Neutral Citation Number: [2025] EWHC 740 (Comm)

Case No: CL-2020-000869

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT**

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

Date: 28 March 2025

**Before** :

**MR JUSTICE JACOBS**

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**Between :**

**(1) G.I. GLOBINVESTMENT LIMITED**
**(2) MATTEO CORDERO DI MONTEZEMOLO**
**(3) LUCA CORDERO DI MONTEZEMOLO**

**Claimants**

**- and -**

**(1) XY ERS UK LIMITED**
**(2) SKEW BASE INVESTMENTS SCA RAIF**
**(3) SKEW BASE S.A.R.L.**
**(4) VP FUND SOLUTIONS (LUXEMBOURG) SA**
**(5) VP FUND SOLUTIONS (LIECHTENSTEIN) AG**
**(6) TWINKLE CAPITAL SA**
**(7) DANIELE MIGANI**
**(8) FEDERICO FALESCHINI**
**(9) LEADER LOGIC HOLDING AG**
**(10) LEADER LOGIC AG**

**Defendants**

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- - - - - - - - - - - - - - - - - - - - -

**Daniel Saoul KC, Ben Smiley, Gayatri Sarathy & Benjamin Archer** (instructed by Milberg London LLP) for the Claimants
**Adam Cloherty KC, James Fennemore & Devon Airey** (instructed by **Bird & Bird LLP**) for the 1st, 6th, 7th, 9th & 10th Defendants.
**Robert Weekes K.C. & Warren Fitt** (instructed by **Forsters LLP**) for the 2nd & 3rd Defendants.

**Richard Blakeley KC & Camilla Cockerill** (instructed by **Gresham Legal Limited**) for the 4th & 5th Defendants.
**Philip Ahlquist** (instructed by **Enyo Law LLP**) for the 8th Defendant.

Hearing dates: 7-10, 14-17, 21-25, 28-31 October, 1, 4-8 November, 2-6 December 2024
Draft judgment circulated 17 March 2025

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# Approved Judgment

This judgment was handed down remotely at 10:30am on 28th March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## MR JUSTICE JACOBS:

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## A: Introduction

### A1: The claims in outline

1. The Claimants bring claims against 10 Defendants arising out of substantial losses made on investments which proved disastrous when the Covid-19 pandemic hit in 2020 and financial markets suffered severe falls.

2. The Claimants contend that these loss-making investments were made on the advice of the First Defendant, XY ERS UK Ltd ("XY"). (Appendix 1 contains a list of the main abbreviations used in this judgment). XY is an English company which was then, but is now no longer, authorised by the Financial Conduct Authority, to carry out regulated activities. It is part of a corporate group which operates in various European countries and was founded, and is owned by, its Chief Executive Officer, Mr Daniele Migani ("Mr Migani"). Mr Migani is the Seventh Defendant in these proceedings.

3. The Claimants allege that they are the victims of a substantial fraud perpetrated by XY, Mr Migani and a colleague with whom he worked closely, Mr Federico Faleschini ("Mr Faleschini" – the Eighth Defendant). They allege that the fraud was carried out with the assistance and complicity of other Defendants. Those other Defendants comprise a series of companies which are alleged to have been controlled or influenced by Mr Migani and Mr Faleschini. Those companies are the Second, Third, Sixth, Ninth and Tenth Defendants.

4. The two remaining Defendants, also alleged to have assisted and been complicit in the alleged fraud, are independent of Mr Migani and Mr Faleschini. They are the Fourth Defendant, VP Fund Solutions Luxembourg SA ("VP Lux"), and the Fifth Defendant, VP Fund Solutions (Liechtenstein) ("VP Liechtenstein"). These companies form part of a banking and financial services group of companies with its head office in Liechtenstein. The group includes a bank, VP Bank AG ("VP Bank"). Where it is not necessary to distinguish between the various companies in the group, I will simply refer to "VP".

5. In summary, the Claimants allege that they retained XY to provide them with financial advice on their investment portfolio. They say that XY presented itself as an independent, unbiased and conflict-free advisor[1], and was engaged on that basis. Thereafter, over a substantial period of time, XY recommended that the Claimants invest in various financial products, consistent with what they understood to be XY's business model. They also allege that those investments were held out as being in line with the Claimants' clearly expressed investment objectives: in summary, capital preservation, liquidity and returns of around 3% per annum, consistent with a conservative approach. (I shall refer to the Claimants' pleaded investment objectives as the "Investment Objectives"). They bring claims in fraud against XY, Mr Migani and Mr Faleschini. They bring claims in conspiracy against all of the Defendants. They also bring claims (i) for breach of fiduciary duty against XY; (ii) against Mr Migani for dishonestly

[1] I have used the spelling "advisor" rather than "adviser" in this judgment, since this was how the word was spelt in many of the witness statements and also in the Offering Memorandum.

assisting the breach of fiduciary duty; and (iii) against XY for breach of various contractual tortious and regulatory duties.

6. All of these claims are denied by all of the Defendants. Opening submissions and the evidence at trial took place over 23 days, with a large number of witnesses giving evidence. Closing submissions took place over a further 5 days. The trial was conducted with great skill and courtesy by all counsel. Mr Saoul KC presented the case for the Claimants. Mr Cloherty KC acted for Mr Migani and XY, and three other companies which, directly or indirectly, Mr Migani owned: namely the Sixth, Ninth and Tenth Defendants. Mr Weekes KC presented the case for the Second and Third Defendants, and Mr Ahlquist presented the case for Mr Faleschini. Mr Blakeley KC presented the case for VP Lux and VP Liechtenstein. All leading counsel were clearly greatly assisted both by their juniors (most of whom carried out some examination or cross-examination of witnesses) and their solicitor teams. The submissions overall were of the highest quality.

7. At a case management conference, the parties were ordered to seek to agree a factual narrative. They were ultimately able to agree, in chronological narrative form, a list of uncontentious facts relevant to the issues in dispute. The following description of the parties is taken, principally, from that narrative. Where the narrative indicated that there was common ground between the parties as to what occurred at meetings, I have incorporated that common ground into Section D, where I deal with the meetings in detail.

### A2: The Claimants

8. The First Claimant, G. I. Globinvestment Limited ("GIG"), is an English company incorporated on 8 June 2016, which is used by the di Montezemolo family to make and hold certain investments, including those which are the subject of this claim. The Second Claimant, Matteo Cordero di Montezemolo ("MDM"), and the Third Claimant, Luca Cordero di Montezemolo ("LDM"), are both high net worth individual members of the di Montezemolo family. MDM is LDM's son. Both MDM and LDM are Italian citizens, and LDM is a well-known industrial figure in Italy, principally as a result of his leadership of Ferrari described below. Although MDM is Italian, he was resident in England during 2016 – 2020, which is the period central to the claim.

9. MDM has a degree in economics from Bologna University. In addition, MDM is or has been: (i) Co-founder, chairman of the board, CEO, and member of the investment committee of Charme Capital Partners SGR SpA ("Charme"). Charme manages private equity investment funds with more than € 1 billion under management; (ii) a member of the board of Banca Intermobiliare di Investimenti Gestioni SpA, a major Italian private/wealth management bank; (iii) a member of the board of Santander Private Banking SpA – a major Italian private/wealth management bank (and part of the well-known multi-national Santander banking group); and (iv) a member of the board of other major Italian corporations, including Octo Telematics SpA, a multinational technology company, and Poltrona Frau and Cassina SpA (both luxury furniture companies).

10. MDM is a person with considerable financial expertise and business experience. After university, he worked for Goldman Sachs in their investment banking team. He then founded Charme with his father. Charme has established four private equity funds, known as Charme I, II, III and IV. They are all classified as alternative investment funds or "AIFs" for the purposes of the EU Alternative Investment Fund Managers Directive. Charme I was established in 2003 and ran to 2014. Charme II was established in 2009 and ran to 2016. Charme III and IV were established in 2015 and 2021 respectively, and are still running. The overall capital raised by the funds is around USD 2 billion. The basic idea of these private equity funds was to identify presently undervalued companies so that their potential could be unlocked for the benefit of investors.

11. MDM kept his personal wealth separate from that part of the wealth of the di Montezemolo family which was held by GIG. MDM's wealth was in part held by an Italian company Emmediemme Tre SRL ("SRL"), which initially made some of the investments relevant to these proceedings. He had "resident but non-domiciled" tax status in the United Kingdom from 3 September 2015 until 2023 when he moved back to Italy.

12. LDM, who graduated with a master's degree in international commercial law from Columbia University, is a prominent Italian businessman. By way of example, for more than 20 years LDM was Chairman of Ferrari, the well-known luxury sports car manufacturer and leading Formula 1 team. He referred in his evidence to having won 19 world championships. He is or has also been: (i) Co-founder and chairman of Charme; (ii) Co-founder, chairman of Nuovo Trasporto Viaggiatori SpA, the largest private train operating company in Italy; (iii) Chairman and CEO of Fiat SpA; (iv) Chairman of Manifatture Sigaro Toscano SpA; (v) Vice-chairman of the board of UniCredit SpA, the second largest bank in Italy (and one of the largest banks in the EU); (vi) Chairman of the board of Alitalia, the flag carrier of, and largest airline in, Italy; and (vii) President of Confindustria (the General Confederation of Italian Industry).

13. According to its most recently filed accounts, the net assets of GIG amount to €212 million.

14. MDM and Marco Nuzzo were appointed as directors of GIG on 8 June 2016. MDM resigned on 26 June 2018, since which date Mr Nuzzo has been its sole director. Mr Nuzzo is the longstanding trusted advisor to, and agent of, LDM and the di Montezemolo family in relation to their investment assets. He has a power of attorney over LDM's private accounts and personal financial investments and is a member of the board of a number of companies owned directly or indirectly by LDM and MDM (or by family trusts), including GIG. Mr Nuzzo's function at GIG was, and is, to represent the interests of the di Montezemolo family.

15. For most of the material time:

    (i) GIG was owned as to 100,099 Class A Ordinary Shares by Withers Trust Corporation Limited as trustee of the "B Trust", an irrevocable discretionary trust established by LDM for the benefit of his five sons (including MDM), and as to one Class B Ordinary Share (with special voting rights) by MDM personally.

(ii) The Class A shares were subsequently transferred to Gamma Holdings Sarl, of which Mr Nuzzo is a director and which is controlled as to 28% by MDM and as to 72% by Withers Trust Corporation Limited (continuing to hold those shares as trustee of the B Trust).

16. Mr Nuzzo, MDM and LDM all gave evidence at the trial.

## A3: The Defendants

17. The First Defendant, XY, is a company incorporated in England and Wales. It is part of the XY Group, which includes XY as well as XY SA, a company incorporated in Switzerland. XY SA is the holding company for the XY Group and has its head office in Zurich.

18. The XY Group provides data technology and strategy consultancy services to those managing high-end wealth. Its services include wealth management, advising on and making arrangements for investments. XY (formerly as the regulated entity within the XY Group) only provided those services to "professional clients" and "eligible counterparties", within the meaning of the Markets in Financial Instruments Directives 2014 and 2018 ("MiFID"), and was authorised and regulated by the Financial Conduct Authority ("FCA") to do so. XY's FCA authorisation was cancelled on 22 February 2024, and it is no longer authorised to provide regulated activities and products in the UK.

19. The Second Defendant, Skew Base Investments SCA RAIF (the "Skew Base Fund" or "the Fund"), is an investment company with variable share capital incorporated in the form of a partnership limited by shares that was incorporated under Luxembourg law on 9 February 2017. The Skew Base Fund qualified as an AIF within the meaning of the Alternative Investment Fund Managers Directive (2011/61/EU). The Skew Base Fund was set up as an umbrella fund comprising several compartments (a "Compartment" or the "Compartments"), including High Frequency Price Opportunity ("HFPO") and Market Insurance Notes ("MIN") Compartments, as explained below.

20. The Third Defendant, Skew Base S.A.R.L. ("SB GP"), is a private limited company that was incorporated under Luxembourg law on 24 November 2016. SB GP was the general partner of the Skew Base Fund from the date of the latter's incorporation.

21. The Skew Base Fund was set up by the Sixth Defendant, Twinkle Capital SA ("Twinkle"), with Mr Migani's involvement. Twinkle also had a significant role in the process whereby investments were made by the Skew Base Fund.

22. The Fourth Defendant, VP Lux, is part of the VP Bank group, which is headquartered in Liechtenstein. It was at all material times the Alternative Investment Fund Manager ("AIFM") and Administrator of the Skew Base Fund pursuant to (i) an AIF Management Agreement (the "AIFMA"); and (ii) an Administrative Services Agreement (the "ASA") respectively, both between VP Lux and the Skew Base Fund (represented by SB GP) and dated 9 February 2017. Pursuant to the AIFMA, VP Lux agreed (among other things) to act as the external

AIFM for the Skew Base Fund, in accordance with Article 4(1) of the Luxembourg law on reserved AIFs and, accordingly, to perform the functions of portfolio management and risk management.

23. The Fifth Defendant, VP Liechtenstein, is also part of VP Bank group. Pursuant to an Investment Management Delegation Agreement between VP Lux, VP Liechtenstein and the Skew Base Fund (represented by SB GP), VP Lux delegated the portfolio management function to VP Liechtenstein.

24. VP Lux and VP Liechtenstein were remunerated pursuant to their agreements with SB GP and the Skew Base Fund for their roles as AIFM and Investment Manager respectively.

25. The Sixth Defendant, Twinkle, is a company incorporated under the laws of Switzerland. It was formerly known as Ziusudra SA until on or about 7 September 2017. Twinkle is the 100% shareholder of SB GP. Twinkle's directors were Antonio Grasso from incorporation until November 2019, and Mr Faleschini from 15 December 2017 until present.

26. The Seventh Defendant, Mr Migani, is and was at all material times the CEO and a director of XY. Mr Migani is also the owner of 100% of the shares in Twinkle, which in turn is the 100% owner of SB GP. Mr Migani therefore indirectly owns SB GP. Mr Migani was regulated by the FCA until 22 February 2024 when XY's FCA authorisation was cancelled. Mr Migani is the owner and one of three directors of Leader Logic Holding AG, which wholly owns Leader Logic AG, both introduced below.

27. The Eighth Defendant, Mr Faleschini, was at all material times the company secretary of XY, as well as CFO of XY SA and the XY Group. He was also head of XY's software development department, known as LAB. Mr Faleschini has been a director of Twinkle since 15 December 2017.

28. The Ninth Defendant, Leader Logic Holding AG ("Leader Logic Holding"), is a private limited company incorporated under the laws of Switzerland. It was known as Leader Logic AG until 16 December 2019. Mr Migani is the owner of 100% of the shares in Leader Logic Holding.

29. The Tenth Defendant, Leader Logic AG ("Leader Logic"), is a private limited company incorporated under the laws of Switzerland. Leader Logic Holding is the owner of 100% of the shares in Leader Logic.

30. The parties were agreed that: the fact of any directorship held was a matter of public record in either England (with respect to XY), Luxembourg (with respect to SB GP) or Switzerland (with respect to Twinkle, Leader Logic and Leader Logic Holding), as the case may be; the Luxembourg companies register recorded that Skew Base Fund's general management was overseen by its general partner, SB GP (and that SB GP was 100% owned by Twinkle).

31. XY classified GIG, MDM, LDM and SRL as "professional clients" for FCA Handbook and MiFID purposes, and they each accepted that classification. SRL was also a "large undertaking" within the meaning of MiFID.

## A4: Outline narrative

32. This section contains, by way of an overview, an outline narrative of the main events and agreements which have given rise to the litigation. Later sections deal with these events and agreements in greater detail.

*2016*

33. In around April 2016, Mr Migani and LDM were introduced, and arrangements were made for Mr Migani to meet Mr Nuzzo in London. There was an initial meeting in May 2016 and a further meeting in June 2016, both attended by Mr Nuzzo. There was a further meeting in July 2016, following which GIG and XY entered into a written agreement on 18 July 2016. This was the first agreement between the parties ("the First Agreement").

34. Following the First Agreement, GIG and LDM provided XY with various information about GIG and LDM's financial positions, and there was a further meeting in September 2016 for which a detailed PowerPoint presentation was prepared. This included slides which related to potential MIN and HFPO investments.

35. The September 2016 meeting led to a second agreement dated 21 September 2016 ("the Second Agreement") between XY and GIG. On 21 September 2016, GIG also entered into a separate agreement with XY SA, according to which XY SA provided day-to-day data management and reporting services.

36. XY continued to provide services in accordance with the terms of the Second Agreement, until a third agreement between XY and GIG was signed on 1 July 2018 ("the Third Agreement"). The Third Agreement was concluded after very substantial further funds (referred to by the parties as the "new liquidity") had become available to GIG.

37. The first meeting after the September 2016 agreement was held on 26 October 2016 and was attended by Mr Nuzzo, MDM and LDM. At this point in time, the parties' discussions had concerned the assets of LDM and the di Montezemolo family companies.

38. In December 2016, however, MDM initiated discussions in relation to his personal wealth; assets which he held personally or through SRL. These discussions were not, at the time, revealed to Mr Nuzzo.

*2017*

39. Further meetings with MDM, in relation to his personal wealth, took place in January and March 2017. The possibility of MDM investing in a Luxembourg fund – the fund which became the Skew Base Fund – was first mentioned in a video call in December 2016. It was then further discussed with MDM in early 2017. The first XY PowerPoint presentation which refers to this possible investment was in the presentation for the meeting with MDM on 2 March 2017.

40. The agreements which related to the structure and operation of the Skew Base Fund had been concluded on 9 February 2017. These comprised the AIFMA and

ASA previously described. On the same date, Twinkle – whilst still at that time named Ziusudra SA – entered into a Service and Technological Agreement ("the STA") with VP Lux and VP Liechtenstein, renewable annually, absent service of a notice of termination, pursuant to which Twinkle undertook to implement, maintain and operate a technological system intended to assist VP Lux and VP Liechtenstein in their performance of the portfolio management function. The schedules to the STA contemplated that Twinkle's services would be provided in respect of 8 different Compartments of the Skew Base Fund, including two in which SRL and GIG later invested (with SRL's investment subsequently being transferred to MDM).

41. Also on 9 February 2017, Twinkle entered a Support Service Agreement with SB GP (the "SSA"), terminable without cause upon three months' notice, pursuant to which Twinkle undertook to provide SB GP with services embodied by "assistance in connection to, *inter alia*, accounting, reporting, marketing, risk, strategic and management support services" as further detailed in the SSA (under clause 5). The schedules to the agreement contemplated Twinkle's services would be provided to SB GP in respect of eleven different investment opportunities and accounts (including the 8 Compartments named in the STA referred to in the previous paragraph).

42. In late March 2017, after MDM had signed a "Reverse Solicitation Letter", VP sent him the "Offering Document" relating the HFPO Centaurus Compartment of the Skew Base Fund, together with a subscription form (I shall refer to the Offering Documents, for the various Compartments, as the "Offering Memorandum" or "Offering Memoranda"). The Offering Memorandum contained details of the Fund, and the risks of investing. Following due diligence carried out (principally) by Mr Facoetti in relation to MDM's tax position, and after further meetings between XY, MDM and Mr Facoetti on 28 March 2017 and 25 April 2017, MDM on behalf of SRL signed the subscription form. SRL thereby applied to invest € 10 million in the HFPO Centaurus Compartment of the Fund. The subscription form contained various declarations, including that MDM (on behalf of SRL) had carefully considered the Offering Memorandum in advance of the application, noting especially the investment policy and the risk factors relating thereto.

43. The € 10 million investment by SRL was the first of a number of investments which the Claimants (and SRL) made in the Skew Base Fund between May 2017 and December 2019. It was, however, the only investment in the Fund which was made in 2017.

44. During the remainder of 2017, there were a number of further meetings between XY and the Claimants. The majority of these meetings related to MDM's personal wealth, but there were also 2 meetings concerning the position of GIG/LDM. In the slide presentations for these meetings, MDM was referred to as "Daddy", and GIG/LDM as "Beauty".

45. Also in 2017, beginning in March, investments in MIN and HFPO structured products were made by or on behalf of LDM and GIG (by Mr Nuzzo) and MDM and SRL. These investments were outside the Skew Base Fund, although the Skew Base Fund invested in the same type of products. In the course of 2017,

some 47 contracts were concluded. These non-Skew Base Fund investments continued to be made throughout 2018 and 2019. In 2018, there were 68 such investments. The investments were made following a notification sent by XY to either Mr Nuzzo or MDM/Mr Facoetti. XY's witnesses described these notifications of investments as containing a "proposal" which was in accordance with the strategy which had been agreed between the parties. The Claimants contend that these notifications are to be regarded as "advice" or "recommendations" that the investments should be concluded.

46. All of these investments made in 2017 and 2018 were profitable, and no claim is advanced in respect of them. The first non-Skew Base Fund investment in respect of which a claim is made was the 121st investment which had been made (in March 2019) following a proposal by XY.

*2018*

47. On 18 February 2018, a second investment in the Skew Base Fund was made. This was an investment of € 3 million in the Skew Base Tangible Credit Compartment. This investment proved profitable, and there is no claim in respect of it.

48. By early 2018, as a result of a successful equity investment (unconnected to XY), there were substantial further funds (referred to in the evidence as the new liquidity) available to GIG. There was potentially a sum in excess of € 200 million available for further investment. A number of meetings were held in the course of 2018 in relation to the possible investment by GIG. All of these meetings were attended by Mr Nuzzo, and most of them by MDM (who remained a director of GIG until June 2018).

49. These meetings led to the Third Agreement between XY and GIG on 1 July 2018, and also to investment by GIG in a number of Skew Base Fund Compartments. In August 2018, VP Lux sent the Offering Memoranda and subscription forms to Mr Nuzzo for 5 Compartments, including the HFPO, MIN (EUR) and MIN USD Compartments. The HFPO and MIN Offering Memoranda were both reviewed by Mr Nuzzo.

50. In September 2018, Mr Nuzzo on behalf of GIG completed application forms in relation to the HFPO and MIN (EUR) Compartments. In October 2018, GIG transferred € 27 million to each of those Compartments.

51. In late 2018, GIG invested further funds in various Compartments of the Skew Base Fund, as follows: 15 November 2018, € 4,999,999.99 in the Tangible Credit Compartment; 30 November 2018, € 10 million in the Real Estate Compartment, and a further € 3,999,999 in the Tangible Credit Compartment; 4 December 2018, € 5 million in the HFPO Compartment; 7 December 2018, € 5 million in the MIN (EUR) Compartment; 14 December 2018, a further € 5 million in the Tangible Credit Compartment.

52. Accordingly, by the end of the 2018, the total amount invested by GIG in various compartments was (in round terms) € 88 million, comprising: HFPO - € 32 million; MIN (EUR) - € 32 million; Tangible Credit - € 14 million; Real Estate - € 10 million.

*2019*

53. During 2019, there were further meetings between XY and the Claimants, and further investments both in the Skew Base Fund and outside it, as well as some redemptions from the Fund.

54. In February 2019, in respect of SRL's € 10 million investment in the Skew Base Fund, MDM elected for his entitlement to a dividend to be satisfied by the transfer of the shares in the Skew Base Fund held by SRL to himself, by way of a dividend in specie from SRL.

55. In May 2019, GIG redeemed shares with a value of € 8 million in the HFPO Compartment. In June 2019, GIG redeemed shares with a value of € 6.8 million in the MIN (EUR) Compartment.

56. In September 2019, MDM invested USD 1,499,990 in the Skew Base MIN (USD) Compartment. This was the last investment made by any of the Claimants in the Skew Base Fund. LDM at no stage invested in the Fund.

57. In relation to SB GP, there were two agreements which altered the arrangements which had been made in February 2017.
    (1) On 1 October 2019, SB GP and Leader Logic Holding entered into a Support Service Agreement (the "2019 Leader Logic Support Service Agreement"). In summary, under the agreement:
        (i) Leader Logic Holding would provide a range of ongoing support services "as from time to time needed by [SB GP]" relating to "Policies and Procedures", "Valuation Methods", "Strategies and Guidelines" and the "Fund's Management" (clause 3);
        (ii) There was an initial set-up period of three months from the date of the agreement (clause 9); and
        (iii) Leader Logic Holding was entitled to fees calculated as set out in Schedule 1 to the agreement and there was provision for "advance payments".
    (2) On 16 January 2020, SB GP and Leader Logic entered into a Support Service Agreement (the "2020 Leader Logic Support Service Agreement").

58. SB GP's fees were set out in the Offering Memorandum for each Compartment of the Skew Base Fund into which GIG and SRL and MDM invested. The fees paid to VP Lux, VP Liechtenstein, Twinkle, Leader Logic Holding and/or Leader Logic did not result in any additional costs or fees being paid by GIG and SRL beyond those fees paid to SB GP when making investments into, or continuing to hold investments in, any of the relevant Compartments of the Skew Base Fund.

*2020*

59. On 22 January 2020, a further meeting at XY's offices in London took place between Mr Migani and Mr Dalle Vedove (for XY), Mr Nuzzo and MDM. XY delivered a presentation in which, amongst other things, it was noted:

    (i) The value of GIG's assets totalled €343.5m, of which €192.6m was allocated to financial assets;

(ii) The net return produced in 2019 by these financial assets was 3.84%. This resulted in an additional income for GIG of €1.27m;

(iii) In 2019, the SB (EUR) MIN Compartment investment had performed in line with the target return of 3.1%. The SB HFPO investment had outperformed the target return of 3.5% and achieved a net return of 4.8%. The SB (USD) MIN Compartment had also outperformed its target return of 3%, achieving a 7.3% net return.

60. This was the last meeting between the parties.

61. In February 2020, and particularly March 2020, financial markets were severely impacted by the Covid-19 pandemic. In March 2020, two market indices (the S&P 500 and the Euro Stoxx 50) suffered 1-day falls of greater than 10%. Equity markets were generally falling at around that time.

62. On 12 March 2020:

(i) In light of the effect of Covid-19 on the financial markets, Mr Nuzzo e-mailed Mr Dalle Vedove to ask for information regarding the SB HFPO and MIN Compartments.

(ii) Mr Nuzzo also e-mailed VP Lux requesting detailed information about the SB MIN and HFPO Compartments.

(iii) A telephone call took place between Mr Migani, Mr Dalle Vedove, Mr Facoetti and MDM about the status and strategy for MDM's investments given the state of the markets.

63. On 13 March 2020, MDM sent Mr Dalle Vedove an e-mail which, in summary, set out questions about the barriers, capital losses and realisable values of various instruments.

64. On 13 March 2020, GIG and MDM received e-mails from VP Lux attaching a Notice to Shareholders stating that due to the distressed market conditions in the context of the Covid-19 pandemic, SB GP/Skew Base Fund had decided to suspend the calculation and publication of the NAV (i.e. the Net Asset Value) for the relevant Compartments.

65. On 25 March 2020, GIG and MDM received a Notice to Shareholders in respect of the SB HFPO Compartment. In summary, that notice:

(i) Noted that Covid-19 had had a significant impact on the markets, causing the markets to crash and become particularly volatile;

(ii) Noted that the Compartment invested in "financial instruments traded over-the-counter or OTC, which generally tend to be less liquid than instruments that are listed and traded on exchanges";

(iii) Explained that an inability to dispose of assets had resulted in the Compartment being unable to meet a collateral shortfall;

(iv) Confirmed that SB GP, after considering advice from VP Lux, had decided that the collateral shortfall in the Compartment could not be rectified and concluded that the Compartment should be liquidated, and the shares compulsorily redeemed in accordance with the provisions in the Offering Documents and Articles of Association of the Fund.

66. On the same date, GIG and MDM received a further Notice to Shareholders in respect of the SB MIN Compartment, which confirmed that SB GP had also decided to liquidate the MIN Compartment and compulsorily redeem the shares. The notice explained that the decision was taken due to the effect of Covid-19 on the market, which, given the nature of the products, had the effect that it would be difficult to achieve the objective of generating a return by investing in those products.

67. Both 25 March 2020 notices informed GIG and MDM that their shares in both Compartments would be compulsorily redeemed with effect from the date when calculation of the NAV per share could reasonably be calculated. GIG and MDM would then receive any monies from the liquidation proceeds in proportion to their shareholdings and according to the terms of the Offering Documents.

68. Between March and April 2021, GIG and MDM received payments in respect of the redeemed shares in the SB MIN Compartment.

69. In broad terms, at the end of the liquidation processes, GIG and MDM's redemptions from the SB HFPO Compartment were nil; GIG's redemption from the SB MIN (EUR) Compartment amounted to approximately half of the value of its initial investment; and MDM's redemption from the SB MIN (USD) Compartment amounted to USD c.850,000 of his initial investment of USD 1.5m.

70. The effect was that all of the capital invested by GIG in the SB HFPO Compartment was lost; GIG lost approximately half of the capital it had invested in the SB MIN Compartment; and MDM lost approximately 43% of the capital he had invested in the SB MIN (USD) Compartment.

71. GIG's investments in the Real Estate Compartment of the Skew Base Fund were successful. The redemption of GIG's shares was processed on 9 December 2021, and payment of funds was made to GIG in the amount of €12,287,102.21. GIG therefore made returns of approximately 23%.

72. GIG's and MDM's investments in the Tangible Credit Compartment of the Skew Base Fund did not suffer a loss. GIG's shares were redeemed between July 2020 and December 2020 for a total amount of €14,434,221.47, being a return of approximately 3.1%. MDM's shares were redeemed between July 2020 and December 2020 for a total amount of €3,116,313.27, being a return of approximately 3.9%.

## A5: Scheme of this judgment

73. This judgment contains the following sections.

74. Section B sets out my overall approach to evaluating the extensive factual evidence in this case, including significant disputes of fact concerning, in particular: (i) whether the Claimants were aware of any connections between Mr Migani/XY and the Skew Base Fund; (ii) whether and to what extent the Claimants were informed of and understood the risks of the investments which they made; (iii) whether there was a conspiracy to conceal matters from the Claimants and other investors. It also contains a summary of my assessment of the evidence of each of the witnesses, and this draws upon conclusions which I reach later in the judgment.

75. Section C describes the "structured products" with which this case is concerned: i.e. the MIN and HFPO products in which the Claimants invested outside the Skew Base Fund, and also by investing in the Fund itself.

76. Section D contains a chronological account of the dealings between the Claimants and XY from 2016 to the breakdown of the relationship in 2020. These dealings are relevant to key issues in the case concerning the misrepresentation and conspiracy claim, including the issues concerning (i) what representations were made; (ii) the Claimants' alleged knowledge of connections between XY/Mr Migani and the Skew Base Fund; and (iii) the Claimants' understanding of the risk of the investments which they made.

77. Section E describes the terms of the Offering Memoranda for the investments made in the Skew Base Fund.

78. Section F describes the origin, formation (including the contractual documents) and operation of the Skew Base Fund. This overlaps in time with the matters covered in Section D, but I do not consider it sensible to seek to interweave these matters into the chronology of the dealings between the Claimants and XY.

79. Section G addresses the case of fraudulent and negligent misrepresentation concerning the "investment representations" relied upon by the Claimants.

80. Section H addresses the case of fraudulent misrepresentation concerning the "independence representations" relied upon by the Claimants.

81. Section I addresses the claim against XY for breach of fiduciary duty, and against Mr Migani for dishonest assistance.

82. Section J addresses the claim in conspiracy, albeit that my conclusions in that regard are largely foreshadowed by the factual findings and conclusions in Sections F and H.

83. Section K addresses the remaining 'non-fraud' claims i.e. the contractual, tortious and regulatory claims which are advanced against XY.

84. Section L addresses XY's counterclaim.

## Section B: Approach to the evidence and witnesses

## B1: Approach to the evidence

85. The trial occupied 28 days, including 20 days of evidence from a large number of factual witnesses. The evidence covered (in particular) the history of the dealings between the Claimants and XY and the formation and operation of the Skew Base Fund, including the roles and work carried out by the various Defendants in relation to the Fund. There was no expert evidence, as a result of a decision made at a case management conference that expert evidence was not necessary. During the early part of the trial, in particular when MDM and other Claimants' witnesses were giving evidence, the court's air conditioning system was not working properly. I have taken into account the difficulties and discomfort which the high temperatures in the court presented for the witnesses.

86. The case involves acute conflicts of evidence between the Claimants' witnesses (in particular Mr Nuzzo and MDM) and XY's witnesses as to what they were told during the course of the meetings and discussions that they had. The conspiracy case draws to some extent on the evidence of the Claimants' witnesses as to what they were told. It is, however, largely advanced on the basis that the court can conclude on the documents and the inherent probabilities, despite the denials of the various witnesses called by the Defendants, that there was indeed a conspiracy and that the legal requirements of that cause of action are fulfilled. Accordingly, the credibility and reliability of the witnesses is a critical part of the present case, in particular in relation to the two issues which Mr Cloherty identified as central, namely: (i) did the Claimants understand the risks involved in the investments which they made; and (ii) did they know of a significant connection between Mr Migani/XY and the Skew Base Fund?

87. In assessing the evidence of the factual witnesses on all issues, I will apply the approach commended by Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)*, [1985] 1 Lloyd's Rep 1, 57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."

88. In that same case, Dunn LJ said (to similar effect):

> "I respectfully agree with Lord Justice Browne when he said in *re F*, [1976] Fam. 238 at p. 259, that in his experience it was difficult to decide from seeing and hearing witnesses whether or not they are speaking the truth at the moment. That has been my own experience as a Judge of first instance. And especially

> if both principal witnesses show themselves to be unreliable, it is safer for a Judge, before forming a view as to the truth of a particular fact, to look carefully at the probabilities as they emerge from the surrounding circumstances, and to consider the personal motives and interests of the witnesses. As Lord Wright said in *Powell v. Streatham Manor Nursing Home sup*. at p. 267:
>
> > . . . Yet even where the Judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact . . .
>
> and he referred in particular to some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witnesses."

89. The approach of Robert Goff LJ was approved by the Privy Council in *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207, 215-216:

> "And it is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities.
>
> …
>
> That observation [i.e. of Robert Goff LJ] is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."

90. Robert Goff LJ's judgment was described as the "classic statement" in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, where Males LJ said at para [48]:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial

> cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence."

91. Robert Goff LJ's approach is also reflected in authorities such as *Gestmin SGPS SA v Credit Suisse (UK) Ltd* at [2013] EWHC 3560 (Comm) at paras [15] – [23] ("*Gestmin*"). The unreliability of human memory was discussed in that case and in subsequent authorities, including *Jaffe v Greybull Capital LLP* [2024] EWHC 2534 (Comm) (Cockerill J) at paras [195] – [202]. That decision itself refers to Popplewell LJ's Combar lecture "Judging Truth from Memory". Even more recently, in *Mohammed v Daji* [2024] EWCA Civ 1247 Newey LJ (giving the lead judgment in the Court of Appeal) said at para [45]:

> "Judges have for many years remarked on the vulnerabilities of evidence as to what witnesses remember. Popplewell LJ recently discussed human memory and how witnesses can come to give mistaken evidence in his 2023 COMBAR lecture, *Judging Truth from Memory: The Science*. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [2020] 1 CLC, at paragraph 22, Leggatt J went so far as to suggest that "the best approach for a judge to adopt in the trial of a commercial case is … to place little if any reliance at all 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". However, Popplewell LJ explained in his lecture that he did not himself wholly agree with this remark and in *Natwest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 the Court of Appeal pointed out at paragraph 50 that "it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* will not be open to a judge, or, even if it is, will be of limited assistance". In *Kogan v Martin* [2019] EWCA Civ 1645, [2020] FSR 3, the Court of Appeal said at paragraph 88 that "a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence"."

92. Thus, although the decisions recognise the fallibility of human memory, it does not follow that the testimony of witnesses is somehow to be sidelined. In *Kogan v Martin* [2019] EWCA Civ 1645, the Court of Appeal said (at para [88]) that the judge in that case had been wrong to view *Gestmin* as an admonition against placing any reliance at all on the recollections of witnesses:

> "We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one

> of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: *The Judicial Determination of Factual Issues* (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

93. My approach is therefore to consider the objective evidence and in particular the documentary evidence, as well as the inherent probabilities, and to test the accounts of the witnesses against those matters. Even though this is a commercial case with a substantial number of documents, the oral evidence of witnesses remains important, not least because: (i) there were a very large number of meetings between the Claimants and XY over a number of years, and these clearly involved substantial discussions between the parties; and (ii) the Claimants' conspiracy case is substantially based upon inferences to be drawn from certain events and documents, and oral evidence from witnesses may put those events and documents into context.

94. I was also referred to the very helpful summary by Calver J of the principles applicable to cases of fraud and conspiracy, in particular the drawing of inferences, in *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) at para [904]:

> "I also bear in mind that as to inferring fraud or dishonest conduct generally:
>
> a. It is not open to the Court to infer dishonesty from facts which are consistent with honesty or negligence, there must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved: *Three Rivers District Council v Bank of England [2001] UKHL 16; [2003] 2 AC 1, [55]-[56]* per Lord Hope and [184]-[186] per Lord Millett.
>
> b. The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than one of innocence or negligence: *JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20]* per Bryan J; *Surkis & Ors v Poroshenko & Anr [2021] EWHC 2512 (Comm) at [169* (iv)] per Calver J.
>
> c. Although not strictly a requirement for such a claim, motive "*is a vital ingredient of any rational assessment*" of

> dishonesty: *Bank of Toyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS [2009] EWHC 1276 (Ch) at [858]* per Briggs J. By and large dishonest people are dishonest for a reason; while establishing a motive for conspiracy is not a legal requirement, the less likely the motive, the less likely the intention to conspire unlawfully: *Group Seven Ltd v Nasir [2017] EWHC 2466 (Ch) at [440]* per Morgan J.
>
> d. Assessing a party's motive to participate in a fraud also requires taking into account the disincentives to participation in the fraud; this includes the disinclination to behave immorally or dishonestly, but also the damage to reputation (both for the individual and, where applicable, the business) and the potential risk to the " *liberty of the individuals involved* " in case they are found out: *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlama AS [2009] EWHC 1276 (Ch) at [858], [865]* per Briggs J."

95. In approaching the evidence in this case, I of course bear in mind that the events with which the trial are concerned took place many years ago. It was obvious that there are many matters which mean that the evidence as to what precisely was said at a particular meeting or discussion is unlikely to be wholly reliable, including because of the passage of time and the fact that there were a very large number of meetings and discussions between the Claimants and XY. It is also obvious that the principal witnesses on both sides have much to gain or lose from the present litigation, which has been bitterly fought for many years, and that this will inevitably colour the ability of some of the witnesses to give objective evidence about the relevant events.

96. In the context of serious allegations, such as the deceit and conspiracy allegations in this case, I also approach the case bearing in mind the following passage from *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) (which has been recently cited, with approval, by Sir Geoffrey Vos C in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at paras [46] – [47] ("*Arkhangelsky*")):

> "[it] is well established that 'cogent evidence is required to justify a finding of fraud or other discreditable conduct': per *Moore-Bick LJ in Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [73]. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: 'where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger', per Rix LJ in *Markel International Insurance Company Ltd v Higgins* [2009] EWCA Civ 790 at [50]. The question remains one of the balance of probability, although typically, as Ungoed-Thomas J put it in *In re Dellow's Will Trusts* [1964] 1 WLR 451, 455 (cited by Lord Nicholls in In re H [1996] AC 563, 586H), 'The more serious the allegation the

> more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'. Associated with the seriousness of the allegation is the seriousness of the consequences, or potential consequences, of the proof of the allegation because of the improbability that a person will risk such consequences: see *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605; [2006] QB 468, para 62, cited *in In re D (Secretary of State for Northern Ireland intervening),* [2008] UKHL 33; [2008] 1 WLR 1499, para 27, per Lord Carswell."

97. In *Arkhangelsky*, Males LJ said at para [117]:

> "In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not."

98. I agree with the Claimants that this does not mean that the more serious the allegation, the more convincing the evidence required. Ultimately, I must decide this case on the balance of probabilities.

99. In assessing the evidence of the various witnesses, I have endeavoured to take into account their evidence as a whole. It does not follow from the fact that the evidence of a witness on a particular issue is to be rejected, or that a witness gave a single bad answer or series of bad answers, that everything that a particular witness has said is to be rejected. The evidence of a witness as to one part of the case may be consistent with the documents or inherent probabilities, whereas his or her evidence on another area of the case may be otherwise. Accordingly, where the factual evidence of a particular witnesses on a particular topic is important, I address that evidence in more detail below in the context of that topic. However, I start by giving some general observations which are reflected in my fact-findings later in this judgment. What follows should therefore be read together with those later fact-findings.

*The Claimants' witnesses*

100. On the Claimants' side, the witnesses were Mr Marco Nuzzo, MDM, Mr Matteo Facoetti and LDM.

101. *Mr Nuzzo*: As described in Section A above, Mr Nuzzo is the longstanding trusted advisor to, and agent of, LDM and the di Montezemolo family in relation to their investment assets. Before working with the di Montezomolo family, he had worked as an international tax consultant for two trust companies, and also completed a master's degree in international tax. He started working for the family in 2011, having grown up with MDM and known both him and LDM for a long time. In his witness statement, he described how he slowly started to

become more sophisticated on the investment side when working with the family. His work for the family meant working for LDM personally, and also being involved in administering his family wealth. Mr Nuzzo is currently a director, manager or officer of about 19 companies associated with the family. When the family office relocated to London in 2016, his salary was £ 400,000 per annum. His remuneration also potentially includes a discretionary bonus, which in 2019 was £ 1,200,000. That particular bonus reflected the successful sale of an equity investment which generated the "new liquidity" which was then discussed with XY in 2018.

102. It is apparent to me that, over the years, Mr Nuzzo (who is a highly intelligent person generally and in relation to financial matters, as indeed were all of the Claimants' witnesses) acquired considerable familiarity with different types of investments, including those which are at the heart of the case. This is borne out by a spreadsheet, produced by XY based on their running a portal as part of the technology services which were provided to the Claimants. This shows a very large number and variety of different types of investment, made over the years, by Mr Nuzzo when acting for GIG and LDM.

103. When giving evidence, Mr Nuzzo was in my view a much better witness than MDM (described below) and was willing to make appropriate concessions. This is illustrated by his evidence, described in Section H below, which frankly accepted the importance of a general partner in the context of a fund such as the Skew Base Fund. However, his witness statement contained in my view a degree of exaggeration in relation to what he was told and understood about the risks of investing in MIN and HFPO products. His oral evidence also underplayed, in my view, the extent of his knowledge and understanding of the risks of the investments which he was making. I illustrate this in Section D.

104. Overall, I thought that he was generally an honest witness, who was seeking to answer questions to the best of his ability, but one whose recollection and evidence had been coloured by the very substantial losses suffered on his watch. For example, he has in my view persuaded himself that in September 2018, he received reassurance about the risks being "standard". I have not accepted that that conversation took place. There are other aspects of his evidence that I have not accepted, as described in Section D: for example, that he did not receive answers from Mr Dalle Vedove to pertinent questions that he had asked. I was also not persuaded by his evidence on some of the more difficult (from the Claimants' perspective) documents which suggested that Mr Nuzzo knew of the connections between Mr Migani/XY and the Skew Base Fund.

105. *MDM*: MDM's background in finance and investment is described in Section A above. I had significant reservations about MDM's evidence, and I treat his evidence on key issues with considerable caution. I discuss aspects of his evidence in some detail in the context of the investment representations claim. It seemed to me that, as a generality, MDM consistently sought to downplay (to an extent greater than Mr Nuzzo) his understanding of what he was being told about the nature of the investments in the strategy which was being suggested to him. I accept that he was not a specialist in structured products, but that does not mean that he would not have applied his financial intelligence and experience to understanding what he was told, asking questions if he did not understand an

important matter. MDM was clearly financially astute and experienced, and I cannot accept that he would have been investing very substantial sums of money in the Skew Base Fund, or investments outside the Fund, with no real understanding of what the investments entailed or what the risks were. Similarly, I was not impressed with his answers, at the start of his cross-examination, to the effect that he had little understanding of AIFs, when in fact he ran (and was the CEO of the general partner of) a number of such funds.

106. It is also the case that MDM pursued to trial a claim against Mr Faleschini on the basis of an allegation that he had relied upon representations he had made. That case collapsed in cross-examination, and was thereafter abandoned. I have been given no explanation as to how it was that MDM (and also his father) came to make this allegation of fraud against Mr Faleschini, in circumstances where MDM had not relied on anything that he had said, and indeed LDM did not even know who he was. This is in my view a point which does reflect adversely on MDM's credibility. It also suggests that there is an element of what Mr Cloherty and others called "reverse engineering" of the claim: i.e. advancing a case on the basis of the result to be achieved, rather than on the basis of the actual facts.

107. *Mr Facoetti*: Mr Facoetti was a more peripheral witness. He has been working for MDM since 2007, when he joined his private equity firm. He is a partner and CFO at the firm, and he also helps MDM with some of his personal affairs. His evidence was that it was MDM who made the decisions. He was not present at many of the meetings which featured in the evidence and did not participate in the 2 December 2016 call when MDM was introduced to the possibility of investing in a Luxembourg fund. Nor was he present at the 2018 meeting when Mr Nuzzo was introduced to the Skew Base Fund.

108. There were occasions in his evidence when Mr Facoetti showed himself as a witness whose recollections were coloured by a desire to assist MDM in his case. This was evident when (see Section D) he sought to explain away an e-mail where MDM had referred to the possibility of making a speculative investment. It was also evident when Mr Facoetti sought, in re-examination, to retreat from an unhelpful answer that he had given concerning Mr Migani having chosen VP Bank as the custodian. That answer lent some support to the case that the Claimants knew that Mr Migani was the person behind the Skew Base Fund, since it would otherwise be difficult to see why Mr Migani would have been choosing the custodian. That said, I accept that Mr Facoetti was an honest witness, and one who was trying to assist the court to the best of his recollection. His witness statement acknowledged that the investments made by MDM had a risk of losing all the capital, although this was "a very very small risk".

109. I did not think that his evidence was of any real assistance on the question of whether MDM knew about the connection of Mr Migani/XY to the Skew Base Fund. Mr Facoetti said that he did not know, and did not care whether there was a commercial relationship between XY and the Fund. In my view, if the connections had been a matter mentioned at one of the meetings that he attended, or by MDM in his discussions with Mr Facoetti, it is unlikely that this would have provoked a reaction on the part of Mr Facoetti.

110. *LDM*: LDM has a very distinguished background, as described in Section A. He was clearly an honest witness, but one who had no real recollection of the meetings about which he gave evidence.

*The witnesses called by XY and Twinkle (and related parties)*

111. *Mr Migani*: Mr Migani is the CEO and founder of the XY group of companies, and in that role is a director of XY. After graduating in physics in 1997, he worked in nuclear research at the CERN laboratory in Switzerland. He then studied for an MBA and joined Boston Consulting Group. He then left to focus on technology solutions and consulting in the financial services industry, particularly in private wealth. When working for a bank in Switzerland, he saw an opportunity to develop a new service offering for ultra-high net worth individuals, which would use technology-based analysis to look at their global estates. He started a company called Maetrica, which provided various technology-based services. He then decided, in around 2011-2012, to develop a new offering to combine that type of work with consultancy services. The new business became the XY Group. When he founded Maetrica, and in the early years of the XY Group, his time was mainly spent in developing processes and solutions and providing services to clients. By 2016, by which time the XY business had grown, his role was less operational and more focused on supervising service delivery and on new client and business development. He said in evidence that, by the time of the events with which I am concerned, the XY business overall employed around 60 people.

112. Mr Migani was cross-examined for some 4 ½ days. Although much of his evidence was sensible and largely consistent with the documents and inherent probabilities, I do not consider him generally to be a reliable witness, and I treat his evidence with very considerable caution. Generally speaking, I do not regard Mr Migani as a witness on whose evidence I can rely, unless corroborated by other reliable evidence in the case including the inherent probabilities.

