I could have said something to the investors, potentially, yes, but I wouldn't say I was ripping them off, no.

Q: Well, the fact is, you are simply prioritising your own company's interests, aren't you? All that we saw earlier on your website, "prioritising our clients, putting their interests first," it's all a complete load of rubbish, by this stage. You are prioritising your own interests, weren't you?

A: So it looks."

321. In his written evidence Mr Lisco said that in early February 2019 he received a telephone call from Mr Thornton after their instruction to One Touch to act for him and Mr Uruthiran in selling the Lightbox. He was told that Mr Kerkvliet "*went to see the care home properties and they were superb and offered 5-star care. The company, [TCHG], was performing well*." Mr Lisco said that he stressed their concern about receiving punctual payments. Mr Thornton assured them payments would be made on time, how good the care home opportunities were, and always used the word "*guaranteed*", particularly describing the returns and the buyback arrangements. At no point did Mr Thornton mention any risks. Mr Lisco said: "*I kept asking him what can go wrong? What if the company goes bust? But he kept mentioning the guaranteed buyback. Mr Thornton never mentioned that we could lose everything we put in*".

322. On 13 February 2019 Mr Thornton proposed the Winchester to them:

"*New Isle of Wight Retirement Home Investment 10% NET for 10 years*".

"*The offer is 10% net for 10 years and then the buyback of 110%, 115%, 120% and 125%*".

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"*The former hotel will be transformed by the developer into a luxury care resort catering for the over 65s*".

"*125% buyback option in year 10*".

"*Fixed return of 10% per annum*".

"*Developed and run by an experienced care business*".

"*Hands off property investment*".

"*These niche luxury care homes with a high proportion of self paying residents have proven to make excellent investments, as these care homes often achieve better profit margins compared to those with a high number of residents relying on support from local authorities*".

"*According to a report by CBRE investors are starting to wake up to this and a "build to rent" elderly PRS market will emerge, becoming an interesting new option for long income buyers*."

323. The brochure was dated January 2019 and stated that:

"*during 2019 Carlauren will update this property to a luxury care resort offering 40 studios and two apartments*". "*By receiving rental income via a managed service provider ... rental income is assured regardless of occupancy*". "*Receive a fixed monthly income via lease management company*". "*Sit back and enjoy a hassle free investment*". "*Enjoy continuing returns through buyback*".

324. Mr Thornton emailed Mr Lisco regarding the development at Lindors Country House attaching 2 further brochures. The contents were materially similar to the brochure for The Winchester. Mr Lisco says Mr Thornton followed up his emails on 13 February 2019 with a telephone conversation in which he "*firmly recommended that they invest in the Winchester*" and stressed that there were few properties left and that they would have to act quickly to secure one.

325. Mr Lisco says that he thought that the pictures in the brochure for the Winchester were what they were buying. He understood the property was operational because that is what Mr Thornton had told him and the rooms looked

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like that from the pictures. They "*firmly believed that the works had been completed because that is the impression Mr Thornton gave us*".

326. After several calls, on 18 February 2019, 5 days after Mr Thornton's first call about the Winchester, Mr Uruthiran completed the One Touch Reservation Form. Mr Lisco says he cannot recall any discussion about this form with One Touch. He understood the Form was to reserve because there was only one unit left. He did not read One Touch's Terms and does not recall being told to do so.

327. Mr Lisco says the section of the Form identifying the buyer's solicitor had already been completed by One Touch with the name of Mr Sara before the form was sent to them. They wanted to use their own solicitor, MSB, because they had done a good job for them before. He says One Touch refused saying MSB "*didn't have enough experience to deal with the care home schemes and had no experience of [TCHG]*". They were told that they had to use POLS. One Touch then offered to match MSB's price for them to use POLS, which they did.

328. In a phone call on 23 February 2018, Mr Lisco says Mr Thornton told them that they should proceed to invest in care homes because such an "*investment was risk free*". It would be a smoother transaction in comparison to the student accommodation previously purchased.

329. In February to March 2019 rental payments from Accordiant ceased in relation to all the units purchased by Mr Hickson. Mr Hickson went to look at Millpond View and found there had been not much progress with building work since his original visit and rubble was all over the place. "*It seemed as though the builders had disappeared"*. He contacted Mr Thornton. He says that Mr Thornton confirmed to him that TCHG were changing direction into luxury hotels and

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therefore getting reinvestment. He was told they "*wouldn't need to worry. There'd be a bit of a pause and then it would all be sorted out*."

330. At about this time, as is apparent from correspondence between Mr Thornton and Mr Lisco on 6 March 2019, Mr Kerkvliet visited China to recruit new sub-agents. He introduced the TCHG concept to them.

331. On 6 March 2019 Mr Durnford completed on Winchester 16. On 6 March 2019 Mr Uruthiran completed on Winchester 18. Mr Thornton wrote to Mr Uruthiran that the investment with TCHG would be "*a lot smoother*" than their first investment in Liverpool, echoing what Mr Lisco says they had been told orally.

332. On 7 March 2019 Mr Kerkvliet emailed Mr Murray of TCHG:

"*We have benefited greatly from your attractive business and we are thankful for that collaboration. For that reason, we have remained loyal and even paying sub agents in advance of being paid…. Over recent months, we have voiced their and our concerns at the lack of resorts and care homes that are actually open. We realised that "burn rate" must be impacting Carlaurens cash flow. In the past two months other providers have approached us with enticing offerings. Whilst we love working with Paul … we cannot ignore the fact that we have become source of sales and finance now with invoicing being paid in 60 days in recent instances*."

333. Mr Kerkvliet mentioned the "*next project*" with sales prices of £90,000, commissions, and what profit TCHG was likely to make, and said:

"*The time appears to be rapidly approaching where your profit is not going to be enough motivation to continue acquire another property. And where the units sale commissions are dependent on you continuing this model, we cannot continue to pay our sub agents in advance of your payment. This is going to be a significant knock to their confidence and in a small country like Israel it will spread like wildfire. Just letting you know how we feel about the current circumstances from a logical perspective*."

334. It was put to Mr Kerkvliet in cross examination that his correspondence with TCHG showed no concern for the purchasers of the units One Touch was

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selling. He agreed that it was only the commission that One Touch received that interested him:

"*Q: I think you understand the case that the Claimants are putting, which is that you were motivated and motivated throughout solely by your commissions and that all the blandishments that we saw in your website about putting their interests first paled and withered in your desire to be paid, which came first always. ... Do you agree ... or not? …*

Q: *I was motivated to sell, so yes, it would have been our commissions, yes."*

335. The same day, 7 March 2019, Mr Moller completed his purchase of Winchester 13 and Ms Orupabo completed on Winchester 7. No Reservation Form was signed by Ms Orupabo.

336. On 19 March 2019, One Touch emailed TCHG stating they had expected a weekly payment of commission invoices to bring things up to date, but £300,000 was owed and £87,000 overdue:

"*If the outstanding invoices are not paid this week, we will not be able to make further launches until we have been brought up to date. Our exposure is getting too high*."

Mr Kerkvliet said in cross examination that if he wanted to get money from a developer, he wasn't going to say I am not selling for you anymore: "*you've got to have a bit of commercial commerciality about you*".

337. In an email on 4 April about fixed charges, Mr Kerkvliet told Mr Murray:

"*I have a wealth manager in China who urgently needs the updated cash flow for their clients it is a new partnership and we need this to get things started please*."

338. From April 2019 Mr and Mrs Funk received no more rental payments from Accordiant and rental defaults began in respect of Mr Motala's units. Mr Uruthiran received no letting revenue after 27 April. In May 2019 rental

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payments ceased in respect of the units purchased by Mr van de Merwe and his wife, son and Mrs Bester. On 21 May 2019 TCHG notified Mr. Roberts that it could not make payments by way of letting revenue.

339. On 25 July 2019 TCHG entered administration.

340. In October 2019 Mr and Mrs Byers discovered that Paignton 29 did not exist, because another unit (14) had not been subdivided.

341. On 29 July 2020 TCHG entered creditors voluntary liquidation.

342. On 10 August 2020 Mr Spier received sums to surrender the leases of Windlestone units 32 and 55 in the liquidation. He received £2,657.43 and £2,747.82 from the liquidators of CHF 9 Limited in respect of the sale. These were a little more than the reservation fee paid for each.

343. On 27 June 2021 One Touch made an insurance notification to Hiscox.

344. On 28 March 2024 One Touch entered creditors voluntary liquidation.

Mr Durnford's relationship with One Touch

345. Mr Durnford read the One Touch website before contacting One Touch. He says, "y*ou could see what [services they were offering] from the way they presented themselves"*. The service One Touch appeared to be providing to him determined how he interacted with them. He disagreed firmly with Mr Wilton's assertions that he had decided to go ahead knowing he did not have an adviser. He "*didn't feel the need*" to take the advice of an independent financial adviser because he "*placed a lot of trust in One Touch*". They were "*really far beyond*" just being an introducing agent in the way they presented themselves. He

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referred to the bullet points and brochure he had received from One Touch describing the investment to him.

346. It was put to him that he had not taken POLS's advice in the Report on Title when they advised a valuation. He said he could already see what the property had sold for in the previous September. Any further valuation would have been a "*wild estimate*" based on its current state prior to refurbishment.

347. Mr Durnford agreed there was always a possibility an investment had a risk of failing, but if "*One Touch had ever mentioned to me any of the problems that they were aware of at the time they were talking to me on the phone, I wouldn't have gone anywhere near it*". He "*was certainly relying on them having done the due diligence they claimed on every investment they offered*". He was not in a position to do the same kind of due diligence One Touch could have done. For example, checking out that Sean Murray's CV was correct. He "*assumed they'd done it already*."

348. He said he can be sure he never looked at the Terms and Conditions on the One Touch website before contacting One Touch because he generally does not look at terms and conditions "*as a first exercise*". "*I'm not sure that [the Terms and Conditions] were really the most obvious things to find, to be honest*".

349. He saw the Warning at the top of the TCHG brochure. That is on "*everything you buy*" and "*that's not a page you're going to stop and read is it, really, if you're trying to look at what the proposition is*?" He did not remember seeing a One Touch Reservation Form and it was shown in re-examination this was not sent to him.

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350. He did not agree the words "*hassle-free*" investment were simply "*part of the sales pitch*". He agreed that "*if the investment had worked*" he did not have to manage the property. Mr King's email of 29 January 2019 setting out the bullet points of the proposal were reasonable "*if it had worked*". He understood the guaranteed income of 10% was an obligation to pay rent whether or not the care home room was occupied. He agreed he had not asked One Touch to investigate the possibility of a fraud.

Mr and Mrs Heneghan and their relationship with One Touch

351. As noted above, English is not Mrs Heneghan's first language. The quotations that follow are original. Mrs Heneghan read the One Touch website. In cross examination she said her husband thought it was too good to be true. They phoned One Touch "*many time*". Nathan King said: *"this is real*". Mr King sent them the email on 11 September 2018 which told them once they bought the property they owned it. It was not a financial product; it was real property. He told them that would protect them and their investment and "*you will not lose money*". They would never have purchased either unit if they were told "*there's always a risk that this might fail*". It was "*very certain*", and on the telephone, "*say that's guarantee*", "*that is a certain thing. It's a different kind of investment. That's a property – this country very demanding for the nursing home*."

352. Mr King did not tell them they needed to get financial advice. They had not obtained separate advice: "*We just followed the One Touch".* "*.. They selling the thing. They know what they selling, isn't it*."

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353. She did not remember reading the Terms and Conditions on the website. The One Touch Reservation Form is not signed by them. She did not remember it.

354. The Aronex investment offer was advertised at a 9% per annum return. Mr and Mrs Heneghan asked One Touch to negotiate a 10% return for them with the developer. Mr King secured this for them.

Mr Funk and his relationship with One Touch

355. In cross examination Mr Funk rejected Mr Wilton's assertion that One Touch were on the seller, TGHC's, "*side of the fence*": "*I wouldn't put it like that because they … may be sitting on the fence … one leg in … the one side and one leg in the other side*." One Touch was like a South African estate agent, who is paid by the seller but has obligations to the buyer.

356. A lot of his decisions were based on the personal meetings he had with Mr Thornton. That was where he felt he built up a relationship of trust. The people he met seemed competent and honest and he was quite satisfied with the advice he got. Questions he asked were well answered. In cross examination, he said:

> "*I asked very specific questions and I feel that I was misled by the information that I was given by One Touch, and the information One Touch gave me was one of the key reasons I did invest … look, in hindsight, you know, I would obviously question their advice, having you know, gone through this bad experience, but at the time I did trust and believe their advice … whether you say financial advice or what advice, it's advice that led me to … invest in the property … the only person I asked for advice on [the insolvency situation] was One Touch. … It was very important, and I accepted what … they had said and it helped me to make a decision about the purchase of the property. … It's advice that led me to invest in the property. … They did not say: "Look we can't help you on that matter. Get advice from somebody else."*

357. He probably glanced at the website. He did not look at the Terms and Conditions on the website. He was not told to look at Terms.

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358. He did not expect POLS to look into the financial situation of TCHG. He only saw them as a conveyancer for the necessary administration and paperwork to "*get the lease in his name*", not as legal advisers in that aspect. He did not see any point in getting a valuation because it was going to be renovated.

359. He was interested in the guaranteed income because he was thinking of keeping it for the long term. He agreed with Mr Wilton he had received contractual promises and "*if it had worked*" it would have been a hassle-free investment.

360. Mrs Funk met One Touch at a Cape Town event. It was "*good to meet the people and I think she met Ben Thornton, to get a level of confidence in the investment*."

361. He signed a TCHG Reservation Form for Park Avenue 4. He saw the One Touch Reservation Form before he sent it on to Mr Lenzlinger for Hoffelder's purchases but had already gone through the TCHG Form for his first purchase and cannot recall studying the One Touch Reservation Form. He assumed the One Touch Form was very similar to the TCHG Form he had signed.

362. The One Touch Reservation Form was signed by Mr Lenzlinger on his instructions: "*If it was, say, illegal or criminal, then obviously he wouldn't sign it, but if I told him to go ahead, you know, with this purchase, then he would sign against my instruction*." It was put to him in cross examination that Mr Lenzinger was happy to sign because the wording on the One Touch Reservation Form reflected his understanding that One Touch was not an adviser, Mr Funk said he could not say what he thought.

363. On 24 May 2019 he wrote to One Touch:

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"*In hindsight, paying a guaranteed 10% income immediately and a guaranteed buyback of 1 to 5% after 10 years is unsustainable. There was no time allowance for refurbishing and converting the properties into care home facilities. With most property investments, such as buy to let, you pay your deposit, you then pay the balance on completion and then rental income starts. I do think that professional agents, like yourselves, should have queried the care home financial model more thoroughly before selling it to unsuspecting investors*."

He agreed that by the date he wrote this email he thought he hadn't been advised properly by One Touch.

364. One Touch introduced him to Pinsent Masons in about August 2019 with a view to investors taking action against TCHG.

Mr Morrell and his relationship with One Touch

365. In Mr Morrell's written evidence, he said he understood from One Touch's website they would be the "*connecting point of my purchase*". The description of its business on the website was important to him. It looked like they were a good company in the field.

366. It was put to him by Mr Wilton that you "*could look*" at the One Touch website as an "*online estate agent*", which he agreed. It was also put to him that if he wanted someone to advise him to work for him, and just for him, then he needed to retain them as his adviser, with which he agreed. And "*of course*", Mr Wilton said, he would have to pay them, to which he agreed. He agreed with the proposition that he could have got advice from a financial adviser or an accountant but said: "*I trusted One Touch*". As mentioned already, asked in re-examination who he understood his agent to be when he clicked on the website to "*contact your agent*", he said Mr Thornton of One Touch.

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367. Mr Morrell does not recall seeing the Terms and Conditions on the website. Pressed that it is likely he would have done, he said, "*It's possible*". No one ever told him to read the small print or the Terms. He agreed he would have noticed the Warning on the brochure. He signed the One Touch Reservation Form because he did not have any concerns what it said: he signed to reserve the unit.

368. The risk was not explained. He did not agree with Mr Wilton he was "*so enthusiastic*" that it would not have changed his mind if he had been given an oral warning. "*Maybe*" it would have. In re-examination he said he would have asked questions, like "*can you give me an example of what might go wrong?*"

369. Mr Morrell thought POLS were just dealing with transferring the financial monies and dealing with Land Registry. It did not occur to him they would comment on what Mr Thornton had said to him. He did not get a valuation when mentioned in the Report on Title. The price of the unit was already marketed at its value and that was what he agreed to purchase.

370. He agreed with Mr Wilton that he received a promise of a guaranteed 10% per year and it would also have been a simple process if it had worked out. In terms of the risk that any investment may not succeed, he said the buyback was marketed to him as a fall-back insurance. No one told him that the person paying the 10% was the same across all the TCHG developments. This would not have made any difference if he had been told.

Mr Hickson's relationship with One Touch

371. Unlike some of the other Claimants, Mr Hickson's case is not that he was told that the purchase proposition was completely risk free, but rather that specific

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risks were not brought to his attention and representations made to him were misleading. He received emails regarding the fixed or continuing income stream, buyback arrangements and guaranteed buyback.

372. He accepted from Mr Wilton that One Touch was not an adviser, but said what One Touch told him: "*was the major influencing factor that prompted me to decide to go … forward with it*." It wasn't just receiving something and reading through it and then deleting it: "*it was numerous conversations*". "*The tone and the advice that One Touch gave me was that they were there to assist*". They were monitoring what was happening and would give feedback.

373. He was not told to look at One Touch's Terms and could not recall reading them. Mr Thornton did not ever warn him of any risk of any kind whatsoever. He had seen the Warning on the Millpond brochure. If he had been told by One Touch that "*there is a risk that these investments might fail*" it would have had a "*greater impact*" than simply being stated on a brochure. If One Touch had told him that there was a risk that he would lose his money "*it wouldn't perhaps have affected the first 4 units, but it perhaps would have affected the 5th and 6th*". At the time he was receiving regular payments without any problems and was "*inundated with wonderful so-called success stories and future prospects*."

374. Mr Hickson said he had not seen or signed a One Touch Reservation Form. Two TCHG unsigned reservation forms were disclosed for Millpond View and two TCHG unsigned reservation forms were disclosed for Sandown. The purpose of the Form was so that he would be able to "*start the process of booking those two units before they got sold to someone else*". There are no Reservation Forms for the Paignton and Bancourt House units.

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375. He described POLS as "*conveyancing solicitors*". He "*was looking to the solicitors for any problems on the conveyancing side of things*" as opposed to the "*risk of investment*". He did not obtain a valuation because the properties were being done up. The current value was not what he was purchasing.

376. He agreed with Mr Wilton that he had received the benefit of a contractual promise to pay him 10% and the buyback clauses.

377. Mr Hickson said in his written evidence that he first realised he had a possible claim against One Touch on 6 February 2022. It was put to him by Mr Wilton that he would have had a partial understanding of what was going on in mid-2019. He agreed with the proposition that by the middle of 2019 it was distinctly one possibility that the disaster was due to bad advice from One Touch. The other possibility was that perhaps the solicitors had not done their job properly. He agreed that he had reason to investigate as:

> "*My feeling with regard to One Touch was that they virtually promised me and said that when we started the arrangement that they would be keeping in touch and updating me as to progress, which they did do, but they didn't warn me in time, early enough, when I think they must have detected problems"*

378. He said in re-examination that he felt One Touch had potentially misled him or not informed him sufficiently early enough: "*They had a responsibility to look after me as one of their customers*."

Ms Hutchison's relationship with One Touch

379. Ms Hutchison explained that One Touch acted as brokers: "*that is a form of advising in terms of their role as professional brokers*". In re-examination she said by broker she meant something akin to an insurance broker:

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"*I think it was how they saw themselves on the website … I saw them as bringing together … investment properties that have … a good due diligence … behind them and then they present that to you and then they debate the… options with you, partially understanding your need, which he did to some extent in terms of financial - how much money I had to invest etc.*"

380. One Touch's website's claim to provide advice fits with her understanding of what Mr Thornton was doing. The newspaper advertorial she had seen absolutely fitted with her understanding of what Mr Thornton was doing.

381. In cross examination she agreed Mr Thornton was not her financial adviser and that One Touch were being paid by the developer and were selling investment opportunities for them. She said:

"*based on the relationship I developed with Ben and the trust I thought I had with him I certainly thought he had my best interests at heart*". "*I certainly took advice … because, you know, when Ben sold a property to me, As, you know, X, Y, said, I believed it. I trusted it*."

382. She accepted that she could have obtained specialist advice, but she did not believe One Touch, as a "*professional broking company*", should have been selling properties that had a fundamental flaw behind the model: "*that's my issue*".

383. She "*definitely*" did not look at One Touch's Terms. She was not shown the Terms at her meeting with Mr Thornton.

384. She assumed she would have noticed the Warning on the front of the brochure. She accepted in cross examination the rental income was not guaranteed and was always a risk. As was capital growth. However, she was told there were only minor refurbishments. Mr Thorton also told her orally she would be paid a guaranteed rental income and about the buyback arrangements. In terms of insolvency scenarios, Mr Thornton told her:

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"*If I wanted to, or if Carlauren went under, it would be really easy to sell the unit and there would be no issue in getting rid of it and finding another buyer, because they were in such high demand. If I decided to sell, Mr Thornton told me there would be a 10% guaranteed uplift on the sale price of the unit. The risk to this investment was minimal and it was secure*."

385. The issue of how the deal was actually structured was never disclosed to her, so she did not know the structure was a risk. The risks she discussed with both POLS and Mr Thornton were around the structure of the agreement from a care home perspective and what would happen if they went into liquidation. She said she was told by them it would be a simple matter of replacing TCHG.

386. Mr Thornton did not tell her that Bancourt House had been burned down. She agreed in cross examination that the brochure said that the development plans involved transforming the property into a luxury care resort with significant internal remodelling and refurbishment, but *"Ben certainly implied that it was not a large scale and that it was pretty much going to be operational very soon*". And, when this was said to her, she would not have known herself how far along they were in the project as compared to the description in the brochure.

387. She signed a One Touch Reservation Form and "*probably*" read it. It did not concern her because they were not her financial adviser. They were an adviser from a broking perspective on the property. She said that she had that discussion with Mr Thornton at the time. She trusted him and signed "*off the back of advice, well recommendations, that were made by them*".

388. In her written evidence she said that looking back she was horrified she did not do any more due diligence. In cross examination she said she can see it was the obvious appeal that it fitted in with her investment strategy: having money in the UK and a good return. She denied that she had purchased impulsively.

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389. Ms Hutchison agreed in cross examination that if the purchase had worked out it would have been a managed and hands off guaranteed rental income. She also agreed that she had a contractual right to sell it back to the developer. She said the one risk that they did not tell her about is the one risk that would have made her not pursue it: the collective nature of the agreement; the 10% being funded by the same party, Accordiant, across all the schemes. She asked rhetorically why Mr Thornton was willing to engage with her on the risks around the rental, the capital growth, everything else except that one point?

390. Mr Sara of POLS was "*given*" to her by One Touch. She was not given an option about whom she could use. Her understanding was that he was a conveyancer. She agreed that if she was concerned about the legal position she could have asked them about it. However, "*I also engaged Ben, so I would have thought if Ben hadn't felt that was his role to answer those questions he shouldn't have*." But yes, she agreed, it's predominantly the conveyancer's responsibility. Put to her by Mr Wilton that different people have different areas of responsibility, she replied "*obviously, also moral obligations too*."

Ms Orupabo's relationship with One Touch

391. Ms Orupabo made an enquiry through One Touch's website and understood One Touch to be acting for her, "*like the email response said*" they were, offering her the service described. They never told her they were not working for her. She was cross examined that all One Touch was doing was providing her with information from the developer about investment opportunities. She was very clear that this was not what she understood. She compared One Touch to an estate agent in Nigeria who is an agent for the buying party:

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"*How estate agents work here is that you contact them, you tell them what you need, and they work for you and they go and approach different people … according to what you need, and then they look for what you need, and you know, give that to you, so that was what I understood One Touch was doing*."

392. It was put to her in cross examination that she could have obtained her own financial adviser or valuer or accountant to advise her. She said she assumed One Touch was basically filling that role. They sent her the study about the care homes, everything that was going on in the UK at the time, the need for care homes, so "*I took it One Touch was giving me all this advice and I didn't need to look outside*." "*That helped me make my decision to invest*".

393. She said of her Investment Consultant, Mr King:

"*I felt he was guiding me through it, you know, and directing me with all the information he had sent to me and all the encouragement after losing all the … different properties that I was interested in … so I was taking what he was sending me because I thought he was acting like a guide and acting on my behalf*."

394. The statements One Touch made to Ms Orupabo by email included statements about operational care homes. For example, a reference in the One Touch Care Guide to three "*previous projects*": Hurst Manor, Windlestone Hall, and Lindors, all of which were TCHG developments. This implied these developments were completed and running as care homes. That was not correct. Mr King had told her orally that there were properties up and running.

395. She was told about the fixed and continuing income and about the buyback arrangements. In her evidence in chief she said:

"If Mr. King had told me that the monthly return was not guaranteed or secured, that the buyback depended on the development company and was uncertain, and that other care homes were not operating as he claimed, I would not have bought."

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396. Mr King did not disclose that Accordiant was the same undertenant across all developments or that there were any risks. She was clear One Touch did not tell her anything about risks associated with investing, purchasing care homes, or purchasing a unit with TCHG. The impression she got from all the information that Mr King gave her was that these care homes were safe:

"*Well, it looked really good ... 10% returns, and then with the inflation happening in Nigeria and everything, so, yes, it looked like a good investment, and it was because One Touch sold it to me I had a good investment*."

397. On 23 January 2019, Mr King emailed her "*there is a lot of competition for these units. Hence why investors like yourself are being disappointed*." He offered to hold the Bay View Unit for her. Her attention was not drawn to the Warning in the corner of the brochure cover and she had not read it.

398. Miss Orupabo believed that One Touch was paid the reservation fee she paid. She was not aware that One Touch was receiving a commission payment from TCHG. She was not told to look at the Terms and Conditions on the website. She did not sign a One Touch Reservation Form for the property she purchased.

399. She had read and signed a One Touch Reservation Form for another purchase which did not proceed in Yeovil but was not told to do so. She said:

"*It's not like I didn't have any concerns about what was said, but I understood that was basically a general disclaimer. I expected that One Touch would tell me things specific to the property if there was really a problem, so I assumed this was a general disclaimer*."

400. She did not agree with Mr Wilton's reading. When she did invest she did not sign a One Touch Reservation Form and "*wasn't given any disclaimer specific to the property I invested in*".

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401. She understood POLS was helping out with documentation, lawyers' fees and the transfers.

Mr Roberts' relationship with One Touch

402. In cross examination, Mr Roberts described his initial meeting with Mr Thornton as follows:

> "*I think that Ben came across as really professional. He was well presented, well groomed and …, represented a very professional and expert company." "I don't know, I think people don't like the word "advice", but he certainly made recommendations and he was very confident in respect of the return numbers and the capital security and the buyback options of the various time periods. And he was pretty knowledgeable, or certainly compared to me, in terms of things like the leases, the underlease, the superior lease, and I think that he was … providing a bit more than a sales spiel for me, a bit more of a comprehensive package than just to sell*."

403. He accepted One Touch was not giving financial advice. He said that Mr Thornton painted a really rosy picture of what this development would be like, and he came with a very professional presentation. Bookings to a luxury hotel and talk about the expertise and the professionalism of One Touch. You would assume any product of their marketing would have had relevant due diligence done behind it. Mr Thornton did not talk about risk at all. "*Ben was more interested in the returns and the safety and all that*". He received emails stating that there was a fixed or continuing income stream and about the buyback arrangements.

404. He could not recall being told to look at One Touch's Terms and he did not look at them. Mr Roberts did sign the One Touch Reservation Form. In his witness statement he said he did not remember discussing it with Mr Thornton.

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405. He described POLS as "transfer attorneys". After he had received some answers from POLS to his questions he sent Mr Thornton an e-mail about the contractual documents he had received from POLS. He said:

> *"It's a very difficult thing to understand because, if you're not in the UK property market, the whole underlease and superior lease and security lease is a difficult thing to follow, and he had spoken to me about it when we were having a meeting a few days before this and I thought maybe he could help me understand it a little bit, which is why I sent that e-mail to him."*

The CRM log includes a note from Ben Thornton recording that they "*chatted about the underlease, sublease etc - said he will get the contract signed today*."

He said that describes his conversation with Mr Thornton.

406. He thought he "*had really been talked into buying the development*". He purchased Bancourt 42 because it looked very attractive, the location looked attractive, the returns were very good "*and I was being offered guaranteed capital growth as well as a monthly income*". Looking at it now:

> "*as far as I am aware, the refurbishment works had not even started at Bancourt 42 and despite me paying the whole purchase price there was no security or protection for my money and no guarantee that the company paying the rental return would be able to continue to do so, given that it entered hundreds of arrangements like mine. The purchase was not hassle free - quite the opposite. Had I known any of this, I would not have bought Bancourt 42*".

Mr Spier's relationship with Galon / One Touch

407. Mr Spier signed a contract with Galon. Galon was acting as a selling agent but they (i.e. One Touch) were "*working with me*". He said Mr Galon "*convinced me to invest in care homes in England, which is a safe and positive investment*." He was told orally it was a "*good business, you pay money, and you get a monthly rent … after 10 years, you get the money you invested back with a return*". He was "*convinced*" by Mr Galon to invest in care homes in England

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"*which is a safe investment*". It was on that basis that the purchase proposition was presented to him. Mr Galon was an old friend. He had known him "*for years and I trust him*". "*They gave me all the confidence*".

408. In cross examination, he said:

"*Yossi Galon told me that they have a new system, a new way of investment, that he has a lot of experience in that, yes, the business is very simple, I have to pay such and such money, I buy a unit and the unit pays me back such and such every month and after 10 years or after five years I can get - I can sell it big*."

409. He received emails stating there was a fixed or continuing income stream and buy back arrangements. He did see the Warning at the top of the brochure. In respect of insolvency scenarios, he was told:

"*You own the 125 year lease and full legal title and that would still be the case if the Care Home group no longer existed. The most extreme outcome would be for new owners to appoint a new management company to operate the home or sell it to another care home operator. The more likely scenarios that the Care Home Group appoint another manager to run the home. The freehold of each home is owned by one "land" company and operated by a separate "operating" company so … gives lots of inbuilt protection*".

410. When he met One Touch for a coffee at their office in November 2018 before making his final purchase through Galon he was told the TCHG business was "*safe*". He was told: "*don't worry. It's under control. Everything is OK. They're working. Don't worry*."

411. He was not told to read One Touch's Terms. He signed the Galon Reservation Form for Langdon Court and an unsigned TCHG form for 55 Windlestone Hall has been disclosed. He signed a One Touch Reservation Form for 32 Windlestone Hall, but that did not proceed and he did not read that Form.

412. He agreed with Mr Wilton that he had received a contractual promise to pay 10%. The legal documentation included the right to require developer's buy

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back. He agreed that if the developer had done what it said it was going to do he would have had property managed by somebody else which was paying a regular income.

413. He made a claim against Galon in Israel in respect of the property he purchased in his own name. He was awarded money but has not recovered anything.

Mrs Moller and her relationship with Galon / One Touch

414. Mrs Moller signed a contract with Galon under which she agreed to pay them a fee of 6%. The contract recorded Galon "*specialised in solid risk free investment in the UK*"; the property yield was 12.5%; there was the possibility of re-purchase by the vendor after five years at 110% and after 10 years at 125%; and said "*The investment is the only one in the western world called hands off investment*", in other words, the property owner has no involvement, responsibility or intervention in the investment. It also included: "*The entire purchase process is accompanied by Galon Real Estate Investments, from the order to the receipt*."

415. Mrs Moller said Galon sold property investments such as student flats and rooms in care homes as investments for people and the 6% fee she paid them was for their role in the investment as an agent. In cross examination, she said she "*trusted Galon not to give me financial advice, but I trusted them that this was a legitimate investment*".

416. She signed the Galon reservation form. In re-examination she confirmed that she was not told to look at Galon's Terms and Conditions on their website. No one ever mentioned the need to look at One Touch's Terms and Conditions.

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When it was put to her in cross examination that in signing the Galon form she agreed she had completed her own due diligence and had not taken advice from Galon, her forthright response was: "*Excuse me, but they were the ones who offered me the investment*".

417. She agreed in cross examination that she had written to the Forest of Dean Council herself to ask whether there was planning permission for change of use to turn the hotel into a care home or nursing home. In re-examination she explained that she was subsequently reassured by Galon and Mr Dillon that no planning permission was required and accepted that reassurance. On 22 October 2018, Galon informed her "… *they will not provide significant care and that therefore change of use from C1 (hotel) to C2 (care home) is not required. The property will work as a "lifestyle resort" for the elder age with no special care support required. Therefore the Class B is not relevant*." Mr Dillon said C2 use was not needed because they were only offering light care for the elderly.

418. She had wanted to see some photographs of the property in operation and had instructed a surveyor to attend and take some photographs. Without her knowledge they had asked One Touch for photographs. Emails show that Mr Dillon asked TCHG and they supplied pictures. These had been passed on by Mr Dillon: "*Passing on the photos we requested for you to complete your surveyors report*." She did not know at the time that the photographs were not contemporaneous photographs of the development as it stood but photographs from a brochure for the development as it was intended to be.

419. She sought to add in cross examination, and was given the opportunity in re-examination, that if anyone had told her that the property was derelict she would

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have turned to One Touch and said "*Excuse me. What's going on here?" They were my agent, Galon being the sub agent of One Touch. I was relying on One Touch and Galon to, you know, send me an investment that was legitimate*."

420. In cross examination, she was invited to agree that when the investment was offered to her she was told it offered a fixed return of 10% per annum, which she agreed. She was also asked to agree that when she purchased what she "*actually got was a promise*" to pay her 10% a year, which she agreed. Similarly, she was invited to agree, and agreed, that "*in the legal documents*", she got a promise that she could sell back the property to the developer after 5 or 10 years. It was put to her that this was the "*contractual promise*", and that what she was told about was "*followed through into the legal documentation*". She was asked whether she agreed that "*if this development had worked ... It would have been a hands-off investment. It would have been an armchair investment*." For example, she would not have had "*to manage tenants*". She agreed that was the case.

421. She said the fixed 10% return and buyback "*sounded very safe*". Asked in re-examination whether Galon or anybody else had explained to her that her 10% money would be coming from a company that was liable to pay 10 per cent money to every single purchaser who bought with Carlauren across all their developments, she said "*yes*". She added "*But, again, I bought from ... I didn't buy it from Accordiant and I didn't buy it from Carlauren*."

422. She agreed that she had joined in a court case against POLS in which wide-ranging allegations were made about their failings to advise and to warn,

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including that the transaction was highly unusual and risky. She had also bought a court case against Galon. That was because:

"*they made it out that it was a perfectly safe investment and that they themselves had invested and, you know, they were very, very happy with it and were getting quickly and buying quickly because they were selling off like hot buns. "They're hands free. Don't worry about it. We will do everything*".

Mr Moller and his relationship with Galon and One Touch

423. Mr Moller had a contract with Galon in which he agreed to pay them a 5% fee as buyer for the services they were providing to him. He described them in cross examination as "*like an estate agent or someone who will make the connection between you and the project*". In re-examination as a "*source of information that I could trust about ongoing business like that in England*".

424. He viewed both Mr Thornton of One Touch and Galon as a "*connecting tool*", "*giving me the information for sure*". He believed he could trust the information that they gave. In re-examination he was taken to an email from Mr Thornton on 29 November 2018 about Seabank Luxury Resort, with bullet points about the features of the particular investment, including the 10% net return, and a page entitled "*Why invest in a Luxury Resort*?" He agreed this was "*absolutely*" consistent with his view One Touch was a sourcing agent bringing properties that would meet his requirements. It was typical of the communications he was receiving before he bought The Winchester unit.

425. An exchange of emails with Mr Thornton on 14 December 2018 involved a discussion of a proposition called the Devon Retirement Home. He wrote to Mr Thornton: "*Just another point I wanted to check, the option of realisation of the property. Am I committed to the terms of the whole project? I assume that the*

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residents are paying much more than what I get from it." Mr Thornton replied "*you are not committed to hold onto the property, you can sell whenever you wish, if you want to make the developer buy it back from you then you will have to wait for the five years*." He "*certainly*" understood that Mr Thornton was helping him with his purchase decision.

426. An email One Touch sent to him dated 13 March 2019 after his purchase of The Winchester giving "*Company Information*" describing One Touch as a property investment company sourcing a wide range of property and well-researched investments to provide the safety and protection needed to reach lifestyle and financial goals was "*exactly what ... expected from them*".

427. Asked in re-examination whether he understood Galon to be doing essentially the same as One Touch, sourcing property that would suit your requirements, he explained:

> "*I expected the same thing, but I think I was counting more on One Touch as a company which works on the premises. That's how I felt. These are the - what you call it? - the agents. So, what an agent would be responsible for, that's his responsibility, to give me the right advice or information.*"

428. After the enquiry he made with One Touch about The Winchester development, Mr Thornton had sent him a TCHG brochure. He was taken in cross examination to the Warning. He said "*well, I see it clearly now, but I can't recall that I've seen it at the time*." He agreed "*there's a risk*", when he was asked whether he knew "*you don't get 10% without the risk of failure*."

429. Mr Thornton sent him a One Touch reservation form for Winchester 13. He did not sign it. He said in cross examination "*I can't say that I really looked into*

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it". He was purchasing through the sub-contractor, that is Galon. He was not specifically told by anyone to look at One Touch's Terms and Conditions.

430. Asked in re examination whether Galon ever asked him to look at their terms and conditions he said: "*I can't recall. I mean, they placed in front of us thousands of papers which we were supposed to read in a few minutes. I suppose it wasn't so professional from our side, but I can't recall specifically*." Mr Galon had sent him a reservation form for Winchester 13 under cover of an email on 24 January 2019: "*Further communication between us is attached in the new project brochure. Also an order form. Please fill up and return as soon as possible so that we can grab a cheap unit for you*." Mr Galon did not say anything else to him about the reservation form. Mr Moller returned the TCHG form about 40 minutes later and paid the £2,000 with a card payment.

431. He was cross examined about the fact he said in his witness statement that Mr Thornton tried to persuade him that there would be no problem if he abandoned Galon for the purchase of Winchester 13 and went with Mr Thornton instead. He said he "*felt bad*" about this and decided to stick with Galon. He also said Mr Thornton offered to waive his commission, which was quite tempting, but he stuck with his principles.

432. He was taken to an exchange of emails with Mr Thornton. In the chain, Mr Thornton wrote to Mr Moller saying that he needed to reserve the unit but then emailed: "*you seem to have reserved it through one of our sub agents out in Israel not directly with us*." Mr Moller replied:

"*I was trying to get it directly with you and save alot. But unfortunately I'm obliged to them as I got the information about the project from them. I'm sorry about that. If you think I'm not obligated today, I'd be more than happy to go*

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through you and not paying the commission. I think it's quite a big sum, but I think that it's not the case."

Mr Thornton replied: "*You're not obligated, but we can't do business like that. You'll have to continue using them*."

Mr Moller replied: "*I'm really sorry about that. I'd like to apologise. I only realised yesterday that I'm obligated to them. Hopefully we'll be able to do business in the future*."

433. The questions and answers that followed were:

"Q: *Mr Moller, let's not beat around the bush. You were trying to avoid paying commission to Galon, and what you're being told by Mr Thornton is that "we don't do business like that". We can't do that. You'll have to continue using them." That's what happened, isn't it? We can all read it.*

A: *No. My original plan was just to check what they did, and I was talking to Mr Thornton but, when it was the time to decide, I felt it wasn't moral, not to use Galon, as I heard about it from them. But when I approached Mr Thornton, I didn't know from the beginning that they're not going to take any commission. I felt that this was the routine …*

Q: [the paragraph from Mr Moller's witness statement was read to him again]. *Now, that is the complete opposite of what happened isn't it? The man with principles is Mr Thornton*.

A: *Again, I would say that I did not know or at least I did not expect that Mr Thornton would do it for nothing. I just - when he - when I got to the point where the deal was to be made, I re-thought about it, and I felt it was wrong because I heard about the whole thing from Mr Galon. But that was my inner thoughts*."

434. In re-examination, he was taken to an email he had sent to Mr Thornton on 29 January 2019 after Mr Thornton queried when Galon had sent Mr Moller the proposal for The Winchester. Mr Thornton made clear that he had been talking to Mr Moller since November 2018. Mr Moller replied: "*My wife invested through them about three months ago. So basically I got the information about it from them*." He said this was why he had felt duty bound to honour the arrangement with Galon and not to proceed with One Touch.

435. As I understood Mr Moller's evidence he focussed on the fact that it was suggested to him that he had contacted One Touch to save commission but he

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disagreed that had been the case. He wished to explain that he had not realised One Touch did not charge a similar 5% commission fee to Galon when discussing The Winchester with Mr Thornton. When he learnt no fee was to be charged by Mr Thornton, and wishing to purchase the unit at The Winchester, he had decided that the correct course for him to take was nevertheless to use Galon to reserve the unit at The Winchester because he considered himself obligated. There is, however, no element of persuasion on the part of Mr Thornton not to use Galon in these emails. The most probable explanation being not that Mr Moller was lying but that he simply did not understand One Touch did not charge direct commission and there was therefore no waiver when he was told no fee would be payable to One Touch if he proceeded with it. Mr Thornton was bound by the terms of the One Touch agreement with Galon when he said Mr Moller must proceed with Galon

436. In cross examination, he was invited to agree that when the investment was offered he was told it offered a "*guaranteed*" return of 10% per annum whether the care home room was occupied; that he "*got a legal promise to pay you that whatever happened*"; and that "*if the investment had worked"* he would have had a hassle-free, easy armchair investment. He agreed that was the case. He was not told that a single company operating across all the TCHG developments was responsible for the 10% payments. That information would not have made a difference.

437. He did not instruct POLS directly. He did not have a say about it or choose him. It was all dealt with by Galon.

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438. He had not joined in the claim against Galon or Private Office because he did not have the money to do so.

Mr Lisco and the relationship with One Touch

439. Mr Lisco gave evidence on behalf of the estate of his late husband, Mr Uruthiran, although Mr Lisco was involved in the material exchanges. He was cross examined about the fact the first investment they made through One Touch, The Lightbox, had proved problematic, and they had not received payments. He said they invested through One Touch again because One Touch offered to sell The Lightbox unit at a reduced fee; did in fact sell the unit for a small profit; had offered a cashback rebate on the sale's fee if they invested in a new unit and "*promised us that the Carlauren investment would be a different project where payments were always made on time*." Mr Thornton's email on the date of completion: "*This one will be a lot smoother*", is an example of the kind of conversation they had with Mr Thornton.

440. "*Honestly, yes*", they trusted what Mr Thornton said. One Touch had sorted out the Lightbox problem for them with the developer: "*so we thought they were genuine in providing us something that they call superb, excellent and risk free*." Mr Thornton "*guaranteed that the sell-back was not a risk."*

441. In an email to One Touch written by Mr Uruthiran on 18 October 2019, after the collapse of the scheme, he said:

> "*Benjamin Thornton ... assured us that the investment was risk free and at no point did he mention the risk of losing money. ...*
>
> *In addition he mentioned that you [Arran Kerkvliet] visited the property and you were amazed by the structure and the organisation and he guaranteed that*

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this was a great hands-off investment, secure and that payments will always be on time.

As we had dealt with your company for many years, we trusted you to invest our savings with a guarantee that this was a safe investment … You even offered to match [our solicitor's fee], when we pointed out that my solicitor was much cheaper and felt were pushed to quick decision as Benjamin pointed out there was only 1 unit left."

442. He had not read the Warning in The Winchester brochure about the risks of engagement in investment activity.

443. Mr Lisco said they were not told the same company was responsible for all the buyback obligations across all TCHG developments. They were told it was risk free.

444. Mr Lisco was cross examined on the basis that they had received One Touch's Terms and Conditions. He said he did not remember. In fact the date printed on the bottom of the relevant document shows that these were only provided by Mr Kerkvliet on 29 October 2019 in response to their complaint to One Touch. Clearly, they did not therefore have this correspondence before their purchase.

445. Mr Lisco was then taken to the One Touch Reservation Form. He said it was a standard reservation form where "*someone does not really care in the details*". They did not read it or the Terms and Conditions.

446. The use of POLS was "*imposed by One Touch*". It was not their choice.

447. Mr Lisco said:

"*if they had told me that [there were already some late payments], that they did not disclose to us because if they had told me, I would never have bought. Knowing from a previous experience they were delaying paying rent, I was not going to go through that experience again*."

Mr van der Merwe and his relationship with One Touch

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448. Mr van der Merwe explained in cross examination that he understood One Touch sourced investment properties.

> "*The way Benjamin conversed while I was in the offices was that they go out as experienced - they're the people, you know that - they go out and they source, after they search the market - In order to benefit us as well."*

449. When he looked at the website, he looked at the different properties: "*that was really blown up on their website*". He did not look further because he had to come and visit them in London. He did not look at the Terms and Conditions.

450. He was asked to agree he did not have a contract with One Touch for them to give him independent advice and it was put to him that he knew very well that Mr Thornton was not acting as his independent adviser. He responded:

> "*I took advice from him. He advised me on certain or specific units rather than others in the different properties to invest in so I certainly took his word and I certainly did trust him to a huge, huge extent … my decision depended on what Benjamin told me*."

451. In re-examination he said he understood the slogan "Your Partner in Prosperity" as meaning "*they would assist me in making a decision what to invest in, what to buy*."

452. He was clear he could "*positively*" say that the brochure that he was sent for Sandown did not have any Warning at the top: "*I have a picture of it right here*". He did not know if it was on the St Austell brochure. He had not seen the Warning, but it was not "obvious" to him anyway that any investment may fail:

> "*No, in real estate, If I buy a farm it's not going to fail. Why would it fail? If I buy a property, how would it fail? … I trusted Ben when he said there's an obscene amount of demand for these units, and the reason why they can guarantee our monthly income is the fact that this demand outnumbered the supply and that there is no reason to be concerned or worried about occupation. … I know businesses fail. The way this was presented to me was it was risk-either risk free or very, very, very, well, no, not even. Ben even told me there*

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was a guarantee - this is a good investment. You can sit back and you know "your money will work for you." ... Benjamin convinced me that the backstop is if I'm not happy and there aren't returns or anything, there is a guaranteed buyback. I didn't know from whom, but he said there was a guaranteed buyback in it."

453. He was emphatic that he did not read the One Touch Reservation Form. He recalled the visit when Mr Thornton passed it to him to sign. Mr Thornton said:

"*This is the reservation form". "These properties they fly off the market and they sell like hot cakes and the only way we would be able to reserve one of these investments properties would be to sign a reservation form. I had that form in my possession for as long as it could be to sign because I trusted Ben and he said, "well this is a reservation form. This is what he called it." I signed that with Ben because in my mind, ... I'm signing the reservation form because I've missed several opportunities in the past because I haven't yet signed this reservation form. I signed the reservation form in my mind and I trusted Ben in the way he handled and treated me, that is what it is*."

454. He strongly disagreed that he was mistaken:

"*My practise as a farmer - amongst the farming community we act upon word of mouth. If you think that I buy your cattle by the end of the year, you don't write the contract. I go back to you, I give you the cash and you give me the cattle. That's how it is*."

455. Mr Thornton did not say anything about Terms. At the meeting, he paid a deposit to Mr Thornton on a second unit to be used when a new development was released. Mr Thornton selected the next unit. His wife signed the next reservation form for that in Namibia in his absence.

456. He agreed with Mr Wilton's proposition that he received a "*legal promise*" to pay him 10% a year when he signed the legal documents and a "*contractual right*" to sell the property back "*to the developer*".

457. In re-examination, he confirmed he was "*certainly not*" told that it would be the same company that was agreeing to pay the 10% payments across all developments and "*never told*" that all the buyers on a single development could call on the same company to buy back their unit. "*Yes, indeed*" that would have

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mattered. From his point of view "*that would put all the eggs in one basket*". He would "*certainly not*" have gone ahead.

458. He disagreed with the proposition that POLS provided him with advice. Put to him in cross examination that if he wanted advice from an expert adviser on valuation he could have got it, he said he was "*not aware he was supposed to do that*":

> "*I'm a farmer and I entrusted this process to Ben, I relied on him, and whatever stacks of paper they sent me, I signed. I signed in order to buy the properties. That is it. I truly did not study each and every word and photo on it*."

459. In April 2019 a rent payment was missed. He then tried to call Accordiant. The next month a rent payment was missed for Sandown. He was asked in cross examination about the passage in his witness statement where he said he started to search the internet and found Mr Murphy had a criminal record and had been involved in a boiler room fraud previously and Sean Murray had done similar things in Michigan previously. It was put to him that it was obvious One Touch had some explaining to do. He said he did not think that at the time.

460. In his oral evidence in chief, he said it did not occur to him in 2019 that he had a complaint against One Touch. That was only around the latter part of 2023, maybe as early as May 2022, but what was in his mind was the latter part of 2023. Initially they were

> "*flooded with … literally hundreds of pages from different solicitors that went back and forth after the scheme collapsed, and we were devastated and financially, practically ruined, so we had to try and deal with that. And it was only after I learned about this on a social media group, and that there might be a connection against One Touch. That's when I realised that I should ask myself, "who's to blame here?" and that's when I became aware of the possible complaint against One Touch*."

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461. He said in cross examination he had not discussed the situation with his older brother. He was unaware his brother had given One Touch a bad review in November 2019 for poor service. They live continents apart, they exchange birthday greetings, but months go by when they do not speak.

462. He repeated in cross examination that at that time in 2019, as a result of TCHG's failure, he "*struggled to keep my head above the water*", "*we were so overwhelmed by all the paperwork*", and they still hoped "*it might not be totally lost*". Pressed by Mr Wilton on his attitude to One Touch, he said he was:

> "*very, very disappointed … I took Benjamin at his word and their entire approach to this whole thing initially, and then it turned out that it was not what it was supposed to be*".

Pressed again, that:

"*it goes further than that, doesn't it … its turned out to be an absolute disaster, and you must realise – you must have been saying to yourself that, "they have actually misled me about the risks, about the nature of this investment." you must have been saying that to yourself*?", he replied yes.

463. In re-examination, he repeated that it had not occurred to him at that time to sue One Touch:

> "*My wife was so disappointed and overwhelmed and devastated, and we had to deal with that. We had to deal with the terrible situation we were in and, yeah, I was not thinking at that stage of suing anybody*."

Mrs Byers' relationship with One Touch

464. It was agreed Mr Byers' evidence would represent the evidence in respect of Mrs Byers' case and Mrs Byers would be asked supplemental questions.

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465. The following important exchange took place in cross examination:

"Q: *... You would have known, or the sense you would have heard was that One Touch the sales agent, it's selling property opportunities, investment opportunities for the developer in question?*

A: No, I took the completely opposite approach. I saw them as an investment consultancy business. You look at their website, you look at Arran Kerkvliet's YouTube video, they were a consulting business that did strategic analysis on properties, gave you the best advice to put us in the best position possible so we all prospered from the investments.

Q; Did you look at the YouTube video at the time?

A: Yes I did."

466. He said they looked at the testimonials on the website and looked at the One Touch business model. They had 4 companies to choose from, and they chose One Touch in the UK.

467. He elaborated in re-examination that he thought they were:

"*advising me – they were looking after me as a client, not for the developer. They were looking after my best interests at heart, looking after me, and advising, giving me the best investments so I could make a sound choice*."

468. Questioned as to why he did not ask One Touch to "*draw up a contract between us so I know what you're doing for me*", he said he worked with Mr Thornton on this for 4 years:

"*The first 2 years of our relationship was him coming backwards and forwards as propositions for us, and eventually after two years of - I'm very risk averse, so we took our time and eventually we found a property that worked for my goals, my financial goals, my family's financial benefit*."

469. He did not agree with Mr Wilton that he had to retain One Touch if it was to act as his independent adviser:

"*I come from Africa where we never did that. We dealt with estate agents one-on-one, never had the terms and conditions or had to draw up a contract to work with someone*." "*I'm not familiar with the UK*".

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470. Mr Byers' evidence was to the following effect. Mr Thornton's email signature box said he was an investment consultant. The One Touch website said they offered a process. They gave you strategic advice on how to best invest your money, and we all prospered. A consultant looks at the long-term longevity of a customer. An estate agent does a one off deal. They built a relationship that does not do one off deals; that's an adviser doing a long term strategy with the customers.