113. I consider that he has sought during this case, unconvincingly, to distance himself from his involvement with Twinkle. A number of documents, admittedly authored by Ms Gaveni, describe Mr Migani as the “General Manager” or the “Managing Director” of Twinkle. In particular, the description of Mr Migani as “General Manager” was included in a set of slides which were used during a due diligence visit by VP to Twinkle’s offices in Mendrisio in March 2019, and which were then sent to VP afterwards. A due diligence exercise is a serious matter, and this particular due diligence was carried out by a team of 3 people, two of whom were very senior: Mr Ries, Mr Stein (who was the Chief Risk Officer at VP Lux) and Mr Kone. In my view, there would be no justification for Ms Gaveni (who by that time had worked for Twinkle for many months) to have given incorrect information to VP as to Mr Migani’s role. I was not impressed by Mr Migani’s evidence (supported by Mr Faleschini and Ms Gaveni) that this was not an accurate statement of the position.

114. It may well be the case that Mr Migani’s day-to-day work for Twinkle was relatively limited. His employment contract with Twinkle, apparently terminated in April 2021 with effect from 30 June 2021, referred to him working only 4 hours a week. However, there is nothing in the contract which suggests that Mr Migani’s work was to be limited to real estate business or consultancy. It is far

more probable, as suggested by the documents referred to in the previous paragraph, that Mr Migani had a more general role. That would be unsurprising, in circumstances where he was the ultimate beneficial owner of Twinkle, and where the two directors of Twinkle (Mr Grasso and later Mr Faleschini) had no real investment expertise. The structure charts showed the operational team, headed by Mr Negro, reporting to Mr Migani as the General Manager, and it seemed to me that this would be the natural reporting line.

115. I am also very troubled by the fact that, at a time after the Swiss criminal proceedings had begun, steps were taken to delete (irretrievably) Mr Migani's Twinkle e-mail account. The purported justification for the deletion did not stand up to scrutiny. At the time when Twinkle was separately represented in these proceedings, their solicitors had advised that Mr Migani's Twinkle e-mail account was deleted at some time between February and April 2021. There is no record of when exactly it was deleted. However, deletion at that time, on the basis of the undesirability of keeping an e-mail account after an employee has left a company, makes no sense. Mr Migani's employment was only terminated in April 2021, with effect from June 2021. In any event, since Swiss criminal proceedings had been commenced, it is obvious that the account should have been preserved. Mr Faleschini said that the deletion occurred after he had spoken with the IT manager (of both Twinkle and XY) and Mr Migani. Accordingly, both Mr Migani and Mr Faleschini were party to this deletion.

116. It is also my view that Mr Migani did not give a frank account of the operation of the Skew Base Fund during the phone call with an investor, Finfloor, in (as I was told) around April 2020. A transcript of that call was obtained, apparently covertly. However, it was the subject of cross-examination and Mr Cloherty did not ultimately press a point that it was inadmissible. No one from Finfloor has been called to give evidence as to what they did or did not know, and I cannot make any findings about that. I can say that I do find it surprising that "Giovanni", the main speaker for Finfloor, should have said that he was not aware that there was an important leverage within the funds – when the Offering Memorandum makes the ability to borrow money very clear. So it may be, as Mr Migani suggested in his evidence, that Finfloor knew rather more on a number of issues than might appear to be the case from the transcript.

117. However, what is clear is that Mr Migani was asked on two occasions to explain his relationship with the Skew Base funds. When he was first asked, he was keen only to answer from the perspective of "XY as a group". Mr Migani said in evidence that this was on legal advice, in circumstances where a claim from Finfloor was anticipated imminently and where the client relationship was between XY and Finfloor. I have no way of assessing whether this was the legal advice. I accept, as Mr Migani said, that this was a very difficult call at a very fraught time, with litigation on the horizon. But I am not persuaded that this means that Mr Migani should not have given frank answers to the questions asked. A frank answer to the question would have involved not simply answering by reference to XY, but rather referring (at least) to the relationship which Twinkle had with the Skew Base Fund. Later in the call, Giovanni asked again, saying he wanted to understand "what your direct relationship was with the VP funds", and a little later "I wanted to understand what your relationship was with

the funds and with the VP Bank". Again, Mr Migani answered by reference to XY's position, and omitted any reference to Twinkle or indeed his ownership of the general partner. The focus of the call was the recent collapse of the HFPO and MIN Compartments, and it seems to me that Mr Migani was – by omitting any mention of Twinkle – seeking to distance himself and XY from responsibility for the collapse.

118. I also found Mr Migani's answers, about some important documents, to be surprising and unconvincing. For example, when asked about Mr Dalle Vedove's e-mail of 14 December 2016 (see Section D below), he was unwilling to accept that there was any reference to investment objectives. When asked about statements made on XY's website as to independence, being conflict-free and unbiased, he sought to draw a distinction between high level strategic consulting advice, and advice on specific investments. The theme of his evidence was that it was always for the client to decide on the latter. But he was asked whether his position was that "you were going to be giving unbiased and conflict-free strategic advice, but when it came to recommending specific instruments you were entitled to act in a biased way, is that your evidence". His answer was:

> "The question is really difficult, but my point is, I did what is written in the contract. There is no mention of independence in the contract. So I did, what was written in the contract, which is we support them in the … strategic design of the strategy, in the implementation we supported them, at the end also in the monitoring of the strategy, okay. So we did exactly what was written in the contract".

I did not consider that the question was really difficult: since I cannot see how the giving of unbiased and conflict-free advice should only apply at the stage where strategic advice was being given.

119. *Mr Dalle Vedove*: Mr Dalle Vedove was given the role as "minder" to the Claimants. He was, in effect, their relationship manager on a day-to-day basis. He attended all the XY meetings with the Claimants, except for the initial meetings in the early summer of 2016. Mr Dalle Vedove had a Master of Science degree and a PhD in management engineering. His PhD was focused on corporate finance. He then joined the management consulting firm McKinsey & Co in Milan in October 2007, and worked there for 6 years. He started working for Mr Migani's company, Maetrica, in May 2013, and then moved to XY in June 2014. He became an employee of another company, XY Ticino, in December 2016, and remains an employee of that company today. Mr Dalle Vedove had no role in Twinkle, and there was no suggestion that he was involved with or had access to the info@skewbase e-mail address.

120. I thought that Mr Dalle Vedove was an honest witness, and was for the most part impressive. He answered the questions thoughtfully and directly, and generally gave answers which seemed to me to be in line with the documents and probabilities. It also seemed to me that Mr Dalle Vedove's work during the period of his dealings with the Claimants (i.e. from around July 2016 to mid-2020) was of a high professional standard. For example, he was sometimes asked by Mr

Nuzzo about investment proposals or ideas from other financial institutions with whom Mr Nuzzo was dealing. Mr Dalle Vedove's answers at the time were generally well-reasoned and well-explained, as were his answers in cross-examination when it was suggested that he was discouraging Mr Nuzzo from investing other than on the basis of XY's proposals. The PowerPoint slide presentations, upon which Mr Dalle Vedove worked, were detailed and well-prepared, and clearly impressed MDM and Mr Nuzzo.

121. The Claimants' closing argument described Mr Dalle Vedove (and Mr Negro) as "company men", loyal to Mr Migani for whom they had both worked for a long time. It was submitted that they were corporate foot soldiers prepared to stick to the script to protect themselves and their employer. However, it did not seem to me that the closing submissions contained a great deal of criticism of Mr Dalle Vedove as a witness, and I therefore asked Mr Saoul – during his oral closing – to identify the important points which, on the Claimants' case, showed that Mr Dalle Vedove's evidence was unreliable.

122. On Day 24, he identified a number of points, but I did not think that any of them was particularly powerful. For example, he submitted that Mr Dalle Vedove had invented an account of the discussions of the April 2018 questions from Mr Nuzzo concerning fees (described in Section D below). I did not think that Mr Dalle Vedove was inventing an answer, but rather was giving evidence as to what he thought was the likely discussion which had taken place, based on the contemporaneous documents. Another example was Mr Dalle Vedove's response to a question raised by MDM in March 2018, concerning a message received from Mr Kone concerning the merger of the Centaurus Compartment with the HFPO Compartment. Mr Dalle Vedove gave a prompt and clear explanation in response to the question asked, and I did not consider that the question or issue required any reference to Twinkle or that it was in any way misleading.

123. In his oral reply, however, Mr Saoul did refer me to Mr Dalle Vedove's evidence in relation to the May 2018 letter requested by Mr Nuzzo. As discussed in Section D, this is one area where I thought that Mr Dalle Vedove's evidence was not accurate and did appear to be given with a view to supporting the evidence given earlier on by Mr Migani.

124. Overall, I have fewer reservations about Mr Dalle Vedove's evidence than about the other main witnesses hitherto discussed, Mr Nuzzo, MDM and Mr Migani. I certainly do not think that Mr Dalle Vedove came to court in order to lie about what investors were told. However, I think that it would be naïve not to recognise that Mr Dalle Vedove, as a long-standing employee of XY and someone who has worked closely with Mr Migani for many years, would be motivated to support the XY case. I therefore bear that in mind in my assessment of his evidence. On the key issue concerning the independence representations, and what the Claimants were or were not told about any connection between Mr Migani and the Skew Base Fund, I accept his evidence as to what investors (including the Claimants) were told; because the evidence overall, including the inherent probabilities, support the account which he gave: see Section H below.

125. *Mr Faleschini* is a Defendant in the proceedings. As Mr Ahlquist explained before he gave evidence, he was a witness not only in his own capacity, but was

also relied on and in effect called by XY and by Twinkle. He has almost 30 years' experience working in management consultancy, where he has specialised in technology, accounting, organisation, marketing and strategy. He has never been an investment consultant, and has never had to provide financial services to clients. He attended the initial introductory meetings with Mr Nuzzo in May, June and July 2016, but he did not attend any of the subsequent meetings described in Section D where the Claimants' investment strategy was discussed. He had first met Mr Migani in 2000, when they were both working for the Boston Consulting Group. He joined XY SA in May 2014. He became a director of Twinkle in December 2017.

126. Much of the evidence in his witness statement was not directly challenged. However, on disputed issues I again treat his evidence with a considerable degree of caution. He was primarily responsible for (what I regard as) the improper deletion of Mr Migani's Twinkle e-mail account. He has also, together with Mr Migani and Ms Gaveni, downplayed Mr Migani's position in Twinkle.

127. At the beginning of his evidence, he made a correction to a passage in his witness statement, which explained his understanding of independence:

> "I'm aware that the website mentions independence. My understanding of the concept is that consultants should not receive commissions, benefits, or incentives from third parties in relation to the advice provided to clients (which is true as all of the fees from XY are from clients)."

128. The correction sought, unconvincingly in my view, to water this down, with a distinction being drawn between Mr Faleschini's understanding back in 2016, and his present understanding of the concept of independence. I think that Mr Faleschini's statement does indeed capture the meaning and essence of independence, and I do not accept that he had a different understanding of the concept in 2016.

129. Mr Faleschini also gave evidence, in his witness statement, about conversations in the first half of 2017 with Ms Talleri and Mr Sampietro (who both worked for the XY Group) about the need to disclose related parties. He said that Mr Migani had asked him whether the clients that were going to invest in the Skew Base Fund should formally acknowledge his involvement with Skew Base. He said that based on discussions that had previously taken place with Jonathan Halsey, the compliance officer of XY, about the need to disclose related parties, and the fact that the clients were being told orally about the new project and its connections to XY, "we concluded that we did not need to make any changes to the contract". There was no documentary support for this evidence, and no corroborative evidence from either Ms Talleri or Mr Sampietro (who were not called as witnesses). I considered it unreliable, although I am not able to conclude that it was a dishonest invention on the part of Mr Faleschini. As with many aspects of the evidence in this case, it may be an example of a witness having a false recollection, persuading himself that something happened when (in my view) it did not.

130. *Mr Francesco Negro* is the Senior Manager (Operations) at Twinkle, a position he has held since July 2018. Prior to that time, he had worked for XY in London. His background is in data analysis and trading. After university, he worked for Morgan Stanley in Milan, Societe Generale and then as a trader at IG Markets. He joined Mr Migani's company, Maetrica, in 2010 as a junior data analyst, and he then transferred to XY S.A. in 2014. He then worked in London for XY in the role of Senior Manager (Director Deal Arrangement), before moving back to Italy to start his role with Twinkle in July 2018.

131. His evidence covered, in broad terms: the way in which he and his colleagues at Twinkle identified investment opportunities which were then passed to VP Liechtenstein for investment by the Skew Base Fund; the nature of the instruments which were traded; and the support which Twinkle provided to SB GP (in particular Ms Gaveni). It seemed to me that he was a witness who was seeking to assist the court to the best of his recollection. His evidence, as to the interaction with VP Liechtenstein, was consistent with the evidence called by VP.

132. Generally speaking, I thought that his evidence was given fairly and was reliable. He did, however, briefly seek to maintain the line that he was reporting to Mr Faleschini, rather than Mr Migani. However, when shown the organisation chart which was given to VP as part of its due diligence in March 2019 (and which showed the operations team, headed by Mr Negro, reporting to Mr Migani), he agreed that there was no reason why Ms Gaveni would be misrepresenting the position at Twinkle.

133. *XY clients*: XY served statements from a number of clients who had invested in the Skew Base Fund. I deal with their evidence in detail in Section H below.

*Witnesses called by SB GP (and the 2nd Defendant)*

134. Evidence was given by the three individuals who were on the Board of SB GP at the material times. Initially, Mr Pietro Longo was the only director, and he was then joined by Mr Joachim Kuske and Ms Viviana Gaveni. I describe the evidence of Mr Longo and Mr Kuske, and give further details as to who they were, in Section F below. In my view, they gave evidence which was honest and generally reliable.

135. *Ms Viviana Gaveni* was around 30 when she joined both Twinkle and SB GP in 2018. She was then in a relationship with Mr Faleschini, and they have subsequently married and had a child. She was employed as the administration, finance and control manager of Twinkle in May 2018, and became a director of SB GP shortly afterwards in July. Prior to that time, she had worked for 2 years as an auditor at EY, albeit not as a qualified accountant. She had then worked for a major US fashion brand in accounting, compliance and later in budgeting. She clearly found the process of cross-examination a considerable strain.

136. Despite her relatively limited experience at the time when she was appointed to those roles, my impression from the documents and also the evidence of Mr Longo and Mr Kuske is that she worked hard and was efficient, albeit that she was having to deal with some matters where her inexperience and relative youth meant, in my view, that she was rather out of her depth.

137. However, I did not consider that I could regard her as a reliable witness on disputed issues. Ms Gaveni was the author of a number of documents which identified Mr Migani as the general manager or managing director of Twinkle, and I do not accept her evidence that this did not reflect his actual position.

138. For the purposes of interlocutory applications in the course of the present proceedings, she had served two witness statements which had completely failed to mention that Mr Migani was an employee of Twinkle. When she did eventually refer to this, in her third witness statement, she said that the employment contract related to real estate consultancy services, which was an entirely separate business line; and that this business line, at the time of her joining, was being overshadowed by the revenues under the agreements relating to the Skew Base Fund. However, she then said the opposite in her trial (4th) witness statement, viz: that, at the time of joining, Twinkle's revenues from the real estate consultancy significantly overshadowed the revenues from the Skew Base Fund. She suggested that this was a translation error. The Claimants submitted that the third witness statement was drafted so as to indicate why Mr Migani's employment at Twinkle could easily have been overlooked, whilst the fourth witness statement then sought to explain away Mr Migani's prominent role in Twinkle. I was not referred to any materials which indicated that there was a translation error. In any event, however, the documents prepared by Ms Gaveni at the time, for example as shown to VP on due diligence, identified Mr Migani as the general manager or managing director, with the operations team headed by Mr Negro reporting to him. I consider that this did reflect her understanding at the time, and indeed the actual position. I do not accept that Mr Migani's role at Twinkle was in fact limited to real estate consultancy.

139. I also consider that Ms Gaveni can fairly be criticised for not telling her fellow directors about the sub-delegation from Leader Logic to Twinkle: see section F below. The directors had expressed a concern that Ms Gaveni's position at Twinkle created a conflict in relation to her position as a member of the board. The agreement between SB and Twinkle was then terminated, and was replaced by contracts with one and then another Leader Logic company. I find it difficult to understand how this solved the conflict of interest, but in any event it seems to me that Ms Gaveni should have explained to her fellow directors what was happening.

140. The Claimants also relied upon Ms Gaveni's deletion, in July 2022, of her WhatsApp account. This should not have happened, with the present proceedings underway. However, I am inclined to accept Ms Gaveni's evidence that this was done at a time when she was in great personal discomfort, including because she was about to give birth. I can understand that she may not have been thinking rationally at that time in her life. She did not, however, delete her Twinkle e-mail account, and therefore her documents from that source have been disclosed.

*The VP witnesses*

141. The VP Defendants called a large number of witnesses, including very senior past and present employees. VP in fact called all the individuals who had any significant involvement in the formation of and operations relating to the Skew Base Fund. The main witnesses were Mr Ries, Mr Konrad, Mr Kone and Mr von

Kymmel. I describe them, and their evidence, in Section F below. They were all honest witnesses, and I found all of them to be generally impressive and reliable. As explained in Section F, I accept their evidence on the disputed issues.

142. VP also called Mr Peer Eisele, who is now the Head of IT Integration and Digital Banking DevOps at VP Bank AG in Liechtenstein. He gave evidence in relation to the operation of VP Bank's software systems, including the Avaloq and Simple Access Object Protocol interface (known as "SOAP") systems. His evidence, both in his witness statement and brief cross-examination, explained clearly how these systems worked. There was, in reality, very little challenge to his evidence, and I see no reason not to accept it. The same is the case in relation to VP's other witnesses: Mr Zehender, the senior investment manager at VP Liechtenstein, and Mr Uwe Stein who is the Chief Risk Officer at VP Lux.

*Witnesses not called*

143. The Claimants submitted that there were a number of witnesses, who would have had material evidence to give, who were not called by the Defendants. Their closing submissions identified a number of XY Group employees: Mr Sampietro, Ms Talleri, Mr Viganò, Mr Zorzi and Mr Varacca. They also identified Mr Grasso, who was originally the sole director of Twinkle, and two directors of the Leader Logic companies.

144. The Supreme Court has addressed the question of adverse inference in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33. The court said at para [41]:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

145. Applying "common sense" in the present case, I do not consider that it is necessary or appropriate to draw adverse inferences against any of the defendants from the fact that these witnesses were not called. None of the witnesses identified by the Claimants feature in any significant way in the pleadings. By contrast, the witnesses who have been called on the Defendants' side are those who were centrally involved. It did not seem to me that there was any important area of the case which had not been addressed by witnesses who had first-hand knowledge of the relevant events.

146. I consider that I am also entitled to bear in mind that, at the pre-trial review, it was the Claimants (with some opposition from the Defendants) who sought an extension of the trial listing and timetable because of the number of witnesses who were being called and who were to be cross-examined, and the scale of the cross-examination required. This resulted in an extension of the trial timetable, so that time that would otherwise have been spent on closing arguments was allocated to cross-examination, and so as to provide for additional time for the preparation of written closings and for oral closings. It was also upon the Claimants' application that the court sat on a number of Fridays during the trial, although Fridays are usually reserved for other Commercial Court business. Against this background, I consider it unrealistic to suggest that insufficient witness evidence was called by the Defendants. I also do not consider that further witnesses would have added materially to the substantial body of evidence, both documentary and oral, which is available for the purposes of considering the parties' arguments in this case.

147. Furthermore, although I have expressed my concern at the deletion of Mr Migani's Twinkle e-mail account, I think that Mr Cloherty made a fair point that there was no suggestion that the e-mail accounts of other individuals, with whom Mr Migani would have been communicating, have been deleted. For example, Mr Faleschini had to produce his own documents, and Mr Negro (the head of the operations team at Twinkle) was a custodian. Accordingly, in so far as Mr Migani was communicating by e-mail with those, or indeed other custodians such as Ms Gaveni, the documents should be available to the parties and the court. Whilst the deletion of this account is relevant to my assessment of the reliability of Mr Migani and Mr Faleschini, I do not consider it necessary or appropriate to draw adverse inferences, in relation to the facts of the case, as a result of that deletion. My approach in this case is therefore to consider the very substantial documentary record which does exist, and to reach my conclusions based on the available material.

148. The Claimants themselves sought to rely on the statements made, in written materials, of individuals that had not been called. In particular, they sought to advance a case whose substance was that Finfloor and also another investor, Mr Boroli, did not know of the connections between Mr Migani/XY and the Skew Base Fund. They also relied on statements made by Mr Pagano, a former employee of XY and senior manager at Twinkle, in Swiss proceedings. I do not consider it appropriate, in a case where serious allegations of dishonesty and conspiracy are made and where there are heavily contested factual issues, to place reliance on statements made by individuals who have not provided statements for

the purposes of these proceedings, and have not been tendered for cross-examination.

## C: The financial products in issue: MINs and HFPOs

### C1: Introduction

149. This section explains the nature of the relevant financial products in which the Claimants invested, either directly or within the Skew Base Fund. It is substantially based upon a section of the Claimants' opening submissions in which the nature of these products was explained in some detail. There was no material challenge by the Defendants to the explanation provided by the Claimants, or to the Claimants' analysis of the products which were in the relevant Skew Base Fund Compartments on 13 March 2020, near the time when those Compartments effectively collapsed.

150. There were essentially two types of financial products: MINs and HFPOs. As described in Section D below, the Claimants invested in these types of products directly, from March 2017 to early March 2020, and also indirectly via the Skew Base Fund. The three Compartments relevant to the Claimants' claim are the HFPO, MIN (EUR) and MIN (USD) Compartments.

151. The details of each of the financial products invested in, both inside and outside the Skew Base Fund, were contained in a "term sheet" provided by the issuer, which was generally a bank or large financial institution. The term sheet was an important document, which often explained how the product worked (sometimes featuring complex formulae to explain in what circumstances and in what amount returns would be paid), including its target market and risk profile.

152. Where the investment was made in a Compartment, the Claimants did not see, at the time, the term sheets for the products within the Skew Base Fund that were invested in. However, as discussed in Section D below, term sheets were often provided to Mr Nuzzo, and less frequently to MDM and Mr Facoetti, in respect of investments made outside the Skew Base Fund.

### C2: The MIN products

153. Prior to investing in the Skew Base Fund, and subsequently, the Claimants had invested in a large number of MIN products known as "stability" notes (sometimes known as "gap" notes). The EUR and USD Compartments of the Skew Base Fund also invested in such products. The Claimants were able to analyse a spreadsheet which had been provided by Mr Faleschini to Mr Ries of VP Lux (and others) on 14 March 2020. This contained details of the constituent products within the various Skew Base Fund Compartments as at 13 March 2020, not long before the HFPO and MIN Compartments effectively collapsed.

154. The 13 March 2020 spreadsheet showed that there were at that time 27 different stability notes in the MIN (USD) Compartment. The MIN (EUR) Compartment contained 42 products, of which 41 were stability notes. The remaining

investment in the MIN (EUR) Compartment was an investment by that Compartment in the MIN (USD) Compartment itself.

155. The evidence and argument at trial did not suggest that there was any significant difference as to the mechanics of the MIN products inside and outside the Skew Base Fund. Nor was there any significant difference between the MINs in the EUR Compartment as compared to those in the USD Compartment. Indeed, the MIN (EUR) Compartment did not exclusively invest in products issued in Euros, and the 13 March 2020 spreadsheet showed that 10 of the same products, all issued in US Dollars, appeared in both Compartments. All of the MIN products therefore worked in essentially the same way, although each product had its own key terms. For example, the barriers could differ: many were set at 10% but there could be higher barriers (e.g. 12.5%). Also, as discussed below, a feature of the product was (as the Claimants described it) “gearing” or “leverage”, which would potentially magnify capital losses caused by a significant market fall. This gearing again varied as between different instruments.

156. A stability note tracks the daily close position of a reference asset named in the note. The underlying asset, (sometimes referred to as the “Underlying”), was (generally speaking) an equity index, which itself was based on a spread of different companies. The equity indices which featured most prominently in the evidence were the Euro Stoxx 50, the Standard & Poors 500 (“S&P 500”) and the MSCI World. These indices had the Bloomberg Codes SX5E, SPX and MXWO, which from time to time I will use in this judgment.

157. The note guarantees the return of an investor’s capital on the date of maturity if there has been no daily fall in the close position of the Underlying beyond the “trigger” or “barrier” level set out in the term sheet, throughout the lifetime of the product. Most of the MINs which featured in the evidence, for example in the MINs in which the Claimants invested outside the Skew Base Fund, had a maturity of 1 year from the date of issue.

158. The “barrier” is very significant. I shall refer to a daily fall beyond this threshold as a “barrier event”. If no barrier event occurs by the date of maturity, the investor will receive the return of capital, and a fixed coupon (*i.e.* an interest payment on the capital).

159. By contrast, if a barrier event does occur within the life of the product, no coupon will generally be paid, although in a minority of notes the coupon is still paid. More importantly however, the investor is exposed to a loss of capital. The loss of capital will be significant. The amount of capital that is lost broadly depends on (i) how far beyond the barrier level the Underlying falls and (ii) the terms of the stability note. Some stability notes provide for a 10% loss of capital for each percentage point that the Underlying falls beyond the barrier. This 10% loss of capital was illustrated in a slide which was used on a number of occasions, in XY’s presentations, described in Section D below. Other stability notes have a “gearing” or “leverage” which is higher than 10%. In some of the term sheets that Mr Nuzzo saw, the gearing was 12.5% or 15%. In the majority of the investments in the MIN Compartments of the Skew Base Fund in March 2020, the gearing was 20%, although there were a large number of notes where the gearing was 10%.

160. The effect of this gearing, whether 10% or a higher figure, is to produce a capital loss that is potentially greater than the fall in the underlying asset, typically the underlying equity index. Because the leverage is applied to the decline in the Underlying, capital losses will be magnified by a factor equal to the leverage. Thus, as explained to Mr Nuzzo on more than one occasion (see Section D below), with a barrier set at 10%, and gearing of 10%, a fall of 11% in the index will produce a 10% capital loss. However, a 12% fall will produce a 20% capital loss. The maximum loss is the capital invested.

161. Most notes, irrespective of whether a barrier event occurred or not, paid out the redemption value on maturity, albeit that the redemption value builds in any capital loss suffered, and may therefore be nothing. However, some notes contain an "automatic early redemption" ("AER") (otherwise known as an "early trigger" or "autocall") provision which would lead to the note being automatically redeemed, and the investor being paid out, shortly after the barrier event took place. AER would have no impact on the redemption value, merely the time at which the redemption value was paid to the investor. In fact, AERs did not play any significant part in the parties' arguments.

162. An important feature of the mechanism is that a recovery in the value of the underlying asset does not provide any protection against the loss of capital which flows from the occurrence of a barrier event. Thus, if the underlying index recovers in the days, weeks or months following a barrier event, but prior to the maturity of the note, this is immaterial. This is because the redemption value of the note (and therefore any loss of capital) is fixed upon the occurrence of the barrier event. This does, however, have the advantage that a further decline in the underlying asset, beyond the fall which breaches the barrier, does not further impact upon the redemption value. In other words, as explained in XY's slide presentation, the instrument "stops", and the loss is crystallised, upon the occurrence of the barrier event. If more than one barrier event occurs within the period, then typically the first barrier event determines the redemption value of the note.

163. Accordingly, as the Claimants correctly submitted in opening, the position put simply is as follows: an investor in a stability note takes the risk that the Underlying will not fall by a given amount over the life of the product. The quid pro quo for undertaking that risk is the payment of the coupon.

164. The Claimants illustrated this in their opening explanation by the following worked example based on a typical stability note. An investor buys one note ("*N*") at the issue price of €100,000. *N* was issued on 3 September 2019 and will mature one year later. *N* tracks the daily close position of the Euro Stoxx 50 (SX5E) index. According to its term sheet, the barrier level of *N* is 90% or, put another way, a barrier event will occur if the close price of SX5E falls more than 10% on any single trading day (as compared with the close price on the previous day) prior to maturity. *N* also provides a fixed rate coupon of 2.86% on maturity if no barrier event occurs. The gearing (or 'leverage') of *N* is 20 and it contains no AER provision.

165. If no barrier event were to occur between 3 September 2019 and 3 September 2020 then, on the latter date, the investor would receive €102,860, being the initial capital (€100,000) plus the coupon of 2.86% (€2,860) on the investment.

166. However, based on actual data, a barrier event did occur on *N* within that period because, on 12 March 2020, the Euro Stoxx 50 closed 12.40% lower than it had on the previous day. Pursuant to *N's* term sheet, where a barrier event occurs, on maturity, the investor receives no coupon and the capital returned (*i.e.* the redemption value of *N*, floored at zero, $N_{RV}$) is calculated as follows:

$$N_{RV} = 100\% - \ Leverage \times \ \left(Underlying\ Daily\ Fall - (100\% - Barrier\ Level)\right)$$

167. Given:

$$\text{Leverage} = 20; \text{Barrier Level} = 90\%; \text{Underlying Daily Fall} = 12.40\%$$

It follows:

$$N_{RV} = 100\% - \ 20\left(12.40\% - (100\% - 90\%)\right)$$
$$= 52\%$$

168. An investor in one stability note, *N*, would therefore recover, on maturity, 52% of their investment, being €52,000, a loss of €48,000. The impact of the level of the gearing is important. Had N been geared at 10 (rather than 20), the loss suffered, assuming the same decline in the Underlying, would be halved, *i.e.* 24% of the investment or €24,000. Likewise, a doubling of the leverage (40) would result in a corresponding doubling of the loss, assuming the same decline in the Underlying.

169. The table below shows for *N,* a typical stability note, the loss of capital suffered by an investor (%) for the gearing *l* and where the barrier level is 90%:

| Underlying Daily Fall (%) | Loss where *l* = 10 (%) | Loss where *l* = 20 (%) |
|---:|---:|---:|
| *10% | 0% | 0% |
| 11% | 10% | 20% |
| 12% | 20% | 40% |
| 13% | 30% | 60% |
| 14% | 40% | 80% |
| 15% | 50% | 100% |
| 16% | 60% | 100% |

**No barrier event*

170. The MIN (EUR) and MIN (USD) Compartments were, in the event, significantly impacted by market falls on 12 March and 16 March 2020. The majority of the stability notes in both Compartments were based on the Euro Stoxx 50 and S&P 500 indices, and they all had a 90% barrier. The Euro Stoxx 50 barrier was breached on 12 March 2020, because of a fall of 12.40% on the previous day.

The S&P 500 barrier was breached on 16 March 2020, because of a fall of 11.98% on the previous day. A minority of notes were based on the MSCI World index, and the barriers there were never breached, despite the market falls.

171. These falls resulted in significant capital losses within the MIN Compartments, including because the gearing of many of the instruments was 20%. In addition, the Compartments had borrowed from VP Bank to part-fund the purchase of the products. At around the same time as these market falls, VP Bank sought repayment of part or all of the lending on the HFPO and/or MIN Compartments. The effect of this was to exacerbate the loss to investors in the relevant Compartments, because they were effectively subordinated to VP Bank.

172. In any event, a point was reached in or around mid-March 2020 when it was not viable for the MIN Compartments to continue to operate, with the result that the MIN (EUR) and MIN (USD) Compartments were liquidated, with GIG and MDM losing 53% and 43% of their capital respectively.

### C3: The HFPO Products

173. In contrast to the position with MINs, the XY presentations described in Section D below did not contain any explanation of the mechanics of HFPO transactions; i.e. the way in which these products worked. It was, however, apparent from the presentation that these products also had barriers, generally set substantially below the current value of the relevant asset (again usually an equity index).

174. The position as at 13 March 2020 is that the vast majority of the HFPO Compartment comprised structured products known as a "reverse barrier convertible" (RBC) and, more specifically, a type of RBC known as a "worst of note". These names give some indication of the nature of these products. A "reverse convertible" bond is, in simple terms, a bond that can be converted by the issuer at maturity, so that the issuer delivers (for example) shares rather than cash. A "reverse barrier convertible" is a variation, because the bond incorporates a barrier. A "worst of note" indicates that there is more than one underlying asset on which the bond is based (for example, two equity indices), and the outcome of the bond is determined by the performance of the "worst of" those underlying indices.

175. A "worst of" note tracks the position of at least two underlying assets (such as two equity indices) from an "initial valuation" date ("IV"), generally around its date of issue, through to a "final valuation" date ("FV"), generally seven days prior to maturity. If any of the Underlyings fall below the "barrier" level set out in the term sheet between IV and FV, then a "knock-in event" is said to have occurred. With this type of product, the barrier is typically continuous, because a breach is measured by looking at whether an Underlying falls below the barrier level <u>at any time</u> on any trading day from IV to FV, rather than looking solely at daily close positions. This therefore differs from the MIN products discussed previously, where the barrier is calculated based on daily close positions, calculated against the previous day's trading.

176. If no knock-in event occurs, on maturity the investor will recover the principal and, in addition, a coupon. This is the maximum return. Some worst of notes guarantee the payment of a coupon, irrespective of the performance of the Underlyings and whether or not a knock-in event occurs. Guaranteed coupons may be paid in full on maturity or paid at (usually monthly) intervals throughout the life of the product.

177. If a knock-in event does occur, an investor is exposed to a loss of capital, because they become exposed to the negative performance of the worst performing of the Underlyings, with the payout to be measured as at the FV. In other words, the two principal factors governing the amount of capital lost are: (i) the extent of the decline in the worst performing of the Underlyings, based on its close position at FV as compared with IV, and (ii) the "gearing" in the note, because the loss is increased by a factor equal to the gearing.

178. In addition, it is common for worst of notes to contain an AER component. This typically means that, irrespective of whether a knock-in event has occurred, if on any of the prescribed valuation dates throughout the note (generally at monthly intervals), all of the Underlyings close on that date at a level equal to or above the level on the issue date then the note will automatically redeem, usually seven days following the valuation date, at 100% of the capital plus any coupon owing up to the early redemption date. In other words, even if the barrier is breached, so long as all Underlyings regain or exceed their original position on any applicable valuation dates, the investor will not lose capital. Again, this is a key distinguishing feature from stability notes, where the position is irretrievable once the barrier is breached.

179. The Claimants provided the following example based on a worst of note which was typical of the notes in the HFPO Compartment as at 13 March 2020. An investor buys one note ("*W*") at the issue price of €100. $W$ has an IV of 25 February 2020 and a FV of 25 June 2020. $W$ tracks SX5E and SPX, and the barrier level is set at 66% for both Underlyings. $W$ pays a coupon of 0.58% on maturity, but only if there is no knock-in event. The gearing or leverage of $W$ is 4, or 400%, and it contains no AER provision.

180. If no barrier event were to occur between IV and FV then on maturity the investor would receive in cash the initial capital of €100 plus the coupon of €0.58. However, based on actual data, a knock-in event did occur on $W$ within that period because, on 19 March 2020, the recorded low for SX5E was at 65.6% of its close price at IV. SX5E was also the worst performing of the Underlyings: at FV it closed at 90.1% of its price at IV. As a result, on maturity, the investor here receives no coupon and, according to the term sheet, the capital returned (*i.e.* the redemption value of $W$, floored at zero, $W_{RV}$) is calculated as follows:

$$N_{RV} = 100\% + \ Leverage \times \ (Worst\ Underlying\ Fall - 100\%)$$

181. Given:

$$\text{Leverage} = 4; \text{Worst Underlying Fall} = 90.1\%$$

It follows:

$$N_{RV} = 100\% + \ 4\ (90.1\% - 100\%)$$
$$= 60.4\%$$

182. An investor in *W* would therefore receive 60.4% of their investment, representing a loss of €39.60 for each note purchased. Again, the leverage has an important impact on the loss suffered. The table below shows for *W*, a typical worst of note, the loss of capital suffered by an investor (%) for different leverages *l* calculated on the assumption that a knock-in event has occurred, and no AER component has been triggered:

| Worst Underlying Fall between IV and FV (%) | Loss where *l* = 3.2 (%) | Loss where *l* = 4 (%) |
|---|---|---|
| 10% | 32% | 40% |
| 11% | 35% | 44% |
| 12% | 38% | 48% |
| 13% | 42% | 52% |
| 14% | 45% | 56% |
| 15% | 48% | 60% |
| 16% | 51% | 64% |

183. The Claimants' analysis of the HFPO Compartment as at 13 March 2020 showed that it comprised 29 products, at least 26 of which were "worst of" notes. It was not possible to analyse the other 3 products. 23 of the products tracked two Underlyings, being SX5E and SPX. The remainder tracked four: SX5E, SPX, Nikkei 225 ("NKY") and the Swiss Market Index. All of the worst of notes had a barrier level between 51% and 84%, with the mean average being 65% and the mode 68%. Most of the notes had a significant gearing element: 13 notes had gearing of 3.2 (320%), and 4 had gearing of 4 (400%).

184. The barrier applicable was breached across 73.1% (19) of the notes in early 2020 when the markets became volatile, resulting in significant capital losses to the Compartment and therefore the Claimants. The Claimants calculated that, on certain assumptions, the loss of capital ranged from zero (where the barrier was not breached) to 93.49%. As with the MIN Compartments, there was borrowing from VP which had facilitated the purchase of notes within the Compartment (thereby increasing the number of notes and potentially the gains and losses), and where the liability to repay the borrowing contributed to the collapse of the Compartment. In the event, GIG and MDM lost all capital invested in the HFPO Compartment as a result of the market volatility in March 2020.

185. "Reverse Convertibles" were not the only type of HFPO in which the Skew Base Fund invested. Mr Negro in his witness statement described how the HFPO Compartment (as well as the Short-Term Arbitrage Compartment in which Twinkle invested its own funds and that followed the same investment strategy as the HFPO Compartment) also invested in an instrument known as a 'bonus cap'. However, the evidence at trial did not explore the differences between reverse convertibles and bonus caps. Mr Negro described them as being similar. They were both coupon paying financial instruments of short maturity, usually 3-4 months, with a significant barrier, usually of 30% or greater.

## D: The dealings and meetings between the Claimants and XY

### D1: Initial meetings in 2016

186. In this section, I address, principally, the dealings and meetings between the Claimants and XY. In doing so, I also consider some other matters which bear on issues, such as the Claimants' appreciation of the risks of the investments which they made, as well as impact of the Covid-19 pandemic.

*Initial introduction and the XY website*

187. In April or May 2016, Mr Nuzzo was told by LDM that a friend of his had spoken to him about XY. This friend was a respected figure, who was involved in the Italian finance industry. LDM trusted this recommendation and he decided to ask Mr Nuzzo to meet with XY.

188. LDM's friend was Mr Franco Tatò, who was a European finance professional and a member of the XY Group's advisory board which gave strategic advice on the development of XY's business. Mr Migani had a very short call with LDM on 27 April 2016, in which LDM referred to Mr Tatò having told him about XY's technology platform. LDM said that he had a need for such a service. He asked Mr Migani to get in touch with Mr Nuzzo, and Mr Migani did so.

189. Mr Nuzzo's evidence, which I accept, is that he looked at the XY website prior to the meeting, although he acknowledged that it was difficult to recall exactly how and when he looked at it. As set out below, the website described XY as "an international group". When describing the website in the following paragraphs "XY" therefore refers to the group as a whole, rather than simply the First Defendant.

190. The website at that time contained a number of statements as to XY's independence and the manner in which it carried on business. The homepage identified, beneath the XY logo, a number of cities: London, Dubai, Geneva, Chiasso, Zurich, Singapore and New York. There then followed the following text:

> "XY is an international group specialized in strategic consulting and the control of large estates. Acting as a global organization authorized by FCA and FINMA, it addresses the needs of ultra-high net worth families, corporations and public sector treasuries worldwide who seek for unbiased consultancy free from conflict of interest.
>
> XY offers focused strategy services aimed at tackling the complexities and paradoxes of today's financial sector. As a global estate orchestrator and neutral partner to the shareholders of large-scale treasuries and assets, it enhances the experience of clients by offering scientific tools for increased knowledge and control, helping establish methodologies that support instant benchmarking, informed decision-making and risk management.

XY brings to fruition an innovative and integrated concept of complete anywhere-anytime status reporting, specifically argued risk assessment, as well as highly customized, fact-based, vendor-independent, strategy consulting. Its unique service-delivery model leverages a proprietary knowledge platform integrating best-in-class technologies and a network of dedicated hubs supported by the company's regional offices and expert divisions.

XY operates in line with the highest quality standards. Authorisations obtained to date include the Swiss Financial Market Supervisory Authority's *FINMA authorization (as affiliated to OAD-FCT)*, the UK Financial Conduct Authority's *FCA authorization*, with *European Passport* authorizations such as the *Ticino Cantonal Authority Fiduciary Authorization*, with many more under way.

XY is committed to transparency and independence in all aspects of its work in accordance with its Code of Ethics and Framework for working with all players within the financial sector without conflict of interest"

191. At the foot of the homepage was the text, in capitals: "AN INDEPENDENT AUTHORIZED OPERATOR".

192. The "About XY" page was headed: "XY IS NOT". This then identified a number of potential businesses or organisations, each of them struck through in order to demonstrate that XY was not: a family office, a private bank, an asset management company, a commercial bank, an investment bank, a real estate agency, a trust company.

193. A "Key questions" page set out 3 matters which XY could do. (In this judgment, text in bold indicates that the original text is bold).

"**1 Identify the client's needs, assess the current situation and design a tailor-made strategy**

- What is the real risk to which the estate is exposed and how can considerable and unexpected losses be prevented?
- What are the visible and hidden costs and are there achievable savings?

**2 Support the implementation phase by combining project management skills and expertise**

- How can relevant decisions be expedited and supported?
- How can the execution of actions involving multiple players be assured within the time and manner agreed?

**3 Analyze the status of the global estate by aggregating all data on a daily basis**

- How can the assets be monitored and relevant information be presented on a regular basis?
- How can financial flows and costs allocated by financial institutions be systematically verified as correct?"

194. The "Methodology" page had the text: "A NEW SCIENTIFIC APPROACH". The text stated:

"XY's methodology leans on the language of numbers and on the simplicity of uncontroverted facts. It enforces objectivity when shareholders monitor the estate, source for advice and form their decisions.

XY offers a unified viewpoint, a real-time outline of knowledge and a comprehensive strategic outlook of the estate's performance, integrating architectural and fiscal considerations, embracing the entire asset base (financial, real estate, valuables, etc.).

XY created a common ground for consensus building when the estate is managed by multiple decision makers. The methodology can be transferred to peers and passed on to successors and heirs. It supports a harmonized estate orchestration culture connecting present and future generations in the estate's ownership."

195. There then followed some "Legacy principles", as follows:

"**1 An informed decision is a better decision**

- Information needs to be fact-based, not opinion-based
- Information needs to be neutral, not biased
- Information needs to be rich

**2 Analytical services make information smart**

- Volumes of data are sourced, qualified and proceed automatically
- Relevant data are augmented and made user-friendly
- Integrated data present a holistic scenario

**3 A scientific method grants peace of mind**

- Strategic guidelines can be enforced
- Automatic alerts lead to swift reaction times
- 100% measurements of activities supports certified performance"

196. The "People" page did not identify the names of any individuals but said that "XY PROFESSIONALS ARE": results driven, committed, analytical, unbiased, open-minded.

197. Finally, the "Contacts" page identified the various cities in which XY was located, giving e-mail addresses. All of the e-mail addresses started "info@. For example, XY Europe's address in St James's Square, London, was: info.uk@xyworldwide.com. I mention this at this stage because, in a different context, the Claimants sought to suggest that the use of an "info@skewbase.com" was part of the concealment alleged. However, as a number of witnesses said at trial, and as illustrated by the Contacts page, the use of an "info@" e-mail address, or equivalent group e-mail addresses, is very common. It permits a number of individuals, who may be working as part of a team, to have visibility over incoming e-mails.

198. Mr Nuzzo's evidence was that he saw from the website that XY were an independent advisor, and that he took this to mean that XY would be advising them to invest in products created by someone else and where XY would not have any economic benefit. I am not persuaded that, at the point in time when he looked at the website, Mr Nuzzo was thinking about possible investment in products on which XY would be giving advice. The services referred to on the Homepage did not specifically refer to advice on investment in products. Rather, it referred to "strategic consulting and the control of large estates". The consulting services that XY provided were, however, described as "unbiased" and "free from conflict of interest", with XY committed to transparency and independence in all aspects of its work. Mr Nuzzo was entitled to understand, and in my view did understand at that time, that this was the manner in which XY conducted its consulting service business. In his evidence, Mr Migani disagreed with the suggestion that XY would be providing "advice" or "financial advice" in an unbiased and conflict-free way, but agreed that the strategic consulting services were to be given in an independent and unbiased way.

199. The Claimants in their Re-Amended Particulars of Claim ("RAPOC") identify a number of representations which are said to be derived from the website. I shall return to the detail in due course (see Section H below), where I conclude that the misrepresentations, as pleaded, were not made out, at least to a substantial extent. I consider, however, that there was a clear representation as to the way in which XY carried on its business at that time. The words independent, unbiased and conflict-free would indicate to a reasonable recipient, in the context of a strategic consultant operating in connection with financial services and making statements about its business, that the services which XY provided were not influenced by financial connections to external parties such as banks. Mr Faleschini was therefore correct in his understanding of the concept of independence, namely that "consultants should not receive commissions, benefits or incentives from third parties in relation to the advice provided to clients".

*May 2016 meeting*

200. The following matters were common ground. Mr Nuzzo met Mr Migani and Mr Faleschini in London on 12 May 2016 at XY's offices in St James's Square. Mr Nuzzo was LDM's day-to-day point of contact with XY, and he was authorised

to represent LDM in his dealings with XY. At this meeting, Mr Nuzzo was also acting on behalf of the di Montezemolo family office as well as MDM. Mr Nuzzo explained that the di Montezemolo family was considering establishing a family investment portal to aggregate and enable oversight, analysis and monitoring of the family's finances and were interested in engaging XY. Otherwise, there is a dispute as to what transpired at the meeting.

201. There are no notes of the meeting, which was – as Mr Nuzzo accepted in cross-examination – essentially a "meet and greet" meeting. There was no written presentation by either side. The RAPOC overstates matters when it asserts that "XY gave a presentation to Mr Nuzzo about XY and the services it could provide". There was no written presentation, but only a brief oral introduction by Mr Migani to XY and its business. Mr Nuzzo's evidence was that the meeting lasted no more than 30 minutes to 1 hour. Mr Migani said that it was 30 minutes or less. It is clear that, on any view, this was a short meeting. It is also obvious that, at this distance of time, the recollections of all of the witnesses as to what exactly was said at this meeting are unreliable. Their evidence is summarised below.

202. Mr Nuzzo's evidence as to this meeting, in his witness statement, was that there was a discussion of their "investment objectives for the liquidity to be managed by XY". He identified the various objectives: not to lose capital, to invest in highly liquid products, and to generate modest periodic returns. He said that during the meeting, as with the other meetings, Mr Migani was the one doing most of the talking, and Mr Faleschini or Mr Dalle Vedove were confirming or adding points if needed. (He was not thereby suggesting that Mr Dalle Vedove attended this particular meeting, and it is clear that he did not). He said that XY said that they were the perfect advisor for their investment objectives, and that their objectives were a perfect match for them because they were used to advising treasuries that wanted a minimum return and that not losing money was their first objective. They also said that they would be perfect advisors because they were independent and free from conflicts of interest. They insisted that they would be able to reduce the costs applied by the banks.