471. He disagreed with the assertion that his wife signed the One Touch Reservation Form because they were happy the reality was they had not been advised by One Touch, and they were not acting as their adviser. Mr Thornton had given them investment advice. For example, he had asked Mr Thornton which option he should choose: Mr Thornton "*convinced me*" to go for option 2:

> "*I saw Ben as my advisor. If you look at all my correspondence, I never went one step forward without consulting him. Even when we're dealing with Private Office and they send back a legal document, I still went to Ben and asked him for his advice. Every step along the way, I'd always go back to Ben as my go to person to help make an informed decision, because, as I said, we were new to the UK, I didn't understand the litigation or all the terminology in the UK. I wanted someone I could trust over time, and that was Ben and he was my go to person and I saw him as my advisor*." It "*got to stage with Ben where I think we became a very, very close friendship because I even gave him advice where to stay in Zambia, who to contact. I gave him some leads in South Africa, and I built up a great trust relationship with him to such a point where I was referring him to my other friends*."

472. In cross examination Mr Byers said he had noted the Terms and Conditions on the website but did not read them. He is highly dyslexic and that would be very onerous for him. He agreed they are very important but said he left it for his wife. They can't "*100% recall*" reading them, but he thought it is "*likely*" Mrs Byers read them. In her cross examination Mrs Byers said she had not read them because Mr Kerkvliet's video was enough "*to give the reassurance of what they*

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were getting into". In re-examination Mr Byers confirmed that no one at One Touch had told them to read the Terms and Conditions on the website.

473. No one had told them to read the small print on the One Touch Reservation Form. Mrs Byers said they were happy to sign "*because it didn't talk about investment consultation per se, it spoke about financial and legal stuff*." One Touch was not acting as a financial adviser.

474. When they were put in touch with POLS by One Touch, Mrs Kerkvliet was copied in by the solicitors to their correspondence. During the conveyancing, Mrs Byers emailed Mr Thornton and obtained his advice about matters POLS raised in the Report on Title. For example, on 9 October 2018: must the flat be surveyed for defects; must I take out building insurance; must I take out indemnity insurance, and about a discrepancy in the figures for the firm's charges. Mr Thornton had called them to discuss these matters. Mr Byers explained "*he's my go to guy and he was the one who was going to tell me what all this meant and no one else – I didn't go to anyone else*."

475. Mrs Byers had also obtained advice from Mr Sara on 16 October in answer to a list of questions she had raised. She wrote to Mr Sara:

> "*When we embarked on this investment we did so because it was sold to us as a totally managed, secure, straightforward payments of capital towards the care home development which would be managed for us and in return we would get a 10% return on our investment paid in monthly instalments. Never was there any mention of additional costs by way of title deeds, indemnity policies, repair / maintenance etc. So for me this is now fast becoming a STRESSFUL rather than hands off, stress free transaction … based on your answers above, we will decide whether to proceed or not*.".
>
> He had replied: "*you are not investing in stocks or shares. You're buying a physical unit and that requires due diligence and legal documentation. During the sublease you do not need to do anything and there are no costs and you will simply receive the monthly rents*."

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Notably, the question and Mr Sara's response was not in respect of any due diligence as to the nature of the investment proposition and return.

476. Mr Byers agreed in cross examination that the Warning at the top of the brochure for the Paignton development was something he would have looked at and was a statement of the obvious. He knew things could go well and they could go badly. The brochure stated the property had been "*acquired vacant, enabling [TCHG] to plan extensive refurbishment works with no disruption to residents*". When they started talking with Ben, he had sent an email the day after he had sent the brochure to say that it would be 6 weeks before the care home was operational, and the cash would start flowing in. He has no reason to think this was not what the developer told Mr Thornton.

477. Mr Byers agreed with Mr Wilton that "*the actual promise you get from the legal documentation is what you were told you were going to get, isn't* it?" If the investment had worked it would have been an armchair investment.

478. Mr Byers said in re-examination that he understood "*guaranteed*" to mean "*as it says on the can. It's guaranteed it will pay out every month, guaranteed for the period of 5 to 10 years*". Mr Thornton did not tell him about any risks. He was not told it was the same company that would pay everyone their 10%. "*It would absolutely have made a difference … I would not have made this investment if I had known that fact*". He said no company can afford to buy everyone out at the same time: "*cash flow would have bankrupted."*

479. Mrs Byers' specific complaint was that the particular room Mrs Byers was sold did not exist. Mr Byers said they would not have gone ahead with the purchase if he had known the unit had not been sub-divided. In cross examination it was

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put to Mr Byers that this was a question of title for the solicitor. Mr Byers replied the onus was on Mr Thornton to double check that the property actually existed.

480. It was suggested by Mr Wilton that the developer told Mr Thornton a particular room was going to be divided in three and this was the message passed on. He said this was not just a matter for a solicitor: Ben should have doublechecked that there was actually a unit to sell, "*I paid £80,000 for fresh air*".

481. When TCHG collapsed it is evident that whilst Mr Byers was angry that anger was not directed towards One Touch. The CRM log for the second half of 2019 shows Mr Byers was regularly calling Mr Thornton and asking him questions about progress with TCHG. The log notes they had "*chatted*". For example, on 4 July 2019 the log records: "*chatted and suggested he go down there and get some pics for us*". On 5 August 2019, "*chatted about CHG – sent email re Pinsent Masons*". On 30 October 2019 "*Called in re title deeds*". On 14 November 2019 "*chatted – said Phil will be working on it for him*". On 23 April 2020: "*chatted – is home schooling his daughter – said they expect to get back 9p to the £ on the [care home]".* On 27 October 2020: "*chatted: said he thinks Sean got away with it. Wants to [keep in touch] but clearly won't deal again*".

482. On 20 November 2020 Mrs Byers made a complaint to Mr Thornton that he "*as my agent sold a unit to me that does not exist*". Mrs Kerkvliet replied on 7 December 2020 that the solicitor should have checked in the course of the searches there was a separate leasehold title for the unit.

483. On 28 April 2021 a complaint was made to TPO. The complaint was:

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"*The purchaser is blaming the agent for selling an off plan property which the developers solicitor failed to create and was not registered at the land registry by the purchaser's solicitor*."

On 23 December 2021 One Touch was notified that TPO had closed the complaint because it had not been bought in time within TPO's terms of reference.

Mr Motala and his relationship with One Touch

484. Mr Motala looked at the One Touch website and read what One Touch was marketing in terms of a property perspective. One Touch came across as a "*well-vetted, you know, kind of leading, you know, broker or agent*". He also saw an interview with Mr Kerkvliet where he appeared on Moneyweb, a prominent financial show in South Africa, "*talking about the investments and things like that, they did come across as a very reputable and leading agency*".

485. It was put to Mr Motala in cross examination that he could have paid to obtain advice from his own adviser. He said:

"*In my engagement with One Touch, you know, the context of the discussion was, you know, they gave me the comfort around some of the risks I wanted information around, and the other concerns that I had, they kind of allayed my concerns from that perspective. And again, just to understand, I sit remotely, so I'm not in the UK. I'm not familiar with the UK property market or the care home market. So a lot of my due diligence or the information I sought came from One Touch*."

He saw no reason to get any other advice based on the discussions he had with Mr Rana, Mr Kerkvliet and Mr Thornton.

Put to him in cross examination that One Touch were agents marketing and selling for TCHG, he described them as:

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"*agents or brokers, intermediary between the buyer and the seller"*. "*Explicitly … they were not acting as a financial adviser, but implicitly, prior and after my purchases, they certainly acted as advisers and more than an agent*".

486. One Touch:

"*Provided more than just a broker or agent, you know, they presented an objective investment structure, you know, and on that they show guaranteed returns, you know, in certain discussions with Mr Kerkvliet and Mr Rana, they actually gave me some tax guidance and some tax advice, you know, on some of the forms and brochures, they pay gross payment. … So they were making factual assurances, you know, that the sites were up and running. So, I mean, if that's not advice, then I'm not sure what is."*

487. He described One Touch as having a "*duty of care*" and a "*duty of professionalism to the buyer … to ensure that ... whatever they're selling is not misrepresented*", and "*what the developer was saying was actually correct*". For every unit they sold, the purchaser was paying the purchase price, and from that purchase price as he expressed matters, directly or indirectly, the buyer was paying One Touch's commission.

488. Taken to the St Austell brochure, he said he would have read the Warning. This was the risk of investment, that there may be a risk in terms of the yields. "*What he couldn't accept*" was that the building at St Austell as described in the brochure "*was actually dilapidated and actually closed by the council subsequently ... that's not investment risk, and to me that's a failure of honesty in the sales process*."

489. He was adamant in cross examination that from his engagements with Mr Thornton he was told that the "*refurbishments*" described in the brochures "*were substantially advanced and what was left was kind of minimum refurbishments. It's not that it was a standalone dilapidated property*." Having purchased two units, it only became apparent later in conversations with Mr Thornton about

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Bancourt House that the first two properties had not yet been completed and had not been up and running.

490. Mr Wilton pressed Mr Motala in cross examination that he must have known One Touch's description of the developments as "*excellent*" was "*just marketing language*", and that he would not have taken a decision on that basis. Mr Motala was clear that he "*took it as verbatim coming from the agent*".

491. He was clear in re-examination that that neither Mr Thornton nor Mr Kerkvliet ever told him to read the One Touch Terms and Conditions. In cross examination he said that he read the One Touch Reservation Form that he signed "*in the context of the specific and verbal assurances that … both Arran [Mr Kerkvliet] and Ben [Mr Thornton] made".* He did not think he was given an option to object: it was "*standard wording, it was not negotiable*", and he:

> "*signed it in good faith that [One Touch], has the duty of care, to insure that what they were sending me actually represented what the developer was telling them*". "*No amount of fine print … justifies them in telling me a property is operational when it actually wasn't*".

492. In cross examination, he was asked to agree that the words "*guaranteed*" or "*fixed*" referred to the developer's contractual promise to pay 10% per annum and he had received that contractual promise and there was a buyback opportunity in the legal documentation signed. He agreed. In re-examination, he explained he understood the word "*guaranteed"* to mean that the underlying investment would yield a net return of 10% of the investment value for the amount of money he invested in the property. He was never told that the investment proposition in fact involved the same company, Accordiant Ltd, becoming the party that would be paying all the 10% returns. If Mr Kerkvliet or Mr Thornton had told him this it would "*absolutely*" have made a difference:

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"*Because then, you know, that's just raises red flags. That's common you know, typical of, you know, a pyramid scheme or a Ponzi scheme. You know, there's no underlying assets. It's kind of capital coming in through one tunnel and coming out of the other, you know. You know the way Accordiant was positioned was they were just a rental collections company, you know, not responsible for paying the returns*."

493. He understood that the person or the party that was committing to the buyback arrangements was the developer company that was selling him the lease of the unit. It had not been explained to him that the developer would have buyback obligations to everyone who bought a unit in the properties in which he was buying a unit. If that had been explained, he would have:

"*reconsidered because when you have a potential situation with a whole group of investors, you know, exercise that option at the same time, which makes it really difficult then for the developer to exercise that option at the same time. All the depositors coming to claim their deposit at the same time*."

494. He agreed in cross examination a lawyer would be the person to give insolvency advice. However, he did not see the need to consult with an insolvency lawyer: the properties as originally sold to him looked good investments on the face of it. If he been told the marketing pictures were "*future artists' impressions and not the current version of what it looks like,*" matters may have been different. If One Touch had "*articulated the risk*" he would probably have engaged in a discussion on what those risks were and what they thought those risks would have been. The conversation would have been a little different.

495. He described in his written evidence how in April 2019 the rental defaults started. By the middle of July 2019 he agreed in cross examination there were sufficient data points to conclude that the TCHG scheme had collapsed. He had "*serious concerns*" and thought "*this is going to be a nightmare situation for me to solve or to kind of wade though because of unfamiliarity with the legal process in the UK as a remote investor etc*". In July 2019, he recalled an email

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from Safe or Scam, who described themselves as investigators who exposed companies selling poor investments through the use of false and misleading information, about Carlauren Group Investments. He wrote to One Touch in September 2019 complaining:

"*Had you done a property diligence and done the basic investment thesis you would have seen that this was nothing more than a grand Ponzi scheme … The super commissions you were earning blinded you*."

496. On 16 September 2019 he made a formal complaint to One Touch by letter. In cross examination he agreed that it was "*correct*" he was "*blaming One Touch for the situation*" in which he found himself.

Mr Kerkvliet's evidence regarding the Claimants

497. In Mr Kerkvliet's supplemental witness statement he said:

"*We outlined the terms on the basis of the information we received from TCHG, like the fixed rental income, and explained them to the investors. That was it*."

"*Investors needed to take a view for themselves, including doing their own due diligence and receiving advice on the security and fundamentals of their agreement with TCHG. It was not One Touch's role to assess the strength of any covenant TCHG provided. This was the job for lawyer, chartered surveyor or financial advisor who was retained by the investor for that purpose*."

498. He said in his witness statement that the website "*lead generation*" was paid for by One Touch upfront and thereafter repeat business was "*way more cost effective than generating new leads*". So:

"*Once the sale was made, we would keep in touch with the investor to maintain our relationship with them, in the event that the investor wished to invest in other properties. We did not provide any asset management services, such as portfolio valuations (as one may obtain a wealth manager or institutional fund manager). One Touch staff would simply be friendly and helpful. We may from time to time, help them get in touch get in contact a developer or facilitate further purchase of a property*."

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499. During cross examination Mr Kerkvliet was asked to comment on the One Touch website extensively. He gave a number of material responses and made a number of admissions as to the accuracy of the statements on the website. These admissions support my factual findings and the Claimants' evidence.

500. It was symptomatic of Mr Kerkvliet's guarded approach to cross examination that when it was put to him the slogan "*Your partner in prosperity*" was important throughout the life of the website and that he must be very familiar with it, his response was "*Okay*". Asked "*Well, is that right*?", his reply was: "*Yeah, I mean it seems to be repeated on various pages*."

501. Mr Kerkvliet was referred to a pre-emptive explanation he had volunteered in his witness statement that when he notified this matter to Hiscox on 27 June 2021. He said to insurers that he had only used the word "*client*" in relation to Mr and Mrs Moller (stating they were not a One Touch client) because he had "*by this stage … started to adopt the language used by lawyers but of course by "client" I meant that they were an investor*." In the light of the disclosure of the website Mr Kerkvliet had to accept in cross examination that his evidence in his witness statement was incorrect. Put to him specifically: "*these purchasers were your clients in the ordinary language, ordinary meaning of that language*", he agreed: "*Yes*".

502. Mr Kerkvliet agreed the website statement "*we put our clients [and] their interests first*" was "*correct*". As was the statement One Touch was trying "*to ensure that the very best outcomes are achieved for our clients*". "*Yeah that's correct*". He accepted that all that the "*clients"* encountered on the One Touch

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website was One Touch's selection of properties. It was all about matching the client to the properties that would get it a sale:

"*All the properties that are on our site, we felt positively about. So, of course, we're in a sales business. We didn't say, "you must go for this." we said, you know, these are opportunities which we feel are good, and if you feel like going ahead with those, then that would be your choice*."

503. Mr Kerkvliet was taken to the quotation attributed to him that "*an experienced investment consultant is assigned to each person*":

"*Q: So, the individual circumstances of the clients was key to what you were doing, wasn't it?*

A: That's correct.

Q: You made it your business to know what those individual circumstances were by asking people about them, didn't you?

A: That's correct

Q: You did that through personal contact? Wherever possible, a telephone call?

A: That's correct.

Q: Or, indeed, a face to face meeting?

A: That's correct.

Q: Then in the last paragraph on this page, your website says: "if we understand what we you are looking for, we are in a better position to help you achieve your goals and save you time by recommending the most suitable property." So, this was essentially a win-win situation? That's what you were looking for.

A: Yeah, a good outcome for all."

504. Taken to the testimonials, Mr Kerkvliet accepted that Mr French's testimonial described the provision of a service tailored to the needs of the individual purchaser, with expert recommendations and guidance every step of the way, and that this is what One Touch put on its website to show the world. However, he wished to add the service and guidance One Touch provided to Mr French:

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"was really just explaining the differences between the South African law and the way that things work. They don't have a leasehold / freehold situation that we have. ... He didn't understand what a leasehold was, so we explained that to him you know."

An answer which, from a "*client's*" perspective, reflects the provision of One Touch's expertise to aid their understanding of the investment and decision making whether to purchase.

505. Against the background of Mr Broadhead's testimonial, Mr Kerkvliet agreed that building up a relationship of trust with people who have got money to spend was an integral part of what One Touch was doing: "*Yeah, to generate sales. That's correct, yes*." In terms of Janet Hope's testimonial he said:

" *… Our sales staff understand the brochure, and they explain it to the people in layman's terms with a view of making sales, which [we] were retained by the developer to do. So part of that is building a rapport and trust, yes. …. We made her feel comfortable and gave her the information she needed, yeah.*"

506. Mr Kerkvliet accepted in cross examination that the statements on One Touch's website about the due diligence they conducted visiting each of the off-plan property developments presented to clients were not in fact true:

Q: Now in this case, looking at the Care Home Group purchase opportunities, you visited Latimer Lodge ... but there is no evidence of your colleagues driving the length and breadth of the country to visit each of the sites, is there?

A: No there isn't

Q: That didn't happen, did it?

A: No

Q: That's not something that you made clear on your website, is it?

A: No

Q: It's not something that you made clear to purchasers when they were interested in a Care Home group investment site? You didn't qualify what is stated on the website by saying, "by the way, we haven't seen, for example, the

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site at Bancourt House or the site at the Winchester"? … Your staff didn't say that to people, did they?

A: No, no. They didn't do that, no.

Q: Therefore, a key part of the due diligence that you are urging on anybody who looks at your website was not in fact done in this case, was it?

A: No."

507. He admitted that the development by development visits described on the website before any individual investment was marketed did not take place.

508. Mr Kerkvliet could not ultimately support the truth of the website statement that the One Touch due diligence involved an independent solicitor reviewing the developer's documentation to establish "*if there was anything in the fine print that could be to the investor's detriment before choosing to recommend an investment*". He prevaricated in cross examination:"… *[Mr Sara] also popped through our offices, so I could have shown it to him at that point. … I believe it still would have happened*". Finally, simply answering: "*I don't recall*".

509. When it was put to Mr Kerkvliet that the website statement that One Touch had selected a panel of solicitors specifically chosen to represent them was untrue, he said clients had 2 options: "*one that we'd selected and one that came from the recommendation of the Care Home Group*". There was no panel of available One Touch selected solicitors.

510. When Mr Kerkvliet was asked why he was at pains to say in his evidence that One Touch was not providing property investment advice when one reads: "*One Touch is a property investment company providing property investment advice",* all he could say was "*property investment advice*" were "*keywords*" the marketing manager chose to use "*which would get some sort of traffic in*".

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He was unwilling to acknowledge these "*keywords*" described the service that the "*traffic*" would therefore understand One Touch provided when proceeding to engage and purchase through the company.

511. The following telling exchange in respect of Mr Kerkvliet's attitude to the giving of his evidence took place when Mr Kerkvliet was asked about his refusal to agree that One Touch provided property investment advice to clients when the website described it as a "*property investment company providing property investment advice*":

"Q: So, let's try the question again. That is totally inconsistent with what you've been saying ... today, that, "we never gave any advice." It's ... obviously inconsistent, isn't it?

A: It appears so, yeah.

Q: Yes, and the reason that it's inconsistent is because the website is telling ... the truth and your evidence is not telling ... the truth. That's right, isn't it?

A: Well, I'd like to see where we've specifically said to any of your Claimants, "yeah, I understand your needs. This is what I advise you to do." So, in this specific space it says, "yeah, we give advice," but I'd like to see where we've given advice to Claimants.

Q: ... The fact of the matter is you don't have an explanation for why this website which you were in charge of is saying, "we give property investment advice," whereas the picture you're painting to the court is entirely different. You don't have an explanation, do you?

A: No."

512. Ultimately, whilst Mr Kerkvliet sought in his oral evidence to move beyond the scope of the questions asked in order to emphasise his agenda that One Touch was paid by the developers, he accepted it was "*correct*" that the "*other role*" One Touch took on was actually as described on the website to make well-informed recommendations to clients, through careful due diligence. This was

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all in the hope of building up a long-term relationship with clients and long-term success. That was a very important part of what One Touch was doing.

513. He accepted nobody was ever given a printed copy of One Touch's Terms and Conditions. He had no evidence any salesman ever directed a client to read the Terms and Conditions before signing the reservation form. He agreed that the website directed clients to read the testimonials of former clients, described in his own Witness Statement as "*stellar*", but they were not told on the website itself to read the Terms and Conditions.

514. It was "*right*" the Terms and Conditions were the terms that One Touch would want to apply in every single situation. He was never asked by a client to change the Terms and Conditions so he couldn't say how he would have responded. The company never suggested any changes in specific cases.

515. Mr Johnson put to Mr Kerkvliet that the effect of the Terms he relied on was "*essentially to completely re-write history*". Mr Kerkvliet was asked to agree in a series of questions that it was "*irrational*" for One Touch to "*take with the one hand and then, by reference to these terms and conditions buried on [the] website, you take away with the other*". And that "*nobody in their right mind*" would knowingly sign up to these Terms where, as Mr Johnson put it, One Touch had undertaken a marketing and sales dialogue with them as "*clients*", who it invited to trust it, who it told the bespoke, tailored, chosen propositions that One Touch was encouraging them to buy, and recommended to them, were well-researched, that they checked out, and will meet their individual financial goals, and the Claimants parted with very substantial sums of money. Mr Kerkvliet did not agree.

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516. In re-examination he said the Terms and Conditions came up as "*quite a big tab*", labelled Terms and Conditions. It wasn't in the bottom footer panel.

517. He agreed in cross examination that it was never explained to the Claimants in One Touch's own publicity on the website or in emails that the person paying the 10% amount was identical across all TCHG developments. He accepted this was a "*highly material fact*" because it was quite different for a client to enter into an underlease with a company that only has obligations to 40 purchasers as compared to a company with obligations to 780. This was plainly something that should have been made clear to them because, "*Yes*", he knew that it was the same counterparty in all cases that would be making the 10% payment.

518. He agreed it was "*correct*" One Touch "*didn't point .. out*" to purchasers that the buyback was to be exercised by an SPV, a new company with no assets or trading history and, therefore, uncertainty about whether it would be able to honour its obligations.

519. He agreed that TCHG's answer in the investment overview brochure in the frequently asked questions section: "*What happens if you go bust?",* pre-supposed that the home was in fact a going concern, and that there was value in it to maintain. This was a brochure that One Touch used in its marketing initiatives. It had One Touch's logo and contact details on the back.

520. In circumstances where he agreed he did not keep any eye on what was going on with the homes, he was asked, "*So you had no basis for providing your clients with material which was talking about a situation that actually didn't exist at the time you were publicising all this*", he said: "*Yeah, it was forward looking"*.

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521. He accepted his written evidence was incorrect in stating that all the Claimants had completed the One Touch Reservation Form. Taken to the TCHG reservation form in respect of Mr Funk's purchase of his unit in Hartlepool 4, he agreed that it didn't say anything about the One Touch website or the Terms and Conditions. Taken to Galons' reservation form for Mrs Moller's purchase at Lindor's 22, he agreed it said nothing about the One Touch website or One Touch's Terms and Conditions. Taken to Aronex's reservation form for Mrs Heneghan's purchase at the Devon Bay hotel, it was correct it didn't refer to the One Touch website or One Touch's Terms.

522. By reference to an email sent by Mrs Kerkvliet to a prospective sub-agent in the United Arab Emirates, in which she wrongly stated TCHG rather than individual SPVs was the purchaser of the freeholds and also mis-identified the underlessee, it was put to Mr Kerkvliet that the One Touch sales force dealing with the purchasers did not understand the TCHG concept and this key part of how things were supposed to work. He said: "*I think, for simplicity, you know, she - may – she'd written that [about the freehold] and she's obviously got this Caring Communities quite wrong*", but this was just an example of one individual who had made a mistake in this document, and he was "*not going to agree*" that these misunderstandings were widespread.

523. He agreed that Mrs Kerkvliet was heavily involved in monitoring what happened after reservation and it was one of her jobs to keep an eye on completion because that was when One Touch received its commission. She would give overseas agents "*the information from [TCHG]. And then, once the*

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reservation was in, she would do the, like, follow up with [TCHG] to see how things were going to completion."

524. In regard to One Touch's "selection" of Mr Sara of Private Office as Panel solicitor he explained matters as follows

"*I've known Jonathan and that he did commercial property transactions. So I've said, "why don't you do one or two cases and see how you get on with that," and the purchasers really liked his manner and he answered all the questions and, so from their perspective, I thought, "Well people are happy with his services and we can continue using him, you know, recommending him to them". It wasn't, like, ... keeping it in control. It was just to say, "we need to have someone that is experienced in doing conveyancing where there's a lease and an underlease and those things that maybe not every residential property conveyancer may know*.

Q: *If it wasn't about keeping control of the process, that important part of the process, the process where the client got independent input from someone who was supposed to be helping them, their lawyer, why did you your company say to people, "you cannot use your own solicitor"?*

A: No, we said to people that they can't use a person who hasn't - who's only done residential conveyancing because they may not be able to understand the process. We didn't say "you can't use anybody else"".

525. Mr Kerkvliet was asked in cross examination to re-visit the following passage in his witness statement:

"*After the provision of the reservation form to TCHG, the final part of One Touch's involvement in the sale of the units by TCHG was to introduce the TCHG investor to the lawyer listed on the reservation form. With some limited exceptions, the lawyer for the TCHG investors was Jonathan Sara of POLS.*

Once the introduction was made to their lawyer, One Touch had no communication related to the legal documents regarding the purchase of the units by the TCHG investors. The TCHG Investors got their legal advice and report on title from their lawyer before agreeing to proceed with their purchase.

The sole involvement that One Touch did have was where it was used by TCHG Investors to pass on questions for TCHG ... to seek to retain a good relationship with some TCHG Investors, One Touch passed on information. The purpose of retaining a good relationship with these TCHG Investors was to keep them happy so that they might purchase further units or get involved in other investments offered by One Touch."

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526. Mr Kerkvliet agreed that this evidence was "*completely misleading*" in giving the impression that the identity of the lawyer was all at arms-length as far as One Touch was concerned and simply a function of the Reservation Form. He agreed that his witness statement did not explain One Touch had found the solicitor, recommended him, and steered people away from using anyone else.

527. Mr Kerkvliet accepted in his supplemental witness statement that Mr King had overstepped the mark in September 2018 when Mrs Heneghan emailed to ask a question about the Warning on the front of a TCHG brochure. He agreed he had not gone far enough in commenting there: the answer given was nonsense because it depended on there being a viable, functioning going concern otherwise the buyer was at risk of losing their property.

528. As regards his comments on Mr Motala's evidence, Mr Kerkvliet agreed that he did not have any dealings with Mr Motala at the time. Mr Motala said Mr Rana told him that he would not be liable for tax on his receipts. He agreed he could not therefore contradict Mr Motala's evidence.

529. He agreed that the summary in his witness statement of Mr Durnford's dealings with TPO was wrong. He agreed that he had been told on 9 April 2021 by TPO that Mr Durnford had not accepted the proposed decision.

530. Mr Kerkvliet had expressed surprise in his witness statement that the van der Merwe family were Claimants. He said that they were not part of the group who had provided a letter of claim on 21 June 2021. He confirmed in cross examination that Mr van der Merwe and his co-purchasers did not manifest any sign of complaint, grievance or suspicion that they might have a claim against

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One Touch after "*everything's gone pear shaped*". An email from Mr van der Merwe on 22 May 2019 asking Mr Kerkvliet and Mr Thornton for:

> "*assistance as a trustful sales agent through which we made these purchases to try and extract the necessary information for us from Carlauren / Accordiant as to when we can expect the arrears to be paid since they do not respond to our emails or phone calls*",

was typical of their attitude at the time.

531. Asked to explain One Touch's Defence regarding Galon, Mr Kerkvliet accepted that Galon was its sub-agent in Israel and the exclusive representative of One Touch. He denied Galon acted as its agent when providing any advice or recommendations to Mrs Moller on the basis Galon was charging 6% of the property purchase price as a fee to act as the buyer's agent and, in United Kingdom estate agency law, "*you can't be representing the buyer and the seller*". He said Galon were giving advice to the purchasers and acting in their interests whereas One Touch was only paid by the developer, TCHG.

532. In May or June 2019 One Touch made enquiries of Pinsent Masons. He encouraged Claimants to get in touch with solicitors and take complaints forward as against TCHG.

Benjamin Thornton

533. In Mr Thornton's written evidence he explained he did not remember too much about the specific interactions with all of the Claimants, and there were some he had not come across. He worked with "*many*" purchasers during his time at One Touch but could not remember the figure or whether that may have been hundreds or thousands. He was not prepared to agree that the relevant Claimants must have been a very small proportion of the purchasers with whom he worked.

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534. He accepted that most of his recollection had been prompted from reviewing documents, particularly the CRM logs. There would be "*some bits that I do remember, there'll be some bits that I do not*". Put to him that "*The reality is we can't really rely on your memory of what happened between you and the Claimants currently, can we*?", he replied: "*yeah, I agree*." He agreed it was absolutely necessary to look at what the documents say, and added: "*I think what I'm trying to explain more is that I'm looking at this as a more of a ... the way we would act as a whole, rather than individual conversations*."

535. Mr Thornton agreed that his title of "*Senior Investment Consultant*" suggested that he considered a client's needs and consulted with them about what they wanted. Asked to agree in cross examination that the purchasers were "*your clients*" as described on the website he said:

> "*Clients, customers. I'm not sure what I classify them as, but I think I would yeah, I mean, that's a marketing line. I'm not sure that means that we represent either side. I think, as Arran just said for the last four or five hours, that we were paid and worked with the seller, as in the developer*."

He agreed that when he referred to purchasers as "*clients*" in his own witness statement that meant clients within any ordinary meaning of the word.

536. Mr Thornton readily agreed it was important for One Touch to meet potential investors in person as described on the website: "*We would like to build a good relationship, a long term relationship ... absolutely, I think if people are going to invest, they need to trust the people they are investing with*".

537. Against the background of the website, Mr Thornton was prepared to concede that he did provide a certain type of "*advice*" to purchasers, but was unwilling to term this as investment advice as described there:

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"*I think the website that was created, or marketing material saying we would give .... People could come and get broad advice, or me saying that I didn't advise people are two different things. ... We would absolutely provide general advice in terms of, as Arran said earlier, the way things worked in the UK, the different structures, the different markets, - I think we even pulled up the Care Home Guide, which would give more general advice about what's good on that front. In terms of individual investments - and that's why in this [witness] statement it says "investment advice"- I don't believe I would give investment advice. I'm not qualified, or I don't have the authority, to tell people what they should invest in*."

538. As regards the website statement: "*if we understand what you're looking for, we are in a better position to help you achieve your goals and save your time by recommending the most suitable proper*ty", Mr Thornton's response was: "*that's what this website that I didn't create is saying, yes. That's not what happened in practise. ... We would show people the range, and they would pick the investment*." "*I wouldn't say I recommended, no*". However, he conceded they would:

"*Absolutely find out what they [the clients] were interested in, whether the outcomes they wanted were yield or growth, and we would absolutely tell them the particular investment that was relevant to their goals*."

"*Find out about their investment goals and show them the different range that would meet those goals, yes*."

539. He confirmed that his remuneration package comprised a base salary plus a percentage commission on each sale that he made. Mr Thornton said in cross examination he could not remember the percentage figure paid to him and could not give a ballpark figure of how much commission he had earned from his work selling TCHG units. He did "*absolutely*" agree he was incentivised to get sales through the door and across the line. His commission was earned when the sale completed. That was when One Touch and then he was paid.

540. Mr Thornton agreed in cross examination that he knew at the time the One Touch team did not visit each of the off-plan purchase developments as stated

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on the website: "*Looking at it now, I would say that [the website] is misleading, but I wouldn't have said that at the time, no*."

541. Mr Thornton was asked to consider the One Touch Reservation Form and the fact it said the £2,000 fee was not refundable 7 days after the form was signed. He agreed that an email between Mr King and Mrs Heneghan confirmed to her that 50% of the fee would be refunded after 21 days. He agreed that he had arranged for Mr Hickson to have his reservation fee refunded if he did not receive a side letter he requested.

542. He agreed that the One Touch disclosure contained copies of his own emails to Mr Sara of POLS "*I've got an instruction for you*", which were copied to Mrs Kerkvliet. He agreed that he did this with all the Claimants he dealt with. He said One Touch would often recommend Mr Sara because "*we knew it was an easy experience for the clients*". He agreed that he was "*actively pushing Mr Sara*" when he had emailed Mr Uruthiran:

> "*Once the deposit has been paid, I will email the solicitor and they will go through the legal process with you. I know Saverio mentioned using Craig at MSB [a solicitor] but he has not dealt in this project before. I have put Jonathan from Private Office as he is superb and you will be very happy with him. (I will also get him to match the legal fees MSB would charge)*."

543. He emailed Mr Kerkvliet about this proposal. Mr Kerkvliet emailed Mr Sara: "*Client will only pay £750, we will cover the rest*." So, One Touch paid the difference in fees between the client's preferred solicitor and POLS so POLS was used instead.

544. He confirmed One Touch helped as much as it could post-purchase when clients had any issues with rent payments from Accordiant. For example, in an email

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exchange with Mr Motala regarding payments for St Austell 8 he asked TCHG to come back to him as soon as possible and he would let Mr Motala know.

Credibility and Reliability of Witnesses

The Claimants

545. Applying my approach to the evidence as already described, I find that each of the Claimants who gave evidence was giving an honest and frank account and seeking to assist the court in a straightforward manner. Notwithstanding these are individuals who have lost amounts of money which are significant to all of them, and in several cases represented the entirety of their life savings or inheritance, there was an absence of anger or hyperbole. For Claimants, including Ms Hutchison, Mr van der Merwe and Mr Byers, the overwhelming emotion displayed was one of sadness as they believed they had formed a relationship of trust and friendship with Mr Thornton. Claimants such as Mr Morrell and Mrs Heneghan found the experience of answering questions in a courtroom about this chapter in their lives an upsetting one; as did Mr Lisco.

546. When first time investors such as Mr Morrell, Mrs Heneghan and Mr van der Merwe gave their evidence, it shone through that they would evidently have been out of their depth and naïve in their dealings with One Touch and were likely simply to accept any confident statement that was put to them as fact by an individual who they considered to be an expert they trusted. In very large part this was also true of the overseas investors, including Mr Motala with his banking background, when it came to matters relating to the nature of English property investments and the purchase process, the reason why they say, of course, they were invited to place their trust in One Touch to advise them.

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547. I do not consider there was any indication that the Claimants' evidence had become distorted by the impact of time or reconstruction or false recollection. The evidence each gives accords with the documentary evidence (important elements of which had not been disclosed at the date of their statements); has been consistent; is consistent with the evidence of those others who were dealing independently with One Touch at the same time and is consistent with the admissions and concessions which Mr Kerkvliet and Mr Thornton subsequently made when cross examined. Their evidence also accords with the inherent probabilities of the situation where each determined to invest in these products and many made their decision to do so swiftly after discussions with One Touch. In most cases considering at that time that POLS played no more than a procedural role for them and still retaining a relationship with One Touch.

548. I regret that I found Mr Kerkvliet to be an unsatisfactory witness and that elements of his evidence were misleading and dishonest. Mr Kerkvliet's witness statements and initial answers in cross examination set out and followed the clear party line that, to use the terminology in his witness statement, One Touch was no more than an estate agent acting for TCHG and did not have any form of relationship with the Claimants. His intent was to place a factual distance between One Touch and the Claimant investors and to deny at each opportunity that any advice or recommendations were given to them. Ultimately, Mr Kerkvliet made a series of highly significant concessions and admissions in cross examination.

549. In some cases these admissions and concessions were the inevitable consequence of the conflict between his written evidence and One Touch's own

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contemporaneous documents. In others these were often the result of multiple phases of questions where an honest witness doing his best to assist the court would have conceded or admitted the relevant propositions far sooner.

550. The degree to which Mr Kerkvliet's evidence departed from the contemporaneous way in which One Touch described the services it offered was only exposed and established because of the success of the application for specific disclosure of the company's on-line materials. There is no good reason why these relevant materials were not identified by One Touch originally and properly disclosed. There is also no good reason why Mr Kerkvliet destroyed other evidence held by One Touch such that it cannot now be considered.

551. An example of the high-water mark of the disparity between the content of Mr Kerkvliet's written evidence prior to that specific disclosure and the content of the on-line materials disclosed was his pre-emptive and deliberate disavowal in his witness statement of the word *"client"* to describe the relationship between One Touch and the Claimants. The very label it is now clear One Touch repeatedly chose to use to describe persons such as the Claimants. The only obvious reason for the comment made by Mr Kerkvliet in his witness statement is that Mr Kerkvliet considered it harmful to One Touch's Defence for the court to be told One Touch always described the Claimants as its clients.

552. By way of further example, in Mr Kerkvliet's witness statement he said that once unit purchasers signed reservation forms with One Touch for the TCHG units the "*final part*" of One Touch's involvement was to introduce the THG investor to the lawyer listed on the reservation form, with some limited exceptions, Mr Sara. The message was one of a further separation of roles and

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of a chronological line drawn. This was misleading. As was his failure to describe Mrs Kerkvliet's role fully and the close relationship with Mr Sara. One Touch was in fact copied into POLS' correspondence through to completion.

553. When One Touch received Mr Durnford's written evidence that POLS copied One Touch into all his emails with them until completion, Mr Kerkvliet responded specifically to Mr Durnford's evidence in a supplemental statement. He sought to explain away this state of affairs as follows:

> "*as is usual, One Touch was not involved in Mr Durnford's purchase after the marketing and reservation*" but "*One Touch was also copied in on correspondence from [Private Office] to Mr Durnford although this was not necessary and did not require One Touch to do anything <u>but was in accordance with our role as marketing agent for the seller</u>*." (my emphasis).

He said this was in order to alert One Touch to the fact of completion and signal they could then raise an invoice for their commission.

554. Mr Kerkvliet's evidence that it is part of the role of a seller's marketing agent to be copied into confidential transactional correspondence between the counterparty purchaser and their solicitor is far-fetched and incorrect. An agent would only be copied into such correspondence if the purchaser was their own client. He also omitted to note that One Touch was also copied into legal documentation.

555. After 4 phases of questions, Mr Kerkvliet conceded that his evidence in his first witness statement regarding the use of the One Touch Reservation Form was wrong. Mr Kerkvliet's explanation for the erroneous case that he caused One Touch to advance that every Claimant had signed a One Touch Reservation Form containing One Touch's Terms and Conditions was unsatisfactory in the extreme. On being told that only 9 examples of a signed One Touch Reservation

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Form had been disclosed he suggested the lack of One Touch Reservation Forms was the result of "*administrative error*", or the forms had been "*misplaced*", or that it was not in the Claimants' interests to reveal them. That is that individual Claimants had suppressed documentary evidence. When pressed about this, and adopting Mr Johnson's description, Mr Kerkvliet withdrew that "*desperate falsehood*", together with his assertion about administrative oversight. Indeed, as I have recorded already, it is Mr Kerkvliet himself who bears responsibility for the disappearance of a large quantity of primary documentation after proceedings commenced in breach of paragraph 3.1(1) of PD 57AD of the Civil Procedure Rules.

556. Given the inherent unreliability of Mr Kerkvliet's evidence, I treat it with significant caution. Where any factual conflict exists that arises for determination between the evidence of Mr Kerkvliet and any of the Claimants, I resolve that issue by reference to the documentation in so far as that exists, and otherwise prefer the evidence of the Claimant.

Mr Thornton

557. At the start of the trial, I was asked to issue a witness summons for Mr Thornton's attendance to give evidence at trial. I regret that I did not find Mr Thornton to be an entirely satisfactory witness. Although he accepted that he could remember very little of substance he was extremely defensive in the way that he gave his evidence, to the point of coming across on several occasions as being evasive, if not untruthful. Not least when stating that he could not remember even the "*ballpark*" of his own commission percentage.

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558. In his witness statements and oral evidence he was firmly intent on expressly following the "party line" set out in Mr Kerkvliet's evidence that no advice or representations had been made and that all the Claimants were bound by One Touch's Terms and Conditions by virtue of signing One Touch Reservation Forms. In his oral evidence, he even expressly referred by way of answer to the evidence which he had heard given by Mr Kerkvliet whilst he was in court.

559. He was happy to volunteer evidence about certain Claimants' jobs or means in both his witness statements which was intended to support One Touch's case that the Claimants were wealthy or sophisticated decision makers. Evidence which was factually wrong about each of Mr Motala, Mr Roberts, and Mr van der Merwe and/or, at best in the case of Mr Roberts, based upon his unnecessary adoption of an entirely erroneous assumption.

560. On a number of occasions in cross examination Mr Thornton refused to accept the accuracy of a self-evidently correct statement until he was shown a document which provided no room for any dispute or equivocation and had to accept he was wrong. These answers were not mistakes due to the difficulty of recalling events after a period of years in respect of his own dealings with one particular client. He subsequently admitted he had given answers which initially denied some matters put to him from conversations "*looking at this as more of the way we would act as a whole, rather than individual conversations*". As Mr Johnson put it, a frank admission by Mr Thornton of reconstruction, but not accurate evidence or a sound basis for his starting point of denying the accuracy of an individual Claimant's recollection. Equally, although he could not remember how many clients he dealt with, or his personal commission or

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earnings, he was unwilling even to accept the likelihood that an individual Claimant who made a purchase from him was now likely to be better placed than he was to recall the terms of their conversation when he had dealt with many others.

561. Ultimately, he did however make the material admission that he gave advice, albeit that he was keen to say it was not financial advice of a kind an independent financial adviser would give. Implausibly, he refused to accept that he was making recommendations or value-based assessments even though it was evident he knew that the Claimants seeking his advice trusted and valued his opinion as a result of the relationship that he had set out to create between them and they would therefore act upon his views.

562. I have concluded that, at best, the majority of Mr Thornton's recollection has been significantly affected by the passage of time and the factors identified by Leggatt J in *Gestmin*. It is evident that Mr Thornton has reconstructed events in his own mind in his own favour in a way that renders him inherently unreliable as a source of evidence in respect of the conversations that the Claimants who dealt with him base their case upon in respect of the advice and recommendations that they say he made to them. With the exception of the admissions and concessions made, and save in so far as Mr Thornton's evidence reflects the content of a contemporaneous document, I therefore prefer the evidence of the individual Claimants who dealt with Mr Thornton as to their relationship with One Touch and the content of their discussions. The only exception is regarding the limited element of Mr Moller's evidence mentioned above.

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The Absent Witnesses

563. One Touch accepts that the evidence given by Mr Funk (for his and his wife's claims), Mr Morrell, Mr Hickson, Mr Spier, Mrs Heneghan and Mr van der Merwe provides a sufficient evidential basis to adjudicate. It says not so for Hoffelder Holdings Gmbh ("Hoffelder") because no representative of that company gave evidence. In particular, the person with executive responsibility, the Swiss lawyer, Mr Lezlinger, who was apparently running the company was not called. Mr Wilton submits Hoffelder cannot prove its case for the following reasons:

i) although Mr Funk indicates that he "called the shots" he does not say and there is no document showing he had authority to make decisions on behalf of Hoffelder and the evidence suggests the decision was for Hoffelder though it would take account of what Mr Funk wanted;

ii) notably, Mr Funk shared information with Mr Lenzinger in the form of One Touch's email description of the TCHG investment and sought his opinion;

iii) the court does not know precisely what Mr Funk told Mr Lezlinger as the decision-maker or how much of that derived from what One Touch said, or what Mr Lezlinger's ultimate understanding or opinion was or on what basis he decided to commit Hoffelder and thus what reliance (if any) Mr Lezlinger placed on anything deriving from One Touch;

iv) Mr Lezlinger, as a lawyer for Hoffelder, signed the One Touch reservation forms; it is inconceivable that he would not have read them

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carefully, which indicates he did not believe One Touch had advised Hoffelder and that he and Hoffelder had not therefore relied upon any "*advice*" given by One Touch;

v) there is therefore no evidence from which the Court can safely infer that there was reasonable or indeed any reliance by Hoffelder on anything One Touch said or did or that Hoffelder would have acted differently if differently advised and so assumption of responsibility and reliance and causation have not been established;

vi) in all these respects the problems have been compounded by the lack of disclosure to evidence the terms of Mr Lezlinger's appointment and his powers and authority, including by way of any company documentation impacting on his role.

564. Whilst the evidence given by Mr Funk does tend to suggest that Mr Funk was calling the shots, I agree that the evidential picture regarding the basis upon which Hoffelder proceeded to invest is not a comprehensive or entirely satisfactory one to demonstrate reliance, come what may. Specifically, in circumstances where Mr Lezlinger is a lawyer and where a One Touch Reservation Form was signed by Mr Lenzlinger and there is no evidence as to what steps he may have taken to investigate the proposition or One Touch's website. In my judgment, direct evidence from Mr Lenzlinger was required. In the absence of such evidence, whilst I continue to refer to the specific issues argued in relation to Hofelder's Claim below, I do not consider the necessary elements of Hoffelder's Claim have been established and I do not allow that Claim.

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565. Mr Johnson rightly drew attention to the general dearth of witness evidence from One Touch to show what really happened between the parties throughout all their transactions. It is evident there were numerous other personnel with direct involvement in the issues at hand who were not called as witnesses. In circumstances where no reason has been put forward to suggest that any of the following individuals could not have provided witness statements or attended court, the Claimants submit, and I agree, that their absence is significant because their evidence would necessarily have assisted the Court in obtaining a fuller picture.

566. Notwithstanding that Mr Kerkvliet's witness statement sets out that it was Mr Cowie, himself a Senior Investment Consultant, who persuaded Mr Kerkvliet to take an initial meeting with TCHG and who knew Mr Murphy, Mr Cowie was not called. His evidence could have helped explain what One Touch knew of the workings of the TCHG scheme when it agreed to market it. It appears probable that Mr Cowie could have assisted in explaining to the court what steps One Touch took to undertake any of the checks which were described in rather general terms by Mr Kerkvliet.

567. Second, Mrs Kerkvliet, who was the highest rank of employee under Mr Kerkvliet as sole director. The disclosure shows that she was involved at every stage of the post-reservation pathway, monitoring the route to completion of the sales. This was very important to One Touch as they only received their commission following completion. The omission to provide evidence from Mrs Kerkvliet was plainly a relevant omission in circumstances where it is One Touch's case that it played no active part in the relevant purchases once

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solicitors were instructed, that the Claimants had the ability to take professional advice from their solicitors before transacting, that some of the Claimants have already obtained a settlement from their solicitors against a background of wide-ranging alleged failures to advise, and that all these matters serve to support its defence that it did not owe and had not assumed any duty at all to the Claimants.

568. It was also part of Mrs Kerkvliet's role to liaise with Galon. She could therefore have assisted the court in respect of the practical relationship between One Touch and Galon and each of the claims made by Mrs Moller, Mr Moller and the Spier family. What One Touch said to Galon about the TCHG purchase proposition and about sales strategy, for example.

569. Mr Brian Dillon was also not called to give evidence. Mrs Moller had some limited contact with Mr Dillon about the planning permissions for The Lindors. When she instructed a surveyor to obtain some actual photographs of the operational care home for her, and this appears to be her surveyor's fault, the surveyor instead obtained some TCHG stock images instead. The Claimants say these interactions went beyond the provision of TCHG's marketing materials to service requests and enquiries from a Claimant which the Claimants say support their case.

570. Mr King was the investment consultant who dealt with Mrs Heneghan, Mr Durnford and Ms Orupabo. He had the ability to give primary evidence relevant to their cases. Moreover, these were some of the very last units to be reserved in this Claim. I agree with the Claimants that given the difficulties that the correspondence evidences One Touch was itself experiencing in obtaining payments of its commission from TCHG by this stage, Mr King had relevant

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evidence to give to the Court as to what he knew about that when marketing TCHG units to these Claimants.

571. One Touch agrees that Galon was its exclusive sub-agent in Israel as recorded in a letter signed by Mr Kerkvliet to that effect. Mrs Moller, Mr Moller and the Spier family separately purchased through Galon. There is, however, no witness evidence from Galon. This would have assisted the Court to understand the interaction between Galon and One Touch in a broader context. Again, what One Touch said to Galon about the TCHG purchase proposition and about sales strategy, for example.

572. One Touch also did not call Mr Feroz Rana, the Investment Consultant who dealt with Mr Motala at the outset of the One Touch sales process for TCHG. Mr Rana therefore had relevant evidence to give to the Court in respect of the service One Touch was providing in its marketing of the TCHG units. Particularly, as regards the material issue of wider services. Mr Kerkvliet's supplemental witness statement states: "*One Touch did not provide tax advice, nor did it ever market itself as a tax advisor*", however it is part of Mr Motala's case that Mr Rana did give him tax advice that if he purchased the TCHG unit the letting revenue that he received would not be subject to United Kingdom tax. This turned out to be incorrect and it is identified as a material misrepresentation in Mr Motala's case. As the Claimants' note, the fact that Mr Rana has not been called means Mr Motala's primary evidence on this point will therefore be accepted, however.

573. No witnesses were called from TCHG or Private Office.

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The Parties' Cases

The Claimants' case: Whether the Claimants had a contract with One Touch

574. Mr Johnson and Ms Innes submit a contract of agency existed between One Touch and each of the Claimants as its clients:

i) One Touch offered to provide a service for the benefit of the Claimants by providing them with information, documents and input in relation to the purchase opportunity;

ii) the Claimants accepted this service by entering into discussions with One Touch or entering into their purchase arrangements with TCHG;

iii) there was an intention to create legal relations exemplified by trust and belief in what One Touch said to them being accepted as materially accurate; and

iv) there was good consideration because the Claimants' dealings with One Touch were opportunities enabling it to earn commission from TCHG.

They refer to the summary of the law on the creation of contracts by conduct in *Chitty on Contracts* (36th ed.) at paragraphs 4-035- 4-037.

The Claimants' Case: Tort

575. The Claimants submit it is abundantly clear that the test for the assumption by One Touch of a common law duty of care to them is satisfied. Where the parties do not fall within one of the established categories of tortious liability, the court

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examines the particular facts to see whether there is an express or implied undertaking of responsibility. The key questions here are whether the Claimants reasonably relied on the statements made to them by One Touch and whether One Touch reasonably foresaw that the Claimants would rely on the statements: *NRAM Ltd v. Steel* [2018] UKSC 13, [2018] 1 WLR 1190, [18] to [25] and [32] per Lord Wilson JSC.

576. On an objective consideration of the evidence, Mr Johnson submits the relevant test is plainly satisfied by reference to the One Touch website material, the concessions and admissions made by Mr Kerkvliet and Mr Thornton, the Claimants' evidence as to what role they believed One Touch was undertaking and, particularly, the Claimants' explanation for relying upon the representations made to them. He submits One Touch's case that it had a one dimensional contractual relationship with TCHG is unsustainable where Mr Kerkvliet eventually accepted in cross examination that One Touch had a dual role. Its other role being to make well informed recommendations to clients through careful due diligence, all in the hope of building up a long term relationship and long term success. He agreed that both elements were "crucial" to the One Touch business and that the role it played to its clients was a very important part of what One Touch was doing. Matters which Mr Johnson submits are definitive of a legally recognisable relationship between One Touch and the Claimants.

577. He points to the way in which each of the Claimants described in their own words the role and duties One Touch assumed and that they were consistent with the website. The existence of trust, the existence of the provision of a

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service, the belief that One Touch had carried out due diligence, that One Touch had researched the opportunities and not simply parroted what they had been told by someone else were far beyond the role of a mere estate agent. Whilst they were representing the seller and were earning commission paid by the seller, that opportunity only existed because of the business the Claimants were placing with One Touch, and does not negate the existence of another role.

578. Mr Johnson submits part of One Touch's challenge to their case is rooted in an ill-founded contention that they are alleging a more extensive financial advisory role for One Touch than the specific property investment intermediary role pleaded. For example, each of the Claimants was asked in cross examination to accept that when they were dealing with One Touch they knew it was not acting as their financial adviser. A matter which they do not allege and which, he says, does not impact on the nature and content of the particular duties which One Touch owed to the Claimants. The nature of the obligation which the Claimants allege is the exercise of reasonable care and skill in what One Touch said about the TCHG purchase opportunity. One Touch is sued as a professional organisation that marketed property opportunities by making factual statements that were materially incorrect.