203. In his witness statement, Mr Migani said that there were two reasons why he asked Mr Faleschini to attend the meeting. First, they were there together in London, since they used to co-ordinate their travel arrangements. Secondly, at the time, Mr Faleschini was the co-ordinator of the XY LAB division and Mr Migani knew from his first conversations with Mr Tatò and LDM that they were interested in technology solutions. He thought that Mr Faleschini's knowledge of their technical solutions and how those were developed could be useful. He described the meeting as having a very brief mutual introduction, during which he introduced XY as a technology provider, repeating what LDM had said about his needs during their first call. Mr Nuzzo then told them about his role, and how he monitored the di Montezemolo family assets. He said that he used a particular software platform developed by another family office, but his experience of the platform was poor and he did not enjoy using it. Mr Migani said that he and Mr Faleschini then introduced XY's proprietary technology solutions, and discussed their systems' main features. Mr Nuzzo was interested in the technological capabilities that XY had to offer, and said that data was a very complex matter

for him. The meeting lasted around 30 minutes if not less. At the end, they agreed to arrange a second, follow-up meeting to discuss the di Montezemolo family's requirements and XY's technology solutions in more detail. He said that this meeting, and the follow-up meeting in June, only covered the XY Group's technology services, and there was no discussion about any other XY services, such as consultancy services.

204. Mr Migani said that neither he nor Mr Faleschini made statements about the XY Group's independence at this, or the second, meeting that followed in June 2016. The topics of independence and financial advice were not discussed, and Mr Nuzzo did not raise or speak about these topics. He was solely interested in XY's technology services and did not ask any questions about the XY Group's relationships with anyone else.

205. Mr Faleschini said, in his witness statement, that Mr Migani gave a brief introduction to XY, spending around 5 minutes on this. Mr Faleschini was introduced as the head of LAB – XY's software development department. His role at the meeting was limited to speaking to and about the technology related services that XY offered. Mr Nuzzo presented himself as the person in charge of the di Montezemolo family office. The nature of the first meeting was for XY to make a good impression and understand the di Montezemolo family needs. There was a discussion about Mr Nuzzo's unhappiness with the wealth management portal that he was using, and a discussion about the technological solutions which XY could offer. There was no mention of providing financial advice, or of the Claimants' financial requirements or about consulting services or investments at the meeting. It was focused on technological services. At the end of the meeting, they agreed to meet again when they were next in London to discuss the Claimants' requirements in more detail.

206. Having heard the evidence and re-read the witness statements and cross-examination as to this meeting, I consider that the following matters are inherently probable and more likely than not to have occurred.

207. First, Mr Migani gave an introduction to XY which was along the lines of what was said in XY's then current website. He is likely therefore to have referred to XY as being independent, and providing consulting services which were unbiased and free from conflict of interest.

208. In that context, I note that in the first meeting for which a PowerPoint was prepared by XY (14 July 2016), the first slide was headed: "International Group Specialising in Strategic Consulting and Large Asset Control". It then had a number of bullet points, which included: "Absence of conflicts of interest and **orientation of service to facts** and not opinions". Mr Migani and Mr Faleschini said that this slide was not actually used at the July meeting. I think it most improbable that either of them could remember whether or not that particular slide was used, and their evidence that it was not used reflects adversely on their credibility as witnesses. In my view, the fact that a slide was prepared referring to "Absence of conflicts of interest" indicates, consistently with the website, that this was the way in which XY presented itself. Indeed, in cross-examination Mr Migani fairly accepted, when shown this slide, that this was generally how XY presented itself to its clients. It is therefore likely that, at the first meeting, Mr

Migani would have referred to absence of conflicts of interest, and being unbiased and independent, as part of his introduction.

209. Secondly, I do not accept that Mr Migani at the May 2016 meeting, or indeed at any of the meetings, referred to XY as an "independent financial advisor". This terminology is not used on the XY website, and it is not the way in which XY described itself in, for example, the PowerPoint presentations that it used over the years. I return to this topic below.

210. Thirdly, I do not accept that Mr Faleschini said anything on the topic of independence/absence of conflicts. As Mr Nuzzo said in his statement, Mr Migani was the person who, at the meetings, did most of the talking. Mr Faleschini's evidence was that he very rarely attended meetings with prospective clients, and in fact he only ever attended two further meetings with any of the Claimants (the meeting with Mr Nuzzo in June 2016, and then the July 2016 meeting). Mr Faleschini, whose main area of expertise was technology, would likely have confined any comments that he decided to make at the meeting to that topic. There would be no reason for him to repeat or endorse anything that Mr Migani said on the question of independence/absence of conflicts.

211. Fourth, I accept the evidence of Mr Migani and Mr Faleschini that the discussion at this meeting focused on technology, and in particular what XY could do to provide a better solution than the one which Mr Nuzzo was currently using and with which he was unhappy. I do not accept that there was any discussion, at this very early stage, as to the investment objectives of Mr Nuzzo and those for whom he was acting. I reject Mr Nuzzo's written evidence that there was a discussion about "our investment objectives for the liquidity to be managed by XY". Mr Nuzzo was meeting XY for the first time, and there had obviously been no decision taken as to whether any liquidity would be "managed" by XY. In fact, the discussions between the parties on the question of investment strategy did not really get going until much later, at the time of the September 2016 meeting described below.

212. I also agree with Mr Migani that, at that stage in May 2016, there could not be a sensible discussion about investment objectives, since XY had no information at all about what the family's assets were. The documents at around that time do not record any discussion of investment objectives. Indeed, when Mr Nuzzo attended the next meeting in June 2016, he showed a spreadsheet which had no financial data in it at all. It was only after the June 2016 meeting that Mr Nuzzo provided some very limited financial information. And it was only after the July 2016 meeting that an NDA (non-disclosure agreement) was signed, and detailed financial information provided. I consider it likely that the focus of the discussion at the May 2016 meeting – both as to what Mr Nuzzo wanted and what XY could provide – concerned XY's technological and data capabilities.

213. This conclusion is consistent with the slide presentation which was later prepared for the meeting on 14 July 2016. The presentations for some meetings subsequent to July 2016 do refer to investment goals, but there is nothing in the 14 July 2016 presentation which does so. One of the slides is headed: "Evidence from the Various Meetings". This has a general reference to the broad nature of the di Montezemolo family assets but does not refer to any investment objectives or

goals. It does however contain a reference to technology: the "family's asset size and challenging economic and market environment require state-of-the-art technologies to support SFO".

214. This conclusion is also supported by Mr Migani's e-mail to Mr Dalle Vedove sent on 13 June 2016, after the second meeting. This refers to wanting an analysis to be carried out in order to "increase the offer", thus suggesting that Mr Migani was looking to provide a service which was beyond the provision of technology services which had been discussed at the first and second meeting.

215. Accordingly, I do not accept much of Mr Nuzzo's evidence about this first meeting, and I have no doubt that it has (inevitably) been coloured and overstated by the litigation and the claims which the Claimants are making. This is also illustrated by another aspect of Mr Nuzzo's evidence as to the events at around the time of this first meeting. In his witness statement, he describes LDM telling him about XY, and asking him to meet Mr Migani. Mr Nuzzo said that they then had two goals: (i) to find an independent financial advisor free of conflicts of interest which affected the banks who were then advising them to invest in their own products, and (ii) to find someone who could help them implement software for the family office to help them monitor their wealth, costs and investment objectives. I have no doubt that Mr Nuzzo was looking for software which could help with the monitoring of the family wealth and costs, but I do not accept that he was looking for a financial advisor free from conflicts of interest. Indeed, in his oral evidence, Mr Nuzzo accepted that he was not "hunting around" for an independent financial advisor in April 2016, and that he was not actively "searching around" or looking for one.

216. Equally, whilst I accept the evidence of Mr Migani and Mr Faleschini as to the technology focus of the meeting, I do not accept their evidence as to the absence of any reference at all, in Mr Migani's introduction, to XY being unbiased and free of conflicts of interest. Again, this evidence has been coloured by the issues in the litigation.

*June 2016 meeting*

217. There was a further meeting on 9 June 2016 in London, attended by the same participants (Mr Nuzzo, Mr Migani and Mr Faleschini). The evidence is summarised below.

218. In his witness statement, Mr Nuzzo said that he did not recall anything specifically different from the first meeting, and that his recollection is that they discussed the same topics at both meetings. He said that either during the meeting, or afterwards, in the context of a discussion as to what the family needed, he showed Mr Migani a spreadsheet that he had prepared regarding all the costs of the family, which XY was supposed to improve and automate. This was the spreadsheet that he used at the time to keep control of the costs of the family office. At that time, he only provided the spreadsheet without the numbers.

219. He also said, in his witness statement, that after the meeting he provided XY "with all information about the financial investments of GIG and LDM, including our liquidity, our liquid investments, and the other information that needed to go into

the family office portal". At the start of his evidence, however, he corrected this and said that this had not happened at that time, but only later.

220. Mr Migani's witness statement describes the meeting in much greater detail. He said that Mr Nuzzo showed on screen an Excel spreadsheet which he had created to show how he wanted to be able to track the family's assets and financial position. This did not contain real financial data: it was a template only. Using that spreadsheet, Mr Nuzzo explained how he wanted a solution which could both (i) aggregate and monitor assets efficiently, and (ii) also offer analytical tools for budget control. He was looking for a tool that could produce budgets over a 20-year period. He did not, however, explain how the family's overall assets were structured. Mr Migani thought that Mr Nuzzo did not have good tools available to track a family office's assets. He was using an Excel spreadsheet which was time-consuming to maintain. Mr Faleschini said very little in this meeting, and indeed the previous meeting.

221. Having learnt what Mr Nuzzo needed XY's technology for, Mr Migani recapped on XY's technology solutions as discussed in the first meeting, and went into more detail. He told him that, through XY technologies, he could achieve his needs with more intuitive and interactive interfaces. He also emphasised that they could, using XY's technology, verify the accuracy of many pieces of information, such as comparing the fees charged by banks with the fees agreed in the contracts with those banks.

222. At the end of the meeting, they agreed on next steps. Mr Nuzzo wanted to see what XY's technology solutions could do in practice. Mr Migani asked him to send an electronic version of the spreadsheet. They would then prepare a mock-up of a portal with flexible interfaces to enable Mr Nuzzo to track the information which he was interested in. They would do this work without charge, and Mr Nuzzo and his employers could then decide whether to collaborate with XY. Mr Nuzzo also said that he was interested in what Mr Migani had said about XY's technology being useful to identify inefficiencies. He said that he would send a dossier of statements for a single bank account used by the family, so that he could see what their technology could do in practice to identify overcharging.

223. Mr Faleschini's evidence, in his witness statement, was that he wanted to understand at this meeting whether XY's existing software known as EVA would meet Mr Nuzzo's needs, or whether he would need to ask the LAB team to develop a customised solution to meet the di Montezemolo family requirements. He described Mr Nuzzo's presentation of the Excel file (not populated by data) and recalled Mr Nuzzo saying that he wanted a 20-year future cash projection for the family. The discussions were solely focused on the technological services. There was no mention of providing financial advice, or of the Claimants' financial requirements, consulting services or investments. In cross-examination, he said that there was no discussion, at either meeting, of the family's investment objectives.

224. Mr Faleschini said that, on the following day, Mr Migani forwarded to him the files received from Mr Nuzzo. These were the Excel spreadsheet presented at the meeting on 9 June 2016, and some Santander bank statements. Mr Faleschini

understood that Mr Nuzzo wanted XY to test whether XY's technology would be able to process and present the information from the bank statements.

225. I accept the evidence of Mr Migani and Mr Faleschini as to the matters discussed at the meeting, and their technological focus. The documents sent by Mr Nuzzo following the meeting are in my view consistent with that evidence, and inconsistent with the idea that there was a discussion about either consulting services unrelated to technology or about the Claimants' investment objectives. If there had been such a discussion, one would have expected far more detailed information about the family assets to have been provided at, or at least subsequent to, the meeting. Mr Nuzzo in his witness statement did originally assert that this had happened. As described above, he said that after the meeting, he provided XY "with all the information about the financial investments of GIG and LDM, including our liquidity [etc]". However, he withdrew that part of his evidence. He accepted that this information was not provided until after the July 2016 meeting.

226. Indeed, there are other reasons why Mr Nuzzo's original evidence as to the provision of that information following the June 2016 meeting was in my view inaccurate. The provision of detailed information would inevitably require the signature of an NDA. Mr Nuzzo accepted that, at the time of this meeting, he was concerned about confidentiality, and hence none of the spreadsheet tabs, shown at the June 2016 meeting and sent subsequently, were populated with any financial data. There was some very limited financial information in the Santander documents sent following the meeting, but this was in my view clearly not sufficient to enable anyone to start to provide strategy consulting services, or to have a discussion about investment objectives. Mr Nuzzo confirmed in cross-examination that one of his key concerns was that there should be an NDA in place before he handed over any information at all.

227. Since there was a technological focus to the meeting, I see no reason why Mr Migani would have been repeating what he had said at the May 2016 meeting, as to XY being unbiased, conflict-free and independent. That point would have been made as part of the initial introduction at the May meeting, and there was no need for Mr Migani to say it again, particularly bearing in mind that the obvious purpose of the June 2016 meeting was to obtain further details of what Mr Nuzzo wanted by way of technology. I also do not accept that Mr Faleschini said anything on the topic of independence/conflict-free at the meeting.

*Information passed by Mr Nuzzo to LDM and MDM*

228. Mr Nuzzo's evidence was that after the first meeting, he spoke to MDM and LDM to update them. He could not recall exactly what he said, but he was sure that he spoke to LDM. He had been sent by LDM to meet Mr Migani, and would have spoken to him afterwards. He did not recall what he told LDM, but he would have repeated what Mr Migani had told him. He was also in regular contact with MDM and would have updated him as part of his day-to-day duties.

229. MDM's written evidence was that he recalled that Mr Nuzzo updated him after his initial meeting with XY in May 2016, and he referred to four matters arising from the way in which XY had presented itself: (i) as an independent firm, free

of conflicts of interests; (ii) as a firm that was 'best in class' with their technological tools to investigate and offset conflicts of interest of private banking and private bankers towards clients; (iii) as best in class to negotiate lower costs from private bankers and private banking firms to clients; and (iv) with their strong technological platform they were able to anticipate any kind of risks coming from the market, and therefore enable clients to protect their investments and exit in advance of any market storm that was coming. He said that he was told by Marco that these were the four things that they presented.

230. When cross-examined by Mr Cloherty on the basis that he could not remember this long list of things, MDM said that he remembered them very well. In cross-examination by Mr Weekes (directed at the Claimants' pleaded case that there was a representation by XY at the first and second meetings that XY was an "independent financial advisor"), MDM said that he was told that XY was an "independent firm": "I recollect well that Mr Nuzzo updated me that XY was an independent firm". He could not recall Mr Nuzzo telling him that XY had said that it was an independent financial advisor, but "for us" independent firm meant independent financial advisor. He remembered that there had been a second meeting, but could not remember what he was told about it.

231. LDM's evidence was that he would always speak to Mr Nuzzo after meetings but could not recall what was discussed.

232. I accept that Mr Nuzzo would have spoken both to LDM and MDM about the first meeting, and indeed in all probability after the second meeting as well. For reasons already given, I do not accept that XY had said that it was an independent financial advisor, or that that is what Mr Nuzzo would have passed on to LDM and MDM. Since, as I have said, the meetings were focused on the question of whether XY's technology could help Mr Nuzzo in his day-to-day work of monitoring the family's assets, it is likely that this would also have been the focus of Mr Nuzzo's conversations with LDM and MDM following the meetings. I do not accept that there was discussion at the meeting, or in the report of the meeting, of many of the matters described by MDM in his statement: for example, being best in class to negotiate lower cost from private bankers, or being able to anticipate any kind of risks coming from the market in advance of any market storm.

233. A potentially important question is whether Mr Nuzzo told MDM anything about XY being an independent firm. Since Mr Nuzzo had read the website, and since (as I have concluded) Mr Migani's introduction at the May 2016 meeting included a reference to XY's independence and being conflict-free and unbiased, I think it likely that Mr Nuzzo would have mentioned this to MDM. However, I think that this is likely to have been only a passing reference. At that point in time, Mr Nuzzo was interested in whether XY's technology could help him, and no-one on the Claimants' side had given any real thought to the possibility of XY providing services relating to the investment strategy of the Claimants. The question of whether or not XY was independent or conflict free was, at that stage, of no real significance. The question was whether XY's technology could assist in the monitoring of the family's assets, and for that purpose it would not really matter whether or not XY was independent, unbiased or conflict-free.

234. One of the issues in the case is the extent to which XY's independence and being conflict-free and unbiased was an important matter to MDM, and also the extent to which it influenced his subsequent decisions; in particular his decision to invest in the Skew Base Fund. In the context of those issues, I note that there is no evidence from MDM that he looked at XY's website at any time; either the version which existed in mid-2016, as described above, or its replacement which was live by the following year. It is also notable, in my view, that this was not a topic that was raised by MDM (or indeed Mr Nuzzo of LDM) at any of the many subsequent meetings between the parties. Indeed, the only representations as to independence which are alleged to have been made, and relied upon, are those made on the website (the 2016 version, not the later revised version), and at the two meetings in May and June 2016.

*14 July 2016 meeting*

235. It is not alleged by the Claimants that any of the independence or investment misrepresentations were made at this meeting. I can therefore address the meeting relatively briefly.

236. This was the first meeting for which XY prepared a PowerPoint presentation. The presentation contained a number of slides which were re-used in the PowerPoint presentations for subsequent meetings. In contrast to later presentations, the 14 July 2016 presentation does not set out any investment goals. Had there been a discussion of the Claimants' investment objectives at the earlier meetings, as contended for by the Claimants, I consider that these would likely have been referred to.

237. This meeting was attended by Mr Nuzzo, LDM (by video from Italy), Mr Migani and Mr Faleschini.

238. Mr Nuzzo had forgotten about the meeting, and therefore did not address it in his witness statement. In cross-examination by Mr Ahlquist, Mr Nuzzo agreed – after having been shown the slides – that the presentation by XY at this meeting was an initial indication of what the technological solution that they had previously been talking about would look like. When asked by Mr Ahlquist whether investments had been discussed at the meeting, Mr Nuzzo said that he did not remember. It was also put to him that it would not have been possible to have a proper discussion about investments at the July 2016 meeting, because an NDA had not yet been signed, and detailed financial information was not sent until after the meeting. Mr Nuzzo said that he could not remember.

239. Although the evidence of Mr Migani and Mr Faleschini was that LDM attended this meeting by video, LDM had no recollection of doing so. He thought that the first time that he met anyone from XY was at an in-person meeting in Rome in September. LDM was clearly mistaken in that recollection. There was no dispute between the parties that LDM had in fact attended this meeting by video, and Mr Migani was cross-examined on that basis. Subsequent to closing submissions, at my request, I was provided with a very helpful agreed schedule of the meetings which had taken place, including their attendees. The schedule confirmed that it was common ground that LDM had attended this meeting.

240. Mr Migani and Mr Faleschini gave detailed evidence as to the background to this meeting, including the preparation of the slides. Mr Migani said that there were various workstreams reflected in the slides. One was to prepare a mock-up of the portal which XY had proposed at the second meeting. This showed a tailor-made solution that XY's technology team developed under Mr Faleschini's supervision. The mock-up of the portal was shown to Mr Nuzzo and LDM at the meeting, and it was received enthusiastically. LDM said that he wanted to proceed with XY to work on a working version of the portal. There was a discussion of the fee structure. The agreement reached was that if the collaboration continued thereafter, XY would absorb the fee of € 50,000. If not, that sum would be payable. I accept this evidence as to what transpired at the meeting.

241. Mr Migani and Mr Faleschini both gave evidence which identified which slides were and were not shown at the meeting, and there was some cross-examination on that topic. Since Mr Nuzzo and LDM had no real recollection of the meeting, they were not in a position to say exactly which slides were or were not shown. I accept the evidence of Mr Migani and Mr Faleschini that time would not have permitted all of the slides to have been discussed. I do not accept evidence in so far as they suggested that they can recall, at this distance of time, which slides were and were not shown. However, I do not think it necessary to explore this topic further. It is sufficient to say that there was no discussion at the meeting of the Claimants' investment objectives.

242. It does not follow, however, that the work which was envisaged, subsequent to the meeting, would be confined to showing what the portal would look like. Mr Migani clearly had in mind that the data provided would enable his team to provide a more detailed analysis of the financial assets. His evidence was that there would be an analysis by Mr Dalle Vedove of his team "as part of identifying inefficiencies in the way that the assets are structured and held, so that we could demonstrate our capabilities at the next client meeting". This is likely to have been the subject of some discussion at the meeting, and it is reflected in the terms of the "Service" as defined in the contract agreed between the parties described below, and indeed the slides that were prepared for the September 2016 meeting.

*The first GIG Agreement*

243. Subsequent to the meeting, the parties signed the first contract between them (i.e. the First Agreement referred to in Section A above). This was headed "Advisory Agreement". The parties were XY (the First Defendant in these proceedings) and GIG. The preamble to the contract referred to GIG desiring XY "to provide consulting services", defined therein as the "Service". The Service was then further described as "the analysis of the financial assets of the Client outlining the strategic and operational guidelines to create added value". The contract was for a short period of 2 months, reflecting the fact that there was no certainty as to whether the parties would continue their relationship at all. I regard this, too, as indicating that, up to that point, there would have been no discussion of any specific investment objectives or goals.

244. The contract dated 18 July 2016 was signed by Mr Nuzzo. The second page identified that GIG was classified, in accordance with FCA Rules, as a

"Professional Client". Certain information was therefore provided, as required by the regulatory regime, as to the consequences of this classification. The relevant text read as follows:

> "Dear Mr. Marco Nuzzo,
>
> Re: New Consulting Client
>
> We are delighted to accept you as a client and confirm that you have been categorised in accordance with the Financial Conduct Authority's ("FCA") rules (the "Rules"), as a "Professional Client". You are entitled to request a different categorisation, as either a "Retail Client" (to benefit from an increased level of regulatory protection). It should, however, be noted that we are not obliged to accept any such request for re-categorisation and we will not be able to provide you with the services under the consulting contract if you are classified as a Retail Client.
>
> By classifying you as a Professional Client, you will not be entitled to certain protections that are afforded to Retail Clients. As a Professional Client, you are considered to be more experienced and knowledgeable when making investments and therefore more able to assess the level of risk involved. Professional Clients are consequently afforded lower regulatory protections that Retail Clients. A summary of the main protections that you will lose by being categorised as a Professional Client is set out below:
>
> **Loss of Regulatory Protections**
>
> • Communications, including financial promotions made with Professional Clients are not subject to all of the requirements imposed by the Markets in Financial Instruments Directive (MiFID) on communications with Retail Clients.
>
> • Information provisions about XY Hub UK Limited ("XY"), its services, and remuneration that are required with respect to Retail Clients are not all required with respect to Professional Clients.
>
> • Professional Clients are not eligible complainants with respect to the Financial Ombudsman Services ("FOS') and access to the FOS will therefore not be extended to Professional Clients.
>
> • Pre-requirements for the entry into written basic agreements for designated investment business may not apply to Professional Clients.

• If XY makes a personal recommendation to Professional Client in the course of MiFID or equivalent third party business, it is entitled to assume that, in relation to the products, transactions and services for which the Professional Client is so classified, the client has the necessary level of experience and knowledge for the purposes of suitability assessment, and where XY is required to provide suitability reports to a Retail Client, in many cases XY is not required to provide them to a Professional Client.

• With respect to non-advised services, XY is not required to request information or adhere to the same procedures when assessing the appropriateness of a given service or product for a Professional Client, and XY may not be required to give warnings to the Professional Client if XY cannot determined appropriateness with respect to a given services or product.

• XY may take into consideration the classification of the client in providing information, including product information, to clients.

**Regulatory Confirmations**

Under the Rules which implement MiFID, we are required to obtain express consent from you in relation to:

• XY Hub UK Limited classifying you as a Professional Client.

Please sign and return to us the enclosed copy of this letter to provide the above confirmation.

If you have any queries regarding the contents of this letter please contact Daniele Migani who will be happy to assist you.

Yours sincerely,

Daniele Migani"

245. Beneath the above text, Mr Nuzzo signed so as to confirm that he had received, read and understood the terms of the letter, and consented to XY classifying GIG as a "Professional Client". He also acknowledged that he was aware that it was up to him to keep XY informed of any change that could affect the categorisation.

246. The status of GIG – and later LDM and MDM personally – as professional clients, under the FCA regime and MiFID (referred to in the above quote) is of relevance principally in relation to the arguments of the parties concerning the Claimants' contractual and (non-fraud) tortious claims: see Section K below.

247. The agreement incorporated XY's "General Terms and Conditions". These too are principally relevant to the contractual and non-fraud tortious claims. They included the following terms, which were also part of the later Second and Third Agreements:

> "3.G: Under no circumstances shall [XY] be held liable for any loss or damage resulting from the provision of the Services, except in the case of wilful misconduct, fraud or gross negligence.
>
> 3.H: In accordance with the rules of the Financial Conduct Authority (the "FCA Rules"), we are required to notify you of your client classification. You will receive the protections afforded by the FCA Rules according to your client classification, as notified to you in the letter to which this Contract is attached;
>
> 4.A: The provision of the Services by [XY] will be subject to any limit or restrictions which the Client may specify either in writing or orally, the terms of this Contract and any applicable legal or regulatory requirement in force from time to time;
>
> 4.F: The Client shall always have full decision-making and executive authority with regard to all strategic and operational decisions relating to the Service;
>
> 10.A: All investment is subject to risk and the degree of risk is a matter of judgment that cannot be accurately pre-determined. The value of investments and the income derived therefrom can go down as well as up and past performance is no guide to the future. The Client is encouraged to review its investment objectives, evaluate its level of risk and exposure to loss on a regular basis."

248. Clauses 11.C and 11.D of the general terms and conditions provided that the First Agreement was to be governed by and construed in accordance with English law, and that the parties irrevocably agreed that the English courts would have exclusive jurisdiction to settle any dispute or claim.

249. Although there was a pleaded suggestion by the Claimants, that these standard terms were not incorporated into one or more of the contracts with XY, I did not understand that argument to be pursued. Each of the contracts between the parties was signed, and the standard terms were expressly incorporated.

*4 August 2016 meeting*

250. There was a meeting in Milan on 4 August 2016, attended by Mr Nuzzo and Mr Migani and Mr Dalle Vedove. This was the first meeting that Mr Dalle Vedove attended. A slide was prepared for this meeting headed "Mapping Reports and Collecting Information". Mr Dalle Vedove said in his witness statement that this

slide was used in order to discuss the information that they would need from Mr Nuzzo to perform their analysis of the client's estate.

251. There was no real dispute that this was indeed the purpose of the meeting. Mr Nuzzo in cross-examination accepted that the meeting was to catch up on where the information sharing had got to, at a time when XY was still gathering data. In cross-examination, Mr Dalle Vedove said that the purpose of his work at that time was to analyse the estate, and also using XY's system to identify improvement areas. It was put to him that, at this time, Mr Migani had explained to him that the Claimants were looking to take a cautious approach with the capital. Mr Dalle Vedove said: "definitely not at that time." He had no idea at the time about any approach that they wanted to take. I accept that evidence. He gave a clear (and to my mind convincing) explanation about how there are "inefficiencies which are absolute, so to say": for example, products that are inefficient, liquidity that is not invested so that it is producing a negative yield, or costs which are significantly above the best practice. These were matters which could be analysed without knowing the client's specific objectives. In my view, this is consistent with the PowerPoint presentation for the September 2016 meeting, which did not refer to any investment objectives or goals, but which did identify areas – such as excessive costs of investment – where there could be improvements.

### D2: The 20 September 2016 meeting

252. A meeting was held in London on 20 September 2016. It was attended in person by MDM, Mr Nuzzo, Mr Migani and Mr Dalle Vedove. LDM joined by video from Rome. Each of these witnesses gave evidence as to what was discussed at the meeting. It was common ground that, at the meeting, Mr Migani delivered a presentation on behalf of XY, and that the presentation included information about HFPO products and that XY also provided information about investing in MINs. The scope of what was discussed at the meeting, including as to what was presented by XY, was however substantially in dispute.

253. It was clear from his oral evidence that LDM had no real recollection of the meeting at all. He was insistent in his evidence that the first time he met anyone from XY was at a meeting in Rome in September 2016. In fact, he had joined the July 2016 meeting by video, and then joined the September 2016 meeting by video as well. There was no evidence of a meeting with LDM in Rome in September 2016 or indeed at any time that year.

254. The September 2016 meeting was the first time that MDM had attended any meeting with XY (whether in person, or by video, or otherwise). In his witness statement, MDM said that he did not recall his first meeting with XY very well. Unconvincingly, in my view, he then insisted in cross-examination that he was only saying that he did not remember the date of the meeting very well.

255. What is clear is that XY had prepared a very detailed set of slides for this meeting, and there is therefore strong evidence as to the matters which formed part of the discussion, or at least were intended to form part of the discussion. The person primarily responsible for the preparation of the slides was Mr Dalle Vedove. Some of the slides are standard slides which would be used generally at

presentations: Mr Dalle Vedove explained that a person in his position with responsibility for the particular client (known in XY as a "minder") would draw upon a library of slides as a starting point. He would then amend the slides so as to be specific to each particular client or portfolio. It is apparent that a considerable amount of work and analysis had gone into the preparation of the slides, in so far as they specifically addressed the assets of LDM and GIG. The slides are certainly very well-prepared and in my view they evidence the professionalism of Mr Dalle Vedove. There can be no doubt that the Claimants would have been impressed by the presentation.

256. There were some 56 slides in the pack, plus a cover page. Mr Dalle Vedove's evidence was that meetings with MDM generally only lasted an hour or so. It would not therefore have been possible, in around an hour, to have a detailed discussion about all of the slides. MDM's evidence was that they were taken through the slides quickly, with XY controlling the speed at which slides were shown. Whilst this was said by MDM in order to deflect detailed cross-examination on the slide which dealt with "Example of An Insurance Note", I accept that some slides would have received more emphasis and attention than others (which may have been passed over quite quickly). However, the slide pack was made available to the Claimants subsequent to the meeting, and although MDM said that he had difficulty opening the documents, I consider that there was a full opportunity for the Claimants to study the slides, and ask any relevant questions, subsequent to the meeting. Furthermore, many of the slides, or very similar slides, were included in the PowerPoints for subsequent meetings, and so the Claimants would have acquired familiarity with many of them by repetition. The "Example of An Insurance Note" had been included in the July 2016 PowerPoint pack, and a very similar slide was included in a number of PowerPoint presentations in 2018.

257. In his witness statement, Mr Dalle Vedove said that the slides were not a complete record of what was said at the meeting. Realistically, he said that he could not recall what was specifically said. His evidence as to what was discussed was "based on my view of the slides". I consider that his evidence provides a sensible and reasonable view as to what, based on the slides, is likely to have been discussed at the meeting; or at least at subsequent meetings, in so far as similar slides were used at subsequent meetings. There was, as I saw it, no substantial challenge in cross-examination as to his evidence as to the topics that would have been the subject of discussion or explanation by reference to the slides. Broadly speaking, I therefore accept his evidence as to the slides that were discussed, and what those slides show.

258. It is not necessary to describe each slide in detail, and in what follows I focus on those which seem to me to be the most important in the context of the issues in the case.

259. Slide 3 showed a breakdown of the assets owned by LDM and also by GIG and by another di Montezemolo family office vehicle known as "Fisvi". Mr Dalle Vedove described this as a "portion" of their assets. This was correct: the assets analysed were those which had been identified to XY following the July 2016 meeting, and they did not comprise the entirety of the Claimants' wealth. For example, there is no information about assets such as real estate or artworks.

Information had been provided as to "financial assets", such as securities. At this stage, no information had been given by MDM about his personal assets. The first discussion about his assets did not occur until December 2016.

260. Slide 3 showed LDM's assets to be € 32.5 million, with liabilities of € 17.2 million. Mr Dalle Vedove referred to these liabilities as being the "Lombard" credit which LDM had obtained against his existing assets. The concept of "Lombard" credit entails raising money on the security of assets such as equities. Mr Dalle Vedove said, rightly in my view, that € 17.2 million was a significant proportion of the € 32.5 million assets, which meant that LDM's investments were highly leveraged. Mr Migani said that the analysis showed that the portfolio made substantial use of leverage, which is by definition a risky approach: with high leverage, there is an increasing risk of the counterparty making a margin call requiring repayment of the lending, especially when an asset base is subject to high market fluctuation (which is the case with equities). In his witness statement, however, Mr Nuzzo said that the € 17.2 million was in fact used for investments which are not shown in the slides. It is not necessary to address this point in any detail. It is clear that, as matters progressed from 2017 onwards, Mr Nuzzo and MDM were keen on the use of Lombard credit in order to increase returns on assets. I do not think it necessary to explore in any detail the question of how familiar they were with Lombard credit, and the extent to which they used it, in September 2016.

261. Slide 7 identified the first agenda item as "Operational inefficiencies". Slides 7 onwards were used, as Mr Dalle Vedove explained, to demonstrate the inefficiencies and risks in the current portfolio. One of the points being made was that the assets were invested in a way that was expensive.

262. They also identified in Slide 8 that one third of the financial assets were indirect instruments, mainly in-house funds, and that there were a number of issues to consider in that context. XY highlighted that there was no visibility into actual investments and low control over investment strategy. They also said that the prices of indirect instruments did not include "chain costs". In that context, they posed two questions: (i) "How Much Am I Actually Spending per Year?''; (ii) ''What Are the Conflicts of Interest?''. The third bullet point on that slide said: "Specialised technology is needed to analyse the actual state of the overall equity".

263. Slide 9 was headed: "Indirect Instruments Burdened by Commissions and Expenses". This identified, in a table, the various costs that were being incurred. Slide 10 was headed: "Profitability of Bond Funds Eroded by Chain Costs".

264. There was, therefore, a theme in Slides 8 – 10 that thought should be given by the Claimants to the third party costs that were being incurred in relation to their various investments. The same theme was picked up in Slide 34, which was headed: "Value that can be created by the transformation of assets". This indicated that there could be a saving of € 300,000 per year in respect of "Unseen Costs and Inefficiencies in Portfolio Instruments and Manager Performance".

265. The second section of the presentation was headed: "Critical Areas in Strategic Asset Structure". Slide 28 and subsequent slides showed XY's analysis of the

investments in publicly traded equities. These made up 62% of the portfolio. This showed that the clients' investments were heavily concentrated in Italian equities, and especially in one company called Tod's which comprised almost one third of the total investments. Mr Dalle Vedove said that an important message to the clients was that this concentration in equities, and specifically in volatile Italian stocks, was a high-risk approach, and that diversifying would reduce risk.

266. Mr Migani was cross-examined at length on Slide 33, headed: "With the strategic restructuring it is possible to increase the expected yield by decreasing the risks of erosion of assets". A sub-heading was: "Distribution of the probability of returns on financial assets". There followed a graph with an x and y axis, and there was text which stated: "Probability of Negative Returns from 49% to 5%". Mr Migani's evidence was that this was simply identifying the probability of a negative return, and how this could be reduced. It was not saying anything about the extent of a negative return. In other words, the slide was not saying that, if the Claimants were to engage XY and follow their strategy, they could never lose more than 5% of their assets.

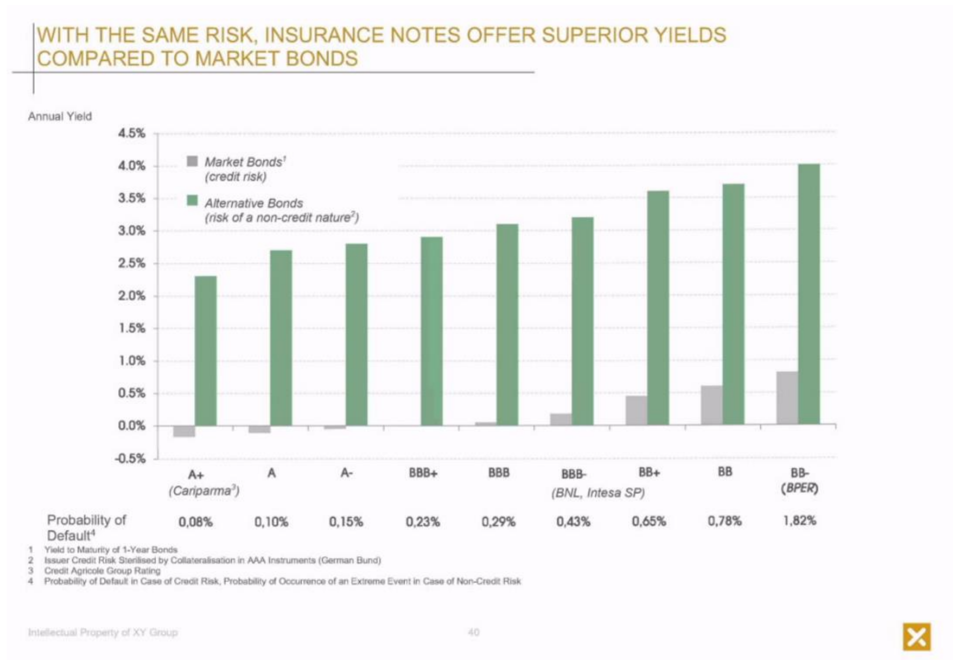
267. I considered that Mr Migani's explanation of the slide was reasonable. There is no clear statement in the slide as to the extent of any loss. In any event, there was no pleaded case of misrepresentation based on that slide (in contrast to the Market Insurance Note Slide 42 described below). I do not consider that Mr Nuzzo, MDM or LDM analysed the slide carefully, or reached the conclusion which was put to Mr Migani in cross-examination. Furthermore, it is clear from the Market Insurance Note slide discussed below that there was the potential for the loss of more than 5% of capital.

268. The third section of the presentation, beginning at Slide 35, was headed "Intervention Guidelines". Mr Dalle Vedove described this part of the PowerPoint as setting out initial proposals for a "Transformation Plan" for GIG's and LDM's bankable investments. Slide 37 identified differences between "fixed return" and "expected return" investments. "Expected return" investments include equities. "Fixed return" investments include the MIN and HFPO products in which the Claimants in due course invested. It is in this section of the presentation that the most important slides, relevant to the issues in this case, are contained. These slides, in particular Slides 40, 41 and 43, are important in the context of the question of how Mr Nuzzo and MDM understood the risk of these instruments. I discuss those slides, and aspects of their understanding of the risk derived from the slides, in the following section. Each of these slides (or very similar versions of them) appeared in later presentations as well.

*Slides 40, 41 and 43 of the September 2017 presentation*

269. Slide 40, headed "With the same risk, insurance notes offer superior yields compared to market bonds" is reproduced below.[2]

[2] Throughout this judgment, quotations from and reproductions of the slides in XY's presentations are in English. These are translations from the original Italian.




270. This slide, as Mr Dalle Vedove explained in his witness statement, compared the return profile that an investor could expect from market bonds (a traditional asset class, rather than an "alternative investment") versus MINs (i.e. Market Insurance Notes). XY's view at that time was that the risk of market bonds was not being adequately remunerated by the market. Those bonds have a credit risk. Slide 40 therefore shows, in grey, the returns for the different levels of credit risk in respect of market bonds: there is, naturally enough, a lower level of risk of default for an A+ bond as compared to a BB- bond. In comparison, MINs (shown in green on the slide) are described as being subject to a different risk: the non-credit risk of an extreme event in the market. The bottom line of the slide identified the "Probability of Default" in relation to both market bonds and MINs. It shows, as the headline to the slide explains, that with the same risk, MINs offered superior yields.

271. In relation to the green bars relating to MINs, it will be seen that the probability of default increases as annual yield increases. Accordingly, for a yield of 4.0%, the probability of default is shown as 1.82%. The slide also makes clear that the risk with these notes is of a "non-credit nature". Footnote 2 explains why: the issuer credit risk is "sterilised by collateralisation in AAA Instruments (German Bund)". Footnote 4 explains that the probability of default is the "Probability of Occurrence of an Extreme Event in Cases of Non-Credit Risk".

272. It is in my view important to note that Slide 40 was not presenting a market insurance note as having zero risk. There is unlikely to be any investment, particularly an investment which would pay (as Slide 40 illustrates) a higher yield than the then market rate for bonds, which has zero risk. Mr Nuzzo asserts in his statement that XY said that MINs were "a product with zero risk because the barrier was impossible to reach, and therefore it was a perfect product for someone who did not want to risk and wanted a stable return". I do not accept that anyone from XY, either at the September 2016 meeting or otherwise,

described a MIN as a product with zero risk. It is obvious that there was a risk. In Slide 40, XY described the probability of default, and showed that it gradually increased depending on the yield. It can fairly be said (and indeed XY did not dispute) that this was shown to be a very low risk of probability of default: 1.82% is clearly not high. However, a low or very low risk is not the same as zero risk. I have no doubt that Mr Nuzzo, and MDM, understood this very well, certainly by the time that Mr Nuzzo began to invest in MINs on behalf of LDM and GIG, and by the time that MDM did so on behalf of SRL. They also understood the nature of the event which would result in default. In both Slide 40 and Slide 41 this is identified as an "Extreme Event".

273. It is also, in my view, important to note that no case was advanced that there was any misrepresentation by XY in relation to the probabilities which were set out in Slide 41, or indeed in any of the other slides. Accordingly, it has not been suggested – and I have no evidence – that the probability of default was in fact much higher than was represented here. As described much later in this section, in relation to the market collapse in March 2020 in consequence of the Covid-19 pandemic, Mr Nuzzo asked various questions of Mr Dalle Vedove concerning the probabilities, and he suggested in the e-mail correspondence that the probabilities had been significantly understated. Mr Dalle Vedove dealt with those points in some detail at the time. This was not a line of argument which was then pursued by the Claimants in the context of the present litigation.

274. It seems to me that if the probabilities set out in Slide 40 are accurate or at least are fairly represented (and I have no evidence which suggests otherwise), then a MIN can properly be regarded as a low-risk investment, in terms of the probability that there will be any loss at all. Assuming again that the probabilities there set out are accurate or fairly represented, the risk that no event will occur, and therefore that investors in one of these notes will receive back their capital and the promised coupon, is in excess of 98%.

275. It is also important to note that, in relation to the Claimants' case concerning the investment representations, no case in fraud is advanced in relation to the non-Skew Base Fund investments. Mr Saoul explained, in his closing argument, that the reason that no such case is advanced is that there was no evidence that XY or Mr Migani had personally benefited from those investments. There was, therefore, no obvious motive for any fraudulent misrepresentation. The significant point for present purposes is that the September 2016 slide presentation was not being prepared for the purpose of an investment in the Skew Base Fund. Whilst XY were no doubt motivated by a desire to impress the Claimants at the September 2016 meeting, and to encourage them to think that there was an alternative investment strategy that could be pursued with the benefit of XY's assistance, there was no motive for XY to make false statements about, for example, the nature of MINs or the probability of default. Furthermore, it was Mr Dalle Vedove who was primarily responsible for the preparation of these slides, albeit drawing on library slides and under the supervision of Mr Migani. Fraud is not alleged against Mr Dalle Vedove personally.

276. The nature of a MIN was set out on the following slide. Slide 41:

EXAMPLE OF AN INSURANCE NOTE

- **Duration 12 Months with Possibility of Release** Even Before Maturity
- Credit Risk of Issuer[1] **Sterilised with AAA Collateral** (German Bund)
- Extreme Event Consisting of a Daily **Decline[2] of More than 10% (barrier) in the MSCI World Global Equity Index**
  - Unprecedented Event
  - Non-Cumulative Extreme Events (in case of first occurrence, the instrument stops with a 10% capital loss every 1% below the barrier[3])
- Yield Equal to **Euribor +3.2-3.5%**
  - No Implied Distribution or Underwriting Costs

1 Choice of Issuer Made Through Beauty Contest Among the Main International Banks
2 Detection of the Performance of the Index Carried Out on a Daily Basis from Close to Close
3 Expected Recovery Rate of 75%

Intellectual Property of XY Group 41

277. This set out an example of an insurance note. It explains in simple terms how an insurance note works, and the nature of the risk: i.e. an "Extreme Event Consisting of a Daily Decline of More than 10% (barrier) in the MSCI World Global Index". It also identified that the instrument would "stop with a 10% capital loss every 1% below the barrier". This indicated that the loss was "non-cumulative"; in other words, the instrument would not be affected by a further daily decline on the following day or days after the barrier was breached.

278. Mr Nuzzo agreed in cross-examination that it was only an example, and that it would always be necessary to look at the terms of the particular note in question. I discuss Mr Nuzzo's answers in cross-examination further below.

279. Mr Dalle Vedove's evidence was that, using Slide 41, they explained to the clients how a MIN works with a hypothetical example. They explained to the clients that the benefit of MINs is that, unless there is an extreme event, they provide a predictable return, which was what the clients were looking for. He described the barrier mechanism: this meant that if there is a pre-determined event which caused the barrier to breach, then there would be a predictable loss of some or all of the invested capital, depending on the terms of each MIN. He said that he was absolutely sure that the clients understood the barrier mechanism, and the fact that losses could occur in the case of extreme events. I think it likely that these matters were explained at the September 2016 meeting, or at least at a subsequent meeting or meetings, and that they were understood by both Mr Nuzzo and MDM. Indeed, Mr Dalle Vedove's evidence as to how the MIN worked, and how it was understood, is broadly consistent with Mr Nuzzo's evidence in cross-examination as to what his understanding was.

280. Slide 43 addressed the products which come within the category of investments referred to during the trial as HFPOs. The slide was as follows:

THROUGH SHORT TERM ARBITRAGE STRATEGIES IT IS POSSIBLE TO OBTAIN VERY IMPORTANT PREMIUMS

**Features**

- Securities Covered by the Strategy are Certificates Traded on Regulated Markets
- Underlying: Indexes, European Shares, American Shares
- Over 50,000 Instruments Available
- Periodic Maturities (usually at least monthly)
- High Liquidity (market bid-ask spread <1%)
- Access to Major Exchanges in Europe to Compare More Efficient Markets
- Counterparties of High Credit Standing
- Tax Efficiency (income that can be offset against previous capital losses)

**Mapped issuers**

SOCIETE GENERALE
Deutsche Bank
BNP PARIBAS
COMMERZBANK
DZ BANK
HSBC
citi

| Issuer and Underlying | Maturity | Distance Barrier % | Barrier probability | Ask Price | Redemption value | Yield % | Annualised Yield % |
|---|---|---|---|---|---|---|---|
| SG - EUROSTOXX 50 | 2.1 months | 38,1% | 1,1% | 92,45 | 93,50 | 1,1% | 6,2% |
| SG - DAX 30 | 2.3 months | 36,7% | 1,4% | 276,05 | 279,50 | 1,3% | 6,9% |
| CITIGROUP - S&P500 | 1.2 months | 32,8% | 1,9% | 41,18 | 41,50 | 0,8% | 7,6% |

Intellectual Property of XY Group 43

281. Mr Dalle Vedove's witness statement does not suggest that a detailed explanation of HFPOs was given at the September 2016 meeting. There was thus no slide equivalent to the "Example" slide that was used for a MIN.

282. Mr Nuzzo's evidence, in his witness statement, was that he believed that there was some discussion of both MINs and HFPOs at around this time, although he could not remember exactly when the discussion took place. He understood that they were more or less the same product as the MINs. The main difference, as he understood it, was that the HFPO notes had a very short maturity, which XY was buying and selling on the secondary market, taking advantage of the low statistical probability of the barrier being reached in the remaining duration of the note.

283. This explanation seems to me to be broadly consistent with Slide 43. This identified some examples of these instruments. The table at the foot of the slide shows relatively short maturity periods. It also shows that the greater the distance from the barrier, the lower the yield and the lower the probability of breaching the barrier. Thus, the Euro Stoxx 50 had a barrier distance of 38.1 %, a probability of breach of 1.1%, and an annualised yield of 6.2%. By contrast, the Citigroup S&P 500 had a lower distance from the barrier (32.8 %), a higher probability of breach (1.9%), and a higher annualised yield (7.6%).

284. Again, therefore, the probability of a barrier breach was not represented as zero, but rather as very low. Mr Nuzzo said that he understood from XY that the probability of losing the capital was "almost impossible". I think that the slide shows that it was very unlikely that the barrier would be breached, but "almost

impossible" seems (as with other aspects of Mr Nuzzo's evidence in his witness statement) to overstate matters.

285. Mr Migani was cross-examined as to whether he explained to the Claimants that there was a real risk of total capital loss in relation to MINs and HFPOs. He accepted that Slide 43 did not contain an explanation of the consequence of the event happening. However, he said that it was crystal clear in the prospectus for the Skew Base Fund that, in a structured product, you can lose all your money. He also said that this was clear from each of the term sheets for the products. He also said that when there is no explanation "you have to think to the worst case, which means default, losing all the money".

286. I consider that there may well have been some reference at the meetings, as Mr Dalle Vedove's evidence suggests, to the possibility that investment in these products could result in a complete loss of capital. In his evidence (about later meetings), Mr Facoetti referred to the "very very small risk of losing all the capital". But the thrust of the presentation would have been that this was an extremely unlikely scenario. Indeed, the MIN Slide (41) indicates that, in the example there given, there would be a loss of 25% of capital; a figure which is premised on a 12.5% daily drop in the MSCI World Global Equity Index. Subsequent to this meeting, as matters developed over the next 2 years, the Claimants did receive documentation, including the Offering Memoranda for the Skew Base Fund, and term sheets for non-Skew Base Fund investments, which consistently indicated that a complete loss of capital was indeed one of the risks of investment in products of this kind.

287. Before leaving this group of slides, I will briefly outline what happened when the markets collapsed in around March 2020 in consequence of the Covid-19 pandemic. There were 1-day falls of more than 10% which impacted the MINs in which the Claimants had invested, both in the Skew Base Fund and outside it. There were falls of around 12% on a single day in the Euro Stoxx 50 index (12 March) and the S&P 500 (15 March). There was no evidence of any similar fall (greater than 10%) in relation to the MSCI World index (which had been referred to in the Example slide 41). There were also sustained falls in both the Euro Stoxx 50 and S&P 500 indices which meant that the barriers of a large number of HFPO instruments were breached, with a significant loss of capital resulting from the fact that the indices did not recover prior to the maturity date of the instruments.

*The evidence of Mr Nuzzo and MDM about the September 2016 slides*

288. In his witness statement, Mr Nuzzo used various expressions to describe the nature of the risk in these products. He says that he was told that a MIN was a "product with zero risk because the barrier was impossible to reach". He said that with an HFPO, because the duration of the instrument was so short, the possibility of losing the capital was "almost impossible". He said that he was not aware that there was "a risk of significant or total loss of capital with an investment in the HFPOs and MINs. That was never discussed, and therefore it was never a possibility in my mind". He said that XY "always said it was not possible to lose the 10% in one day". In relation to the Skew Base Fund (where the relevant Compartments were to invest in these products), he said that the "possibility of losing the capital was close to zero for me".

289. In cross-examination by Mr Cloherty about the September 2016 meeting and the slides, it was clear that Mr Nuzzo understood that Slide 40 was showing a high-level comparison of the mathematical probability of default in relation to the credit risk of market bonds and the risk of an extreme event in the case of a MIN. As he said: "with the same risk there, but different yield". He agreed that this slide was not making statements about all MINs in all circumstances. He agreed that Slide 41, headed "Example'', was clearly not making any statement about all MINs generally. He agreed that the slide was setting out a hypothetical MIN. He agreed that that slide was not saying that the risk was zero, and that it was not saying that it was impossible to lose capital, or that the risk of losing capital was non-existent. He said that the slide made him think that "there is very low probability". It was put to him that the slide showed that, if the event did occur, you would start to lose capital very quickly. He said that because of the explanations given at the meeting, that there were stock market mechanisms designed to stop very large falls, the possibility of going much more below the 10% barrier was "even less probable". It was, he said, ''very very remote''. But he agreed that the slide was showing that if the event did occur, then you would start to lose capital. But he said that since there was a "very very low probability that the event happens, and even if it happens, the loss should be minimal, because it's not going to go minus 15% if minus 10 [%] never happened in history". He agreed that the slide was not saying that there was no chance of a capital loss. If Slides 40 and 41 were put together, they indicated to him that the risk is "very, very low".

290. I asked Mr Nuzzo about the footnote, which referred to an expected recovery rate of 75%. He agreed that this indicated that that meant that, "in the very extreme case", there would be a 25% loss of capital. He also said that such a loss would definitely be a significant loss.

291. It seemed to me Mr Nuzzo's evidence in cross-examination involved a departure from some of the more extreme statements in his witness statement. In my view, he was not being told that the product was "zero risk because the barrier was impossible to reach", and this is not what he understood. Indeed, early in his cross-examination, he accepted that when it comes to financial instruments there is no such thing as zero risk in making the investment. His evidence that Slide 41 showed a significant loss in a very extreme case is a departure from his evidence that he was not aware that there was any risk of a significant loss of capital with an investment in the HFPOs and MINs.

292. In my view, Mr Nuzzo's evidence indicates that he was aware that there was indeed a risk with these MIN products, and that the essential risk was that there would be an extreme event which breached the barrier. He understood that there was a very low risk that such an event would occur (a conclusion which is consistent with the way in which the probabilities are presented in Slide 41), but nevertheless he was aware that this was the essential risk of these instruments. It would have been obvious to someone as intelligent as Mr Nuzzo that instruments of this kind are available, paying a coupon which is substantially above that payable in respect of ordinary market bonds, because the counterparty paying the coupon considers that there is indeed a risk which justifies that payment, and which is being transferred to the party who is to receive the coupon if the extreme

event does not occur. It is clear that Mr Nuzzo thought that the risk of the extreme event occurring was very low indeed. However, he did also understand that if it did occur then, depending on its severity, there could be a very significant loss of capital, and that this could occur very rapidly indeed. Slide 41 identified a 10% loss of capital for each 1% below the barrier. Again, he thought that the risk of this happening was very low indeed, but it was nevertheless a risk that he understood to exist.

293. I have hitherto been dealing with the slide presentation at the September 2016 meeting, and Mr Nuzzo's evidence about it and more generally his understanding of the products. However, the above conclusions are reinforced by the evidence concerning materials (in particular term sheets) which Mr Nuzzo later received, when he entered into MIN and HFPO transactions on behalf of GIG and LDM, as well as the Offering Memoranda for the Skew Base Fund. I will discuss these in due course.

294. My conclusions as to how Mr Nuzzo understood MINs and HFPOs apply equally to MDM. They attended the same meetings, saw the same slides, worked closely together, and had long been friends. It is improbable that Mr Nuzzo and MDM would have seen and understood these instruments very differently.

295. MDM's evidence about the 20 September 2016 meeting, and the slide presentations at that and subsequent meetings, was very far short of convincing. I can well understand why he said in his witness statement that he did not recall his first meeting with XY very well as it was over 7 years ago. However, I do not accept that (as he sought to maintain in cross-examination) he was here simply referring to the date of the meeting (which in fact he identified in the following paragraph of his witness statement).

296. MDM was unwilling, in cross-examination, to engage in any detailed discussion of what could be understood from Slides 40 and 41. MDM was asked about Slide 41, and it was put to him that he would have understood that this was merely "an example". He said that he had not understood that, and had not understood "how they were working". He said that the time spent on that page was "equal to zero or not long enough to understand what we were speaking about".

297. I do not consider that MDM had a recollection of this meeting which enabled him to say that near to zero time was spent on those slides. Indeed, I think it likely that these slides were discussed at the September 2016 meeting, as Mr Nuzzo's evidence tended to suggest. The possibility of the di Montezemolo family changing their investment approach was one of the main themes of the slides. In that context, the possibility of entering into structured products, such as MINs and HFPOs, was an important part of the ideas that XY was putting forward. It is therefore likely that there was some discussion about such products, as Mr Dalle Vedove's evidence indicates. This is borne out by the fact that, within days of the September 2016 meeting, Mr Nuzzo was asking questions of Mr Dalle Vedove about the possibility of entering into a structured product which had been proposed to him by a bank, Union Banque Privee ("UBP"). However, even assuming that there was no discussion about the relevant slides at this particular meeting, MDM had an opportunity to review them afterwards. Furthermore, these or very similar slides were used in subsequent presentations at meetings attended

by MDM, and there was obviously a discussion about the nature of these products at some stage. Indeed, there must have been a discussion about Slide 41, because part of the Claimants' pleaded case asserts a misrepresentation in that slide.

298. It was put to MDM in cross-examination that he would not have been so timid so as not to ask XY to stop on a particular slide and explain it. He accepted that he was not timid. He went to say that he was "relying on the slides in which they stopped on, full stop, nothing more than that. And if they were not stopping on other sides, or they were stopping extremely in a short time, I was taking it because I had full trust, to be clear, full trust on XY". MDM's evidence as to having full trust in XY was a constant theme, indeed mantra, in his evidence. However, this evidence makes no real sense in the context of the September 2016 meeting or indeed any of the meetings at around that time. In September 2016, MDM was meeting XY for the first time. There was no trust which had been built up by that stage. Furthermore, XY were suggesting products with which (MDM's evidence was that) he had no prior familiarity. I have no doubt that if MDM was interested in these products, and moving his family investments in a different direction, MDM would have wanted to understand what they were and how they worked.

*The upshot of the September 2016 meeting*

299. Slide 53 (which repeated Slide 1) identified the "Next Stage Objectives". In relation to Financial Assets, the next stage was: "Transformation Plan and Service Roll-Out". Three bullet points were linked to that: "Detailed Strategy Definition", "Deal Arrangement" and "Operational Risk Management". This last phrase is potentially significant in the light of one of the documents, much later in the story, relevant to the issue of whether the Claimants knew that Mr Migani was the person behind the Skew Base Fund.

300. Mr Dalle Vedove's evidence was that the upshot of the meeting, reflected in the phrase "Detailed Strategy Design", was that the clients were to reflect on what had been explained at the meeting, and to let them know what they liked. This would enable Mr Dalle Vedove and Mr Migani to prepare a more detailed strategy. His general impression was that the clients were interested in the asset classes presented, but that they did not take a decision on strategy either at this meeting or shortly afterwards. I accept this evidence.

301. Subsequent to the meeting, on 21 September 2016, Mr Nuzzo on behalf of GIG concluded 2 contracts. One contract was for consulting services to be provided by XY (the UK company). The contract was headed: "Advisory Agreement". The "Service" was defined as being "offered on an ongoing basis and is intended to support the process of planning, implementing and controlling the Client's investment strategy". It stated that "all asset management activity is excluded". It was for a 3-month period, but to be extended automatically for a further 12 months unless terminated by one of the parties 15 days prior to the expiration of the 3 months.

302. The second contract was with XY SA (the Swiss company). This was headed (in translation) "Consulting Agreement". It related to technology services: "Service" was defined as consisting of "requirements analysis, operational process set-up

and day-by-day management of data for monitoring and reporting relating to the Client's assets and economic flows". The initial term of the contract was 12 months.

## D3: Late September 2016 – November 2016

*26 September 2016 exchange*

303. Shortly after the meeting, Mr Nuzzo forwarded to Mr Dalle Vedove an e-mail exchange which he had had with Mr Ilario Presta of UBP in Lugano. Mr Presta had proposed, on Friday 23 September, that Mr Nuzzo should contract for a structured product. The product would be a 1-year certificate, with a yield of 4.5%, based on three indices. The "capital is protected up to a loss of 42% (of Monday's levels)". If none of the indices lost more than 42%, then "you have guaranteed capital + coupon of 4.5 %". If the "worst performance of the three indices is still positive at maturity, there is capital + coupon + performance". The instrument provided an upside, if the worst of the three indices increased. UBP wanted to complete the transaction by Monday, giving Mr Nuzzo a short time to respond. At the bottom of the e-mail were some "Reflections on the new structure". Mr Presta made various points which were somewhat similar to points which had been made in XY's presentation on 20 September 2016; the then negative yield of investment grade bonds; that whilst equity markets offer opportunities, the risks of losses are high; that UBP recommended that clients should evaluate structured products. The e-mail concluded: "If it's OK for you, just reply OK as usual". In an e-mail sent on the Monday, Mr Presta said that: "The barrier is set at about 54".

304. I accept Mr Nuzzo's evidence that, at this stage, he had not previously entered into a structured product such as the one that UBP was proposing, or such as discussed at the 20 September 2016 meeting. However, the e-mail exchange shows that, by this time, Mr Nuzzo had some interest in a structured product of this kind, and that by now he understood the concept of a barrier in the context of a structured product. The product proposed by Mr Presta bore similarities to the HFPO products described in Section C above (in which the Skew Base Fund invested) and in the slides for the September 2016 meeting. There was a barrier, which was set at some distance below the current market position. Unlike a MIN, the product was not related to a 1-day fall. Rather, as Mr Presta's e-mails indicate, it was important to see where the relevant indices stood at the start, and at maturity, with capital not being protected if there had been a fall of 42%.

305. Mr Nuzzo's interest in the proposed product resulted in him asking Mr Dalle Vedove's for his views, for which he needed a quick response. Mr Nuzzo wanted to know whether XY advised him to do nothing pending a review of the entire position "or can something be done in the meantime".

306. Mr Dalle Vedove's response, on 26 September 2016, was that they did not recommend buying the structured product recommended by UBP "which incorporates a level of risk (worst of formula on 3 highly stressed indices) that in our opinion is not adequately remunerated''. He said that it was preferable to review the position as a whole "taking into account all the different objectives

shared during the meetings (safeguarding assets, efficiency, lending value, etc.) while of course anticipating any actions that may require particular urgency".

307. The exchange also introduced Mr Nuzzo to the concept of a barrier which is impacted by the "worst of" a number of indices, and I consider that he would have understood this concept without difficulty. The indices in question were "Italian, Spanish and banking sector indices". These were not the more broadly-based indices on which the MINs and HFPOs relevant to these proceedings (both inside and outside the Skew Base Fund) were in due course based.

308. Mr Dalle Vedove's e-mail refers to various objectives having been shared during the meetings. The slides for the October 2016 meeting, described below, refers to "the achievement of shared goals". I consider that it is likely that there had been some general discussion at the September 2016 meeting, on each side of the table, as to what they were looking to achieve. However, I do not accept that, at this still relatively early stage, there was any precise statement by the Claimants as to what their particular objectives were. The references to "efficiency" reflect points made in the September presentation as to what XY would be aiming to achieve, if engaged by the Claimants. The reference to "safeguarding assets" (which appears in many later documents as well) could reflect what the Claimants said to XY as to one of their objectives, but is equally consistent with XY telling the Claimants that this was one of their aims, as reflected for example in their concern as to the Claimants' overweight (in XY's view) exposure to equities and in particular Italian equities. The reference to "lending value" is most likely reflected in a bullet point in Slide 7 of the October 2016 slides (discussed below), namely maintaining outstanding loans secured by financial assets; in other words, the use of Lombard credit. The reference to "etc" reflects the fact that there may have been discussion of other goals as well.

*26 October 2016 meeting*

309. The next meeting took place in London on 26 October 2016. The attendees were MDM, Mr Migani and Mr Dalle Vedove in person, and LDM and Mr Nuzzo by video. A further detailed slide presentation was prepared for the purposes of this meeting. The cover page referred to "Beauty Family Board". LDM was referred to in the presentation as "Beauty"; the di Montezomolo family office's Italian company Fisvi SRL as "Beauty SRL"; and GIG as "Beauty Ltd". It was common ground that, at the meeting and as recorded in the presentation, XY explained by way of background, certain conclusions that could be drawn from an analysis of the data concerning GIG's/LDM's financial assets, for example: that operational inefficiencies placed a burden on GIG's/LDM's portfolio; and that GIG's/LDM's portfolio had a high risk of erosion of asset value (the mathematical probability of a negative return over the course of a year was 49%). Otherwise, the scope of what was discussed, including as part of what was presented by XY, was disputed and was the subject of evidence from Mr Nuzzo, MDM, Mr Migani and Mr Dalle Vedove.

310. Mr Dalle Vedove described the purpose of this meeting as being to recap on the points discussed in September 2016, and to discuss potential options for how to achieve the clients' objectives, and to assess the clients' interest in each of those

categories of investments within each asset class. He said that he understood the objectives to be as set out in Slide 7, which identified a number of "shared goals":

> "BACKGROUND TO THE DETAILED STRATEGY
> - Designed an investment strategy with the goal of **directing the achievement of shared goals**:
>   - **Elimination of operational inefficiencies**, with a recurring benefit in excess of 550 K€ per year
>   - Generate a **clear and measurable monetary value**
>   - Maintaining outstanding **loans** secured by financial assets
> - The selected strategy provides **flexibility in the selection of financial institutions** to be involved; two hypothetical organizational models will be presented:
>   - The first privileges **existing relationships**
>   - The second introduces **elements of innovation** aimed at maximising the value that can be generated
> - Monitoring and reporting **technology** will be applicable whichever organisational model is chosen"

311. In cross-examination, Mr Nuzzo resisted the idea that these were "shared goals" and described them as the "goals that XY said we could reach with them". He said, for example, that operational efficiencies were something that XY had highlighted, but it was not something which they had asked for. I do not think that the list on Slide 7 was an exclusive list of the goals. For example, there is no reference, or at least express reference, to safeguarding assets, which was one of the points made in Mr Dalle Vedove's 26 September 2016 e-mail. I think that the goal of safeguarding assets is implicit in the September and October presentations as a whole and was a reason why XY were suggesting that there was too much exposure to equities. However, the list of "shared goals" on Slide 7 did indeed represent what XY were saying that they could aim to deliver.

312. I accept Mr Dalle Vedove's explanation in his witness statement as to what lay behind each of the goals. The first bullet point referred back to the inefficiencies previously identified in the September 2016 presentation. The second bullet point, referring to "clear and measurable" monetary value referred to the strategy to reduce unpredictability in the portfolio. This was elaborated upon in later slides, where XY introduced a balance with fixed return investments (i.e. structured products) alongside "expected return" investments (i.e. equities) which the clients wished to retain. The third sub-bullet refers to Lombard credit. The clients wanted to continue to be able to pledge their investment assets to counterparties in order to raise liquidity at short notice to make other investments. Mr Dalle Vedove said that, as matters developed, these were often "speculative opportunities" and not generally aligned with a strategy of predictable returns.

313. The slides, overall, reflect a strategy of diversification of assets. The heading to Slide 10 referred to the importance of continuing with currency diversification. Slide 13 set out a target allocation of financial assets in Euros. The total was € 35

million, to be split between the following asset classes: Expected Return (i.e. equities) € 10.5 million or 30%; Insurance Notes € 8.7 million (25%); Short Term Arbitration (which I understand to be synonymous with HFPO) € 8.7 million (25%); and Reinsurance € 7.1 million (20%).

314. The slide also set out figures for "Expected Net Return". In relation to "Expected Return" assets, the return was minus 10% to plus 15%, thereby reflecting the greater uncertainty with assets such as equities. The "Expected Net Return" for Insurance Notes, Short Term Arbitration, and Reinsurance was given individually (for example 4% - 6% for Short Term Arbitration), and also as an overall figure for the 3 classes collectively (3%/3.5%).

315. Slide 14 was then headed: "Focus on Insurance Notes" and it is likely that there was a further discussion about this type of structured product at the meeting. Mr Nuzzo's witness statement suggests that this was indeed discussed at the meeting. Slide 15 repeated the Slide 40 from the September 2016 meeting. Slide 41 gave a different example of a "recent insurance note exploiting opportunistic windows in the commodities market". This identified a barrier, set at 50% with two underlying commodities indices. A footnote identified that in case of a barrier event, performance was linked to the worst of the two indices. In fact, as Mr Migani accepted in evidence, this was actually a "worst of" note (i.e. an HFPO) rather than a MIN. Mr Migani went on to say that the mechanics of HFPOs and MINs are different, but they are all related to "tail events" i.e. the risk of an extreme event.

316. Slide 18 gave an "example of a recently implemented portfolio" of HFPO instruments, showing the distance from the barrier and also the annualised yield (totalling 7.5%). Slides 19 and 20 addressed reinsurance and referred to the types of risks covered by the reinsurance market, ranging from earthquakes to pandemics. In his evidence, MDM indicated that he was and indeed remained attracted to the reinsurance industry.

317. Slide 22 referred to the USD component. Mr Dalle Vedove made a fair point that XY did not propose changes to the clients' investments for discussion without good reason. Thus, no structured products were proposed for the USD component, bearing in mind that the market for USD bonds was different to that for Eurobonds, with investors in the former being adequately remunerated for the underlying credit risk.

318. Slide 25 onwards showed how investments might be balanced between fixed and expected return instruments. Slide 26 referred to a comparison of the financial institutions to be involved for the implementation of the strategy, and included the text: "Privileged Conditions Reserved for XY Customers". This expression was relied upon by the Claimants in the context of the independence issues, the contention being that the Skew Base Fund was explained to the Claimants in a similar way.

319. Mr Dalle Vedove said that the clients did not take any final decisions during the meeting. Mr Nuzzo did provide feedback afterwards, indicating that he and the family were interested in the ideas presented. In the event, however, the clients did not follow the proposed strategy in full. LDM did not wish to sell equities,

and the main action taken was to liquidate a portfolio held by an asset management company, Kairos. By the end of 2017, the fixed return component of the clients' estate was therefore around 50% rather than the 70% which was proposed.

320. Following the meeting, on 7 November 2016, Mr Nuzzo told Mr Dalle Vedove that the Kairos portfolio had been substantially liquidated. Mr Dalle Vedove said that, in relation to next steps, very attractive investment opportunities were opening up these days. He said that it was preferable for Mr Nuzzo to continue to deal with the "current institutions", UBS and UBP: in other words, the banks with which Mr Nuzzo had previously been dealing.

**D4: December 2016 and the 2 December 2016 video call**

321. On 28 November 2016, MDM e-mailed Mr Migani to request a meeting. There was then a video call between MDM and Mr Migani on 2 December 2016, during which MDM indicated that he wished to use XY's services for the purposes of investing some of his own personal wealth. MDM's personal wealth had not previously been the subject of discussion at the meetings, and XY at this point had only received data concerning the financial assets of GIG (and Fisvi) and LDM. There were no other participants on the call.

322. Subsequent to the call, Mr Migani sent a relatively lengthy e-mail to Mr Dalle Vedove informing him of what had been discussed. I consider that the e-mail is a fair reflection of what was discussed: it is contemporaneous with the call, and Mr Migani would have no reason to misinform his colleague, who was the "Minder" for the di Montezemolo family. Furthermore, MDM in cross-examination accepted that many of the matters recorded in the note were indeed discussed: for example, the £ 4 million in HSBC Guernsey.

323. I was provided with two competing translations of the e-mail, but there was generally no material difference between them. XY's case is that, at the meeting, MDM was introduced to the possibility of investing in what became the Skew Base Fund. Both translations say: "Very interested in our ad hoc vehicles".

324. The Italian original also says: "Gil accennato ad una struttura a che abbiamo con comparto lux e a detto sarebbe un sogno (ma io dico da capire la fiscalità)". The rival translations are:

> "I mentioned to him a structure we have with a lux compartment and he said it would be a dream (but I said we must understand taxation)" [XY translation].

And

> "He mentioned a structure that we have with the Lux sector and said it would be a dream (but I say we must understand the taxation)". [Claimants' translation]."

325. This passage is relevant to the question of whether there was any discussion at the meeting of the Skew Base Fund, and, if so, what Mr Migani said about it. I consider that, in context, the XY translation is more likely to reflect what was said. It is improbable that it was MDM who mentioned the structure which Mr Migani had in Luxembourg: it must have been Mr Migani who said it. Equally the reference to "comparto" is, in context, better translated as "compartment" rather than sector, given that the proposed fund was going to have compartments. I accept Mr Migani's evidence that he referred to "a structure that we have with a Luxembourg compartment".

326. The e-mail as a whole is relevant to issues concerning the family's approach to investment prior to the 2 December call, and MDM's approach as well. I will therefore set it out in full:

> "• has an SRL [limited company] based in Italy and supported by UBS in which there is approximately €22 M all liquid that he wants to invest. They are not collateralised with anything and maybe tomorrow he could make small entrepreneurial investments of €1- 2M by pulling Lombard (credit), but not in the short term. The company is in Italy, but he wants to move it abroad, optimising taxation as a non-dom resident. Ideally he would also like to take the company apart, distributing the profit. He wouldn't want to pay any income tax generated from this €22M. He said that he's a reasonable and good family man, this is the family's little treasure. In Italy, he never filed financial statements even if he has to pay a fine for this. Phase 1 invest and Phase 2 evaluate the relocation. They[3] told him about Lux. and Malta. You are following the Erede firm (interesting as a top introducer). Very interested in our "ad hoc" vehicles. The tax relocation must be secure and unattackable but fiscally efficient. I mentioned to him a structure we have with a lux compartment and he said it would be a dream (but I say we must understand the taxation). I told him I would avoid Malta for reputational reasons.
>
> • He generally says he has doubled his capital from 11 M to 22 M over the past 11 years and he would like to keep the same growth. I told him that we need to take into account period inflation and calculate the real premium on inflation, which can be a reference to consider as an ambitious goal.
>
> • He wants strategies that are as conservative as for his father... even small growth as long as it's consistent
>
> • this part is also secret from Nuzzo and we must use another alias like "father of the family".

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[3] The XY translation was uncertain as to whether this was "They" or "I". The Claimants' translation was "They", and I consider that the context supports this.

> • HSBC Guernsey has 4 M GBP (or EUR), it is not understood whether they are invested or not. He then has a 4.2 M GBP mortgage on his London home where he pays 2.5% + LIBOR. If he repays 1.2 M GBP (no penalty) his cost is 1.9 M GB.
>
> • He earns 300 K GBP of which 100 K GBP for mortgage, 100 for family and other miscellaneous expenses. He would like to better invest the 4 M GBP and generate income that pays some of the mortgage.
>
> • In Italy he has a BNL account worth €1.3 M, but due to various expenditures it has an absorption of €250 K per year. Through the distribution of a profit of €1.3 M, they will increase to €2.5 M. He asked me if he could cover the €250K expenditure with the €2.5M yield, I told him that 10% is impossible and he understood that it was impossible.
>
> • I asked him who could be the contact person to facilitate communication activities with him and he told me about his Charms man, Matteo Facoetti, who acts as an aide.
>
> • He said he can be contacted by phone at any time for orders and he would like to start up right away with the operation... he was very excited. On UBS Italy he said we can change it if we want it without any problems. Free rein.
>
> • He then has another 10-15 M he will give us (but let's pretend this isn't there for now)"

327. MDM's evidence in his witness statement was that the video meeting was with both Mr Migani and Mr Dalle Vedove. He accepted, however, that Mr Dalle Vedove was not present at the meeting. He said that they confirmed that they were willing to work with him and SRL and "that they were in line with investing my liquidity according to the same guidelines discussed previously: high liquidity in my portfolio, low returns and to safeguard my capital''. He said that XY proposed the name "Daddy", and this was fine. He did not recall asking XY to grow SRL's capital. He gave guidance to XY to protect his savings in a safe way. He asked for low returns "and made clear to them that I wanted to live my life only using those returns and not touching my capital". Neither of them mentioned any relationship between XY and Skew Base Fund at that or any other meetings: the meetings "were always focused on the products". He did not recall the benefits of investing specifically in Luxembourg.

328. In cross-examination, MDM was asked about a number of aspects of the note. He was asked about the reference to Lombard credit. He said that he was not really familiar with Lombard credit until he started working with XY. When cross-examined about "a structure we have with a Lux compartment", MDM said that he didn't think that they spoke about structures. He was asked about the reference to "[They] told him about Lux and Malta", and it was suggested that somebody

had been talking to MDM about Luxembourg and Malta as jurisdictions for fund investments. MDM said that he honestly did not remember. Nor did he remember whether, at the meeting, Mr Migani mentioned the possibility of investing in a Luxembourg fund. But he said that he would not have used the expression that this would be a dream. Whilst he could not remember whether Mr Migani mentioned the possibility of investing in a Luxembourg fund, MDM was clear that he did not say that he was the person behind the fund.

329. Mr Migani's evidence, in his witness statement, was that all he knew in advance of the call was that what MDM wanted to talk about was personal and did not relate to his family's estate. He said that, at the start of the call, MDM said that he was interested in collaborating with XY to provide assistance with his personal global estate. He was interested in XY's consultancy services, rather than technology solutions. He made a firm request never to say anything to Mr Nuzzo or LDM about his personal matters. He said that he wanted to substantially increase the size of his personal global estate, to double its size within an 11-year period. He explained that SRL was an Italian personal company belonging to him. He wanted to minimise the number of transactions that SRL was involved in, because lots of activity would risk SRL being audited by the Italian tax authorities. To achieve that, MDM was thinking about SRL investing through a fund, because this would involve fewer transactions than investing directly.

330. Mr Migani said that he was asked for his thoughts, including on a specific idea that he had about creating a dedicated investment fund in Malta. Mr Migani said that it was important to manage this type of structure carefully, and that choosing Malta would be a reputational risk. He said this because he thought that other jurisdictions, such as Luxembourg and Switzerland were more reputable and stable.

331. Mr Migani then told MDM about a project he was working on, to set up a fund in Luxembourg as an entrepreneur. He said that this fund would be aligned with high standards, in contrast to the fund in Malta which MDM had told him about, that this was "a project of mine", and that it would be easy and fast to create a dedicated compartment in that fund which could be specific to MDM. This was what became the Skew Base Fund, but he did not call it that on this call.

332. Mr Migani said that MDM was enthusiastic about the idea of the Luxembourg fund. He was told that it was not yet live, and MDM responded that he wanted Mr Migani to be very quick in supporting him with this, to start producing results. They agreed that he would send him a list of the information required, so that he could move quickly when the fund went live.

333. Mr Migani said that his e-mail reflected MDM having inconsistent objectives, given economic realities. He referred to prudent strategies ("strategie prudenti", translated as conservative strategies), but was also targeting a doubling of the capital such as had been achieved in the last 11 years. He also asked about achieving a 10% return in order to cover € 250,000 expenses, but was told that this was impossible.

334. Mr Migani was cross-examined in particular about whether he told MDM that he was the person behind the fund. He said that he remembered MDM saying that

he was looking at the possibility of creating a fund in Malta, "to minimise the transaction at the level of SRL". Mr Migani had then told him that he was working on projects as an entrepreneur, these products consisting of creating a Luxembourg based fund. He said that he suggested using a dedicated compartment, which would have been much easier than creating a fund from zero. He was insistent that he had said that it was his project, and that he was the entrepreneur of this project.

*2 December 2016 call: discussion*

335. The 2 December call is of importance in relation to the issues of both independence and investment objectives.

336. In relation to the independence issues, it is clear from the note that there was a discussion of the Luxembourg fund which Mr Migani was in the process of creating. The reference to a "lux compartment" is clearly a reference to what became called the Skew Base Fund, with compartments. The note indicates that the discussion arose after MDM had referred to others having told him about Luxembourg and Malta, and this is supportive of Mr Migani's evidence that MDM was himself talking about putting money into funds in one of those jurisdictions. There is nothing in the evidence which suggests that Mr Migani was contemplating anything in Malta, and therefore this is indeed likely to have come from MDM.

337. The most important part of the note is the reference to MDM being interested in "our ad hoc vehicles", and "a structure that we have with a lux compartment". This wording does strongly suggest, in my view, that Mr Migani was telling MDM about his or XY's connections with the vehicles and the structure: the vehicles and the structure were theirs. This supports the view that Mr Migani would have told MDM, as he said in evidence, that this was his project and he was the entrepreneur behind it. The note is certainly consistent with that having been said. When I come to consider the inherent probabilities and other aspects of the evidence in more detail (see Section H below), I conclude that MDM (and indeed Mr Nuzzo at a later stage) were indeed told that Mr Migani was the person behind the fund. Looking at the evidence in the round, I accept Mr Migani's evidence as to what he said to MDM on the occasion of the 2 December call.

338. If this had been said by Mr Migani, I do not consider that it would have struck alarm bells with MDM, or that it would have put him off investing in the proposed fund. MDM was interested in investing in a fund, and I accept that one reason for this was to reduce the number of transactions that SRL was undertaking. The idea of the fund seemed to him, at the time, to be a very good idea; hence the reference to it being a "dream"; a word that I see no reason for Mr Migani reporting, unless it had actually been said. I do not consider that, at the time, MDM would have been particularly concerned about a potential conflict of interest between XY's role in providing consulting services to him, and Mr Migani's interest in the fund as the entrepreneur behind it. In my view, what MDM was interested in was the opportunity to make good investments. He was not focused on XY's "independence" or absence of conflicts of interest. He had never looked at XY's website, and the reference to XY's independence, lack of bias, and the absence of conflicts had been mentioned to him only in passing in one conversation, nearly

7 months earlier, by Mr Nuzzo. There had been no further discussion about this in any of the subsequent meetings.

339. Mr Migani also referred in his evidence, in relation to the 2 December 2016 video call, to the conversations that he was having with other clients at around this time and into early 2017, and how the idea of an umbrella fund with dedicated compartments was well received. There is evidence (discussed in Section H below) from a number of people who invested in what became the Skew Base Fund that they were told of Mr Migani's connection to the fund, and that they regarded this positively. If (as I consider to be established on the evidence) other investors were being told about the connection, there was no obvious reason why Mr Migani should not give the same information to MDM. It is true, as Mr Saoul submitted, that the relationship with the family was new, and with MDM personally only just beginning. However, that alone would not have been a reason to treat MDM as a person who needed to be treated with particular caution, as far as concerns revealing Mr Migani's connection to the proposed fund. That might have been the case if the evidence showed that it was apparent to Mr Migani that MDM and/or Mr Nuzzo were paying particular attention to the question of conflicts of interest and independence on the part of XY. However, that had not been the subject of discussion at any of the meetings, save for the fact that it had been referred to in Mr Migani's introduction at the short meet and greet meeting in May 2016.

340. In relation to the investment objectives, the note of the 2 December 2016 call paints something of a mixed picture. It does indicate that there was a desire on the part of MDM to preserve the family's capital: the phrase "buon padre di famiglia" (translated as reasonable and good family man but known to some by the Latin phrase "bonus paterfamilias"), looking after the family's little treasure. However, it is obvious that MDM was not interested in simply trying to preserve that money for the future, for example by putting it in the bank or investing only in investment grade bonds. Neither of those strategies would have preserved capital in any event. The value of the money in a bank would be reduced by inflation, and the evidence indicates that, at that time, the yield on investment grade securities was negative after costs. Furthermore, MDM was talking about using the income from his assets to fund reasonably substantial living expenses, both in England and Italy. Unless income could be generated to meet those expenses, the capital would be eroded by the need to do so, at least unless there was another substantial source of income. Furthermore, it appears that MDM was also interested in growth of the assets. The note indicates that he was looking to keep the same growth as had been achieved in the past 11 years, where the assets had doubled from € 11 million to € 22 million. On any view, and even leaving aside MDM's desire to fund expenses from the income of the assets, this was an ambitious goal, as Mr Migani told him.

341. The note does go on to record that he wanted "strategies that are as conservative as for his father". This provides support for the evidence of LDM that, at prior meetings which LDM attended, he had asked for a conservative approach from XY. However, the note also indicates that MDM was looking for small consistent growth. I also had some sympathy with Mr Migani's point, in cross-examination, as to the somewhat subjective nature of the concept of a conservative strategy.

Mr Migani there made the point that the existing assets of GIG and LDM, as shown on the slides for the earlier meetings, were heavily weighted towards Italian equities, with a substantial amount invested in a single Italian company. It can certainly be said, as Mr Migani suggested, that this is not a conservative approach.

*2 – 14 December 2016*

342. Subsequent to the 2 December 2016 call, MDM involved Mr Facoetti in the process, which then began, of XY obtaining financial data as to MDM's assets. Mr Facoetti was at the time, and still is, the CFO of Charme Capital. He is also a member of the investment committee of Charme, and had previously been CFO of a number of private equity funds. As described above (Section B), he also assisted MDM with aspects of his personal financial affairs. Mr Facoetti is an economics graduate of Bocconi University, an advisor, and is also an officer or board member of a number of companies owned directly or indirectly by MDM.

343. Mr Migani's evidence was that there was then a call on 12 December involving Mr Facoetti and Mr Dalle Vedove. He said that during the call, MDM gave more information about his spending needs, including personal expenses and liabilities such as mortgages, and that he wanted to cover those expenses with returns generated by his assets. He also said that he wanted to invest and start generating returns quickly, and also that he needed to access Lombard credit to invest in other opportunities (Mr Migani said that he used the word "speculative" opportunities) when they came up. He also wanted cash available from Lombard credit to buy currency, shares or invest in private equity opportunities at short notice. Otherwise, the call was focused on data collection.

344. In my view, this evidence (which I accept) is consistent with the documentary evidence: in particular the note of the 2 December 2016 call, and then the meeting slides for the January 2017 meeting. It also accords with Mr Dalle Vedove's 14 December e-mail (discussed below) as well as the fact that investments started to be made by SRL relatively early in 2017.

345. On 14 December 2016, Mr Dalle Vedove sent the following e-mail to MDM:

> "Following the call on Monday, we inform you that we have already started the dialogue with the institutions and acquired the financial statement information on the SrL.
>
> Since the times for architectural evolution will not be immediate, we would immediately proceed with the gradual investment of available liquidity, as per reflections also shared with Dr. Migani.
> We have already identified some early investment opportunities consistent with safeguards, characterised by very short maturities, high liquidability and target returns in the range of 2%-4%. The opportunities are in line with those we have had the opportunity to share in meetings focused on [your] father's heritage.

> In this first phase, we would start investing in UBS, waiting to acquire data from other institutions and make more in-depth thoughts on the overall balance of assets.
>
> If you agree, we will start routing these transactions, which you will then confirm with the bank.
>
> We are obviously available for a quick alignment call if you think it is appropriate."

346. In cross-examination on this document, Mr Dalle Vedove said that he understood that MDM wanted investment opportunities similar to those that had been proposed in the previous months to his father and to GIG, and that these opportunities were consistent with safeguards characterised by very short maturities, high liquidability and target returns in the range of 2 – 4%.

347. He also said that the reference to "safeguards", that appears in this and other documents, should not be taken as meaning "low-risk". He said that the expression "safeguard-oriented", which appears in the March 2017 slide presentation discussed below, meant that the goal was to limit as much as possible the probability of negative returns and that the goal was to have stable and as predictable as possible returns. Mr Migani said that when they used the word "safeguarding", it meant a low probability of losing money.

*22 December 2016*

348. There was a further call on 22 December 2016. Mr Migani's evidence was that, prior to the call, he sent Mr Dalle Vedove an e-mail containing his thoughts on what had been discussed in the earlier call. The e-mail contained reference to how MDM's € 22 million was to be invested, with € 3 million in "speculative equity things". It also said: "Do speculative things with Lombard if needed", and "You define strategy based on my objectives". It referred to the amount of MDM's English expenses being £ 300,000, and that MDM paid for boats and other things in Italy.

## D5: January 2017

*12 January 2017 meeting*

349. In December 2016 and early 2017 MDM provided information to XY about his personal financial position. MDM signed mandates granting XY authority to obtain information about MDM's accounts and investments directly from the relevant banks. GIG and LDM also signed similar mandates.

350. MDM met XY again on 12 January 2017. This meeting, concerning MDM's personal assets (including those of SRL), was held in London, and attended there by MDM, and by Mr Migani and Mr Dalle Vedove. Stefano Sampietro and Valeria Talleri of the XY Group joined by video-link from Switzerland. Mr Migani had asked them to join because he knew that MDM wanted to discuss tax and restructuring issues during this meeting. Mr Facoetti was also present, either

in person or by video-link. Tax issues were a recurring theme of the presentations in relation to MDM's assets and investments, but it is not necessary to discuss the tax issues in any detail.

351. XY had prepared a detailed set of slides. Slide 3 identified the total assets of MDM (including SRL) as being € 29.7 million, with liabilities (principally mortgages) of € 9.7 million. Slide 4 then identified the "Italian Asset Goals". There were 3 bullet points at the bottom of the slide:

> "•To generate regular and measurable growth in the real purchasing power of assets with safeguard-oriented and readily liquidated investment strategies
>
> •Enable rapid implementation of equity investments of companies designated by Daddy when the opportunity presents itself
>
> •Addressing Italian expenditure needs, which can be quantified at around €250 K/year''

352. Mr Facoetti readily accepted, in cross-examination, that these were MDM's "main" objectives. In his evidence, MDM said that these were not all of the goals, but they were a "good starting point". He was willing to accept that the third bullet (addressing Italian expenditure needs of around € 250,000) was a goal, but he described it as a "B" goal. He described the "A" or tier 1 goals as preservation of capital, high liquidity and low risk. I do not accept that there were "A" and "B" goals. I consider that the three goals identified in the slide did represent MDM's objectives at that time, and that addressing the Italian expenditure needs was an important objective for him.

353. Slide 5 set out the UK asset goals. A bullet point at the bottom of the page stated:

> "• Generate a recurring annual flow, in addition to Daddy's salary, to meet UK expenditure needs, which can be quantified at around 300K GBP/year and the progressive repayment of the UK mortgage''

354. Again, I consider that this was an important objective for MDM at that time, although I accept that it was not the only objective. The other bullet points on Slide 3 were equally applicable to the UK assets.

355. Whilst there is some overlap between the Claimants' pleaded Investment Objectives, and the goals as set out in this slide, they are not exactly the same – which is why MDM sought to relegate certain objectives into "B" goals. There are, here, specific figures for expenses as a goal for the investment strategy. It was also a goal to "generate regular and measurable growth in the real purchasing power of assets". MDM's desire to increase the value of his assets, whilst at the same time meeting his expenditure needs, is also reflected in the note of the 2 December 2016 conversation.

356. Slide 10 was headed "Target Investment Strategy Consistent with Shared Goals and Current Market Environment". The first line of the slide was:

> "Objective to create monetary value net of operating costs > 0.7 M€ per year"

357. The investment strategy then divided the € 29.7 million into Insurance Notes (€ 10.4 million (35% of the whole)); High Frequency Price Opportunity (also € 10.4 million (35%), and Reinsurance (€ 8.9 million (35%)). At the foot of the page, the profitability of each element was set out, so as to produce € 700,000 - € 1 million in total, with the most profitable being the HFPO segment with a yield of 3.0% - 4.5%. The final line of the slide said: "In all cases, selection of highly liquidable and efficient instruments for UK RND [i.e. non-domiciled resident] taxation''.

358. Slide 11 identified the activities which had already been started, to implement the investment strategy. That included selected insurance notes via a beauty contest involving over 15 leading financial institutions. These would have an annual yield of around 3%.

359. MDM was asked about that slide in cross-examination, and it was put to him that he clearly understood what those products were about. He said that he did not. He said that, at the time of this meeting, he did not understand what a barrier was. He did not understand it from the January 2017 meeting, nor from the previous meetings. He said, in response to my questions, that at the time of the meeting he did not understand how either the market insurance notes or the HFPOs worked. He described having a "general understanding" from the meetings, but that even now he thinks that they have been created in a way that is "not a common way to understand". Even after 8 years, he still could not say how they really worked.

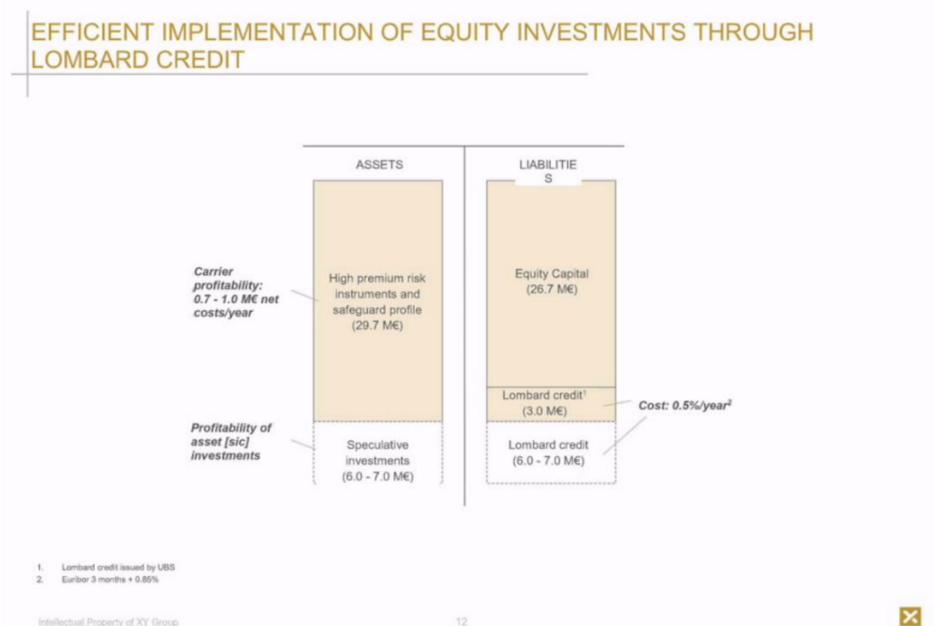
360. I found much of this evidence very surprising, and cannot accept it. Mr Nuzzo's evidence was that the MINs had been explained at prior meetings, and he understood the concept of a barrier in a MIN. I have no doubt that he understood the basic way in which MINs worked, and that the capital invested in the MINs was at risk if there was an extreme event. I accept that there is little in the evidence, or in the presentations themselves, which establishes that XY explained to the Claimants the exact way in which HFPOs worked. However, it was clear that those products involved barriers, and Mr Nuzzo's evidence was that he understood them to be very similar to MINs. He therefore understood that a breach of the barrier would potentially mean that the capital invested in the HFPOs was at risk in a significant way. Mr Nuzzo was interested in the HFPO-type products proposed by Mr Presta (see 26 September 2016 above, and 14 February 2017 below), and Mr Nuzzo would have understood the importance of the value of the underlying index or asset at the maturity of the instrument.

361. MDM is an extremely intelligent and experienced financial services professional, running private equity funds which have raised around USD 2 billion. It would be very surprising indeed if he were to be contemplating investing around € 10 million in market insurance notes, and another € 10 million in HFPOs, without an understanding of what these products were about, and in particular the significance of the barrier in the products. This was his third meeting with XY,

and there had also been some phone calls in December 2016. There was, therefore, plenty of opportunity for MDM to have asked for an explanation if he had very little understanding of the way in which these products, being proposed by XY as part of the investment strategy, would work. I do not accept that MDM had by this stage built up such a degree of trust with XY that he would not wish to have understood the nature of the structured products that they were proposing, and the nature of the risk that was being run by investing in such products.

362. The bottom half of Slide 11 stated that XY had aligned the contracts and commissions of UBS "under privileged conditions reserved for XY clients", and this had resulted in a reduction of fees.

363. Slide 12, set out below, referred to the efficient implementation of equity investments through Lombard credit, with a portion of assets of € 6 – 7 million (over and above the € 29.7 million which then existed) as "speculative investments", and some Lombard credit on the liabilities side:




364. Slide 12 therefore distinguished between "High premium risk instruments and safeguard profile" and "Speculative investments". The MINs and HFPOs (as well as the reinsurance instruments), where the proposed investment was € 29.7 million, came within the high premium risk instruments and safeguard profile. Those instruments were not viewed by XY, or indeed any of the parties, as speculative investments. The reference to "high premium risk" was not intended to denote that these instruments were at high risk of loss. Rather, the point was that they commanded a high premium (much better than the coupon on ordinary corporate bonds, for example) for the risk that was being undertaken. The expression therefore made it clear that, as would in any event have been obvious to MDM, there was indeed a risk attached to the proposed instruments.