579. Mr Johnson submits that One Touch seeks to exaggerate the content of the duty actually alleged in order to make it into a broad or extensive advisory duty. Partly to escape the effect of the plain admissions made by Mr Kerkvliet and Mr Thornton and partly to bolster their submission that expert evidence is required for the fair disposal of the Claims. He says the other ulterior purpose is with an eye to the quantum and coverage trial.

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580. The subjective perceptions of the parties are not determinative, but the descriptions they gave of their interactions provide the background to an objective consideration of the facts. Mr Funk best encapsulated their understanding in his answers in cross examination: One Touch were sitting on the fence, one leg on each side. They were providing advice. Mr Motala said they were not a financial adviser in the sense of an independent adviser, but they were more than an agent with a duty of care and professionalism to ensure that what they were selling was not misrepresented.

581. Mr Johnson says there is clear evidence the Claimants were basing their decisions on what they were told by One Touch. Even where they accepted One Touch was not working for them in a formal sense, nonetheless One Touch was trusted as their only point of contact. Even the high point of Mr Morrell's acceptance that One Touch was not working for him is coupled with One Touch's acceptance at trial that Mr and Mrs Morrell relied upon what Mr Thornton told them (although reasonableness of his reliance is challenged).

582. Mr Johnson cites the speech of Lords Hamblen and Burrows JJSC in *JP SPC 4 v. Royal Bank of Scotland International Limited* [2022] UKPC 18, [2023] AC 461 at [64], where their Lordships identified that important factors include:

> "*(i) the purpose of the task or service and whether it is for the benefit of the Claimant;*
>
> *(ii) the defendant's knowledge and whether it is or ought to be known that the Claimant will be relying on the defendant's performance of the task or service with reasonable care; and*
>
> *(iii) the reasonableness of the Claimant's reliance on the performance of the task or service by the defendant with reasonable care*."

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583. He cites *Playboy Club London Limited v. Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 WLR 4014, at [10], per Lord Sumption JSC, who stated:

> "*The defendant's knowledge of the transaction in respect of which the statement is made is potentially relevant for three purposes: (i) to identify some specific person or group of persons to whom he can be said to assume responsibility; (ii) to demonstrate that the Claimant's reliance on the statement will be financially significant; and (iii) to limit the degree of responsibility which the defendant is taken to assume if no financial limit is expressly mentioned*".

584. Applying the factors identified, Mr Johnson submits that it was reasonably foreseeable the purchasers would rely on One Touch for what they were told about the purchase propositions and that they would not be expected to undertake any extensive due diligence of their own because:

i) One Touch knew about the purchase arrangements offered by TCHG because it was marketing and selling them, explaining them, and answering questions in relation to them, and it did this on a wide scale. It did this successfully in 93 instances and engaged sub-agents in various jurisdictions (including Galon) to the same end. In his exchanges with Mr Murray, Mr Kerkvliet said he had provided £17 million worth of sales via One Touch and its sub-agents. It was still seeking to recruit sub-agents as late as 4 April 2019 to sell the TCHG products.

ii) One Touch was focussing on purchasers interested in these opportunities with the money to buy them.

iii) The target market was widely spread and included first time buyers with little financial sophistication, together with some more experienced people, together with other purchasers, often from overseas. One Touch

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was astute to refine its marketing endeavours. It made clear on the website that it would assist any purchaser.

iv) Given the costs of purchase, the financial commitments undertaken by the Claimants based on what One Touch told them were plainly significant.

v) Plainly the provision of information about TCHG's properties was intended to benefit the Claimants because it caused them to enter into a (supposedly) financially advantageous purchase.

vi) One Touch's specialist knowledge was at the heart of all its communications with the Claimants, who were encouraged to trust and rely on it. The Claimants were relying upon One Touch to exercise care and skill in all its communications with them.

vii) It was reasonable for the Claimants to rely upon One Touch when it provided marketing and sales information to them. The asymmetry of information as between the Claimants and One Touch was clear. The Claimants were not in the same position as One Touch and could not be expected to gainsay what they were told.

585. Mr Johnson warned that the various lines of case law relied upon by One Touch in its Counsels' submission to dispute the existence of an advisory duty of care are drawn from different contexts. Mr Wilton's mention of special relationships was not helpful here as the true focus should be the application of the core criteria that the Court must apply when every case turns upon its own facts. Mr Wilton's concentration on the position of a vendor's agent was dangerous where

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Mr Kerkvliet himself accepted his company was playing a dual role. Thomson v *Christie Manson & Woods* [2004] EWHC 1101, [2004] PNLR 42 and *McCullagh v Lane Fox* [1996] PNLR 205 were examples of different kinds of cases with different facts with nothing to contribute when assessing One Touch's dealings with the Claimants. *McHale v Dunlop* [2024] EWHC 1174 (KB), [2024] PNLR 26 was a case about a mere introducer; that is not the territory One Touch was in. Mr Wilton's reliance on cases concerning banks were far removed from the present context and were, Mr Johnson said, very different for a multitude of reasons. There was also value passing to One Touch through its interactions with the Claimants.

The Claimants' Case: the Relevance of One Touch's Terms and Conditions

586. The Claimants accept that the matter of the effect of the provisions alleged by One Touch to divest it of liability is plainly central to the question whether One Touch entered into a contractual relationship with, or assumed a common law duty of care to, the Claimants. They have a multi-pronged attack on their relevance and/or application.

587. They point out that before considering any question of the substantive validity and enforceability of the Terms and Conditions which One Touch relies upon to negative the alleged duties which it owed to the Claimants, it is necessary first to identify how far the One Touch Terms and Conditions were in circulation among the Claimants at all.

588. They say the evidence establishes that One Touch did not supply a copy of its Terms and Conditions, or explain their alleged effect, to any Claimant. None of the documentary evidence relating to the contact between any of the One Touch

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salesforce and the Claimants contains any direction to them to read the One Touch Terms or the provision of any link to them. The Claimants confirmed they were not told to read the Terms on the website or the One Touch Reservation Form supplied to some of them. When individual Claimants were asked whether they had read the Terms they did not state they had.

589. Mr Kerkvliet confirmed the One Touch website did not tell people to read the Terms either. He agreed that this was despite the fact they were directed to read the "*stellar testimonials*" and numerous advisory pieces designed to get them to purchase. The website Homepage and the "Services Overview" had links to take people straight to the testimonials, but not the Terms and Conditions. The "Contact Us" page invited the submission of enquiries from prospective purchasers, but had no reference to the Terms and Conditions. Whilst Mr Kerkvliet claimed that the Terms were displayed prominently on the website, the evidence does not support that assertion.

590. There were different formats of Reservation Forms in evidence:

i) the TCHG version which did not contain the alleged provisions or any address / link to One Touch's Terms and Conditions relied upon;

ii) Galon's version, which purports to benefit Galon and says nothing about One Touch / One Touch's Terms and Conditions;

iii) the One Touch Reservation Form, which is the only version to contain the provisions relied upon by One Touch.

591. Only 9 Claimants signed the One Touch Reservation Form. Of those 9:

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a. Mr Motala bought two units included in this Claim and used TCHG's Reservation Form for one of the two;

b. Mr van der Merwe purchased five properties. Two of them had One Touch Reservation Forms. One had an unsigned TCHG Reservation Form. The other two had no signed Reservation Forms at all. Both the latter purchases were left to Mr Thornton's discretion.

592. The Claimants submit that this is a patchy and inconsistent documentary record regarding the use by One Touch of the One Touch Reservation Form. An unpromising start for the proposition that 9 Claimants are irrevocably bound by the disclaimers and exclusions in it for all or some of their purchases. The documentary evidence shows it was a purely functional document which earmarked a unit for a particular purchaser and initiated the purchase process. Both Mr Kerkvliet and Mr Thornton accepted that the Reservation Forms (in whichever version) were mechanical and placed purchasers onto the completion pathway. Signature did not commit purchasers to buying. Reservation fees were refundable in certain timescales or by bespoke arrangements. One Touch did not explain the effect of the Form to anyone where it was used.

593. Given these facts, the Claimants submit clauses 7 and 12 of One Touch's Terms and Conditions have no effect or operation as "basis" or non-reliance provisions which negative the existence of the alleged contractual or common law duties. They say the clauses are to be construed in accordance with the principles discussed in *Lewison on The Interpretation of Contracts* (8th ed.), chapter 12,

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section 21. The immediate difficulty being that One Touch did not bring the Terms and Conditions to the Claimants' attention adequately or at all.

594. They submit that mere reference to the One Touch website in general terms in the One Touch Reservation Form signed by nine of the Claimants falls well short of incorporating the terms into those parties' dealings. They refer to the summary of the law in this regard in *Chitty on Contracts* (36th ed.) at 16-011 and 16-012. In any event, Mr Johnson submits the material effect of the so-called "Purchasers Agreement" in the One Touch Reservation Form is also to rewrite history. The provisions "… *attempt to alter the character and effect of what has gone before and in substance are an attempt to exclude or restrict liability*". Mr Johnson relied on the summary of the law in Lewison at para. 12.175, citing *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), where Christopher Clarke J said:

> "*To tell the man in the street that the car you were selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before and in substance be an attempt to exclude or restrict liability*."

A statement approved by the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221.

595. The Claimants submit that if these clauses are nevertheless operational the provisions are therefore to be construed in accordance with the stricter approach to exclusion clauses discussed in *Lewison on the Interpretation of Contracts* chap. 12 at sections 4-10. In particular, One Touch did not use sufficiently clear words to exclude negligence liability and they are not effective for that purpose.

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596. They say the provisions are also subject to the requirements of reasonableness, which they "*manifestly transgress*". Mr Johnson drew attention to the questions he put to Mr Kerkvliet in cross examination regarding the fact that the Terms and Conditions relied upon, particularly clause 12, had the irrational effect of erasing One Touch's obligations, whereas One Touch actively persuaded the Claimants (and many others) to part with huge sums, both in absolute and relative terms. Mr Kerkvliet failed to give any credible explanation for this shameful "*Charlatan's charter"*.

597. The Claimants say the position in relation to Galon is similar. Their Reservation Form was identical save that it referred to the terms and conditions of Galon in place of One Touch. They say it did not achieve what One Touch says it achieved, falls foul of the strict approach to exclusion clauses (including in relation to the exclusion of negligence liability), and does not confer any other benefit on One Touch.

Unfairness: Consumer Rights Act 2015

598. As pleaded in the Amended Reply, in so far as the provisions of the Terms and the One Touch Reservation Form seek to or otherwise have the effect of excluding liability for negligent misstatement, breach of contract or breach of the 2008 Regulations, the Claimants contend they constitute unfair terms or notices under section 62 of the Consumer Rights Act 2015 Act ("the 2015 Act") or sections 2 and 3 of the Unfair Contract Terms Act 1977 ("UCTA"). The pleaded particulars of unfairness are as follows in relation to the Terms and Conditions, and are repeated in relation to the One Touch Reservation Form:

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i) no steps or reasonable steps were taken to draw the Terms and Conditions to the attention of the Claimants.

ii) The Claimants were given no opportunity to enter into negotiations in respect of the terms and conditions but are alleged simply to be bound by them by dint of contact with One Touch. On an objective analysis the Claimants did not assent to them.

iii) There was an imbalance of bargaining power between the Claimants, who were private individuals with limited or no experience of off plan property investments in the UK, many of whom were domiciled abroad, and One Touch, which held itself out as an experienced and professional investment adviser / intermediary, alternatively on One Touch's own case, an agent of TCHG for the marketing and sale of investment properties for reward.

iv) It would be contrary to the requirements of good faith, fair dealing and reasonableness for One Touch to make statements to the Claimants which it intended would induce them to enter into the purchase arrangements with TCHG and for which it was paid 12.5% Commission on sales that it arranged by TCHG, only then to claim that the Claimants were not entitled to rely on any of those statements or required to verify those statements themselves regardless of their content, by operation of the Terms and Conditions.

v) The effect of the Terms and Conditions alleged by One Touch creates a significant imbalance between the rights of the Claimants and the rights of One Touch.

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599. Mr Johnson submitted that all the individual Claimants were dealing as consumers so as to fall within the scope of section 2(3) the 2015 Act. They have all provided factual information about their qualifications, jobs, experience of company directorships and ownership, together with property investment and management and advisory fund management. The factors pleaded in the Amended Reply establish that the provisions relied upon by One Touch would create a significant imbalance in the parties' rights and obligations. The lack of reasonable notice, the impossibility of negotiation, the imbalance of bargaining power between the Claimants and One Touch, and the stripping of any content or substance from One Touch's role if the provisions are upheld, point firmly against enforceability. Mr Kerkvliet and Mr Thornton confirmed that the Terms and Condition were standard form and were never altered in practice.

UCTA

600. The UCTA is principally relevant to Hoffelder Holdings. The Claimants submit the provisions relied upon engage section 2(2) (attempts to exclude or restrict negligence liability) and section 3 (attempts to exclude or restrict liability for breach of contract where one party's standard terms of business are in play: in this case, those of One Touch). They assert that the factors pleaded in respect of the individual Claimants in the Amended Reply apply with equal force. Specifically, the inequality of bargaining power and the deprivation of any remedy for One Touch's breaches of duty if the provisions are upheld. These factors were recently considered in a business context in *Last Bus Limited v. Dawsongroup Bus and Coach Limited & Anor* [2023] EWCA Civ 1297, [2023] 4 WLR 80.

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Clause 10 of the Agreement to Lease and Sublease of Leasehold Care Studio between the SPV, the Claimant and Accordiant

601. The Agreement and Sublease executed by each SPV, the individual Claimants and Accordiant contains an entire agreement clause as follows:

> "*10.1 This contract and any documents annexed to it constitute the whole agreement between the parties and supersede all previous discussions, correspondence, negotiations, arrangements, understandings and agreements between them relating to their subject matter.*
>
> *10.2 The parties acknowledge that in entering into this contract and any documents annexed they do not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) other than those:*
>
> *(a) set out in this contract or the documents annexed to it; or*
>
> *Contained in any written replies that their Conveyancers have given to any written enquiries raised by the other party's Conveyancer before the date of this contract. ...*
>
> *10.4 Nothing in this clause shall limit or exclude any liability for fraud*."

602. One Touch's Counsel relied upon this clause for the first time in their closing arguments. As Mr Johnson points out, awareness of this clause was not put to any of the Claimants in their evidence, such that there is no evidence whether they understood the effect of it or were aware of it. He submits that regardless, the clause is unfair in so far as matters of fact were misrepresented by or on behalf of the SPV and Accordiant. If the clause were ever to be relied upon by the relevant TCHG entity against purchasers the Consumer Rights Act 2015 and UCTA 1977 would apply for, broadly, the same reasons as the Claimants rely upon. The clause would therefore not be enforceable. The Claimants reserve their position on TCHG's liability in relation to misrepresentations about Accordiant's position. The court is not in a position to adjudicate that matter but

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the clause has no effect on One Touch's position anyway. It presents no obstacle to a conclusion that One Touch assumed responsibility to the Claimants.

603. The Claimants contend One Touch cannot enforce any of the provisions it relies upon because they were either of no effect or are unenforceable.

One Touch's case: Was there a contract with One Touch for it to provide advisory services?

604. One Touch says it never agreed to act as the Claimants' professional adviser and there is no reason to infer any contractual relationship with the Claimants. None of the Claimants suggest they contracted with One Touch nor describe any dealing necessarily implying the formation of a contract. It says the facts bear the imprint of a sales relationship not a services contract. One Touch says it emphasised in its Terms of Business and the One Touch Reservation Forms that the Claimants should get their own advice.

605. Mr Wilton submits that none of the ordinary indicia of a contractual arrangement of the kind alleged exist in this case: there was no offer and acceptance or any certainty of terms. There was no moment at which any of the Claimants sat down with One Touch to seek to specify what exactly it was that One Touch would do for them. There was no retainer letter of the kind one would expect from a provider of professional services such as an investment adviser setting out the services to be provided and the fee to be charged. There was no payment by any of the Claimants to One Touch for the provision of advice.

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606. Mr Wilton argues that it is instead to be inferred that the Claimants understood that One Touch was acting for TCHG. Any contract with the Claimants would therefore potentially conflict with One Touch's duties towards TCHG.

One Touch's case: An advisory duty in tort?

607. One Touch submits that it is a fundamental part of the factual context to evaluate what was reasonably expected of them and what duties they assumed, if any. One Touch was simply selling investment opportunities as TCHG's agent and provided information about them. It assumed no duty to the Claimants.

608. Mr Wilton says it is the job of a salesman to persuade someone to buy something. A sales representative may provide information about or a recommendation to purchase a product or even an element of evaluative comment as to different buying options. One could loosely characterise some of that kind of interchange as "advice" which the purchaser may well rely on in the sense that it may influence a decision about whether and what to buy, but it would be wholly wrong to infer that the salesman is assuming an advisory responsibility. The salesman is not undertaking to protect the interests of the purchaser. A misrepresentation will ordinarily afford recourse against the vendor under the Misrepresentation Act 1967. There is no basis for a misstatement claim against the salesman.

609. Mr Wilton submits that One Touch's role here was entirely analogous to that of a sales representative in a car showroom selling cars. The potential buyer would not think they had retained the individual in the showroom to act as a finder's agent to find a car that would suit their purposes. He contrasts its position with that of the conveyancing solicitors, POLS, where there was a retainer letter

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setting out exactly what they would do. A pattern of communication from someone who Mr Wilton says was plainly an adviser.

610. He says One Touch accepts it was putting forward opportunities which appeared to be suitable for investment and carried out initial checks before agreeing to market a developer's properties. Mr Kerkvliet's evidence was that One Touch checked out the status of the companies and whether the directors were bankrupt and looked at the commercial plausibility of the offering. They conducted a filtering operation to find investment opportunities which looked to be suitable for the sort of people who might deal with it for One Touch's own purposes. They did so because they had no interest in selling investment opportunities which fail.

611. Although One Touch referred to their own due diligence on the website as an assurance that such a check had been undertaken nothing was said to imply that that was in fulfilment of any responsibility to potential purchasers. Mr Wilton submits that there was nothing on the One Touch website or in its other communications to support the inference that One Touch was agreeing to act on the Claimants' behalf such that they might be answerable if investments turned out to be unsuitable.

612. As regards the statements on the One Touch website implying that it would undertake due diligence and provide advice and guidance to purchasers, Mr Wilton submits there is no evidence any of the Claimants placed any reliance on what was said. Mr Wilton says there was no clarity on the website or in marketing materials as to precisely what advice would be provided or as to the

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precise expertise offered. It plainly did not involve legal or surveying or valuation advice as the Claimants all knew they had to seek that elsewhere.

613. He submits that One Touch took every opportunity to impress on the Claimants by way of the Terms and Conditions that they were not undertaking an investigative or advisory role on the Claimants' behalf and did not accept any responsibilities for such matters and that the Claimants should undertake their own due diligence including by getting their own financial and legal advice. They explained they were introducing opportunities and providing information and assisting the Claimants to make a decision but, objectively, he submits it is impossible to construct any broad advisory duty from the website.

614. Mr Wilton says the communications to investors once they made an enquiry, the emails and One Touch Care Guides, and referring to One Touch as "*your partner in prosperity*" take matters no further. The language was marketing language which begged the question as to what if any tasks One Touch was performing. Similarly, he submits those Claimants who first met One Touch at a marketing event in South Africa did not receive any definite undertaking to provide advice of the sort the relevant Claimants allege.

615. Fundamentally, Mr Wilton argues that the advisory duty which the Claimants allege is the broad or extensive advisory duty of an investment adviser retained to assess the suitability and safety of the investment in question, including by reason of fraud. However, One Touch was not like a financial adviser or an accountant seeking to advise a client about where to place their money for the most suitable investment return in an investment which is most suitable for them. He says its Investment Consultants did not sit down with the people with

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whom they dealt to identify their wealth, their attitude to risk, what they could sensibly afford, or a full range of alternatives for investment possibilities as a financial adviser would have done. Consequently, One Touch did not owe any duty to the Claimants requiring it to undertake "extensive" due diligence, to analyse the risks, and to report in the way an independent investment adviser might. The Claimants did not bargain for or pay for such a service and One Touch never assumed responsibility to provide such a service.

616. Mr Wilton argues it was not foreseeable that the Claimants would rely on what they said, and nor would it have been reasonable to do so. One Touch went out of its way to emphasise that the Claimants should get their own advice. It was not foreseeable that the Claimants would not get their own advice, certainly from a solicitor as that was necessary if the investment purchases were going to proceed. The Claimants had every opportunity and good reason to get their own financial and valuation advice too.

617. Mr Wilton submits that it is highly significant that the Claimants did receive advice from an independent solicitor, POLS, which had, some of the Claimants went on to allege in their claims against POLS, an extensive advisory duty. These claims led to a settlement, the terms of which are known only to those within a confidentiality ring. In the proceedings against POLS there were allegations of failing to warn of the nature, effect, and ramifications of the transaction, failing to advise in respect of disadvantageous aspects of the leasehold interest and that there was no opportunity to inspect before proceeding, failing to advise that the scheme bore characteristics of a Ponzi scheme, failing to advise on the planning position, advancing the interests of the

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seller not the Claimant, failing to adhere to the stipulations bearing on the scope of a solicitor's duty in the Solicitors Regulation Authority's warning notice of 23 June 2017 (which alerted solicitors to the risk of fraudulent activity in respect of investment schemes of this kind), failing to renegotiate the terms of the transaction to correct deficiencies in the lease and the fact that the consideration was payable in full on exchange rather than by stages or on completion of building work, and failing to advise that the transaction was unusual and risky. One Touch says it was no doubt also alleged that the Claimants relied on POLS and that if the firm had advised properly, they would not have proceeded.

618. Mr Wilton says the Claimants therefore alleged that POLS was retained to provide extensive advice including regarding the very losses which One Touch contends led to their losses. He says this no doubt reflected the fact that given a Solicitors' Regulation Authority Warning Notice issued in 2017 the duties of a solicitor dealing with developments of this kind arguably include an obligation to advise purchasers not to proceed and hence to protect them against downstream losses however arising and including by fraud: see *Niprose Investments Limited v Vincents Solicitors Limited* [2024] EWHC 801 (Ch), [2024] PNLR 22, where the SRA Warning Notice is set out at [10].

619. Mr Wilton contends that it is irrelevant if One Touch is found to have encouraged the Claimants to use POLS. They were an independent solicitor acting for the Claimants and not One Touch. He says there is no basis for supposing One Touch knew or desired that POLS would not provide all appropriate advice. One Touch also prays in aid that POL's client care letter recommended a survey. POL's standard Report on Title also invited the

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Claimants to raise any question with Private Office: "*It is very important that you raise any specific enquiries you may have before exchange of contracts*" and recommended valuation advice. He says this was a reminder that One Touch was not providing any such advice and there was a need for such advice.

620. Mr Wilton submits it was obvious the Claimants could get their own advice and it was not unreasonable to expect them to do so given POL's encouragement, the amounts of money being invested, the warning on some of the TCHG brochures, the knowledge it says that the Claimants had that One Touch was acting as a selling agent, and the warnings on the One Touch website and the One Touch Reservation Form that it was not advising the Claimants.

621. Although One Touch accepts it is possible for a vendor's agent to owe an advisory duty to a purchaser, Mr Wilton submits it is relatively rare and there is every reason to be very cautious before finding any such duty. He argues that something unusual in the form of a special relationship is needed to trigger such an advisory duty. An illustration of such an exceptional case is *Thomson v Christie Manson & Woods* (as cited above). Mr Wilton submits the normal expectation is that a vendor's agent will not owe any such duty and that the buyer will have to seek his own advice. In a property sales context, Mr Wilton refers to *McCullagh v Lane Fox* (as cited above) where no duty was owed by an estate agent to a purchaser because there was no assumption of responsibility for the misleading information passed on about the size of a property. By way of further illustration, Mr Wilton refers to *P&P Property Ltd v Owen White & Catlin LLP* [2019] Ch 273, where no duty was owed by a solicitor or estate

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agent acting for the vendor in respect of the conduct of identity checks where an identity fraud was taking place.

622. Mr Wilton also submits that with financial products there is ordinarily no advisory duty arising from interactions between a salesforce and a purchaser even where elements of "advice" may be given by individuals whose job titles imply they are an adviser of some kind. In *Thornbridge Ltd v Barclays Bank* [2015] EWHC 3420 the court rejected the contention that the provision of information and some advice by a bank about an interest swap gave rise to an assumption of responsibility. He says identical reasoning is applicable here.

623. Mr Wilton says the position is similar where a defendant introduces a financial product, as illustrated by *Knights v Townsend Harrison Ltd* [2021] EWHC 2563 (QB), in which accountants introduced a tax avoidance scheme. The court rejected any advisory negligence in that case as there was no assumption of responsibility. In part by reason of certain limitations on liability, but notwithstanding the accountants had encouraged the Claimant to proceed with the schemes. He points out that there was no expert evidence for a case that the schemes should not have been introduced and the case largely failed for that reason.

624. Mr Wilton argues that to impose an advisory duty on One Touch here transfers risk to the agent in respect of an activity for which it was not getting paid and that is likely to be objectively unreasonable, not least as a purchaser will ordinarily have recourse against the agent's principal, the vendor. He says this was a reason why no duty was imposed on the solicitor in *Gran Gelato v Richcliff* [1992] Ch 560 in respect of erroneous answers to pre-contract

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enquiries. Mr Wilton submits that like the solicitor in *Gran Gelato* One Touch would also be exposed to the possibility of a conflict of interest if it were to be held that it owed a duty of care to the Claimants when undertaking its duties as agent for TCHG. As to the risk of the insolvency of the principal, One Touch relies on the dicta of Sir Donald Nicholls VC in *Gran Gelato* at 571F that this is, unhappily, an ordinary fact of commercial life and not a good reason to impose an advisory duty on an agent.

625. Alternatively, he submits any advisory duty could only exist if in the individual case One Touch was drawn in to providing "advice" when it was foreseeable and reasonable that the individual Claimant would rely upon it. This turns on how One Touch interacted with individuals, but Mr Wilton submits the conditions for the imposition of a broad advisory duty do not exist in any event.

An Attenuated Duty?

626. Mr Wilton says that the most that could properly be suggested was that there may be scope for an attenuated duty to be found limited to a duty to pass on information with due care. That is on the basis that One Touch provided information to the Claimants in relation to the TCHG scheme and how it operated. If so, the duty assumed would have been to use reasonable skill and care to provide information consistent with, and which did not go beyond, the information contained in the TCHG brochure or TCHG's training to One Touch.

627. He refers to two recent cases where the court rejected the assertion that an intermediary had assumed a duty of a *Hedley Byrne and Heller* type character to give advice to Claimants because there was no such assumption of responsibility but did find a residual duty to pass on information with due care.

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In *McHale v Dunlop* (as cited above), the only duty owed by an introducer of an investment not acting as an independent financial adviser was held to be in respect of the careful passing on of information. In *Thornbridge* (as cited above), the contention was rejected that the provision of information by a bank gave rise to an advisory relationship but accepted a salesman had a duty not to mislead albeit no duty, if no advisory relationship, to explain fully the products it was selling.

628. Mr Wilton submits this is the furthest any duty could go where there was no clear understanding as to what One Touch would do, when it should have been clear it was primarily acting as a sales agent, when it was plainly not providing independent advice, when the Claimants had their own solicitors and were told to get surveying and valuation advice before purchase, but when One Touch did provide information to assist investors to decide whether and what to purchase.

629. If so, One Touch would be in breach of such a duty if it failed to pass on information with due care such that One Touch was misleading in that restrictive case. That is if there was a misunderstanding of information given by its principal, TCHG, and One Touch passed on misinformation which they were in a position to correct. However, Mr Wilton says that is not the case it faces and, if there was anything in the case of that kind, it would not get the Claimants to where they need to be. To succeed, he says, the Claimants need to succeed to persuade the court that this is a full blown advisory responsibility to encompass all of the different aspects which informed the different breaches of duty that have been alleged. Taking the necessary objective approach, he submits neither contractually nor by way of an assumption of responsibility was One Touch

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undertaking to advise the Claimants or accepting responsibility should any of the information it passed on prove incorrect.

One Touch's Case on the Terms and Conditions of Business

630. Mr Wilton made clear that One Touch does not found its case on One Touch's Terms or the One Touch Reservation Form as it says its role did not involve any advisory responsibility. *Thornbridge* (as cited above) illustrates that where there is no advisory relationship in the first-place terms are not needed to displace any advisory liability because none arises. Its defence is not dependent upon establishing that its Terms were incorporated in any contract (it says there was none) or that they did come to the Claimants' attention as non-contractual notices. However, the Terms provide further evidence of the fact no advisory role was assumed and, insofar as they might make a difference, the court can take account of them when assessing if there was any advisory responsibility.

631. To the extent that liability may turn on such matters, One Touch submits that the Terms were sufficiently brought to the Claimants attention, or at least the attention of the Claimants who saw or signed a copy of the One Touch Reservation Form, that they were incorporated in any contract (if there was one) and gave rise if need be to a contractual estoppel and / or they operated as effective non contractual notices bearing upon whether a duty of care was owed.

632. One Touch says the publication of the Terms on the website and the reference and link to them in the One Touch Reservation Form represented sufficient notice that One Touch was not assuming an advisory responsibility. Even more so given the limited interaction they would typically have with purchasers and the fact investors could be expected to look at the website and know that it

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would likely contain terms. Mr Wilton describes the One Touch Reservation Form as an important formal document. A significant moment in the journey to invest was when a purchaser paid £2,000 paid to reserve a unit. He says the statement of One Touch's position about their own role was clear.

633. One Touch says there was no objection to the One Touch Reservation Form because the Claimants who saw or signed it knew One Touch was a selling agent, providing information about investment opportunities. They were not working for the Claimants. They were not assuming the obligations one would anticipate from an adviser working for the Claimants.

634. It says "*most*" Claimants saw and had the opportunity to read the One Touch Reservation Form and "*many*" signed and assented to what it said. The Claimants it identifies as "*having sight of it*", with 9 having signed it, were Mr Durnford (although it was demonstrated in re-examination that he was not provided with the Form), Mr Hickson (who did not sign it), Mr Moller (who signed a Galon Form), Mr and Mrs Morrell, Mr Motala (who also signed a TCHG Form), Mr Uruthiran, Ms Hutchison, Mr Roberts, Mr Spier and family (who signed Galon Forms for their purchases), Mr and Mrs Heneghan, Ms Orupabo (who did not sign a One Touch Form for her purchase), Mr van der Merwe (who also purchased using a TCHG Form and no Reservation Forms at all) and Mrs Byers.

635. Mr Wilton relies upon *Thornbridge* (as cited above) at paragraphs 97-111 for its reasoning that the agreed basis upon which services are provided can give rise to a contractual estoppel and can define the basis of the relationship even where such matters are agreed late in the day, whereupon no question of

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reasonableness arises, and the analysis of the limitation of liability letters in *Knights v Townshend Harrison Limited* (as cited above), paras. 244-251.

Consumer Rights Act 2015 / UCTA

636. In the further alternative, One Touch submits that insofar as its Terms and Conditions operated as an exclusion of a liability which might otherwise arise, and are not "basis clauses" (insofar as there was a contract), they are also reasonable and should be upheld by reference to section 62 of the Consumer Rights Act 2015 and/ or sections 2 and 3 of UCTA. Mr Wilton submits they reflect the reasonable expectations for the parties and the circumstances, both because One Touch was acting as a selling agent not an adviser and because at the time of their dealings with One Touch it was anticipated that the Claimants would obtain their own advice, either acting on their own initiative, or at the very least by way of the instruction of solicitors which was inevitably going to follow if they paid a reservation fee.

637. Mr Wilton submits that none of the Claimants questioned or objected to these notices and that is unsurprising because it should be inferred they appreciated One Touch was a marketing agent. Inferentially, he says the Claimants must have realised One Touch was marketing opportunities which it had an obvious financial interest in them pursuing by virtue of the commission arrangement it had with TCHG, all of which is fundamentally inconsistent with One Touch owing them any duty to give independent advice.

Clause 10

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638. In closing arguments, Mr Wilton introduced his further new argument that the Claimants' recourse against TCHG, or the relevant TCHG SPV, for any non-fraudulent misrepresentation would have been limited by the terms of an entire agreement and non-reliance clause at clause 10 of the Sales Agreement between the SPV and the individual Claimants. Mr Wilton submits, citing Hobhouse LJ in *McCullagh v Lane Fox* (as cited above), that the fact a purchaser has agreed with the vendor that he has not relied upon any pre-contractual representation creates a fundamental difficulty for a claim alleging that he has relied on that very same representation so far as the agent is concerned. Mr Wilton says this makes it all the less likely, objectively, that One Touch could reasonably have been thought to have been assuming responsibility for representations made on TCHG's behalf as its principal. That would be to shift all the corresponding risk to the agent, even where the principal alone was at fault, as it would follow that TCHG could not be vicariously liable for any misstatement by One Touch. He says such wholesale transfer of risk to One Touch is particularly unattractive here. He argues, the Claimants could afford to get their own advice, many already had significant investments, One Touch was dealing with people of all different kinds from different countries with different experiences of investment, different levels of sophistication, different financial circumstances and different attitudes to risk, and when it was not to be expected that One Touch would assess their individual circumstances and attitude to risk or give tailored advice.

639. It is One Touch's case that neither contractually nor by way of assumption of responsibility was One Touch undertaking to act as the Claimants' investment

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adviser. One Touch's Terms and the One Touch Reservation Form evidence that or, if need be, exclude any liability for any advice that was given.

My Decision: The Alleged Contractual Duties and the Impact of the Terms and Conditions

Contract

640. Since there was no express contract in place between One Touch and any of the Claimants, One Touch could only owe the Claimants a duty in contract if a retainer could be implied from the conduct of the parties. As the parties agree, for an implied contract to be in place, all the ordinary pre-requisites necessary to imply a contract must be satisfied.

641. As explained in *Chitty on Contracts* (36th ed.) at paragraphs 4-035 to 4-037 an offer to sell goods made by sending them to the offeree can be accepted by using them; an offer contained in a request for services may be accepted by beginning to render them; and an offer of services may be accepted by the offeree's conduct in arranging an appointment in certain circumstances (para. 4-035). However, conduct will only amount to acceptance if it is clear that the offeree's alleged act of acceptance was done with the intention (ascertained in accordance with the objective principle) of accepting the offer (para. 4-036).

642. Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement may be more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all.

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But sometimes (where there is a gap, rather than a conflict) the court can resolve the uncertainty by applying the standard of reasonableness (para. 4-037).

643. It is necessary to consider whether on an objective consideration of all the circumstances an intention to enter into such a contractual relationship ought fairly and reasonably to be imputed to the parties: *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249. The implication of the contract must be necessary. Typically, where the parties have acted in a way which is consistent only with the intention to make a contract, as opposed to where the parties would, or might, have acted as they did in the absence of a contract: *Clifford Chance LLP and another v Societe Generale SA* [2023] EWHC 2682 (Ch). This is a high bar.

644. In my judgment, regardless of whether the nature of the relationship between One Touch and the individual Claimants was a pure sales relationship as contended by One Touch, the facts and circumstances do not readily support the creation by conduct of a legal contract for services as between One Touch and each of the Claimants who did not sign a contract to instruct Galon. Specifically, it is difficult to identify the moment at which the parties' necessary intention to contract ought fairly and reasonably to be imputed to the parties such that One Touch was retained by each Claimant and the terms of the retainer.

645. Taking a standard set of facts, an individual Claimant made an enquiry of One Touch by completing the "contact us" form having read the One Touch website or attended one of the One Touch in-person seminar presentation events. One Touch telephoned the Claimant or held a one to one in person investment consultation with them to establish the Claimant's basic financial position and

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objectives as a potential investor (as described by Ms Hutchison and Mr Thornton, for example), and the Claimant engaged with the One Touch Investment Consultant and shared that information and One Touch provided its views and opinion. One Touch proceeded to provide the Claimant with details of a specific investment offer for a particular development or developments and added the Claimant to their mailing list. The Claimant asked One Touch questions and these were discussed and answered. The Claimant decided to invest in a TCHG unit (which may or may not have been in the first scheme presented to them). A Reservation Form for a unit may or may not then have been completed in any one of several forms. The Claimant paid the reservation fee to TCHG or One Touch. The Claimant was put in touch with POLS by One Touch and instructed POLS. One Touch was copied into the correspondence with POLS up to completion. The Claimant completed the purchase of the unit. As a result of the completion of the sale to the Claimant, One Touch was entitled to be paid commission by TCHG. There may then have been a repeat transaction.

646. Until the moment at which the individual Claimant agreed to make their investment, both the Claimant and One Touch could simply have determined not to engage further at any stage. Much may, for example, have turned upon exactly how satisfactorily each party considered their initial conversation had progressed; the degree of their engagement and the timing and seriousness of their initial or subsequent response; and how well the Claimant felt that the subsequent questions they asked were answered by One Touch or how confident they felt in the guidance provided. Thereafter, by the stage at which the Claimant decided to invest, they had already received the majority of One

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Touch's service and, they say, had already relied upon its information and advice in taking their decision. It being the case that the consideration for these services was the opportunity afforded to One Touch to earn a commission payable by a developer on any product from One Touch's range if the Claimant did eventually purchase.

647. Applied in this context, I consider the construct of an implied contract concluded at some stage between One Touch and each of the Claimants is an artificial and unnecessary one. In my judgment, the parties would, or might, have acted as they did in the absence of a contract here. I do not therefore agree with the Claimants that any contractual relationship should be implied by conduct. Necessarily, such conclusion does not, however, remove the Claimants' ability to pursue their alternative cases in tort.

The Impact of the Terms and Conditions and Disclaimers

648. Before turning to the Claimants' cases in tort, and in case I am wrong in concluding that there was no implied contractual relationship by conduct as alleged, I briefly address the Claimants' submissions regarding the impact of One Touch's Terms and Conditions in contract as well as tort.

649. As set out in Chitty at para. 16-011, by reference to circumstances where a document is tendered, the question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. It is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient. It is not necessary that the conditions

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themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given. Reference to standard terms to be found on a website may be sufficient to incorporate the terms on the website into the contract so that terms may be incorporated into a contract by ticking a box on screen or by clicking on a hyperlink. Clicking on a hyperlink may not be sufficient to incorporate terms in every case, for example where insufficient time is given to the reader to read and digest the terms.

650. Further, as summarised in Chitty at para. 16-012, although the party receiving the document knows it contains conditions, whether the particular condition relied on is one which is a particularly onerous or unusual term, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention. The words "onerous or unusual" are not terms of art and the authorities do not always agree on whether a particular term meets that test. The hurdle which must be overcome has, however, been described as a "high hurdle". Much depends on the facts and circumstances of the case so that the court must have regard to the context and respective bargaining positions of the parties. When considering whether or not a particular term is "unusual" regard should be had to the practice of the particular market or industry and also, perhaps, to the history of the relationship between the parties so that a significant change in the contractual terms used to govern the relationship between the parties may suffice to establish that the term is "unusual". The requirement that the term has been brought "fairly and reasonably to the others attention" is unlikely to be met in the case where the clause is "buried away in the middle of a raft of small prints". The practical equivalence of a "red hand"

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may take the form of a "clear reference" to the term, such as using bold print to highlight the term, use of capital letters or otherwise giving the clause a degree of prominence in the contract. A further alternative is expressly to draw the existence of the terms to the attention of the other party.

651. It is now common ground that, contrary to One Touch's Defence, One Touch did not provide its Terms and Conditions to the Claimants directly. During the personal contact that took place between each of the One Touch Investment Consultants and the Claimants, the Consultants did not refer the Claimants to read their Terms on the website, or describe the content of the Terms relied upon to them. None of the Claimants recall finding the Terms on One Touch's website themselves or reading them. As demonstrated by Mr Johnson, there was no cross referencing to the Terms on the key pages of the website. I would add that Mr Durnford specifically said in his evidence that he does not think they were easy to find and Mr Wilton did not seek to demonstrate to any Claimant that this was not the case. I have followed the link provided to me in closing submissions. The Terms were not prominently featured but appeared low on a drop down menu reached from the final of the main headings.

652. In my judgment, looking at all the circumstances and the situation of the parties in these Claims, One Touch's reliance upon the appearance of the Terms on its website does not therefore provide satisfactory evidence for me to hold as a matter of law that One Touch did all that was reasonably sufficient to give all or any of the Claimants notice of its Terms such that they were incorporated into any implied contract by conduct. My reasons are those identified by Mr Johnson set out by way of submission at paragraphs 586-597 above.

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653. Further, I do not consider that One Touch did all that was reasonably sufficient to give notice of its Terms for these purposes in the case of those individual Claimants who signed the One Touch Reservation Form provided to them or those who may have been provided with a One Touch Reservation Form where a purchase did not proceed. Fundamentally, as physically presented and described to each Claimant who received a One Touch Reservation Form, the One Touch Reservation Form was not presented to them as an important document which they were required to consider carefully and sign to establish the legal basis or nature of the relationship that had developed between One Touch and themselves up to that point and henceforth. The One Touch Reservation Form was described to them as a Form which needed to be signed and returned quickly in order that the unit they had already selected for purchase could be reserved for them and not sold to anyone else in the meantime.

654. On the facts and in the circumstances of this case and considering the context and respective bargaining positions of the parties, I consider the Terms upon which reliance is placed by One Touch on the face of that Form and by reference to the Terms on the website were unusual. They marked a significant change in the history of the relationship between the parties up to that point. Against the background of the description which One Touch had given upfront to that point of its services to clients on the major pages of its website and in its marketing materials; the discussions and dealings between each Claimant and One Touch up to that point; the fact it was not explained to any of the Claimants that by signing the reservation form they were also agreeing to One Touch's Terms as set out and the fact that there was no express reference to clauses 7 and 12 of the Terms now relied upon by One Touch from amongst the 20 Terms and

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Conditions to be found on its website; and where these specific Terms have no prominence there, One Touch cannot show they brought the terms on the One Touch Reservation Form and the link to the address for the Terms on the One Touch website fairly and reasonably to the Claimants' attention such that they were incorporated in any deemed contract. There was also no offer to discuss or negotiate the Terms. Indeed, in almost every case, One Touch's overriding imperative when they provided the One Touch Reservation Form to the individual Claimants was that they must not hesitate to return the Form quickly or risk losing the unit they had chosen. The implication being that the unit selected to suit their purposes would be lost if there was any further delay, whether for discussion or otherwise. Notably, the documents show Mr Thornton pressed Claimants such as Mr Funk to return a Form even if they had outstanding questions for discussion afterwards. In the case of Mr van der Merwe, Mr Kerkvliet and Mr Thornton placed a One Touch Reservation Form in front of him to sign during a meeting which he saw for no longer than it took him to sign it.

655. Additional factors which undermine the incorporation of such terms through signature of a One Touch Reservation Form are the fact that the Claimants are, except for the Fourth Claimant, consumers and for many of the Claimants this was the first transaction of this kind they had entered. There was asymmetry in their relationship with One Touch.

656. In the case of Mr Motala and Mr van der Merwe One Touch was inconsistent in its use of the One Touch Reservation Form. They were not asked to sign a Reservation Form for other identical transactions. This was also true for those

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Claimants who were sent the Form for transactions which did not proceed. Strongly suggesting this Form was indeed used by One Touch as nothing more than a reservation document in the cases where it was produced. When Ms Hutchison and Ms Orubapo asked about the Form they were reassured.

657. Each of these facts and circumstances is equally supportive of my view that neither the Terms on the website nor the One Touch Reservation Form where signed or provided took effect as a valid non-contractual notice.

658. Accordingly, as I have found that the Terms and /or the Purchaser's Notice on the One Touch Reservation Form were not incorporated into any contract, none of those Terms was capable of giving rise to a contractual estoppel. Although an agreed basis upon which services are provided can give rise to such an estoppel and can define the basis of the parties' primary relationship even where such matters are agreed late in the day, such that no question of excluding liability or the reasonableness of such exclusion arises, see, for example, *Thornbridge* at [97]-[111] and *Knights* at [244]-[251], there was no question that the relevant terms were not included within the parties' contracts on the facts before the court in those cases.

659. If I am wrong in concluding that there was no incorporation in any deemed contract, I agree with the Claimants that in so far as the limitation of liability provisions operated as an exclusion of a liability which might otherwise arise, and are not basis clauses, clear words are necessary before a court will hold that a contract has taken away rights or remedies which one of the parties to it would have had at common law. Whilst it is open to parties to make an agreement which has that effect, the more valuable the right, the clearer the words of the

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exclusion clause must be in order to exclude that right: see, for example, *Triple Point Technology Inc v PTT Public Co Ltd* [2021] AC 287 at [107]-[108], per Lord Leggatt. Specifically, an exemption clause will not relieve a party from liability for negligence unless it does so expressly or by other clear words on correct interpretation of the contract.

660. I adopt the summary provided in Lewison's Interpretation of Contracts (8th ed) by reference to Lord Morton's guidelines in *Canada Steamship Lines Ltd v R* [1952] AC 192, that in order to constitute an express exemption of liability for negligence the meaning of the clause must be clear to an ordinarily literate sensible person, and it is likely that it must contain the word "negligent" or "negligence" or some synonym for those words: para. 12.80. I also note that in *PA (GI) Ltd v Cigna Insurance Services (Europe) Ltd* [2023] EWHC 1360 (Comm), Dame Clare Moulder held that in the light of developments in the law, it was no longer necessary to refer explicitly to negligence.

661. As mentioned, it is also the case that liability for negligence may be excluded without an express reference to negligence if a fair reading of the clause shows that the parties intended to exclude such liability: para. 12.84. In answering the question whether the ordinary meaning of the clause is indeed to exclude liability for negligence, fine distinctions of language have emerged. If the clause enumerates losses without dealing with causes, it may not protect against liability for negligence; but if it enumerates causes and suggests that the contracting party is free from all losses however caused, he will be protected: para. 12.86, *Gibaud v Great Eastern Railway* [1921] 2 KB 426, per Scrutton LJ. If the clause excludes liability for loss "however caused" that would be likely

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to exclude liability for negligence: *Hinks v Fleet* [1986] 2 EGLR 243; *Brown v Drake International Ltd* [2004] EWCA Civ 1629. If there is any ambiguity at this stage in the process of interpretation then it is resolved against the proferens: see, for example, *Price & Co v Union Lighterage Co* [1904] 1 KB 412.

662. The Claimants say the wording of clause 12 was inadequate because it did not expressly refer to negligence. Very little time was devoted by One Touch's Counsel to this further aspect in their written or oral submissions. However, in my judgment, the wording was insufficient given the facts and circumstances of this case given the individual Claimants status as consumers. My interpretation of the wording used would, in any event, be subject to my conclusion regarding the application of section 62 of the Consumer Rights Act 2015 ("the 2015 Act") and UCTA 1977.

663. On the basis One Touch's limitation of liability clauses were true exclusion clauses and otherwise effective here, the clauses fall within the scope of the Misrepresentation Act 1967 such that the test of reasonableness under the UCTA 1977 and (now) the 2015 Act apply. See, for example, *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* (as cited above), *Springwell Navigation Corp v JP Morgan Chase Bank* (as cited above), and *First Tower Trustees v CDS (Superstores international) Ltd* [2018] EWCA Civ 1396; [2019] 1 WLR 637.

664. I agree with the Claimants that where the provisions of the Terms and /or the One Touch Reservation Form seek to, or otherwise have, the effect of excluding liability for breach of contract and negligent misstatement (and indeed breach of the 2008 Regulations), they constitute unfair terms or notices under section

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62 of the 2015 Act or sections 2 and 3 of the UCTA 1977. They are therefore of no effect. Importantly, my finding for these purposes is identical so far as the Terms and Conditions and/or content of the One Touch Reservation Form fall to be treated as non-contractual notices.

665. As regards all the Claimants except Hoffelder, the 2015 Act is applicable. Section 62 of the 2015 Act provides for contract terms and notices to be fair. By sections 62(1) and (2), an unfair term or notice, which includes a non-contractual notice, is not binding on a consumer. Sections 62(4) and (6) provide that a term or notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations (under the contract or otherwise) to the consumer's detriment. Sections 62(5) and (7) identify the context within which the inquiry takes place.

666. In *Payward Inc & Ors v. Chechetkin* [2023] EWHC 1780 (Comm), [2023] 2 CLC 45, Bright J observed at [72 to 74] that the statutory definition of a consumer is wider than in other areas such as jurisdiction, where the relevant criteria omit the words "*wholly or mainly*". Even in the jurisdiction context, financial literacy, business sophistication and high value transactions do not necessarily tip the balance against consumer status: *Ang. v. Reliantco Investments Ltd.* [2019] EWHC 879 (Comm), [2020] QB 582, 609 to 612 per Andrew Baker J. In reaching his decision in that case, his Lordship said:

"*62. The question is whether a private individual committing capital to speculative currency transactions in the hope of making investment gains is, or can be, an "consumer" in that definition. Wealthy consumers are consumers nonetheless and the amounts involved in this case do not mean Ms Ang was not a consumer. ...*

63. In my judgement, the investment by a private individual of her personal surplus wealth (ie surplus to her immediate needs), in the hope of generating

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good returns (whether in the form of income on capital, capital growth, or a mix of the two), is not a business activity, generally speaking. It is a private consumption need … It will be a fact specific issue in any given case whether a particular individual was indeed contracting as a private individual to satisfy that need, ie as a consumer, or was doing so for the purpose of an investment business of hers (existing or planned)."

667. In my judgment, based on the detailed evidence provided about each of the Claimants, each (save for Hoffelder) was dealing as a consumer when they entered their transaction so as to fall within the scope of section 2(3) of the 2015 Act. They were all individuals "*acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession*". Even in the case of Mr Motala with his banking background, his financial literacy and business sophistication do not tip the balance against his consumer status given the very specific nature of the personal property investments purchased overseas.

668. In circumstances where the Terms and the content of the One Touch Reservation Form seen and signed by some were not brought adequately to the Claimants' attention (as described above), and were undercut by One Touch's statements that the One Touch Reservation Form required to be signed by the Claimants without delay for the specific purpose of reserving a unit only, I am unimpressed by Mr Wilton's arguments that it was significant that none of the Claimants questioned or objected to the Terms or disclaimers. I do not agree that the reason for this was because it is to be inferred that they reflected the reasonable expectations of the parties that One Touch was acting as a selling agent and not an adviser. Indeed, Ms Orupabo explained she was concerned about it (in respect of a unit she did not purchase) but thought the Purchaser's Notice could not be specific to One Touch's role in the unit she was buying. A conclusion reflecting her view they were advising her to purchase. In cases

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where a One Touch Reservation Form was sent and the sale did not proceed or was not proceeding at that stage or an earlier Reservation Form had been sent in a different format and signed, it is also to be inferred that the relevant Claimant did not consider it, and I accept the Claimants' evidence to that effect where they were cross examined about that anyway.

669. I accept that the factors pleaded in the Amended Reply (set out at 597-598 above) establish that the provisions relied upon by One Touch would create a significant imbalance in the parties' rights and obligations. The lack of reasonable notice, the impossibility of negotiation, the imbalance of bargaining power between the Claimants and One Touch, and the stripping of any content or substance from One Touch's role if the provisions are upheld, point firmly against enforceability. Mr Kerkvliet and Mr Thornton confirmed that the Terms were standard form and were never altered in practice.

670. Each of the pleaded particulars of unfairness in relation to the Terms, and the One Touch Reservation Form are established in that:

i) no steps or reasonable steps were taken to draw the Terms and disclaimers to the attention of the Claimants.

ii) the Claimants were given no opportunity to enter negotiations in respect of the Terms and disclaimers but are alleged simply to be bound by them by virtue of contact with One Touch. On an objective analysis the Claimants did not assent to them.

iii) there was an imbalance of bargaining power between the Claimants, who were private individuals with limited or no experience of off plan

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property investments in the UK, many of whom were domiciled abroad, and One Touch, which held itself out as an experienced and professional investment adviser / intermediary, alternatively on One Touch's own case, an agent of TCHG for the marketing and sale of investment properties for reward.

iv) it would be contrary to the requirements of good faith, fair dealing and reasonableness for One Touch to make statements to the Claimants which it intended would induce them to enter into the purchase arrangements with TCHG and for which it was paid 12.5% commission on sales that it arranged by TCHG, only then to claim that the Claimants were not entitled to rely on any of those statements or required to verify those statements themselves regardless of their content, by operation of the Terms and disclaimers.

v) the effect of the Terms and disclaimers alleged by One Touch creates a significant imbalance between the rights of the Claimants and the rights of One Touch.

671. The limitations of liability in the One Touch Terms and Conditions and on the One Touch Reservation Form are therefore unenforceable against the individual Claimants, in any event.