365. The right-hand column of Slide 12 envisaged that Lombard credit, to be provided by UBS, would be employed to fund a portion of € 29.7 million. It would also be used to finance the "speculative investments" in full. This was a reference to MDM's desire to invest in equities. One of the goals on Slide 4 was the "rapid implementation of equity investments designated by Daddy when the opportunity presents itself". In his evidence, MDM agreed that he wanted to do this in "companies I know I like".

366. There was no reference in any of the slides to the Luxembourg compartment, or to a RAIF (i.e. Reserved Alternative Investment Fund). Mr Dalle Vedove does not suggest, in his evidence, that this was discussed. Mr Migani's evidence is that it was, and he referred in his witness statement (wrongly) to a slide referring to "RAIF". It is possible that there was some discussion of the Luxembourg fund at this meeting, as Mr Migani suggested in his evidence. It had been discussed in December 2016, and the topic might have arisen in the context of the discussion (reflected in the PowerPoint) about the "numerous inefficiencies" arising from holding financial assets and holdings through SRL. However, it was not referred to in the next slide presentation (on 31 January 2017), and I think that the evidence as a whole does not enable me to conclude that the RAIF was discussed at this meeting.

*The investment objectives*

367. I pause my description of the narrative at this stage in order to consider how matters stood, as far as concerns the Claimants' investment objectives, as at mid-January 2017.

368. The Claimants' pleaded case is that, at the very first meeting in May 2016, Mr Nuzzo explained that the di Montezemolo family took a reasonably conservative approach to investments of the family assets and that its investment objectives were to: (i) preserve capital; (ii) invest in highly liquid products, and (iii) generate modest periodic returns. These are defined by the Claimants as the Investment Objectives (see Section A). The RAPOC goes on to refer to this trilogy of Investment Objectives having been discussed at subsequent meetings. Thus, XY is alleged to have advised the Claimants at the September 2016 meeting that the strategy XY was recommending was "consistent with the Investment Objectives". Similarly, at the October 2016 meeting, XY is alleged to have said that the proposed investments were consistent with the Investment Objectives. At the 2 December 2016 meeting, MDM is alleged to "have confirmed to Mr Migani that his objectives in [regard to his personal investments] were the Investment Objectives".

369. There can be no doubt that there were discussions in the period prior to January 2017, participated in by both sides, as to what they wished or were trying to achieve. I accept that the Claimants would have given a broad indication of their approach to investments, and their overall objectives, as part of the discussion. Indeed, in their witness statements, Mr Migani and Mr Dalle Vedove describe their understanding of the Claimants' investment objectives, at around the end of 2016.

370. Mr Migani said that there were two important principles that he took from the meetings in September and October 2016 concerning GIG's objectives, and the attitude of Mr Nuzzo and MDM to risk. He said that most important was the level of return. Secondly, there was liquidity, with a focus on being able to pledge instruments and raise capital for speculative investment opportunities at short notice.

371. Mr Dalle Vedove said that he believed that the clients' investment objectives were as presented on Slide 7 of the October 2016 meeting. The Claimants did not say, in 2016, that they needed to achieve a particular return target, although later in the relationship they did make more specific demands about the percentage returns that they wanted to achieve. He said that the clients were very focused on Lombard credit and whether their assets could be pledged. They were not focused on liquidity in terms of being able to exit investments quickly, but rather on being able to pledge their investments to other institutions in order to obtain Lombard credit at short notice. He said that they also held many high-risk investments, including single stock equities.

372. In my view, the Claimants' investment objectives, as communicated to XY, were not rigidly defined in terms of the three pleaded Investment Objectives, although aspects of those three objectives were communicated to XY. Moreover, those aspects were not the only objectives which were communicated. I consider that there was an iterative process as the discussions proceeded. This is consistent with the point made by MDM when he was being asked about the goals set out in the slides for the 12 January 2017 meeting. He said:

> "In the further meetings there were sessions that were … advancing every time. So you cannot take a meeting as, each of the time, the definitive meeting. So what is written in this presentation is the last point of four years of work together, especially after we met after only two months. So it's an advancing, a brain-storming of evaluations, of discussions, and then arriving at what is the strategy".

373. I think that this comment applies not only to the period after January 2017, but also to the period leading up to and including that meeting. Hence, one sees a variety of objectives being discussed in the documentation. The safeguarding of assets was one of the objectives communicated by the Claimants and indeed agreed upon: Mr Dalle Vedove's e-mail of 14 December 2016 refers to "investment opportunities consistent with safeguards", and the 12 January 2017 slides refer to "safeguard-oriented".

374. A high level of liquidity was another objective communicated and agreed upon: Mr Dalle Vedove's e-mail of 14 December 2016 refers (in translation) to "high liquidability" (i.e. high liquidity), and the 12 January 2017 slides refer to "readily liquidated investment strategies". It may be that an important reason for "high liquidity" was, as Mr Dalle Vedove's evidence indicated, the ability to raise money for other investments that MDM (or the other Claimants) wanted to make: the 12 January 2017 slides refer to the rapid implementation of equity investments. The October 2016 slides refer to "maintaining outstanding loans

secured by financial assets". However, I accept the evidence of MDM and Mr Facoetti that this was not the only reason for the desire for liquidity, and that another reason was to be able to sell investments if a market storm was coming. I also accept their evidence that XY indicated that their technological approach enabled them to anticipate market storms.

375. There was also some discussion as to the level of return that was hoped to be achieved. I accept Mr Dalle Vedove's evidence that the Claimants did not specify, at this stage, a particular rate of return. The basic objective, as set out in Slide 7 of the October 2016 presentation, was to generate a "clear and measurable monetary value". There was some discussion of the figure of 2% - 4% referred to in Mr Dalle Vedove's 14 December 2016 e-mail, but it is not clear whether this was a target return for the fixed asset component or for the investment strategy as a whole. I am inclined to think that it was the former. Slide 13 of the October 2016 slide identifies an overall return on fixed assets of 3% - 3.5%, with insurance notes being 2.5% - 3%. The slide also gives a figure for the return on all the financial assets, including the € 10.4 million to be invested in "Expected Return" assets (i.e. equities), where there was a greater upside and potential downside (minus 10% to plus 15%). XY's figure was 0% to 7% for the assets as a whole.

376. There were, however, other objectives. The October 2016 slides referred to the elimination of operational efficiencies, with a recurring benefit in excess of € 550,000 per year. In his conversation with Mr Migani in December 2016, MDM was looking for some (possibly considerable) growth in the value of his assets. This was also referred to in the January 2017 slides ("generate regular and measurable growth in the real purchasing power of assets"). However, it is not clear that this was an objective identified by GIG in the earlier meetings: it appears to have been an objective introduced by MDM when dealing with his personal assets. There was also the objective of meeting MDM's expenses, with a target (Slide 10 of the January 2017 slides) of € 700,000 a year after operating costs. The same slide referred to € 0.7 - € 1 million, as being the profitability: a figure that would represent 2.5% - 3.5% of the € 29.7 million asset total.

*18 January 2017*

377. On 18 January 2017, Mr Dalle Vedove e-mailed MDM saying:

> "warn you that later today you will be contacted by UBS to confirm Purchase of the two insurance notes, as shared in last week's meeting".

378. Brief details of the two notes were then set out. This included the yield (here 3% and 3.08%), and the duration of the note (here, 1 year, which was typical of the MINs). It did not included details of the barrier. However, as described below, the barrier was identified to MDM and Mr Facoetti at the 31 January 2017 meeting. The parties helpfully agreed a schedule which contained references to all of the non-Skew Base Fund investments which were made by the Claimants. This included details of when the detailed term sheets for each instrument were provided to the Claimants. In the case of some instruments, the term sheets were provided at the time when the trade was concluded. In the case of these two instruments, the term sheets were not provided until later. In the case of many

instruments, the schedule indicates that the term sheets were not provided at all, and there was (generally speaking) no request from Mr Facoetti, or indeed Mr Nuzzo, for the term sheets.

379. In the case of the two MINs referred to in Mr Dalle Vedove's e-mail of 18 January 2017, the term sheets were provided 2 months after the trade date, when they were sent to Mr Facoetti.

380. The term sheets for these particular instruments are, it is fair to say, lengthy and complex. On page 7, under a heading "Performance of Formula, Explanation of Effect on Value of Investment" is the text:

> "Investment in Certificates including fixed interest rate involves risks linked to the fluctuation of the market rates which could have negative effect on the value of these Certificates".

At the bottom of that section, in bold text, is the statement:

> "**The attention of the investors is drawn to the fact that they could sustain an entire or a partial loss of their investment.**"

381. These were the first transactions concluded in implementing the strategy discussed at the January 2017 meeting, and indeed the first transaction concluded by any of the Claimants pursuant to their discussions with XY.

*23 January 2017: reinsurance instruments*

382. On 23 January 2017, Mr Dalle Vedove wrote to MDM (copying Mr Facoetti), to state that "following up on what we shared at our last meeting in London, we arranged with UBS the investment of part of SrL's liquidity in instruments operating in natural catastrophe reinsurance". The e-mail identified 3 instruments comprising a total amount of € 5 million. Two of the three instruments were described as "Cat Bond", indicating that these were indeed catastrophe reinsurance instruments. Mr Dalle Vedove said that he anticipated that MDM would be contacted by the bank to confirm orders by telephone. He said that in order to finalise the transaction, "we ask you the courtesy of", amongst other things, signing documents which were attached. The UBS order standard forms for the purchase/sale of financial instruments had been completed by one of Mr Dalle Vedove's colleagues at XY. Mr Facoetti responded to the e-mail by asking if it was OK if "we sign and send tomorrow morning".

383. I note a number of features of this transaction, which is the second transaction concluded by SRL following the January 2017 meeting.

384. First, the nature of the instruments was catastrophe reinsurance. There was no significant focus in the trial on instruments of this type, which were one of the components of the proposed strategy contained in the January 2017 slide presentation. The fact that MDM was willing to purchase instruments of this kind, where the underlying risk was natural catastrophes, indicates that MDM was not pursuing a strategy which was risk-free.

385. Secondly, there was some cross-examination directed at whether or not XY was "advising" MDM to conclude these transactions. Mr Dalle Vedove, in cross-examination, disagreed with the proposition that this was "advice" or a "recommendation". He said, in summary, that there must have been a discussion about these instruments at the January meeting, and that what XY was doing was supporting the implementation of the strategy which had then been discussed. As he said: "our goal is to support the client with the design, with the implementation and with the control of the investment strategy", and he explained that control was in the sense of monitoring and checking.

386. The question of whether XY was recommending or advising the Claimants to enter into these, and similar instruments, is relevant to the non-fraud claims and in particular the claims based on breach of Conduct of Business Sourcebook ("COBS"). In Section K below, I consider the question of whether this is to be analysed as advice or a recommendation to enter into these particular instruments, in the context of COBS rules and more generally. The answer requires consideration of the English case-law concerning what amounts to advice or investment advice. I conclude that, looking at matters in the round, investment advice was being given as and when XY proposed particular instruments which in their view fitted the strategy which had previously been advised.

387. This does not appear to have been the way that Mr Dalle Vedove looked at it at the time. He seems to have considered that the position was that XY's advice related to the strategy, and the second stage of the process was the provision of assistance in implementing the strategy. The general pattern was that XY would send an e-mail in which they identified investments to MDM or Mr Nuzzo, and a brief summary of the instrument was given, including its yield and duration. Generally speaking, XY would not use words which said that they "advised" or "recommended" that the transaction should be concluded. Rather, they would say (words to the effect) that investment had been identified as part of the MIN or HFPO strategy, and that the banking counterparty to the instrument would then be in touch directly with MDM or Mr Nuzzo. The final decision as to whether to conclude a transaction was therefore taken either by MDM or Mr Nuzzo. XY would not conclude the contract.

388. Although I reject the approach of Mr Dalle Vedove as a matter of law (see Section K below), I do not consider that (as Mr Saoul suggested in cross-examination of Mr Dalle Vedove on this issue) Mr Dalle Vedove's evidence – that this was not "advice" – was "ridiculous". For present purposes, I will use the relatively neutral expression used by Mr Dalle Vedove and others; namely that the investments were "proposed" by XY.

389. Thirdly, the Claimants relied upon the fact that, for these instruments and indeed for other investments as matters moved forward (and in particular the investments in the Skew Base Fund), XY assisted in completion of the relevant forms which needed to be signed. It is clear that that happened. However, I do not think that the assistance provided demonstrates that the Claimants were entirely unthinking in their approach, or were wholly reliant on XY for their decision-making. Nor does it mean, for example, that it was unnecessary for MDM to read the Skew Base Offering Memorandum, or the risk warnings contained therein, or indeed

the declaration that he was making when he agreed to invest in the Skew Base Fund.

*31 January 2017*

390. There was a meeting on 31 January attended by Mr Migani, Mr Dalle Vedove, MDM, Mr Facoetti, Mr Sampietro and Ms Talleri. The slides for the meeting were headed: "Update on Tax Issues". Mr Dalle Vedove described it as a meeting to discuss a specific topic, which was taxation. Most of the slides deal with that topic. Some slides, however, referred to the investment strategy. One slide referred to: "Already initiated liquidity investment consistent with shared target strategy". This identified the 3 reinsurance instruments as well as the two insurance notes (i.e. MINs) totalling € 1.5 million, described above. They were identified under the heading: "Highly liquidable and efficient instruments selected for UK RND taxation".

391. The insurance notes were described as having diversification on two primary indices, namely the S&P 500 and Euro Stoxx 50, and also as having "Safeguard-oriented barriers (12.5% and 10%)". For reasons already given, I consider that both MDM and Mr Facoetti must have understood the nature of a barrier, and in general terms how these instruments worked.

392. Mr Migani's evidence was that there was discussion at this meeting of MDM's decision to proceed with a dedicated compartment. I am not persuaded that this was discussed at the meeting. It is not supported by Mr Dalle Vedove's evidence or any contemporaneous document. The slides for the meeting do not suggest that the RAIF, or compartments, were on the agenda for discussion.

## D6: February – March 2017

*February 2017: further MINs concluded by SRL*

393. Two further MIN transactions were concluded by SRL in February 2017.

394. On 9 February 2017, Mr Dalle Vedove wrote to MDM to advise that "an additional investment opportunity has been identified in the area of insurance notes. The deal is already shared with UBS, which will try to contact [you] later today to confirm the purchase". The e-mail contained a table which identified the product as a "Stability on Nikkei 2.95% 02/2018". In other words, the note would expire (and the coupon be paid) in a year's time.

395. The Term Sheet applicable to the transaction was sent to Mr Facoetti a month later, together with the Term Sheets for the earlier transactions. The Term Sheet for the Nikkei transaction identified various risks, and advised investors to seek "independent financial, tax, accounting and legal advice". One of the risks identified was:

> "**Market risk**: the product may at any time be subject to significant price movement which may in certain cases lead to the loss of the entire amount invested.

> Certain products may include embedded leverage, which amplifies the variation, upwards or downwards, in the value of the underlying instrument(s) which may result, in a worst case scenario, in the partial or total loss of the invested amount."

396. On 14 February 2017, Mr Dalle Vedove sent a similar e-mail to that sent on 9 February, with details of another stability note. The Term Sheet for this instrument, which was sent with the other term sheets to Mr Facoetti on 23 March 2017, was a Commerzbank term sheet. It was shorter than the term sheets for the previous transactions.

397. The first page defined the Coupon:

> "Provided that no Stop Loss Event occurs, the note holder will receive on each Coupon Payment Date an amount equal to 2.80 % p.a. paid on the Coupon Payment Date.
>
> **If a Stop Loss Event occurs, the Coupon amount will accrue only up to but excluding the Stop Loss Event Date**"

398. A Stop Loss Event was defined as follows:

> "A Stop Loss Event shall occur if, on any Business Day from and including the Trade Date to and including the Valuation Date, the closing level of the Underlying Index is: more than 12.5% below the closing level on the immediately preceding Business Day.''

399. The term sheet also addressed the position in relation to a "Secondary Market" and "Secondary Market Risk":

> "Commerzbank AG will provide a secondary market; the prices on the secondary market will be dependant on the market conditions. On the secondary market, trading prices will include any accrued interest …
>
> Investors must note that in case of a sharp intraday drop the secondary market price might be quoted at a significant discount to the issue price or even at a value of 0% or no price might be quoted".

400. Under the heading "Disclaimers", the product was identified as Category 2: "Soft Protected: Capital or coupon or both are protected until protection disappears due to the occurrence of a predefined market event". It went on to advise investors to consider various risks including:

> "The risk that the investor may receive substantially less than 100% of the Principal Amount if they wish to liquidate the investment prior to maturity or, unless the product is capital guarantee, at maturity".

401. There was a formula which identified the amount payable if a Stop Loss Event did occur. The formula provides, in summary, for a reduction of 15% of capital for each percentage point that the relevant index (here the Euro Stoxx 50) fell on the date of the Stop Loss Event: i.e. for each percentage point greater than a 12.5% fall.

*14 February 2017 transaction proposed by UBP*

402. Shortly before SRL concluded the above transactions (which Mr Nuzzo did not know about), Mr Nuzzo had received a proposal from UBP in an e-mail headed: "Structured note with 60% barrier". This was a "worst of" note which bore some similarity to the HFPO instruments. As explained by Mr Presta to Mr Nuzzo: if the worst of 3 securities (well-known insurance companies) lost more than 40%, the investor would receive shares in the worst performing security. Mr Nuzzo was clearly interested in this possible transaction, and he sought Mr Dalle Vedove's views. Mr Dalle Vedove said:

> "With regard to the structured product proposed by UBP, in our opinion the risk profile is high and inconsistent with asset protection objectives.
>
> The likelihood that at least one of the three underlying securities could lose more than 40% over the next 16 months is far from negligible."

(In the Italian original, the word translated as "asset protection objectives" was "safeguard objectives").

403. Mr Dalle Vedove explained that he took this view, because the underlying assets here were 3 individual companies, rather than an overall index. There was, therefore in that respect a material difference between this product and the types of "worst of" notes that XY were proposing.

404. On 14 February 2017, Mr Presta of UBP proposed a different "worst of" based transaction. Mr Presta's description of the product was as follows:

> "To summarise if after three months NUSSUNO of the three securities lost 5% you have an early capital repayment + coupon if the worst of the three securities lost more than 5% go to the second observation and same discussion if NONE of the three securities lost more than 10% early repayment + 2 coupons... go forward until the last observation if NONE of the three securities lost 40% of the capital gains invested plus 12.78% of the coupon.
>
> If at maturity the worst of the three stocks has lost over 40% you still receive a number of shares such that you have the initial capital up to a loss of 40% beyond the loss it is the customer's
>
> You could do 500K for EFL and 300K for Globinvestment''.

405. The e-mail then described the terms, which included:

> "Strike Level: 60%.
> …
> Settlement: Physical in case wof [worst of] is below strike at maturity".

406. Mr Nuzzo then asked Mr Dalle Vedove to "take a look at this structured note. It doesn't sound bad to me. If we like it, we have to do it by today".

407. It is apparent from this exchange that Mr Presta must have considered that Mr Nuzzo was interested in products of this kind, and was capable of evaluating them. Mr Nuzzo agreed in cross-examination that he did indeed form a view about the product (and it was clearly a positive one) but that he also asked Mr Dalle Vedove for his views. It is noteworthy, in my view, that Mr Nuzzo formed a positive view about the product, even though it potentially entailed a 40% loss of capital, as explained in Mr Presta's e-mail.

408. In his response, Mr Dalle Vedove gave what seemed to me to be a sensible and professional response. He identified that it had "a certainly high degree of risk, due to the "worst of" formula on single stock, moreover related to each other". However, he said that the return was attractive, and made some other points. His conclusion was that "we do not recommend an allocation like the one suggested by the bank", and "would limit the investment to a maximum of £ 100K".

*1 March 2017 – first transaction by Mr Nuzzo*

409. Up until this point in time, Mr Nuzzo had not concluded any transactions on the basis of any proposals by XY. On 1 March 2017, however, Mr Nuzzo did enter into a MIN transaction. Mr Tiana of XY contacted him, saying that an "investment opportunity has been identified within the insurance notes". He enclosed the Term Sheet, and the "instruction to be forwarded to the trustee, for confirmation of the transaction".

410. Accordingly, on this occasion (for the first time) a Term Sheet was provided prior to the contract being concluded. The Term Sheet in this case was essentially the same as the Commerzbank Term Sheet relating to the mid-February instrument concluded by SRL. The barrier was 12.5%, and the capital loss was 15% for each percentage point fall. The product was also a Category 2 product, so that the "capital or coupon or both are protected until protection disappears due to the occurrence of a predefined market event".

*2 March 2017 meeting*

411. On 2 March 2017, MDM and Mr Facoetti met Mr Migani and Mr Dalle Vedove in London.

412. It was common ground that, at the meeting, at least the following was discussed: (a) SRL could invest € 10 million, a significant portion of its assets; (b) SRL's target net return was 3.5%, i.e. € 350,000 per annum, although there was also the possibility of extending that return further through the use of Lombard credit; and

(c) SRL would seek to achieve its target return through trading in market instruments that were near their maturity, i.e. HFPOs.

413. A slide presentation had been prepared, and it included (for the first time in a slide presentation) a reference to the Luxembourg RAIF.

414. Slide 2 identified the "Shared Goals at the Start of 2017". The first goal ("To generate stable and measurable growth in the real purchasing power of assets with safeguard-oriented and readily liquidated investment strategies") was identical to the first Italian asset goal identified on Slide 4 of the 12 January 2017 presentation. There was some alteration in the drafting of the other goals, as compared to the 12 January 2017 presentation, but nevertheless a considerable overlap:

> "• Produce regular cash flows to meet spending needs in Italy, which can be quantified at approximately €250 K/year, and to supplement the UK salary
>
> • To fully benefit from UK RND tax status, including overcoming the limitations of the current architectural model with efficient and robust solutions
>
> • To optimise costs weighing on assets, including through targeted interventions on existing real estate mortgages".

415. Slide 5 identified the "Target Investment Strategy" as being: "to create monetary value net of operating costs [greater than] 0.7 M€ per year. Slide 8 identified the step work plan to achieve the shared goals. In relation to the SRL assets, the slide stated:

> "Realisation of investments oriented towards safeguarding and with a high risk premium".

416. Slide 9 described the 4 MINs which had been the subject of investment by SRL to date. This set out some of the key terms of those notes, including the barrier and the yield. On the right hand side of the slide was a chart of the three indices relevant to the notes: the Euro Stoxx 50, S&P 500 and the Nikkei. The charts identified the barrier: 10% for one instrument, 12.5% for two of them, and 15% for the third. It illustrated that in the case of 3 of these instruments, there was a margin between the relevant barrier and the historic performance of each of the indices over the period January 2011 – January 2017. However, the charts also showed that, in the case of the Euro Stoxx 50 index, there had been a fall of nearly 10% on one day in around July 2016, and that in the case of the Nikkei there had been a fall of 10% in around January 2011, and a number of other daily falls over the period of around 7.5%. The slide therefore illustrated the fact that significant daily falls were possible.

417. Slide 11 is the slide which addressed the Luxembourg RAIF, with the headline: "Completion of Phase 1 with Start Today of High Frequency Price Opportunity Strategy through a Dedicated Compartment". This slide had been the subject of work on the day prior to the meeting, with Mr Dalle Vedove having been sent a draft of the slide presentation by one of his colleagues. The slide presented at the meeting was as follows:

COMPLETION OF PHASE I WITH START TODAY OF HIGH FREQUENCY PRICE OPPORTUNITY STRATEGY THROUGH A DEDICATED COMPARTMENT

Investment in the 10 M€ Sub-Fund

Investor — SrL

Vehicle — Regulated RAIF dedicated fund[1]

Depository — VP Bank Luxembourg

- Listed Group with S&P A- Rating
- +800 Employees
- +40 BN € AuM

- **Net Profitability in Excess of 3.5% (350 K€/year)** through trading in market instruments with **opportunist prices** near maturity
- Possibility of boosting profitability through **the use of Lombard Credit** (0.40% spread) within the segment
- **Preferred** manager and dedicated **segment costs** (1.0%)
- Maximum **efficiency and operational speed**
- **Accounting simplification** with certified NAV computation

**Reverse Solicitation Available Today for Start-Up**

1 Managed Vehicle from VP Fund Solutions (Luxembourg) SA AIFM

Intellectual Property of XY Group 11

418. The Claimants, in their submissions on the independence issue, relied heavily on the fact that there was no reference in this slide to any connection to Mr Migani and XY, with the slide referring on a number of occasions to VP. Thus, the "Vehicle" was described as "Regulated RAIF dedicated fund". The footnote reference was: "Managed Vehicle from VP Fund Solutions (Luxembourg) SA AIFM". The third bullet on the right-hand side was: "**Preferred** manger and dedicated **compartment** costs". (The Italian original uses the word "compartment" rather than "segment" in the above English translation of the slide). The Claimants argued that the fund was here being presented as a VP product, without any disclosed connection to XY or Mr Migani.

419. Slide 11 also referred to the possibility of "boosting profitability through the use of Lombard Credit (0.40% spread)" within the compartment. As explained above, the use of Lombard credit involves using an asset to borrow money, with the aim of reinvesting the borrowed money in further investments. If the investments are profitable, then this has the effect, as the slide says, of boosting profitability. As described above, there was a dispute in the evidence as to the extent to which the Claimants used Lombard credit prior to their involvement with XY. Whether or not they did so, the important point in my view is that by the time of 2 March 2017 meeting, MDM was certainly very familiar with the concept of Lombard credit, and was attracted towards it as a way of increasing the return on his assets. Slide 11 indicated that it would be possible, within the compartment itself, to use Lombard credit. This would mean that the money invested in the compartment

would purchase assets, and these would then be used to secure borrowings which could then be used to purchase further assets.

420. As explained in slides for subsequent meetings, one advantage of this approach is that the borrowing would be the liability of the Fund itself, rather than the investor who would therefore not be exposed beyond the value of their investment. However, as with all borrowing on the security of assets – and as would have been obvious to both MDM and Mr Facoetti, as experienced financial professionals – it would potentially increase not only the return on the assets, but would also involve greater potential liabilities. If the value of the assets significantly decreased, or the anticipated returns did not materialise, there could therefore be problems in repaying the borrowing. This was, much later in the story in March 2020, a problem which did indeed materialise, and was a significant factor which led to the liquidation of the HFPO Compartment of the Fund.

421. The text at the foot of Slide 11 stated that "Reverse Solicitation Available Today for Start-Up". Slide 12 set out a list of documents required for the "subscription of the dedicated sub-fund".

422. Slides 13 to 15 addressed various aspects of the use of Lombard credit. One aspect of the "plan to achieve the shared goals" was: "Amplification of Profitability through Lombard Credit". Slide 15 identified assets of € 27.5 million, the majority of which (€ 25.5 million) were to be: "High premium risk instruments and safeguard profile". It also identified how the € 27.5 million was to be funded: € 21.5 million in equity capital, and € 6 million in Lombard credit. The reference here to Lombard credit was borrowing by MDM or SRL rather than by the proposed Fund.

423. It was common ground that, at the end of the meeting, MDM signed a letter on behalf of SRL, addressed to VP Lux and SB GP, to register its interest in investing € 10 million into the Skew Base Fund. The letter established a defined "Commitment" by SRL to invest that sum in the HFPO Centaurus Compartment of the Skew Base Fund, although it was not suggested that this amounted at that time to a contractually binding commitment on the part of SRL to make that investment.

424. MDM said very little about this meeting in his witness statement, describing how as "always we discussed the same objectives that I did not want to take risk and that this was matched with a very safe, low return". He described how at the end of the meeting, before XY rushed out of the room, they asked him to sign the reverse solicitation letter referred to on Slide 11, in order to register an interest in the Skew Base Fund.

425. MDM was cross-examined at some length about this meeting, and the slides that were shown. It was apparent, in my view, that he had no real recollection of the meeting – something which in my view is understandable bearing in mind the length of time since it took place. However, many of his answers in cross-examination sought to contradict various fairly obvious conclusions that could be drawn from the slide presentation as to what is likely to have been discussed or to have been apparent to MDM.

426. Thus, when asked about the "Target Investment Strategy", with its objective to create monetary value, net of costs, greater than € 0.7 million per year, and which identified the proposed investments in MINs, HFPOs and Reinsurance, he denied that he understood what the elements of the strategy involved. He said that he had "more confidence on the names but not the details". Given that the proposed investments involved many millions of Euros, I do not accept that MDM understood little more than the names of the products.

427. MDM was asked about the reference to "high risk premium" in Slide 7, in the context of investment of assets. His evidence was that this only meant an "adequate" premium for the risk of these investments. However, as he acknowledged, the Italian word "elevato" did actually mean "high". MDM, to my mind, did not like the word "high", because this would lead to the obvious conclusion that the receipt of a high risk premium would necessarily entail that the person receiving the premium was indeed taking a risk. When it was put to him that high risk premium "means that the investments came with a reward, but they also involved a risk", MDM answered that this was not right. It was put to him that the fact that he was chasing a high risk premium "shows that you knew that in making these investments, you were undertaking a risk". His answer was that: "It's exactly the opposite": he was not chasing a high risk premium, but rather that it was being explained to him that he was having too high a risk for the premium that he was receiving. It was put to him that it was obvious that he knew that making these investments attracted a reward, but the price for the reward was the risk in the investments. He answered "no". I found these answers unimpressive and unconvincing, and indeed MDM did eventually accept (when the point was put to him for effectively the fourth time) that he understood that the investments involved a risk.

428. I have no doubt that MDM did understand that the proposed investments in MINs, HFPOs and indeed reinsurance all involved a risk, and I do not accept the evidence in his witness statement that he explained that one of his objectives was that he "did not want to take risk", in so far as this was intended to convey the idea that MDM was unwilling to take any risk at all. I think that Mr Facoetti's evidence, that at this meeting the risk of an HFPO product was described as "very very low", more accurately reflects what XY explained about the relevant products and what MDM understood. However, there is in my view clearly a difference between a product with a very low risk (which an investor is necessarily willing to take), and a product with no risk at all. Furthermore, Mr Facoetti's evidence (in the context of the meeting later in March 2017) indicated that he understood that there was a risk of losing all the capital. In his witness statement, he described the HFPO product as "an investment that was supposed to give a very interesting low return with a very, very small risk of losing all the capital". If Mr Facoetti understood that there was a risk (albeit very, very small) of losing all the capital invested in an HFPO, then MDM would also have understood that.

429. MDM was asked about the slide which showed the MINs and which contained the chart showing the barriers. He said that he "had no explanation on how the barriers were working". It was put to Mr Facoetti, when asked about the slide, that they would have asked questions. He agreed that they did ask questions, but

said that the explanation that they got was “not all enough to understand these products”. I consider that MDM, and indeed Mr Facoetti, did indeed understand the significance of the barrier, and specifically that the low risk that was being taken was the risk that the barrier would be breached. The risk of this happening was understood by them to be very low, but they also understood that a significant capital loss could arise if this very unlikely eventuality did transpire. I also consider that both MDM and Mr Facoetti considered that they did understand the products discussed at the meeting, and certainly understood sufficient about them to contemplate investing very substantial sums in them. If they thought that the explanations provided were not satisfactory or sufficient, they could and would have asked further questions about them.

430. MDM was asked about Slide 11, which described the “dedicated compartment” and the “Regulated RAIF dedicated fund”. MDM said in his evidence that it was not 100% clear to him at the time that this was referring to a fund at all. Although he agreed that he knew that an “AIF” was an alternative investment fund, this was “not well explained and we didn’t pay so much attention to that”. I have no doubt that, at the meeting, MDM did understand that what was being proposed was a fund, and I reject his evidence that this was not explained or that he did not understand it. Indeed, the idea of investing in a fund had been discussed back in December 2017. In addition, Charme itself ran AIFs, and so MDM had familiarity with that concept.

431. Furthermore, when asked about the slide, Mr Facoetti accepted that they did understand that there was a RAIF, and that this was a new fund, essentially managed by VP Fund Solutions and with a custodian bank called VP Bank. He also accepted that, at some point, they understood that what was being proposed was a compartment for a single investor, MDM.

432. Mr Facoetti’s evidence in his witness statement focused principally on what XY said about HFPO products at the meeting, rather than what may have been said about the Fund. In cross-examination, he did not accept that anything was said at the meeting about Mr Migani’s connection to the proposed Fund. His understanding was that the Fund was a third-party VP offering, and that HFPO products were similarly third party offerings.

433. Mr Migani’s evidence as to the 2 March 2017 meeting was that MDM’s message was that he wanted investments which were as stable as possible, whilst generating a significant predictable return in order to fund his expenses. He said that MDM was well aware of the risk profile of the fixed income, non-traditional instruments that XY had suggested “as a way to achieve the predictable returns which MDM wanted, barring extreme events”. I accept this evidence.

434. In relation to the Fund, Mr Migani said that they talked MDM and Mr Facoetti through how investing in a dedicated compartment of the fund would work, and that they referred back to earlier conversations about the dedicated compartment. I think it is likely that there was discussion about a dedicated compartment, and that this was a topic which had been discussed when the fund was first introduced to MDM in December 2016.

435. Mr Migani said that he could not recall precisely what was said about the connection between him and the Skew Base Fund at the meeting, but "there can have been no doubt whatsoever that its general partner was ultimately owned by me and that this reassured MDM because the Fund itself was an unknown player". He also said that he had also introduced the Fund to MDM as a sister company of XY and "the whole premise of our discussion about the dedicated compartment was that this was something that could be created for MDM because of the connection between me and the Fund and where the cost effectiveness of it could be achieved because of it".

436. In cross-examination arising from the way in which the Fund was presented in Slide 11, Mr Migani agreed that it was important to disclose the conflict of interest (i.e. arising from XY's role as consultant and Mr Migani's interest in the fund). He acknowledged that a decision had been taken to do so orally rather than in writing. He said that this was the practice at the time, unfortunately, and with the benefit of hindsight he would change that.

437. One other feature of Mr Migani's evidence about Slide 11 is relevant. He said that when Slide 11 was presented, MDM asked him about VP. He had not heard of VP and wanted to know what due diligence had been carried out on VP before selecting it as the custodian. Mr Migani said that he recalled that he was asking about VP as the custodian, not as the AIFM. Mr Migani said that he had selected VP through a beauty contest; that VP was a serious player and (as he had previously said in the 2 December call) he had specifically wanted a Luxembourg-based structure for this project.

438. In cross-examination by Mr Weekes, Mr Facoetti was asked whether he recalled a discussion about how Mr Migani chose VP Bank to be the depositary. Mr Facoetti's answer was:

> "He chose VP Bank to be the depositary because it was the partner that, for XY … had been a reliable partner in the past years."

439. It was then put to him that Mr Migani could only have chosen VP Bank to be the depositary if he had set up the fund. Mr Facoetti disagreed (albeit without explaining why). In re-examination, Mr Facoetti seemed to me to change his evidence. When reminded of Mr Weekes' question about Mr Migani choosing VP Bank, Mr Facoetti said: "probably he didn't even choose it". He then said that if the HFPO was VP Bank product, then it would be "normal that they choose themselves to be the custodian bank".

440. In his witness statement, Mr Dalle Vedove said that Slide 11 was the basis for their discussion with MDM and Mr Facoetti as to their investment in the dedicated compartment in the Skew Base Fund for HFPO investments. This would be an exclusive compartment available only to MDM and his vehicles to invest in, and MDM was attracted by the idea of a dedicated compartment targeted to his needs.

441. Mr Dalle Vedove did not give positive evidence that, at this meeting, Mr Migani explained his connection to the fund. In his witness statement, he acknowledged

that he had no recollection of the meeting prior to looking at the slides. He did, however, say that at around this time, the clients (i.e. MDM/SRL) asked for various documents relating to the Skew Base Fund, including a fiscal or legal opinion about it. He said that he understood the reason that they made those requests to XY was because they were aware of the connections between Mr Migani and the Fund. He said this "because usually those requests for information about an investment would be made directly to the issuer, not the client's consulting partner. Also, fiscal or legal opinions are usually reserved documents not available to a fund's investors".

442. I consider, in Section H below, the question of whether the Claimants were told about Mr Migani's connection to the Skew Base Fund. I conclude that they were. I have also concluded that MDM was told about the connection in the 2 December 2016 call. In the light of those overall conclusions, I think it likely that the connection was referred to at the 2 March 2017 meeting, since this was the first occasion on which a slide actually referred to the proposed fund and also where concrete (albeit preliminary) action was being requested in relation to the proposed fund: i.e. the signature of the reverse solicitation letter.

443. If it was mentioned, as I consider to be the case, I do not think that either MDM or Mr Facoetti would have reacted adversely, or that it would have provoked any discussion. MDM was interested in making good investments, and he had neither looked at the XY Group website nor been party to any discussion with them about independence or the absence of conflict of interest. The idea of doing so through a fund was attractive to him, not least because it would avoid the need for multiple investments. Mr Facoetti, who was essentially assisting MDM, had similarly not looked at the website or been party to any discussion about independence/absence of conflict. In cross-examination by Mr Blakeley, Mr Facoetti said that he did not care whether there was a commercial relationship between XY and the Skew Base Fund.

444. Whilst I do not base my conclusions on this important issue on a single answer in cross-examination, it does seem to me that Mr Facoetti's initial answer, in which he accepted that Mr Migani had chosen VP Bank as depositary, does indicate that he appreciated at the time that Mr Migani was the person who had set up the fund.

*2 – 28 March 2017*

445. MDM signed the "Reverse Solicitation" document at the end of the meeting. Such a letter is required, in the context of a fund such as the Skew Base Fund, essentially because such funds cannot be marketed to the public. Accordingly, if the prospectus for the investment (i.e. the Offering Memorandum) is to be provided to a potential investor, the latter must request (i.e. solicit) the document from, in this case, VP. The Offering Memorandum for the HFPO Centaurus Compartment and application form were sent to MDM by Mr Ries of VP by e-mail on 23 March 2017.

446. The detailed terms of the Offering Memorandum are set out in Section C below. The Offering Memorandum amongst other things:

(i) Specified that, to be eligible to invest in a Compartment of the Skew Base Fund, the investor was required to be a "Well-Informed Investor" (*investisseurs avertis*) within the meaning of Article 2(1) of the Luxembourg law of 23 July 2016 on reserved AIFs (a "Well-Informed Investor");

(ii) Described the investment objective and investment policy of the relevant Compartment, including the type of product in which the Compartment would invest;

(iii) Specified that investment in the Fund was only suitable for those with (i) sufficient knowledge, experience and/or access to professional advice to make their own evaluation of risk; and (ii) sufficient resources to be able to bear any loss that may result;

(iv) Warned of the general and specific risks of investing in the Skew Base Fund/relevant Compartment, which included, among other things, the risk of losing the entire amount originally invested;

(v) Disclosed that SB GP was entitled to be paid, out of the assets of the Fund, the annual fee and performance fee specified therein;

(vi) Stated that the relationship between the Skew Base Fund and VP Lux as AIFM was subject to the terms of the AIFMA (see Section A above) and that under the terms of that agreement VP Lux is responsible for the portfolio and risk management of Skew Base Fund, subject to the overall supervision of SB GP;

(vii) Stated that VP Lux was entitled to an annual fee and may be entitled to a performance fee, for each Compartment or share class, to be paid by SB GP;

(viii) Stated that VP Lux as AIFM may delegate to third parties the power to carry out some of its functions on its behalf, including that, with the consent of the Skew Base Fund and under its supervision and responsibility, VP Lux may appoint a delegate investment manager for a specific Compartment;

(ix) Stated that any investment manager fee (i.e. any fee of VP Liechtenstein) was to be borne by SB GP;

(x) Stated that, amongst other things, SB GP, VP Lux, VP Liechtenstein and other service providers of the Skew Base Fund and/or their respective affiliates, members, employees or any person connected with them may be subject to various conflicts of interest in their relationships with the Skew Base Fund; where a conflict or potential conflict of interest arises, the Depositary will have regard to its obligations to the Fund and will treat the Fund and the other funds for which it acts fairly and such that, so far as is practicable, any transactions are effected on the terms which are based on objective

predefined criteria and meet the sole interest of the Fund and the investors of the Fund;

(xi) Stated that the Articles of Association of the Skew Base Fund and the subscription form were governed by Luxembourg law.

*Other developments in March 2017*

447. In March 2017, MDM opened an account with LGT and restructured positions previously held with multiple different institutions, moving them into a single intermediary. XY had the ability to view transactions and the balances of MDM's LGT account. XY also had the ability to view account information in respect of MDM's accounts with CA Indosuez and Sabadell, which MDM opened on XY's advice in May 2017 and October 2018 respectively.

448. MDM's meetings in 2017 in relation to his personal wealth and his interest in the Skew Base Fund were not revealed to Mr Nuzzo. Mr Nuzzo was, however, starting to invest in structured products on behalf of LDM and GIG. The first transaction, described above, was the MIN which Mr Tiana had proposed on 1 March 2017, and which Mr Nuzzo concluded for LDM on 3 March 2017.

449. On 14 March 2017, Mr Tiana of XY e-mailed Mr Nuzzo with details of four transactions "to be implemented as part of the Short Term Arbitrage strategy". The four transactions, with a total value of € 900,000, were based on the Euro Stoxx 50 index, with a maturity date of 23 June 2017 (i.e. around 3 ½ months away). Those transactions were concluded by Mr Nuzzo on behalf of LDM.

450. On 27 March 2017, Mr Tiana e-mailed Mr Nuzzo with details of two investment opportunities "under the insurance notes strategy", with Mr Tiana indicating each opportunity could be taken up by GIG and LDM personally. Mr Tiana sent Mr Nuzzo the term sheets. Two transactions were then concluded on behalf of each of LDM and GIG.

451. The term sheet for one of the insurance notes, on the MSCI World index, was issued by Natixis. The event which would potentially impact the capital return on that instrument was a fall in the market of 10% or more. Under the "Suitability Assessment", Natixis stated that investing in such a product could "lead to a significant risk level". The term sheet described the product as a "High or medium risk investment", followed by the words "e.g. no guaranteed redemption amount or loss potentially above the paid premium". The risk factors included (in capital letters) that:

> "THE CERTIFICATES MAY REDEEM BELOW PAR AND THE REDEMPTION AMOUNT MAY VARY CONSIDERABLY DUE TO MARKET CONDITIONS AND WILL LIKELY BE VALUED AT A CONSIDERABLE DISCOUNT TO ITS PAR VALUE. ANY AMOUNT SCHEDULED AND DUE UNDER THE TERMS OF THE CERTIFICATES BEARS THE CREDIT RISK OF THE ISSUER
>
> …

> PROSPECTIVE INVESTORS SHOULD HAVE SUFFICIENT KNOWLEDGE AND EXPERIENCE IN FINANCIAL AND BUSINESS MATTERS TO EVALUATE THE MERITS AND RISKS OF INVESTING IN THE CERTIFICATES AS WELL AS ACCESS TO, AND KNOWLEDGE OF, APPROPRIATE ANALYTICAL TOOLS TO EVALUATE SUCH MERITS AND RISK IN THE CONTEXT OF THEIR FINANCIAL SITUATION."

452. Investors were also advised to take their own independent legal and financial advice before making any investment decision.

453. The term sheet for the other insurance note was issued by Commerzbank. It exposed the investor to a risk of loss if there was a fall of 10% or more in the Euro Stoxx 50 index. It contained information and warnings similar to those described above in relation to earlier Commerzbank MINs.

454. On 27 March 2017, after having received the term sheets, Mr Nuzzo asked Mr Tiana to let him know "what is the risk with these instruments? In case the event occurs, how much is my maximum loss?" Mr Tiana replied as follows:

> "the strategy approach is to hold the instruments to maturity, in each case the issuer is committed to maintaining a secondary market that usually allows LV to be recognized, albeit contained generally between 30 and 50 percent.
>
> The secondary market also allows the instrument to be sold before maturity should liquidity be needed.
>
> In any case, to allow you to consider pulling any additional debt we have requested confirmation of the specific LTV from UBP based on the termsheets of this ad hoc issue for XY customers. In the event of a barrier event, which is to be considered extreme, the instrument stops with a 10% capital loss for every 1% below the barrier.
>
> The probability of the barrier event is lower than that of an Investment Grade bond default and the recovery, in the case of a barrier event, higher than in the case of a bond default."

455. On 28 March 2017, Mr Nuzzo asked Mr Tiana to proceed with both purchases.

456. Accordingly, Mr Nuzzo was advised that the barrier event was considered "extreme", and also that the capital loss would be 10% for each 1% under the barrier. He was also advised that the instrument "stops" with that capital loss. The information there given was similar to that contained in the slide which had been used in the September 2016 presentation concerning the "example" of an insurance note. Mr Nuzzo would have been aware from both the original slide,

and from Mr Tiana's explanation, that there was a risk of a significant capital loss if the barrier was breached.

*28 March 2017 meeting*

457. Another meeting was held on 28 March 2017 attended by MDM, Mr Facoetti, Mr Migani and Mr Dalle Vedove. On the day before the meeting, Mr Facoetti had e-mailed Mr Dalle Vedove to advise him that the annual expenses of MDM in Italy were higher than forecast. They were expected to be around € 500K rather than the € 250-300K referred to in previous occasions. He also identified a number of other expenses arising from various investments. He said that he "wanted to understand how we can find solutions, perhaps a riskier path, which allows for management capable of achieving the annual expense target". In cross-examination, Mr Facoetti said (and I accept) that the Italian original was better translated as a "thread more riskier": in other words, a little bit more risky.

458. The e-mail in my view indicates, contrary to the approach of MDM in his evidence, that an important objective of the investment strategy was indeed the covering of his expenses. Mr Facoetti also fairly accepted in cross-examination that MDM was looking both for some capital growth in the value of his assets, as well as covering expenses; that he could not achieve those goals without accepting some sort of risk; and that the more income he wanted, the greater would be the risk that he would have to accept; and that to achieve those objectives would require more risk than if the sole objective was to preserve capital.

459. The slide presentation prepared for the meeting took Mr Facoetti's revised figures into account in a slide headed "Mapping of Personal Cash Flows". It is not, however, necessary to examine the detail of the figures. The overall "shared goals" remained in most respects unchanged from the way in which they had been described in the presentation for the 2 March 2017 meeting. There had, however, been a small revision to the second goal, which now referred to spending requirements in Italy and the UK, as well as the availability of other income: to "produce regular cash flows that, when supplemented by salary and other income, will enable the company to meet its commitments and spending requirements in Italy and the UK". In cross-examination, Mr Facoetti agreed that the "shared goals" slide captured the most important goals.

460. Many of the other slides were the same as or similar to the slides used in the 2 March 2017 meeting, and they indicate that this meeting was largely an update on the matters which had previously been discussed. Mr Dalle Vedove said (and I accept) that the majority of the presentation was dealing with elements of MDM's estate, rather than the proposed investment in the Skew Base Fund. However, he also said that there was some discussion about progress towards SRL's proposed investment in the Skew Base Fund. Slide 19 referred to the start of the "strategy of high frequency price opportunity through a dedicated compartment", and identified some documents which were now available, and some which had yet to be obtained. The position as at 28 March 2017 was that MDM had received the Offering Memorandum from VP, but had yet to confirm his intention to invest in the Skew Base Fund by signing the application form. The evidence of Mr Migani and Mr Dalle Vedove is that they were told that Mr

Facoetti was in the process of carrying out due diligence in relation to that possible investment. This is borne out by the contemporaneous documentation, for example Mr Facoetti's request for specialist tax advice from Italy.