672. For the reasons set out at paragraph 564 above, I have already determined that the claim made by Hoffelder is not made out given the lack of evidence from Mr Lenzlinger. I also know very little about Hoffelder. Whilst the Claimants assert that the factors pleaded in respect of the individual Claimants in the Amended Reply apply with equal force, I cannot establish in any event whether

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that is or is not correct to engage section 2(2) of the UCTA (attempts to exclude or restrict negligence liability) and section 3 (attempts to exclude or restrict liability for breach of contract where one party's standard terms of business are in play).

Tort

673. As described by Lord Reed in *N v Poole BC* [2019] UKSC 25; [2020] AC 780 at [68]:

> "[T]he principle [of assumption of responsibility] has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimants reliance upon the exercise of such care) … or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken."

674. In *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 638 C-E, Lord Oliver said that for a duty of care to arise under the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 line of authority in a claim for negligent misstatement it must typically be shown that:

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

675. In *Williams v Natural Life Foods Ltd* [1998] 1WLR 830 at 835, Lord Steyn said:

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> "The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in his dealings with the claimant. Obviously, the impact of what the defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification, the primary focus must be on exchanges … which cross the line between the defendant and the [claimant]."

676. As Lord Wilson explains in his judgment in *NRAM Ltd (formerly NRAM plc) v Steel* [2018] 1 WLR 1190, the requirement that there should be an assumption of responsibility is to some extent a legal construct in the sense that in many cases the defendant professional will be treated as having assumed responsibility to the third party for his actions by virtue of the proximity between them and the obvious effect which any failure on his part would have on the third party. There will rarely be an actual, conscious and voluntary assumption of responsibility not least because a professional will have a client to whom he is contractually bound. But, on the basis that the court is deciding whether to treat the defendant as having assumed legal responsibility to the third party, non-client, for his actions, it will be necessary to balance the foreseeability that the third party will rely on the professional to perform their task in a competent manner against any other factors which would make such an imposition of liability unreasonable or unfair.

677. The relevant law was comprehensively summarised by Carr LJ (as she then was) in *Spire Property Development LLP v Withers LLP* [2022] EWCA Civ 970; [2023] 4 WLR 56. Carr LJ explained:

> "59. Where there is no retainer, different considerations arise. The concept of assumption of responsibility as identified in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 remains the foundation of the tortious liability: *NRAM Plc (formerly NRAM Plc) v Steel* [2018] UKSC 13; [2018] 1 WLR 1190 at [24]; *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43; [2019] 1 WLR 4041 at [7]. The reference to "voluntary" assumption

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in *Hedley Byrne* (at pages 529-530) must not be taken to mean that the defendant needs to consent to the claimant placing responsibility on them. Rather the doing of the act implies a voluntary undertaking to assume responsibility.

60. Whether any responsibility is assumed, and the extent of any such assumption, is to be judged objectively in context and without the benefit of hindsight. Thus, an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant the claimant (see *Henderson v Merrett Syndicates Ltd*, at [181], endorsing *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 637). The primary focus must be on exchanges which cross the line between the solicitor and the claimant (see for example *William v Natural Life Health Foods* [1998] 1 WLR 830 ("*Williams*"), 835G). A fact sensitive enquiry in each case is necessarily required. …

64. … As set out above, the question of scope of the duty assumed by the solicitor has to be assessed as a matter of objective construction. The touchstone of liability is not the state of mind of the defendant (see *Williams* at p835G). As to principle, whether or not a duty of care is exacted on the facts, and the scope of that duty, is a question of law. As to fairness, the person requesting the advice should be entitled to proceed on the basis that [there] the solicitor has assumed responsibility for that which, on an objective basis, the relevant communications suggest that they have …

678. The question whether advice has been provided is an objective one. Mr Johnson referred to *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474; [2021] 3 WLUK 561 at [75] where, in a financial investment case, Newey LJ drew upon the analysis of Henderson J in *Walker v Inter-Alliance Group Plc* [2007] EWHC 1858 (Ch); [2007] Pens LR 347 and of Judge Havelock-Allan QC in *Rubenstein v HSBC* [2011] EWHC 2304 (QB) at 83, to summarise the position as:

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

679. In turn, Mr Wilton relies on the dictum of Hamblen J in *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) at 508:

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"There is a clear distinction between giving advice and assuming legal responsibility for that advice".

680. He also referred to the following extract from the judgment of Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), an investment banking case:

"The fact that a person, in the capacity of a salesperson, gives investment advice, tells us nothing about what, if any, obligations were in fact owed … still less does it inform us to the extent of any such duties of care as were owed. In order to decide whether the advice given gave rise to obligations that went beyond the normal recommendations or "advice", given in the daily interactions between an institution's salesforce and a purchaser of its products, so as to import obligations of the type owed by a fully fledged investment advisor, one needs to look at all aspects of the objective evidence of the relationship between the parties."

[361] "It should be appreciated that the expressing of opinions and giving of advice is "part and parcel of everyday life for salesman in emerging markets".

[449] "It follows that mere giving of advice, even specific investment advice, is not sufficient to establish a duty of care. This is the case even where the investment advice is relied upon by a customer: "the fact that … a salesman … was, in that capacity, giving such advice and making recommendations, and that the customer was taking the salesman's advice and recommendations into account … does not in my judgement predicate that a duty of care arises on the part of the salesman. Reliance on its own, even if established, does not give rise to an advisory relationship, with consequential duties of care".

681. The question is therefore whether responsibility should be held to have been assumed by One Touch to each of the Claimants in marketing the TCHG investment products to them, assessed objectively on the facts, rather than by reference to One Touch's state of mind, and without the benefit of hindsight. It is a fact sensitive enquiry as to whether One Touch gave advice, and whether if it did give advice, it assumed an advisory relationship giving rise to a duty of care. The issue of reasonable reliance requires consideration both of whether it was reasonable for the Claimants to have relied on any representation or advice given by One Touch and also whether One Touch should reasonably have foreseen that the Claimants were likely to do so.

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682. I do not agree with Mr Wilton that the existence of One Touch's General Services Agreement with TCHG provides an unpromising start for the Claimants' case here. The starting point here is not the familiar one where an individual necessarily well-understands that a relevant professional or salesperson is in a contractual relationship with their counterparty to act as its agent or employee in a well-understood role and therefore comprehends what their duties to their own client likely entail. Including, for example, the potential for conflict of interest. Furthermore, here, One Touch simultaneously presented property investment opportunities as sourced and brought to the market from a range of different companies: not simply TCHG.

683. There is no evidence that at any stage One Touch ever expressly described or introduced the company to the Claimants or others as the salesforce acting for their developer clients, including TCHG. The facts stand in stark distinction to Mr Wilton's analogy of the salesman in a car showroom. Perhaps more pertinently, they also stand in sharp relief to the nature of the well-understood role of an estate agent who acts for a client in respect of a property brought to them for sale, draws up particulars for them describing the property, conducts viewings, then negotiates the sale on their client's behalf.

684. The various forms of documentary evidence and publicity which One Touch generated expressly chose to portray the business as a neutral intermediary or conduit which had sourced products from a range of developers to the standards it had set itself by reference to the needs of the investor clients to whom they intended to present them. In effect, they stood behind the products in their dealings with the Claimants and vouched that the information they provided

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about them was accurate and reliable based on the due diligence they said they conducted.

685. The picture presented by One Touch was not that Mr Rana, Mr Thornton, Mr King and Mr Kerkvliet were salesmen whose job it was to sell the TCHG products and to make their money by selling them. They were presented as making their money by providing expert advice in return for the commissions which they would receive if an investor invested in any one of the range of specially selected products One Touch recommended to them in order to suit their identified needs. Mr Thornton and Mr King and the other One Touch Consultants were not simply providing information as to how a TCHG investment would work. The evidence is that they advised the Claimants in conversation and by email that One Touch itself had independently looked at the figures and evaluated the risks and considered the investments good ones and safe.

686. Objectively, from the outset of One Touch's relationship with each of the Claimants and throughout the course of each of the transactions that followed, One Touch openly presented and promoted a fundamentally identical description of the nature and purpose of the business and the services it offered to prospective investors. This was the case whether they were first brought into contact with the company through One Touch's own description of their business and services:

i) as a result of an internet search using One Touch's marketing search terms, and/or

ii) through viewing the One Touch website, and/or

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iii) through viewing Mr Kerkvliet's You Tube videos, and/or

iv) through reading a One Touch newspaper advertorial, and/or

v) following an invitation to attend a One Touch presentation by Mr Kerkvliet at an hotel followed by an in-person one to one investment consultation with Mr Kerkvliet and/or Mr Thornton.

687. One Touch told the potential investors that they were its "*clients*" and "*Here at One Touch we put our clients and their interests first*." This is not language which objectively described, or communicated, that One Touch's clients would, in reality, simply be TCHG and the other developers whose properties they marketed and that they only acted for them. To the contrary, these were express statements by One Touch deliberately directed to prospective purchasers which told them that the primary focus of One Touch's business in matching people with properties was to treat the prospective purchasers' own interests as paramount. This was the repeated mantra at the heart of the service One Touch said it provided to them as "*clients*". It was sourcing high yield properties *"for people looking for income producing investments*".

688. One Touch positioned its business and services as suitable for use by various classes of clientele. Specifically, they identified in their publicity their experience with nervous first-time investors who would be attracted by the offer of advice and guidance. They focussed marketing on overseas investors who were looking for help to make secure investments in a stable currency. Stating that they could help them navigate through an unfamiliar legal system and the process of making an investment in a product and a development in another country. This was not a business which simply advertised properties or products

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for sale and purchase. It targeted groups of potential investors on the basis that they were the kinds of people who would be attracted by a service where they were told that they would be looked after as a client through the provision to them of expert "*investment advice*", guidance and support. Evidence which supports my findings that the Claimants objectively expected to receive advice, and not just information, and that the Claimants reasonably thought One Touch was assuming an advisory relationship towards them, that they were entitled to rely upon them as an advisee, and that One Touch was well aware that the Claimants would do so when deciding to purchase.

689. In so far as it was understood by certain of the individual Claimants that One Touch acted as an agent on behalf of various developers in marketing the selected products which it stated that it had sourced from those developers and/or that One Touch would be paid a commission by a specific developer on a purchaser's investment in their development, these are relevant factors which must be considered and weighed. However, they form only part of the matrix of fact given the way in which One Touch described both its own business and its relationship with the prospective investors with whom it dealt in communications which crossed the line between them. Reflecting the evidence as to the Claimants' own perceptions as a result of their dealings with One Touch, Mr Kerkvliet himself described a "*dual role*". A situation where he did not himself apparently consider the General Services Agreement with TCHG was incompatible with treating the Claimants as One Touch's clients.

690. Critically, One Touch's case that it was simply passing on information from the developer cannot stand with its own description of its business and services on

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the website, You Tube and newspaper adverts, for example. One Touch introduced its service in terms by telling prospective investors that it would provide investment advice to them about the products it had sourced and as to which was suitable for them by reference to their own financial goals.

691. The individual "Investment Consultant" assigned to each client by One Touch was introduced to them through their advertising as the expert who would advise them. I consider that Mr Rana and Mr King's titles of "Investment Consultant" and Mr Thornton's title of "Senior Investment Consultant" carry weight here. They reinforce the nature of the service to be provided. The Consultants would provide expert advice to potential investors as their clients regarding the suitability of the selected investments One Touch offered following a consultation with them as to their own needs. A state of affairs that is reinforced where One Touch's advertising was pitched to the widest range of investors, and specifically targeted first time and overseas investors, who may well not have made investments of this kind before or were unfamiliar with the English system. As described in the website testimonials which One Touch displayed, One Touch set out to attract clients who were looking to invest outside the scope of their own experience and told them that they could confidently trust One Touch's expertise with regard to products of this kind if they purchased one of its sourced products.

692. Mr Wilton draws attention to the Judge's conclusion in *Thornbridge* that the title of "Corporate Risk Adviser" could not be given any significant weight there. As stated in the judgment in that case, that was a conclusion expressly

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drawn in the circumstances of that case: see [96] (ii). The relevance and weight of evidence of this kind is context specific and the facts are not analogous.

693. It is right to say that against a different background the language which One Touch used to describe their Investment Consultants as "*approachable*" and "*informed*", and the statements that the Investment Consultants loved to share their "*expert knowledge*" to "*help*" potential investors to "*take empowering decisions with confidence and ease*", could be consistent with a non-advisory sales relationship. Here, however, they provide an additional gloss to One Touch's presentation of its business as a property investment company which specialised in sourcing investments through the active endeavours of its expert team who could then advise them as to their suitability for them. One Touch encouraged the prospective investor to ask their Investment Consultant questions about the products recommended because this engendered confidence that they could safely repose trust in the products based on their expertise.

694. Although plainly motivated to reinforce One Touch's defence that it was making sales for the developer, Mr Kerkvliet's answers also exposed that the One Touch staff routinely went beyond the developer's brochure to provide their own explanations in simpler terms. Doing this in order to make the investor "*feel comfortable*" that they had been provided with the relevant information that they needed in order to make a decision whether to purchase. One Touch's own rationale being that building a relationship of trust and ease between Consultant and client encouraged the client to purchase. That being to One Touch's financial advantage.

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695. Similarly, from the beginning to the end of a transaction, the footers to the emails One Touch sent to the Claimants continuously reinforced the company's motto that it was "*your partner in prosperity*". The message that One Touch was working together with the recipient in a partnership where One Touch's role was to help the investor to achieve the financial goals which they had identified to One Touch to the investor's financial advantage.

696. One Touch presented itself as a property expert with regard to the nature of these products in respect of these products and its industry knowledge. To the same effect, the website article set out at paragraph 118 above made comparisons with other forms of investment and provided a favourable evaluation of the TCHG care home units it had sourced and marketed. I accept Mr Morrell's evidence that Mr Thornton told him that his money would be better invested with TCHG than left in the bank. Mr King told Mrs Heneghan the TCHG product was not too good to be true. Other Claimants such as Ms Hutchison and Ms Orupabo initially contacted One Touch seeking to invest in student property and were advised during their initial investment consultations with Mr Thornton and Mr King respectively that it was the TCHG care home units which were the most suitable form of property investment for them to suit the financial needs each had described. Advice which they then took. Mr King advised Mr Durnford that the TCHG care homes investments were safe investments when he mentioned investing in bonds instead. Mr Thornton advised Mr Uruthiran and Mr Lisco that a TCHG care home investment would best suit their needs for a stable return when persuading them to reinvest following their previous poor experience. One Touch also recommended other products from within its range too. Just days after Mr and Mrs Heneghan made

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their care home unit investment with TCHG through Mr King they invested in an hotel room investment with Aronex through Mr King too.

697. The clear message One Touch used to attract potential property investors such as the Claimants to engage with the company, and to do business through One Touch, was always that One Touch was a specialist "*property investment company*" which dealt only in property investment products which had been independently sourced by their own experienced experts from a range of selected reputable developers. Whether the investment was in student accommodation, hotels or care home developments, the property investment products they offered in developments across the country had been identified by One Touch through the application of the metrics described, and the investor focussed "*due diligence*" which they said they always carried out prior to any marketing.

698. Contrary to Mr Wilton's submission that One Touch undertook such due diligence for its own benefit only, One Touch expressly informed prospective investors that it undertook this due diligence for *their* benefit. The rationale provided for One Touch's choice of the selection of property investments that it marketed was always that these had been "*well-researched*" by One Touch to "*provide [the investor] safety and protection*". They were investments with developers One Touch was able to describe to them as "*reliable developers*" and "*credible developers*". One Touch told investors it had ensured that any investments it marketed had "*minimal risks attached*". In essence, that their "*experts*" had sourced and checked these particular property investment

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products specifically because they offered the investor safety and protection to minimise investment risk to them in so far as that was possible.

699. Indeed, to reinforce the company's core message that One Touch's concern was the investors' "*safety and protection*", One Touch deliberately adopted legal terminology when communicating that they had carried out "*due diligence*" on any property investment before offering it to a client. A process of carefully examining and verifying information about an investment opportunity which is carried out to mitigate risk. One Touch openly publicised that this "*due diligence*" even included an instruction to an "*independent solicitor*" to conduct an investor focussed review of "*the proposed purchase agreement to establish if there is anything in the fine print that could be to our clients' detriment*." That is not the objective statement of a vendor's agent and provider of information.

700. To similar effect, One Touch publicly stated that it did not market any project that it would not be "*comfortable in recommending to our prospective clients*". Again, contrary to One Touch's case, an express assertion by the company that the products it marketed were recommended by One Touch. Beyond that, it did not market a project where they did "*not have a good feeling about the development team, or the suitability of the investment*". Independent endorsements of the developers and their products volunteered by One Touch to support the merits of the investments which One Touch represented they had carefully chosen through an evaluation exercise for presentation to their "*clients*".

701. I note that this informed process of selection was portrayed as rooted in research including One Touch's own appraisal of a development team to whom a

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prospective investor would not have access. The intent being that the communications seen by or presented directly to the individual Claimants would convey to them, as a "*client*" of One Touch, they could safely repose their trust and confidence in One Touch to look after their best financial interests when it provided information, advice and guidance to them about their selected recommended property investments. The message communicated was that One Touch could provide special insight that no other adviser would and that the Claimants could not obtain themselves. A solicitor, valuer, surveyor or the Claimant would not have access to the developer themselves to establish their credibility through asking them detailed questions about their plans, product and means. They would also have no access to speak to TCHG's contractors on an intended development site, as One Touch said that it always did when assessing the project pre-marketing.

702. The TCHG products promoted to the Claimants were therefore deliberately presented by One Touch in its communications as the fruits of a value judgment exercise which One Touch had conducted to establish their independent merit and safety and which was intended to influence the decision of the potential investor Claimant as the recipient of that information. The intention being to persuade the Claimants and others to invest in these products and to communicate that they were better products for them than others that may be available in the market. These were not the normal recommendations or "advice" given in the daily interactions between an institution's salesforce and a purchaser of its products. They also all support the assumption of an advisory relationship with regard to the provision of that advice to the investor client.

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703. Mr Kerkvliet's answers in cross examination served to underline these investments were positively presented by One Touch in its interactions with clients as investments which it considered to be good products itself. One Touch was not in the business of marketing any property investments that a developer may invite it to market for them.

704. Importantly here, when considering the impact of the contractual background as between One Touch and TCHG and its other contemporaneous developer clients, One Touch set out to foster its own long-term business relationship with each of the Claimants independent of any developer whose products they marketed, including TCHG. They made clear to prospective investors: "*Our brand is not about a one-time sale*". Mr Kerkvliet's evidence was that One Touch's business plan was to secure the investors' own repeat business with One Touch for its own economic advantage. For example, in Mr Uruthiran and Mr Lisco's case, in 2015 they had invested in student accommodation with a different developer through One Touch. When they came back to One Touch in late 2018, Mr Kerkvliet and Mr Thornton recommended that they invest in a TCHG care home unit instead. After investing with TCHG, Mr and Mrs Heneghan immediately invested with Aronex as well.

705. The fact Claimants such as Mr Motala and Mr Funk did not see One Touch as simply TCHG's marketing agent, and that they considered they had their own separate and continuing relationship with One Touch to look after their interests, is evident from the fact that when they received correspondence from Accordiant regarding its change of name, each immediately wrote to One Touch to seek their advice as to whether this was indicative of a problem. They then

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accepted One Touch's reassurance. Similarly, it was One Touch to whom Mr Motala wrote to complain about the fact he was not receiving his guaranteed returns in 2018. He asked One Touch to chase Accordant on his behalf, which One Touch did. Later in 2018, Mr Motala wrote to One Touch to complain about Accordiant's inefficiency. In 2019, when Mr Hickson's return was not paid, it was Mr Thornton he contacted to sort matters out for him. Much later, when TCHG collapsed and investors contacted One Touch, One Touch sought to encourage Claimants to use solicitors it had sourced to seek to recover their monies from TCHG in insolvency.

706. As to reliance, it is evident that individual One Touch Consultants did not only actively persuade Claimants to invest with TCHG but also to persuade them to make that investment decision quickly. It is striking how fast many of the Claimants purchased after their first contact with their One Touch Investment Consultant. The consistent theme within One Touch's correspondence was that the Claimants needed to reserve the identified unit quickly or a valuable opportunity may be lost to them. A standard refrain which cuts across the submission that One Touch had any expectation that the Claimants would first undertake any meaningful "due diligence" of their own rather than relying upon One Touch to have already taken the steps which it considered necessary as an expert property investment company. Through their marketing and branding, One Touch set out to foster reliance.

707. Mr Wilton's submissions regarding the foreseeability and reasonableness of the Claimants' reliance on what One Touch said cannot stand with the facts. In particular, his submission that One Touch went out of its way to emphasise that

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the Claimants should get their advice and that it is highly significant that they received advice form POLS. There is no evidence that One Touch emphasised that the Claimants should obtain their own advice about the investment proposition. On the basis of the evidence provided and the evidence which I accept, the Consultants did not say this to any of the Claimants. It also did not provide its Terms and Conditions to each Claimant or direct their attention to the website and its content.

708. Only 9 Claimants signed a One Touch Reservation Form. None of them were advised in writing to pay close attention to its terms. One Touch treated this in its dealings with them as a functional document to secure a reservation only; and to do so quickly. The signature of this document was not portrayed or appreciated to be an important formal moment sufficient to re-set the advisory relationship which existed at that point. In context, and unlike the facts in cases such as *Thornbridge* and *Knights* (as cited above), even where this Form was read by any of the Claimants, the counter-factual statements set out at the point of reservation regarding One Touch's role and the obtaining of independent advice therefore carry little objective weight in the balance here against the background of the advisory relationship of trust which One Touch had carefully developed between itself and these individual Claimants. Where the statements were read, the evidence of individual purchasers was that they did not consider they were applicable to the investment they were making. I have also held them to be unenforceable as non-contractual notices. I do not therefore consider the Purchaser's Warning or reference to the website sufficient evidence to define One Touch's role as non-advisory, or to render it either unforeseeable or unreasonable that the Claimants would continue to rely upon One Touch's

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advice, and therefore to undermine an assumption of a duty of care as pleaded and described by the Claimants on a fact specific analysis.

709. To the same effect, I do not consider the existence of the Warning on some of the TCHG brochures distributed by One Touch makes it either unforeseeable or unreasonable that the Claimants would rely upon One Touch. One Touch distributed the brochures without explicit reference to the Warning against a background where it presented the product as an investment it had sourced and the Warning itself was standard text inserted by TCHG and not a bespoke warning. Where there is evidence that Mr Hickson and Mrs Heneghan raised the Warning with their Investment Consultants Mr Thornton and Mr King and they downplayed its effect.

710. As to POLS, it is noteworthy that it was a standard early element in One Touch's cross examination of each of the Claimants that they must accept that when they retained POLS they had to complete a retainer letter in order for it to act for them as their adviser. A line of questioning pursued to support One Touch's case that there was a clear separation of roles between One Touch as TCHG's agent and POLS as the Claimants' adviser. The assertion that followed being to the effect that each Claimant must therefore have understood that without a letter of retainer and / or payment to it One Touch's role was confined to that of a marketing agent for TCHG only. Alternatively, that the Claimants had not relied upon One Touch at all in completing their purchases and that it was not foreseeable that the Claimants would rely upon One Touch and that it would be unreasonable to have done so.

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711. At the date when each Claimant made their decision to purchase a unit One Touch cannot have envisaged that it was unreasonable to rely upon its advice because the Claimants were instead relying upon the advice of either a solicitor or a surveyor or a valuer. First, there was no legal documentation available to the Claimants prior to POLS' instruction when One Touch advised them in respect of the investment proposition against a background where One Touch publicised that it had previously asked an independent solicitor to review the documents from the clients' perspective. Second, One Touch marketed the units off-plan without the ability for Claimants to view, but having viewed the sites themselves, they said. They were not available for third party inspection. Third, because the only relevant material about the structure and safety of the purchase proposition and the timeline for development was necessarily that which had been made available to them by One Touch. Fourth, because it then referred them to solicitors it said were very experienced in dealing with these investments and who they worked with often. Fifth, because from that point onwards they remained in touch with both the Claimants and POLS without mention being made by the Claimants of the instruction of a valuer or surveyor or any request for access to a site, for example, and were copied into all the Claimants' correspondence with POLS through to completion. In some cases, continuing to answer questions raised directly.

712. POLS were indeed solicitors One Touch not only recommended but sometimes persuaded the Claimants to use. Even obtaining a discount for Mr Uruthiran to persuade him to do so. Mrs Heneghan was told her own solicitor would not have sufficient expertise to deal with the matter for her. Whilst POLS had independent obligations these were overlapping relationships.

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713. The majority of the Claimants understood POLS at the time simply to be dealing with the formalities of the transaction on their behalf. They did not look to them to provide advice regarding the risk of investment. Thus, reflecting their view that they had already obtained reliable advice in respect of the safety of their purchase from One Touch.

714. From the very recommendation of POLS and throughout the conveyancing, Mrs Kerkvliet, occasionally Mr Kerkvliet himself, and Mr Thornton, were routinely copied into the confidential legal correspondence to and from POLS and the Claimants up to the date of completion of their purchases. As explained at paragraph 554 above, this was not appropriate if One Touch solely acted as an agent for TCHG, and it was unnecessary if One Touch was simply an entity which had provided information on behalf of TCHG. Instead, this was the action of an entity which objectively continued to encourage the Claimants that it was monitoring their transactions through to completion as part of the service it was providing to them for their assistance. It was therefore both foreseeable and reasonable that the Claimants continued to rely upon One Touch as looking after their interests through to completion. As the disclosure demonstrates, Mr Thornton also continued to answer questions asked of One Touch by Mr Funk, Mr Roberts, Mrs Byers and Mrs Bester, including on legal matters. Thus demonstrating continued reliance upon the company at the time.

715. I also fully accept the Claimants' evidence that POLS' recommendation of a surveyor and valuer would seemingly have taken matters no further anyway given the nature of their purchase. This was presented as a standard sentence in each Report on Title. These were in the main development sites and they were

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sold off-plan without the opportunity for purchasers to inspect. As mentioned, the Claimants were told on the website that One Touch had visited the sites already. The price payable for the off-plan unit was set through open market exposure in circumstances where One Touch told the Claimants that if they delayed the prospect may be lost and disappointed would-be purchasers consistently did lose out on investment in these attractive TCHG schemes.

716. In summary, the purpose of the task or service provided to the Claimants was presented by One Touch as a service whereby it would treat them as their client and provide them with expert property advice on a suitable property investment to suit their individual needs from the range of property investments it had sourced from reliable developers based on its own due diligence. This was to be for the benefit of the Claimant.

717. One Touch had comprehensive knowledge of the detail of these transactions from the point of first contact with a Claimant through to the point of eventual purchase and, in some cases thereafter. It chose to actively promote the TCHG investments to the Claimants as potential investors who it thought based upon its contact with them would be interested in purchasing these specific products. It did this in a way which was specifically designed to encourage the Claimants to rely on One Touch's professed expertise as described, and the checks it publicised it had carried out for their protection, and with the knowledge that it would be reasonable for the Claimants to do so. This was so whether they were overseas investors unfamiliar with the English market and procedures who had been targeted because of their identified interest in protecting their funds and generating an income safely and profitably off-shore; unsophisticated first time

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United Kingdom based investors looking for informed help and advice to invest their savings safely for a better rate of return than the bank; or retired individuals who had come into additional funds and were looking to boost their retirement savings. Three of the separate classes of individuals expressly referenced across the client testimonials One Touch selected to advertise its services on its website and at in person events.

718. One Touch presented itself in numerous communications which objectively crossed the line between itself and the Claimants as a whole and individually as the conduit between the developers whose products it had personally selected for marketing and for the investors in those products whose interests it told them that it was putting first and upon whose selection recommendations it could rely. I therefore consider that the Claimants' description of One Touch as an "*experienced property investment intermediary*" is entirely apt.

719. Taking these matters together, One Touch did not simply market property investments to the Claimants on behalf of developers by advertising them for sale and purchase in the well-understood manner of a vendor's estate agent. Looked at in the round, and objectively, One Touch's dealings with the Claimants amounted to advice, not merely the giving of information. They involved recommendations and expressions of opinion in circumstances where One Touch not only gave advice but voluntarily assumed legal responsibility for that advice.

720. In the circumstances of this case, I do not consider that the cases which Mr Wilton cited by way of differentiation are of assistance to One Touch. Each decision turns upon its own specific facts. The first of these cases was *Thomson*

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v Christie Manson & Woods Ltd (as cited above). It was alleged that the auctioneers Christies owed the claimant a duty of care in describing a sale item to her and to inform her of any doubts or queries of which they were aware. The duty was alleged to arise not simply by reason of her receipt of Christies' catalogue with its description of the items but by reason of her position as a "special client" of the auctioneers and what she was told about the items prior to the sale on behalf of Christie's by the employee appointed as a special advisor to her. Christies conceded that it owed a duty to the claimant to use reasonable skill and care in describing the items as they did and in making statements to the claimant about their date and quality. It did not rely on any of its conditions of business as excluding or precluding the existence of such a duty of care. It made these concessions because the claimants had requested information about the items in advance; Christies knew she had no relevant expert knowledge and that she was not taking expert advice; and the employee gave her information in conversations before the sale. It denied it owed any wider duty by reason of sending the sales catalogue, or by designating her a special client. Christies asserted that its dealings with the claimant were as the agent of the seller.

721. Mr Justice Jack held that Christies' catalogue descriptions fell below the standard to be expected. The descriptions all provided a feeling of confidence and certainty about the items, which was unjustified. The limited duty Christies had conceded in describing the items and making statements about them did not take account of the relationship which existed between the claimant and Christies as their special client whom the employee had been deputed to help and advise. Christies knew that she was not taking any independent advice and she was looking to them. They knew that this was a new field for her and that

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she had never made a comparable purchase before. They took it upon themselves to inform her through the employee of the very high quality of the items as examples of the period, plainly with the object of encouraging her to bid for them. They gave what was in the circumstances an incomplete picture and she was entitled to a fuller one.

722. Mr Justice Jack did not find, and did not need to find, that Christies were obliged to give the full and detailed advice that might have been expected from an independent art expert had the claimant engaged one to advise her on the items, as she could have done. He was satisfied that the circumstances required Christies to tell the claimant that the dating of objects in this area was an unusually difficult one because of the copies and imitations of 18th Century items which were made in the Second Empire and that Christies were relying very largely simply upon the exercise of their judgement following visual inspection. The claimant should have been told that the catalogue inflated what could properly be said about the items and was likely to give a misleading impression about Christies' knowledge and the sureness of their judgement. The circumstances required that the claimant should be told the risk that she ran in paying a large sum for the items. The evidence was that if she had been told she would not have bid.

723. If anything, contrary to One Touch's reliance upon this decision, *Thomson* is an example of a case where, notwithstanding Christies' role as the vendor's agent and the fact that the claimant could always have sought their own independent expert advice, the fact that Christies had identified to the claimant that they treated her as their own special client, had knowledge of her personal

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circumstances and of her reliance upon their own professional expertise in evaluating the merits of the sale items advertised by them, and when answering her questions in order to encourage her to make her decision to bid, are echoed by the facts here. The major difference being that the Claimants would go on to instruct a conveyancing solicitor to make their purchase.

724. The decision also provides a helpful demonstration of how the nature of any duty adopted is always fact specific. It was unnecessary for the court to find that the duty Christies assumed was equivalent to the wide-ranging duty of an independent expert for the judge to hold that Christies should have provided the claimant cautionary advice about the misleading impression created by their own catalogue because of the true limitations of their own state of knowledge and sureness of judgment and the risks of purchasing.

725. In *McHale v Dunlop* (as cited above), it was held on the facts that the defendant had not assumed responsibility to the claimants because he had not specifically presented himself as a financial adviser, as alleged by the claimant, but merely as an introducer of investors to investments in the Dolphin Trust; he had not gone beyond presentation of the Dolphin Trust's investment brochure; and, in all the circumstances, including the fact that the claimant had presented himself as a sophisticated investor, the defendant had not taken it upon himself to advise the claimant as to the suitability of the Dolphin Trust as an investment vehicle. It was found as a fact that the claimant had already decided that he wanted to invest some of his pension funds in Dolphin Trust loan notes. It was only having taken that decision, in principle, that the claimant was introduced to the defendant. The claimant knew that the defendant was not an independent

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financial advisor offering independent advice on the suitability of a particular investment from a range of possible investment opportunity options. He knew that the defendant was concerned solely with trying to obtain investments in the Dolphin Trust because he would receive commission on such investments. The claimant was not looking for advice from the defendant on the relative merits of acquiring loan notes in the Dolphin Trust as against other investment opportunities. Rather, he was looking to the defendant to execute his own investment decisions. The claimant had based his investment decisions on his own professional experience and the advice of a friend.

726. In my judgment, these facts stand in marked contrast to those in the present case. The Claimants do not allege that One Touch was an independent financial adviser, but rather a property investment intermediary as described. One Touch did not introduce itself as an introducer but expressly as a property investment adviser which would provide its clients advice on a suitable property investment product for them from within the range of investment products they had personally selected according to the standards they described. The information One Touch supplied to the Claimants was not limited to the supply of TCHG materials. It included One Touch's Investment Consultant's own emails with summaries of the attractions of each investment; the attachment of One Touch's own branding to TCHG brochures by way of apparent endorsement of the content given their professions of expertise; and the interaction between One Touch's Investment Consultants and each of the Claimants assuring them as to the suitability of the TCHG product and their recommendations as to its merits.

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727. In none of the Claimants' cases is there evidence to support any similar finding that the individual Claimant was not looking for advice on the merits of the TCHG investment itself and / or the merits of the TCHG investment as against other investment opportunities offered by One Touch. There is also no evidence that any Claimant had already made their TCHG investment decision and was just looking to One Touch to execute it.

728. In *McCullagh v Lane Fox & Partners Ltd* (as cited above), the plaintiff visited a property, in response to the defendant estate agent's advertisement, which described the property as having a garden of nearly one acre. The acreage given was erroneous. During the viewing, a director of the estate agent orally represented that the garden was of about that one acre size. At the end of the viewing the vendor handed the plaintiff a copy of the defendant's particulars for the property which contained a liability disclaimer in a broad form commonly used by estate agents. When contracts were exchanged, they incorporated the National Conditions of Sale, including an acknowledgment that the purchaser had not entered the contract in reliance wholly or partly upon any statement or representation by or on behalf of the vendor save for written replies to enquiries. The Court of Appeal held that the disclaimer was a fact to be taken into consideration in determining whether the defendant had assumed responsibility for the statement to the plaintiff under the principles in *Hedley Burn v Heller*, and was sufficient to negative any such assumption that might otherwise arise where the defendant knew that the plaintiff would not seek an independent assessment of the acreage of the site. That given the trading position of estate agents, the opportunity (despite the timescale) for the plaintiff to instruct his own surveyor, and his access to legal assistance in the course of the purchase

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(including, therefore, the ability to raise inquiries of the vendor), it was reasonable to allow the defendant to rely upon the disclaimer pursuant to section 11 of the Unfair Contract Terms Act 1977, and consequently the defendant owed the plaintiff no duty of care.

729. In the present case, One Touch did not present itself to the Claimants as a vendors' estate agent as commonly understood. As such, the well-known trading position of estate agents has no proper role to play here in assessing whether One Touch voluntarily assumed a duty of care to the Claimants. It is, however, noteworthy that but for the impact of the disclaimer in the circumstances of that case, *McCullagh* provides a further example of a case where an assumption of responsibility may otherwise have arisen where the defendant's agent knew that the claimant would not seek an independent assessment of a matter stated in their materials and as to which they had also provided oral confirmation.

730. I do not consider Mr Wilton's reliance upon *Gran Gelato Limited v Richcliffe (Group) Limited* (as cited above), supports the weight that Mr Wilton places upon it. The case arose out of a conveyancing transaction where it was held that the plaintiff purchaser had a good cause of action both under a common law duty of care and section 2(1) of the Misrepresentation Act 1967 against the first defendant, their vendor, as a result of the vendor's solicitor's answer to an inquiry before lease, which constituted a misrepresentation on which the plaintiff relied in proceeding with the purchase of an underlease. However, the plaintiff's argument that the second defendant, the vendor's solicitors, owed

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them a direct duty to take reasonable care when answering the Inquiries on behalf of their client failed.

731. The Vice Chancellor found that all the factors which led to the conclusion that a duty of care was owed by the vendor existed in the case of the vendor's solicitors. The only material difference was that in making the representations the vendor's solicitors were acting not as principals but as agents on behalf of the vendor. The fact they gave their answers as the vendor's solicitors, for and on behalf of the vendor did not make a difference by itself. As the Vice Chancellor expressed the position at 66H-67B:

> "it is now established that the fact that the person making the representation was acting for a known principal does not necessarily negative the existence of a duty of care owed by him to the representee. … In such a case the representee can sue the agent at common law in accordance with *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 principles".

732. This was the position in the context of agents generally: 570 at B-C. However, the Vice Chancellor held that there was a distinction to be drawn in the case of solicitors acting for sellers in "normal conveyancing transactions". In these types of transactions, solicitors who are acting for a seller do not "in general" owe a duty of care to the would-be buyer when answering inquiries before contract or the like. Three factors were identified by the Vice Chancellor which weighed with him against this background: see 570D to 571E. As I note below, these have been the subject of subsequent judicial discussion.

733. The first lay in the context in which the representations were made in *Gran Gelato*. The buyer was formally seeking information from the seller about the land and his title to it. The answers given by the solicitor were given on behalf of the seller. In such a case, the buyer relies upon the answers to inquiries of

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this kind as answers given on behalf of the seller. They will expect the seller's solicitor, as a professional acting on behalf of his client, to have got the answers right. One would therefore expect to find the law provides the buyer with a remedy against the seller if the answers were given without due care. The second factor was that the law does provide the buyer with a remedy against the seller in respect of any misrepresentation in the answers given on his behalf. In the ordinary way, in providing the answers the solicitor is acting within the scope of his authority. Whoever was at fault, on such facts, the buyer has a remedy for damages at common law against the seller. The third was that "in general", in a case where the principal himself owes a duty of care to a third party, the existence of a further duty of care, owed by the agent to the third party, is not necessary for the reasonable protection of the latter in normal conveyancing transactions.

734. The Vice Chancellor was unpersuaded by an argument that to impose a duty of care on solicitors would be to expose them to conflicting duties, with one duty owed to their clients, and another different duty owed to the buyer (517 at C-E). The duty to the buyer would be to take reasonable care to see that the answers provided were accurate. "That duty would march hand in hand with a duty to the same effect owed by the solicitor to his own client. There would be no conflict". However, he continued:

> "Nevertheless, …, it does seem to me that in the field of negligent misrepresentation, caution should be exercised before the law takes the step of concluding, in any particular context, that an agent acting within the scope of his authority on behalf of a known principal, himself owes to third parties a duty of care independent of the duty of care he owes to his principal. There will be cases where it is fair, just and reasonable that there should be such a duty. But, in general, in a case where the principal himself owes a duty of care to the third party, the existence of a further duty of care, owed by the agent to the third

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> party, is not necessary for the reasonable protection of the latter. Good reason, therefore, should exist before the law imposes a duty when the agent already owes to his principal a duty which covers the same ground and the principal is responsible to the third party for his agent's shortcomings. I do not think there is good reason for such a duty in normal conveyancing transactions". Within this context, the risk the buyer may be left without an effective remedy if the vendor becomes insolvent was not a sufficient reason.

735. The Vice Chancellor took care to emphasise that there will be "special cases" even in a conveyancing context where the general rule does not apply and a duty of care will nevertheless be owed by the seller's solicitors to buyers. He gave the example of the New Zealand decision of *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22. There, solicitors acting for a borrower certified to an intending mortgagee that specified documents had been duly executed and were fully binding on their client and that there were no other charges on the intended security. The solicitors owed a duty of care to the lender in connection with the giving of that certificate because:

> "On any reasonable appraisal of that arrangement, the solicitors must be taken to have assumed personal responsibility to the mortgagee for the accuracy of their certificate … the solicitors had stepped outside their role as solicitors for the client and had accepted a direct responsibility to the lender": 571G-572B.

736. I note that in *McCullagh v Lane Fox & Partners Ltd* (as cited above), Hobhouse LJ, in his own judgment, at page 147, expressed reservations about Sir Donald Nicholls' reasoning in the *Gran Gelato* case in so far as it turned on the solicitor providing the answers to the inquiries on behalf of the vendor and on the purchaser having a remedy in tort against the vendor himself. Hobhouse LJ said that, unless the reasoning of the Vice Chancellor was confined to stating a special rule, applicable to solicitors in conveyancing transactions, it was contrary to earlier authority and wrong in principle.

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737. In *P& P Property Ltd v Owen White & Catlin LLP and another, Dreamvar (UK) Ltd v Mishcon de Reya and another (Law Society intervening)* [2018] EWCA Civ 1082, [2019] Ch 273 at 309G-H, Patten LJ said he was far from convinced on a proper reading of the Vice Chancellor's judgment in *Gran Gelato* that he intended to lay down a rule that there could be no duty of care owed by an agent where the claimant has an effective remedy against his principal. Such a proposition would have been ill-founded for the reasons identified by Hobhouse LJ. As Patten LJ said at 309H-391A (and Floyd and Gloster LJJ agreed):

> "The better view is that the decision in the *Gran Gelato* case simply establishes the need (as in any other case where liability for economic loss is claimed on the basis of a tortious duty of care) to take all relevant factors into account including that the solicitor is providing the replies on behalf of his client and will often be dependent on the client for the content of those replies. This is why Hobhouse LJ went on to recognise that, in the light of its treatment in *White v Jones*, the exception of a solicitor from owing any duty of care in a conveyancing transaction except to his own client had to be treated as a particular rule of policy applicable to the special role of a solicitor in transactions of that kind."

738. In *P&P Property Ltd* and *Dreamvar* itself the respective property purchasers' claims against the respective vendors' solicitors were based upon particulars of negligence which detailed omissions and other alleged failures by the defendant solicitors acting for the vendors to properly carry out the identity checks in relation to their own clients' identity required under the applicable Money Laundering Regulations ("MLR") before accepting instructions. Any imposition of liability depended upon placing on the solicitors a duty to the purchasers when carrying out the anti-money laundering ("AML") checks even though it was common ground that the MLR did not themselves create any parallel liability to affected third parties based on a breach of statutory duty. Adopting an incremental approach starting from the general rule that a solicitor

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in a conveyancing transaction does not normally owe a duty of care to anyone but their own client, it was held that there was clearly no assumption of responsibility by the vendors' solicitors. Both sets of professionals were instructed to act for the vendor in an arm's length sale of the property and the solicitors owed no duties to anyone but their clients when acting in relation to the sales. In both cases the purchasers instructed their own solicitors who were free to raise any enquiries they wished and could, at least in theory, have sought an undertaking from the vendors' solicitors that any necessary AML checks had been carried out. They were not asked to give undertakings or assurances that they had carried out the AML checks and nor did they represent that they had completed any necessary checks. The highest matters could be put was that the defendants in both actions should have realised that the purchasers would rely on them to carry out the AML checks in a full and competent way. AML checks are carried out in order to satisfy the requirements of the MLR and not as part of a transaction designed to benefit the purchasers of property. Had the vendors' solicitors been asked for an undertaking or assurance, they would have had the opportunity to refuse or to limit their liability in some way by way of a suitable disclaimer. Taking all these matters together, these were not cases where it was fair and reasonable to treat the vendors' solicitors as having assumed responsibility to the purchasers for the adequacy of the due diligence performed in relation to their clients' identity.

739. In my judgment, the relevant facts of *Gran Gelato* and *P&P Property Ltd* and *Dreamvar* bear little relation to those of the present case. They are further examples of the courts weighing the relevant facts to determine whether any duty of care was assumed. In each case, it was found that the vendor's solicitors

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acted as nothing more than the vendor's known agent, in the usual course, in transactions in which they engaged with the purchasers' own solicitors. None of the identified aspects of the transactions were sufficient to disapply the general rule applicable in those cases, specifically that a solicitor in a conveyancing transaction does not normally owe a duty of care to anyone but their own client. There is, however, no general rule that a seller's agent cannot owe such a duty to a purchaser.

740. Even if One Touch was simply acting as an agent within the scope of their authority on behalf of TCHG as a known principal, it would be fair, just and reasonable in this case for the court to hold that One Touch owed the Claimants a duty of care independent of the duty of care One Touch owed to TCHG which covered the same ground in respect of those specific matters the Claimants allege to fall within One Touch's duty to them and where TCHG, as principal, was otherwise responsible to the Claimants for their agent's shortcomings. One Touch told the Claimants that they were its clients and it put their interests first; the circumstances were not those of a standard third party agency relationship; it told them that One Touch had undertaken the due diligence described; that due diligence was not undertaken as a result of a statutory obligation; and One Touch positively presented to prospective investors in its marketing materials that such due diligence was undertaken in order to ensure that the investments met their clients' needs, were good rental opportunities, and that there was nothing in the terms of the purchase agreements with developers that would be to the detriment of the investors as their clients. All statements that were made in order to induce investors to have the confidence to invest through One Touch

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in the belief that checks had been made for their own protection and, hence, to generate the commissions upon which the One Touch business relied.

741. Having considered the important factors such as the purpose of the tasks and services and whether they were for the benefit of the Claimants, One Touch's knowledge and whether it was or ought to be known that the Claimant would be relying on One Touch's performance of the task or service with reasonable care, and the reasonableness of the Claimants' reliance on the performance of the task or service by One Touch by reference to One Touch's own descriptions of its business and the identification of those matters that crossed the line, I consider that on the basis of One Touch's own professions of expertise and experience regarding the selection of the TCHG investment products:

i) it assumed a common law duty of care to the Claimants to provide information, documents and advice to the Claimants on the TCHG investment opportunities with the reasonable care and skill to be expected of the experienced investment intermediary which One Touch held itself out to be; and

ii) it assumed a common law duty of care not simply to repeat what it had been told by TCHG without checking the position for itself, but to carry out its own due diligence as described on its website to verify such information, documents and advice when making statements concerning the TCHG units and the purchase arrangements.

742. Where One Touch provided information or documents including brochures which emanated from THG to the Claimants, One Touch adopted and is liable in law for the contents of such information or documents. Mr Kerkvliet accepted

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that the attachment of the One Touch logo to documents which Mr Thornton then said were routinely handed out could be taken as an endorsement of the content by One Touch. On the facts and circumstances of this case I consider that One Touch did adopt those documents and is liable in law for their contents on the basis that these are products it advised the Claimants it had selected and which it endorsed during the course of the advisory role which it assumed and in the context of the voluntary assumption of the duty of care which was established.

743. In the circumstances of this case, and as set out at paragraphs 87-95 above, it was not a "fatal handicap" as described by Mr Wilton to establishing the nature and content of One Touch's duties that there was no expert evidence setting out what could reasonably have been expected of an investment intermediary. One Touch's own description of its service establishes the nature and content of its own duties in performing the role of an investment intermediary here. The Claimants as persons receiving One Touch's advice about the suitability for them of TCHG's products should be entitled to proceed on the basis that One Touch has assumed responsibility for that which, on an objective basis, the relevant communications in the form of its website and publicity suggest that they have.

744. Whilst the evidence given in the case of each individual Claimant necessarily varies, I do not consider there is any good reason to reach a different conclusion as regards the duty owed to them in the case of any one of them on an objective consideration of the relevant facts in each case.

An Attenuated Duty?

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745. If I am wrong about the extent of the role which One Touch assumed, I consider that One Touch owed the attenuated duty which Mr Wilton described. One Touch clearly provided information to the Claimants in relation to the TCHG scheme and how it operated. In undertaking the role to provide such information and advice, One Touch assumed a duty to use reasonable skill and care to provide information which was consistent with, and did not go beyond, the information either contained in the TCHG brochure or provided in TCHG's training to One Touch.

746. Whilst it is unnecessary for me to consider this further as a result of my primary conclusions, each of my further findings and conclusions regarding reliance and causation and scope of duty apply equally to such an attenuated duty. I also consider such a duty to have been breached. The evidence supports a finding that the Investment Consultants and Mr Thornton routinely went beyond the "script" provided by TCHG when describing the investment opportunity presented by TCHG. Fundamentally, they failed properly to set out the investment structure and the key fact that the investors' returns were to be paid by Accordiant. A fact which Mr Kerkvliet says TCHG told them during training and which he accepts should have been made clear.

747. Notwithstanding Mr Kerkvliet's denial that this was the case, the inescapable inference is that the salesforce did not understand this critical component of the purchase package. Mr Thornton could not even remember whether he knew or was told that Accordiant was the sole undertenant and conceded that he did not read the legal documents.

Breach: Misrepresentations and Negligent Failures to Advise

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748. As I mentioned at paragraph 8, the representations the Claimants allege were made to them by One Touch about the TCHG scheme and One Touch's failures to advise were classified by the Claimants under several recurring themes. One Touch submits that the Claimants have not established any breach. Again, it says a fatal handicap is there is no expert evidence setting out what could reasonably be expected of an investment intermediary. A submission I reject.

749. I disagree with Mr Wilton's submission that One Touch acted reasonably in all material respects in any event. The preliminary checks it says that it carried out on TCHG before agreeing to sell its investments are not documented. I have concluded that Mr Kerkvliet is an unsatisfactory witness. I have also commented on his evidence as regards these checks, and as compared to the statements made on the website, at paragraphs 132 -149 above.

750. I have rejected One Touch's case that it was simply a selling agent and introducer and I reject Mr Wilton's submission that a "*superficial sense check of the financial viability of THG's proposals*" was sufficient to discharge One Touch's obligations. Contrary to Mr Wilton's argument, I consider that there is good reason for finding that One Touch did less than purchasers were entitled to expect.

The Unit Price would provide a 10% return / fixed or continuing income stream

751. The Claimants say this statement was incomplete and misleading. The identity of the undertenant was necessarily a key part of the scheme because it was the undertenant which was to pay this return. One Touch (and Galon) should therefore have identified Accordiant to the Claimants as the undertenant and should have explained to the Claimants that the purchaser's 10% return or fixed

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or continuing income stream relied solely upon the viability of Accordiant, which was uncertain. In failing to give this advice, One Touch did not explain to the Claimants that the fundamental weakness of the key selling point of the TCHG scheme was that Accordiant was / would assume identical payment obligations to all TCHG Option 2 purchasers. This plainly raised very serious doubt that Accordiant would be able to honour its obligations. The Claimants say there was therefore a misdescription by One Touch of a core term of the purchase proposition.

752. One Touch knew that Accordiant was / would be the sole TCHG Option 2 undertenant. TCHG had explained this to One Touch during training. One Touch was selling units in a multitude of developments, knew what the arrangement was in each case, and knew who the undertenant was going to be in each case. Mr Kerkvliet sought to blame TCHG for claiming that income from a specific unit would be paid to the purchaser concerned. The Claimants say this does not meet the point. In any case, TCHG's materials such as the TCHG Investment Overview and One Touch Care Guide used by One Touch failed to address the existence of a single undertenant in all cases and materially misstated the reality of the arrangements.

753. One Touch says any misstatement as to the precise identity of the sub-lessee was immaterial as Accordiant had a close association with TCHG in any event. It also says this leads nowhere as the Claimants knew before they entered the lease and sublease who the sub-lessee was. Whether Accordiant or the TCHG SPV was the sublessee, their ability to pay would depend on its financial position.

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754. On the basis that it was a marketing agent or introducer One Touch submits that it had no obligation to inquire into or report on the detailed financing arrangements on the developer's/Accordiant's side. It says this is something that an accountant or specialist financial advisor or valuer might have queried if briefed to assess the overall cogency of the financial arrangements. It was also within the remit of POLS to make sure the Claimants knew who the sublessee was and to address the risk of default and the impact upon the Claimants' position as investors and lessees in such circumstances.

755. One Touch adds that the fact Accordiant had to pay rent before the homes were up and running was not obviously a reason for concern. Monies had been borrowed by TCHG secured on the care homes and there were the purchase funds paid to the relevant TCHG SPV as well. It says there was nothing obviously wrong with such funds being used to pay what was due to investors provided there were also ample funds, as there appeared to be, to get on with the refurbishment and then open the care home in question. In the Welcome Pack TCHG gave assurances there were inter-company financial arrangements to ensure Accordiant had the necessary funds.

Finding

756. I agree with the Claimants that this fundamental statement was incomplete and misleading, and that there was therefore a misdescription by One Touch of a core term of the purchase proposition. When recommending the TCHG investment to the Claimants it was insufficient for One Touch to omit this information and to operate on the basis there would be no issue as a result of

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superficial assumptions, or close company relationships, or as a result of the wording of TCHG's post-purchase TCHG Welcome Pack without more.

757. The fact the Claimants knew who the sub-tenant was before purchasing their units does not remedy the lack of a prior explanation by One Touch. The company had full information about TCHG's schemes and programme and knowledge of the intent that Accordiant would be the sub-tenant across all schemes.

758. As the experienced property investment intermediary One Touch held itself out to be, this was the critical aspect of the Option 2 investment structure from the point of view of any investor. Option 2 was the only option which TCHG recommended. As Mr Kerkvliet himself conceded, this was not explained in anything produced by One Touch, this was highly material, and it should have been made clear to purchasers.

759. It was self-evidently pertinent information that Accordiant was and would be the company responsible for the payment of all investors' returns and contractual outgoings from the moment of any investor's investment across all the off-plan TCHG developments. A factor which should have been reflected within One Touch's recommendations about the suitability and safety of these investments.

760. The facts which support my findings of breach of duty are that One Touch failed to inform and advise the Claimants that the guaranteed 10% returns and safety of the investments were dependent upon Accordiant and, in this regard:

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i) Accordiant was the company which would be responsible for paying the advertised returns to them as well as paying the outgoings that would be due to the SPV company;

ii) Accordiant would perform this same role in respect of every TCHG development which was brought forward under TCHG's scheme of development or had been brought forward to date; and

iii) Accordiant was neither the freehold owner nor the operating company of the development in which they were investing and One Touch had been told that it would be reliant upon other companies within TCHG in order to provide it with the funds to meet its obligations;

iv) no documentation had been checked or was available to One Touch to confirm the existence, nature, and security of any financial arrangements that may be in place between Accordiant and any other company or third party funder with regard to these returns.

761. It is apparent that Mr Thornton regularly mis-described the basic structure of the TCHG investment proposition when asked questions addressed to payment and risk. As indeed did Mrs Kerkvliet in an email on 3 January 2018 when explaining the proposition to a sub-agent. The inescapable inference is indeed that the One Touch Investment Consultants and Partners did not understand the critical components of the purchase package or were cavalier in explaining it.

762. Subsequently, after mid-2018, when recommending these investments to individual Claimants, One Touch failed to discuss with them that Accordiant had, to its knowledge, defaulted in paying this return to certain investors who

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had purchased through One Touch and to reflect its own concerns as to TCHG's financial position within One Touch's own advice and recommendations about the suitability of these investments.

The investment offered by TCHG was "excellent".

763. The Claimants say this statement was patently untrue. One Touch say such representation was nothing more than a puff. The kind of sales talk which would not reasonably be relied upon and upon which it would not have been reasonable to rely. Alternatively, it was a statement of opinion put forward in good faith and justified on the basis of what One Touch reasonably understood the position to be.

Finding

764. As a statement made by a property investment intermediary who had carefully sourced property investments for property investors and provided investment advice this was not a mere puff. It is the kind of statement which would reasonably be relied upon and which it was reasonable for Claimants to rely upon. I agree with the Claimants that this statement was patently untrue. It is also the type of statement which undermined the potential impact of the Warning on the TCHG brochures and an independent assessment of risk.

Annual returns were guaranteed / safeguarded / assured.

765. The Claimants say such comments were patently untrue because everything depended on Accordiant.

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766. In turn, One Touch says, based on what TCHG had promised, such comments were not unreasonable given the contractual arrangements pursuant to which Accordiant was to make payments irrespective of whether the room was producing any income and that the purchaser had a right to initiate a buyback. It relies on the confirmation given by individual Claimants in cross examination that this is what they understood was involved. It says that this is what they got. Mr Wilton submits it was not One Touch's role to analyse the legal arrangements and identify any deficiencies or legal or commercial risks. That might be the role of a solicitor or accountant or other specialist, but not, he says, a marketing agent and introducer. Counterparty risk under the sublease and whether it was supported by any form of security was something POLS should have addressed. Moreover, he says, it was plain the investment could fail and there was no certainty that returns would be paid or that a buyback would be achievable. With the possible exception of Mr and Mrs Heneghan overall the Claimants understood that.

Finding

767. I accept that the statements were to the effect that the return would be payable from the point of investment and regardless of whether a unit was occupied or not. That was recorded in the legal documentation. However, I do not consider that One Touch's defence meets the point. The statements were patently untrue because everything depended upon Accordiant and that was not identified or explained. It is not a matter solely for a lawyer to identify counterparty risk. As the experienced property intermediary One Touch described itself to be in its marketing, Accordiant's ability to make such payments was a matter which One

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Touch should specifically have identified and explained. One Touch knew that Accordiant was assuming responsibility for making these payments in respect of every TCHG investment product it offered to investors.

The availability of the buyback arrangements, which were "guaranteed".

768. The Claimants say Mr Kerkvliet conceded that One Touch never told purchasers that the SPV responsible for the buyback obligations was a new company with no trading history. The Claimants contend that this was one of the key flaws. In truth, the arrangements afforded no protection or assurance to the Claimants. There were no guarantees. The purchaser's right was in fact only a right to sell back to the developer, and the developer in each case was simply a SPV for that particular care home development.

769. In reality, the entitlement was only as good as the developer SPV in question and that necessarily depended upon the success of the individual development. None of the SPVs had track records or assets and there was no reason for One Touch to express confidence that any of these arrangements would be capable of being honoured.

770. One Touch says that this is what TCHG was promising and whilst the viability of the arrangements might depend on the financial health of the SPV and the success of the care home, One Touch's duty, if any, did not extend to appraising and analysing such prospects. This also applies to the sub-allegations regarding the need to surrender the sub-lease and the SPV's option to purchase the unit for 110% of the purchase price. They say a reading of the transactional documentation by a lawyer such as POLS or an accountant or independent financial advisor might provide the basis for such advice. One Touch had no

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similar duty to analyse and report on the legal arrangements and their implications.

Finding

771. I agree with the Claimants that this fundamental statement was misleading and that it falls within the scope of One Touch's duties. It was therefore a misdescription by One Touch of a further core term of the purchase proposition recommended by One Touch. The security provided by this guaranteed buyback was a key facet of the proposition as it was presented and it was necessarily overstated by One Touch.

772. Not only did Mr Kerkvliet concede that One Touch never told purchasers that the SPV responsible for the buyback obligations was a new company with no trading history, One Touch had not in fact visited any of the development sites purchased by the SPVs to form any independent view as to the likelihood that any individual development owned by an SPV was likely to be viable or to prosper. There was no reason for One Touch to express confidence that any of the buyback arrangements would be capable of being honoured from the outset. Particularly, when Investment Consultants such as Mr Thornton chose to present the opportunity for buy back as the insurance which the Claimants enjoyed in the event of insolvency when questioned about risk.

What happens if TCHG goes bust?

773. The Claimants' say that TCHG's literature gave false assurances about what would happen in an insolvency scenario and One Touch made similar representations to Claimants both orally and by email. One Touch falsely

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reassured certain Claimants that an insolvency event in TCHG was unlikely and that their money would be safe, and their leasehold interest would hold value, even if TCHG became insolvent.

774. The key failing was that One Touch presumed that the care homes were or would be going concerns, whereas only Latimer Lodge entered operation as a care home. Mr Kerkvliet turned a blind eye to what was happening on the ground despite procuring £17 million worth of sales. He did not monitor progress or even visit sites as the website claimed. The "*forward looking*" nature of One Touch's purported assurances was not made clear.

775. Mr Kerkvliet conceded that Mr King's assurances on risk to Mrs Heneghan were "*nonsense*". Mr Thornton conceded that his understanding and assurances given to clients including Mr Funk were oversimplistic and wrong in the sense of being misleading. He did not recall looking at relevant figures to support what he was saying.

776. One Touch says any such representations derived from TCHG's publicity and insofar as they were passed on One Touch was reasonably relaying what TCHG had said, which was not inherently implausible, not least because of the success of Latimer Lodge and the apparent determination to operate this series of care homes. Anyway, it was intended that purchasers would retain their leasehold interest such that there could well be an opportunity to restructure arrangements to allow the care home to continue if TCHG or the individual SPV went bust, alternatively a sale of a unit or the units in combination might have been possible. A solicitor or valuer or accountant might have been bound to give detailed and cautionary advice after studying the legal documentation and

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analysing what might happen in the event of an insolvency, it was not within One Touch's remit or expertise.

Finding

777. I agree with the Claimants that the representations were not in fact true, and that there were no reasonable grounds or basis they had for believing them to be true, such that this was a further breach of duty. I do not consider that a solicitor or valuer or accountant was required to identify there may be an issue for the investors on insolvency, and One Touch chose to provide reassurance without suggesting that any of the Claimants took specialist advice when they raised the issue with One Touch. An expert property investment company considering a leasehold structure of this kind for recommendation to investors would have carefully considered the position as part of its due diligence and when referring documents to a solicitor to ascertain whether there may be any detriment to clients as asserted.

778. It was inherently implausible, even if the entirety of the leasehold structure did not collapse with any freeholder insolvency, that a purchaser holding an intermediate leasehold interest in a single individual care home room in an off-plan development would be able to obtain the payment of their guaranteed return and rents and outgoings from Accordiant. Alternatively, that if Accordiant collapsed, they would receive payment of their guaranteed returns from the actual or intended care home operator who had no obligation to pay them this return. Alternatively, that if the care home operator collapsed, as individuals, they would have the ability to appoint a replacement new manager or care home operator. Alternatively, if TCHG as a whole collapsed, that they,

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as individuals, would have any ability or control to achieve the redevelopment of the property as an operational care home or, if the site was already redeveloped and operational as a care home, that they would have the ability and control to identify and agree terms with a new care home operator who would pay them the guaranteed return or any return. At minimum, as Mr Kerkvliet and Mr Thornton accepted, the key failing was that One Touch presumed that the care homes were or would be going concerns, whereas only Latimer Lodge entered operation as a care home.

779. Again, after mid-2018, when recommending these investments to individual Claimants, One Touch failed to advise them that Accordiant had, to its knowledge, already defaulted in paying this return to certain investors who had purchased through One Touch and /or to reflect this within One Touch's own advice and recommendations about the suitability of these investments.

One Touch said to some individual Claimants that units could be sold on

780. The Claimants say this overlooked the need for the SPV's consent, which could act as a fetter on sale, and the lack of an after-market for properties of the kind in issue. One Touch say any such representation was not unreasonable given the way matters were presented to One Touch. They say there is no evidence that sales would not have been possible if the care homes had been refurbished and operated as intended, and there have been some sales, although just for modest sums, notwithstanding the failure of the investments. A solicitor or valuer or other specialist would likely have been bound to examine how an onward sale might work, given the property holding framework. That was not within the remit or expertise of One Touch.

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Finding

781. In my judgment, the ability to re-sell is a key aspect of a property investment. I therefore consider that this is a matter which One Touch should have taken into account in its advice to purchasers having carried out the due diligence it stated it had undertaken. Furthermore, from mid-2018 when the red flag difficulties began to become apparent to One Touch it should specifically have considered the potential for re-sales when continuing to recommend the investments to clients. Following his complaints, Mr Motala asked One Touch to sell his units, for example. One Touch's reliance upon a few isolated low value sales within the context of TCHG's liquidation, and which were possibly really references to small payments made through the liquidators in order to obtain surrenders to achieve a clean freehold title, would not otherwise have provided evidence of an after-market as it asserts.

There were care homes in operation, which had been viewed / extent of refurbishment.

782. The only operating care home was Latimer Lodge. A number of Claimants (identified in the Schedule) were told by agents of One Touch by email and orally that TCHG had care homes up and running, that the care home that they were purchasing was up and running, and/or only minor refurbishment works were required. Claims about the limited extent of works were misleading, given that only Latimer Lodge entered operation as a care home and the Joint Administrators' Report to Investors shows that the properties were significantly dilapidated when TCHG entered into insolvency.

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783. One Touch says if any such representation was made, it was not unreasonable as it was plainly a representation of a non-specific character which was also true on its own terms as Latimer Lodge was operating.

Finding

784. It was true that one care home was operating. It was untrue that there were potentially two care homes operating. It was untrue that One Touch visited each site or that it had any firsthand knowledge of the refurbishment or redevelopment required based upon a site visit. Except for the visits made to Latimer Lodge and the wider Latimer Lodge site, I do not accept that any other visits were made.

785. In context and specifically given One Touch's professed knowledge of the developments, the representations were unreasonable. At minimum, the picture created was one of progress and delivery by TCHG. The element of false exaggeration was intended to provide the potential purchaser with confidence. The important implication was either that TCHG's redevelopment works on a further care home had been completed with the necessary regulatory pre-operation checks passed in order for it to have become operational accommodating residents or that a second and further homes was / were, at the very least, on the verge of operation. There was no reasonable basis for One Touch to say anything more than that one care home, Latimer Lodge, was operational as a care home and that One Touch had not itself visited any other site.

786. I accept the Claimants' accounts of the relevant oral conversations regarding the reassuring picture painted by One Touch as to the limited nature of the works

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required and / or progress, given that One Touch has either failed to proffer any witness who could dispute them, or relies on the evidence of Mr Thornton who repeatedly stated that he could not remember conversations with Claimants or other material facts and conceded that his written evidence contained basic errors.

92% occupancy

787. In a document sent to certain Claimants entitled "projected annual P&L: "Current Developments", a 92% occupancy rate per development was assumed. The Claimants say there is no evidence to support that claim.

788. One Touch says it was just passing on TCHG's projection and this was not a representation about current occupancy. There was no reason for One Touch to think it was unrealistic given the apparent shortage of care homes and the success of Latimer Lodge.

Finding

789. No evidence has been adduced by One Touch to support TCHG's assumption of a 92% occupancy rate per development in the "projected annual P&L: "Current Developments"" sent to various Claimants. Given that only Latimer Lodge was open (and that it had previously operated as a care home), and the other TCHG proposed developments listed involved different kinds of properties to be redeveloped across a wide range of different national locations, I consider this flat figure should have been identified as a figure to be treated with caution during discussions with Claimants. No evidence has been produced to the court of any research by One Touch to support the provision of existing

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care homes and the demand for new care homes in each of the locations it marketed. There was therefore reason for One Touch to advise that the use of an identical, and high, percentage figure may not always be realistic.

One Touch told individual Claimants the contracts would provide protection against losing the asset and the money invested

790. When Mrs Heneghan asked Mr King whether her investment was at risk by reference to a disclaimer on a brochure, he responded that "*the Carlauren Group have to put this statement in … once you have purchased a room you own it and the contracts in place will protect you from loosing (sic) all your money*". The Claimants say the statements were untrue: the purchases were in fact high risk.

791. One Touch says it was not unreasonable for them to take the view that the ownership of a leasehold interest and the contractual structure would provide protection against loss of the asset purchased or the monies invested. They did not say such protection would be wholly effective in all circumstances. A solicitor or valuer or accountant might have been bound to give detailed and cautionary advice after studying the legal documentation and analysing what might happen if things did not work out but it cannot reasonably have been expected that One Touch would do so. It was not within its remit for expertise.

Finding

792. In my judgment it was unreasonable for One Touch to take this view when choosing to recommend a structured property investment product of this kind. One Touch had identified on the website that it would ask an independent solicitor to review the documentation prior to recommendation. On the evidence

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before me, I do not accept that it had done so in order to give any advice and reassurance of this kind.

793. It was also unreasonable for One Touch to take the view that the ownership of a leasehold interest and the contractual structure would provide protection against the loss of the asset purchased or the monies invested when the evidence strongly suggests that One Touch did not properly understand the structure of the investment that it was marketing by reference to its own expertise. Specifically, when Mr Kerkvliet accepted, and the emails demonstrate, that an aspect of the service One Touch offered was to explain the English leasehold structure to investors who were not familiar with the concept of leasehold or did not understand how it would work. Even after POLS was instructed, there is an example of Mr Thornton providing an explanation of leasehold when asked by Mrs Byers and also answering questions from others as mentioned. Even stating an explanation he sent in one case was clearer than that provided by POLS.

Representations to individual Claimants the investment was risk free or not subject to tax.

794. When Mrs Heneghan asked Mr. King whether her investment was at risk by reference to the Warning on the brochure, he stated that "*the Carlauren Group have to put this statement in … once you have purchased a room you own it and the contracts in place will protect you from loosing (sic) this assets all your money*". The statements were untrue. I agree with the Claimants that the purchases were in fact high risk.

795. Mr Rana told Mr Motala that he would not be liable to pay tax on the payments by way of letting revenue. One Touch accepts it gave information to Mr Motala

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about tax which Accordiant later said was wrong. One Touch says there has been no attempt to prove that what Accordiant said was correct, or that a reasonably competent investment intermediary could not have taken the view One Touch took.

Finding

796. In so far as One Touch submits it is very unlikely that any Claimant was told the investment was risk free, I accept the Claimants' evidence.

797. I accept Mr Motala's evidence that the tax advice he was given was incorrect and that he did pay tax as a result. There are other instances of One Touch providing tax advice in connection with the sale and purchase of these TCHG investments, for example Mr Kerkvliet to Mr Funk. I do not accept the force of One Touch's submission that there has been no attempt to prove a reasonably competent investment intermediary could not have taken the view that One Touch took. One Touch marketed itself as an expert when marketing these investments to the off-shore purchasers it targeted. It is reasonable to expect it should have understood the tax consequences for these investors and that it would give accurate basic tax advice when answering questions of this kind.

Most Claimants were told these were easy armchair investments

798. One Touch submits that any such information was sales puff and just passing on what TCHG said. It was an optimistic but not unreasonable overall picture. One Touch says but for the fraud there is no reason to think this would not have been realised.

Finding

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799. The representation that these were easy armchair investments was neither sales puff nor simply passing on what TCHG had said. One Touch presented the TCHG products as investments that it had selected to market and it recommended them to the Claimants on the basis they would meet their requirements. These words embodied the central appeal. If the investor chose TCHG Option 2 the investment would generate them a steady return and the return would be paid without any need for them to actively manage their investment. This was an unreasonable overall picture given the high risk nature of the investment and the risks in the event of insolvency. This is regardless of One Touch's assertion that there is no reason to think this risk would have been realised but for fraud.

800. I find that each relevant representation alleged to be made to each Claimant as set out in the Schedule to this judgment was made.

Unit 208 The Devon Bay Hotel

801. Whilst I agree that the way in which One Touch presented its services to prospective investors applies identically in respect of Mr and Mrs Heneghan's decision to purchase Unit 208 from Aronex, the evidence focussed upon factors relating to TCHG. Regrettably, I simply do not have sufficient evidence before me based on this case as pleaded and evidenced to establish whether One Touch breached such obligations.

One Touch's Case: Claimants advised by Galon

802. One Touch says that Mr and Mrs Moller and the Spier Family dealt predominantly with Galon in Israel. Any claim they have is against that

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company and not One Touch. They point out that those Claimants who sued Galon are not alleging that One Touch is vicariously liable for the wrongdoing, whatever it says that was, for which Galon was apparently held liable to these Claimants in Israel.

803. One Touch submits there is no basis for vicarious liability because the sub-agency between One Touch and Galon was an independent contractual arrangement pursuant to which One Touch appointed Galon as a sub-agent selling these investment products on behalf of TCHG. It says the word "sub-agent" and the use of agency language as between One Touch and Galon is apt to mislead as Galon was not performing services on behalf of One Touch. It was a sub-agent in that it was engaged by One Touch to market on behalf of TCHG for which activity One Touch ceded a share of its commission payable by TCHG. It says this was contemplated by its agreement with TCHG and the introducer agreement with Galon in the letter of 1 November 2017 recording it was to market and promote investment opportunities as the exclusive agent in Israel.

804. Although the language of agency on behalf of One Touch appears in those documents, it says the substance was that Galon was assuming the role of sub-agent vis a vis TCHG. One Touch's reasoning was that TCHG was the counterparty selling the leasehold interests and Galon was marketing its investments opportunities and introducing its clients to TCHG not One Touch. There was therefore no agency of One Touch entailing its vicarious liability for Galon. Any misstatement was not made with the actual or apparent authority of One Touch and nor was it made in the course of Galon performing a service

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representing One Touch, as opposed to Galon acting in an independent capacity selling for TCHG: Bowstead at 8-180 and 8-182. Galon's clients dealt with it as a principal and not an emanation of One Touch. Galon was carrying on business on its own account as between Galon and its clients. It says the appropriate analogy is with the doctor, an independent contractor, who conducted medical examinations arranged by a bank, but who was not doing so as agent for the bank: *Various Claimants v Barclays Bank Plc* [2020] UKSC 13, [2020] AC 973. Insofar as Galon was acting on behalf of TCHG then TCHG not One Touch would have been vicariously liable for any misrepresentation passed on by Galon.

805. Alternatively, if Galon was marketing TCHG's properties as an agent for One Touch then, if Galon acted as alleged, One Touch says it stepped outside its role as a marketing agent. The translations of the contracts with Galon demonstrate that Galon provided investment advice pursuant to a distinct advisory role for which it was paid an "*advisory and handling fee*" of 5% or 6% of the price of the investment. Under the relevant contracts Galon was obliged "*to advise and provide [the client] with the optimal investment options and their details, and to handle the transaction from the initial reservation through receipt of the guaranteed return*," and "*to serve as a reliable source of advice and guidance throughout the investment period*". That crosses the line from marketing to investment advice and Galon was not acting as One Touch's agent or with its authority in that respect. It had an independent contractual obligation for which, if breached, Galon alone was liable.

Finding

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806. Under the General Service Agreement dated 1 February 2017 TCHG as the Company engaged One Touch as the Agent to provide "Services" consisting of the Sale of Care Suites, Recruitment of Sub-Agents to assist in the sale of Care Home Suites and any other tasks which the parties may agree on. The Agreement included the following terms:

"Use of sub-agents and/or 3rd party marketing

The agent is responsible for conducting ongoing due diligence to ensues (sic) all sub-agents and third parties operating on behalf of the agent continue to operate within the terms of the agreement. The sub-agents will be registered on the company platform [TCHG website address] and the agent will provide training to the sub-agent and manage their sales process. The agent will have full discretion of the compensation level offered to the sub-agent. The compensation rate offered to the sub-agent will typically be 70% of the compensation that the agent receives from the company."

Non-circumvention

"The company will not liaise with the sub-agents, co-brokers or referral network of the Agent directly. Any inquiries made by sub-agents and co-brokers will be referred back to the agent."

"Exclusivity

The period of exclusivity will continue as long as the Agent (and their sub-agent network) sells a minimum of three units per month."

"Unless the introducer has acted in breach of this agreement, upon termination, the company will not work directly with any sub-agent or co-broker introduced by the agent. If the company wishes to work with the sub- agents introduced, the agent will receive 30% Commission of any resultant sale."

807. The Introducer Terms of Agreement dated 4 September 2017 concluded by One Touch as "the Company" and Galon as "the Introducer" recited that One Touch had appointed Galon "*to market [One Touch's] products such as student property and residential buy to let property care home and hotel room developments*". The Agreement was governed by English law. Galon was during the currency of the Agreement to have the right, and would use their best

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endeavours, "*to market [One Touch's] products and services as a non-exclusive Agent/Introducer/Broker*".

808. Under clause 4, Galon was to independently of One Touch by means of advertising, marketing, seminars, exhibitions and networking use their best endeavours to promote the products and services of One Touch. Under clause 5, One Touch was to provide marketing material, One Touch branding and websites relating to One Touch's products and services.

809. Under clause 7 One Touch agreed to pay Galon commissions or fees for each property or investment product sale generated from marketing activities directly by Galon or its appointed sub-agents, co-brokers and referral network. It was to pay Galon a commission per sale equal to 70% of One Touch's commission received on each property sold by Galon where Galon carried out the majority of the sales activity. This commission share was to increase to 80% on the 4th unit sold in any property development. One Touch was obliged to pay Galon upon receipt of payment from the developer. A schedule of each of One Touch's products (properties and property developments"), was to be provided to Galon each month, including the agreed commission for each property sold.

810. At clause 10.4 Galon agreed not to liaise with any of the developers, master agents, vendors or property owners that One Touch introduced as part of its products and services.

811. Subsequently, One Touch provided Galon a letter dated 1 November 2017 addressed "To whom it may concern" on One Touch's headed paper. It stated:

"We have won several awards for our due diligence and are very selective of which property developers we work with.

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This letter confirms that One Touch Investment have chosen Galon Limited as their exclusive agent for the marketing and distribution of care homes and retirement property investments to clients located in Israel.

We work closely with Galon Ltd to assist in the smooth processing of the property purchase and customer care after the property has been acquired."

812. Mr Galon requested the letter by email to Mrs Kerkvliet dated 1 November 2017:

"*Can you please send us ASAP an official letter of confirmation that [Galon] have an exclusive agreement with One Touch which is a Properties Marketing company of Carlauren. I need it because many investors asked me about it."*

Mrs Kerkvliet replied on 2 November 2017: "*Please find the letter attached. I hope this meets your requirements*?"

813. Given the express terms of the Introducer Agreement, I do not accept One Touch's argument that the sub-agency between One Touch and Galon was an independent contractual arrangement pursuant to which One Touch appointed Galon as a sub-agent selling these investment properties on behalf of TCHG. The Introducer Agreement records in terms that Galon was engaged as an agent by One Touch to market products for One Touch. Its agency extended to every kind of investment product which One Touch marketed. TCHG was not mentioned in the Introducer Agreement and the Agreement was not specific to TCHG investment products or care home investments.

814. In my judgment, any misstatement by Galon was made with the actual or apparent authority of One Touch in the course of Galon performing a service representing One Touch. In Bowstead & Reynolds on Agency (23rd ed) at 8-180 and 8-182, the editors express the view that:

""authority" may also be used to *create* liability in one person for the misstatements of another who is not the former's employee but merely an agent

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(i.e. independent contractor), and for whom there is no liability under the normal principles of non delegable duty relating to independent contractors. The reasoning is somewhat limited. It should apply to an agent:

"when the function entrusted is that of representing the person who requests his performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in any independent capacity."

Thus it has been held that an estate agent, who is not an employee, may have authority to make representations about property for which the agent is seeking a buyer or tenant, so that the principal is liable for their falsity. … Cases involving negligent representations seem relatively straightforward, at least where there has been a holding out of authority by the principal to make them. The tortious liability, based on an assumption of responsibility, closely parallels contractual liability."

815. I reject One Touch's further submission that as between Galon and its clients Galon was not acting as an agent for One Touch. The terms of the November 2017 letter which One Touch provided at Galon's request demonstrate that this was not the case. The letter was required for production to potential investors. The fact that Galon was acting as an agent for One Touch is also evidenced by the direct contact between Mrs Moller and One Touch and Mr Spier and One Touch relating to the TCHG investments which they purchased through Galon.

816. As held in *Various Claimants v Barclays Bank plc* (as cited above), a person will be vicariously liable for the wrongful acts of someone who was not their employee if the relationship between them was sufficiently akin or analogous to employment to make it fair, just and reasonable to impose such liability. That is the case on these facts. Although Galon also operated as an independent company it worked directly for One Touch when marketing the TCHG properties. It received administrative support, information and training from One Touch in respect of the products it was to sell. It also received payment direct from One Touch, and that payment was a percentage of One Touch's own commission which it received as a result of every sale made by Galon.

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817. On the limited evidence available to me, I do not accept that Galon stepped outside its role as marketing agent and ceased to act as One Touch's agent or with its authority. I accept that the translation of the contracts between the relevant Claimants and Galon included a term that Galon would be paid an "*advisory and handling fee*" of 5% or 6% of the price of the investment. Galon was also obliged to "*advise and provide [the client] with the optimal investment options and their details, and to handle the transaction from the initial reservation through receipt of the guaranteed return*" and "*to serve as a reliable source of advice and guidance throughout the investment period*". Matters redolent of the claims which One Touch made about its own service on its own website and which, in the case of Galon, One Touch submit cross the line from marketing to investment advice. Ultimately however, and regardless of the separate contractual obligations which Galon thereby assumed, it marketed the TCHG investments to investors within the scope of its agency using the information provided to it by One Touch and making the representations set out in that information to procure sales.

818. In all the circumstances, as the Claimants assert, I consider that One Touch was vicariously liable for the services provided by Galon as One Touch's agent.

819. My findings in respect of the One Touch and Galon Reservation Forms which the respective Claimants saw or signed are also identical. The Galon reservation form did not make any reference to One Touch's Terms and Conditions. It is also to be noted that in so far as Galon had obtained the payment of a contractual advice fee it is striking that the Purchaser's Agreement nevertheless recorded

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that the purchaser had not taken any advice. I consider that these terms would fall to be struck down and do not limit the liability of Galon or One Touch.

The Claimants' Case on Reliance

820. All of the Claimants state in their witness statements that they relied upon what One Touch told them and would not have entered into the purchase arrangements had the representations not been made. Mr Johnson submits that the fact of reliance is also plain from the oral evidence. For example, what One Touch said to the Claimants constituted: "*the major influencing factors which prompted me to decide to go … forward with it*", Mr Hickson; and "*really, really, mattered*", Mrs Heneghan.

821. As One Touch well knew, with a few minor exceptions, the information provided by One Touch was the only source of information which the Claimants received about the TCHG scheme. None of the Claimants carried out significant due diligence beyond One Touch. They were not encouraged to do so and did not think it was necessary. Mr Thornton accepted that he did not tell any Claimant to conduct their own due diligence. Many of the Claimants saw POLS as dealing with conveyancing functions, as explained by Mr Morrell, for example.

822. Mr Johnson submits that it was plainly reasonable for the Claimants to rely upon the representations. The Claimants were (with one exception) individuals and consumers. In the light of One Touch's professions of expertise, and their assurances of the investigations and due diligence that they had undertaken on the Claimants' behalf, it was entirely reasonable for the Claimants to take One Touch at its word and to rely on what One Touch told them.

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One Touch's case on Reliance and Causation

823. One Touch accepts that reliance has been proved in the cases of Mrs Heneghan and Mr Morrell. They relied on what One Touch said to them and that was a material factor in inducing them to proceed. It denies reliance has been proved in any other case. It says where Claimants accepted One Touch was acting as a selling agent they were making their own assessment and relied on TCHG's offering as passed on. The Claimants relied on POLS.

824. One Touch's case is that causation turns on what if any alternative information or advice should have been given to the Claimants: see the Court of Appeal's analysis in *McLean* at [170]. Mr Wilton submits that it will only be if the court finds that very discouraging advice should have been given that the Claimants would have decided not to proceed. He says the evidence demonstrates they were all very enthusiastic about the proposition. Many were willing to invest a large proportion of free capital, purchased multiple units in a short space of time, were anxious to participate and disappointed when they missed out. He accepts that if One Touch should have advised strongly against proceeding the Claimant's position is a strong one. If One Touch should have been more cautious, that would not have made any difference to the course of events.

825. One Touch's case is that Hoffelder cannot prove its case on reliance or causation for the further reason that it has not adduced relevant evidence in order to do so.

My Finding

826. The Claimants' evidence establishes that they relied on One Touch and/or Galon in making their decision to invest and would have proceeded differently if

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different advice had been given. I accept the Claimants' submissions that it was entirely reasonable for the Claimants to have relied upon One Touch given their understanding as to its expertise and its knowledge of these investments. In my judgment, One Touch should have accepted that reliance has been proved in every case. I have rejected the enforceability and effect of the clauses and disclaimers in the Terms and Conditions and the One Touch Reservation Form which One Touch relies upon for the reasons set out at 648-672 above.

827. I have already discussed the speed with which certain Claimants invested having attended a presentation and/or read the website and then spoken to a One Touch consultant. The encouragement to proceed to invest swiftly was a facet of the relationship of sure and safe reliance upon One Touch which One Touch set out to create. It was evident during some of the Claimants' evidence just how strong, from their point of view, the personal relationships were that developed between them and their One Touch Investment Consultant. There was a clear demarcation at trial between the way in which Mr Kerkvliet and Mr Thornton referred to some individual Claimants simply by their surnames (without even a title) and the way, even after all this time and given the events that have happened, that the Claimants still referred to them, and particularly to Mr Thornton, by first name alone when giving their evidence. No doubt this demonstrates the success of One Touch's sales techniques as applied to the Claimants, but it also reflects the degree to which Claimants such as Mr van der Merwe, Ms Hutchison and Mr Byers, very quickly came to regard Mr Thornton as their own trusted adviser when he provided them the TCHG investments.

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828. As regards causation, the question of what would have happened if any alternative information or advice should have been given to the Claimants must be set against the background of the false context which One Touch provided to the Claimants regarding the manner in which it had selected the TCHG investments and its role in respect of the Claimants as its own "*clients*" whose interests it publicised that it put first. Various of the statements on One Touch's website and in its publicity materials which were used to build a relationship of trust and confidence in One Touch and in the investments it marketed were untrue. One Touch's consultants did not drive the length and breadth of the country sourcing development projects. One Touch had not visited any of the TCHG sites and projects in respect of which it sent glowing information to the Claimants. At very best, One Touch's presentation of TCHG as a credible care home developer with a track record of delivery was initially significantly overstated based upon only one very recently redeveloped or refurbished care home, Latimer Lodge, a site which had previously operated as a care home. Thereafter, care homes which One Touch marketed were not completed and opened and there was no new objective evidence to support this conclusion. There is no documentary evidence that One Touch ever properly carried out any "*due diligence*" or other checks before marketing the TCHG schemes, including the fact that it did not have an independent solicitor comb over the fine print of the TCHG documents from a purchaser's perspective before recommending the products as stated.

829. As time went by, despite the fact there were very serious "red flags", One Touch did nothing to modify its approach to marketing the TCHG schemes to the Claimants. If anything, I agree with Mr Johnson that in the sales made by Mr

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King to Mr Durnford, Mr and Mrs Heneghan and Ms Orupabo and by Mr Kerkvliet and Mr Thornton to Mr Uruthiran, there is a clear picture that One Touch doubled-down on its advice that these were safe and beneficial schemes and generated a series of very quick further sales. The sale by Galon to Mr Moller where Mr Moller also spoke separately to Mr Thornton also completed in March 2019.

830. Against this background, I consider that Mr Wilton's central submission that the evidence demonstrates the Claimants were all very enthusiastic about the proposition is of limited relevance. It is correct that many were willing to invest a large proportion of free capital, purchased multiple units in a short space of time, and were anxious to participate and disappointed when they missed out. However, that enthusiasm reflects the manner in which One Touch had deliberately built up their confidence in presenting its service and the TCHG concept and investments to them. It reflects their reliance upon One Touch.

831. On this basis, if One Touch had been more cautious in its advice I consider that would have of itself made a difference to the course of events and the investment decisions taken here. On the balance of probabilities, I consider that they would not have proceeded. As Mrs Heneghan, an unsophisticated investor, put it before she telephoned One Touch and took Mr King's advice, the product looked too good to be true. These were investors looking for safety and security to invest life savings and inheritances and / or specifically to protect against risks to their savings abroad. Their attitude to any specific risks associated with these investment products must be judged against that background.

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832. That said, on the facts of this case, the Claimants' position that One Touch, as an investment intermediary, should have advised strongly against proceeding is a strong one. I am satisfied that very discouraging advice should have been given and that the Claimants would have decided not to proceed. If One Touch had accurately described the limited extent of the due diligence it had undertaken and the true extent of its expertise, I am amply satisfied that the Claimants would not have proceeded to decide to invest as they did in any event.

833. Whilst Mr and Mrs Moller said it would have made no difference to their decision if told that Accordiant was and would be the sub-tenant of all the TCHG units sold, this does not detract from their reliance upon the other representations made to them and the fact that I am satisfied that they would not have proceeded if there had not been both negligent failures to advise in those other regards as well as negligent advice in fact given. In particular, by the time that the TCHG scheme was recommended to them as a sound investment Accordiant was already defaulting on some of its obligations to make payments to investors to Mr Kerkvliet's knowledge and TCHG was experiencing cash flow issues paying One Touch's own commissions yet its recommendations and advice regarding the safety of the TCHG scheme remained wholly unaltered. Mrs Moller and Mr Moller made their separate investments in TCHG units in November 2018 and March 2019 respectively.

834. As regards Mr Hickson, I accept that it is clear from the entirety of the evidence given by Mr Hickson that in substance he was encouraged to, and did, trust and rely on One Touch regarding the fixed or continuing income stream, buyback arrangements and guaranteed buy back. I do not give weight to Mr Hickson's

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answer in cross examination that if One Touch had told him there was a risk that he would lose his money it would not perhaps have affected his purchase of the first 4 units but would perhaps have affected his purchase of the 5th and 6th units. The answer was given against the background of a question regarding an oral warning in the terms of the Warning on the TCHG brochure. Neither the question nor the answer was specific to any of the negligent failures to advise Mr Hickson properly in respect of Accordiant and the SPV or his reaction to the advice One Touch should have given him at the date that each unit was purchased.

Scope of Duty

The Claimants' Case

835. The Claimants submit that the losses they have sustained fall within the scope of One Touch's duty. They say that without trespassing on the agenda for the coverage and quantum trial the answers to the questions set out by the Supreme Court in *Meadows v. Khan* [2021] UKSC 21, [2022] AC 852, is "yes".

836. They say it is not open to One Touch to assert that the true cause of the Claimants' losses was a fraud perpetrated by Sean Murray. First, they say such a contention can only operate as a positive case on causation, i.e. the assertion of a *novus actus interveniens* for which One Touch was not responsible and which obliterated or eclipsed the effect of its own breaches of duty. One Touch's Amended Defence does not advance any such contention but maintains that the developments were capable of generating the promised returns (which remained its position at trial) and the loss was caused by reliance on other advisers, including POLS. Moreover, they submit it is axiomatic that if an allegation of

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fraud is advanced, it must be specifically and fully pleaded and distinctly proved, referring to the *Commercial Court Guide*. The alleged fraudster must be given an opportunity to answer the allegation. None of that has happened and all of it was within One Touch's control.

837. Secondly, they submit it is not open to One Touch to cherry-pick parts of the Claimants' statements of case to suggest that the existence of a fraud is in fact in issue or is common ground. Mr Johnson says the Claimants have referred by way of background to the apparent funding of a luxury lifestyle by Mr Murray. It is not part of their positive case on the issues that arise for decision. It is entirely absent from the agreed List of Issues and Common Ground.

838. Thirdly, they submit the material relevance of a new case on causation is the counterfactual analysis set out in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 ("SAAMCO") and the question: would the Claimants have suffered the same losses if the representations made by One Touch had been true? They contend a counterfactual analysis does not avail One Touch because:

i) The Claimants complain about negligent *failures to advise* as well as negligent advice / representations in fact given. Paramount among them was the failure to explain that Accordiant was the sole undertenant across 780 units with the risks that entailed. The counterfactual does not assist because there was no advice on this subject which might be imagined to be true. Instead, one asks if One Touch had told the Claimants the true position, what would they have done? Except in isolated instances, the case of Mr Morrell and Mr and Mrs Moller, their

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case is that they would not have entered into their purchase transactions if they had been told the true position. Thus the counterfactual misfires in the vast majority of cases.

ii) If one asks whether the loss would have been suffered if the advice in fact given had been correct, the answer is "no". Taking the Claimants' key themes, there would have been a guaranteed or fixed 10% payment stream payable by dint of care homes that were open and operating as going concerns. The SPVs would have been well-resourced. In an insolvency situation, there would have been assets and / or businesses with material value to salvage and the "worst-case scenario" of merely changing operating company would have been viable.

iii) Further or alternatively, the counterfactual is no more than a potentially "*useful cross-check*" and must not be allowed to subsume the analysis of the fundamental questions (i) what was the scope of the duty assumed by One Touch, and (ii) do the claimed losses fall within the scope of that duty: *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783, [4, 23, 25-27], per the majority. The counterfactual analysis proposed by One Touch yields an answer that offends fairness and common sense, which the court can and should reject: *Charles B. Lawrence & Associates v. Intercommercial Bank Ltd.* [2021] UKPC 30, [2022] PNLR 7, [18-19] per Lord Burrows and Lady Rose JJSC, giving the Board's unanimous judgment.

<u>One Touch's case</u>

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839. One Touch contends that the Claimants have a scope of duty problem. For the Claimants to succeed the court must be satisfied that there was a duty to protect them from the very risk which caused their losses. There needs to be a connection between risks, which there was a duty to protect the Claimants against, and losses eventuating, looking backwards as it were, from something which was wrong with the advice that was given about those risks. Demonstrating that a risk was not identified properly, and if it had been identified properly, the Claimants would not have invested, is not sufficient for success. The Claimants need to demonstrate that the particular risks which were not identified are risks which occasioned the loss in question. Unless they can do so, there is no scope of duty, duty nexus case, which is good in law.

840. One Touch said at trial that the answer to the question what is the cause of the losses in this case is straightforward: the scheme failed because of the wrongful appropriation of funds for illicit purposes. The scheme was a fraud, in particular involving Sean Murray, who dissipated funds to finance a luxury lifestyle. It quotes paragraph 10 of the Amended Particulars of Claim in respect of Mr Murray's dissipation of funds and paragraph 51 of the Claimants' Skeleton Argument which referred to the Administrators' Report to Investors:

> *"The Report to Investors dated 9 March 2020 of the Joint Administrators of TCHG records that TCHG received a total of £75 million from purchasers, which monies were spent by Sean Murry on luxury assets including a private jet. Of the developments relating to these proceedings, only Lindors and Langdon Court were operating – but as hotels, not care homes. The remainder of the properties never operated or traded, either as hotels or care homes, and are considerably dilapidated*."

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841. On 24 January 2020, the Joint Administrators obtained a without notice proprietary and freezing injunction against Sean Murray to freeze his worldwide assets up to the value of £40 million.

842. Mr Wilton stressed it is not alleged that One Touch knew about or was complicit in this fraud. He submits that it is therefore necessary to be very careful about seeking to impose responsibility beyond someone who was involved in the fraud, and upon someone who was not complicit in it. He submits that to succeed on the scope of duty principles and duty nexus principles, the Claimants need to establish a duty to protect them from the risk of the sort of fraudulent activity which it says is now known to have happened, where money is not being used for the appropriate purpose.

843. He says it is not the Claimants' case that it was part of One Touch's role, or that it owed any duty, to uncover the unlawful use of funds by Mr Murray. Any duty owed by One Touch did not extend to protecting the Claimants against the fact persons behind TCHG diverted a large proportion of investment funds to line their own pockets instead of refurbishing and operating the care homes.

844. One Touch also submits that the Claimants do not and cannot allege that their losses flow from something inherently doomed about these investment schemes. It says the Claimants have not sought to demonstrate by expert accounting evidence or by any other means that these investments were incapable of producing the returns which were advertised in TCHG's financial projections. There is no evidence before the court that the TCHG scheme could not have worked if it had been run responsibly and honestly.

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845. In essence, it says the Claimants' allegations concern ordinary property investment risks, a series of deficiencies and risks in respect of these investments which would have deterred them from investing had they been highlighted but which are not said to have caused that failure or the losses. It is not suggested that any circulation of funds with Accordiant paying what was due by way of rent out of purchases funds caused the failure of the developments and nor have the Claimants proved that anything like that in fact happened. Nor is it said (or proved) that the losses flowed from the counterparty risk in respect of any weakness of Accordiant's covenant to make the rental payments.

846. It says it is not suggested that the Claimants tried but failed to sell the properties back to the relevant TCHG SPV. Nor is it pleaded or proved that the losses flowed from the fact that at one particular time only one rather than two homes were operating, or from the fact that the projected occupancy was unrealistically high, or from the fact that the units could not be sold like a conventional dwelling house, or from the lack of protection should there be an insolvency or from the lack of protection confirmed by contractual structures, or from the fact that the investments were not hassle free or from any deficient tax information given to Mr Motala.

847. It says the losses were not occasioned by any such matters. They failed because of a concealed fraud. The Claimant cannot establish that the scope of One Touch's duty extended to protecting them from such a fraud or that their losses, occasioned by that fraud, were attributable to anything One Touch got wrong, In other words that there is insufficient nexus between the harm of the kind for which they seek compensation and the subject matter of One Touch's duty: see

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Manchester Building Society v Grant Thornton LLP [2021] UKSC 20, [2022] AC 783 at [1-4] and [6-13], and *Meadows v Khan* [2021] UKSC 21, [2022] AC 852 [1-2], [28-38], [50-54], in particular the summary of the principles at [6] in *Manchester,* and at [17]:

"… in the case of negligent advice given by a professional advisor one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk."

848. Earlier cases reinforce this point. In *BPE v Hughes Holland* [2017] UKSC 21, [2018] AC 599, the negligence had nothing to do with the reasons the Claimant suffered loss, as even if the transaction had had the characteristics he wrongly assumed as a result of his solicitor's negligence, he would have lost everything. This establishes:

i) The burden is on the Claimant to plead and prove that his loss is within the scope of a defendant's duty of care [53];

ii) Losses are only recoverable if within the scope of a defendant's duty and attributable to what made its act or omission wrongful so if loss would still have occurred even if the position was as wrongly assumed there will be no recovery [37-41];

iii) That is so even if the information not reported was of critical importance such that the transaction would have stopped had a timely report been made [47-52].

849. One Touch refers to *Afan Valley Ltd v Lupton Fawcett LLP* [2026] EWCA Civ 2 which it says reiterates the point that losses which are not referable to what a professional got wrong, such as where they flow from an underlying fraud, are

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not recoverable. In that case, no loss flowed from what the solicitors did get wrong [61-65]: the solicitors were not concerned with the risk of a collective investment scheme fraud and the losses would still have been sustained even if the schemes had not been collective investment schemes [65-72].

850. Even if the investments had enjoyed the attributes the Claimants say One Touch wrongly encouraged them to suppose, there would still have been a fraud occasioning the same losses. The case is an attempt to transfer the risk of that fraud to One Touch, a selling agent and introducer, when it was a risk in respect of which One Touch never undertook to provide any protection. The loss was not within the scope of One Touch's duty and there is no nexus between it and anything One Touch got wrong.

My decision

851. This is not a case where One Touch assumed responsibility for every aspect of the transaction in prospect for the Claimants. However, neither is it a case where One Touch contributed only a small part of the material on which the Claimants relied in deciding how to act. The overall commercial merits of the transaction as a suitable property investment for the Claimants were rooted in One Touch's recommendation of the TCHG products as the fruits of its own selection exercise based upon the detailed facets of the specific due diligence that it described it had already carried out, and the information and advice which One Touch then provided to them about TCHG and the investments to guide their decision making process in determining to invest. Indeed, I note that One Touch itself stated on its website that its service would guide them every step of the way.

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852. One Touch's responsibility extends to those decisions to invest in my judgment. The result being that One Touch is not simply liable for the financial consequences of the information being wrong but also for the financial consequences of the Claimants entering into the transaction so far as these are greater.

853. Following the collapse of Accordiant, I am satisfied on the balance of probabilities that the Claimants have demonstrated that the particular risks which were not identified to them regarding the flaws in the TCHG scheme are risks which occasioned the loss in question within the scope of their duty. I consider that One Touch assumed a duty of care to protect them from the very risks which caused their losses. Accordiant was the weak link in the TCHG investment proposition given its critical roles and non-trading status; the investment proposition was an inherently risky one based upon the limited due diligence in fact carried out by One Touch; the buyback rights were not a form of fall-back insurance but entirely dependent upon the substance of the SPV at the date those rights were exercisable; the investors' position in the event of an insolvency was wholly vulnerable; TCHG was not in fact opening and operating care homes and/or in specific cases it was not correct that only minor works were required as stated.

854. When considering One Touch's submissions regarding scope of duty it is important to stress that One Touch's pleaded Defence is that the TCHG developments were capable of generating the promised returns (which remained its pleaded position in this trial), and that the loss was caused by the Claimants' reliance on other advisers, including POLS.

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855. Whilst One Touch submits that the Claimants have not sought to demonstrate by expert accounting evidence or by any other means that these investments were incapable of producing the returns which were advertised in TCHG's financial projections, it has produced no such evidence itself to make good its own submission that these developments could generate the promised returns. That is against a background where the evidence before me comprises TCHG's poor financial position from the beginning of 2017; its lack of expertise in the care home sector; the flimsy materials produced to One Touch setting out TCHG's unsupported projected trading profit figures; the fact One Touch did not visit the proposed sites to have any direct knowledge of the scale and costs of the works required or the suitability of each property for conversion; the evidence as to the planning difficulties at Windlestone Hall and the rapid scale of TCHG's accelerated programme prior to collapse. This material supports a conclusion that the TCHG scheme was more likely than not incapable of generating the proposed returns for the investors as advertised.

856. The material which One Touch relied upon at trial was taken from the Joint Administrators' Report to Investors dated 9 March 2020. It paints a more mixed factual picture than the "straightforward" picture One Touch sought to present in asserting that there is no reason the TCHG scheme could not have succeeded. The Report was not limited to the SPVs with which the Claimants dealt or the properties in which the Claimants purchased units. It extended to all the SPV companies which TCHG created and to all the other properties it purchased.

857. The Joint Administrators stated that they believed that the Group had invested in assets which were not integral to the advertised business model, including

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software development, the acquisition of a private jet, expensive cars, luxury yachts, 2 private residences and an aircraft maintenance company. They also recorded that investors had expressed significant concerns as to the reasons for TCHG making such acquisitions and investments, and the sources of funding, given TCHG was at this stage failing to complete renovation projects as expected and failing to provide them with returns as expected. They identified there were large intercompany loans between many companies within the complex Group structure. In their conclusion, the Joint Administrators expressed the view that it was the manner in which the Group business and purchases were made and the lack of proper financial control which led to it being unsustainable and to its subsequent failure (page 5).

858. Purchase prices were identified for individual properties, together with charges and indebtedness, the number of units sold and the proceeds of sale. An overview was given of the status of the various development projects and any works completed. In some cases, the costs of works to complete the project were estimated. Planning issues were noted.

859. I was not taken to any of the detail of the projects by One Touch. However, taking a high value example, at Windlestone Hall, Durham, the property where Mr Spier purchased units, the Joint Administrators' summary table shows the property was purchased by the relevant SPV for £849,999 on 8 December 2017. I understand there was a loan. 53 units were sold with a value of £8,521,730. The estimated costs to complete the necessary works were £10 million. No interior works had been commenced. The exterior roofing was only made water resistant through the use of tarpaulins. The premises were non-trading. The local

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authority had taken action to secure the premises due to their condition. No planning permission was obtained for a number of units sold. The number of units sold to generate the sum obtained was also considered unsustainable. A set of information which does not suggest at face value that this project was viable.

860. Critically, it was Accordiant which was responsible for paying the returns which were at the heart of the marketing attraction of the investments and it was the SPVs that were responsible for buyback. It was not therefore TCHG but Accordiant which was contractually obliged to pay the Claimants their returns from the very moment of their investments. It was also not TCHG but Accordiant which was responsible for simultaneously paying all sums due under the Leases.

861. Accordiant had no demonstrated independent capacity to make these payments. It also had no contractual right to receive any of the income received by a SPV company on the sale of a unit in a relevant proposed TCHG development. And, during the term of the investments, it had no contractual right to share in any eventual profits which were subsequently intended to be generated for the care home operator through the operation of the care homes if / when they opened in future. By way of example, in answer to some Claimants' questions, the TCHG projections specifically produced by One Touch to reassure them focused solely upon the operating profit of the care home operator with whom none of the Claimants were to have any contractual relationship. These did not demonstrate that Accordiant could fund the returns as advertised. Further, there is no evidence as to the reliability of the input figures One Touch points to against a

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background where One Touch's further submissions are based upon a TCHG fraud.

862. Similarly, the assertion that the proceeds of the unit sales paid to the SPV would be ringfenced to meet Accordiant's obligations is not supported by any figures which explain how this could have operated as advertised. Particularly, when the SPV company, with no assets other than the encumbered freehold, was responsible for funding all buyback payments as and when any unit investor wished to exercise their rights.

863. The flawed nature of One Touch's advice as to the likely consequences in the event of insolvency is amply demonstrated by the fact that the buyback rights are valueless and no new care home operator has stepped in to assume responsibility for paying investor returns. With the exception of a unit or units surrendered to the liquidator for a small payment, the Claimants' investments have failed.

864. I have already concluded that these were all risks which fell within the subject matter of One Touch's duty, and have commented upon the relationship between the Claimants who instructed POLS and One Touch. I reject the submission that the relevant risks were matters in respect of which the Claimants simply relied upon POLS or that POLS' retainer operated as a novus actus interveniens such that there is no sufficient nexus between the harm for which the Claimants seek damages and the subject matter of One Touch's duty. Looking backwards from the losses eventuating there remains a connection between those losses and One Touch's negligent advice and failures to advise.