**D7: April – June 2017**

*DLA Advice – March/April 2017*

461. On 31 March 2017, Mr Dalle Vedove forwarded to Mr Facoetti an e-mail which had been sent by Mr Bartnik of the law firm, DLA Piper, to the "Skew Base Team" at the info@skewbase.com address. Mr Bartnik's e-mail was copied to a number of individuals at DLA Piper, and also to Enrico Viganò at his skewbase.com e-mail address. Mr Viganò was an XY Group employee, and the idea of the Fund had originally been his initiative. The Claimants, however, had had no dealings with him.

462. The legal advice contained in the e-mail was as follows:

> "Dear Skew Base Team,
>
> I would like to confirm that it is permitted under Luxembourg law to have only one investor per compartment in a reserved alternative investment fund with an umbrella structure. Pursuant to the definition of an alternative investment fund that can be found in the AIFM directive, several investors are required in order to qualify for the status of an alternative investment fund; however, in the present case this is not an issue as we have several investors within the entire umbrella, even if there is only one single investor in some of the compartments."

463. Subsequently, under cover of an e-mail dated 11 April 2017, Ms Talleri of the XY Group sent Mr Facoetti lengthier advice from DLA Piper. The covering e-mail said that, as agreed with Mr Dalle Vedove, "attached is the memo, prepared by the legal team, regarding the instrument. Please contact us if you need any clarification or information". The subject-heading of the e-mail was: "Raif – legal consideration".

464. The attachment was a 2-page memo on DLA Piper letterhead, headed: "External Memo – Strictly Private and Confidential". It was addressed to "SkewBase". The memo identified the current structure, and then dealt with Luxembourg AIFM regulation. This contained more detailed advice explaining, in summary, that it was permissible for an investment fund to be established for one single investor, and that (as advised in Mr Bartnik's 31 March 2017 e-mail) it was permissible to have one investor per compartment in a reserved AIF.

465. It was contended on behalf of XY (and other Defendants) that these e-mails indicated that Mr Facoetti was aware of the connection between Mr Migani and the Skew Base Fund. Mr Dalle Vedove said, as already explained, that he understood that the reason that the request was made to XY (rather than the issuer)

was because the connection was known. Mr Facoetti said that this was not the case: the request was made to XY because it had introduced MDM to the Skew Base Fund, and it was natural to deal with XY.

466. I consider that these documents, and the request for information which led to them being provided to Mr Facoetti, is more likely than not to be explained by Mr Facoetti's knowledge of the connections between the Skew Base Fund and XY/Mr Migani. Mr Facoetti's evidence, in his witness statement, was that he was in touch with Ms Talleri and Mr Sampietro of the XY Group because he wanted to understand the tax implications of investing in the HFPO product, and this was why the legal opinion had been sent. The 31 March 2017 e-mail was addressed by a law firm to the Skew Base Team, and it was forwarded by Mr Dalle Vedove to Mr Facoetti on the same day (within around 3 hours) of the e-mail having been sent by Mr Bartnik to the Skew Base Team. The ability of XY to produce to Mr Facoetti, within such a short time-frame, a legal opinion sent to the Skew Base Team, is indicative of a close connection between XY and the Skew Base Fund, consistent with the case that Mr Facoetti and MDM were aware of the connection. If he did not already know of the connection, Mr Facoetti would (if he had thought about it for a short while) have been puzzled as to XY's ability to produce, so quickly, a legal opinion which had been sent to another party; a party which, on Mr Facoetti's evidence, was unconnected with XY but was part of, or created by, VP Bank. It may well be, however, that Mr Facoetti did not think about it, even for a short while; because, as indicated above, he did not care whether there was such a connection.

467. Similar conclusions arise in relation to the 11 April 2017 e-mail and its attachment. The e-mail from Ms Talleri of XY refers to "the memo prepared by the legal team". She does not refer here to VP's legal team. The memo itself is dated the day before her e-mail, and has a "strictly private and confidential" header. It was addressed to Skew Base. The opening paragraph of the letter itself explains that the Fund is managed by its general partner, Skew Base S.a.r.l.. Again, if Mr Facoetti did not know the connection between XY and Skew Base, he would have been puzzled as to XY's ability to produce, again relatively quickly, a private and confidential legal advice which had been provided to (on Mr Facoetti's evidence) a wholly independent third party which was unconnected with XY but was part of or created by VP.

468. There is also a further point which arises in relation to the e-mail dated 31 March 2017 which Mr Dalle Vedove forwarded. One of the recipients was Mr Viganò, who was a senior XY figure involved in the creation of the Skew Base Fund. It is true that neither MDM or Mr Facoetti actually knew him at that time. However, there was no attempt by Mr Dalle Vedove to delete his name from the e-mail forwarded to Mr Facoetti. Mr Dalle Vedove made the fair point, in his evidence, that there was no attempt by him to cover up Mr Viganò's connection to the Skew Base Fund.

*Further HFPO transactions*

469. On 12 April 2017, Mr Tiana sent Mr Nuzzo details of 5 further instruments as part of the "Short-Term Arbitrage strategy". They were again all based on the Euro Stoxx 50 index, with maturity dates just over 2 months away. Mr Nuzzo was

asked: "In case you proceed, we ask that you please confirm that the arrangements have been sent to the Bank". Mr Nuzzo confirmed on the same day that he had made the arrangements with the bank.

*24 April 2017 meeting with Lombard Odier*

470. On Monday 24 April 2017, MDM met Mr Alexis Chardigny of Lombard Odier, a Swiss private bank. Prior to that meeting, on 5 April 2017, MDM had referred to this proposed meeting in an e-mail to Mr Facoetti. The principal purpose of the meeting was a possible investment by Lombard Odier in Charme Capital's private equity fund. However, MDM was also interested in, as he said in cross examination, competition from different providers; i.e. as to how he might invest his wealth. So, he asked Mr Facoetti to tell Mr Chardigny "in parallel I would like to have a final proposal from them for my personal position and srl".

471. Subsequent to the meeting, Mr Chardigny e-mailed MDM on 28 April 2017, saying it was nice seeing him again on the Monday. Mr Chardigny said that following their discussion "and your wish to see a portfolio with recurring annual income", he had prepared a proposal generating an annual income of 3%, before taxes and their fees. The portfolio details were then given, and it included 63.5% in bonds, with a high yield exposure greater than 55%. He explained that this portfolio was more aggressive from a risk perspective than an earlier proposal that he had made.

472. The e-mail concluded with a reference to another matter discussed on Monday:

> "Separately, as discussed on Monday please find attached a factsheet on a structured product (18 month Autocallable Yield Note Worst-Of on Eurostoxx 50, S&P 500, Nikkei 225) in euros providing you with a quarterly coupon of 1%. This investment has a continuous barrier at 60% which means that if any of the 3 underlying indices trades below 60% of its initial level your original capital would be at risk."

473. In cross-examination in relation to this meeting, MDM said that the proposals made by Mr Chardigny were essentially unsolicited. He said that at the end of the meeting, which was to discuss Lombard Odier's investment in the Charme fund, Mr Chardigny had asked: "would you be interested in receiving some proposals of ours?". That evidence was not credible and I reject it. It is clear from the e-mail to Mr Facoetti, and indeed from the terms of Mr Chardigny's e-mail of 28 April 2017, that MDM was interested in receiving Lombard Odier's proposals as to how his wealth might be invested. Indeed, there had been an earlier proposal which Mr Chardigny had revised in the light the discussion at the meeting. The significance of the meeting, however, goes beyond its relevance to MDM's credibility as a witness.

474. First, MDM was clearly interested in receiving, from Lombard Odier, a proposal which would generate a higher income than an earlier proposal, even if this meant an increased risk. Mr Chardigny's e-mail therefore supports XY's case that income was a matter of importance to MDM, and not simply a goal which was secondary to the safeguarding of assets.

475. Secondly, MDM was also clearly interested in structured products, and there had been a discussion about them at the meeting with Mr Chardigny. Mr Chardigny's e-mail explained the nature of a "worst of" product in the passage quoted above, and MDM would have understood that such products had a barrier, that this barrier could be breached by a drop in any of the indices, and if so then "your original capital would be at risk".

476. One of the two attachments to the e-mail was a "factsheet" prepared by Lombard Odier relating to the product described in the e-mail. This fact sheet contained, on the first and second pages, a relatively simple description of this type of product and its risks. These included the following on page 1:

> "**YOU SHOULD CONSIDER THIS INVESTMENT IF**:
>
> •You are looking for an enhanced yield and a conditional protection, based on the expectation of stable Underlyings
>
> •You do not want your investment to last more than 18 month(s)
>
> •You understand the nature, workings and risks of equity-linked structured products
>
> •You do not expect the Underlying Assets to trade below the Barrier Level between the Trade Date and Maturity Date
>
> **HOW DOES IT WORK**?
>
> •The note provides a quarterly fixed Coupon of 1% (4% p.a.), if the note has not been auto called on the previous period and irrespective of the development of the Underlying Assets described below
>
> **AUTOMATIC EARLY REDEMPTION**
>
> • The note will be early redeemed at 100% plus the pending Coupon if, on any of the predefined observation dates, all the Underlyings close above their predefined Autocall Level
>
> **REDEMPTION AT MATURITY (if no Early Redemption has occurred)**
>
> •If none of the Underlying Assets has ever traded below the Barrier Level between Trade Date and Maturity or if none of them close below the Autocall Level at Maturity, the note will be redeemed in cash at 100%, plus the last Coupon.
>
> •If at least one of the Underlying Assets has ever traded below the Barrier Level between Trade Date and Maturity Date and any Underlying Asset closes below the Strike Level on

> Maturity Date, the note will be redeemed at the Final Redemption level (p.2) – delivered in cash – plus the last Coupon."

477. On page 2, there was a table which illustrated the final redemption of capital on the maturity date, on different scenarios. It showed that if none of the instruments had traded below its barrier level (60%) between the trade date and the maturity date, there would be a full redemption of capital (plus the coupon). This would apply even if the worst performance was a fall of 39%. In contrast, in a scenario where the barrier had been breached by one of the underlying indices during the period, the redemption would depend on the "worst of" performance on the maturity date. If, therefore, the worst showed a drop of 40% at the maturity date, the final redemption would be 60%; i.e. a 40% loss of capital. If there was a 20% drop, then the recovery would be 80%; i.e. a 20% loss of capital.

478. Page 2 identified the main benefits of the investments as follows:

> "• This investment generates a guaranteed Coupon periodically regardless of how the Underlying performs. The Coupon is paid quarterly
>
> •If none of the Underlying Assets below the Barrier Level between Trade Date and Maturity Date, the capital of the note is protected
>
> •At maturity this investment outperforms a direct investment in the Underlying Assets if the latter trade sideways and if none of them has traded below the Barrier Level between Trade Date and Maturity Date."

479. It also identified the main risks as follows:

> "• Investing in this note represents a potential loss similar to a direct investment in the Underlying Assets and could thus result in a total loss of the invested capital. If the final level of an Underlying Asset on Maturity Date is zero you will lose your invested capital.
>
> •You are fully exposed to the Default Risk of the Issuer (see section "General Risks" on the next page). In the worst case-scenario, a default of the Issuer can lead to the loss of the entire invested capital
>
> •You are aware that if at least one underlying closes below the respective barrier level between the Trade Date and the Maturity Date, the capital is at risk. You may lose some or all of the invested capital as you are fully exposed to any decline in the level of the worst performing underlying.

> You will not receive the benefit of dividends or other income that may be paid on the underlying
>
> • The lead manager intends, but is not obliged, to provide a daily (off-exchange) secondary market under normal market conditions. The assessment of normal market conditions and the provision of a secondary market are at the issuer/lead manager's discretion or follow the rules of the exchange where listed, in case of listed notes.
>
> By selling in the secondary market you may receive less than the capital invested."

480. It seemed to me that this explanation by Lombard Odier, of products of this kind, was relatively simple and clear. There is no positive evidence that MDM actually read this: he was not cross-examined on this particular factsheet. However, he would have read the covering e-mail from Mr Chardigny, and would have had no difficulty in understanding the explanation of the product in the paragraph quoted above. This too provided a simple explanation showing the importance of the barrier, the fact that it could be breached by a fall in any of the indices, and that the "original capital would be at risk". I have no doubt that MDM, who was at that time contemplating a € 10 million investment in a fund which would make investments in similar products, understood the basic risk that was being taken with these products. If he wanted more information, or a more detailed explanation, he only had to read pages 1 and 2 of the fact-sheet, or indeed to ask questions of XY either at the meeting which took place on the day after his meeting with Mr Chardigny, or subsequently after receipt of Mr Chardigny's e-mail.

*25 April 2017 meeting*

481. The next meeting with XY took place on Tuesday 25 April 2017 attended by MDM, Mr Facoetti, Mr Migani and Mr Dalle Vedove. A slide presentation was prepared, headed: "Update on major worksites". Many of the slides are related to MDM's tax position, including the possibility of creating "clean capital" in the light of new HMRC guidelines. The "major worksites" were listed on Slide 12 as: "Creation of Clean Capital from personal assets currently at UBS"; "Transfer of personal and corporate assets to new accounts at LGT"; "Liquidity Extraction from SrL". LGT was a bank which had been identified by XY as being prepared to offer advantageous terms for Lombard credit.

482. Slide 14 added a further major worksite: "High Frequency Price Opportunity Strategy Initiation via Dedicated RAIF Fund". The position at this time was that the Offering Memorandum and subscription form had been sent to MDM on 23 March 2017, but MDM had not as yet (i.e. as at 25 April 2017) committed to investing in the fund by signing the subscription form. A principal reason was that Mr Facoetti was carrying out due diligence, with a particular focus on the tax position. There had, however, clearly been more than sufficient time for MDM and Mr Facoetti to read the Offering Memorandum, and I reject any suggestion that MDM was somehow required to sign important documents without sufficient opportunity to consider them. Surprisingly, given the magnitude of the

investment which MDM appears to have been contemplating (€ 10 million was his initial investment via SRL), both MDM and Mr Facoetti said that they did not read the Offering Memorandum at that time. Mr Facoetti said that he first read it in 2020, after Covid-19 had resulted in severe losses to the MIN and HFPO Compartments of the Skew Base Fund. I will discuss, below, whether or not MDM read the Offering Memorandum.

483. Slide 15 was headed: "High Frequency Strategy Can Be Initiated Immediately Price Opportunity Through Dedicated Fund". This adapted and updated Slide 11 from the 2 March 2017 meeting (described above). The slide referred to a Fund investment of € 10 million. On the left-hand side was a chart describing the RAIF as a vehicle managed by VP Fund Solutions (Luxembourg) SA as AIFM, and VP Bank Luxembourg as Custodian.

484. On the right-hand side was text with the following three bullet points:

> "• Confirmed by DLA Piper and Ludovici & Partners the possibility of qualifying the RAIF, even in the case of a single investor, as a collective investment body on the basis of Luxembourg law 2, with the consequent benefits – Tax Suspension – Accounting Simplification
>
> • In light of the transfer of the Srl's registered office to Luxembourg, it is possible to immediately initiate the investment in the fund
>
> • With a view to maximum prudence, the multi-investor fund is set up, without any implications for the investment strategy".

485. There was no significant challenge in cross-examination to the witness statement evidence of Mr Dalle Vedove and Mr Migani about this meeting.

486. Mr Dalle Vedove said that there was an update on MDM and Mr Facoetti's investigations into the Skew Base Fund with MDM's other advisors, including his tax advisors Ludovici & Partners. He said that MDM was always very focused on the tax implications of his investments, particularly those through SRL, and the possible impact on his UK RND status. I accept that evidence, which is consistent with Slide 15, the slide presentation for that meeting as a whole, and indeed other presentations which addressed MDM's tax position. He also said (and I accept) that MDM had decided in principle to invest in the Fund by the time of this meeting, and that the final decision was made at the meeting itself.

487. Mr Dalle Vedove also explained his understanding of the reasons why MDM decided to make the investment in the umbrella fund structure rather than directly in HFPO investments.

488. First, MDM was interested in the Fund structure for the same reason that other clients saw benefits: more efficiency, including delegating investment decisions to a professional asset manager, and also accounting simplicity because SRL would invest in a single asset rather than multiple investments directly. Those benefits were referred to on Slide 15 as "Accounting simplification". In cross-

examination, Mr Dalle Vedove confirmed that one of the benefits that MDM saw was that decisions would be taken by a professional fund manager.

489. The second reason was that MDM was very concerned about his tax position and the fund structure had tax benefits compared to multiple direct investments in an asset class. Mr Dalle Vedove said that he was not a tax expert, and could not speculate as to how this helped MDM's tax position specifically, but he did know that it was a major issue for him and that it was another factor in his decision for SRL to make investments via the fund. Similarly, Mr Migani (when discussing the 25 April 2017 meeting) said that he knew that one of MDM's major concerns was investing SRL's assets in a tax-efficient way, and that Ludovici & Partners had flagged a risk to MDM that a compartment dedicated solely to an investment by SRL would have negative tax consequences. Although Ludovici's conclusion was that this was not an issue, XY presented the alternative option in the third bullet on Slide 15, which would be for SRL to invest in a multi-investor compartment and avoid this risk.

490. I accept this evidence of Mr Dalle Vedove and Mr Migani as to the discussions at the meeting, and the attractions of the fund to MDM.

*26 April 2017 – the share application form*

491. On 26 April 2017, MDM on behalf of SRL signed the Skew Base Investments SCA RAIF share application form. The investment was € 10 million in the HFPO Compartment. The form contained a number of boxes, some of which had been marked with a cross. For example, page 4 was headed "Client Identification Form". There was an 'x' in the box which was applicable to a declaration that "we qualify as professional investors in the sense of Annex II of Directive 2004/39/EC of the European Parliament …". MDM's evidence was that the form had been completed by XY, with the relevant boxes crossed, in advance of his signature. I accept that aspect of his evidence.

492. MDM applied his signature, on various pages of the form, 9 times. His evidence was that he did not read a single word of any page on the form. This evidence extended to the "Declarations and Disclosure Statement" which occupied 2 pages of the form. The first such declaration was:

> "A. I/We acknowledge receipt of the current Offering Document, Articles of Incorporation and of the latest available annual report of the Fund, which I/we have carefully considered in advance of this application noting especially the Investment Policy and the risk factors relating thereto. I/We hereby confirm that I/we understand and accept that this application is made solely on and in full compliance with the terms thereof."

493. Section 5 of the application form, at the end of the document, was headed: "Declaration and Signature". This included a declaration that "to the best of my/our knowledge and belief, the information on this form is correct and complete".

494. I find it very difficult to believe, and cannot accept, that MDM would not have read a single word of the document that he signed. I also find it very difficult to believe that, with an investment of € 10 million, and in circumstances where MDM regarded himself as the guardian of his family assets, MDM would not have read the Offering Memorandum. I accept that he would not have read every page in immense detail. However, as a person who is financially very astute, and who is able to absorb financial information quickly, I consider it more likely than not that MDM would have familiarised himself with the essential features of the Fund in which he was putting a very large sum of his family's money, and the risks associated with the investment. Declaration A states in terms that the person signing the document has noted "especially the Investment Policy and the risk factors relating thereto". In my view, the signature of the form provides powerful evidence that MDM had read those matters. I do not accept that he read neither a word of the share application form nor a word of the Offering Memorandum. I do not accept that, contrary to the declaration signed, he was unaware of the risks set out in the Offering Memorandum.

495. On around 23 May 2017, SRL made a transfer of € 10 million from its Swiss bank account at LGT Bank to the Skew Base Fund in respect of SRL's investment in the HFPO Compartment.

*25 May 2017*

496. The next meeting between any of the Claimants and XY was on 25 May 2017, when Mr Dalle Vedove met MDM. Mr Dalle Vedove had prepared a lengthy slide presentation. This included a large number of slides that had been used on previous presentations, but also included slides which updated MDM on developments since the meeting in late April 2017. This meeting was not referred to in the parties' written or oral evidence. Save that it shows that Mr Dalle Vedove went to some trouble to prepare a detailed slide presentation which updated MDM on how matters were progressing, I do not think that it adds materially to the evidence as to other meetings.

*June 2017*

497. On 1 June 2017, MDM e-mailed Mr Migani and Mr Dalle Vedove (copied to Mr Facoetti) in relation to various possible actions resulting from the fall in the value of sterling in the run-up to the UK election. One of his "considerations" was whether "it is worth acquiring € 500K in pounds as a speculative investment". Mr Facoetti, when asked about this e-mail, had a ready answer to the use of the word "speculative" in the e-mail. He did not like the negative connotation, or the implication that MDM was prepared to speculate with money of which he was the bonus paterfamilias. He therefore said that what was meant was "opportunistic" rather than "speculative". I was not impressed with this answer. The word in the Italian original was "speculativo", and there was no suggestion that it had been mistranslated.

498. Mr Dalle Vedove gave, at the time, what seemed to me to be a sensible answer to the points which MDM had raised in his e-mail. In relation to the proposed currency transaction, he said that: "In view of safeguarding assets, we do not recommend speculative investments in currencies by experience, as asset classes characterised by very high unpredictability".

499. On 6 June 2017, Mr Tiana identified to Mr Nuzzo an investment opportunity "under the insurance notes strategy", linked to the S&P 500. The proposed transaction involved € 200,000. Mr Tiana sent Mr Nuzzo the term sheet. Mr Nuzzo responded by saying that in the next month, he would need some liquidity to complete the purchase of a property, and he asked a question relating to the availability of money at LGT.

500. Mr Tiana's response identified the liquidity at LGT. He said that the proposed transaction "aims precisely to bring the portfolio to full investment on shared strategies, even leveraging issues reserved for XY customers as in this case". He recommended that Mr Nuzzo proceed with the transaction.

501. Mr Nuzzo responded by saying that he had read the term sheet

> "… but I would ask you to please simplify my life, from what I understand the product has a 1 year term with yield 2.6% unless the S&P 500 loses from one day to another more than 10%? In that case how much is paid back".

502. Mr Tiana gave a response which was very similar to the response given to Mr Nuzzo's 27 March 2017 query (see above).

> "you have correctly interpreted the termsheet.
>
> in the event of a barrier event, which is to be considered extreme, the instrument stops with a 10% capital loss for every 1% below the barrier.
>
> The probability of the barrier event is lower than that of an Investment Grade bond default and the recovery, in the case of a barrier event, higher than in the case of a bond default."

503. The term sheet that Mr Nuzzo had read included the following text in bold on the first page:

> "These Notes provide the Note Holders with exposure to the Underlying (specified below) which by its nature should be viewed as involving a high degree of risk and should be regarded as speculative and as such should only be considered by persons who can afford such a loss. The Note Holder's profit potential is limited to the coupon payment. The Note Holder may lose all of the investment as they are fully exposed to the performance of the Underlying, in particular, all the investment could be lost following a Barrier Event (specified below)."

504. I can understand why Mr Nuzzo asked for his life to be simplified. The term sheet contains various formulae which are by no means easy to follow. Mr Nuzzo clearly was able to follow the formulae to some extent, because he identified that the barrier event was a 10% fall from one day to another. Mr Tiana's response

told Mr Nuzzo that there would be a 10% capital loss for every 1% below the barrier. Mr Nuzzo thereafter concluded the proposed transaction.

505. On 13 June 2017, Mr Dalle Vedove told MDM that it was now possible to "finalize the SRL liquidity setup and implement the arbitrage strategy through Lombard credit". MDM was told to expect a call from LGT to confirm the disbursement of Lombard credit for € 3.9 million, and investment in 3 insurance notes (€ 2.2 million) and 3 reinsurance instruments (€ 2 million). The insurance notes were described as a privileged opportunity for XY customers. These transactions were concluded by SRL, and there is no evidence that term sheets were sent to MDM or Mr Facoetti in respect of them.

506. In the same e-mail, Mr Dalle Vedove said that in the next few days, MDM would be contacted again by LGT to confirm the investment of € 0.5 million in an insurance note on the commodities (oil) market. He was told that this was also a preferred issue for XY customers. These transactions were also concluded by SRL in June 2017. The term sheets (which according to the parties' agreed schedule were provided to MDM by LGT) contain (under the heading Product Description) a simple description of the "Market expectation of the Investor":

> "Underlying trades sideways to slightly higher.
>
> The Barrier Event will not occur".

The Product description was also in simple terms:

> "This Product offers the investor a periodic opportunity to receive a Conditional Coupon Amount. In addition, the Product can also be early redeemed, if the relevant conditions are met on any of the pre-defined Autocall Observation Dates. If no Early Redemption and no Barrier Event have occurred, the Investor will receive on the Redemption Date a Cash Settlement equal to the Denomination. If a Barrier Event has occurred, the redemption of the Product will depend on the value of the Underlying, as described in section "Redemption"."

The "Significant Risks" section contained the following at the start:

> "The risk of loss related to this Product is similar to an investment in the Underlying. Therefore, the Investor could lose the total capital invested if the Underlying value falls to zero".

507. In late 2018, GIG invested in a similar product, and received a similar term sheet, albeit that the "Product description" was somewhat shorter and did not refer to "Early Redemption".

*22 June 2017 meeting*

508. A set of slides was prepared for a meeting on 22 June 2017 concerning MDM/SRL. This meeting, like all of the meetings in 2017 that I have described

above, were meetings relating to MDM/SRL, rather than LDM and GIG. Mr Nuzzo did not attend any of these meetings.

509. The 22 June 2017 meeting was not addressed in detail in the parties' witness statements, and there was only very brief cross-examination of Mr Migani on the slides for that meeting.

510. Slide 13 of the slide presentation presented, in graphical form, the various insurance notes (totalling € 6.6 million). As at that time, SRL had entered into 3 transactions based on the Euro Stoxx 50 index; two transactions on the S&P 500; one transaction on the Nikkei and one on the MSCI World index; and the oil transactions, described in the chart as "Reverse Convertible".

511. Slide 14 identified the 5 reinsurance instruments which had been concluded, with the amount invested to date being € 8 million.

512. Slide 33 identified the "Shared Objectives in early 2017". These were materially the same as those in the presentation for the 28 March 2017 meeting. Slide 35 described the replacement of "UBS with LGT to maximise arbitrage opportunities through Lombard Credit". Other slides dealt with tax issues.

**D8: July – December 2017**

513. The hearing bundle contains XY PowerPoint presentations for a number of meetings in the second half of 2017. These were three presentations (18 July 2017, 6 September 2017 and 15 November 2017) in respect of MDM/SRL and two presentations in relation to GIG/LDM (3 August 2017 and 21 December 2017). However, these meetings were not specifically referred to in the witness statements, and were not covered in any detail in the oral evidence, and I do not think it appropriate or necessary to make detailed findings about these meetings or presentations. I therefore confine myself to the following points which emerge from the documents.

514. The slide presentation for the 3 August 2017 meeting was the first to include, at the start, a "Caveat" in the following terms:

> "• This presentation is intended for the recipient as a written summary of the meeting that occurred on the date of publication of the document, and cannot in any way be extrapolated from the context of the meeting
>
> • This presentation is intended to highlight XY's point of view for the purposes of communication and specific discussion, and does not in any way represent a commitment or obligation for XY
>
> • This presentation expresses XY's thoughts on the date of publication of the document and is subject to change at any time without notice

> • This presentation contains sensitive and confidential information owned by XY
>
> • The Recipient may not distribute, copy, print, or reuse information contained in the document without authorisation from a legal representative of XY
>
> • XY cannot be held liable in any way for any commitments made by the recipient based on what can be inferred from the presentation
>
> • All information exchanged in this document is still covered by the mutually signed non-disclosure agreement as part of the collaboration agreement".

515. Subsequent presentations, both to "Beauty" and "Daddy" contained a similar caveat, either at the beginning or end of the relevant presentation.

516. The 3 August 2017 presentation was the first which had been prepared in 2017 for Mr Nuzzo and therefore LDM and GIG. Slide 5 identified "Investment Strategy Guidelines" as follows:

> "**• Eliminate operational inefficiencies** and **contain banking costs** on both assets and liabilities
>
> • **Personal** assets:
> - Generating **clear and measurable monetary value**, also benefiting from **speculative opportunities**, but with **constant oversight of asset** erosion risks Increased **currency diversification** (particularly towards the USD) to ensure the safeguarding of the purchasing power of assets on a global scale
>
> • **Family Office** Assets:
> - Adoption of a **safeguard** with the generation of **risk-adjusted returns taken** even in an environment of strong interest rate compression
> - Maintaining a high capacity to use **Lombard credit** to fund industrial and business initiatives".

517. It is apparent that there is some overlap between these guidelines and the Claimants' pleaded Investment Objectives, and some overlap between these guidelines and the goals and objectives identified in the presentations for MDM/SRL. However, they were not identical. A similar slide was also included in the presentation for the 21 December 2017 "Beauty" meeting.

518. In relation to the slide presentations generally, it can fairly be said that they provided a great deal of information to the Claimants as to how matters were progressing in relation to their investments and market conditions. Although MDM advances a central complaint about not being told of Mr Migani's

connections to the Skew Base Fund, there is no complaint that – during the many meetings that took place in 2017 – there was inadequate reporting as to how the investments were proceeding and the strategy that was being pursued. Similarly, and although there were only 2 meetings involving Mr Nuzzo during the year, there is no complaint of inadequate reporting. At this point in time, the Skew Base Fund had not been mentioned to Mr Nuzzo at all.

519. During the period July – December 2017, some 21 structured note transactions (both MINs and HFPOs) were concluded by MDM/SRL, and LDM and GIG (via Mr Nuzzo). It is not necessary to describe these in detail. In most cases, a term sheet was not provided, but in some cases it was. An example of the latter was the Commerzbank term sheet for a transaction concluded in November 2017. This contained similar terms/warnings to those described in relation to earlier Commerzbank term sheets. The position overall in 2017 is that where term sheets were provided, these contained risk warnings which in most cases were prominent.

## D9: January – February 2018

*The Morgan Stanley term sheets*

520. During the period January to 13 March 2018, GIG and LDM (through Mr Nuzzo), and MDM entered into 27 structured note transactions. In relation to the MDM transactions during this period, the evidence indicates that term sheets were not provided.

521. Some term sheets were, however, provided to Mr Nuzzo in respect of the transactions which he concluded. The first series of (three) transactions was concluded in January 2018, and the term sheets led to questions from Mr Nuzzo.

522. On 11 January 2018, Mr Dalle Vedove wrote to Mr Nuzzo stating that XY had "identified an opportunity to invest part of the available liquidity of LTD [i.e. GIG]" in 3 insurance notes. A table set out the details of the notes, and Mr Nuzzo was told that these should be sent to the bank within the day for the purchase transaction. Each note was for € 500,000. Mr Nuzzo was asked to confirm that the instruction had been sent to the bank, so that "we can monitor the correct execution of orders".

523. On 12 January 2018, Mr Nuzzo replied saying that – as he had mentioned in the past – he would "like the products we buy to be quoted by Lombard Odier because, all things being equal, I prefer to do it with them". He therefore asked Mr Dalle Vedove to obtain a quote from them on those products and to compare them. Mr Dalle Vedove's response explained that Lombard Odier did not issue these products directly, but acted as distributor for a fee. However, they were included in the regular beauty contests which XY did, and they would be considered for further opportunities. (These "beauty contests" involved XY obtaining quotes, from a number of banks, for possible structured note transactions). Mr Dalle Vedove said that in the meantime "we would not give up investing in the three instruments issued by Morgan Stanley, which offer attractive returns in relation to underlying assets and barriers".

524. Mr Nuzzo then responded with a series of questions:

> "It is very important to me that they are involved and that they then know that the choice is made based on the conditions presented to us.
>
> Do your three suggested products have returns of 2.43% / 2.86% / 2.7% net of fees?
>
> Can you clarify exactly how much our loss would be assuming the Nikkei loses 17% in a day?
>
> Can you clarify exactly how much our loss would be assuming the Eurostoxx loses 15% in a day?
>
> Can you clarify exactly how much our loss would be assuming the MSCI loses 15% in a day?
>
> Can you also confirm how much the lending value of the products indicated is?
>
> A quick note here to also remind you to send me the policy transfer instructions".

525. In order to ask these questions about the extent of losses referable to daily falls in the indices, Mr Nuzzo must have read each of the term sheets, or at the very least the "Product Description" on the first page. Each of his questions was premised on a fall which was greater than the barrier in the relevant term sheet, and in order to identify the barrier he must have looked at the term sheet. The information as to the barrier was not in Mr Dalle Vedove's e-mail. In cross-examination, Mr Nuzzo was unwilling to accept that he had read the term sheets, but he was unable to explain the source of the percentages, contained in his question, if he had not read the sheets (or at least the Product Description on the first page).

526. In relation to the term sheet based on the Nikkei, the Product Description was as follows:

> "The Securities are senior, unsecured obligations of the Issuer and all payments, including the repayment of principal, are subject to the credit risk of the Issuer and the Guarantor. The Securities are not principal protected. The Securities are issued in EUR and pay a pre-defined cash coupon on the relevant Interest Payment Date(s). The Securities are designed for investors who do not believe the NKY will suffer a one day fall of more than 15% over the product's lifetime. If no Trigger Event occurred the note will redeem at 100% and a coupon of 2.43% paid at maturity. If a Trigger Event occurs the investor loses 100%-(15 x (Underlying one day fall -15%)), floored at zero, paid at maturity."

527. There were similar product descriptions for the other two products, save that the coupons were different and the barriers were lower: 12.5% in relation to the note linked to the Euro Stoxx 50 index, and 10% in relation to that linked to the MSCI World index.

528. The term sheet for each product also contained two and half pages of text under the heading: "Risk Factors". Investors were urged to consult with advisors with regard to any proposed or actual investment in the securities. The first two risk factors were as follows:

> "**Capital is not protected:** The final redemption amount depends on the performance of the Underlying and could be zero
>
> **Product Market Risk:** The value of the Securities and the returns available under the terms of the Securities will be influenced and dependent on the value of the Underlying. It is impossible to predict how the level of the Underlying will vary over time. The historical performance (if any) of the Underlying is not indicative of its future performance."

529. The questions which Mr Nuzzo asked, about what the loss would be, were all premised on the basis of substantial falls in the relevant indices, which were well above a 10% fall. Mr Nuzzo had, in my view, appreciated that the notes were being sold, and a significant coupon was being paid, because there was a risk of such a fall. I do not accept his evidence, in so far as he suggested that he was always told by XY that a fall of 10% was impossible. Mr Nuzzo was here contemplating much greater falls. Indeed, in his evidence, he described the percentages (the 15% and 17%) as having been chosen because he was trying to understand the "worst case".

530. It is clear that there was some discussion between Mr Dalle Vedove and Mr Nuzzo in relation to the questions which he had asked. On 12 January 2018, Mr Dalle Vedove told his colleagues that he had talked to Mr Nuzzo, and "we agreed that he would forward the orders to the bank".

531. In his evidence about this e-mail exchange and the conversation with Mr Dalle Vedove, Mr Nuzzo said that Mr Dalle Vedove probably told him not to worry because the falls referred to in his questions had never happened; that there was no risk, or a "very, very low risk". He said that Mr Dalle Vedove had not answered his specific questions. Mr Nuzzo said that he had understood at the time that a fall of 1% beyond the barrier would cause a 10% loss of capital. Thus, in relation to the MSCI index note, where he had asked about a 15% fall, he would have understood that this would produce a 50% loss of capital. However, he said that he had not understood at the time that some of the notes contained a gearing that meant that a 1% fall could produce a loss greater than 10% per percentage point fall.

532. Mr Dalle Vedove's evidence was, in summary, that he would have answered Mr Nuzzo's questions properly. He would therefore have explained, based on Mr

Nuzzo's questions that the losses for a 17% fall in the Nikkei would be 30%, because the gearing was 15% with a 15% barrier; that the losses on the Euro Stoxx 50 would be 15 x 2.5% (i.e. 37.5%) because the gearing was also 15% on a 12.5% barrier; and on the MSCI World index, 50% because the gearing was 10% on a 10% barrier. He said that he would have told him that it was a very unlikely event, but not impossible.

533. In my view, Mr Dalle Vedove's evidence reflects what is likely to have been said to Mr Nuzzo in the conversation. Mr Nuzzo is an intelligent, experienced and serious financial professional (as indeed is Mr Dalle Vedove). Mr Nuzzo would not have been satisfied with, in substance, a refusal to answer his specific questions. Mr Dalle Vedove would have appreciated that Mr Nuzzo wanted answers to his questions, and his e-mail of 12 January 2018 evidences his intention to "give you all the answers". Moreover, Mr Dalle Vedove would also have appreciated that Mr Nuzzo had the term sheets, and had looked at them. The "gearing" is in fact apparent from the last sentence of the Product Description, with the Nikkei and Euro Stoxx 50 both including 15x in the formula, and the MSCI 10x. Accordingly, it would not have been difficult for Mr Nuzzo to ask what that formula meant, and why there was a difference between 15x and 10x. Against this background, it would not have been sensible, or at all likely, for Mr Dalle Vedove to have prepared for the conversation by thinking that he was going to avoid giving proper answers to Mr Nuzzo. Indeed, I do not consider that Mr Dalle Vedove had any obvious motive for doing so. No doubt he would have been keen for Mr Nuzzo to have concluded the proposed transactions, which had been negotiated by XY. However, I do not consider that this would have led him to refusing to provide proper answers to Mr Nuzzo's questions or to misleading him. Indeed, it is not alleged that Mr Dalle Vedove gave false answers to the questions asked.

534. Accordingly, I conclude that – contrary to Mr Nuzzo's evidence – he did understand that some MIN products had a gearing which was greater than the 10% referred to in the "Example" slide which had been used at one of the 2016 meetings to explain MINs. He therefore appreciated that there were some instruments where the loss of capital would be higher than 10% for each 1% below the barrier – a figure which is itself a very significant loss. He also appreciated the possibility of market falls greater than 10%, albeit that he (and Mr Dalle Vedove) thought that such falls were very unlikely. The Product Description in each of the term sheets identified that they were designed for investors who did not believe that the relevant index would suffer a one-day fall of more than the relevant barrier (15%, 12.5% and 10%). It would have been obvious to Mr Nuzzo that this was a possibility, and a possibility recognised by the issuer, since otherwise there would be no reason for the issuer to pay a significant coupon to those prepared to invest.

*16 January 2018 presentation*

535. A presentation was prepared for "Client Board Daddy" (i.e. MDM/SRL) dated 16 January 2018. This was covered only briefly in the cross-examination of MDM, who recalled little about it. Slide 10 identified what had been achieved during 2017 under the heading: "In 2018 Machine Fully Operational Thanks to Numerous Interventions in 2017". The bullet points included:

"• Introduced a new **model** of asset **governance** and **analytical and independent control** to support and objectivise strategic and operational decisions
• Introduced efficient and preferred investment opportunities capable of generating **instantaneous net asset productivity > 3 per cent/year**
• It is now possible to plan in detail the **production of cash flows** for the **year 2018** and **the consistency between expected revenue and expenditure commitments**".

536. Slide 40 listed out the 12 insurance notes which had been concluded, with a total value of € 10.7 million. The barriers were identified, as were the underlying indices: 4 on the S&P 500; 4 on Euro Stoxx 50; 3 on MSCI World; and one on the Nikkei 225. The final page of the presentation contained the Caveat to which I have referred.

*Late January 2018*

537. Subsequent to the meeting, an exchange took place on 24 January 2018 between MDM and Mr Dalle Vedove. MDM was interested in buying the stock of IMA, an Italian company that he regarded as sound, using Lombard credit for both positions. The amount proposed was € 1 million for each of himself and SRL. In the final line of MDM's e-mail, he referred to the fact that Lombard credit was available for the SRL, but "for my personal position I do not remember if we already structured a Lombard ready for some speculative investment". The e-mail indicates that, by this time, MDM was familiar with and keen to use Lombard credit if available. He also recognised in the e-mail that the investment was a "speculative" one. This did not fit easily with his evidence, in his witness statement, that he was not a speculative investor. In cross-examination, he accepted that the use of credit to buy an asset did involve an increased risk, in the event that the asset declined in value and the lender sought repayment because of its exposure to declining security. However, he made the fair point that he knew this company well, and that (as shown by earlier presentations) it had always been intended that there would be some speculative equity investments.

538. Mr Dalle Vedove's response to MDM's e-mail identified the amount of credit available, and also pointed out that the use of credit for the IMA purchase for his personal position would limit the Lombard credit for the shared strategies discussed at the previous meeting. MDM's response was that he wished to proceed with the acquisition for his personal position "hoping for a good performance of the IMA stock (above your annual target of 3.9% net for my personal position) so that this performance can contribute to a higher return". Later in the e-mail, he said that he would monitor the stock carefully "to ensure that the performance does not fall short of our annual target of 3.9% net". Two of the slides for the 16 January 2018 meeting (Slides 19 and 20) had referred to a target return of 3.9%. MDM's e-mail indicates that he was content with that proposed target, and indeed was seeking to improve on it via the IMA purchase. He said in cross-examination that he had not imposed the target, but rather that it had emerged from the investments which were doing well. Whilst that may well be the case, it does not detract from the fact that MDM was content with this target, and gave no indication that it was too high or was likely to involve undue

risk. It was a target which was well above the yields, at that time, from European government debt or investment grade bonds.

539. On 26 January 2018, Mr Jacopo Stock of XY identified to Mr Nuzzo an investment opportunity: a market insurance note, based on Euro Stoxx 50, with a yield of 3.1%, and proposed amount of € 800,000. The BNP Paribas term sheet was provided to Mr Nuzzo, and this contained risk warnings broadly similar to those previously described; e.g.

> "The Securities have no capital protection at any time and there can be a partial or total loss of any capital invested. Investment in the Securities is therefore highly speculative and should only be considered by persons who can afford to lose their entire investment".

540. Mr Nuzzo accepted in cross-examination that he was aware that this product had a 10% barrier. In my view, he must have identified the barrier from the term sheet, since Mr Stock's e-mail, proposing the possible investment, did not refer to the barrier. Mr Nuzzo asked Mr Stock to "confirm to me how much the loss would be if the Euro Stoxx 50 lost 11% in a day or 12%". It is in my view likely that Mr Nuzzo asked that question because he was aware, including from his conversation with Mr Dalle Vedove earlier in January, that the losses from a 11% or 12% one-day drop were not fixed at 10%, but could vary depending on the instrument. I do not therefore accept Mr Nuzzo's evidence that he thought that the percentage loss of capital on MINs was always 10% per percentage point.

541. Furthermore, the premise of Mr Nuzzo's questions is, again, an appreciation on his part that a one-day fall of 11% or 12% was a possibility. Mr Stock's response set out the figures in a small table. This showed a 10% loss on capital for an 11% fall, and 20% for a 12% fall. Mr Nuzzo accepted in evidence that he understood that these products had (what Mr Cloherty described as) a multiplier effect on the loss. In the event, in March 2020, the most significant 1-day falls in the S&P 500 and Euro Stoxx 50 indices were in the region of 12%: i.e. one of the percentage falls that Mr Nuzzo was asking about here.

542. Mr Stock produced a similar table on 13 March 2018, discussed below.

*February 2018*

543. On 14 February 2018, Mr Dalle Vedove e-mailed MDM pointing out that some insurance notes purchased at the beginning of 2017 were due for repayment. Pending the identification of "liquidity reinvestment opportunities", he recommended repaying € 1.4 million in Lombard loans to reduce the interest burden. He said that the operation was temporary and the "Lombard credit will be fully reactivated in the coming weeks".

544. The e-mail illustrates how the initial structured note transactions had proved successful, and indeed this was a success that continued until March 2020. It also illustrates one of the regular themes of the presentations described, namely the use of Lombard credit in order to enhance the returns for MDM/SRL.

## D10: 9 March 2018 meeting and the new liquidity

545. On 9 March 2018, a meeting took place between Mr Nuzzo and MDM and Mr Migani and Mr Dalle Vedove. The background to the meeting was that, at the beginning of 2018, Mr Nuzzo and MDM knew that GIG was going to receive a large amount of cash from the sale of a train company called Italo. They wanted to discuss with XY possible approaches for the allocation of that liquidity, which amounted to € 200 million.

546. This was obviously a very substantial sum of money, and unsurprisingly GIG was also discussing possible approaches to investment with other advisors and banks. Mr Nuzzo and MDM were clearly interested in seeing what a variety of advisors and banks might say. Although (as Mr Nuzzo said in cross-examination in relation to the April 2018 meeting) they were very pleased with the strategies proposed by XY, and they thought highly of XY, they were not simply going to accept whatever it was that XY proposed.

547. This was the first meeting in which XY presented the option for GIG to invest part of the new liquidity in the Skew Base Fund. As Mr Dalle Vedove explained in his witness statement, they had not been allowed to let Mr Nuzzo or LDM know that MDM had invested in the Skew Base Fund before, or even that MDM had a separate relationship with XY concerning his personal assets. Accordingly, the Skew Base Fund was presented at the meeting as if MDM did not already know anything about it. There was therefore an unusual or strange situation (as Mr Dalle Vedove described it) of XY having to present the fund to both Mr Nuzzo and MDM on the basis that it was new to both of them. Mr Dalle Vedove said that this, together with the fact that the amount of the new liquidity was very significant, meant that he had a good recollection of the meeting.

548. For the purposes of the meeting, XY had prepared a lengthy slide presentation running to 74 pages (plus the Caveat on the final page).

549. Slide 7 showed that interest remained at historical lows in Europe. The slide contained charts showing the yields for Italian, Spanish, French and German government bonds. Each of them showed that yields were negative for even quite long-dated bonds: for example, yields were negative for French bonds up to 5 years, and were only marginally positive for a 6 year bond. A 30-year French bond would pay 1.8%: a figure which was, as a later slide shows, well below the potential yields from the structured notes proposed by XY. Similarly, German government bonds of up to 6 years were negative, with an 8-year bond paying 0.2% and a 30-year bond paying 1.3%.

550. Slide 8 contained a graph showing the performance of equity markets (the S&P 500 and the Euro Stoxx 50 indices) over a 20-year period. It showed that the indices tended, at least to some extent, to move up and down together. Sometimes (but not always) the low points coincided. The two indices tended to hit peaks at more or less the same time, but there could be a substantial difference in the peaks: at the end of 2017, the S&P 500 showed a performance which was much higher than the Euro Stoxx 50.

551. Slide 11 set out "Guidelines for the Strategic Allocation of the New Liquidity". This slide was as follows:

> "• In the formulation of the strategic allocation, we hypothesised **approximate liquidity of 200 M€**
> • The family's wealth scale and international positioning require a **multi -currency approach**
> • **Hedging** with regard to the family's expenses (ALM logic)
> • **Currency diversification** in (relatively) independent economic areas in case of shock
> • **Diversification** of the universe of investment opportunities
> • It has been assumed that **about 70%** of the new liquidity will be allocated to the EUR silo and **about 30% to the USD silo**
> • Sizing of silos according to **long-term logic** (rebalancing only based on significant family or market events)
> • **Assessment** of the yields of each silo in **Local Currency**, without consolidation in a base currency of reference
> • Strategic allocation will be applied at a later time between **personal assets** and **Family Office assets**".

552. Slide 12 set out the "Current Strategic Asset Allocation of the Eur Silo". This showed € 140 million being invested in a variety of different types of investment: Commercial Credits, Synthetic Notes, HFPOs, MINs, Real Estate Indirect and Equity Putwriting. Although the slide was headed "Current", this was a proposal for allocation which was up for discussion. The slide proposed that the Commercial Credits, HFPO, MINs and Real Estate Indirect should be in a "Specialist RAIF". There was no reference on the slide, or in the presentation, to VP. The target net return varied for each category, but there was an overall figure of 3.5 – 4.5%. The suggestion was that 18% of the € 140 million should be invested in HFPOs, and 11% in MINs. The remaining 71% was proposed in other investments, with the largest proposed component being Synthetic Notes.

553. Slide 14 set out a proposal for the investment of the balance of € 60 million of the "USD Silo". The mix here was different: Market Bonds, MINs, Insurance Linked Securities, Real Estate Direct and Private Equity Indirect. Here, the proposal was that the MIN and Private Equity components would be in a "Specialist RAIF". The target net return again varied for each category, and the overall figure was 5% to 6%. The suggestion was that 8% of the € 60 million should be in MINs. The largest proposed component was 25% in Market Bonds, where returns on USD bonds produced higher yields than available in relation to Eurobonds.

554. The presentation then dealt with each of the categories, starting with Commercial Credits. Slide 30 dealt with HFPOs and was headed: "Very Significant Premiums can be Obtained through a HFPO Strategy". It was substantially the same (with only minor changes) to a similar slide which was shown as part of the September 2016 presentation (and reproduced above). The slide set out the barrier in relation to HFPOs based on 3 equity indices, with instruments which were 2.1, 2.3 and 1.2 months from maturity. The "Probability Barrier" was identified as 1.1%, 1.4% and 1.9% referable to barriers of 38.1%, 36.7% and 32.8% respectively. This gave

XY's calculation of the probability of the barrier being breached. It indicated that the probability was very low, but was not non-existent.

555. Slide 34 was the first slide in the section dealing with MINs. Its heading was: "With the Same Risk, Insurance Notes Offer Superior Yield Compared to Market Bonds". It was substantially the same as a similar slide presented in September 2016 (see above). It compared the low yields on market bonds with the more favourable yields, for the equivalent risk, on insurance notes. It again gave the probability of default, which increased as the yields increased. A footnote explained that the probability of default was the probability of "occurrence of extreme event in case of non-credit risk": this was the risk applicable to a MIN. Again, the probability was very low, but not non-existent: 0.78% for a note yielding between 3 and 3.5%.

556. Slide 35 was an "Example of an Insurance Note" and was again substantially the same as the slide presented in September 2016. It referred to an "extreme event". This was the wording that XY generally used to describe the event. It was used in the equivalent September 2016 slide, in two of the e-mails which had been sent to Mr Nuzzo in the intervening period (described above), and in Slide 34 for this presentation on 9 March 2018.

557. Slide 36 was a graph which showed, in relation to the MSCI World index, that between 1992 and 2017, there had never been a fall of 10%: the highest one-day fall in that period was 6.9%.

558. Slide 37 was new and was headed: "Possible diversification of investment in insurance notes and use of implicit leverage". The sub-heading was: "Risk of leverage totally related to the vehicle". Mr Migani's evidence was that this was illustrating how an investment vehicle could use substantial leverage: equity capital of 65% plus leverage of 35% could produce 100% of assets available for investment. He explained that the use of such leverage would not expose the investor to the risk of further loss beyond his investment, because the borrower would be the vehicle. It was clear from Mr Nuzzo's answers in cross-examination about the similar slide used at the April 2018 meeting (described below) that Mr Nuzzo understood the slide, and the use of leverage, in the way described by Mr Migani. Mr Nuzzo also accepted that the ability of the vehicle to borrow, and obtain increased returns, without exposing the investor to the risk of further loss, was a reason to invest in the fund, although he said that it was not the main reason.

559. On the right-hand side of the slide, there was a heading: "… and High Diversification of Underlyings". This identified 6 equity indices, and 4 other indices (investment grade bonds, basket, gas and gold) and an ellipsis indicated that there were others.

560. The remaining slides dealt with the other possible types of investment for both the EUR and the USD silos. Mr Migani's evidence was that he went through the various asset classes, and there were some (private equity, and individual real estate) which were of no interest to the clients. But they were interested in other asset classes, although (as Mr Dalle Vedove explained) they did not invest in Equity Putwriting.

561. Since this was the first time that XY had mentioned a RAIF to Mr Nuzzo, the principal dispute between the parties was as to what, if anything, Mr Migani said about his connection to that fund.

562. Mr Nuzzo's evidence was that because of the large amount of the liquidity, he could not handle the daily e-mails. He said that, at this meeting, there was no mention of the Skew Base Fund, but rather XY "started mentioning a possibility to invest in funds where only certain people could invest thanks to XY's introduction. It was only at a later stage that they started to mention VP Bank".

563. Mr Migani's evidence was that, using Slide 12, he introduced the Skew Base Fund for the first time. He said this was a new opportunity which they had worked on, and that: "I was the creator of this opportunity and the owner of the General Partner of the Fund was the same as XY". He said that it and XY had the same owner: "il proprietario e lo stesso", meaning that the General Partner was a sister company of XY. He explained to MDM and Mr Nuzzo that the fund structure was an efficient way to invest, and was only available to XY's clients. He also explained that he was the entrepreneur who had developed the idea for the Fund, and that his connection meant that GIG had access to a unique efficient offering for investing in these asset classes which was not available elsewhere in the market. Mr Migani said that Mr Nuzzo saw it as a positive that he was the entrepreneur behind the Skew Base Fund, and that this gave XY's clients the ability to develop specific strategies. Mr Migani said that Mr Nuzzo said that the model was attractive to him because he had a large number of investments to manage and monitor. At the end of the meeting, Mr Nuzzo said that he thought the Skew Base Fund was a good option for him to evaluate.

564. Mr Dalle Vedove's evidence was that Mr Migani took the lead, as he always did, in the part of the meeting where they discussed the Skew Base Fund. He said that he had set up the fund to enable XY clients to invest in alternative asset classes in an efficient way. He did not recall the exact words that Mr Migani used to talk about the Fund in the meeting, but it was clear from what he said, as it always was, that the General Partner of the Fund was set up and owned by him. He also explained the involvement of VP as the AIFM. He would have used the same language that he used with all of their other clients, and there was nothing unusual about the way that he introduced the Fund on that occasion.

565. For reasons set out in Section H below, I consider it more likely than not that the connection between Mr Migani and the Skew Base Fund was communicated to Mr Nuzzo and MDM along the lines described in the evidence of Mr Migani and Mr Dalle Vedove, and that this happened at the first meeting where the Fund was introduced to Mr Nuzzo. Since Mr Migani was proposing that the investment in a number of different types of assets would be in a "Specialist RAIF", Mr Migani would have needed to give some explanation as to why Mr Nuzzo (who had not previously heard of the Fund) should regard this as an attractive option. It is in my view doubtful that Mr Migani would have been explaining the virtues of VP, not least because it was unlikely that Mr Nuzzo would be familiar with that organisation. Indeed, Mr Nuzzo's evidence is that VP was not mentioned at that meeting. It is far more likely that the virtues of investing in the Fund would have included an explanation of Mr Migani's involvement in it.

566. Mr Dalle Vedove also said that Mr Migani mentioned MINs as one of the products in which certain compartments of the Skew Base Fund invested. They focused on MINs because the Claimants had previously invested in those products, and XY wanted to show that they could continue to invest in those assets in a more efficient way. I think it likely that there was some discussion about MINs, by reference to the slides that had been produced. I do not accept MDM's evidence that, at the time of this meeting – at which point he had had MINs explained at the meeting itself and at the September 2016 meeting, and had invested in a large number of MINs – he did not understand the nature of the risk involved in such products, and did not understand that a breach of the barrier would result in a loss of capital. As already indicated, I do not accept that a person of MDM's intelligence and financial acumen would have contemplated investing many millions of Euros in an asset class whose essential features he did not understand.

567. A further dispute concerns what, if anything, was said about the Claimants' investment objectives. Mr Nuzzo said that at this meeting, and at subsequent meetings, Mr Migani advised that investing a quarter of the new liquidity in MINs and HFPOs was a good strategy, and was consistent with their objectives. MDM's evidence, concerning this meeting and the later meeting on 17 April 2018, was that the level of discussion and interaction were always the same. XY said that the investments respected the guidelines, that there was a very high demand for these products which the Claimants should not miss, and that XY had secured a space for GIG.

568. By contrast, Mr Migani's evidence was that the client's objectives and the general guidelines for investing the new liquidity, were set out on Slide 11 (see above). Mr Dalle Vedove said, in relation to Slide 11, that since the clients' objectives would often change over time, they wanted to ensure that XY's understanding was aligned with what the clients wanted to achieve. He said that the clients did not challenge XY on those guidelines.

569. I consider it likely that there was some discussion at the meeting as to the Claimants' objectives. Slide 11 was essentially concerned with a proposal as to how the new liquidity would be allocated, rather than the more general question of what the Claimants and XY were seeking to achieve. As discussed below, the presentation for the next meeting, set out "Investment Strategy Guidelines for New Liquidity" in different terms to Slide 11, and with considerable similarity to earlier slide presentations. There is therefore likely to have been some discussion of the objectives. However, the main focus of the presentation at the March 2018 meeting was the detail of the investments which were being disclosed. This is evidenced by the lengthy presentation as a whole, with detailed slides relating to each of the proposed asset classes.

570. No decisions were taken by Mr Nuzzo and MDM at this meeting as to how to invest the additional liquidity, or indeed whether they would accept XY's proposals. Those proposals were not set in stone, and were likely to be the subject of further discussion. I think that MDM largely captured the flavour of the discussion in his evidence when asked about not doing Equity Putwriting. He said that there was no confrontation, but "I would always put it as a brain-storming,

landing on what would have been their advice, what would have been our desire, and this is how it went."

## D11: March/April 2018 and the fees correspondence

*10 March – 16 April*

571. Subsequent to the meeting, MDM decided to invest in the Tangible Credit compartment of the Skew Base Fund. That investment was initially € 3 million and was later increased: see Section A above. It proved profitable, and there is no complaint about it in these proceedings.

572. On 13 March 2018, Mr Nuzzo asked Mr Stock of XY for further information about two products that had been proposed to him. He said: "I need to know what I am buying. Can you give me the description of the product". Mr Stock then sent him the term sheets for both transactions, and produced a summary in a small table. The final column was headed "Leva" (i.e. Leverage), and both products were listed as 10x. Mr Nuzzo asked what this meant, and Mr Stock replied that each percentage point beyond the barrier equals 10 percentage points on capital. The term sheets sent to Mr Nuzzo were issued by Commerzbank and Morgan Stanley, and they contained information and warnings similar to those contained in those banks' term sheets previously described.

573. On 23 March 2018, Mr Nuzzo asked for Mr Dalle Vedove's opinion on a product which had been suggested to him by Mr Chardigny of Lombard Odier. Mr Dalle Vedove sought the opinion of his colleagues, in particular as to whether the price was fair. He then sent a detailed response to Mr Nuzzo, explaining that the product was a "worst of" note referable to the CAC40 and DAX indices. Redemption would be at 100% if the 2 underlying indices were greater than 65% of the initial strike at maturity, otherwise the instrument replicated the worst underlying performance.

574. Mr Dalle Vedove listed the main defects that they saw with the product proposed by Mr Chardigny. The barrier was relatively close to the strike (-35%), given the duration of the investment (3 years), resulting in high risk of capital loss. Also, the yield was not in line with the underlying risk. He compared this product with, by way of example, the instruments that fell under the "Short Term Arbitrage strategy", which involved the Euro Stoxx 50 index. He said that this was less risky than the CAC and DAX indices, and with barriers around 65% it was possible to obtain returns greater than 6% with maturities of just over 1 year.

575. This exchange illustrates a number of points.

576. First, Mr Nuzzo was clearly interested in considering "worst of" notes which were proposed by persons other than XY. In order to be interested in such products, he had to have had a reasonable understanding of them. Indeed, in his earlier e-mail to Mr Stock, he had referred to his need to understand what he was buying.

577. Not long after this exchange, Mr Nuzzo received a presentation from Credit Suisse, in connection with the new liquidity available to GIG. One of the slides

identified two different types of "worst of" notes, both of which had a barrier and where capital protection was described as "conditional on failure to break the barrier". Mr Nuzzo agreed, in cross-examination, that these "reverse convertible" products were similar to the products that he had been discussing with XY; and also that Credit Suisse must have considered that he was capable of understanding and evaluating a reverse convertible product.

578. Secondly, Mr Dalle Vedove's e-mailed response is written on the basis that Mr Nuzzo did have an understanding of this type of product.

579. Thirdly, the e-mail contains a brief explanation of instruments which might fall under the HFPO strategy; namely based on the Euro Stoxx 50 index, with barriers at around 65%, and maturities of just over a year. In fact, the HFPO instruments in which Mr Nuzzo had decided to invest prior to that time had maturities which were rather shorter: generally around 3 months. However, Mr Nuzzo's interest in the Lombard Odier product shows that he was contemplating an investment in a product which would have a far longer maturity period.

580. On 11 April 2018, Mr Nuzzo on behalf of LDM and GIG, and MDM, entered into a total of 5 further structured note transactions, following proposals from XY. Term sheets were not provided.

*17 April 2018 meeting*

581. Mr Nuzzo, MDM, Mr Migani and Mr Dalle Vedove met again on 17 April 2018. The slide presentation ran to 61 pages. The slide presentation referred to in the evidence appears to have been the version which was updated by Mr Dalle Vedove shortly after the meeting, in particular to pick up Mr Nuzzo's idea of the Rothschild investment referred to below.

582. Slide 4 set out "Investment Strategy Guidelines for New Liquidity", under 4 headings:

> "1. **Preserve** capital and generate a periodic **income stream**
> - <u>Target cash income</u> of 3% net of costs, to be distributed to members on an annual basis
> - High liquidity of the strategy
> - Prevalence of investments with <u>very predictable returns</u>
>
> 2.Manage Any A**dvances** of Income to Shareholders, **Without Affecting Capital**
> - Use of <u>purpose-designed funding</u>
> - Design of financing repayment plans through income generated from year to year
>
> 3. Prepare **Quarterly Reporting** of Results
>
> 4. Seize Possible **Entrepreneurial Investment Opportunities** Over Time
> - Consider 20-30 M€ as potentially amount to place

- Maintaining flexibility on funding sources: capital vs. Lombard credit".

583. In cross-examination, Mr Nuzzo initially did not accept that this slide set out the guidelines or objectives that the Claimants were giving to XY at this point. However, he then accepted that the slide did describe their guidelines. He also said that 3% net of costs was "our idea, yes", and that they were looking for that return to give the family an income; that they wanted returns that were very predictable; and that they were looking to fund the income requirements without eating into capital.

584. MDM seemed less willing to agree that Slide 4 fairly set out the objectives for the new liquidity. His answers in cross-examination sought, in summary, to suggest that the significant guideline was "preserve capital". On this basis, the references to the maintenance of an income stream, and the payment of income to shareholders, was not something that was obligatory: it was GIG's idea of a target, but it was "never a milestone". He said that the "milestone was and were the investments objectives, safeguarding, high liquidity, all the ones that are very clear". He said that he did not want 3%, but was "willing" to have it. I do not accept this evidence. I consider that Slide 4 does fairly represent the guidelines or objectives which both parties considered to be applicable, and that this included a target of 3% net of costs. Indeed, similar slides appear in later presentations.

585. I also accept Mr Dalle Vedove's evidence that XY's consultancy work required a balancing of these objectives. Thus, as he said, GIG's goal of predictable returns meant that the portfolio needed to include fixed return investments, to reduce volatility in yearly returns.

586. Mr Dalle Vedove also said that the clients wanted to ensure positive returns in the short-term as well as in the long-term. Thus, the clients targeted no loss of capital in any timeframe: they did not want negative returns in the short-term even if that loss of value would be recovered over the longer-term. He said that this objective was challenging to balance with the clients' target of net annual returns of 3%, in an environment in 2018 where traditional asset classes were producing negative returns. Traditional fixed return strategies only would not achieve a 3% return, which is why XY continued to put forward the option of investments in "alternative investments which were stable and would provide predictable returns except in extreme non-credit events". I accept this evidence.

587. It is clear from the presentation as a whole that, for example, the objectives could not be achieved by investment in European government bonds, even Italian bonds which were the most favourable of the 4 European government bonds at that time, but where yields were negative for 2-year bonds, and only reached 2.9% for a 20-year bond.

588. Slide 13 was headed: "Working Hypothesis for the Design of the Strategy", followed by: "To be finalised together during the meeting". It identified the proposed approach as follows:

"• In the formulation of the strategic allocation, we hypothesised **approximate liquidity of 200 M€**

• The family's wealth scale and international positioning require a **multi -currency approach**

• **Hedging** with regard to the family's expenses (**ALM logic**)

• **Currency diversification** in (relatively) independent economic areas in case of shock

• **Diversification** of the universe of **investment opportunities**

• It has been assumed that **about 70%** of the new liquidity will be allocated to the EUR silo and **about 30% to the USD silo**

• Sizing of silos according to **long-term logic** (rebalancing only based on significant family or market events)

• **Assessment** of the yields of each silo in **Local Currency**, without consolidation in a base currency of reference

• Strategic allocation will be applied at a later time between **personal assets** and **Family Office assets**".

589. This slide was an adaptation of Slide 11 of the March 2018 meeting, set out above. Many of the slides were repeated from the March 2018 presentation, and some were adaptations.

590. Slide 14 identified the proposed categories of investment for the Euro component. This was an adaptation of the equivalent slide used at the March 2018 meeting. It included € 25 million in HFPO and the same amount in MINs. These (as well as Commercial Credits and Real Estate Indirect) were identified against "Working platform" as: "Exclusive Access Vehicles (VP Fund Solutions)". These proposed investments in MINs and HFPO's each represented 19% of the total EUR component of € 130 million.

591. A new investment category was introduced on this slide, as compared to the March presentation: "Private Debt". The slide identified Rothschild, and that the "Working platform" was "Managed". Mr Nuzzo accepted that this was introduced at his suggestion (it replaced Equity Putwriting which had been proposed in March). This illustrates, in my view, how there was an iterative discussion as to proposed allocation of investments, with the Claimants not simply accepting proposals made by XY. This investment was to be in a fund which was run by Rothschilds, which Mr Nuzzo had sourced. Mr Dalle Vedove explained that he knew from his previous work on the GIG portfolio that Mr Nuzzo had a long-standing relationship with Rothschilds and often wanted to

make investments with that firm, even if those were not consistent with the overall strategy (which this debt purchase was not).

592. Slide 15 set out the USD component, with MINs amounting to € 10 million (representing 18% of the total of € 55 million). The remaining 82% was proposed to be invested in Market Bonds, Real Estate Direct and Private Debt, the latter again with Rothschild.

593. Slide 16 set out proposed fees in relation to the "New Beauty Project". This comprised (i) a base fee of 0.28%, and (ii) a bonus (variable fee) based on results achieved, comprising one-third of the annual monetary result over 3.2% net of all costs. The explanation of the 0.28% fee was that it was "minimum compared to market standards", and the slide then set out various comparison costs:

> "• Base fee equal to **0.28% year on new masses,** minimum compared to market standards
>
> - Average ETF cost between 0.30 and 0.50% per year
> - Average cost of traditional bond funds between 0.50% and 0.80%
> - Average cost of traditional balanced funds between 0.80% and 1.20%
> - Typical costs of traditional management (TER) between 1.50% and 3.00%".

594. Many of the remaining slides concerned details of the proposed investment classes, and repeated slides in the March 2018 presentation. Thus, Slides 29 (HFPO premiums), 32 (comparison with market bonds), 33 (Example of an Insurance Note) and 35 (Possible Diversification of Investment in Insurance Notes) were identical to the March 2018 equivalent slides.

595. Shortly after the meeting, Mr Nuzzo (on behalf of GIG and LDM) concluded 2 structured product investments. In order to preserve liquidity in GIG, Mr Nuzzo decided to reduce the amount of GIG's investment from that proposed by XY.

*25 April 2018 e-mails*

596. A number of e-mails were exchanged on 25 April 2018, and these are relevant in relation to the issue of whether the Claimants (in particular Mr Nuzzo on behalf of GIG and LDM) knew of the connections between Mr Migani and the Skew Base Fund, and whether Mr Migani sought to conceal that from the Claimants.

597. At 1.52 pm (UTC), Mr Nuzzo wrote to Mr Dalle Vedove in an e-mail headed: "new proposal". This was clearly a reference to the fee proposal that had been made in the 17 April 2018 meeting described above. Mr Nuzzo asked:

> "With respect to your proposal discussed the other day, can you confirm whether the costs of the RAIF are included in your fees or, otherwise, what these costs are".

598. Mr Dalle Vedove passed this e-mail to Mr Migani later that afternoon. He said to him: "When you have a moment, we will coordinate on how to respond to him. Thank you".

599. Mr Migani later e-mailed (using his iPhone) Mr Dalle Vedove as follows:

> "In fact you can even tell him that RAIF costs are so low because inside our fees is all the reporting, strategic guidelines and operational risk management that we do and that is fundamental to the results … everything that remains inside RAIF are audit structure costs, AIFM bank managers, etc."

600. Mr Dalle Vedove responded: "OK very clear. Tomorrow I hear from him".

601. On the following day (26 April), Mr Nuzzo e-mailed Mr Dalle Vedove in relation to their next meeting, which Mr Dalle Vedove had proposed for 10 May 2018. Mr Nuzzo said:

> "Thanks Francesco, shall we set it for 11 a.m.
>
> Can you confirm for me, then, regarding your fees if they are inclusive of RAIF costs or not and if so, how much these RAIF costs are".

602. There was no e-mailed response to the question which Mr Nuzzo had asked. However, Mr Dalle Vedove's evidence (described below) was that he did speak to Mr Nuzzo in relation to his questions.

603. XY, and indeed the other Defendants, made a number of points about this e-mail exchange. They contend that the question which Mr Nuzzo asked, twice, only makes sense if he understood that the RAIF was connected to XY. Otherwise, and if the RAIF was wholly independent, there was no logical reason why "your fees" (i.e. XY's fees) should include the costs of the RAIF. They also contend that Mr Migani's response shows that his state of mind was that Mr Nuzzo knew about the connection between himself/XY and the fund. Both of these arguments were heavily disputed, and were the subject of evidence and detailed submissions.

604. In his witness statement, Mr Nuzzo said:

> "I remember very well why I sent that e-mail [i.e. the 26 April e-mail]. We were talking to XY as well as other advisors, such as Cambridge Associates and Banca Intesa, and I had an Excel spreadsheet where I was putting the proposals together to compare them. If I added the fees of XY including the fixed fee and the performance fee, plus the Skew Base Fund fees, I realised that the fees were much higher than Cambridge Associates, and that is why I sent the e-mail. I did not know about Mr Migani's connections to the Fund".

605. At the start of his evidence, Mr Nuzzo wanted to clarify this evidence. He said that the timing was wrong: his questions in April 2018 were made at a time when he still did not know what the costs were of the Skew Base Fund. He only found out later what the costs of the Skew Base Fund were.

606. In cross-examination on the 25 April 2018 e-mail, Mr Nuzzo was asked why the fees of a completely external fund should be subsumed in XY's fees. He said that because XY was not managing those funds anymore, he wrongly assumed that they were using the management fee to pay the fund directly. He was doing a pure mathematical exercise to understand exactly what the costs for all the investments were. It was put to him that XY, as a business, would not absorb the fees that were charged by a completely external fund for managing the fund. He agreed that it would not, "but this was always what they told us from the beginning, the conflict of interest, so they were not doubling fees". He said that here he assumed "that I was not paying XY and also the funds for the same amount of money". He was asked about his reference to "doubling fees", and it was put to him that he was saying that he didn't want to double the fees, and didn't want to pay Mr Migani twice. He responded: "No, I don't want to pay management fees twice on the same amount".

607. In cross-examination on the 26 April 2018 e-mail, it was put to him that if the Skew Base Fund was a completely arm's length fund, then inevitably its fees would be in addition to XY's fees. He said that this is not what he thought at the time.

608. Mr Dalle Vedove's evidence about the 25 April 2018 e-mail, in his witness statement, was that he thought at the time that Mr Nuzzo asked the question because he did not want to pay twice for both XY's and Skew Base's fees. He said that he discussed Mr Nuzzo's question with Mr Migani, who asked that he call Mr Nuzzo and explain that XY and the Skew Base Fund had different roles and did different things, so had separate fees. He said that he did so and Mr Nuzzo seemed to accept the answer.

609. In cross-examination, Mr Dalle Vedove said, in relation to Mr Migani's e-mail to him, that there was a conversation which preceded this, and Mr Migani was adding to what he had said in that conversation ("you can even tell him"). He said his understanding was that he could tell Mr Nuzzo that the RAIF costs were so low "because I'm involved, right, in the management of the RAIF, and so I managed to keep the fees as low as possible". He said that Mr Nuzzo's question indicated that he did know about the connection: "otherwise, I don't understand why he should ask: are the RAIF costs included into your fees, which are XY fees". When I asked him what, to the best of his recollection, he had told Mr Nuzzo he said:

> "I told Mr Nuzzo that XY was doing a job and the RAIF was doing a different job, so there was no reason at all why the fees should be included, the RAIF fees, into XY fees, okay. But I also said, look, remember that the costs or the fees of the RAIF are competitive, and they actually were competitive, but for MIN compartment, the fees were 0.6%, which is, I would say, pretty low for a mutual fund. I said: please remember that the

> fees are competitive because this is a structure that Mr Migani had set up specifically for XY's clients, so he tried to be as competitive as possible to the fees. That is what I said to Mr Nuzzo."

610. He was challenged on this account by Mr Saoul, who put to him that it was not contained in his witness statement and that the evidence was invented. Mr Dalle Vedove said that there were many things not in his witness statement, bearing in mind that there had been a 4-year relationship with hundreds of e-mails, tens or hundreds of documents and several meetings.

611. At the end of his evidence, in response to questions from me, he said that he had refreshed his memory by looking at the e-mail from Mr Nuzzo, and that there were two questions to answer. The first question was whether XY's fees included the cost of RAIFs, and there was an easy answer to that question: the answer was "no". He also had to tell Mr Nuzzo what the fees were for the RAIF: so he answered the question, 0.6% for the MIN and 1% for the HFPO and so on. He definitely had to comment on the fees of the compartment, which were competitive. So he had to explain why the fees of the RAIF were competitive, and the easy explanation is that it is because this was a RAIF set up by Mr Migani to allow XY clients to invest in these opportunities.

612. I now set out my conclusions in relation to this e-mail exchange.

613. First, I think that it is more probable than not that Mr Nuzzo's questions, as to whether "your fees" (by which he meant XY's fees) included the cost of the RAIFs, were prompted by his knowledge of the connection between Mr Migani/XY and the RAIF. If there was no connection at all, and the Skew Base Fund was a fund which was run wholly independently by VP, then there is no obvious or logical reason why XY's fees should include the costs of the RAIF. Mr Nuzzo's explanation as to why he asked the question (twice) changed as between his witness statement and his oral evidence: his written evidence, that this resulted from a spreadsheet comparison that he was doing, and that he clearly remembered this, was not maintained.

614. In his oral evidence, Mr Nuzzo said that XY might have been using their management fee to pay the fund directly. I did not find this answer persuasive: there was no obvious reason why XY should be paying the fees of the Fund, in respect of investments made by their clients, by giving up part of their own fees. In any event, even if this was a possibility, it is far less plausible than the possibility (and in my view likelihood) that Mr Nuzzo's question was prompted by his knowledge of the connections between Mr Migani/XY and the Skew Base Fund. XY's Slide 16, used at the April 2018 meeting, had compared XY's 0.28% fee with other fees being charged in the market: in the case of each category, the 0.28% was below, and usually well below, other fees. Mr Nuzzo clearly had in mind XY's fee proposal in Slide 16 when he asked his questions. If the Skew Base Fund was a fund wholly independent of Mr Migani/XY, it is very difficult to see (based on the likely level of fees as set out on Slide 16) that XY would have been paying their management fee to pay the fund directly. Indeed, one would not

normally expect XY to absorb, within its own fees, the costs of a completely external fund.

615. This last point is also borne out by the fact that, as Mr Nuzzo accepted in cross-examination, there were a number of other funds that Mr Nuzzo (for GIG) invested in through XY, including the Rothschild fund (described above), a SCOR fund and an LGT cap bond fund. These were all external funds. In none of these cases did Mr Nuzzo ask whether XY's fee would include the external fund's fees. In fact, in relation to Rothschild, Mr Nuzzo approached them direct and negotiated a fee reduction.

616. Secondly, Mr Migani's e-mailed response to Mr Dalle Vedove is in my view consistent with Mr Migani thinking that Mr Nuzzo understands (because he has been told about) the connection between himself/XY and the Skew Base Fund. It is more difficult to read that e-mail response as consistent with an attempt to conceal the existence of the connection. As all counsel acknowledged in their submissions, it is not appropriate to subject an e-mail of that kind, sent on an iPhone, to a fine degree of textual analysis. I have therefore tried to stand back from the detail of the individual words.

617. A number of matters are in my view clear from the message. Mr Migani wanted Mr Dalle Vedove to explain how low the costs of the RAIF were. I agree with Mr Dalle Vedove that this would naturally have led him to tell Mr Nuzzo (who by that stage had not received the Offering Memorandum for the Skew Base Fund) what the costs actually were. Mr Nuzzo was clearly interested in knowing the costs at that point in time: both messages (25 and 26 April) refer to it, with the second message indicating that it could be answered at the proposed meeting in May. In my view, it is probable that Mr Dalle Vedove answered that question when they spoke about the subject, and that he told him the fees which were payable. Having asked about the topic (twice), the absence of any further request by Mr Nuzzo after 26 April is indicative that his questions were answered. Mr Dalle Vedove's evidence was that he did speak to Mr Nuzzo by telephone, and indeed he was cross-examined on the basis that there had been a telephone discussion after the e-mail requests. I do not accept Mr Nuzzo's evidence in so far as he suggested that he never received an answer to his questions.

618. The second thing that is clear from Mr Migani's message is that he wanted Mr Dalle Vedove to explain all the work that "we do" and which is "fundamental to the results". This includes all the reporting, strategic guidelines and operational risk management. The results there being referred to are the results of the RAIF. In my view, it is easier (and more probable) to read this part of the e-mail as emphasising, rather than concealing, the connection of Mr Migani/XY to the Skew Base Fund. Also, the phrase "operational risk management" suggests a considerable degree of involvement in the actual operation of the Skew Base Fund. Indeed, it seems to me that it could fairly (if somewhat loosely) be used to describe the involvement of Twinkle.

619. Mr Saoul, in his closing submission, drew attention to Mr Migani's use of that expression ("operational risk management") in the September 2016 slide presentation. This phrase had been used in September 2016 to describe the work that XY would do as part of their proposed "Transformation Plan and Service

Roll Out". That part of the slide had 3 bullet points: "Detailed Strategy Definition; Deal Arrangement; Operational Risk Management". However, I did not think that this assisted the argument that the connection was being concealed. On the contrary, it indicated that the work that XY was proposing to do for the Claimants in September 2016, and which they had then done for the next 18 months or so, was work that they were going to do in relation to the Fund itself, and on which the success of the Fund depended.

620. Thirdly, in the light of these matters, I tend to think that Mr Dalle Vedove's account of what he believed that he told Mr Nuzzo is more probable than Mr Nuzzo's evidence that he never received an answer. However, it is not possible to make a finding that Mr Dalle Vedove did tell Mr Nuzzo all of the matters which he described in his evidence. This was a conversation that took place many years ago. Mr Dalle Vedove's evidence was in my view a reasonable reconstruction, influenced by the terms of Mr Migani's e-mail, of what may well have been said. It is possible that Mr Dalle Vedove's response would have referred in some way to the connection between Mr Migani and the Fund, but I cannot positively conclude that it was. I do not, however, think that Mr Dalle Vedove would have sought to mislead Mr Nuzzo about that.

621. There was some debate as to whether the reference in Mr Migani's e-mail to "our fees" referred to XY's fees, or more generally (as Mr Dalle Vedove suggested) to the fees of Mr Migani's companies. I think that there was some support for Mr Dalle Vedove's evidence in the contrast that was drawn between the fees for all of the reporting, strategic guidelines and operational risk management, and the limited third party costs which "remains inside the RAIF". Also, the reference to "strategic guidelines" would seem naturally to refer to SB GP, which was responsible for setting the strategy of the Fund and any changes to the strategy. However, I consider that the reference is not clear, and I do not consider that it is possible to reach a definitive view.

622. In conclusion, I consider that this e-mail exchange provides evidence that Mr Nuzzo knew of the connection prior to sending his questions, that Mr Migani was not seeking to conceal the connection, and that the connection was mentioned when the questions were answered. I return to these conclusions in Section H below when I discuss the independence issue in more detail.

### D12: May 2018 – the draft letter and PowerPoint for the di Montezemolo family

623. In May 2018, as Mr Dalle Vedove said in his witness statement, he understood that Mr Nuzzo and MDM had to present the allocation and strategy of the new liquidity to other family members, which would be both LDM and LDM's other sons. He was told by Mr Nuzzo that he and MDM had a meeting with the family members (which XY did not attend) where they presented this strategy, covering how they intended to invest the new liquidity, the returns expected, and the money they expected to distribute to family members at the end of each year.

624. Mr Dalle Vedove described two documents requested by Mr Nuzzo for this family meeting: (i) a statement saying that there was a strategy in place and that the strategy was aligned with the objectives of the family; (ii) a short PowerPoint

presentation about the strategy and the role and expertise of XY, on which he and Mr Migani worked.

625. Looking first at the letter, a draft was sent by Mr Dalle Vedove to Mr Nuzzo under cover of an e-mail dated 29 May 2018. Mr Dalle Vedove said that he was sending "the investment strategy and counterparty statement". He asked Mr Nuzzo to say whether this was "in line with your requirements". The draft letter was as follows:

> "XY SA is an international group specialising in strategic consulting and management control for U-HNWIs.
>
> XY SA is authorised and regulated by the Financial Conduct Authority (FCA) in the UK - authorisation no. 604661 - to carry out 'investment advisor and arranger' activities with a European passport to operate in the countries of the European Economic Area. In Switzerland, XY SA is supervised by the self-regulation body OAD FCT, recognised by the Federal Financial Market Supervisory Authority (FINMA). XY SA has achieved ISO 9001:2015 quality certification, through SQS and IQnet - Certificate No. 43937.
>
> XY hereby certifies that the investment strategy is consistent with the objectives expressed by the Client and that all selected counterparties have passed thorough due diligence and operate under a competitive cost regime."

626. The letter was a draft and was not signed. Mr Dalle Vedove's evidence was that it was then discussed at the 6 June 2018 meeting (described below). The letter was then amended and was signed by Mr Migani. The final paragraphs now read:

> "XY hereby certifies that the investment strategy is consistent with the objectives expressed by the Client.
>
> All banking counterparties have passed scrupulous due diligence, operate on a cost competitive basis, and XY SA and its subsidiaries do not receive any retrocessions from them".

627. Although the letter was signed, it was never sent to Mr Nuzzo, who did not chase for it. In an e-mail dated 11 June 2018 from Mr Migani to Mr Faleschini (who had been involved in preparing and reviewing the letter) and Mr Dalle Vedove, Mr Migani said:

> "… since with the letter we expose ourselves by certifying a strategy (there is a small risk), I would hold it off until Nuzzo stimulates it again, maybe he even forgets. Evaluate in any case you Francesco what to do, any option is fine".

628. Mr Dalle Vedove replied that he had checked the letter, and it was OK with him. He proposed that they prepare the pdf and keep it on stand-by, so as to have it ready in case Mr Nuzzo requested it.

629. There is no pleaded allegation that the draft letter, sent on 29 May 2018, contained a misrepresentation (whether fraudulent or otherwise). Nor, unsurprisingly, is there any pleaded allegation of misrepresentation arising from the redrafted letter which was never sent to Mr Nuzzo. However, the Claimants argued that both letters were misleading, or contained half-truths, in the light Mr Migani's connections to the Skew Base Fund, and the fact that Twinkle was to receive substantial payments from VP, with monies then flowing further from Twinkle to Mr Migani's Leader Logic companies. They submitted that both the draft and the signed letter demonstrated a lack of candour and willingness to mislead.

630. Mr Migani's evidence in cross-examination was that the letters were about the past, not the future. Accordingly, they did not concern the proposed investment strategy for the new liquidity. There had as yet been no implementation of that strategy, or even an agreement to implement it. Accordingly, the letters could only refer to what had previously happened, and were not forward-looking.

631. Mr Dalle Vedove, in cross-examination, sought to support that approach. He accepted that the PowerPoint presentation, sent to Mr Nuzzo, did refer to the future. But he said that the letter was not concerned with the future. They did not know whether the new liquidity was available or not. They were still discussing their thoughts about how to invest the strategy, and did not know who the counterparties were that would be chosen. Accordingly, the letter could not refer to decisions that were not taken at that time.

632. I do not accept that evidence. The context of both the PowerPoint presentation and the letter was the possible investment of the new liquidity, and the discussions that Mr Nuzzo and MDM were going to have with other family members. Mr Dalle Vedove in his witness statement said that he understood the letter to be "like a marketing document for them to show to other family members that there was a clear strategy for the new liquidity". Mr Dalle Vedove's evidence on this letter was, in my view, aimed at supporting the line which Mr Migani had taken in his evidence about it on the previous day, and was difficult to reconcile with Mr Dalle Vedove's witness statement. In his written and closing submissions, Mr Saoul identified a number of reasons why Mr Dalle Vedove should not be regarded as a reliable witness. It seemed to me that his best point was Mr Dalle Vedove's evidence about this letter, and I take that into account when assessing Mr Dalle Vedove's credibility and reliability.

633. However, I did not think that there was any significant force in the points which the Claimants made about the two letters. They both refer to the "objectives expressed by the Client". I do not consider that this refers to the pleaded trio of objectives, but rather to the objectives which had been summarised in the recent April 2018 meeting. The reference in the letter to selected counterparties having passed through due diligence and operating under a competitive cost regime does not seem to me to be inaccurate, and certainly not deliberately so. I am doubtful as to whether the drafters of the letter had in mind, here, the Skew Base Fund itself as a "counterparty". It is more probable that they had in mind the various banks who were counterparties to the financial instruments in which the Claimants had hitherto invested, and might in due course further invest (whether directly or indirectly via the Fund).

634. Similarly, when the letter was revised so as to refer to "retrocessions" (or, in another translation, "commissions") there was a reference to "banking counterparties". This again brings to mind the banking counterparties to the various financial instruments, rather than the Skew Base Fund itself or VP Lux or VP Liechtenstein in relation to their management of the Fund. Mr Migani explained in his evidence that it is common in the industry for "kickbacks" to be paid by banks who are counterparties to financial instruments. He described the Investopedia definition of "retrocessions" ("kickbacks, trailer fees or finders' fees that asset managers pay to advisors or distributors") as being a good definition. I do not think that the payments made by VP Liechtenstein to Twinkle, for its work as Investment Advisor, falls neatly or very obviously within that description. (It is also the case that those monies were not paid to XY SA or its subsidiaries). Again, I am not persuaded that this reference in the letter was inaccurate, and, even if it was, I am not persuaded that it was deliberately inaccurate. Mr Migani's evidence was that his companies had never received kickbacks of that kind, and that this had been confirmed by the Swiss authorities. The Claimants have not suggested in these proceedings, and have certainly not proved, that any such payments were received.

635. Furthermore, in assessing whether these letters were deliberately untruthful, it is relevant to take into account the concern which Mr Migani expressed, in his internal e-mail dated 11 June 2018, about the signed letter. This had nothing to do with the accuracy of the statements made therein, which in my view he genuinely believed to be accurate. Rather, he was concerned that the certification of a strategy gave rise to a "small risk": in other words, a potential liability risk.

636. The other document that was prepared at around this time was a PowerPoint presentation which Mr Nuzzo intended to use when speaking to the family. On around 23 May 2018, Mr Dalle Vedove arranged for Mr Nuzzo to be sent some slides which the latter was then in a position to edit. Mr Dalle Vedove had worked on those slides, having received input from Mr Nuzzo as to what he wanted. XY's logo was removed from the slides. The presentation was headed: "New Liquidity Investment Strategy". Some of these slides were the same as those used in the most recent XY presentation in April 2018. Some of the slides were adapted from that presentation: for example, the "Investment Strategy Objectives" identified a monetary income of 2.5% net of costs, which was lower than the 3% in the equivalent April 2018 slide. It also described 2.5% as "particularly challenging in the current market context". It is likely that these adaptations were made at Mr Nuzzo's request.

637. Some months later, in September 2018, Mr Nuzzo sent Mr Dalle Vedove the slides which he had in fact used for the presentation to the family. The slide presentation was dated 9 July 2018. It is clear that Mr Nuzzo had made further adaptations to the slides which Mr Dalle Vedove had sent, including omitting two slides which dealt with Mr Migani and XY. Thus, he omitted a slide which had a picture of Mr Migani, and which described XY as specialising in "providing global estate orchestration free from conflict of interest", and which also said: "Exposure to patent cases of conflict of interest and lack of transparency leads him to understand the industry's deep-rooted contradictions". Mr Nuzzo had also amended the "Investment Strategy Objectives" slide in a number of ways. For

example, the slide sent by Mr Dalle Vedove had referred to "Minimising the risk of asset erosion, even in particularly negative market scenarios". Mr Nuzzo had changed this to: "Limit any possible risk of erosion of assets to a minimum". He had also added a slide which was headed: "Distribution Rules". This identified the maximum amounts to be received by various categories of beneficiaries, depending on their age.

638. I did not consider that this episode was of any real assistance in identifying what investment strategy objectives were agreed between XY and the Claimants at this time in relation to the new liquidity. It seemed to me that they were as set out in Slide 4 of the April 2018 presentation. That slide was then repeated, without alteration, in Slide 7 of the presentation used for the next meeting, on 6 June 2018.

**D13: June – December 2018**

*6 June 2018 meeting*

639. There was a meeting on 6 June 2018 between Mr Nuzzo, MDM, Mr Migani and Mr Dalle Vedove. There was then a further meeting on the same day (held without Mr Nuzzo's knowledge) with MDM. A long slide presentation was prepared for the first meeting, but this largely repeated slides which had been used for earlier meetings. Mr Dalle Vedove said that they would not have gone through the full set of slides at the meeting. Mr Nuzzo said that the meetings between March and September 2018 were more or less the same.

640. There was limited cross-examination in relation to this meeting, and the slide presentation indicated that relatively little had changed since the April 2018 meeting.

641. In my view, the notable changes were that there had been some increase in the available liquidity: Mr Dalle Vedove's evidence is that it now appeared that € 238 million would be available. This was in part reflected in the slides showing the proposed investment asset classes: the figure for the Euro investments had increased by € 11 million to € 141 million, and the figure for US Dollar investments by € 5 million to € 60 million. A new slide headed "2018 Deployment Plan" showed a timeline for investments, with 80 – 90% being invested by the end of 2018. A column headed "Instant Annual Return" identified increasing returns over the remainder of the year, with November – December 2018 being 3.0 – 3.2%.

*July 2018*

642. On 1 July 2018, XY concluded contracts with GIG and LDM. The contracts contained a base fee and a performance related fee. For example, the GIG contract had a base fee of 0.065% of the total assets under service, and a performance fee if the "Money Weighted Return" methodology produced a result which exceeded 3.2%. The parties therefore contemplated that it may be that the results might exceed the 3.0 – 3.2% referred to in the 6 June slide presentation.

643. In late June and early July, Mr Nuzzo concluded a number of structured product investments which had been proposed to him by XY. There were in fact 13

contracts concluded by the Claimants (mainly by Mr Nuzzo for LDM and GIG) between 17 May 2018 and 5 July 2018. Mr Nuzzo received the Commerzbank term sheets for 3 transactions concluded on 5 July. These were in the standard Commerzbank form as previously described. One of the contracts had a multiplier of 15%, which would apply if there was a one-day fall of 12.5%. Mr Nuzzo also received a Commerzbank term sheet for a similar product in which he invested, on behalf of both GIG and LDM, in late July.

644. A meeting took place on 4 July 2018 between MDM, Mr Migani and Mr Dalle Vedove. XY prepared a slide presentation which showed, for example, the results of the year to date for various investments made by MDM, and figures concerning his expenses. The slide presentation also included reference to the possibility of a transaction involving SRL paying a dividend in kind to MDM. This transaction in fact took place later, in February 2019: see Section A above.

645. A further slide presentation was prepared for a meeting on 31 July 2018 with MDM. Both July presentations show a positive performance by the approximately € 20 million invested in "safeguard assets", including HFPO and MINs. This showed an annualised performance of + 3.5%. A separate analysis of the MINs in the 31 July 2018 presentation showed an annualised performance of + 6.4%.

*August – 19 September 2018*

646. By the end of July 2018, MDM had invested in the HFPO and Tangible Credit compartments of the Skew Base Fund, but GIG had yet to invest in the Fund. However, on 20 July 2018, Mr Nuzzo on behalf of GIG requested VP Lux to send information regarding the investment strategies for 5 of the Skew Base Fund Compartments.

647. On 3 August 2018, Mr Kone of VP Lux sent Mr Nuzzo the subscription forms and the Offering Memorandum and relevant annexes for the following compartments of the fund: HFPO; MIN €; MIN USD; Tangible Credit; and Real Estate. Mr Nuzzo's evidence was that he considered those documents in detail, as part of his due diligence which he took seriously.

648. In his witness statement, Mr Nuzzo's said that he spoke to Mr Migani on 11 September 2018 following receipt of the documents, after he had reviewed the Offering Memoranda of the funds. He said that there were three things that concerned him: (i) it was "repeating the risk of the products which in a way is something you always find in a financial product (even with a bond from a bank, there are disclaimers)"; (ii) the leverage seemed very high; and (iii) the performance fees.

649. He said that each of these matters was then discussed on the call. In relation to the risk warnings, Mr Migani said it was a "normal formula that you have to include in the offering memorandum and not to worry". They specifically discussed page 70 of the HFPO Offering Memorandum, which referred to the product being for investors who were willing to bear variations in the market value and were able to bear significant losses. Mr Migani said that this was

"standard wording in the prospectus, that XY know the product, they understand everything and not to worry because the products are very safe".

650. In cross-examination, he said that Mr Migani told him what they always told him: that there wasn't that risk, to be calm, that the products were very safe. Mr Nuzzo said that he definitely made a mistake in thinking that he could disregard the warnings, and that he did not understand at the time that they were important.

651. In his written evidence, Mr Migani accepted that there was a call on 11 September 2018. But he denied that Mr Nuzzo raised concerns with him about the risk warnings in the Offering Memoranda. He did not do so either on a call on that date or at any later date. In cross-examination, he maintained this denial, stating that he was a serious professional, and that there was no credibility in the idea that documents of that kind would be sent in a formal way to the client and he would say "don't worry, this is not true".

652. It was common ground that, in this call, Mr Nuzzo enquired as to whether SB GP's fees in the Offering Memoranda could be reduced. I am not, however, persuaded that Mr Nuzzo raised with Mr Migani any concerns about the risk warnings in the Offering Memoranda that he had received. There is no contemporaneous documentation which refers to this issue being raised. In contrast, there is documentation which evidences Mr Nuzzo's concerns about leverage and SB GP's performance fee. Mr Migani's evidence is that the leverage issue was only raised later. But for present purposes, the significant point is that there is documentation that supports Mr Nuzzo's evidence that he was concerned about both of these matters, but none which suggests that he was concerned about the risk warnings. Indeed, there is no reference to the alleged September 2018 conversation on this topic in any document prior to the service of the pleadings in the present proceedings.