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865. I agree with the Claimants that it is not open to One Touch to assert at trial that the true cause of the Claimants' losses was a fraud perpetrated by Mr Murray which eclipsed its own breaches of duty. That is a positive case on causation and a case which required to be pleaded and proved. The existence of a fraud is absent from the agreed List of Issues and Common Ground as either a matter to be determined at this trial or a matter that is agreed.

866. There is no evidence before me that the £75 million which Mr Murray is alleged to have removed from TCHG was removed from Accordiant, nor that Mr Murray has been the subject of any finding of fraud by a court through any concluded investigation in the 7 years since the collapse of TCHG and the 6 years since the Reports to which I was referred.

867. It is correct that on 24 January 2020 the Joint Administrators obtained a without notice proprietary and freezing injunction against Mr Murray to freeze his worldwide assets up to the value of £40 million. I have not been told what became of those proceedings or taken to any final judgment against Mr Murray in those proceedings or any others.

868. Mr Murray has not been joined to these proceedings and there is no evidence submitted within these proceedings on behalf of any of the TCHG companies or Mr Murray in respect of the fraud Mr Wilton asserts. It would therefore be inappropriate for me to make a finding of fraud against Mr Murray as One Touch implicitly invites in submitting that the reason for the TCHG scheme failure was necessarily the wrongful appropriation of funds for illicit purposes and/or to conclude on such basis that the scheme was otherwise capable of generating the promised returns.

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869. I also note that the Property Ombudsman's Case Review of Mr Durnford's case dated 16 January 2021 did not reach the conclusion that the TCHG scheme was viable but for the alleged fraud. One Touch contended to the Ombudsman "*that the Developer's net profit from the sale of the units should have been able to subsidise the completion of the project* …". The Ombudsman found:

> *"The alleged "misuse" of funds and potentially fraudulent activity referred to by the agent and others are serious allegations. It seems there were other serious issues / failings with the project and arrangements put in place, making the proposals very risky.*
>
> *… The Agent suggests that if Mr. Murray had not behaved as he did, then the project may have proceeded as advertised and provided the benefits described. There must though, be a question mark over whether the investment opportunity as marketed and sold was too good to be true. The proposed development was one of more than 20 proposed property purchases for redevelopment to be used to create an ambitious, network of care homes across the UK. It also seems that the financial obligations of Accordiant extended to many other projects under the arrangements described by the Administrators.*" (my emphasis)

870. On the basis of all the evidence placed before me, including the pivotal role of Accordiant and Mr Kerkvliet's own evidence that the TCHG business model required TCHG to bring forward 2 care homes a month, a matter which caused Mr Kerkvliet himself concern by the Autumn of 2018, there were undoubtedly serious issues and failings with the structure and the TCHG project. This was a highly ambitious business model for any company. Let alone an inexperienced start up care home development and operator group of companies. There are no factual grounds to conclude these investments may have prospered as One Touch suggests. These were seriously risky investment propositions from an investor's perspective.

871. The consequent risk of insolvency could not easily be discounted in circumstances where Accordiant assumed obligations to all investors and SPV companies from the date of an investor's investment. Against which possibility,

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the investor's only fall-back was the potential for a buyback by a SPV company with no assets other than the income it had received from initial purchases and the value of the encumbered freehold interest it held in a property which was intended to be the subject of a redevelopment.

872. In any event, I also accept the Claimants' submissions that a counterfactual analysis does not avail One Touch in this case for each of the reasons set out at paragraph 838(i) above. The counterfactual does misfire in the majority of cases here and it is no more than a potentially useful cross-check in any event. To apply it here would subsume the analysis of the questions of what was the scope of the duty assumed by One Touch and do the claimed losses fall within the scope of that duty: *Manchester* (as cited above) at [4, 23, 25-27], per the majority.

873. I agree with the Claimants that the counterfactual analysis proposed by One Touch yields an answer that offends fairness and common sense, which the court can and should reject: *Charles B. Lawrence & Associates v. Intercommercial Bank Ltd.* [2021] UKPC 30, [2022] PNLR 7, [18-19] per Lord Burrows and Lady Rose JJSC, giving the Board's unanimous judgment. Not least when the counterfactual in an insolvency scenario in this case results in a wholly implausible real world scenario whereby the individual intermediate long leaseholders of individual units in an intended care home or care home could simply group together and find a new care home operator or turn their units to a different use.

The Consumer Protection from Unfair Trading Regulations 2008 ("the CPUTR").

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The Claimants' Case

874. In the alternative, the Claimants claim relief on the basis that One Touch was a trader which engaged in misleading actions by providing incorrect information which caused the Claimants to enter into the purchase arrangements, in breach of the CPUTR. Given my findings as to the voluntary assumption of a duty in tort, there is no need for the Claimants to rely upon this alternative case. I therefore do so relatively briefly.

875. In summary, the Claimants say:

a. One Touch was a "trader" as defined in regulation 2(1), namely a person acting for purposes relating to its business. All the Claimants except Hoffelder were "consumers", again as defined in regulation 2(1), namely individuals acting for purposes wholly or mainly outside their business.

b. By making the false statements upon which the Claimants rely, One Touch engaged in commercial practices that constituted misleading actions as prohibited by regulation 5(2) of the 2008 Regulations, in that false information was provided to the Claimants which deceived or was likely to deceive the Claimants as to the matters specified in regulation 5(4). The commercial practices of One Touch were also unfair, within the meaning of regulation 3(3).

c. One Touch received commission from the Claimants' purchases, which is to be treated as a payment to One Touch by the Claimants for the purposes of regulation 27A(2)(c). Accordingly, One Touch is liable to pay damages under regulation 27J.

One Touch's Case

876. One Touch's defence to this element of the Claims comprised two separate strands. In essentially similar terms to the defence advanced in respect of those

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matters upon which I have already reached conclusions, the first of these strands is One Touch's pleaded case that One Touch was not acting as agent of the Claimants; the Claimants were experienced commercial investors and therefore not consumers; One Touch simply passed on communications from TCHG and cannot be liable for them; One Touch can rely on the Terms and Conditions and One Touch Reservation Form and the disclaimers / exclusions therein; no false information was provided to the Claimants in any event; and the Claimants did not rely on the relevant representations. Accordingly, the Claimants were not entitled to relief under regulation 27J as claimed. For the reasons already stated, I reject these same component elements of this defence on this issue too.

877. The second strand is a separate legal argument which One Touch advanced at trial. It says this is a pure point of law and the general denial in its Defence of the application of the CPUTR is sufficient to enable it to take the point.

878. The argument is as follows. The CPUTR are largely concerned with criminal liability. It is only in particular circumstances by way of new provisions introduced by amendment as Part 4A, that there can be any civil liability to pay damages. The CPUTR apply to acts, omissions, and other conduct by businesses directly connected to the promotion, sale or supply of "a product" to a consumer. A "consumer" is "an individual acting for purposes that are wholly or mainly outside that individual's business". One Touch now accepts that the evidence shows that all the Claimants except Hoffelder were acting in that way.

879. Regulation 27A defines when a consumer has a right of redress. The first condition is that a consumer must enter into a contract with a trader for the sale or supply of a "product" by the trader or must make a payment to the trader for

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the supply of a "product". Regulation 27A states that "product" does not include immoveable property other than "a relevant lease". At the relevant date, "a relevant lease" was defined as an assured tenancy within the meaning of the Housing Act 1988.

880. Having regard to section 1 and part 1 of Schedule 1 to the Housing Act 1988, the arrangements entered by the Claimants were not for the grant of a relevant lease. The care home unit was not a dwelling house let as a separate dwelling to the Claimant; the Claimant tenant did not occupy the unit as their only or principal home; the rent payable was £250 per annum or less; and the tenancy under the Lease was for a term certain of more than 21 years. The identical points apply to the Sub-Lease. The terms of the ultimate letting to an occupier were never established.

881. As a result, Mr Bankes-Jones submits, the Claimants cannot base any claim under the CPUTR on the sale of the leasehold interest or in respect of payment for such an interest. Furthermore, the Claimants did not contract with One Touch for the provision of the leasehold interest or pay One Touch for the supply of that interest. The only viable claim the Claimants might have had would have been against the SPV which contracted to sell their leasehold property, although even then the fact the lease was not a "product" is an insuperable obstacle.

882. Mr Bankes-Jones also submits that the second condition in regulation 27A is not fulfilled because that requires a trader to engage in a prohibited practice. One Touch denies there was any such practice or that it has been proved any prohibited practice was a significant factor in the Claimant consumer's decision

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to enter the contract or make the payment. Further, that One Touch's causation arguments apply under regulation 27(J)(1); that there is no right to damages under regulation 27J(5) because One Touch was relying upon TCHG; that there is a scope of duty issue; and that under regulation 27K(5) One Touch's limitation arguments under the Limitation Act 1980 also apply.

The Claimants' Response

883. The Claimants accepted that it is correct that a product does not include immoveable property. Ms Innes advanced two substantive arguments. The first was a submission that the "product" in this case cannot be narrowed down to just a lease. She says such an approach is artificial and does not reflect the purchase proposition because there was also a right to receive rent through the grant of the Underlease. The second was that a "service" is capable of being a "product". She submits that the contract which the Claimants asserted with One Touch in these Claims or the service provided by One Touch is capable of being such a product such that the CPUTR bite.

My Decision

884. In my judgment, it was not too late for One Touch to take this purely legal short point regarding the application of the CPUTR.

885. The CPUTR have now been superseded but are still in effect for acts or omissions which took place before 6 April 2025: section 252 of the Digital Markets Competition and Consumers Act 2024. Whilst various of the 2008 Regulations may be enforced by way of criminal prosecution by Trading Standards and some of the CPUTR apply specifically to estate agents, for the

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Claimants to succeed in a civil claim to damages under the CPUTR they must indeed bring themselves within the scope of Part 4A, as inserted by the Consumer Protection (Amendment) Regulations 2014.

886. The interpretation provisions are set out in regulation 2:

> "consumer" means an individual acting for purposes that are wholly or mainly outside the individual's business.
>
> "trader" (a) means a person acting for purposes relating to that person's business, whether acting personally or through another person acting in the trader's name or on the trader's behalf, and (b) except in Part 4A, includes a person acting in the name of or on behalf of a trader.
>
> "commercial practice" means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.
>
> "product" means – (a) goods (b) a service … (d) immoveable property, (e) rights or obligations … but the application of this definition to Part 4A is subject to regulations 27C and 27D.

887. As explained, regulation 27C(1) states that for the purposes of Part 4A "product" does not cover immoveable property other than a relevant lease. Defined at regulation 27C(2) in relation to England as an assured tenancy within the meaning of Part 1 of the Housing Act 1988 or a holiday let.

888. As set out in regulation 27A:

> "(1) A consumer has a right of redress under this Part [4A] if –
>
> (a) the conditions in this regulation are met, and
>
> (b) the conditions (if any) in the following provisions of this Part for the availability of that right are met.
>
> (2) The first condition is that –
>
> (a) the consumer enters into a contract with a trader for the sale or supply of a product by the trader ("a business to consumer contract")

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(b) the consumer enters into a contract with a trader for the sale of goods to the trader (a "consumer to business contract")

(c) the consumer makes a payment to a trader for the supply of a product ("a consumer payment")

(4) The second condition is that –

(a) the trader engages in a prohibited practice in relation to the product …

…

(6) The third condition is that the prohibited practice is a significant factor in the consumer's decision to enter into the contract or make the payment."

889. As explained in regulation 27J:

(1) Subject as follows, a consumer has the right to damages, if the consumer –

(a) has incurred financial loss which the consumer would not have incurred if the prohibited practice in question had not taken place, or

(b) if the consumer has suffered alarm, distress or physical inconvenience or discomfort …

(2) The right to damages is the right to be paid damages by the trader for the loss or the alarm, distress or physical inconvenience.

(3) The right to be paid damages for financial loss does not include the right to be paid damages in respect of the difference between the market value of a product and the amount payable for it under a contract.

(4) The right to be paid damages under this regulation is a right to be paid only damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice.

(5) A consumer does not have the right to damages if the trader proves that –

(a) The occurrence of the prohibited practice in question was due to -

(i) a mistake,

(ii) reliance on information supplied to the trader by another person,

(iii) the act or default of a person other than the trader,

(iv) an accident, or

(v) another cause beyond the trader's control, and

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(b) the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practise.

890. I agree with One Touch that the Claimants cannot establish the grounds for a claim under the CPUTR. The Claimants entered three contracts: an Agreement for Lease with the SPV; the Lease of the individual unit granted to them by the SPV; and the Underlease of the individual unit with Accordiant. The Lease contained the Buyback rights. The Underlease contained the provisions obliging Accordiant to pay the monthly guaranteed return and to pay the sums due to the SPV under the Lease on their behalf. The Lease and the Underlease created proprietary interests. The bundle of rights and obligations created, including the right to grant an underlease and to receive rent, were attributes of these specific leasehold interests granted.

891. For the reasons set out by Mr Bankes-Jones, neither of these interests was a "relevant lease" for the purposes of regulation 27C because it did not create an assured tenancy under the Housing Act 1988. Accordingly, neither the grant of the Lease nor the Underlease properly falls to be classified as a contract for the sale of a product within the scope of Regulation 27B.

892. I also agree with One Touch, and have already found, that the Claimants did not contract with One Touch such that it has an entitlement to claim damages from One Touch under the 2008 Regulations. Although a contract relating to a product may include the provision of a service or rights and obligations by a trader for these purposes, it therefore follows that the individual Claimants did not contract with One Touch as a trader for such a product. Further, One Touch did not receive payment from the individual Claimants as consumers for a

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service. The payments made by the Claimants were payments to the relevant TCHG SPV.

The Limitation Defence

One Touch's Case

893. One Touch defends the claims bought by the following Claimants in respect of the following properties without prejudice to its position that such claims are statute barred on the grounds of limitation under section 5 of the Limitation Act 1980 ("the 1980 Act") and/or section 2 of 1980 Act because events occurred in excess of 6 years prior to the issue of these proceedings on 21 November 2023 and, in the case of Mrs Byers, in excess of 6 years prior to the issue of these proceedings on 23 October 2024:

a. Mr and Mrs Funk's claim in relation to Care Studio 4, Park Avenue, Hartlepool, where the reservation form was signed on the 20 October 2017 and the reservation fee paid on or around that date, and exchange and completion took place on 5 December 2017;

b. Mr Motala's claim in relation to Care Studio 8, Caring Communities St Austell, Truro Road, St Austell, where the reservation form was signed on the 13 October 2017, exchange and completion took place on 6 December 2017 and the reservation fee paid on or around that date;

c. the Hickson Claimants' claim in relation to Care Studio 9 and 23 Millpond View, Hayle, Cornwall where the reservation fee was

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paid on about 15 July 2017 and exchange and completion took place on 29 September 2017;

d. the Hickson Claimants' claim in respect of Care Studio 39 and 41, Sandown, Isle of Wight, where the reservation form was signed on the 9 September 2017, and the reservation fee paid on or around 19 September 2017 and exchange and completion took place on 17 November 2017;

e. the Hickson Claimants' claim in respect of Care Studio 20 Paignton where the reservation fee was paid on 14 November 2017 and exchange and completion took place on 16 January 2018;

f. the van der Merwe Claimants' claims in relation to Care Studio 8, Ocean View, Sandown, Isle of Wight, where the reservation form was signed on the 12 September 2017 and the reservation fee paid on or around that date and exchange and completion took place on 17 November 2017;

g. the van der Merwe Claimants' claims in relation to St Austell where the reservation form was signed on the 12 October 2017 and the reservation fee paid on or around that date and exchange and completion took place on 1 December 2017;

h. Mrs Byer's claim for 29 Paignton where the reservation fee was paid on 1 or 3 October 2018 and exchange and completion took place on 25 October 2018, with issue on 23 October 2024.

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894. One Touch submits that any causative breach of contract must have preceded the Claimants' payment of the £2,000 registration fee as whilst One Touch monitored the progress of the transaction thereafter it was not providing any further information or "advice". It says that actionable damage in tort was done when the £2,000 was paid, alternatively, on exchange when the Claimants were committed to these loss-making transactions.

895. Mr Wilton submits that the payment of £2,000 is easily sufficient damage to start time running for a claim in tort under section 2 of the 1980 Act. On the Claimants' case they received nothing of any value corresponding to that payment. They were each £2,000 worse off than they should have been. Furthermore, he says, the £2,000 was irrecoverable whether or not the Claimants proceeded. It was money thrown away and an expense they would not otherwise have incurred. Nor did the £2,000 secure an opportunity to participate in a valuable investment opportunity. On the contrary, he submits, the Claimants' case is that the opportunity had no value.

896. Mr Wilton submits there is authority that the payment of an initial fee in connection with a later entry into a loss-making transaction is sufficient damage to start time running: see *Knights v Townsend Harrison* (paras. 225 and 240-242), where the accountants acting as introducers of a tax avoidance scheme had a limitation defence by reason of the Claimant having come under an obligation to pay such an initial fee. In this case, he says, the reservation fee was actually paid by the relevant Claimants.

897. Alternatively, Mr Wilton submits, if time did not run from the date the reservation fee was paid then it will certainly have run from the (simultaneous)

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exchange and completion, such that the claims of the Hickson Claimants for Care Studios 9 and 23 Millpond View and Care Studios 39 and 41 Sandown and the claim of the van der Merwes' in respect of Ocean View, Sandown will be time-barred.

898. He cites *Byrne v Hall, Pain & Foster* [1999] 1 WLR 1849, which demonstrates that damage is done when a property worth less than supposed is purchased, the precise moment being upon exchange of contracts. At that moment the Claimant does not get what he or she reasonably expects and is obliged to pay more than the interest acquired is worth. Likewise, he says, the Claimants were committed on exchange to these loss-making property investment purchases.

899. Mr Wilton submits that to like effect are the 'unsuitable investment' cases. Time runs from the investment date even if the rights acquired have the same value at the moment of transfer as what was paid for them. He cites *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2008] PNLR 37 (headnote and paras. 20-25, 32, 37, 39 and 47-49 in particular).

900. Mr Wilton noted that the mere fact that a Claimant does not get what he anticipated does not in itself mean damage has been done. That is a question of fact. Although where he gets something materially different such an inference will be readily drawn: *Maharaj v Johnson* [2015] UKPC 28, [2015] PNLR 27 (paras. 25-27).

901. He says this is not a *First National Commercial Bank Plc v Humberts* [1995] 2 All ER 673 or *Nykredit Mortgage Bank v Edward Erdman Group Ltd* [1997] 1 WLR 1627 style lender's case where damage may not occur at the time of the transaction. That may be so in a lender's case because the value of rights

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acquired may for a time be at least equal to the monies outstanding together with accruing interest such that the lender may have every reason to expect that no loss will be sustained: see *Nykredit* (headnote, 1631E and 1632 C). This case is different. He describes it as a case alleging failings by a supposed investment adviser inducing investors to purchase a worthless interest having first thrown away £2,000. That is in the same category as the purchase of a property worth less than was paid for it in *Nykredit* at 1630G. Thus, he submits, time runs from the point of purchase, subject only to the caveat that £2,000 had already been thrown away such that in this particular case time runs from that earlier date.

902. Alternatively, even if one treats this as a lender's case, Mr Wilton says the Claimants' case is that the leasehold interest was worthless and that there was no substance to Accordiant's covenant, and the investment was doomed to fail and neither safe nor secure. The fact that Accordiant may for a time have continued to make payments is neither here nor there unless the Claimants say that the leasehold interests combined with its covenant were worth as much as the sums they invested. He says they do not and could not plausibly say that.

903. Nor, he submits, is this a contingent liability case like *Law Society v Sephton* [2006] 2 AC 543 where the Law Society was contingently exposed to having to pay compensation to defrauded clients of a solicitor by reason of an accountant's failure to identify matters which would have prompted an intervention. Whether the Law Society would have to pay would depend on contingent factors including whether the loss might be made good and whether a client would make a claim on the Compensation Fund. Until the latter happened there was only the possibility of a claim. Mr Wilton says that scenario

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bears no relation to this case in which the Claimants paid £2,000 to reserve and then completion monies to acquire a leasehold interest said to have no value where the whole arrangement was vitiated by a fraud. A case of this kind has nothing to do with the *Law Society v Sephton* scenario where there is only a contingent possibility of having to pay money in the future.

904. One Touch submits that section 14A of the 1980 Act is also of no help as the relevant Claimants had actual or constructive knowledge of damage and attributability more than 3 years before issue. Mr Wilton cites *Haward v Fawcetts* [2006] UKHL9, [2006] 1 WLR 682 at [8]-[24] and *Witcomb v Keith Park Solicitors* [2023] EWCA Civ 326, [2023] PNLR 20 at [55-57] (both cases dealing with actual knowledge), and *Forbes v Wandsworth Health Authority* [1997] QB 402 at 412A-414H (dealing with constructive knowledge), and *Kay v Martineau Johnson* [2026] EWCA Civ 224 (actual and constructive knowledge).

905. Mr Wilton says that the schemes collapsed and Accordiant defaulted in 2019 when it and the SPVs and other companies within TCHG went into an insolvency process. On the Claimants' case One Touch's "advice" induced them to proceed and it was obvious by mid-2019 they had sustained large losses which might be due to failings by One Touch. As the Claimants present their case, One Touch had portrayed the investments as highly attractive with minimal risk and yet it was now plain that the opposite was the case. Something had evidently gone badly wrong and there was by that stage every reason to investigate whether One Touch might have been responsible.

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906. Mr Wilton says there was nothing technical about the matter: the Claimants had been sold what had proved a disastrous investment having been told by One Touch, on their case, it was an excellent opportunity. They already had good reason to investigate the possible wrongdoing of One Touch. They did not need sight of the documentation passing between One Touch and TCHG they say they obtained on or after 20 April 2021 to tell them that. They did not need legal advice either. Alternatively, legal advice should have been taken by the end of 2019.

907. Mr Wilton seeks to draw on the Claimants' conduct (including of Claimants who do not face a limitation defence) as evidence that demonstrates there was reason to investigate the possible responsibility of One Touch well before 21 December 2020. Mr Funk himself recalled "*thinking quite quickly that this had been a bad purchase*" and by May 2019 he was criticising One Touch for its failure to look more closely at TCHG's financial model. Mr Motala was aware the whole development scheme had collapsed in early 2019. He undertook a 'Safe or Scam' report, was blaming One Touch by July 2019 and made a complaint on 16 September 2019. Mr Hickson knew there were serious problems following the default in early 2019. Mr van der Merwe knew of the collapse of the schemes in early 2019. As did Mrs Byers who was also concerned by the fact no proof of title had been supplied. Mr Wilton says Mr Byers was making angry calls to One Touch in June 2019, and in October he was saying they would get 9p in the £ from the insolvency, and a complaint was made to One Touch in November 2020 and to TPO in April 2021.

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908. As regards other Claimants, Mr Durnford complained to One Touch in July 2020 and to TPO in September 2020 and said it was obvious to him and everyone else that the investments were a total disaster long before July 2020. Mrs Heneghan, described by Mr Wilton as probably the least sophisticated of all the purchasers, made a formal complaint to One Touch by September 2020.

909. Taken together, Mr Wilton says the evidence demonstrates that the Claimants already had sufficient knowledge (actual or constructive) of both the damage sustained and that it was possibly due to failings by One Touch by, at the latest, 21 November 2020, alternatively they could reasonably have been expected to get advice telling them that by that stage. However, proceedings were not issued in the Main Claim until 21 November 2023, 4 years after Accordiant's default and the schemes' collapse, and in the Byers' Claim until 23 October 2024, 5 years after the collapse.

The Claimants' case

910. On a true analysis, the Claimants submit no claim is time-barred. They say that One Touch's case on limitation is misconceived for the following reasons.

911. Firstly, they submit that One Touch's limitation defence is founded on the erroneous proposition that the cause of action in tort accrued on the execution and return of the reservation form and payment of the reservation fee, because the Claimants irrevocably committed themselves to their purchase transactions at that point. The Claimants submit this is incorrect as a matter of fact. Completing a reservation form and paying a reservation fee secured a unit at the offered price for a specific period. It did not in any way commit the purchasers

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to proceeding. One Touch's inconsistent practice in relation to reservation forms is inapt to establish any wider effect of reservation.

912. Secondly, the Claimants submit that One Touch's limitation defence is founded on the incorrect premise that the reservation fee is to be treated as if it were a deposit in a conventional conveyancing transaction. Mr Johnson says it bears no relation to a deposit and the off-plan purchases were materially different from everyday conveyancing.

913. Thirdly, the Claimants submit that One Touch's limitation defence proceeds on the basis that the Claimants suffered an immediate loss as soon as they entered into their purchase arrangements. The Claimants say it is fair to note that both sides have said differing things on this subject. One Touch itself specifically denies "*that the leasehold interests were worthless when the Claimants purchased them, or are worthless now*": Defence paragraph 64.2; Byers Defence paragraph 50.2.

914. The Claimants submit that what Mr Johnson described as the "incontrovertible point" is that the purchase arrangements performed and paid out for a considerable time, until Accordiant was no longer able to service its obligations. Accordingly, the Claimants' primary case is that they only suffered loss when their payments ceased and that this is when their causes of action in tort accrued. Cf. *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 W.L.R. 1627; *Maharaj v Johnson* [2015] UKPC 28. By Order made on 31 October 2025, the Claimants were permitted to amend their reply to plead this contention. Accordingly, they say no Claimant is time-barred.

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915. Fourthly, they say the fact that the Claimants also claim amounts equal to their reservation fees (on the basis that if One Touch had not breached its duties, they would not have entered into the purchase arrangements), does not mean that loss arose on the date of payment. They cite *Law Society v Sephton* (as cited above); and *First National Commercial Bank Plc v Humberts* [1995] 2 All ER 673.

916. Fifthly, in the alternative to their primary case, the Claimants contend that their causes of action accrued on the date of simultaneous exchange and completion. Of the Claimants who face a limitation defence, the claims of Mr and Mrs Funk, Mr Motala, Mr Hickson (in relation to his claim concerning Paignton 20), Mrs van der Merwe and Mrs Byers, were all issued in time on this alternative case.

917. If so, sixthly, with regard to Mr Hickson and his 2 Millpond View units and 2 Sandown units and Mr van der Merwe in respect of Sandown 8, Mr Johnson submits that, if the Claimants' primary case on limitation does not prevail, they claim the benefit of a 3 year period under section 14A of the Limitation Act 1980. They do so on the basis that until they instructed their solicitors on 6 February 2022 and in early February 2022 respectively, they did not have the knowledge required to bring a claim against One Touch.

918. The Claimants necessarily accept that knowledge can be actual or constructive. What needs to be known is the material facts relating to damage, the possibility that the defendant was responsible, and the factual essence of the acts or omissions committed by the defendant which caused the damage. In this case, the Claims called for specialist technical expertise. Namely, an analysis of what had gone wrong with the transaction mechanics and why and how One Touch were in breach. That required an analysis of papers held by TCHG's liquidators,

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which only took place after the issue of a Part 8 claim on 29 March 2021 and an order of ICC Judge Barber dated 16 April 2021.

919. The subsequent analysis demonstrated that in the aftermath of TCHG's collapse, One Touch's apparent efforts to assist the purchasers were in fact self-serving attempts to deflect responsibility and that it had long known of the financial and other problems experienced by TCHG, but had prioritised its commissions. Accordingly, Mr Hickson and Mr van der Merwe did not have the knowledge required to start time running until they had received the benefit of such specialist expertise and input: for example *Etroy v Speechly Bircham LLP* [2023] EWHC 386 (Ch), [2024] PNLR 1, Clare Ambrose (sitting as a judge of the High Court).

920. As to Mr Hickson:

i) Mr Hickson first gained the relevant knowledge under section 14A(5) after a conversation with a fellow investor. He said that "*in* [2022]…*I followed that up later on with an email to Mark Meyer who the fellow investor had introduced me*". He said that this was around 6 February 2022;

ii) Whilst Mr Hickson accepted in cross-examination that it was possible he had been put in the situation because of bad advice from One Touch and he had reason to investigate in 2019 "*whether One Touch was responsible*", his concern at that stage was the failure of One Touch to keep him updated and adequately monitor the situation, rather than whether One Touch was itself answerable for the situation that had arisen.

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921. As to Mr van der Merwe:

i) Mr van der Merwe first gained the relevant knowledge under section 14A(5) "*in the latter part of 2023*". That is shortly before the issue of the Claim. Whilst Mr van der Merwe accepted when put to him that he "*must have been saying to himself*" in late 2019 that he had been misled about the nature of his investment, he clarified in re-examination that at that stage he was not thinking about bringing legal proceedings against anyone and certainly not One Touch.

ii) This was confirmed by Mr Kerkvliet who agreed, when shown an email dated 22 May 2019 from Mr van der Merwe, which described One Touch as a "*trustful sales agent*", that Mr van der Merwe had "*never manifested any sign of complaint, grievance or suspicion that he might have a claim against your company*".

iii) Attempts were made to establish that Mr van der Merwe must have discussed the situation, and One Touch's role, with his brother Tiene. The Claimants argue that the court should accept Mr van der Merwe's clear and consistent evidence that he did not do so and is in fact distant in age and geographical location from his brother, and rarely communicates with him.

922. The witnesses were cross-examined on their contact with external lawyers from about May 2019 onwards. The Claimants explained that in fact, much of the initial action following the cessation of letting revenue was co-ordinated by One Touch. Unsurprisingly, therefore, these endeavours did not identify the possibility that the Claimants' losses were attributable to One Touch. Such

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endeavours included briefing Pinsent Masons LLP and liaising with other law firms and Quantuma on behalf of purchasers. Mr Kerkvliet accepted that he encouraged Claimants to get in touch with Pinsent Masons and to take forward claims for redress against TCHG.

My Decision

923. In my judgment, the correct approach to establish the running of the primary limitation period under section 2 of the 1980 Act in those Claims which One Touch contends are time barred is to take the date of simultaneous exchange and completion of the Lease and Underlease of the care home unit purchased as the relevant date that loss accrued in each case. At the moment of exchange the Claimants became committed to these loss-making property investment purchases. They did not get what they reasonably expected and they were obliged to pay more than the interest they acquired was worth given the risks attached to the investment.

924. I take as my starting point *Byrne v Pain & Foster* (as cited above), which demonstrates that for the purposes of section 2 of the 1980 Act the cause of action accrues on the date when a purchaser exchanges contracts to purchase property (rather than on the later date of completion of their purchase). That is because it is on that date they irrevocably committed themselves to acquiring an interest in a property which was worth less than they were led to believe and which they would not have committed themselves to acquire but for the negligence. Simon Brown LJ explained at 1856 H-1857C as follows:

> "… I see no distinction in principle between "parting with his money and receiving in exchange property" at completion and, as will generally occur on exchange, paying a deposit and becoming committed to pay the balance on

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completion. True, it is not until completion that the purchaser receives the property in the sense of the legal estate in the property. On exchange, however, he obtains a very real interest in the property and, for example, must insure it.

In the last analysis the *Nykredit* case [1997] 1 WLR 1627 to my mind assists the defendants' argument rather than the plaintiffs'. Lord Nicholls like Stephenson J in *Forster v Oughtred & Co* [1982] 1 WLR 86 accepted Mr Stuart Smith's formulation of the meaning of actual damage. One looks, therefore, for "any detriment, liability or loss" including "liabilities which may arise on a contingency" and "losses incurred from onerous provisions or covenants in leases" subject only to the loss being "a relevant loss", ie one "falling within the measure of damages applicable to the wrong in question". Here, I repeat the plaintiffs on exchange became irrevocably committed to acquiring the lease, a lease worth less than they reasonably believed, and one which they would not have committed themselves to purchase but for the defendants' negligent report. That, as it seems to me, plainly resulted in "actual (as opposed to potential or prospective) loss or damage of a kind recognised by the law," as Saville LJ expressed it in *First National Commercial Bank Plc v Humberts* [1995] 2 All ER 673, 676."

925. To the same effect are the "unsuitable investment" transaction cases to which Mr Wilton referred. In *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2008] PNLR 36 at [38], Dyson LJ explained:

"In my judgement, an investor who wishes to place £100 in a secure risk-free investment and, in reliance on negligent advice, purchases shares does suffer financial detriment on the acquisition of the shares despite the fact that he pays the market price for the shares. It is no answer to this investor's complaint that he has been induced to buy a risky investment when he wants a safe one to say that the risky investment was worth what he paid for it in the market. His complaint is that he did not want a risky investment. A claim for damages immediately upon the acquisition of the shares would succeed."

926. On the facts of this case, I do not accept One Touch's primary submission that the fact a £2,000 reservation fee was previously paid to TCHG by the Claimants was sufficient to start time running earlier under section 2 of the 1980 Act prior to the date of exchange. On that date, in this case, the entirety of the purchase price was paid. There was no deposit.

927. I do not consider that the analogy drawn with *Knights v Townsend Harrison* (as cited above) is appropriate. In *Knights v Townsend* the alleged negligent act in

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question, or the act constituting the breach of duty, was the defendant firm of accountants introducing the second claimant to a tax avoidance scheme with a company called OneE, and providing inappropriate advice in relation thereto, or failing to provide appropriate advice. On the claimants' case this caused the second claimant to suffer loss and damage, with the loss and damage increasing as it became increasingly committed to the OneE scheme. HHJ Cawson QC, sitting as a Judge of the High Court, held [at 240], that the "significant point" was that in consequence of these acts complained of the company became committed to pay £5,000 by signing a letter of engagement with OneE to enter the OneE scheme. This represented non-negligible actual damage (being a liability incurred) and thus reflected when loss was first suffered and the relevant six year limitation period first accrued.

928. The Judge applied Lord Nicholls' endorsement in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* (as cited above), at 1630D-E of the Court of Appeal's approval in *Forster v Oughtred & Co* [1982] 1 WLR 86 of counsel's submission that actual damage meant "any detriment, liability or loss capable of assessment in money terms …". He held [at 241] that although the claimants alleged that furthermore significant loss was suffered when effect was given to the OneE scheme, and the company paid £250,000 into the relevant Employer Financed Retirement Benefit Schemes:

> "… the fact is that not insignificant loss had been sustained. … The difficulty from the Claimants' perspective is that the further loss alleged to have been suffered occurred in consequence of the same cause of action".

The second claimant's claim was therefore time barred.

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929. In my judgment the payment of a £2,000 reservation fee by the Claimants to TCHG to secure a specific unit at the offered price for a specific period is not analogous to the signature of the letter of engagement and the obligation to pay £5,000 in *Knights v Townsend*. *Knights v Townsend* concerned the certain loss of £5,000, which was significant, together with a change in the second claimant's legal position through the signature of the letter of engagement. As at the date the letter of engagement was signed the role played by the defendant accountants as an introducer came to an end in respect of that transaction.

930. When considering the reservation fee paid in this case and the application to it of the relevant words "any detriment" and "loss capable of assessment in money terms", I also remind myself that this passage, although approved by high authority, cannot be construed as if it were a statute: *Law Society v Sephton* (as cited above) per Lord Walker at 556H and Lord Mance at 569C. As Lord Mance explained, Lord Nicholls in *Nykredit* "was far from accepting that everything that can loosely be described as "detriment" will constitute damage for the purposes of a tort claim".

931. The figure of £2,000 is of an order that is rather less significant than a payment of £5,000 for the purposes of the application of the limitation provisions in the section 2 of the 1980 Act. Fundamentally, however, when making the £2,000 payment the Claimants did not suffer the certain loss of that fee or become irrevocably committed to proceed with the purchase transaction. Their advisory relationship with One Touch also did not come to an end.

932. In my judgment, the reservation fees paid were refundable as a matter of law. Mr Hickson did not sign any Reservation Form and there is no evidence that he

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agreed that his reservation fee/s was/were non-refundable. Mr Funk and Mr van der Merwe were encouraged to pay their reservation fees quickly whilst discussions were continuing and prior to signing any reservation form. There was no suggestion that once the fees were paid they would be non-refundable.

933. Mr Funk subsequently signed a TCHG Reservation Form which provided for the full or partial refund of the reservation fee within certain time limits. Mr Motala had previously signed a TCHG Reservation Form in that same format. There is therefore no reason to consider that the terms as to the non-refundability of the deposit contained within the One Touch Reservation Form would have been applied to trump TCHG's own terms given that relevant fee was paid to TCHG. In any event, and in the case of each of the Claimants, including Mr van der Merwe, who saw the One Touch Reservation Forms in these cases for no longer than it took him to sign them during the meeting with Mr Kerkvliet and Mr Thornton, I have held that the relevant terms of the Reservation Forms were unenforceable against the Claimants as non-contractual notices. These terms include the terms relating to the conditional refundability or non-refundability of the reservation fee.

934. Payment of the fee was not presented by One Touch to the Claimants as any kind of serious or significant legal step or even a step which required careful reflection because the fee paid may not be refundable to them. It was presented as nothing more than a payment to secure the straightforward administrative holding of a unit for their own protection by enabling their chosen unit to be "reserved" for them and taken off the market. The fees were also payable prior to the date when the Claimants were to obtain any legal advice through the

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subsequent introduction of a solicitor to them by One Touch. Where a Reservation Form was completed part of its function was to enable the appointment of a solicitor.

935. I accept that a claimant may suffer measurable loss through negligence without entering into any transaction which changes their legal position (for example, Lord Mance's example in *Law Society v Sephton* (as cited above) at 565G of the case where a defendant entrusted with deeds or valuables simply loses them). However, the line of directly analogous cases such as *Byrne v Hall, Pain & Foster* (as cited above), where a claimant purchased a property which they would not have purchased at all if properly advised, have all involved a payment coupled with a change of position. In such circumstances the amount of a deposit paid would generally reflect the payment of a more significant sum such as a percentage of the eventual purchase price.

936. Applying the combination of pertinent factors identified by Simon Brown LJ in *Byrne v Hall, Pain & Foster* (as cited above), the payment of a relatively low £2,000 refundable reservation fee in return for the removal of a unit from the market is not akin to the actual loss suffered through the detrimental legal consequences of the exchange of contracts for the sale and purchase of a property coupled with the payment of the deposit. When paying the £2,000 fee the Claimants did not change their legal position by obtaining any interest in a TCHG unit, and they incurred no responsibility for any outgoings, such as insurance. These circumstances therefore bear little resemblance to those of a conventional property transaction where relevant and not insignificant actual (as

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opposed to potential or prospective) loss or damage of a kind recognised by law has been held to be suffered when contracts are exchanged and a deposit is paid.

937. As I have already mentioned, in contrast to the *Knight* case, One Touch's involvement did not cease on payment of the reservation fee, in any event. The loss that the Claimants suffered occurred as a result of One Touch's continuing causative breaches of duty up to the date of exchange and completion. POLS openly copied One Touch into each element of the confidential conveyancing correspondence which passed between themselves and the relevant Claimants from the moment of their introduction by One Touch through to exchange and completion. A state of affairs which can only have strongly suggested that One Touch was looking after the Claimants' interests through its oversight of the conveyancing correspondence and that nothing in the content of that correspondence served to change One Touch's recommendation and advice to them with regard to the merits of their TCHG investment.

938. In so far as it provides further support for the conclusion I have already reached, I also note that certain other Claimants received payments of about £2,500 from the Liquidators of an SPV company for the surrender of their leasehold interest. As an encumbrance upon the freehold titles of each of the TCHG sites, it is therefore conceivable that the Leases of the units purchased may be considered to have had some minimal value which exceeded the sum of the reservation fee paid anyway.

939. Whilst I therefore see no good reason to accelerate the accrual of a cause of action in this case, it also follows that I reject the Claimants' primary case on limitation. That is that the relevant date here for the purposes of section 2 should

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be taken to be dates in 2019 when the Claimants' returns ceased to be paid to them by Accordiant rather than the date of exchange and completion.

940. In support of their submission, the Claimants relied, by way of analogy, upon the lender's case of *First National Commercial Bank Plc v Humberts* [1995] 2 All ER 673. There the plaintiff lender entered into a loan transaction as a result of a negligent valuation. The starting point being that the advance made by the claimants will represent the measure of their loss. That did not mean, however, that the advance or any part of it was actually lost at that time. As a matter of fact, the plaintiffs would not have been able to establish that they had lost the whole or any part of their advance at the date the advance was made because they had demonstrated that their security exceeded the advances: Saville LJ at 678 c-e.

941. The Claimants' pleaded case in the APOC sets out that the leasehold interests acquired were worthless. There was no substance to Accordiant's covenant. The investment was doomed to fail as it was neither safe nor secure. As explained above, the proper analogy in this case is therefore with Lord Nicholls' example in *Nykredit Mortgage Bank v Edward Erdman Group Ltd* (as cited above) at 1630G of the "simple case which gives rise to no difficulty" where a purchaser buys a house which has been negligently overvalued.

942. In my judgment, the evidence relied upon by the Claimants cannot properly be compared with that in *First Commercial* or Lord Nicholls' example in *Nykredit* at 1631B-F of the "more difficult" case:

> " … where, as a result of negligent advice, property is acquired as security. In one sense the lender undoubtedly suffers detriment when the loan transaction is completed. He parts with his money, which he would not have done had he been

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> properly advised. In another sense you may suffer no loss at that stage because often there will be no certainty he will actually lose any of his money: the borrower may not default. Financial loss is possible, but not certain. Indeed, it may not even be likely. Further, in some cases and depending on the facts, even if the borrower does default the overvalued security may still be sufficient. …
>
> Thus, typically in the case of a negligent valuation of an intended loan security, the basic comparison is between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the true value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property."

There is no evidence that the rights acquired had anything other than a negligible or minimal value.

943. The facts are also not analogous to those of the contingent liability cases such as *Law Society v Sephton*, relied upon by the Claimants. There, the Law Society was contingently exposed to having to pay compensation to defrauded clients of a solicitor by reason of an accountant's failure to identify the solicitor's misappropriations of funds from its client account in its annual reports to the Law Society. It was held that by virtue of the terms of the Solicitors' Compensation Fund Rules 1995, the Law Society's contingent liability was dependent upon the misappropriation not being otherwise made good and a claim in proper form being made. The possibility of the obligation to pay money in the future was not in itself damage until the contingency occurred. Consequently, until a claim was made, no loss or damage had been sustained by the fund, and no cause of action had accrued. That is a very different state of affairs to the case presented by the Claimants in respect of the fundamentally worthless nature of the TCHG investments they purchased here.

944. Accordingly, on the basis that the correct date for the purposes of section 2 of the 1980 Act is the date of exchange, the claims brought by Mr and Mrs Funk, Mr Motala, Mr Hickson in respect of Unit 20 Paignton, Mrs van der Merwe,

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one of Mr van der Merwe's purchases, and Mrs Byers' purchase are not time barred.

945. In the alternative, Mr Hickson and Mr van der Merwe have relied upon the provisions of section 14A of the 1980 Act. That provides for a three-year limitation period running from the "earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action": subsection (5). Sub-section (6) explains that "the knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge both (a) of "the material facts about the damage in respect of which damages are claimed" and (b) of "the other facts relevant to the current action mentioned in subsection (8)". By sub-section (7), "the material facts about the damage" are "such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment". The "other facts" referred to in sub-section (6)(b) include that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence, the identity of the defendant and, if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of the claim against the defendant.

946. By sub-section (9), knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of sub-section

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(5). By sub-section (10), for the purposes of section 14A a person's knowledge includes knowledge which he might reasonably have been expected to acquire (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek. But a person shall not be taken by virtue of subsection (10) to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and where appropriate to act on) that advice.

947. As set out in *Haward and others v Fawcetts (a firm) and another* [2006] UKHL 9 at [8]-[24] "knowledge" for the purposes of section 14A of the 1980 Act means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a claim form, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. Lord Nicholls said at [9] that "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice". "In other words, the claimant must know enough for it to be reasonable to begin to investigate further."

948. Knowledge that the damage was "attributable" in whole or part to the acts or omissions of the defendant alleged to constitute negligence within section 14(8)(a) means knowledge in broad terms of the facts on which the claimants' complaint was based and of the defendant's acts or omissions and knowing that there was a real possibility and not a fanciful one that those acts or omissions had been a cause of the damage. Requiring such knowledge does not offend

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against section 14A(9) of the 1980 Act, which makes irrelevant knowledge that conduct involved negligence as a matter of law.

949. As explained by Newey LJ in *Kay v Martineau Johnson (A Firm)* [2026] EWCA Civ 224 at [21(iii)]:

"Where a claim relates to professional advice, the fact that the claimant knew that he had incurred loss as a result of acting in accordance with the advice need not mean that he had knowledge that "the damage was attributable … to the act or omission which is alleged to constitute negligence" for the purposes of section 14A(8)(a). Lord Mance said in paragraph 118 [of *Haward v Fawcetts*] that "it is … wrong to suggest that all a claimant needs to know is that he has received professional advice but for which he would not have acted in a particular way which has given rise to loss, or that he has not received advice when, if he had received it, he would have acted in a way which would have avoided such loss", adding:

> "a claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done or at least discovers some respect in which the transaction was from the outset unsound giving him … prima facie cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss."

In a similar vein, Lord Nicholls in *Haward v Fawcetts* said:

"19. … As already noted, in addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ("attributable to") the acts or omissions alleged to constitute negligence. The conduct alleged to constitute negligence in the present case was not the mere giving of advice. The conduct alleged to constitute negligence was the giving of flawed advice: Mr Austreng did not give the advice appropriate to the true financial state of the company's affairs.

20. This feature of the advice cannot be brushed aside as a matter of detail. Nor can it be treated, as it was by the judge, as a matter going only to particulars. Far from it. This feature is the very essence of Mr Haward's claim. Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.

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> 21. There may be cases where the defective nature of the advice is transparent on its face. It is not suggested that was so here. So, for time to run, something more was needed to put Mr Haward on inquiry. For time to start running that needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given."

950. In *Witcomb v Keith Park Solicitors* [2023] EWCA Civ 326, [2023] PNLR 20 at [55-57], the Court of Appeal described as "plainly correct" Bourne J's comments in his judgment at first instance in that case [2021] EWHC 2038 (QB), [2021] PNLR 24, after quoting from *Hawards v Fawcett*, that:

> "36. From all of this, I conclude that where the essence of the allegation of negligence is the giving of wrong advice, time will not start to run under section 14A [of the 1980 Act] until a claimant has some reason to consider that the advice may have been wrong.
>
> 37. Similarly, where the essence of the allegation is an omission to give necessary advice, time will not start to run under section 14A until the claimant has some reason to consider that the omitted advice should have been given."

951. "Actual" knowledge under sub-sections (6)-(8) involves more than "constructive" knowledge under sub-section (10). The language of section 14A recognises "a range of different states of mind": *Haward v Fawcetts* per Lord Mance at [126]. Constructive knowledge within subsection (10)(b) involves a situation where, although the claimant does not yet know sufficient for (a) to apply, he knows sufficient to make it reasonable for him (by himself or with advice) to acquire further knowledge which would satisfy (a).

952. As regards constructive knowledge and the burden of proof on the Defendant, as set out in *Forbes v Wandsworth Health Authority* [1997] QB 402 at 412A per Stuart-Smith LJ, the approach is to determine what the claimant should have realised or obtained, asking no more of them than is reasonable. That is a standard of objective reasonableness but must take into account the claimant's position, circumstances, character and intelligence.

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953. Mr Hickson says that until he contacted solicitors on 6 February 2022 following a conversation with a fellow investor, he did not have the knowledge required to bring a claim against One Touch. Mr van der Merwe says that it was when he instructed solicitors in early February 2023, he obtained the knowledge required to bring a claim against One Touch.

954. From mid-2019 Accordiant defaulted upon its payment obligations to all investors. Subsequently, Accordiant and the SPVs and other companies within TCHG began to go into insolvency processes. In my judgment, whilst it was clear that something had gone badly wrong, it is not surprising that the Claimants' focus was upon TCHG. Their purchases had been made with TCHG. In the case of Mr Hickson and Mr van der Merwe they had not made these purchases recently through One Touch. Since the date of their purchases, they had been in a direct relationship with Accordiant, and it was Accordiant which had the obligations to make the payments to them. At this stage, the fact that it was known that the schemes had collapsed meant the investors' positions were left unclear prior to the outcome of the Administrators' investigations.

955. I consider that the fact that One Touch had presented the investments as highly attractive with minimal risks did not mean that there was reason for the Claimants to investigate whether One Touch might have been responsible for their losses. The nature of the relationship which existed between the Claimants and One Touch was a well-developed relationship of trust. That was particularly so in the case of Mr Hickson and Mr van der Merwe as multiple investors.

956. Fundamentally, in the aftermath of the collapse of TCHG One Touch's immediate response was to seek to resume its role of looking after the interests

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of the purchasers to seek to obtain redress from TCHG on their behalf as the entity responsible for their losses. It also suggested that the failure of the scheme could only be due to fraud. An email between Mr Lisco and Mr Uruthiran contains the content of a standard email from One Touch dated 14 June 2019 in which One Touch stated:

"*One Touch instructed a litigation solicitor and barrister on behalf of our clients to provide advice on the potential of recovering costs based on the contractual obligations of the lease and underlease.*

The advice provided is not provided to protect Carlauren Lifestyle Resorts, Carlauren Group or Accordiant. The instruction was to explore the viability of pursuing the aforementioned companies to recover the lost income being incurred by our clients due to a contractual breach.

Please read the attached letter from the Litigation solicitors at Compass law and the preliminary advice form Gough Square Chambers (of barristers)".

One Touch added:

"*One Touch had studied various research documents on the Care Home market and found that the typical operating profit is between 20% and 30%. It seems strange that the operating resorts are not able to pay the 10% contracted income.*

A number of the care homes have yet to be refurbished and the purchase price that was paid should have been sufficient to cover refurbishment costs. Form the legal documents alone the legal team could not advise on whether possible fraudulent transactions have occurred.

From the Companies House records, it appears likely that intercompany loans have taken place. Could the potential acquisitions of sites (or group companies) been facilitated from the income that should have been used for refurbishing the projects our clients invested in?

It would be useful for investors to ask Carlauren and Accordiant the following:

1. *For a chartered building surveyor/ quantity surveyor to provide a report on their property. The report should include a summary of the works completed and an estimate of the works (including fixtures and fittings) that are still required to get the properties to operational.*

2. *How Accordiant generated income from the closed care homes in order to pay investors?*

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3. *They claim that "our portfolio in the shared ownership model have a valuation of £470 million". How was that valuation derived?*

   Some of our clients have spoken to members of Carlauren's team who have apparently stated that they have received further funding from Carlauren International and their Chinese Partner amounting to £3 million.

   If that is true it would be a great result. It would be good understand [sic] how they will implement their strategy. Which properties are they going to fix first? ...

   Carlauren have requested a six-month payment holiday ...

   Solution for non-operational care homes & resorts

   We believe that the right thing for Carlauren to do would be for Carlauren to gift the freehold to each of the leaseholders of associated property (in exchange for cancelling the buyback obligation). That way the leaseholders would become (share of freehold owners) and have full control of the property. They would then be in a position to sell the entire care home / resort to specialist provider OR to pay for the full refurbishment to be completed. ...

   Solution for operational care homes & resorts

   The income from operational care homes should be paid to the owners who purchased in those developments. That way the leaseholders would become (share of freehold owners) and have full control of the property.

   Carlauren Resorts (the operating company) Seems to be motivated in continuing to manage the operational resorts. We propose that the investors offer Carlauren Resorts the opportunity take a lease on the operational resorts- provided that the proposed lease income would be in line with other operators invited to tender.

   These suggestions, although not perfect, seem like a practical solution. If you agree, we would propose that you instruct a litigation solicitor to propose the solution to Carlauren.

   We are trying to work with you to obtain clarification on how the business turn around is practically going to be implemented."

957. Subsequently, One Touch contacted Mishcon de Reya LLP, PCB Solicitors and Pinsent Masons LLP. It decided that Pinsent Masons' strategy was the best and invited investors to participate in a group action against TCHG. Mr Kerkvliet accepted in evidence that he actively encouraged Claimants to get in touch with solicitors and to take forward claims for recompense against TCHG.

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958. By 25 July 2019 Quantuma were appointed as Administrators and on 28 November 2019 Duff & Phelps and Quantuma were appointed as Joint Administrators of the various companies in TCHG. At this stage, Mr Murray was replaced as director of the various companies. One Touch liaised with Quantuma on behalf of purchasers.

959. On the basis of this evidence, I agree with the Claimants that One Touch's efforts at this stage were in part at least self-interested. They distracted from the potential for the investors to look to One Touch when they were being guided to claim against TCHG. That was in circumstances where One Touch knew, at very minimum, that it had not in fact carried out the due diligence checks it described on its website and in its publicity materials and that it had continued to sell TCHG units for a period of about a year whilst the "red flags" about TCHG's stability and the security of the investments accumulated in its own files. Necessarily, it was no part of this exercise for One Touch to suggest to the Claimants or other purchasers or the solicitors or Administrators that they should look into its own responsibility for the losses suffered. That remained the case after Mr Motala made a complaint to One Touch on 16 September 2019.

960. I do not place any weight in this context upon Mr Hickson's agreement during cross examination by Mr Wilton that it was distinctly one possibility that the disaster was due to bad advice from One Touch and he had reason to investigate. Given the specific reason Mr Hickson gave for his answer it was clear that he meant he thought the financial disaster was possibly due to One Touch's failure to warn him in time in the run up to the collapse of TCHG when "*they must have detected problems*". He did not identify as a possibility that the disaster was due

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to One Touch's failure to advise him properly in the first place when recommending the investments in these 4 units to him. His reasoned evidence supports his reliance upon section 14A in respect of his claim.

961. Mr van der Merwe's acceptance when pressed in cross examination that he must have been saying to himself in 2019 that One Touch had actually misled him about the risks was at odds with his earlier oral evidence that it did not occur to him in 2019 that he had a complaint against One Touch, his subsequent evidence that at that stage he was not thinking of suing anyone, and his witness statements. It is also wholly at odds with the evidence which Mr Kerkvliet gave about Mr van der Merwe in his witness statement where he described his surprise that Mr van der Merwe was a party to the Claim. In cross examination, Mr Kerkvliet said Mr van der Merwe had never manifested any sign of complaint or suspicion that he might have a claim against One Touch during this time.

962. In my judgment, Mr van der Merwe was the least sophisticated of all the witnesses who gave evidence: a farmer and naïve first-time investor who dealt in handshakes with people he trusted rather than in paperwork and who flew to London to meet Mr Kerkvliet and Mr Thornton in order to decide whether these were people he could trust in order to invest. The bond of trust that he developed with One Touch was possibly the strongest of all the Claimants. He asked Mr Thornton to select units for him without even first receiving the specific brochures for the relevant developments. Given the contemporaneous evidence, and Mr van der Merwe's presentation in court, it is implausible that Mr van der Merwe would have had reasonable belief that the damage was attributable in

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whole or in part to the act or omission which is now alleged to constitute negligence for the purposes of section 14A(8)(a) in 2019.

963. Mr van der Merwe gave a frank and compelling account of the fact that he and his wife were both overwhelmed and devastated and "*financially practically ruined*", struggling to keep their heads above water, during these years. The paperwork he described which flooded into them, and with which they could not cope, came from solicitors with regard to TCHG. I accept Mr van der Merwe's account as entirely credible that it was only when he learnt about this on a social media group in 2022-2023 that he thought he should ask himself whether One Touch was to blame. I also accept his evidence that he did not discuss these matters with his brother beforehand given the nature of their relationship.

964. I also cannot accept One Touch's submission that if the Claimants required legal advice at all they should have obtained that advice in late 2019. As the Joint Administrators' Reports reveal, the process of investigating and understanding the reason for TCHG's collapse was a very complex one. It was only on 24 January 2020 that the Joint Administrators themselves sought a without notice freezing order against Mr Murray. The Property Ombudsman's Case Review in Mr Uruthiran's case also refers to apparent communications from Quantuma to One Touch describing the Judge noting the support One Touch gave at that stage, assisting the Judge to make the related orders. One Touch referred to this comment with regard to that complaint as suggesting there was a chance the investors may get some of their money back. It is reasonable to believe this was One Touch's generally stated position at that stage.

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965. On 9 March 2020 the Joint Administrators' Report identified that creditors believed there was a Ponzi scheme and a large-scale fraud. When TPO completed their Case Review in Mr Uruthiran's case on 21 May 2020 they recorded that proposals put forward by the Joint Administrators had "recently been approved" with the decision taken to form creditors' committees. It was not yet known the extent to which investors may be able to recover some or all of their investments. The Winchester, in which Mr Durnford had also invested, was yet to be marketed for sale as part of the asset realisation process.

966. Evidence taken from TPO's Case Review dated February 2021 in Mr Durnford's case subsequently describes that the period of the Administration had "recently" been extended to November 2021, with a Progress Report filed by the Administrators on the Registrar at Companies House in January 2021. Investigations into TCHG's affairs were stated to be still ongoing, including the use of Group funds. The Administrators said it was uncertain if there would be sufficient realisations to enable distributions to non-preferential secured creditors, being dependent on future asset realisations, ongoing investigations and the costs of the insolvency proceedings.

967. In my judgment, the fact that the conduct of certain other Claimants, who do not face a limitation defence, evidence that certain forms of complaint were made to One Touch in the second half of 2020 does not also demonstrate that there was reason for Mr Hickson and Mr van der Merwe to investigate the possible responsibility of One Touch well before 21 November 2020 as One Touch submits. The complaints upon which One Touch relies to support this submission were made to One Touch by Mr Durnford in July 2020 (followed

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by his complaint to The Property Ombudsman in September 2020), and by Mrs Heneghan in September 2020. Unlike Mr Hickson, who was the first of the One Touch purchasers in 2017, and Mr van der Merwe, who purchased in 2017 and early 2018, Mr Durnford and Mrs Heneghan had only purchased through One Touch during the immediate period when TCHG was failing. As had Mr Uruthiran.

968. Accordingly, in contrast to Mr Hickson and Mr van der Merwe, Mr Durnford and Mr and Mrs Heneghan had received and relied upon One Touch's assurances about the safety of the TCHG care home investments a matter of weeks and months before TCHG collapsed. In such circumstances, and in the light of the Joint Administrators' Reports, they had an immediate reason to question One Touch's due diligence and the advice which they had received given the publicity surrounding the collapse of the TCHG scheme. In the case of Mr Durnford, he received only two payments from Accordiant before his return ceased. Mr Uruthiran received only one.

969. I note that One Touch classifies Mr Durnford amongst the relatively more sophisticated investors and submits that Mrs Heneghan was, perhaps, the least sophisticated. In my judgment, Mrs Heneghan was amongst a group of relatively naïve first-time investors and/or overseas investors which also included Mr Morrell and Mr van der Merwe. However, in contrast to Mr Morrell and Mr van der Merwe, Mrs Heneghan was motivated throughout to press and test One Touch. Not least when Mr Heneghan's starting point before she contacted One Touch in late 2019 had been that the TCHG investments looked too good to be true.

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970. Similarly, I do not consider that One Touch's reliance upon Mrs Byers' complaint to One Touch in November 2020 assists it with regard to Mr Hickson and Mr van der Merwe's own actual or constructive knowledge. Mrs Byers' email was actually sent at 22.30pm on the material date applicable for the purposes of Mr Hickson and Mr van der Merwe's own reliance upon section 14A: 20 November 2020. Mrs Byers wrote:

"*my complaint is … that you, as my agent sold a unit to me that does not exist. I would therefore like to hear your explanation in order to decide how best to progress my grievance*."

971. Mrs Byers identified One Touch as having acted as her agent. The essence of her complaint was that she had purchased unit 29 on the basis of a floor plan and email provided by One Touch and the unit she had purchased did not exist. There were therefore no title deeds. No allegation was made of any other negligent act or omission by One Touch. These facts are unique to her Claim.

972. I also consider the lack of evidence of the investigation by any of the other Claimants of a claim against One Touch supports Mr Hickson and Mr van der Merwe and their assertions that they had neither the relevant actual nor constructive knowledge for the purposes of section 14A prior to 21 November 2020.

973. Further, I agree with the Claimants that these Claims did call for specialist technical expertise. What the claimant must actually know in order to set time running is the essence of the act or omission to which his damage is attributable. For time to run, something more was needed to put the Claimants on inquiry. The process of beginning to identify why and how One Touch were in breach of the duties it had assumed required additional information and a proper

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understanding of the scheme of the TCHG development projects and knowledge of the transaction mechanics.

974. As in the case of Mr Haward's claim in *Haward v Fawcett* (as cited above), it is of the very essence of Mr Hickson and Mr van der Merwe's claims that One Touch did not perform the responsibilities it assumed properly. Particularly in the light of the contemporaneous publicity surrounding the allegations of a concealed Ponzi scheme, and One Touch's response to that, these were not cases where the defective nature of One Touch's advice was transparent on its face. This required an analysis of papers held by TCHG's liquidators, which only took place after the issue of a Part 8 Claim on 29 March 2021 and an Order of ICC Judge Barber on 16 April 2021. An analysis which I am told demonstrated that in the aftermath of TCHG's collapse, One Touch's efforts to assist the purchasers were in fact self-serving attempts to deflect responsibility. It had long known of the financial and other problems experienced by TCHG but had prioritised its commissions. Information which will have caused all those who had worked with One Touch to reconsider the advice and recommendations which they gave to them and their role in their purchases.

975. As described by Lord Mance in *Haward v Fawcett*, these cases are therefore an example of the scenario where there are other causes of loss which appear to the Claimant to be capable of explaining the whole loss. Each Claimant believed they had received apparently sound and reliable advice from One Touch and saw no reason to challenge it unless and until they discovered that this had not been preceded by or based on the investigation which he instructed or expected. They did not attribute the financial loss they had suffered in the purchases

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entered into in reliance on such advice unless and until they had each made further discoveries concerning the inadequacy of One Touch's work giving them cause to complain on the face of it.

976. As a result, time did not start to run against either Mr Hickson or Mr van der Merwe as a result of actual knowledge until they individually knew enough for it to be reasonable to embark on preliminary investigations into this possibility. They only realised that when specialist lawyers were consulted and they received the fruits of that advice. This was objectively reasonable in the circumstances. Mr Hickson's claims in respect of the purchase of the first four of his units and Mr van der Merwe's claim in relation to his unit at Sandown 8 are not therefore time barred as a result of the operation of section 14A of the 1980 Act.

The Property Ombudsman

The 3 Claimants' Cases

977. One Touch argues that the claims of Mr Durnford, Ms Suganthan (as executrix to the estate of Mr Uruthiran) and Mr and Mrs Heneghan are barred by *res judicata* through their acceptance of an award of the Property Ombudsman ("TPO").

Acceptance of an award from The Property Ombudsman

One Touch's case

978. One Touch says the claims that Mr Durnford, the estate of the late Mr Urithran, and Mr and Mrs Heneghan seek to make are res judicata and that they are

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precluded from instigating further claims against One Touch having previously compromised those claims by accepting full and final awards from TPO. One Touch's case relies on the decision made, in the context of a determination of the Financial Ombudsman ("FOS"), in *Clark v In Focus Asset Management* [2014] EWCA Civ 118.

979. The relevant wording of these Claimants' acceptances of TPO awards was as follows:

> "*I, Mr Durnford… hereby accept the proposed decision and award of £800 in Full and Final Settlement of my/our complaint/s against One Touch Property Investment concerning the performance of their London Office, in regard to all my/our complaint/s which have been considered*."
>
> "*We Mr Uruthiran and Mr Lisco…hereby accept he Ombudsman's final decision and award of £2,000 in Full and Final Settlement of my/our complaint/s against One Touch Property Investment concerning the performance of their London Office, in regard to all my/our complaint/s which have been considered*."
>
> "*We, Mr Heneghan and Mrs Zhao-Heneghan …hereby accept the proposed decision and award of £1,500 in Full and Final Settlement of my/our complaint/s against One Touch Property Investment concerning the performance of their London Office, in regard to all my/our complaint/s which have been considered*."

980. One Touch submits there is no doubt that each of those Claimants accepted TPO's decision in what was made clear to them would be in full and final settlement of the claims they had against One Touch. The fact of that settlement being full and final and settling all claims against One Touch was made clear in each of the settlement acceptance forms they signed.

981. Mr Bankes-Jones cited the following passages from the judgment of Arden LJ (as she then was) in *Clark*:

> "82. I am satisfied that the ombudsman's award is a judicial decision for the purposes of the requirements of res judicata. The process involves giving the

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parties an opportunity to state their case: the award is not the product of the ombudsman's enquiries alone. The ombudsman is not making an administrative decision. The fact that article 6 applies to the process, as the judge pointed out, is not determinative of this question but it strongly indicates that the decision of the ombudsman is a judicial one. The decision of the European Court of Human Rights on this point in *Heather Moor & Edgecomb Ltd v UK* (App no 1550/09) that the ombudsman was a "court or tribunal" for the purposes of article 6 of the Convention makes this clear:

"The parties accepted that Article 6, under its civil head, is applicable to the facts of this case. The Court agrees. In deciding the complaint against the applicant and ordering it to pay compensation to L, the Ombudsman determined the applicant's civil rights and obligations. The procedure must therefore conform to the standards set down in Article 6.

According to the Court's well-established case-law, an oral and public hearing constitutes a fundamental principle enshrined in Article 6 § 1 (see Jussila, cited above, § 40). As the Court recognised in that and other cases, however, the holding of a hearing is not an absolute obligation. There may be proceedings in which it is not required, where the courts, or other deciding authority, may fairly and reasonably decide the case on the basis of the parties' written submissions and other written materials (ibid., § 41). Considerations of efficiency and economy may also be relevant in certain contexts, one example being social security law. The present context is of protection for consumers in the domain of financial services and investment advice. Parliament's intention, clearly stated in the legislation, was to provide for the resolution of certain disputes quickly and with minimum formality. It notes in this respect the very high number of disputes that FOS deals with annually, which the Government put at 150,000..."

83. I also note that the Ombudsman Service accepts that it makes judicial decisions for the purposes of res judicata."

982. And further at para. 91:

"I do not attach any significance to the fact that an award lacks binding status when it is written or to the fact that an award is not binding unless and until the award is accepted. The crucial point is that, in the end, an award which is accepted is binding on the Complainant and the adviser."

983. And at paras. 121 and 123:

"For all the reasons I have given, I would allow this appeal. Parliament did not manifest any intention that Complainants to the Ombudsman Service should be in any different position from other Claimants who have taken their claim for compensation through a tribunal for dispute resolution and obtained a decision, and then sought to litigate the same grievances again in the courts. They are not

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> able to raise the same claims in court proceedings even if they could have recovered more in court proceedings. What they had to do to obtain this higher level of compensation was to reject the award and bring court proceedings for that amount……
> If my Lady and my Lord agree, this means in future cases that, if and to the extent that the defendant can show that before the Ombudsman Service the Claimant relied on a complaint which was in substance based on a set of facts which constitutes the cause of action on which he relies in his subsequent proceedings, and the ombudsman determined that complaint whether by reference to what is fair and reasonable or by reference only to legal principles (which he considered to be fair and reasonable to apply), then res judicata applies. It does not matter whether the award was for the maximum sum that can be awarded or for a lesser amount."

984. Mr Bankes-Jones submits that TPO's terms of reference make clear that any decision is final and in full and final settlement of the dispute. The position was, for example, communicated fully to Mr Lisco by the Ombudsman, and underlined for emphasis in the correspondence with him when he accepted the award: "This award is also made on the understanding that it brings to an end all related disputes between these parties but does not affect the Complainant's ability to pursue the Developer/Mr Murray for recompense."

985. Mr Bankes-Jones says that TPO is a competent Tribunal with a clear statutory footing is in no doubt as the Scheme is implemented under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. Regulation 14C expressly provides:

> 14C.—(1) Where an ADR entity aims at resolving a dispute by imposing a solution, the solution will not be binding on a party to the dispute unless—
> (a) the ADR entity notifies the party that the outcome will be binding; and
> (b) the party specifically accepts that the outcome will be binding.
> (2) The requirements under paragraph (1) must be met before the ADR entity notifies the party of the outcome of the alternative dispute resolution procedure.

The Claimants' Case

986. The Claimants submit that *Clark* does not apply so as to bar the Claimants' claims. They say:

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i) TPO is not, like the FOS, a creature of statute. It is a private company funded by its members (i.e. companies such as One Touch). There is no authority to support the proposition that its awards are "judicial decisions" capable of giving rise to a res judicata. TPO's own Terms of Reference are equivocal as to whether an award will have any such effect: paragraph 44: "an Award and/or a Decision might compromise their ability to pursue that matter through the Courts".

ii) TPO's procedure is insufficiently formal, consistent and independent to constitute a judicial decision:

a. TPO did not adequately explain its rules and processes to Mrs Heneghan. She was not told that she might not be able to bring a court claim if she accepted TPO's award as required (in mandatory terms) by paragraph 44 of TPO's Terms of Reference.

b. When Mr Durnford's complaint was raised, TPO engaged in informal correspondence with Mr Kerkvliet and proposed that it deal with the complaint summarily on the same basis as Mr Uruthiran's previous complaint.

c. One Touch refused to disclose correspondence or its file to TPO in respect of Mr Uruthiran's complaint, but TPO nevertheless proceeded to make a decision.

d. TPO allowed Mr Durnford to withdraw his acceptance of its award.

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iii) Res judicata only applies where, among other things, the relevant tribunal had jurisdiction over the parties and the subject matter, and the decision determined a question raised in later litigation: *Clark* at [8]. Paragraph 11(a) of TPO's Terms of Reference provides as follows (emphasis added):

> "The Ombudsman shall not investigate a dispute (or any part of a dispute), or shall discontinue the investigation of a dispute (or any part), if:
>
> a. it appears the Complainant is seeking a legal decision or sanction that can only be obtained in the Courts and/or an adjudication of potentially criminal activity or claims of negligence"

The decisions in issue either (i) did not deal with any allegation of negligence, or (ii) if they did, were beyond TPO's jurisdiction, such that res judicata does not apply.

987. Even if *Clark* does apply, the Claimants submit Mr Durnford's claim is not res judicata because he revoked his acceptance of the award in his case, which, they say, both TPO and Mr Kerkvliet acknowledged and affirmed. In any case, they submit, Mr Durnford's complaint did not focus on the representations actually made by One Touch and did not include any complaints relating to buyback. Mr Durnford's claim is therefore (at least partially) outside the scope of his complaint to TPO.

988. Similarly, even if *Clark* does apply, they say this argument is not even pleaded against Mr and Mrs Heneghan.

My decision

989. The Property Ombudsman scheme was set up in 1990 as a limited company, The Property Ombudsman Limited. At the relevant dates, TPO was an "ADR

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entity" authorised by the Secretary of State under Regulation 4 of the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 ("the 2015 Regulations"). Its name appears on a list maintained in accordance with Regulation 10. The 2015 Regulations have recently been revoked on 6 April 2026 pursuant to the Digital Markets, Competition and Consumers Act 2024.

990. The 2015 Regulations designated certain "Competent Authorities" that were to be responsible for vetting and monitoring ADR entities which provide alternative dispute resolution services in compliance with the specified standards set out in EU Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. In this case, the Secretary of State is the Competent Authority under Regulation 8. Regulation 9 provided that the Competent Authority may only approve an application for a body to become an ADR entity if it had met or would meet the requirements in Schedule 3.

991. In order to be so authorised, a body had to satisfy the Secretary of State that it met the requirements set out in Schedule 3 to the 2015 Regulations. These included at paragraph 3 that (a) an ADR official possessed a general understanding of the law and the necessary knowledge and skills relating to the out of court or judicial resolution of consumer disputes, to be able to carry out their functions competently; (b) appointed each ADR official for a term of office of sufficient duration to ensure the independence of that person's actions; (c) ensures that no ADR official discharges their duties in a way that is biased as

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regards a party to a dispute; (d) remunerates an ADR official in a way that is not linked to the outcome of the dispute; and (f) ensures that the obligation to disclose a conflict of interest is a continuing obligation throughout the procedure.

992. At Schedule 3 paragraph 5 the 2015 Regulations also included that the body made certain information available on its website in a clear and easily understandable manner, including (e) the type of domestic disputes which it is competent to deal with, including any financial thresholds which apply; (f) the procedural rules of the alternative dispute resolution procedure operated by it and the grounds on which it can refuse to deal with a given dispute in accordance with paragraph 13; (i) the principles the person applies, and the main considerations the person takes into account, when seeking to resolve a dispute; (k) a statement as to whether or not a party to the dispute can withdraw from the alternative dispute resolution procedure once it has commenced; (l) the costs, if any, to be borne by a party, including the rules, if any, on costs awarded by the person at the end of the alternative dispute resolution procedure; (m) the average length of each alternative dispute resolution procedure handled by the person; (n) the legal effect of the outcome of the dispute resolution process, including whether the outcome is enforceable and the penalties for noncompliance with the outcome, if any; and (o) a statement as to whether or not alternative dispute resolution procedures operated by it can be conducted by oral or written means (or both).

993. Under paragraph 13 the relevant "person" may only refuse to deal with domestic disputes which it is competent to deal with on one of the grounds stated. These

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include (a) no previous complaint to the trader; (b) the dispute is frivolous or vexatious; (c) the dispute is being considered by another ADR entity or by a court; (d) the value of the claim falls below or above the monetary thresholds set by the person; (e) the complaint has been submitted out of time; (f) dealing with such a type of dispute would seriously impair the effective operation of the person.

994. Under Schedule 3 paragraph 6(b) the person must ensure that (i) the parties to a dispute are not obliged to obtain independent advice or be represented or assisted by a third party although they may choose to do so, and (ii) that the alternative dispute resolution is available free of charge or at a nominal fee for consumers. At paragraph 7 it was required that the person (a) ensures that during the alternative dispute resolution procedure the parties may, within a reasonable period of time, express their points of view; (b) provides a party to a dispute within a reasonable period of time, upon request, with the arguments, evidence, documents and facts put forward by the other party to the dispute, including a statement made, or opinion given, by an expert; (c) ensures that the parties may, within a reasonable period of time, comment on the information and documents provided under paragraph (b); (d) informs the parties that they are not obliged to retain a legal advisor, but that they may seek independent advice or be represented or assisted by a third party at any stage of the alternative dispute resolution procedure; (e) notifies the parties of the outcome of the alternative dispute resolution procedure and gives the parties a statement of the grounds on which the outcome is based.

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995. At paragraph 8 (subject to paragraphs 9 and 10), in relation to an alternative dispute resolution procedure which aims at resolving a dispute by proposing a solution, it was required that the person ensures that the parties have the possibility of withdrawing from the alternative dispute resolution procedure at any stage, and are informed of this right before the procedure commences and:

(c) are informed, before agreeing to or following the proposed solution -

(i) that they have a choice as to whether or not to agree to, or follow, the proposed solution;

(ii) that their participation in the alternative dispute resolution procedure does not preclude the possibility of them seeking redress through court proceedings;

(iii) that the proposed solution may be different from an outcome determined by a court applying legal rules; and

(iv) of the legal effect of agreeing to, or following the proposed solution;

(d) before expressing their consent to a proposed solution or amicable agreement, are allowed a reasonable period of time to reflect.

996. Under Regulation 3 "consumer" means "an individual acting for purposes which are wholly or mainly outside that individuals trade, business, craft or profession", and "trader" means a person acting for purposes relating to that person's trade, business craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

997. Under Regulation 14B:

"An agreement between a consumer and a trader to submit a domestic dispute to an ADR entity is not binding on the consumer to the extent that the agreement …

(b) has the effect of depriving the consumer of the right to bring judicial proceedings in relation to the domestic dispute."

998. As stated above, Regulation 14C of the 2015 Regulations expressly provided:

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> 14C (1) Where an ADR entity aims at resolving a dispute by imposing a solution, the solution will not be binding on a party to the dispute unless -
> (a) the ADR entity notifies the party that the outcome will be binding; and
> (b) the party specifically accepts that the outcome will be binding.
> (2) The requirements under paragraph (1) must be met before the ADR entity notifies the party of the outcome of the alternative dispute resolution procedure.

999. I have been provided with a number of different sets of Terms since the oral hearing, but at the relevant date, the parties are now agreed that the Terms of Reference for The Property Ombudsman Scheme effective from 1 August 2019 were the relevant Terms ("the 2019 Terms"). The references to paragraph numbers below are to the paragraph numbers of the 2019 Terms. The Terms of Reference have been amended subsequently.

1000. The 2019 Terms outlined the nature, powers and extent of the Ombudsman scheme. They state that TPO's Scheme is designed to reach a resolution of unresolved disputes in full and final settlement. At paragraph 1, that the Scheme provides consumers with free and independent redress of complaints, relating to acts or omissions of Member or Registered Agents in connection with the sale and/or purchase of property in the United Kingdom.

1001. "Member or Registered Agent" is defined at paragraph 61k as meaning:

> "any firm which is directly a member of TPO or who is subject to the Ombudsman's jurisdiction and these Terms of Reference by virtue of a contractual relationship with a trade association of which the firm is a Member and has agreed to abide by their rules".

"Estate Agency Work" is defined at paragraph 61g as meaning:

> "any things done by any person in the course of a business (including a business in which they are employed) pursuant to instructions received from an individual ["the client"] who wishes to sell or purchase any property in the United Kingdom … for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to purchase or, as the case may be, sell such property; and after such an introduction has been effected

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> in the course of that business, for the purpose of securing the sale or, as the case may be, the purchase of that property. …".

1002. The limited company has two parts to its structure: TPO's Board and the Office of the Ombudsman. Complaints start and finish with the Ombudsman. In reaching decisions, the Ombudsman is impartial and independent of TPO's board and all outside influences: paras. 3 and 4.

1003. The 2019 Terms are principally framed to guide the Ombudsman in dealing with complaints and coming to independent decisions. They allow the Ombudsman to use their discretion within the general guidelines given: para. 5.

1004. The Ombudsman's principal duties are stated to be to resolve unresolved complaints by consumers who may be actual buyers or leaseholders (amongst others) in relation to the carrying out of relevant estate and/or letting agency and/or property management work by any Member or Registered Agent and to investigate such complaints and issue a Decision within the powers of the Ombudsman in accordance with Part 3: para. 9a.

1005. "Decision" is defined at paragraph 61f as:

> "a Direction and/or decision and/or conciliation, mediation or other informal resolution process … made by the ombudsman within their powers under the [2019 Terms of Reference]."

1006. TPO's principal powers are set out at paragraph 10 as:

> "(a) to direct that a Member or Registered Agent take steps to improve practice and/or to desist from a continuance of existing practice where appropriate, including the issuing of a formal apology to the Complainant;
>
> (b) to direct that a Member or Registered Agent pays the Complainant a financial Award in full and final settlement of the complaint, not exceeding £25,000 per complaint by way of compensation for actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act(s) or omission(s) which was/were the subject matter of the complaint."

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1007. "Award" is defined at paragraph 61a as meaning:

"a compensatory amount in money, or money's worth of a Final Decision".

"Final Decision" is defined at paragraph 61h as meaning:

"is the Decision made by the Ombudsman following any Representations and in accordance with these Terms of Reference".

1008. Part 3 of the 2019 Terms is entitled "Dealing with Complaints Scope of Investigations". At paragraph 11 it is set out that:

"The grounds of any complaint must be that in relation to the Complainant, the act or omission by the member or registered agent complained of constitutes:

a. a breach of the Member or Registered Agent's obligations under the law;

b. a breach of the Member or Registered Agent's obligations under any relevant Code of Practice or any internal rules, procedures or statements of practice of the Member …;

c. unfair treatment;

d. maladministration;

in a way that results in the Complainant suffering actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act(s) or omission(s) which was/were the subject matter of the complaint."

1009. The "General conditions for acceptance of a complaint" are set out at paragraph 12 of the 2019 Terms and the "General exclusions" are at paragraph 13:

"General conditions for acceptance of a complaint

12. The Ombudsman shall only consider, or continue to consider, a complaint if they are satisfied that:

a. the complaint is made against a firm registered with TPO as described;

b. the complaint is made to them on behalf of the persons described entitled to make a complaint;

c. the internal complaints procedure of the Member or Registered Agent has been exhausted, but the Complainant remains dissatisfied with any observations made, or conditions of a full and final settlement offered …;

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d. the complaint is made within set timescales;

e. the act or omission giving rise to the complaint occurred within stated timescales;

f. provisions relating to previous complaints do not apply;

g. the subject matter of the complaint was not contained in a complaint form, made by or on behalf of, the same Complainant previously considered by the Ombudsman. However, the Ombudsman may reconsider complaints previously considered if relevant new evidence is available and no award has been accepted and paid in full and final settlement;

h. the Ombudsman may, in the instances set out in paragraph 13 below, not investigate a complaint or may discontinue an investigation. Notwithstanding those instances, they may still consider any complaint put to them provided that:

- There is no other relevant independent body for the conciliation, arbitration or adjudication of complaints in relation to the matter; and
- the Ombudsman feels that it is in their competence to do so; and
- both the Complainant and the member or registered agent so agree;
- where the amounts claimed by the Complainants exceeds the monetary limit defined in 10b above the Ombudsman will advise the Complainant of that limit in their jurisdiction and provide the option of either discontinuing the investigation or proceeding by agreement to restrict the claim to the award limit.

General exclusions

13. The Ombudsman shall not investigate a complaint (or any part of a complaint), or shall discontinue the investigation of a complaint (or any part of it), if:

a. it appears the Complainant is seeking a legal decision or sanction that can only be obtained in the Courts and/or an adjudication of potentially criminal activity or claims of negligence ….". (my emphasis)

1010. "General Procedure" is at paragraph 14 of the 2019 Terms:

"The Ombudsman shall first decide whether or not a complaint falls within their Terms of Reference. In determining this, they shall take into account the guidelines in Paragraphs 11 to 13 above and consider any Representations from the Complainant and the Member or Registered Agent."

1011. As to "Consideration of a complaint", under paragraph 16 of the 2019 Terms,

the Ombudsman must advise the parties within three weeks of the date the

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complete complaints file was prepared if they are intending to decline to take the matter forward. In such cases they must explain their reasons in writing.

1012. Under paragraph 17, subject to the provisions of the 2019 Terms, the Ombudsman shall at their own discretion, decide the procedures and the timescales to be adopted, provided that no lawful rights are removed from either party. Under paragraph 18, in their consideration, the Ombudsman shall act impartially and fairly in all circumstances and must give reasons for the Decision in writing.

1013. For the purpose of the investigation into a complaint, the Ombudsman may require the Complainant or Member or Registered Agent to provide to them information and documents which are within their knowledge or reasonably ascertainable by them and information and documents in their possession or under their possession or control as are relevant to the dispute: para. 23. The Ombudsman is entitled to proceed with their consideration of the complaint and to draw their own conclusions if, in their opinion, requested information is not provided within a reasonable timescale previously notified: para. 24

1014. The Ombudsman is not bound by any legal rule of evidence, permitted to take evidence on oath or cross examine witnesses:

> "They shall reach their Decision based on the evidence as they see it; the guidelines given in Paragraph 28 below; and on what appears to them to be fair and reasonable under the circumstances": para. 27.

1015. The "Guidelines" at paragraph 28 are:

> "In making any Decisions under the Terms of Reference and in determining what is fair and reasonable, the Ombudsman shall have regard to:
>
> a. the law;

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b. any relevant Code of Practice and any internal rules or procedures or statements of practice issued by a trade association of the named Member or Registered Agent;

c. the provisions of any contract binding the Member or Registered Agent and the Complainant;

d. any other matter the Ombudsman considers relevant to the act or omission by the Member or Registered Agent and which is the subject matter of the complaint."

1016. Under paragraph 29: the Ombudsman "shall operate in accordance with these Terms of Reference".

1017. Under paragraph 30, having come to a proposed decision on the complaint received, the Ombudsman will send a case review containing the proposed decision to both parties. Each party has 14 days in which to accept or provide representations against the proposed decision, following which either:

i) the proposed decision will be confirmed as the Final Decision; or

ii) in the event that a representation has been received to show that there has been a significant error in fact or that significant new evidence has been provided (which was not previously available) which is likely to result in a change to the proposed decision, it will be necessary to allow the other party the opportunity to comment on the representation (within 14 days) and such comments will be taken into account before issuing a Final Decision to both parties at the same time."

1018. The circumstances in which a Representation will be considered are set out in paragraph 31 of the 2019 Terms. Under paragraph 32:

"The Ombudsman can decline to consider a Representation if they consider it falls within any of the categories defined in Paragraphs 13a-c or is, after due consideration, a reiteration of the original complaint."

1019. Any request for an oral hearing must be considered by the Ombudsman by reference to the nature of the issues to be determined, amongst other matters. In deciding whether there should be a hearing the Ombudsman will have regard to

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the provisions of the European Convention on Human Rights: 2019 Terms para. 33.

1020. In accordance with paragraph 34, having considered any representations, the Ombudsman shall come to a Final Decision in which they may direct that the Member or Registered Agent takes or desists from taking steps including the issue of a formal apology; and/or that the named Member or Registered Agent pays the Complainant an Award by way of compensation for actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act or omission of the subject matter of the complaint.

1021. Under paragraph 35, a Final Decision shall be in writing and shall:

a. give a summary of the reasoning for making the Decision;

b. state the amount, if any, of the Award of compensation to be paid and the conditions for acceptance;

c. specify any directions that the Ombudsman has made;

d. not be subject to further Representation;

e. not be subject to appeal (as in Paragraph 4).

Under paragraph 36, although such decisions are not subject to Appeal or further Representation, this does not preclude the Complainant or Member making a complaint about the Ombudsman's service, processes and procedures, which will then be dealt with in accordance with TPO's service complaints handling procedure.

1022. The Awards made by the Ombudsman are compensatory and not punitive. They are to compensate the Complainant for any actual, proven financial losses and/or for undue and avoidable aggravation, distress and or inconvenience that

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have been occasioned by the act or omission of the member or registered agent. they shall not exceed £25,000 per complaint: paras. 37 and 38.

1023. Under paragraph 40, if the Complainant fails to accept the Decision within 21 days [14 days if there has been a Representation] of receipt thereof, the Decision and any award therein shall lapse.

1024. Under paragraph 41:

> "If the Complainant accepts the Decision in writing in full and final settlement of the subject matter of the complaint within 14 days [and a further14 days if there has been a Representation] the Ombudsman shall then notify the Member or Registered Agent of that fact within 5 days of the Ombudsman's receipt of the Complainant's acceptance. The Member or Registered Agent shall then pay the amount of the Award to the Complainant:
>
> a. within 28 days of the Ombudsman's notification'; …".

1025. Under paragraphs 43 and 44 "Full and Final Settlement":

> "43. Any Award made and accepted is in full and final settlement of all the complaints made against the Member or Registered Agent upon which the Ombudsman has made a Final Decision.
>
> 44. The Ombudsman must inform the Complainant that acceptance of an Award and/or a Decision might compromise their ability to pursue that complaint through the Courts. By acceptance of the Ombudsman's Award, the Complainant is agreeing to the full and final settlement of that dispute. However, if they reject the Ombudsman's Final Decision, a Complainant can pursue their case through the Courts, as with any complaint on which the Ombudsman has been unable or has declined to make a Final Decision." (my emphasis)

1026. Under paragraph 46, once the Ombudsman has made a Final Decision and an Award has been accepted and paid in full and final settlement, the case is closed. The case cannot be re-opened by either party, even with the production of new evidence.

Mr and Mrs Heneghan

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1027. In circumstances where the res judicata argument was not pleaded against Mr and Mrs Heneghan in One Touch's Defence and no application was made to amend One Touch's Defence to take this point, it is not now open to One Touch to take this point at this very late stage. If this point was to be taken it should have been taken at the outset. In so far as the Claimants rely upon Mr and Mrs Heneghan's dealings with TPO to evidence their argument, I do not therefore proceed to discuss the specific matters set out in Mr and Mrs Heneghan's complaint and their determination further.

Mr Uruthiran

1028. At the instigation of Mr Kerkvliet in an email dated 16 October 2019, Mr Uruthiran and Mr Lisco submitted a complaint to TPO on 23 October 2019. TPO contacted One Touch on 4 November 2019. On 4 November 2019, TPO also wrote to Mr Uruthiran informing him that if a complaint was supported, TPO awards were of a modest sum; the average award made by TPO was £395. They asked him to note that TPO was unable to consider any aspect of their complaint relating to TCHG. TPO would only consider the level of service they had experienced and previously raised with One Touch. On 12 December 2019 and 14 January 2020, TPO requested One Touch's company file from Mr Kerkvliet.

1029. The Introduction to TPO's Case Review and Proposed Decision set out that TPO had taken a commonsense approach, given the circumstances as made apparent to them through the evidence submitted and in the light of the specific complaints raised. They had taken into account legal principles but not adopted a legalistic approach. They had carefully read all the evidence presented and

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taken into account the relevant requirements of the Code of Practice for Residential Sales Agents and the responsibilities of the parties involved. It was explained that where there was a dispute about what happened, they based their decision on the balance of probabilities. They had done their best to describe the events as they understood them, but the arrangements referred to were fairly complex and they did not have access to all of the information in the case. This had not though prevented them from assessing the role of One Touch to the extent that they had been able to.

1030. As subsequently summarised by TPO in the Proposed Decision, Mr Uruthiran and Mr Lisco's complaints were that they purchased with the understanding that the investment was secure and risk free. Mr Uruthiran had described how One Touch:

i) Failed to perform due diligence on the Property and failed to advise of any potential risk. TCHG was already in trouble since October 2018. The purchase completed in March 2019 and they only received two monthly payments in March and April 2019

ii) Was quick to seek legal advice after only a few days of delay with the promised rental payments. This showed One Touch was aware of TCHG's financial trouble but kept selling properties until April 2019 to earn commissions;

iii) Led them to believe a successful claim against TPO would be claimed against One Touch's insurance;

iv) Accused them of defamation regarding bad reviews.

They also set out their concerns with the property investment they were sold / mis-sold, the actual arrangements and structure of the operation in reality and as it developed over time.

1031. TPO explained they had highlighted some of Mr Uruthiran's concerns that related to One Touch. These included how One Touch described the

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opportunity, the viability of the developers' business plan and their wider portfolio of developments; vague answers to queries and requests for clarification; pressure to reserve the unit and proceed with the purchase; the lack of provision of information / due diligence on the proposal or advice; the lack of transparency regarding the financing of the development and the potential use of the Complainant's money for other projects within the developers' portfolio of ongoing operations; the practice of paying investors with money from later investors/ borrowed funds owed to creditors; and the fact Mr Uruthiran said he would not have bought the property had he known he would be investing in a hotel rather than a care home.

1032. They noted that in One Touch's response it said it had provided a brochure from the Developer and explained the information provided and that Mr Uruthiran made a decision to purchase. Mr Uruthiran had previously purchased from them, and it had worked out well. One Touch said it could not be held responsible for TCHG mismanaging the funds and completing the refurbishment as they had contracted to do. It had been working with TCHG for 2 years, with a significant number of investors having purchased property from TCHG and having received rental income on time. One Touch had no idea of what was to come.

1033. One Touch referred to "conducting due diligence as outlined on their website". It said it had searched the company records and not found any banned directors or bankruptcies. It described having visited Latimer Lodge and found the service to be good. It pointed out the positive fundamentals of the location in Sandown with the Isle of Wight having an ageing population. It said The Winchester appeared to be a good property to introduce to the Complainants as

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a result. It believed a 10% rental income return was realistic and affordable based on average rental incomes for these types of properties. It was retained by the developer to market the properties. All the promotional materials were provided by the developer. It would be very surprised if Mr Thornton said the investment was risk free. It pointed out any investment carries some risk and referred to the Warning on the brochure. In summary, it believed it did provide accurate information and did not make any misleading claims. The contractual underlease set out the contractual commitment to receive 10% net rental income. It had approached Mr Murray after hearing rental payments had been delayed to find out his strategic plan and had made suggestions to create cash flow to ensure purchases would be paid. It referred to the Terms and Conditions and the One Touch Reservation Form.

1034. It said neither it nor Mr Uruthiran could have predicted the apparent fraud by the developer. TCHG was not in liquidation with an evaluation process to be carried out: "*They recognised the uncertainty of the outcome but asked the Complainant to remain calm until the administrators strategy became clearer*". It believed it had lost countless sales due to bad reviews. It felt it would be unfair to penalise them for a fraudulent developer and it would be a "*great injustice*".

1035. TPO's findings highlighted One Touch's obligations under the Code for Residential Sales Agents; One Touch's communication and records of dealing; and One Touch's role when marketing the Winchester and persuading Mr Uruthiran to invest. TPO found:

i) One Touch had an obligation to provide Mr Uruthiran with a service consistent with fairness, integrity and best practice: Paragraph 1d;

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ii) under the Consumer Protection from Unfair Trading Regulations 2008, as explained in Paragraph 7i of the Code for Residential Sales Agents, agents have an obligation to take all reasonable steps to make sure that all statements, whether oral, pictorial or written, made about the development / property and their offers are accurate. These obligations continued to apply alongside the agent's Terms and Condition. They formed the basis of TPO's findings;

iii) the information and services provided by One Touch did not constitute financial investment and tax advice but as a sales and marketing agent One Touch had an obligation to provide all material information of which they were aware or should have been aware to enable Mr Uruthiran to make informed decisions at each stage of the transaction. This was particularly important at the point One Touch marketed the Property;

iv) they would have expected One Touch to be accurate and transparent in their dealings with Mr Uruthiran and to warn him of the risks involved when deciding to reserve and hand over a significant sum;

v) they considered any verbal conversations and written exchanges to be a "key part of the sales process" that occurred alongside the provision of marketing material and the Reservation Form / agreement entered into. After a further request, One Touch had provided exchanges with the Complainant on 18th February 2019, when they confirmed his understanding that on buying the last available property at the price range envisaged, he would receive guaranteed yearly income of £9,995, paid on a monthly basis with buyback options. During the exchange it also recommended POLS who it described as superb and experienced.

vi) they expected One Touch to have communicated clearly and effectively with Mr Uruthiran throughout and to be able to demonstrate the same, and to have treated him fairly, with integrity and in accordance with best practice in accordance with the Residential Sales Code, paragraph 1e.They considered these obligations to apply to all One Touch's dealings with Mr Uruthiran including when they persuaded him to pay the reservation fee;

vii) it was unsatisfactory that One Touch had not provided all of their notes and exchanges or all of their files as it should have done in accordance with the Code of Practice, paragraphs 1i and 15a. This included notes of conversations that it should have and the arrangements it had in place with TCHG. Having described investor buyers as "their clients", they evidently benefited from payments from the developer.

viii) "*I am of the view that the exchanges between the parties potentially formed a key part of the sale process alongside the documentation provided and ultimately helped persuade the Complainant to sign the reservation agreement and secure the property for purchase*." One Touch explains that it would be surprised if their Senior Consultant described the investment as risk free and they are entitled to dispute the

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Complainants' version or recollection of events and discussions. However, [One Touch] cannot provide records of the discussions / all the communications that took place and cannot confirm with certainty that such comments were not made. The onus is on the agent to confirm what it told the Complainants in writing and verbally.

ix) by marketing and "selling" the property investment opportunity to Mr Uruthiran as they did, "*[One Touch] contributed to the disadvantageous position Mr Uruthiran was now placed in, with little evidence to show that One Touch discussed the risks for him, in terms of the transaction not proceeding as he might have envisaged or understood*". One Touch's failure to demonstrate they provided Mr Uruthiran with a service consistent with fairness and best practice was contrary to their Code obligations;

x) TPO did not determine One Touch coerced Mr Uruthiran to enter into the arrangements. One Touch had stressed there were few properties left. Whilst this approach was not in itself misleading, as far as they could see, "*it was reasonable to conclude that this left Mr Uruthiran with less opportunity to carry out the sort of due diligence One Touch refers to*";

xi) TPO did not conclude One Touch was ultimately responsible for Mr Uruthiran's losses following his decision to go ahead and complete: "*This type of investment had an element of risk to it. I accept that Mr Uruthiran had some responsibility to ensure that he understood the risks before paying over just over £100,000 including legal fees before the Development was completed. I am, though, concerned that [One Touch] did not do enough to warn of the nature and extent of the risks when introducing the Development to [Mr Uruthiran] and persuading him to invest by acquiring one of the refurbished Properties. ... it was unreasonable for [One Touch] to completely distance themselves from the claims contained in the brochure and their accompanying emails. I refer for example, to the email sent to Mr Uruthiran on 13 February 2019 headlined with the claim of "New Isle of Wight Retirement Home Investment 10% NET for 10 years" with reference their telephone conversation* [sic]."

xii) they noted One Touch's references to "*other care home projects that their clients had invested in, in recent years, and their success and the due diligence they have explained that they carried out regarding [TCHG] and connected parties / individual*s" and said:

"*although I have not seen detailed evidence to support some of these assertions, particularly regarding the success of investments in similar care homes operated by the Carlauren Group.*

To the extent they have described them, [One Touch's] conduct and investigations seem sensible. I have reviewed their website, which clearly sets out their property investment due diligence process and the extent of it, which includes an independent review of the proposed purchase contract by their solicitors to establish if there is anything in

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it to "their clients detriment" (I understand them to mean prospective buyers). They go on to say that they do not move ahead with the marketing of any project where they do not have a good feeling about the development team, or the suitability of the investment.

In terms of explaining their approach, [One Touch's] website page is helpful and relatively transparent for an agent involved in marketing investment properties for sale. They also identify the fundamentals behind their property sourcing approach and include a dedicated page and access to a guide to investing in care homes …

However, what I cannot see is evidence of [One Touch] assessing the proposed arrangements by [TCHG] and this particular project's finances, the viability of the financial projections, before passing on the Developer's claims / promises / assertions in the brochure and their marketing communications. Nor can I see any effective consideration/ discussion at the time of when the redevelopment was likely to complete, how the income return obligations would be met or the strength of the promises made by[TCHG]. I note [One Touch's] comments pre review that they calculate the developer's net profit from the sale of the units should have been able to subsidise the income obligations to the Complainant and other investors for around 24 months if things had been done properly. On the face of it, this may have potentially been true, but it is evident that the arrangements put in place by the [TCHG] group, the use of different companies with separate obligations and the apparently limited contractual commitments and the lack of protection to ring fence monies from the sale of the properties means this basic premise did not happen and was not likely to. The alleged "misuse" of funds and potentially fraudulent activity alleged by [One Touch] and others are serious allegations, but it does appear that there were other serious issues / failings with the project and arrangements put in place, making the proposals very risky.

I recognise that the agent was instructed/ engaged by the developer but [One Touch] also owed Mr Uruthiran and other consumers obligations as explained in the Code of Practice, to enable Mr Uruthiran to make an informed transactional decision whether to proceed or not with the purchase. I do appreciate the disclaimers and the generic warning ... I accept that [one Touch] was not ultimately responsible for the claims made by the developer and I would not necessarily expect an agent to be fully aware of the complexities of the wider [TCHG] group structure and their overall strategy. But nor do I consider it reasonable for [One Touch] to distance themselves entirely from the claims made and the promises made, about the particular Winchester care home project when they decided to market the investment opportunity to Mr Uruthiran, approached him and encouraged him to invest. [One Touch] suggest that if Mr. Murray had not behaved as he did, then the project may have preceded as advertised and provided the benefits described by [One Touch] in their communications including the "guaranteed" income return. There must though, be a question mark over whether the

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investment opportunity as marketed and sold was too good to be true, or at the very least was far from guaranteed. It was evident that the proposed development was one of more than 20 proposed property purchases for redevelopment to be used to create an ambitious, network of care homes across the UK. It also seems that the financial obligations of Accordiant extended to many other projects under the arrangements described by the Administrators. …

Irrespective of the role of other parties including solicitors acting for the Complainant, I cannot see that [One Touch] did enough to identify and discuss these specific risks with this type of investment in the way I would have expected. As well as identifying the positives regarding [TCHG] and [the] Development, [One Touch] could easily have identified specific areas that they had not investigated before they encouraged [Mr Uruthiran] to invest and pay over the initial reservation fee and provided some clear warning in this regard. I understand [One Touch] … may be keen to stress that they were not responsible for providing financial/investment/commercial advice. It does, though, seem that the information provided to [Mr Urithirnan] by [One Touch] on behalf of [TCHG] was not effectively investigated or verified by anyone. I understand the Complainants own obligation to assess the risks but I am also satisfied that to an extent he trusted and relied on the information provided by [One Touch] to be accurate and reliable.

[One Touch] has confirmed that they relied on the information provided by the developer and have included [TCHG's] Care And Resort Due Diligence document. I note that this document provides an assessment of the market and area in general. However, again, I cannot see any information about how the project would be funded and how the guaranteed rental payments would be met or by whom. In other words, it is difficult to see what information as provided by [TCHG] that [One Touch] relied on in these regards. My understanding of the proposals envisaged was that the "guaranteed" rental payments were to be funded by income received from the end users/ occupiers of the care homes. Yet, the development had not apparently been refurbished and was not generating income itself when [Mr Uruthiran] reserved the property through [One Touch] or when he went on to buy it. If the income was to come from other completed projects or money within the Group, I would have expected to see some evidence or explanation of this, providing some reassurance about the project's viability."

xiii) "*I cannot determine (nor will I be able to do so) that [One Touch] was aware of the financial difficulties of [TCHG] when encouraging the Complainant to invest, the extent of the risk of [TCHG]/Accordiant defaulting on their contractual obligations only two months after completion or that they were involved in any way in the potential defrauding of the Complainant of his investment monies. That [TCHG]/Accordiant defaulted on the obligations very quickly after the sale completed (which was soon after the Complainant had been persuaded to invest) does by itself show that the [sic] failed in its legal*

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obligations but understandably adds to the Complainant's concern about the project he was encouraged to purchase. Ultimately, the promises made in the marketing material made by [TCHG] but also provided by [One Touch] albeit on the developer's behalf, which the Complainant relied on, were not met."

xiv) as prior investors with One Touch, it is reasonable to conclude that in this context, One Touch's decision to market this particular investment opportunity gave the Complainant some reassurance about investing in it.

xv) "*I appreciate [One Touch's] overriding view that the key reason the project failed was not due to a failure to meet the contractual obligations but because of the alleged fraudulent conduct of Mr. Murray. However, I note the comments by the Joint Administrators in their January 2020 report when they confirm that "the Group's business model was fundamentally flawed and unsustainable leading to the Group's failure*."

xvi) Mr Uruthiran was also entitled to complain that the use of the development and any plan for it moving forward has been and may well be significantly different to the one he was sold, having been persuaded to invest by One Touch on TCHG's behalf.

xvii) TPO did not conclude that One Touch deliberately or knowingly misled Mr Uruthiran. As a result TPO was not of the view that One Touch should compensate him for the loss of investment monies and associated legal fees he was claiming or reimburse the purchase price paid.

xviii) "*based on the evidence I have seen*" One Touch attempted to assist Mr Uruthiran when it became apparent TCHG was in difficulties and the guaranteed rental payments were not forthcoming. TPO did not conclude that One Touch's actions in this regard demonstrated a prior awareness of TCHG's difficulties.

1036. TPO stressed that they had not made a legal determination of the claims in the Complaint Form and were limited in their ability to investigate and determine the issues in the way that solicitors acting for Mr Uruthiran and a Judge in a court of law may be able to do. Nor were they making any judgment on the actions of TCHG and other companies.

1037. In summary, whilst noting the disclaimers that One Touch were not providing financial / investment advice, TPO stated they remained concerned as to

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whether enough was done to investigate / consider and explain / raise concerns or warn about:

i) the proposed arrangements, the financing of the development and other projects by the developer;

ii) the security of the "guaranteed" rental payments", a key marketing claim, and the relationship between Accordiant and the Developer and TCHG and the obligation between them;

iii) the overall viability of the project;

iv) the extent of the risks involved in terms of the refurbishment, the development not going ahead as advertised, the solvency of the developer/ TCHG and their care development projects, including the development, and the Complainants not receiving the income return advertised and agreed to.

1038. They concluded:

"I consider that [One Touch] had some responsibilities in this regard when they decided to market the Development and encourage the Complainant to invest in this opportunity sold by [TCHG], whose business model as operated was described by the Administrators as "fundamentally flawed and unsustainable".

1039. TPO awarded Mr Uruthiran £2,000 for aggravation, distress and inconvenience. They stated:

"*This award is also made on the understanding that it brings to an end all related disputes between these parties but does not affect the Complainant's ability to pursue the developer / Mr. Murray for recompense. I consider this award to provide fair recompense for the agent's role in the aggravation, distress and inconvenience the Complainants and, particularly, the Complainant has experienced*."

1040. The Proposed Decision included an express statement that the parties had the opportunity to represent against the decision, although a representation relating to the amount of the proposed compensation would not constitute a ground for representation. Above the heading "Proposed Decision", it was stated:

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"I reiterate that I have not made a legal determination of the issues and any claims including those of negligence and fraudulent mis-selling, or the possible unlawful sale of a collective investment scheme."

The Award of £2,000 was "in full and final settlement of the dispute between the parties".

1041. The Case Review or Proposed Decision was sent to both parties on 21 May 2020. The parties were notified that they had until 4 June to either accept the Proposed Decision or make representations against it. Together with the covering letter and Proposed Award, Mr Uruthiran was sent a form. This required him to select one of three options and to complete, sign and date the relevant Part. "*Part 1: Acceptance of Ombudsman's Proposed Decision. Part 2: Non-Acceptance of Ombudsman's Proposed Decision. Part 3: Representation (grounds for reconsideration)".*

1042. On 1 June 2020, Mr Uruthiran requested an extension of time as One Touch was awaiting a response from its insurers. Time was extended until the end of June. On 2 June 2020 One Touch informed TPO it was willing to accept the recommendation. On 26 June 2020, Mr Uruthiran and Mr Lisco signed and returned Part 1 of the TPO Form: Acceptance of Ombudsman's Final Decision. They ticked the box for One Touch to make a bank transfer to them of the payment awarded.

"*We Mr Uruthiran and Mr Lisco…hereby accept the Ombudsman's final decision and award of £2,000 in Full and Final Settlement of my/our complaint/s against One Touch Property Investment concerning the performance of their London Office, in regard to all my/our complaint/s which have been considered*."

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1043. On 30 June 2020, and again on 7 July 2020 and 8 July 2020, TPO informed One Touch that the Decision was "now Final" and the Award payable by 28 July 2020. Mr Kerkvliet acknowledged receipt on 8 July 2020.

1044. In circumstances where there was then disagreement between the parties regarding a non-disclosure agreement which One Touch sought, TPO wrote to all parties on 9 July 2020:

"*I remind you of the review wording in the conclusion:- This award is also made on the understanding that it brings to an end all related disputes between these parties but does not affect the Complainants ability to pursue the developer/ Mr. Murray for recompense*."

Mr Durnford

1045. Mr Durnford submitted a complaint to TPO on 7 September 2020. The complaint was made on TPO's (then) standard form. It included a note that: "If your complaint is of a legal, criminal or private nature The Property Ombudsman Scheme's Terms of Reference may preclude our consideration of the matter." As subsequently summarised by TPO in the Proposed Decision, Mr Durnford's complaints were that:

i) the due diligence undertaken by One Touch in relation to the marketing of the TCHG projects from late 2016 was inadequate. Mr Murray was presented as a successful entrepreneur. By failing to carry out any meaningful checks One Touch failed in their duty of care towards clients including him.

ii) it was unclear what steps One Touch had taken to monitor TCHG's ongoing activities between 2017 and 2019 when Mr Murray had been spending vast amounts on personal assets. He believed this failure to pay any meaningful attention constituted a breach of their duty of care to their clients.

iii) One Touch had not mentioned TCHG would be pooling the client's investments. Had he been warned about this he would not have invested. All the marketing information provided to him was about The

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Winchester, but in reality TCHG was running a collective investment scheme and transferring money around a complex web of companies;

iv) One Touch showed an unwillingness to admit culpability in recommending TCHG to "*their clients*".

1046. On 6 October 2020 TPO advised One Touch of the complaint and invited One Touch to respond. On 23 October 2020, TPO chased Mr Kerkvliet for a copy of the Company File.

1047. On 28 October 2020 One Touch provided their written response in the form of a "without prejudice" submission. In that response One Touch said they had conducted a market appraisal. They had analysed the comparable rentals in the local area along with industry standard operating margins which supported the net income of 10% which Accordiant was contracted to pay to investors. Based on the purchase cost and advice from an industry expert about the typical costs and commissioning of newly established care homes and marketing costs, a buffer of £983,900 profit was identified for the complete refurbishment and bringing the Winchester care home into operation. It was beyond the scope of their responsibility as a property agent to investigate what personal investments a developer they were working with was making but based on the low purchase price of the hotels and older care homes, a significant profit was left on each care home. Their investors were paid on time so they had no reason to suspect Mr Murrray could not afford luxury personal items. They were told each home was being run as a separate business and had no reason to suspect otherwise. The Winchester Investment Brochure included the Warning. Mr Durnford would have received a report on title. Mr Durnford never asked them how risky the investment was and they did not give any advice on the suitability of the investment.

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1048. TPO's Proposed Decision included a Case Summary which began by clearly setting out that compensation was awarded having regard to what they considered to be a fair and reasonable outcome, bearing in mind legal principles and, in this case, the Code of Practice for Residential Sales Agents. Any award was strictly compensatory and was to provide redress for financial loss and/or distress, aggravation or inconvenience a Complainant suffered because of an agent's service shortcomings. TPO found that in Mr Durnford's case:

i) as provided in the Consumer Protection from Unfair Trading Regulations 2008, as explained in Paragraph 7i of the Code for Residential Sales Agents, agents have an obligation to take all reasonable steps to make sure that all statements, whether oral, pictorial or written, made about the development / property and their offers are accurate. These obligations continued to apply alongside the agent's Terms and Conditions;

ii) the information and services provided by One Touch did not constitute financial investment and tax advice but One Touch had an obligation to provide all material information of which they were aware or should have been aware to enable Mr Durnford to make informed decisions at each stage of the transaction and this was particularly important at the point they marketed the Development;

iii) they would have expected One Touch to be accurate and transparent in their dealings with Mr Durnford and to warn him of the risks involved when deciding to reserve and hand over a significant sum;

iv) by marketing and "selling" the property investment opportunity to Mr Durnford as they did, One Touch contributed to the disadvantageous position Mr Durnford was now placed in, with little evidence to show that One Touch discussed the risks for him, in terms of the transaction not proceeding as he might have envisaged or understood. However, they did not conclude One Touch was ultimately responsible for Mr Durnford's losses following his decision to go ahead and complete because: "*This type of investment was risky*";

v) it was unreasonable for One Touch to completely distance themselves from the claims contained in the brochure and their accompanying emails;

vi) they noted One Touch's references to "*other care home projects that their clients had invested in, in recent years, and their success and the due diligence they have explained that they carried out regarding [TCHG] and connected parties / individuals*" and said:

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"*although I have not seen detailed evidence to support some of these assertions, particularly regarding the success of investments in similar care homes operated by the Carlauren Group. To the extent they have described them, [One Touch's] conduct and investigations seem sensible. I have previously reviewed their website, which clearly sets out their property investment due diligence process and the extent of it, which includes an independent review of the proposed purchase contract by their solicitors to establish if there is anything in it to "their clients detriment". They go on to say that they do not move ahead with the marketing of any project where they do not have a good feeling about the development team, or the suitability of the investment. In terms of explaining their approach, the agent's website page is helpful and relatively transparent for an agent involved in marketing investment Properties for Sale. They also identify the fundamentals behind their property sourcing approach and include a dedicated page and access to a guide to investing in care homes …*".

vii) "*[One Touch] has also provided a summary of their financial assessment of the viability of the project moving forward in terms of rental income return, by carrying out some form of appraisal. However, this is limited. I have not seen effective consideration/ discussion of when the redevelopment was likely to complete, how the income return obligations would be met or the strength of the promises made by [TCHG]. I note [One Touch's] comments that the Developer's net profit from the sale of the units should have been able to subsidise the completion of the project. However, it is evident that the arrangements put in place by [TCHG], the use of different companies with separate obligations and the apparently limited contractual commitments and the lack of protection to ring fence monies from the sale of the properties means this basic premise did not happen*."

viii) "*The alleged "misuse" of funds and potentially fraudulent activity referred to by [One Touch] and others are serious allegations. It seems there were other serious issues/ failings with the project and arrangements put in place, making the proposals very risky*."

ix) "*My understanding of the proposals envisaged was that the "guaranteed" rental payments were to be funded by income received from the end users/ occupiers of the care homes. Yet, the development had not apparently been refurbished and was not generating income itself when [Mr Durnford] reserved the property through [One Touch] or when he went on to buy it. If the income was to come from other completed projects or money within the group, I would have expected to see some evidence or explanation of this, providing some reassurance about the project's viability*."

x) "*As well as identifying the positives regarding [TCHG] and [the] Development, [One Touch] could have done more to identify specific areas that they had not investigated before they encouraged [Mr Dunrnford] to pay over the initial reservation fee and provided some clear warning in this regard. I understand [One Touch] is keen to stress*

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that they were not responsible for providing financial/investment/commercial advice. It does, though, seem that the information provided to [Mr Durnford] by One Touch on behalf of [TCHG] was not effectively investigated or verified by anyone."

xi) "*I recognise that [One Touch] was instructed/ engaged by [TCHG] but [One Touch] also owed the Complainant and other consumers obligations as explained in the Code of Practice, to enable the Complainant to make an informed transactional decision whether to proceed or not with the purchase. I do recognise the disclaimers and the generic warning given [on the brochure*."

xii) "*I cannot determine (nor will I be able to do so) that [One Touch] was aware of the financial difficulties of [TCHG] when encouraging the Complainant to invest, the extent of the risk of [TCHG]/Accordiant defaulting on their contractual obligations only two months after completion or that they were involved in any way in the potential defrauding of the Complainant of his investment monies. That [TCHG]/Accordiant defaulted on the obligations very quickly after the sale completed (which was soon after the Complainant had been persuaded to invest) understandably adds to the Complainants concern about the project he was encouraged to purchase. Ultimately, the promises made in the marketing material made by [TCHG] but also provided by [One Touch] albeit on the developer's behalf, which the Complainant relied on, were not met*."

xiii) "*I am reasonably satisfied that the Complainant understood all should have understood the risks of investing in this type of off-plan project to some extent, and that he decided to proceed with the purchase after draft contracts were provided*". *As [One Touch] points out the Complainant indicated that he would run the opportunity passed his accountant before proceeding.*"

xiv) "*I appreciate [One Touch's] Overriding view that the key reason the project failed was not due to a failure to meet the contractual obligations but because of the alleged fraudulent conduct of Mr. Murray. However, I note the comments by the joint administrators in their January 2020 report when they confirm that the Group's business model was fundamentally flawed and unsustainable leading to the group's failure*."

xv) "*I note [One Touch's] disclaimers that they were not providing financial/ investment advice and their general risk warning. I am though, concerned whether enough was done to investigate/ consider and explain/ raise concerns or warn about: the proposed arrangements, the financing of the development and other projects by the developer; the security of the "guaranteed" rental payments (a key marketing claim) and the relationship between Accordiant and the Developer/ obligations between the two; The overall viability of the project; and the extent of the risks involved in terms of the refurbishment/ development not going ahead as advertised, the solvency of the developer / [TCHG] and their*

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care development projects (including [the Winchester]) and the Complainant not receiving the income return advertised and agreed to."

xvi) "*I am aware of the serious claims of alleged fraud and other allegations made against Mr. Murray, … and the ongoing investigations, … as well as the attempts of the joint administrators to recover and distribute some monies to the various investors, including the Complainant. … Ultimately, I am of the view that the Complainant has likely been the victim of potentially fraudulent activity which was not foreseen or foreseeable by [One Touch] when they marketed the project to him*."

xvii) "*I also do not consider it reasonable for [One Touch] to distance themselves entirely from the claims made and the promises made, about the particular Winchester care home project when they decided to market the investment opportunity to the Complainant. I am of the view that there were flags about the plans and the activities of Mr. Murray to raise concerns and I understand why the Complainant believes the agent should have done more to investigate and ask questions Mr. Murray and his businesses [sic] before taking on this investment opportunity to market on their behalf, albeit I appreciate this is said with some degree of hindsight and it is fair to recognise that the agent also appears to have been duped to an extent*."

xviii) "*I would, though, expect conscientious and diligent agents to apply reasonable caution about the sorts of investment opportunities they take on to market and sell, with promises of high rental income return over an extended period of 10 years as a good indicator of concern, with the sales pitch perhaps being too good to be true. I believe it is incumbent on agents to show they have properly considered the potential risks of investing in such products and identified these two buyers; sign posting when they can; this is also an ongoing responsibility. Agents should be able to show they have carried out appropriate due diligence and demonstrate they have taken reasonable steps to provide the prospective buyer with all material information they can, to enable an informed transactional decision to be made. Hindsight identifies this investment opportunity marketed/ sold as unsound and the developer as unreliable. I am not satisfied that [One Touch] provided a service to the Complainant in accordance with best practise throughout in accordance with paragraph 1e of the Code of Practice*".

1049. TPO stressed that they had not made a legal determination of the issues and of any claims including those of negligence and fraudulent mis-selling or the possible unlawful sale of a collective investment scheme.

1050. The Ombudsman awarded Mr Durnford £800 compensation in full and final settlement of the dispute between the parties. This was for One Touch's role in

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contributing to Mr Durnford's aggravation, distress and inconvenience in light of One Touch's role in marketing the investment opportunity to him in the circumstances. The award was at a level to take into account the complaints raised, the issues supported and the role and conduct of the TCHG Group in particular.

1051. The Proposed Decision included an express statement that the parties had the opportunity to represent against the decision, although a representation relating to the amount of the proposed compensation would not constitute a ground for representation.

1052. The Proposed Decision and award were sent to Mr Durnford and to One Touch on 16 February 2021. The covering letter stated that both parties had until 2 March 2021 to either accept the Proposed Decision or make representations against it. Guidance notes were enclosed. The letter concluded with the statement that if TPO did not hear from the recipient by the stated date it would be assumed that they accepted the Proposed Decision and award.

1053. Together with the letter and Proposed Award Mr Durnford was sent a form. This required him to select one of three options and to complete, sign and date the relevant Part. "Part 1: Acceptance of Ombudsman's Proposed Decision. Part 2: Non-Acceptance of Ombudsman's Proposed Decision. Part 3: Representation (grounds for reconsideration)".

1054. On 16 February 2021 Mr Durnford signed and completed Part 1:

> "*I, Mr Durnford… hereby accept the proposed decision and award of £800 in Full and Final Settlement of my/our complaint/s against One Touch Property Investment concerning the performance of their London Office, in regard to all my/our complaint/s which have been considered*."

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Mr Durnford checked a box indicating that he would like the money to be paid by bank transfer. The box stated, "*You will be required to provide One Touch Property Investment with your account details*".

1055. On 16 February 2021, Mr Kerkvliet emailed TPO that he would be keen to hear if Mr Durnford was willing to accept the conclusion and award. On 3 March 2021, TPO wrote to Mr Kerkvliet asking One Touch to confirm whether it accepted TPO's Proposed Decision in relation to the complaint or whether he would like to submit a Representation against it. TPO informed Mr Kerkvliet that Mr Durnford had advised that he accepted the Decision in full and final settlement of his complaint.

1056. On 5 March 2021, TPO again informed Mr Kerkvliet that Mr Durnford had confirmed that he accepted the award of £800 in full and final settlement of his complaint. Mr Durnford's signed acceptance form was attached for One Touch's records. The email explained One Touch was to pay the Award to Mr Durnford by 2 April 2021. The 28 days deadline was in accordance with TPO's Terms of Reference. TPO asked for confirmation when the payment was made so the case file could be closed. Mr Kerkvliet emailed TPO on 5 March 2021 stating that One Touch accepted TPO's Proposed Decision.

1057. Mr Durnford did not supply his bank account details as required when he signed his acceptance on 16 February 2021. As a result, One Touch could not make the payment of the award by 2 April 2021.

1058. On 7 April 2021 TPO office emailed Mr Durnford, in response to an email which, unfortunately, I have not seen, including its date. The writer at TPO was the Case Management Officer, not the Adjudicator who had reached the

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Decision on behalf of TPO. The writer thanked Mr Durnford for his email "*advising you wish to reject the Decision*". They asked: "*Please may I ask that you fill in the non-acceptance section of the attached form so I can proceed with closing the file*".

1059. On 9 April 2021 TPO's office emailed Mr Kerkvliet:

"*Mr Durnford has not accepted the Proposed Decision and award and has reserved his position in full*".

What happens next

We have now closed our case file."

Mr Kerkvliet replied by return: "*Great, thanks for the update*."

The Relevant Law

1060. Common law doctrines preclude a person who has obtained a decision from one court or tribunal from bringing a claim before another court or tribunal for the same complaint. As set out by Arden LJ in *Clark* (as cited above) at [6]-[7], res judicata principally means that a court or tribunal has already adjudicated on the matters and precludes a party from bringing another set of proceedings: see, generally, *Lemas v Williams* [2013] EWCA Civ 1433. The doctrine also covers abuse by a litigant of the court's process by bringing a second set of proceedings to pursue new claims which they ought to have brought in the first set of proceedings (the rule in *Henderson v Henderson* (1843) 3 Hare 180, 67 ER 313).

1061. Res judicata may apply either because an issue has already been decided or because a cause of action has already been decided. The latter is known as cause

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of action estoppel. In *Clark* at [8], the requirements of cause of action estoppel were taken to be that:

i) the decision was judicial in the relevant sense;

ii) it was in fact pronounced;

iii) the tribunal had jurisdiction over the parties and the subject matter;

iv) the decision was (a) final; (b) on the merits;

v) it determined a question raised in the later litigation; and

vi) the parties are the same or their privies, or the earlier decision was in rem.

1062. If the requirements of res judicata are fulfilled, they constitute an absolute bar, and the court has no discretion to hold that res judicata should not apply in any particular case. There is a two-fold rationale. First, "the public interest in finality of litigation rather than the achievement of justice as between individual litigants" see per Lord Goff in *The Indian Grace* at 415. Second, there is private interest. As Sir Nicholas Browne-Wilkinson VC put it in *Arnold v National Westminster Bank plc* [1983] 3 All ER 977 at 982: "it is unjust for a man to be vexed twice with litigation on the same subject matter": per Arden LJ at [11-12].

1063. *Clark* concerned the Financial Ombudsman Service dispute resolution scheme set up by Parliament by primary legislation, namely the Financial Services and Markets Act 2000 (the "FSMA"), for consumers who have disputes with providers of regulated financial services. Nothing was said in the legislation about consumers taking legal proceedings after accepting an award under the scheme. There were conflicting decisions at the level of the High Court as to whether consumers could do this and it fell to the Court to resolve this conflict.

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1064. I note that the Financial Ombudsman Service dispute resolution service is described in *Clark* at [22]-[28] as one that determines disputes and may award compensation. If a consumer accepts an award of compensation, the award is binding on the adviser and the Complainant and is final. The scheme is important to consumers as it is free to them. The scheme is largely funded by the financial advisers against whom complaints are made. A key component of the process is that the Ombudsman gives each side the chance to put their case in writing. There may or may not be a hearing in front of the Ombudsman. He may direct that oral evidence be received and that the parties supply documents to him, but there is no cross examination of witnesses and there is no formal disclosure of documents between the parties. The Ombudsman determines the complaint "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". He can therefore ignore technicalities in the law or a lack of evidence or award compensation which would not have been recovered at law if he thinks that is the right course. At the end of the process the ombudsman issues an award. He expressly has the power to award compensation. A money award if accepted leads to the creation of a legal right, namely the right to receive the sum awarded and the right is enforceable as if it were a judgment of the court.

1065. Arden LJ at [27] described it as a "defining feature of the Ombudsman service" (section 228 of the relevant Act) that a Complainant can choose not only whether to submit his complaint to it in the first place but also whether to accept the decision of the Ombudsman, but if he accepts the determination within the time limit, it is final and binding on both parties.

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1066. The issues argued in *Clark* were described at [51] as (1) whether the decision of the Ombudsman was a decision of a judicial body for the purposes of the res judicata doctrine and (2) whether (and, if so, under what conditions) complaints to the ombudsman and causes of action relied on in subsequent proceedings are the same. Arden LJ explained at [52]:

> "Both questions are important since the doctrine of res judicata should not be extended beyond these bounds: the rule is about not having two bites at the *same* cherry. In considering the identity of any questions decided by the ombudsman and to be decided by the court in the later proceedings, the court must focus on the substance of what occurred before the ombudsman and what involved in the new proceedings: see *The Indian Grace* at 419-421 and see per Lord Clarke in *Coke-Wallis* at [19]. Importantly the burden of proof is on the adviser."

1067. On issue 1, the Court of Appeal held an award of an Ombudsman under the scheme in question can give rise to res judicata: at [73]. Arden LJ held at [77]-[78]:

> "For the purposes of that doctrine, it is sufficient as I see it that the ombudsman decides a question posed by facts constituting a cause of action. The rationale of res judicata would apply in those circumstances and none of the authorities shown to us require that the decision in terms decides whether or not a cause of action has been shown or what the parties legal rights or obligations were. In my judgment, it is sufficient that he decides whether the facts underlying a cause of action give rise to any claim as between the Complainant and the advisor and whether the claimant has any remedy against the advisor relative to those facts. The fact that the remedy is not the same as would be awarded in a court of law is also not a requirement of res judicata: otherwise, res judicata would not be available if the first decision is that of a foreign court in which different remedies are available from those available in our courts. … That conclusion means that if the Complainant were (unwisely) to accept an award offering him only an apology, res judicata would apply if he chose to bring court proceedings. His wiser course would be to reject the award altogether in those circumstances.
>
> 78. Some (fictional) examples might help here. Suppose that a Complainant, a woman running her own small business and approaching retirement age, has a pension with a guaranteed annuity rate, and she seeks advice from her financial advisor in 2008 about obtaining new fiscal advantage by buying a pension at the age of 55 years rather than at the age of 60 years. She understands that annuity rates were likely to fall. Her financial advisor arranges for her to buy an annuity but does not explain that she would be giving up the benefit of the guaranteed annuity rate that she would have if she retained her pension until age 60 years. She complains to the ombudsman's service about this. The ombudsman

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investigates and discovers that industry practice is to explain this matter in financial terms so that the client can see what she is giving up. The award gives her compensation on the basis that the advisor had not explained to her clearly the benefits that she was giving up by buying an annuity before her pension date.

78. If the Complainant in my example accepted the award but, being dissatisfied with the amount of compensation awarded to her by the ombudsman, started court proceedings to obtain further compensation in respect of the advisors failure to give her clear advice about the benefit she was giving up when she sold her pension, the court would have to consider whether this was the same complaint and if so whether the ombudsman had determined the question raised by this complaint. The courts would have to look at the detailed documentation, but on the face of the summary I have given this would be the type of case where the court could conclude that in substance the complaint and the decision involved the same matter as she now pleaded in the court proceedings and so res judicata applied."

1068. In the event of lack of particularity in the complaint, it was noted that this may make it difficult to ascertain whether the award was the product of the facts constituting the cause of action relied on in later proceedings. Arden LJ said, at [82], the answer to this point was two-fold:

"First, this point should not be overstated simply because Complainants are consumers. Some of them will no doubt be well informed and they may have legal advice. In addition, as a practical matter the ombudsman will have to investigate the complaint if he is not clear what it is about and to explain what the complaint is when he upholds or declines to uphold it in his award. Second, the burden of showing that the facts constituting a cause of action formed the basis of an award and that the same cause of action is relied on in the court's proceedings will lie on the adviser. If the court is not satisfied, there will be no res judicata. In short, the Complainant has the benefit of any doubt."

1069. In summary at [89]:

"My conclusion means that there will be occasions when a Complainant may bring court proceedings against an advisor even though he has accepted an award to which section 228(5) applies. Whether that can happen depends on whether the substance of the proceedings asserted before the courts are the same as that before the ombudsman service. Fresh proceedings are not permitted if based on the same cause of action so a Complainant cannot use proceedings to top up his award for that wrong. The burden of showing that the requirements for res judicata are made out on the facts of the two sets of proceedings will fall on the adviser."

1070. And at [91]:

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> "I do not attach any significance to the fact that an award lacks binding status when it is written or to the fact that an award is not binding unless and until the award is accepted. The crucial point is that, in the end, an award which is accepted is binding on the Complainant and the adviser."

1071. In considering issue 2, Arden LJ then made clear at [121]-[123]:

> "For all the reasons I have given, I would allow this appeal. Parliament did not manifest any intention that Complainants to the Ombudsman Service should be in any different position from other Claimants who have taken their claim for compensation through a tribunal for dispute resolution and obtained a decision, and then sought to litigate the same grievances again in the courts. They are not able to raise the same claims in court proceedings even if they could have recovered more in court proceedings. What they had to do to obtain this higher level of compensation was to reject the award and bring court proceedings for that amount. …
> If my Lady and my Lord agree, this means in future cases that, if and to the extent that the defendant can show that before the Ombudsman Service the Claimant relied on a complaint which was in substance based on a set of facts which constitutes the cause of action on which he relies in his subsequent proceedings, and the ombudsman determined that complaint whether by reference to what is fair and reasonable or by reference only to legal principles (which he considered to be fair and reasonable to apply), then res judicata applies. It does not matter whether the award was for the maximum sum that can be awarded or for a lesser amount."

1072. The first of the grounds that the Claimants rely upon to seek to distinguish the Court of Appeal's decision in *Clark* is that TPO is not, unlike FOS, a creature of statute and there is no authority to support the proposition that its awards are "judicial decisions" capable of giving rise to res judicata. It is correct that I was not referred to any authority regarding the application of the doctrine of res judicata to TPO specifically or, indeed, to any case law or published discussion in respect of TPO at all.

1073. I was also not referred to any authority as to the need for a decision to be a decision of a "creature of statute" or, indeed, for that not to be the case.

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However, as Mr Bankes-Jones submits, TPO was approved by the Government as an ADR entity.

1074. In my judgment, the most helpful starting point in this regard is the reasoning of the Supreme Court in *R v (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1; [2011] 2 AC 146. *Coke-Wallis* concerned the relevance and application of the principle of res judicata in the context of successive proceedings before a non-statutory regulatory or disciplinary tribunal. The claimant was a chartered accountant and a member of the respondent Institute. The Institute preferred a complaint against the claimant alleging that he had committed an act likely to bring discredit on himself, the Institute or profession contrary to byelaw 4(a) of the Institute's bye-laws. The complaint was dismissed by a disciplinary tribunal. The Institute then preferred a second complaint, alleging that he had committed an act contrary to bye-law 4(a). The disciplinary committee rejected the claimant's application for summary dismissal of the complaint on the grounds of autrefois acquit, res judicata or abuse of process. The claimant sought judicial review of that decision. Lord Clarke JSC (with whom Lord Phillips and Lord Rodger JSC agreed), said at [27]:

> *"*Although the point was not conceded on behalf of the Institute, it was not submitted in the course of argument that the principle did not apply to non-statutory disciplinary proceedings of this kind. In any event, the principle does in my opinion apply to such proceedings ….
>
> 28. The judge [2008] EWHC 2690 (Admin) at [9], [10] described the objects and powers of the institute. The institute was incorporated by Royal Charter in 1880 to promote the profession of accountancy by compelling the observance of strict rules of conduct for its members and by setting a high standard of professional education. By a supplemental Royal Charter of 1948 the principal objects of the institute were declared to include the maintenance of high standards of practice and professional conduct by all its members. The institute

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is, at least for some purposes, a public body … The Institute has power from time to time to make bye-laws under paragraph 15(a) of the Supplemental Charter. By paragraph 15(b) no new byelaw or rescission or variation of a bye-law shall have effect until approved by the Privy Council.

28. In these circumstances I see no reason why the principles of cause of action estoppel should not apply to proceedings before a disciplinary tribunal set up under the bylaws. The provisions of the charter and supplemental charter are akin to statutory provisions and it seems to me that similar principles to those identified by Lord Bridge in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 473 apply to them. It was not suggested in the course of the argument that there was anything in the charter or supplemental charter to lead to the conclusion that the principles of cause of action estoppel should not apply to successive sets of disciplinary proceedings.

30. Indeed, even if the byelaws created only private rights as between the institute and its members, I see no reason why the principle of cause of action estoppel should not apply. In *Meyers v Casey* (1913) 17 CLR 90, 114, where the High Court of Australia was considering a decision of the committee of the Victoria Racing Club, Isaacs J said this of objections considered by the committee:

"They are, by reason of the committee's decision, res judicatae, as much as if instead of the committee it had been the Supreme Court unappealed from, that had so held. That rests on the well known rule that a competent court or other tribunal has jurisdiction to give a wrong judgement, and if there is no appeal in the strict sense, then its decision, whether right or wrong, must stand, and cannot be questioned in any subsequent proceedings elsewhere."

31. See also Spencer Bower & Handley Res Judicata, 4th ed, at para. 2-025, where the editors say:

"Every domestic tribunal, including any arbitrator, All other person or body of persons invested with authority to hear and determine a dispute by consent of the parties, court order, or statutes, is a "judicial tribunal" for present purposes, and its awards and decisions conclusive unless set aside."

In addition to *Meyers v Casey* and other cases, the editors cite *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 630, 643c, per Diplock J, Where he said that, the parties having chosen an arbitration tribunal to determine the issues, they are bound by an interim arbitration award on specific issues under the principle of issue estoppel. He added at p 643e, that the power of an arbitrator to make an interim award was first conferred by the Arbitration Act 1934 and that, before then, the only kind of award he could make was a final award which determined all the issues between the parties. It is implicit in Diplock LJ's judgement that in such a case the principles of cause of action estoppel would apply."

1075. Similarly, Lord Collins said at [57]:

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> "it has been held or assumed in a number of decisions in other common law jurisdictions that res judicata principles apply to successive complaints before professional disciplinary bodies. Many professional disciplinary bodies are established or regulated by legislation, but the principles apply equally irrespective of the status of the disciplinary body. The reason is that from the earliest times it has been recognised that the principle of finality or res judicata applies to tribunals established by the parties, such as an arbitral tribunal …".
>
> And at [60]:
>
> "… The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession, and to uphold proper standards of behaviour …".

1076. On an application of the reasoning in both *Coke* and *Clark* I conclude that TPO's awards are "judicial decisions" capable of giving rise to res judicata. Firstly, because the principle can apply to non-statutory proceedings in any event. Secondly, because I consider TPO's role to be a public alternative dispute resolution role in so far as it is conducted by TPO as an authorised ADR entity under the 2015 Regulations and 2019 Terms authorised by the Secretary of State (and where any replacement Terms had to be similarly so authorised). Thirdly, because I consider such authorisation under the 2015 Regulations to be analogous in its effect to the provisions of section 225 of FSMA which provided for the statutory FSO scheme discussed in *Clark*. Fourthly, because it is possible for res judicata to apply in purely private proceedings, such as non-statutory arbitration, in any event.

1077. As I have set out above, TPO's 2019 Terms describe the powers of TPO, including to improve practice: para 10(a). In common with the characteristics of the FSO service described in *Clark* at [22]-[23]:

i) a "key component" of the process of TPO is that he gives each side the chance to put their case in writing through the making of the complaint and the opportunity for the agent to make submissions in response;

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ii) in some cases there may be a hearing (2019 Terms, para. 33);

iii) TPO may direct that the parties supply documents to them (2019 Terms, para. 23);

iv) there is no cross examination of witnesses (2019 Terms para. 27);

v) there is no formal disclosure of documents between the parties;

vi) TPO shall reach their Decision based on the evidence as they see it; the guidelines in paragraph 28 below; and on what appears to them to be fair and reasonable under the circumstances (2019 Terms para. 27). TPO can, therefore, ignore technicalities in the law or a lack of evidence or award compensation which would not have been recovered at law if they think that is the right course. On the other hand, they may in any particular case conclude that it would be wrong to depart from the legal position. Paragraph 28 of the 2019 Terms fleshes out the process by requiring TPO, when considering what is fair and reasonable, to take into account the law, any relevant code of practice and any internal rules or procedures of statements of practice issued by a trade association, for example.

vii) At the end of the process TPO issues an award. (2019 Terms para. 17). The 2019 Terms expressly give the Ombudsman the power to award compensation. The compensation may not exceed the limits specified (2019 Terms, para. 10(b)).

viii) a "defining feature" of TPO's scheme is also that a Complainant can choose not only whether to choose to submit his complaint in the first place but also whether to accept the decision of the Ombudsman" (2019 Terms paras. 30 and 40), but if the parties accept the Decision the proposed decision will be confirmed as the Final Decision (2019 Terms para. 30).

1078. In so far as relevant, the Claimants did not seek to distinguish TPO's scheme on the basis that Arden LJ drew attention to at [24] the fact it has been held the

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court may set aside the FSO's decision if it is perverse or irrational: see *R(IFG) v Financial Ombudsman Service* [2006] 1 BCLC 534 [13]. The power for the FSO to decide a dispute according to what is fair and reasonable is therefore not carte blanche. I should add however that despite my enquiry no authority has been drawn to my attention as to whether an application for judicial review has ever been brought against TPO.

1079. Similarly, the Claimants did not seek to distinguish TPO's scheme on the basis Arden LJ drew attention to at [26] the fact an award made by the FSO that involves the payment of money can be enforced as a county court judgment under section 229(8), schedule 17, paragraph 16 of FSMA. My enquiry of both parties with regard to enforcement did not result in any further information.

1080. I do not consider that the Claimant's supporting submission that paragraph 44 of TPO's own 2019 Terms of Reference is "equivocal" as to whether an Award is capable of operating as res judicata provides good support for contending that *Clark* does not apply. I have quoted the paragraph in full at paragraph 1025 above, but the Claimants point to the fact the paragraph states: "The Ombudsman must inform the Complainant that acceptance of an Award and/or a Decision *might* compromise their ability to pursue that complaint through the Courts."

1081. In my judgment, paragraph 44 recognises that the principle of res judicata may apply. It was for this reason that a Complainant was expressly required to be warned by TPO that if they accepted the Award, they must agree that they did so in full and final settlement of the dispute. Alternatively, if they rejected TPO's Final Decision they could pursue their case through the Courts.

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1082. Under the 2019 Rules the decision as to whether to accept or reject the Award and Decision was, therefore, a decision for a Complainant to weigh and make against the background that they may be unable to re-open their complaint or pursue it further if they accepted the Award or Decision. Ultimately, the question whether they could do so turning upon whether "*that complaint*" was also to be the subject of any subsequent proceedings.

1083. As in *Clark*, the fact that paragraph 44, or indeed the proposed Decision and /or TPO's Form, did not expressly state whether or not an award precludes legal proceedings is not a bar to the application of the principle of res judicata. Indeed, if anything, I consider the wording used by TPO was clearer as to its consequences than that of section 228(5) FSMA which was considered in *Clark*: "*If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final*".

1084. I do not therefore accept the Claimants' first ground.

1085. The Claimants' second ground as to why they say *Clark* does not apply is that TPO's procedure is insufficiently formal, consistent and independent to constitute a judicial decision. The Claimants advance four specific reasons in support of this submission. Before turning to these four reasons, and considering whether any or all of them make a difference in the specific case of the Claimants, I emphasise that TPO's procedure as set out in the 2019 Terms is sufficient to constitute, or result in, a "judicial decision" for those same reasons explained by Arden LJ in *Clark* in the case of the FSO at [77] and [82], as set out at paragraphs 1067-1068, in my judgment. The Awards and Decisions that

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were made were not the result of TPO's enquiries alone. TPO did not make an administrative decision. Each party had the opportunity to state their case.

1086. The first specific reason advanced is that TPO did not adequately explain its rules and processes to Mrs Heneghan. That she was not told that she might not be able to bring a court claim if she accepted TPO's Award. Mrs Heneghan confirmed in her oral evidence that she was not told that this was the case. Neither Mr Lisco nor Mr Dunford take this same point. I do not interpret Rule 44 as requiring TPO to expressly state in terms that acceptance of an award might mean the Complainant could not pursue their claim in court, rather than informing them that their acceptance was in full and final settlement of the claim, whereas refusal would mean that they could pursue their claim in court.

1087. Regrettably, it is also apparent, and perhaps unsurprising given the lapse of time and the lack of TPO's own file in Mr and Mrs Heneghan's case, that the disclosure in respect of the complaint to TPO made by Mr and Mrs Heneghan does not constitute a complete run of TPO's correspondence. It is not therefore clearly established what in total Mr and Mrs Heneghan did (or did not) receive from TPO. It is clear that correspondence attached to a 21 December 2020 TPO email to Mr and Mrs Heneghan in response to their complaint is missing. By reference to an email dated 3 January 2021 from Mrs Henneghan the missing TPO correspondence must have contained some information about the procedure to be followed, including the ability to provide a further "comment" and evidence, at minimum. A further missing document is the letter dated 11 May 2021 under cover of which the Proposed Award and the TPO Form were

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actually sent to Mr and Mrs Heneghan. The fact the TPO Form was signed and the Proposed Decision accepted again evidences such correspondence was sent.

1088. In Mr Uruthiran and Mr Lisco's case, there is a copy of a pro forma TPO letter used to send them their Proposed Decision on 21 May 2020. That was, of course, a year earlier. This may therefore not have been identical to the covering letter which Mr and Mrs Heneghan presumably received. However, that letter stated:

> "If you accept the Proposed Decision …
>
> This confirms that you accept the Proposed Decision and award in full and final settlement of your dispute with One Touch Property Investment in regard to all your complaints on which the Ombudsman has made a judgement.
>
> The final decision will then become binding on One Touch Property Investment."
>
> "If you do not accept the Proposed Decision …
>
> ….
>
> This confirms that you do reject the findings in their entirety and reserve your position in full.
>
> We will … close our case file.
>
> Your legal rights are not affected and you are free to pursue your complaint through the Courts."

1089. In my judgment, regardless of whether Mrs Heneghan was not specifically told that she might not be able to bring a court claim if she accepted TPO's award, these statements were sufficient for the purposes of paragraph 44 of the 2019 Terms and / or for the purposes of Regulation 14C of the 2015 Regulations.

1090. The Claimants' second specific submission is as regards Mr Durnford. They point to the fact that when Mr Durnford's complaint was received, TPO engaged in informal correspondence with Mr Kerkvliet and proposed that it deal with the

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complaint summarily on the same basis as (it appears) Mr Uruthiran's previous complaint. I do not consider that the fact of this correspondence undermines TPO's eventual Decision as a judicial decision.

1091. TPO wrote to One Touch and explained that they were reviewing the complaint made by Mr Durnford. They identified that the issues were very similar to the previous complaint reviewed. On the basis of the content of Mr Durnford's complaint it was suggested that an identical £2,000 award could be made to Mr Durnford without TPO proceeding to review any further response by One Touch beyond that recorded in its previous Decision and Award against One Touch. If that course was agreeable to One Touch, TPO said Mr Durnford would be approached and the position explained.

1092. Mr Kerkvliet objected on the basis that One Touch asserted the complaints differed substantially and required individual review. TPO replied that they looked at each case on its own individual merits but were also able to take into account the information they had regarding similar / the same transactions. This complaint was not only in respect of the same Group but the same project and around the same time. Their view was therefore that some kind of compensation to Mr Durnford was likely. TPO stated they were however quite happy to complete the review. They requested One Touch's further documents, if they wished to submit them. A full review then followed. In the event, Mr Durnford was awarded £800.

1093. Whilst TPO's correspondence with the Claimants and One Touch was relatively informal on occasion, that is unsurprising within the context of a process of this kind.

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1094. The Claimants' third specific point was that One Touch refused to disclose correspondence in Mr Uruthiran's case, but TPO nevertheless proceeded to make a decision. Again, I do not consider this undermines the Decision in Mr Uruthiran's case as a "judicial decision". As identified in *Clark*, there need be no formal disclosure process for a decision of a Tribunal to be a judicial decision. The 2019 Terms provide that TPO may seek documents: para 23. TPO may also proceed to determine the complaint, and to draw their own conclusions, if the documents are not provided within a reasonable timescale: para. 24. In Mr Uruthiran's case, TPO requested documents and was provided with only some of them. TPO therefore specifically set out in the Decision that TPO had not been provided with all the documents it sought from One Touch. In the findings, it proceeded to criticise One Touch and stated that it drew an adverse conclusion from One Touch's non-compliance. Whilst a range of factors were evidently in play, I also note that the Award made to Mr Uruthiran was higher than in each of the other cases.

1095. The fourth and final point that the Claimants rely upon in support of the submission that TPO's procedure is insufficiently formal and consistent is their assertion that TPO allowed Mr Durnford to withdraw his acceptance of its Award. As a matter of fact, I am not satisfied that this was the case based upon the correspondence that I have seen.

1096. After the Decision had become a Final Decision, Mr Durnford notified TPO that he wished to reject the Decision. An administrative officer asked Mr Durnford to complete the "non-acceptance" section of the form so that they could close their file. Against a background, where One Touch had previously been told by

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TPO that Mr Durnford had accepted the Proposed Decision and Award, the case officer informed One Touch that Mr Durnford had not accepted the Proposed Decision and Award and had reserved his position. They had therefore closed their case file.

1097. In my judgment, this correspondence after the date of Mr Durnford's original acceptance has no impact upon TPO's application of the 2019 Terms and does not render its procedures insufficiently formal, consistent and independent to constitute a judicial decision. The Proposed Decision and Award had already become a Final Award under the 2019 Terms and a binding solution under Regulation 14C of the 2015 Regulations.

1098. In accordance with paragraph 30 of the 2019 Terms, having received the Proposed Decision and Award and the TPO Form and covering letter, Mr Durnford and One Touch had 14 days in which to accept or provide Representations against the Proposed Decision, following which either the Proposed Decision would be confirmed as a Final Decision or, if Representations were received, Representations would be taken into account before issuing a Final Decision. Mr Durnford accepted the Proposed Decision and the Award on 16 February 2021. TPO informed One Touch of this fact in accordance with paragraph 41 and supplied a copy of Mr Durnford's Acceptance Form. One Touch did not seek to make Representations. On 5 March 2021, One Touch accepted the Proposed Decision and its obligation to pay the Award. Accordingly, as the Proposed Decision met each of the criteria for a Final Decision as set out in paragraph 35 of the 2019 Terms, from 5 March 2021 the Proposed Decision was to be confirmed as the Final Decision.

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1099. For the purposes of Regulation 14C of the 2015 Regulations:

i) through the provision on 16 February 2021 of TPO's covering letter, the Proposed Decision and Award, and TPO's Form for Acceptance or Rejection, TPO notified the parties before the Final Decision that the outcome would be binding; and

ii) Mr Durnford's signature on TPO's Acceptance Form on 16 February 2021 specifically accepted the Proposed Decision and the Award of £800 Award made by TPO on the basis that the outcome would be binding as it was in full and final settlement of all the complaints against One Touch concerning the performance of their London office and "*I acknowledge that my acceptance of the Ombudsman's Proposed Decision means that it will automatically be converted into the Ombudsman's Final Decision*".

The solution therefore became binding on Mr Durnford under Regulation 14C of the 2015 Regulations.

1100. Mr Durnford's belated decision to withdraw his acceptance was therefore of no legal effect following the Final Decision. It was Mr Durnford's choice not to provide his bank account details to receive the Award which he had agreed to accept, and which One Touch had agreed to pay in accepting the Proposed Decision and Award. Mr Durnford did not seek to re-open the case before TPO.

1101. The Claimants' third ground for seeking to differentiate the decision in *Clark* is that res judicata only applies where, among other matters, the relevant tribunal had jurisdiction over the parties and the subject matter, and the decision

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determined a question raised in later litigation. It relies on paragraph 13a of the 2019 Terms which provide that TPO shall not investigate a dispute (or any part of a dispute) if "it appears the Complainant is seeking a legal decision or sanction that can only be obtained in the Courts and/or an adjudication of potentially criminal activity or claims of negligence". It submits that the Decisions either did not deal with any allegations of negligence or, if they did, went beyond TPO's jurisdiction, such that res judicata does not apply.

1102. In my judgment this submission is also ill-founded. TPO proceeded within the scope of its jurisdiction and did not exceed it. Paragraph 11 of the 2019 Terms sets out that any complaint to TPO must be that in relation to the Complainant, "the act or omission" by the member or registered agent complained of constitutes a breach of the Member or Registered Agent's obligations under the law or a breach of the Member or Registered Agent's obligations under any relevant Code of Practice, for example, "in a way that results in the Complainant suffering actual proven financial loss and/or aggravation, distress and/or inconvenience caused by the act(s) or omission(s) which was/were the subject matter of the complaint." It is, therefore, of the essence of the process that TPO has jurisdiction to investigate "acts and omissions" of a relevant professional under the law or a Code of Practice which are alleged to cause loss.

1103. As such, in my judgment, the fact that a complaint may equally be framed as acts or omissions amounting to breaches of Code obligations or as negligence does not mean that in investigating and determining the complaints and making relevant findings under the Code obligations TPO is therefore acting in excess of their jurisdiction. In each Decision TPO stressed that they had not made a

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legal determination. They also stated they had taken into account the law and the relevant requirements of the Code of Practice for Residential Sales Agents. In their findings they explained the content of One Touch's Code of Practice obligations under paragraphs 1d and 7i and stated it was these obligations that formed the basis of their findings. They also explained One Touch's additional obligations under Code of Practice paragraphs 1e, 1i and 15a and applied those paragraphs. In making their findings they then proceeded to set out the ways in which One Touch had provided a service which was contrary to their Code obligations. They then reiterated that that had not made a legal determination of any issues and claims including those of negligence. They did not therefore exceed their jurisdiction.

1104. Although this is a point that was not taken by the Claimants, I should add that in the case of Mr Durnford each of his complaints was framed using the language of "duty" and therefore of negligence. I do not know whether this resulted in any consideration by TPO of whether it should reject the complaint on the basis that Mr Durnford was seeking a legal decision on claims of negligence. Certainly, Mr Durnford does not assert that he did not understand the scope and limits of TPO's jurisdiction. As I have already explained, TPO's Decision set out in plain terms the basis upon which their findings had been made under the Code and that there was no legal determination of any complaint of negligence. Furthermore, not only was it open to Mr Durnford to reject the Proposed Decision in any event, but it was brought clearly to Mr Durnford's attention when considering whether to accept or reject the Proposed Decision and Award that if he did seek a legal decision from TPO on a claim of negligence this was not the basis upon which TPO proceeded.

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1105. I asked the parties whether they could provide any reason as to why TPO has no negligence jurisdiction. They could not find any specific explanation for the relevant exclusion. The fact that TPO's jurisdiction does not extend to making a legal decision on claims of negligence, and that it did not do so in the case of any of the Decisions, does not, however, determine the issue of res judicata. As explained by Arden LJ in *Clark* at [77]-[78] it is sufficient that the Ombudsman decides a question posed by facts constituting a cause of action. None of the authorities require that the decision in terms decides whether a cause of action has been shown or what the parties legal rights or obligations were. It is sufficient that the ombudsman decides whether the facts underlying a cause of action give rise to any claim as between the Complainant and the advisor and whether the claimant has any remedy against the advisor relative to those facts. The fact that the remedy is not the same as would be awarded in a court of law is not a requirement of res judicata.

1106. I have set out in some detail TPO's summary of the complaints and evidence and the findings made in each of the individual cases of Mr Uruthiran, Mr Durnford and Mr and Mrs Heneghan. I have done so because each Case Summary amply demonstrates that TPO decided questions in each case posed by facts which could be addressed by TPO by reference to the application of the relevant Codes of Conduct and which were also capable of constituting a cause of action: negligent misstatement as now pleaded in this Claim. In each case, TPO therefore decided whether the facts underlying this cause of action gave rise to any claim as between the Complainant and One Touch and whether the individual Claimant had any remedy against One Touch relative to those facts. The fact that the remedy awarded was not the same as the remedy that would be

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awarded in a court of law is irrelevant. In substance each of the complaints and the Decisions involved the same matters as each of these Claimants now pleads in the Main Claim and so res judicata applies. In my judgment, the present facts are analogous to those posited by Arden LJ in her fictional example in *Clark* at [78]-[79], as quoted at paragraph 1067 above.

1107. The requirements of cause of action estoppel as summarised in *Clark* are therefore satisfied in each case because each of the Decisions was (i) judicial in the relevant sense; (ii) in fact pronounced; (iii) TPO had jurisdiction over the parties and the subject matter; (iv) the decision was (a) final; (b) on the merits; (v) it determined questions raised by these Claimants in this later litigation; (vi) the parties are the same.

1108. The Claimants' final submissions on the issue of res judicata were that even if *Clark* applied Mr Durnford's complaint did not focus on the representations actually made by One Touch and did not include any complaint in relation to buyback. As set out in the complaint to TPO, Mr Durnford's complaints alleged One Touch's failure to carry out meaningful vetting was a failure in their duty of care; that their failure to pay attention to TCHG's ongoing activities constituted a failure in their duty of care; that he was not told that funds were not ring fenced within the Winchester project but were pooled; and that TCHG was unwilling "to admit culpability in recommending [TCHG] to their clients". In substance, therefore, in my judgment, each of the complaints was sufficiently broad to involve the same matters Mr Durnford now pleads in the Main Claim. Each of the actionable representations form part of One Touch's overall recommendation of the TCHG scheme.

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1109. In the circumstances, I consider that res judicata applies and Mr Urithrian and Mr Durnford's claims are automatically barred. In reaching this conclusion, I understand the concern expressed by counsel in *Clark* and referred to by Davis LJ at [126] that these circumstances may "operate as a trap for complainants (many of whom will not be legally represented) in that sweeping and unparticularised allegations might then operate as a bar to subsequent legal proceedings". As Davis LJ commented, "the doctrine of res judicata is not conclusively delimited by the wishes or intentions of the parties". Similarly, as Black LJ commented:

> "Although there may, at first sight, appear to be an unfairness in preventing a claimant from taking legal proceedings to recover the balance of his loss over the award made by the ombudsman, it is important to remember that the claimant himself holds many of the cards. He can consider the award issued by the ombudsman and any recommendation that the ombudsman makes for additional compensation and, with the benefit of that independent evaluation of his claim, decide whether to take the award or to reject it. If he rejects it, his right to bring proceedings in the court is untrammelled. If he takes it, he has benefited from a practical scheme which he has been able to use without risk of costs."

Conclusions

1110. I therefore hold that:

i) each of the Claimants has established One Touch's liability to them for the purposes of this element of the split trial, except for Hoffelder and Mr and Mrs Heneghan with regard to their Aronex Claim only; but

ii) the claims brought by Mr Durnford and Mrs Suganathan are subject to res judicata.

1111. I therefore now invite Counsel to liaise on the issues of costs and the production of an order.

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SCHEDULE ONE

Claimant no.	Name	Category of representation and reference to Amended Common Particulars of Claim									
		Fixed or continuing income stream §20	**Excellent investments §21**	**Guaranteed/ safeguarded/ assured returns or income §22**	**Buyback arrangements §23**	**Guaranteed buyback §24**	**Operational care homes §25**	**Assumption regarding occupancy §26**	**Free to sell §27**	**Insolvency scenarios §28**	**Easy armchair invest-ments §39**
1	Stephen Durnford	X		X	X		X				X
2, 3, 4	Walter Funk, Elke Funk, Hoffelder Holdings GmbH	X		X	X	X	X	X		X	X
5	Elisheva Moller	X			X		X				
6	Shmuel Moller	X		X	X						X

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Claimant no.	Name	Category of representation and reference to Amended Common Particulars of Claim									
		Fixed or continuing income stream §20	**Excellent investments §21**	**Guaranteed/ safeguarded/ assured returns or income §22**	**Buyback arrangements §23**	**Guaranteed buyback §24**	**Operational care homes §25**	**Assumption regarding occupancy §26**	**Free to sell §27**	**Insolvency scenarios §28**	**Easy armchair invest-ments §39**
7, 8	Michael Morrell, Elcedita Morrell	X		X	X						X
9	Ebrahim Motala	X	X		X	X	X		X	X	X
10	Sumithradevi Suganthan (as executor to the estate of Jeyaruban Uruthiran)	X		X	X						X

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Claimant no.	Name	Category of representation and reference to Amended Common Particulars of Claim									
		Fixed or continuing income stream §20	**Excellent investments §21**	**Guaranteed/ safeguarded/ assured returns or income §22**	**Buyback arrangements §23**	**Guaranteed buyback §24**	**Operational care homes §25**	**Assumption regarding occupancy §26**	**Free to sell §27**	**Insolvency scenarios §28**	**Easy armchair invest-ments §39**
11, 11A, 11B	Richard Hickson, Rebecca Catherine Hickson, Felicity Anne Danby	X		X	X	X					X
12	Sandra Hutchison	X			X				X	X	
13	Sopreye Orupabo	X		X	X		X				X
14	Peter Roberts	X			X						X
15, 16A-D	Shai Abraham Spier, Anat Spier, Jochanan Jaaqov Spier,	X		X	X	X	X	X		X	X

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Claimant no.	Name	Category of representation and reference to Amended Common Particulars of Claim									
		Fixed or continuing income stream §20	**Excellent investments §21**	**Guaranteed/ safeguarded/ assured returns or income §22**	**Buyback arrangements §23**	**Guaranteed buyback §24**	**Operational care homes §25**	**Assumption regarding occupancy §26**	**Free to sell §27**	**Insolvency scenarios §28**	**Easy armchair invest-ments §39**
	Varda Spier, Ori Shmuel Spier, Yael Spier										
17, 18	Min Zhao Heneghan, Michael Heneghan	X		X	X					X	X
19, 20, 21, 22	Peter van der Merwe; Esme can der Merwe; Martinus van der Merwe; Margaret Bester	X		X	X						
Byers claim	Margaret Byers	X		X	X	X					X

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