653. Moreover, this was not the first time that Mr Nuzzo had seen documentation, in relation to the proposed MIN and HFPO products, which contained risk warnings. He had by that time received a fair number of term sheets for the investments which had been made over the preceding 18 months, the first such term sheets having been received in March 2017. Accordingly, I am doubtful as to whether Mr Nuzzo would have been surprised to see the risk warnings contained in the Offering Memoranda, and indeed his evidence indicated that he expected to see risk warnings in documents of that kind. In fact, on 11 September 2018 itself, XY proposed a structured note to Mr Nuzzo, with an investment of € 500,000, and this transaction was concluded on 14 September 2018. Mr Nuzzo received a BNP Paribas term sheet with the risk warning:

> "The securities have no capital protection at any time and there can be a partial or total loss of any capital invested. Investment in the Securities is therefore highly speculative and should only be considered by persons who can afford to lose their entire investment."

654. Furthermore, if Mr Nuzzo did have concerns, it is inherently probable that he would have raised them with MDM, particularly bearing in mind his close relationship with MDM, and that the proposed investment by GIG was to be very

substantial. However, MDM, in his evidence, did not suggest that Mr Nuzzo raised any such concerns with him. Nor did he raise any such concerns with XY at the meeting which took place not long afterwards (on 20 September 2018) and which he attended. (I note in this context that MDM had ceased to be a director of GIG in June 2018, and whilst he attended one of the meetings with XY on that day, he did not attend the meeting which Mr Nuzzo attended).

655. In my view, Mr Nuzzo's evidence, as to this discussion about the risk warnings, is a case of a witness persuading himself, after the event, that something had happened in order to explain why he acted in a way which, with the benefit of hindsight, he regrets and considers to be a mistake. Mr Nuzzo could not admit to himself that, on behalf of GIG, he invested very substantial funds in the Skew Base Fund with his eyes open, knowing of the risks and warnings contained in the Offering Documents. He has therefore rationalised that decision by explaining that his concerns were allayed.

656. The Claimants' pleaded case on this conversation is that Mr Nuzzo was told that the warnings were "standard". However, even if this had been said, I do not consider that it would amount to a representation that they could be disregarded. It would simply be a representation that these risk warnings were standard for the type of investment that was being offered in the Offering Memorandum.

657. On 18 September 2018, Mr Nuzzo on behalf of GIG signed the Share Application Form for the investment of € 27 million in the HFPO Compartment. This included the various declarations contained in the standard form subscription document, similar to that previously described in relation to MDM: including that the Offering Memorandum had been carefully considered "noting especially the Investment Policy and the risk factors relating thereto".

658. On 19 September 2018, Mr Nuzzo e-mailed Mr Dalle Vedove with the subject: "Track record". He referred to the various funds which "we have decided to subscribe for now", namely HFPO, MINs and Tangible Credit. (It appears that at this stage, GIG had decided not to invest in the real estate compartment). He asked for a number of documents: the latest annual report, the liquidity management policy and valuation policy, the net asset value test, the historical performance of the company and the relevant compartment, and the collateral policy. Mr Dalle Vedove replied on the same day, saying that they would try to retrieve the requested information.

659. Mr Nuzzo's request for documents was sent via the Skew Base Team to Mr Kone of VP. Also on 19 September 2018, Mr Kone sent Mr Nuzzo, as per his request, an extract of "our general policies with regards to Liquidity management, Valuation and Collateral management". He was asked to treat these documents with high confidentiality. He was told that other documents would follow shortly. The terms of Mr Kone's response had been drafted by the Skew Base Team.

*20 September 2018*

660. There were two meetings on this day: one meeting with Mr Migani and Mr Dalle Vedove attended by Mr Nuzzo (for which a "Beauty" slide presentation was

prepared), and another meeting attended by MDM (for which a "Daddy" slide presentation was prepared).

661. The slide presentations for these meetings were essentially updating the position. Thus, in the "Beauty" presentation, some of the figures for both the proposed investments in both USD and the € asset classes had changed to a small degree. For example, the proposed investment in the Rothschild Private Debt fund had increased from USD 7 million to USD 10 million. The projected return for the € investments, taken as a whole, was 3.2 – 3.5% per year. The equivalent figure for the USD investments was higher: 3.4% – 3.8% per year. It appears that the Claimants were happy with those projections: there is nothing which suggests otherwise. In the "Daddy" presentation, there were slides which addressed the possible dividend in kind, as well as figures for MDM's expenses in the UK and Italy. Indeed, a feature of the "Daddy" presentations is that they generally contained detailed slides relating to MDM's expenses, indicating that the payment of expenses from income generated by the investments remained one of MDM's important objectives.

662. Subsequent to that meeting, on 25 September 2018, Mr Nuzzo signed the subscription agreement for a € 27 million investment (initially written as € 25 million) in the MIN (Euro) compartment of the Skew Base Fund.

663. It was common ground that the terms on which GIG subscribed for shares in both the HFPO and MIN (Euro) compartments were set out in the relevant documents and share application forms for those Compartments. The share application forms and offering documents contained materially the same acknowledgments, declarations and terms as those described above in relation to MDM's investments.

*The performance fee and the fee rebate letter*

664. The following was common ground. As previously described, after Mr Nuzzo's review of the HFPO and MIN offering documents, there was the telephone call between Mr Migani and Mr Nuzzo on 11 September 2018, and that during that call Mr Nuzzo enquired as to whether the GP's fees in the offering documents could be renegotiated. In the event, the performance fee was reduced under a fee rebate letter. On 1 October 2018, SB GP sent GIG a cover letter, marked for Mr Nuzzo's attention, enclosing a draft fee rebate letter. On around 27 November 2018, the fee rebate letter between SB GP and GIG was executed. It provided that SB GP would reimburse GIG the pro rata proportion of the performance fee received by SB GP with respect to GIG's investment, provided GIG's aggregate investment remained above € 80 million.

665. The dispute between the parties was as to whether the sequence of events, which led to the fee rebate letter, evidences Mr Nuzzo's knowledge of the connections between Mr Migani and the Skew Base Fund. There was no dispute that the question of the Fund's performance fee was a matter discussed between Mr Nuzzo and Mr Migani, rather than between Mr Nuzzo and VP or indeed SB GP directly.

666. Mr Nuzzo's evidence was that he had noticed that they were paying a lot of fees: the management fee to XY, the performance fee to XY, the management fee to the Fund, and the performance fee to the Fund. He therefore told Mr Migani that this was too much and had to be renegotiated with the Fund. He said that on the call with Mr Migani and Mr Dalle Vedove on 11 September 2018, they said words to the effect of: "What we can do is to try to delete the performance fees of the Skew Base Fund, but we will need to get the approval from Skew Base". The fixed fee of the Fund would remain.

667. When, later on, Mr Nuzzo received the letter which waived the performance fee above a threshold, he thought it clear that the Skew Base Fund, being a third party, could approve the cancellation of performance fee only if GIG had a certain amount invested in the funds, so for them the management fees would be enough. He said that if he had known that Mr Migani was receiving 90% of the Fund's fees, he would never have accepted it.

668. In cross-examination, Mr Nuzzo said that the reason that he raised this issue with Mr Migani was not because he knew that he was the man behind the Fund. Rather, Mr Migani was the person who had introduced the Fund to him. He did not have any contact with the Fund. Mr Migani was the one who discussed asking Skew Base about the possible reduction, and he was the only person that Mr Nuzzo could talk to.

669. Mr Migani's evidence was that this call was linked to the issue of fees which Mr Nuzzo had raised in April 2018, specifically in his e-mails dated 25 and 26 April (see above). He said that Mr Nuzzo again tried to raise with him the SB GP's management fee and those charged by XY for their services. He said that the fees of SB GP should be part of the XY Group's fees. His argument was that GIG was already paying fees to XY and should not be double-charged by paying fees to the General Partner which was connected to XY. Mr Migani's response was the same that he had previously agreed with Mr Dalle Vedove in April 2018: that the fees were for different companies and for different services. After Mr Migani had said no in relation to SB GP's management fees – which Mr Nuzzo did not aggressively push – Mr Nuzzo said that he (i.e. meaning Mr Migani) could at least remove the GP's performance fee, because there was already a performance fee part in the fees payable to XY. Mr Migani's response was that he did not control the GP, which had its own management. But he wanted to give a helpful response, as the di Montezemolo family were important clients, so he said that he would ask the GP and come back to him, but that he was confident that the GP would waive performance fees. Following consideration by the GP's board, the GP did agree to waive performance fees for investments exceeding a particular threshold. After receiving the GP's response, Mr Nuzzo e-mailed to ask why an investment threshold should apply. Mr Migani explained why the GP had adopted a threshold, namely that investors needed to be treated the same, and so it was important to set a threshold which could be available to any investor.

670. Mr Migani's view was that Mr Nuzzo would not have asked him this question without knowing the connection between him and SB GP. Mr Nuzzo did not contact either the GP or the AIFM, but was aware of and wanted to use Mr Migani's connection with the Fund for his benefit.

671. Mr Dalle Vedove's evidence was that he knew about Mr Nuzzo's request and Mr Migani's response because he was told by Mr Migani about it. His evidence did not suggest that he was party to the call where it was raised. Mr Nuzzo's suggestion, in his witness statement, that Mr Dalle Vedove was party to the 11 September 2018 call was, in my view, mistaken.

672. The documentation in relation to the performance fee rebate indicates that the request was indeed considered by SB GP's board. A draft rebate letter was sent to Mr Nuzzo on 1 October 2018, under cover of a letter from Mr Longo and Mr Kuske, the two independent directors of the GP. They advised him that they were going through the process of adapting the articles of incorporation of the Fund, and other documents, in order to comply with relevant laws and regulations that "discipline this sort of agreement".

673. Mr Nuzzo then e-mailed Mr Migani (not copied to Mr Dalle Vedove) to raise points in relation to the threshold. He said that the proposed threshold of € 92 million was not acceptable "first, because the investment does not even reach the amounts indicated, but then the minimum investment level for these conditions had never been discussed". He also raised a point on the tax treatment of the mechanism for the rebate.

674. A redrafted letter was sent to Mr Nuzzo on 3 October 2018. The draft reduced the threshold from € 90 to € 80 million, and it was eventually signed (by Mr Kuske and Mr Longo) on the basis of the € 80 million figure. It appears that Mr Nuzzo was content with that reduction, since he later countersigned the final version of the letter.

675. I do not consider that the limited contemporaneous correspondence on this fee rebate in October/November 2018 sheds any real light on the question of whether Mr Nuzzo's request to Mr Migani was prompted by his knowledge of the connection between XY/Mr Migani and the Skew Base Fund, or whether it arose because Mr Migani (as the person who had introduced Mr Nuzzo to the Fund) was the natural person to speak to about the fees to be charged. I consider that the correspondence is consistent with the cases of both parties on this issue, and does not clearly point in one direction rather than the other. Accordingly, if this matter stood on its own, I do not think that the correspondence would materially advance the case of either party. Equally, the inherent probabilities do not strongly favour one side or the other. Mr Nuzzo's decision to speak to Mr Migani could have been prompted by his knowledge of the connection between him and the Fund. However, if Mr Nuzzo had a query as to the level of fees to be charged by the Fund, which Mr Migani had introduced, then there is nothing strange about Mr Nuzzo raising the point with Mr Migani – and then pursuing the point with him after a call in which Mr Migani had indicated that he could try to do something about it.

676. However, Mr Nuzzo's challenge to the level of fees in September 2018 does not completely stand on its own. It needs to be seen in the light of his previous query in April 2018, as to which I have expressed the conclusion that this was likely prompted by his knowledge of the connection between Mr Migani and the Skew Base Fund. Given my earlier conclusion, I consider that the September 2018 query was also prompted by Mr Nuzzo's knowledge of the connection.

*The level of borrowing by the Fund*

677. Another issue which was raised by Mr Nuzzo at around this time was the proposed level of borrowing on the part of the Fund. The Offering Memorandum for each of the Compartments had a heading "Leverage" in the Appendix. This went on to refer to a figure of 400%:

> "The Compartment may use leverage to enhance the return of the strategy. The maximum allowed leverage is 400% under both the gross exposure and commitment approach".
>
> There was then an explanation of both the "Gross method" and the "Commitment method."

678. Mr Nuzzo raised the issue of 400% leverage with Mr Migani. (It is not necessary to resolve the dispute as to whether this was in the 11 September 2018 call, or subsequent to the 20 September 2018 meeting). It appeared to be common ground, by the end of the trial, that Mr Nuzzo misunderstood the nature of the 400% leverage referred to in the Offering Memorandum.

679. In any event, I accept Mr Migani's evidence that Mr Nuzzo had wrongly thought that 400% represented a credit line which meant that each Compartment could borrow up to 4 times the value of the underlying investments in the compartments. In fact, as Mr Migani explained, the 400% figure referred to the leverage calculated under the regulations which applied to the Fund. Those regulations contain their own definitions and method of calculation, which are quite different to the ordinary "loan to value" percentage figure that Mr Nuzzo had in mind. Mr Migani explained to Mr Nuzzo that the 400% was referring to a different concept to what he thought it meant. He thought that Mr Nuzzo then understood the difference, because he then asked Mr Migani to confirm that the credit-line would not exceed 80% loan to value.

680. This then resulted in a letter, signed by Mr von Kymmel and Mr Ries, confirming that: "a maximum credit line (Loan-to-Value) of 80% of the respective compartments' Gross Asset Value in the course of ordinary investment activities is currently not and shall generally not be exceeded".

681. Mr Nuzzo queried with Mr Migani whether this was still too high, and suggested that the letter should give notice to GIG if the loan to value ratio exceeded 50%, so as to give GIG the possibility of exiting the Fund. It does not appear that this suggestion was pursued further by Mr Nuzzo.

682. In his oral evidence, Mr Nuzzo's complaint appeared to be that the 80% should have been calculated on the basis of net asset value rather than gross asset value. However, the letter from VP clearly refers to Gross Asset Value.

683. It appeared at one stage that the Claimants were advancing a misrepresentation case based upon this part of the story. However, in their closing submissions, the Claimants did not seek to make anything of it, recognising that Mr Nuzzo may have misunderstood the position. In my view, the episode serves to confirm Mr Nuzzo's understanding that the Compartments might make significant

borrowings (up to 80%) in order to enhance returns. Indeed, as previously described, the possibility of such borrowings (without recourse to the investor) was clear from XY's presentation of the Fund at the meetings, and Mr Nuzzo accepted that this was one factor which made investment attractive.

*Investments made in late 2018*

684. On 23 and 30 October 2018, GIG transferred € 27 million to each of the Skew Base HFPO and MIN (EUR) Compartments respectively. Contract Notes confirming the subscriptions, were subsequently issued dated 24 October 2018 (for SB HFPO) and 2 November 2018 (for SB MIN (EUR)).

685. On 15 November 2018, GIG invested € 4,999,999.99 in the Tangible Credit Compartment of the Skew Base Fund.

686. On 30 November 2018, GIG invested € 10 million in the Real Estate Compartment of the Skew Base Fund and € 3,999,999.99 in the Tangible Credit Compartment.

687. On or around 4 December 2018, GIG invested € 5 million in the SB HFPO Compartment.

688. On or around 7 December 2018, GIG invested € 5 million in the SB MIN (EUR) Compartment.

689. On or around 14 December 2018, GIG invested a further € 5 million in the Tangible Credit Compartment of the Skew Base Fund.

690. Alongside the investments in the Skew Base Fund, MDM and LDM – and to a lesser extent GIG – continued to make investments in structured products outside the Fund. It is not necessary to described these in detail, since they essentially followed a similar pattern to the investments previously described. Thus, the proposal for the investment was made by XY, and the trade was thereafter concluded either by Mr Nuzzo (on behalf of LDM and GIG) or by MDM or Mr Facoetti on his behalf. Some term sheets were provided for the trades to Mr Nuzzo, but it appears to have been a feature of MDM's trades at this time that term sheets were not provided to him or Mr Facoetti, and nor were they requested. In the period between October 2018 and March 2020, the schedule agreed by the Claimants and XY shows 69 transactions, many of which were on behalf of LDM who had not invested in the Skew Base Fund.

*Further meetings in 2018*

691. XY prepared a "Beauty" presentation dated 31 October 2018, and I infer that a meeting took place on that day. However, this meeting – as with a number of meetings/presentations in 2018 and 2019 (22 November 2018, 12 March 2019, 14 May 2019, 23 July 2019, 6 November 2019 and 19 December 2019) – was not the subject of any witness evidence. I therefore make only limited findings in relation to these presentations.

692. Generally speaking, the presentations show that the Claimants were being regularly updated on the progress of their overall investments, and the relationship appears to have been harmonious during this period.

693. The presentation for the October 2018 "Beauty" meeting contains a slide setting out a structure for reporting on the results of the investments. The slide refers separately to the "family" target of 2.5% (i.e. the target that Mr Nuzzo and MDM had proposed to the family) and the "work team" target of 3.2% (i.e. the target to which XY was working).

**D14: 2019**

*January 2019*

694. By way of an agreement which stated that it was entered into on 1 January 2019 (but was in fact drafted in or around September 2019), MDM entered into an agreement with XY effective from 1 January 2019, incorporating its general terms and conditions. In summary, that agreement provided that: XY would provide "financial advisory and deal arrangement" services (clause 1); XY would charge an initial set-up fee and an ongoing variable fee (clause 2); and that the term was 12 months, to be extended automatically for a further 12 months unless terminated 30 days prior to its expiration (clause 3). Although XY had been providing consulting services to MDM, in relation to his personal wealth, since January 2017, this appears to have been the first signed agreement between them.

695. It was common ground that, on 24 January 2019, a meeting took place at XY's London offices between Mr Migani and Mr Dalle Vedove and Mr Nuzzo. XY delivered a presentation which showed that the majority of major markets had suffered significant losses in 2018 and that despite this, GIG had produced stable net positive results equal to approximately 2 to 2.5% per annum (and even greater in respect of the SB HFPO and SB MIN (EUR) Compartment investments).

696. The presentation for this meeting in January 2019 was the subject of some limited evidence. In his witness statement, Mr Migani referred to this meeting as illustrating how, in the period until March 2020, GIG's and SRL's investments performed well and, in many time periods, ahead of the traditional markets. I agree that the slide presentation for the January 2019 meeting did indeed show that all major markets had suffered significant losses in 2018, and that, despite those poor market conditions, the GIG strategy was shown to be yielding stable positive net results.

697. Slide 15 was part of the section of slides which focused on MINs. It was headed: "Diversified Short-Dated and Index Portfolio", and it showed that the composition of GIG's investment was (as to 98%) in three indices: Euro Stoxx 50 (41%), S&P 500 (35%) and MSCI World Index (22%). The remaining 2% was in the Hang Seng index.

698. Slide 17 dealt with HFPO under the heading: "+ 5.8% Productivity through Continuous Monitoring" ("… grazie a presidio continuo"). It showed that 69.5%

of the HFPO instruments were "High Yield" (greater than 5%), with the remaining 30.5% being "Medium Yield" (2.5 – 3%).

*February – June 2019*

699. In respect of SRL's € 10 million investment in the Skew Base Fund, in February 2019 MDM elected for his entitlement to a dividend to be satisfied by the transfer of the shares in the Skew Base Fund held by SRL to himself, by way of a dividend in specie from SRL. Mr Facoetti confirmed in his evidence that the question of whether to extract capital from SRL by way of a dividend in specie, and how to do it, involved issues of corporate and tax law; and that there was a team of advisors, including three specialist Italian firms, who were advising on this. It was also addressed in various XY slide presentations.

700. Two slide presentations were prepared for meetings in March 2019. Again, they showed strong performance. For example, the "Daddy" presentation, dealing with MDM's assets, showed an "Instant Net Return" of between 5.2% and 6.1% in respect of the assets described as the "Safeguard Assets". This included, principally, HPFO, MIN and Tangible Credit investments.

701. The "Beauty" presentation referred, in a "Next Steps" slide, to: "Critical ongoing monitoring and ongoing maintenance of the investment portfolio to ensure the achievement of the economic objectives shared with the family (return 2.5%/year corresponding to € 5m)". One of the slides in the HFPO part of the presentation was headed: "3.6% net productivity through continuous monitoring" ("… grazie a presidio continuo"). This part of the presentation covered the HFPO investments in the Skew Base Fund.

702. On a date between 27 and 31 May 2019, GIG redeemed shares with a value of € 8 million in the Skew Base HFPO Compartment.

703. On 4 or 7 June 2019, GIG redeemed shares with a value of € 6.8 million in the SB MIN (EUR) Compartment.

*July – December 2019*

704. On 10 July 2019, Mr Nuzzo sent through to Mr Aloe of XY an e-mail which he had received from Mr Chardigny at Lombard Odier. Mr Nuzzo attached two notes which had previously been proposed by XY as potential investments. One note had BNP Paribas as a counterparty, and the other note had Marex as a counterparty. Mr Chardigny had advised that Marex was not an approved counterparty of Lombard Odier, which would therefore not be able to lend against it. The BNP Paribas note contained a risk warning similar to that previously described. The Marex note contained risk warnings, including that the investor could lose the total capital invested. Mr Nuzzo told Mr Aloe of XY that he did not wish to subscribe, in view of the absence of lending value and also because "given the yield in both cases below 3% I wonder if it really is worth it".

705. Mr Nuzzo's e-mail illustrates the importance to him of the ability to raise money on the security of the notes that he was buying. XY also made the fair point that it shows him evaluating for himself the merits of the proposed investment, although I note that the focus of this evaluation was the yield rather than other

aspects of the note (for example, the fact that the BNP Paribas note had a multiplier of 20).

706. On 10 July 2019, MDM sent a letter (via XY) to VP Lux and SB GP requesting "information regarding the investment strategies focused on gap notes in USD and procedures to subscribe to the fund." This was another "reverse solicitation letter" relating to a compartment of the Skew Base Fund (MIN (USD)) in which MDM had not himself previously invested: his previous investments had been in the HFPO Compartment (originally via SRL) and the Tangible Credit Compartment.

707. On 30 July 2019, VP Lux e-mailed a Share Application Form and Offering Memorandum to MDM in relation to Skew Base Fund's MIN (USD) Compartment. On 28 August 2019, having received an e-mail from VP Lux asking whether "you have the chance to fill up the application form", Mr Facoetti asked Mr Dalle Vedove and a colleague: "what we need to do with regard to what they are requesting". Mr Dalle Vedove said in his e-mail response:

> "We will support you in completing the attached form to submit to MdM for signature (the other document received is for information only)".

708. Mr Migani was cross-examined to the effect that this e-mail was telling Mr Facoetti that it was not necessary for him or MDM to read the Offering Memorandum, which was the "other document received". Mr Migani rejected this suggestion, saying that reading the document was "an obvious thing, when you invest in a fund. You can't invest with blind eyes, sorry, especially when you are a professional client". That answer was also the substance of the evidence of a number of the VP witnesses, including Mr Konrad.

709. I agree with Mr Migani's point, and I do not consider that Mr Dalle Vedove was saying anything to the contrary in his e-mail. He was simply drawing attention to the fact that it was the subscription form that needed to be completed, whereas the other document did not require completion. It did not follow that the Offering Memorandum did not need to be read. On 30 August 2019, Mr Zorzi of XY sent Mr Facoetti, amongst other documents, the subscription form "completed as indicated in the previous e-mail".

710. On or around 16 September 2019, VP Lux received from MDM a US$ 1.5 million application for shares in the Skew Base Fund's MIN (USD) Compartment. The share application forms and Offering Memorandum contained materially the same acknowledgments, declarations and terms as those previously described in relation to MDM's investment in the HFPO Centaurus compartment, save that MDM declared himself to be a "Well-Informed Investor" on the basis that (i) the size of his financial instrument portfolio exceeded € 500,000; and (ii) he worked or had worked in the financial sector for at least one year in a professional position which required "knowledge of transactions or services envisaged".

711. MDM's investment of US$ 1.5 million was completed in early October 2019.

712. A slide presentation was prepared for a "Beauty" meeting with Mr Nuzzo on 14 November 2019. Mr Dalle Vedove included an "Investment Strategy Objectives" slide. This appears to have been taken from the presentation which Mr Nuzzo had made to the family in July 2018, and which had been sent to Mr Dalle Vedove in September 2018. The parties' witness statements did not refer to this slide. When asked about the inclusion of this slide, Mr Migani was surprised and found it strange that it had been included in an XY presentation. He drew attention in particular to the fact that XY's slide presentations had a figure of 3%, and he said that 3.2% was the figure in the contract with GIG above which a performance fee would be paid.

713. I too find it strange that this slide was included in the November 2019 presentation (and indeed in the December 2019 presentation, albeit as an attachment to the main slides) and I think it most likely that this was an error. It is most probable that Mr Dalle Vedove made an error in choosing this slide, rather than the objectives that had been shared and agreed between XY and the Claimants in April and June 2018. I do not think that its inclusion in the November 2019 presentation (or as an attachment to the December 2019 presentation) indicates that there was a change in the shared objectives from the way in which they were set out in the April and June 2018 slides described above.

714. The presentation for the December 2019 "Beauty" meeting contained slides reporting on the current position. Slide 9 was a chart showing the breakdown of € 7.4 million invested in 8 Market Insurance Notes outside the Skew Base Fund: 5 based on the Euro Stoxx 50 index, and the remaining 3 on the S&P 500. Slide 10 was headed: "Current Productivity of the HFPO Strategy + 4.6% thanks to Continuous Monitoring" (again "… grazie a presidio continuo"). The slide showed that 89.9% of the HFPO instruments (with a total value of € 1.5 million) had a high yield, greater than 4%. Both of these slides showed the position outside the Skew Base Fund itself and were related to LDM's personal position (rather than GIG's position).

## D15: January to March 2020 and the Covid-19 pandemic

*22 January 2020 meeting*

715. It was common ground that on 22 January 2020, a further meeting at XY's offices in London took place between Mr Migani and Mr Dalle Vedove (for XY), Mr Nuzzo and MDM. XY delivered a presentation in which, amongst other things, it was noted: (i) the value of GIG's assets totalled € 343.5million, of which € 192.6 million was allocated to financial assets; (ii) the net return produced in 2019 by these financial assets was 3.84%. This resulted in an additional income for GIG of €1.27 million; and (iii) in 2019 the SB (EUR) MIN Compartment investment had performed in line with the target return of 3.1%. The SB HFPO investment had outperformed the target return of 3.5% and achieved a net return of 4.8%. The SB (USD) MIN Compartment had also outperformed its target return of 3%, achieving a 7.3% net return.

*The Covid-19 pandemic*

716. Mr Dalle Vedove's evidence was that the Covid-19 pandemic had an unprecedented impact on a huge range of investments across many markets. His memory was that everything happened very quickly in February and March 2020. He said that a "huge scope of types of investments" were affected by the market shock, and these included the underlying investments invested in by different compartments of the Fund, in which the Claimants had invested. He said that most asset classes lost a significant proportion of their value at the start of 2020, and that the impact on the Claimants was not bigger than average. There was a difference in the mechanism, in that (with the MINs) the loss would be suffered once the barrier was breached and the investment would then be terminated, with any value remaining returned to the investor and the loss suffered. With other asset classes, there was a possibility that the investment if retained by the investor would recover in value.

717. The evidence of Mr Konrad was broadly in line with that of Mr Dalle Vedove. He said that in March 2020, when the COVID-19 pandemic began, the turbulence in the financial markets was so severe that the investors in certain compartments of the Fund lost a significant amount of the value of their investments, and in some cases the value of the investments was wiped out altogether. He said that the HFPO and MIN Compartments lost a very significant amount of their value. The turbulence affected the majority of investment funds at the time that had any exposure to equities (i.e., to the global stock markets) in structured products. Only investments in short-term money market funds or bonds were relatively unaffected. As a result of the collapse of certain of the Fund's compartments, VP itself also suffered significant losses, totalling more than CHF 20 million, due to the large credit line that VP Bank Luxembourg had provided to the Fund. That was a substantial problem for VP, and as a result, it effectively wiped out a considerable amount of VP's entire annual profit for 2020. His experience of investing and the performance of investments generally during the early days of the COVID-19 pandemic was that very few investments were completely unaffected by the extreme market turbulence during that period.

718. A good overall summary of the global financial position is contained in the summary which Mr Uwe Stein (the Chief Risk Officer of VP Lux) sent to the Luxembourg regulator on 23 March 2020 quoted below. This identified the stock market downturn as beginning on 20 February 2020.

719. At the end of February 2020, individuals within VP were expressing concerns as to the impact of the pandemic on the Skew Base Fund, and on the loan which VP Bank had made. An analysis of the HFPO Compartment, carried out on 27 February 2020, by Mr Kaganov of VP Liechtenstein, showed that (on the basis of the 70% of products for which he had information), the barriers had not yet been breached, but that the then current highest threshold was only 13% away from the current market value of the Euro Stoxx 50 index. On 1 March 2020, Mr Konrad expressed his views to his colleagues in strong terms, after Mr Ries suggested that various people including Skew Base, should be asked about an earlier opinion that Mr Konrad had expressed:

> "I don't share your opinion. Skewbase is extremely aggressive and prescribes tail risks without end, their opinion can only be: nothing will happen, so it's not interesting. Our credit department doesn't understand the risk at all and doesn't analyse the portfolio properly.
>
> If something happens and a major credit default is the result, VPFS will be pilloried and we will be killed. I can just about understand buying knock-out certificates, but leveraging them is irresponsible. In my ten years as a trader, I have seen many go under with this strategy....
>
> I guarantee you that the Skewbase investors are not aware of the strategy being pursued here."

720. On the same day, 1 March 2020, Mr Migani was expressing concerns to Mr Sampietro as to what might happen if there was a margin call by VP Bank in relation to the HFPO and Short-Term Arbitrage Compartments of the Fund:

> "with regard to the funds (HFPO and STA), it is the margin call of the bank on the Lombard that could be devastating. There are still ample margins but it would be better to anticipate how to handle the situation if impractical issues arise.
>
> Thank you and have a good Sunday.
>
> We should prepare for the storm".

721. During the period between January 2019 and 6 March 2020, XY had continued to put forward proposals for investments to MDM and Mr Nuzzo (on behalf of LDM), and a number of investments were then made. The trade dates of the last transactions were 10 March 2020, pursuant to proposals made on 6 March 2020.

722. Mr Migani's evidence was that it was at around 12 March 2020 that it was becoming clear that the impact of the Covid-19 pandemic on the financial markets had become so severe and indeed unprecedented that some compartments of the Fund would have lost a significant amount of their value, because of the loss of value in the assets which they held. It was on those dates that the oil price crashed and when the severity of the scale of the impact on financial markets started to be revealed, and clients started expressing concerns to XY about that scale.

723. The Claimants' evidence also focused on March 2020, as the time when they began to appreciate the severity of the problems in the world financial markets. LDM said that in March 2020, he was aware of the overall financial situation in the world and that it was becoming worse and worse. Mr Facoetti referred to a phone call from MDM on 6 March 2020, when MDM asked how the investments were performing. He said that everyone was thinking about their business at that time in the light of the developing pandemic. Mr Nuzzo described a call with Mr Dalle Vedove on 9 March 2020, resulting from the pandemic becoming more

serious. He asked for a detailed analysis of the funds to know what was happening with regard to the pandemic and its effect on the markets, and to have an update on the valuation of the investments. He did not, however, recall what was said on the call, but Mr Dalle Vedove did not mention what was happening within the funds.

724. Mr Dalle Vedove's evidence was that for some investments, such as direct single-instrument MINs, XY could assess the impact immediately; because the effect of breaching the barrier was set by a formula in the term sheets. But it was not as straightforward for other investments, including the value of GIG's and MDM's shares in the Fund, because the XY team did not have a complete view of the contents of each compartment. In order to assess the impact of the value on each Compartment, they had to wait for a net asset value or NAV to be published by the Fund.

725. On 10 March 2020, following his conversation with Mr Dalle Vedove on the previous day, Mr Nuzzo asked various questions relating to possible sale of investments. This included asking what he would realise by exiting the MINs and HFPO funds. He also said, that, as discussed on the previous day, "I would like to have an exact view of the investments within the funds". On the same day, 10 March 2020, both MDM and Mr Nuzzo were provided by XY with spreadsheets which listed the investments. The spreadsheets indicated the discount for immediate liquidation: for example, that the HFPO Skew Base investment could be liquidated at a discount of 5 – 10%. It was put to Mr Dalle Vedove in cross-examination that the information as to discount values was put forward dishonestly. This was not a pleaded allegation of dishonesty, and Mr Cloherty fairly objected to the line of questioning after it had proceeded for some time. I see no reason to reject Mr Dalle Vedove's evidence that the spreadsheet was compiled on the basis of the information that was available at the time.

726. Mr Dalle Vedove also said that, at this time, there was market volatility, but barriers had not yet been breached. I was not referred to any evidence to the contrary, and Mr Nuzzo's evidence is that it was not until 12 March 2020 that there was a "terrible day", with the Euro Stoxx 50 losing 12% in one day, and then on 16 March 2020 the S&P 500 index lost 11%. The MSCI World index (which was the example given in the XY slide which was used in a number of presentations, such as Slide 41 for the September 2016 meeting) did not suffer a fall in excess of 10% during March 2020.

727. Despite the pandemic and the market volatility, the position prior to 12 March 2020 appears to be that there was no substantial loss to the Skew Base Fund HFPO and MIN Compartments. That certainly seems to be the position as at 2 March 2020, when an e-mail was sent by Daniel Giger, the Senior Credit Risk Officer at VP Bank. He was responding to an earlier e-mail from Mr Konrad asking for his analysis. He said that they were very aware of the current increase in volatility in the markets, and were following the situation promptly; and that "Currently, none of the Skew Base Compartments show a significant shortfall". He referred to the increased risk in relation to the products under discussion (HFPO and MINs), but reminded Mr Konrad that "it is still a tail risk and a loss of more than 10% on a single trading day has not been observed with either the SX5E or the SPX". Mr Giger expressed the view that "the portfolio of structured products is well

diversified by issuer and number of structured products". He set out a table identifying the different issuers, and the current market value and said that "with LTVs based on the points above, we still feel comfortable".

728. On 10 March 2020, Mr Nuzzo thanked XY for the documents but said that it is not what he had asked for. He said that he "would like to have details of the notes present all within the Market Insurance Notes fund and the certificates present in the HFPO fund". He added:

> "I need to have the Realization Price of these products which clearly cannot be calculated as a discount on the MTH value as shown in the table but will possibly be a discount on the MTM value and in the case of the Market insurance note and HFPO funds there must be no discount but will simply be the net asset value calculated as of the valuation date. I am waiting to receive The details of the funds."

729. 12 March 2020 was the day that the Euro Stoxx 50 index lost 12% in one day. Mr Nuzzo sent a number of e-mails to Mr Dalle Vedove on that day. He asked him for an analysis showing that none of the indices of the market insurance notes had historically lost more than 10%. Later on, he sent an e-mail where the parties disagreed as to the correct translation. Mr Nuzzo said in Italian: "Mi avete sempre detto che i fondi li controllate voi quindi non è possibile che non abbiate questi dettagli". The principal dispute concerns the word "controllate", and whether it meant (i) "control" or (ii) "monitor" in the sense of to "check".

730. The word in Italian can mean "control" or it can mean "monitor" in the sense of to "check". A number of dictionaries, to which I was referred, identify "monitor" before "control" in their list of meanings. Mr Nuzzo's evidence was that he meant "monitor" or "check" rather than "control".

731. XY's translation of the e-mail was as follows:

> "In light of today's results, I need to have the exact details of the products contained with the Market Insurance Notes and HFPO funds. I need to be able to understand where events have already occurred (see today's Eurostoxx results) and therefore the losses that have crystallised and where else we are at risk.
>
> You have always told me that you control the funds, which means that it is impossible that you do not have these details, as such, please send them to me by tomorrow morning so that we can analyse matters completely."

732. The material difference in translation concerns the final sentence, which in the Claimants' version is as follows (showing the changes to the XY translation):

> "You have always told me that you ~~control~~ check the funds, which means that it is ~~impossible~~ not possible that you do not have these details. ~~as such,~~ Therefore please send them to me

> by tomorrow morning so that full evaluations can be made. ~~we can analyse matters completely~~".

733. This was one of three e-mails sent during the period March – June 2020 where Mr Nuzzo used the word "controllate" or "controllo". Indeed, in the second e-mail (sent on 24 April 2020) and the third e-mail (sent on 27 June 2020) he described the "controllo" as "maniacale"; which is best translated as "manic" or "maniacal". (Mr Nuzzo agreed in cross-examination that "maniacal control" was a better translation than "extremely thorough"; and that "maniacal control" is an unusual phrase). I shall discuss these e-mails below, but for present continue with the chronology.

734. On the afternoon of Friday 13 March 2020, MDM (with the assistance of Mr Facoetti) sent a lengthy e-mail to Mr Migani and Mr Dalle Vedove, with a list of questions in relation to HFPO, MIN, Tangible Credit compartments and also in relation to USD bonds. In relation to HFPO, MDM referred to the improvement in the Euro Stoxx 50 index that day, and said:

> "In the event that, as I hope given today's performance of the Euro Stoxx 50, the preservation of invested capital is restored, how is it possible to dismantle the credit mechanism Lombard as an amplifier of returns to extricate itself from the bank's perverse conflict mechanism to my detriment that to save its 4 min of Lombard sells at the expense of my 10 min?
>
> That is, in the face of a careful assessment about the chances of recovery we leave the money in the HFPO but without the associated HFPO Lombard"

735. This question demonstrates some understanding on the part of MDM as to the way in which HFPOs work, and in particular that there is a chance of improvement in the event that the market improves.

736. Mr Dalle Vedove responded quickly, on the same afternoon, saying that they were gathering all the information to be able to answer his questions in a timely manner. However, some information had to be provided "to us by the different banks and operators, so we will not be able to by today". He suggested a call early the following week. However, MDM insisted on a call that afternoon. Mr Dalle Vedove provided a few answers to MDM's questions by e-mail on the next (Saturday) morning, supplementing what he had said in the call. Mr Facoetti responded noting with "great disappointment and surprise the situation you have outlined to us verbally and below in writing". He asked to have, from the various managers of the products that XY had recommended to them, "documentation proving these bad results".

737. There was evidence from Mr Nuzzo, MDM, Mr Facoetti, Mr Migani and Mr Dalle Vedove as to a number of calls at around this time. I do not need to describe them in detail. It is clear that the situation was very fraught. By 13 March 2020, Mr Nuzzo was aware that redemption for the MIN and HFPO Compartments had been suspended as described in Section A above.

738. The position in relation to the Skew Base Fund as at 20 March 2020 is summarised in an internal VP slide presentation on that date:

> "RAIF, Skew Base Investments SCA RAIF compartments: partly sharp decline in fund volumes due to the fact that derivative positions for long market exposure are still open and must be rolled forward; liquidity issue as the investments show no trading volume on regulated markets so they cannot be sold or redeemed to the issuer until maturity (which will be June/ July 2020); funds suspended from trading until further clarification about valuation and liquidity status; huge leverage in the funds to be diminished step by step; remedial action plan with the loan granting bank to be designed. HUGE CREDIT LOSS RISK ON BANK SIDE."

*23 March 2020 summary by Mr Stein of VP*

739. On 23 March 2020, Mr Uwe Stein sent an e-mail responding to various questions asked by the Luxembourg regulator, Commission de Surveillance du Secteur Financier ("CSSF"). This provides a good summary of the market position, and the position of the HFPO and MIN compartments of the Fund, as it had developed at that time. The text below was also contained in an internal VP presentation dated 23 March 2020. Under the heading "Reasons for liquidation", Mr Stein said as follows:

> "The Covid-19 Crisis, one of the most significant global public health crises in the last 100 years, has disrupted global economic activity and causes major disruptions and unprecedented volatility in financial markets. We just witnessed a global collapse in asset prices the likes we haven't seen before, not even in 2008 or 2000. The stock market downturn began on 20 February 2020, markets over the following weeks became extremely volatile and VIX spiked reaching its record highs in history. The markets crashed all around the world on Monday 9 March 2020 (the "Black Monday"), mainly due to the combination of two aspects, on one hand the Covid-19 pandemic and the other hand the Russia-Saudi Arabia oil price war, being at that time the worst drop since the Great Recession in 2008.
>
> Subsequent significant drop was registered three days after the Black Monday. On 12 March 2020 (the "Black Thursday"), the stocks across Europe and North America fell more than 9%. Wall Street experienced its largest single-day percentage drop since the Black Monday in 1987, the FTSE MIB of the Borsa Italiana fell nearly 17%, becoming the worst-hit market during Black Thursday and Eurostoxx 50 fell more than 12% (first time ever EuroStoxx 50 lost more than 10% in one day and lost almost 40% in less than a month). Four days later, on 16 March 2020, all three main Wall Street indexes fell more than 12% (it

took the S&P 500 only six sessions to fall into correction territory, the fastest downfall in history). Although all Central banks unleashed a massive QE5, rate-cut and swap-line, the market didn't seem to be reassured by these measures, continuing the panic selling. The Compartment invested in listed structured products such as bonus certificates, bonus cap certificates, reverse bonus certificates, reverse bonus cap certificates, discount certificates, reverse convertibles, investment certificates and other similar investment certificates with a maximum residual maturity of 12 months. The underlying assets of each certificate may be equity indices (including but not limited to specific sectors and countries), commodities, single stocks or any combination of the above. The maximum potential loss of any certificate cannot exceed the amount paid to purchase the certificate. The Compartment may use leverage to enhance the return of the strategy. The value of investments held by a Compartment may decline in value due to factors affecting financial markets generally, such as real or perceived adverse economic conditions, changes in the general outlook for revenues or corporate earnings, changes in interest or currency rates, or adverse investor sentiment generally. The level of collateral required for financial derivatives transactions is determined taking into account factors including the nature and characteristics of transactions, the creditworthiness and identity of counterparties and prevailing market conditions. Given the exceptional distress in the markets, the value of collateral present in the Compartment declined due to exceptional adverse market conditions resulting in a collateral shortfall in the Compartment (the "Collateral Shortfall").

Liquidity refers to the speed, extend and ease with which investments can be sold or liquidated or a position closed. On the asset side, liquidity risk refers to the inability of a Compartment to dispose of investments at a price equal or close to their estimated value within a reasonable period of time. On the liability side, liquidity risk refers to the inability of a Compartment to raise sufficient cash to meet a Collateral Shortfall due to its inability to dispose of investments. In the above mentioned extremely distressed circumstances, investments became less liquid or illiquid due to a variety of factors including adverse conditions affecting a particular issuer, counterparty, or the market generally, and legal, regulatory or contractual restrictions on the sale of certain instruments. In addition, the Compartment invested in financial instruments traded over-the-counter or OTC, which generally tend to be less liquid than instruments that are listed and traded on exchanges. Market quotations for less liquid or illiquid instruments also became more volatile than for liquid instruments and/or subject to larger spreads between bid and

> ask prices. Difficulties in disposing of investments resulted in a loss for a Compartment and compromised the ability of the Compartment to meet a Collateral Shortfall due to the fact that it may only be executed once (i) sufficient assets of the concerned Compartment are sold on the secondary market or (ii) a sufficient amount of underlying assets of the Compartment has reached its term and the relevant liquidation proceeds have been disbursed to the Fund.
>
> As a result of the above exceptional circumstances, the General Partner, in consideration of the advice provided by the AIFM, had to acknowledge that the Compartment would not be able to rectify the Collateral Shortfall and consequently decided together with the AIFM to liquidate the positions of the Compartment, to compulsorily redeem all shares of the Compartment and to terminate and liquidate the Compartment."

## D16: April to June 2020

740. A number of documents in the period April - June 2020 featured in the arguments concerning the Claimants' alleged knowledge of the connections between Mr Migani/XY and the Skew Base Fund.

741. On 1 April 2020, Mr Nuzzo sent an e-mail to MDM. The document is unusual, because the documentary evidence (referred to in the trial) contains no other written communications between Mr Nuzzo and MDM in relation to the investments which are the subject of these proceedings. Mr Nuzzo passed on exchanges which he had had with Mr Kone of VP Lux concerning various aspects of the Fund, including the question of redemption of the investment in the Tangible Credit compartment and information about the liquidation of the HFPO and MIN Compartments. The decision to liquidate those compartments had been taken by the GP on 19 March 2020, with notice to shareholders having been sent on 25 March 2020.

742. When passing on the chain of e-mails with Mr Kone, Mr Nuzzo said to MDM:

> "This is the one for the XY funds".

743. Mr Nuzzo said that this meant the funds advised by XY. The Defendants said that this showed that both Mr Nuzzo and MDM treated the Fund as being XY's fund, and that it therefore supported their case that the connection between the Fund and XY was known to the Claimants. I shall come back to this point below.

744. On 24 April 2020, Mr Nuzzo wrote an e-mail to Mr Dalle Vedove. Again, the main dispute is as to how the Italian word "controllo" should be translated. Set out below is XY's translation:

> "To date more than two months after the default events related to the market insurance notes we still have no news as to when

> we will be able to re-enter the cash left, nor have we received the calculation of the NAV.
>
> For HFPO as well as knowing that capital has been completely lost, we have not received any information. As requested multiple times, I need to have a detail of the investments made by the fund and how we have fully lost capital.
>
> For the tangible credit fund, I would like to have the NAV calculated on 15/04 and I would also like to have an idea of when we can regain cash.
>
> For the Real Estate fund I would like to have the exact detail of the underlying investments.
>
> Please do not continue to answer me that you did not have them because otherwise it means that until now you have not checked what funds were doing while you have always told us that you actively managed the funds and had "manical" control of what was happening.
>
> Please also note that the equity data in 2020 have never been entered even though you have already received the data in March."

745. Although there were a number of differences in the Claimants' translation, the key dispute (both as to translation and as a matter of substance) concerns the penultimate paragraph. The Claimants' translation of that paragraph is as follows, again with differences from XY's version shown:

> "Please do not continue to answer me that you did not have them because otherwise it means that until now you have not carried out any check over ~~checked~~ what the funds did ~~were doing~~ while you have always told us that you actively managed the funds and had ~~"manical" control~~ an "extremely thorough" check of what went on ~~was happening~~.
>
> Please also note that the ~~equity~~ financial data in 2020 have never been entered even though you have already received the data in March."

746. The substantial dispute is therefore over the penultimate sentence, which in Italian reads as follows:

> "Per favore non continuare a risposndermi che non li avete perchè altrimenti vuol dire che fino adesso voi non avete effettuato alcun controllo su quello che facevano I fondi mentre ci avete sempre raccontato che voi gestivate attivamente I fondi e avevate un controllo "maniacale" di quello che succedeva".

747. The third e-mail was sent on 27 June 2020, and Mr Nuzzo again uses the expression in Italian "un controllo maniacale". The e-mail was part of a chain, starting at the end of May 2020, in which Mr Nuzzo requested information and debated issues concerning the probability of a barrier breach that had been used in XY's presentations, and Mr Dalle Vedove provided detailed responses. In the 27 June 2020 e-mail, Mr Nuzzo said as follows (using the translation in the trial bundle which translated this phrase as "manic control"):

> "My requests are aimed at trying to understand how it is possible that tools that in our meetings and presentations have always been compared to government bonds as a degree of risk (in many cases even better) have lost 100% of the capital.
>
> The shared strategy has always had as its first objective to preserve capital, which, on the other hand, has not happened at all and above all, while you said that you have manic control of everything that was done now it seems impossible to have certain information. In this regard, please find attached the email received from VP Bank, which tells me that some requested information is confidential! But are we joking? After you have lost €40M any customer has the right to know exactly what happened, so please manage the matter directly with VP Bank.
>
> Among other things, when we subscribed to the funds we had discussed that the possibility of 400% leverage was too high and you had made me the attached letter that was not absolutely respected, I would like to understand why."

748. The important question is what these e-mails reveal, if anything, about Mr Nuzzo's perception of any connection between XY and the Skew Base Fund. In looking at the three e-mails (March, April and June) in which Mr Nuzzo used the word "controllo" (or a derivative thereof), it is again important not to try to interpret the e-mails as though they were statutes or contractual terms, and to recognise that there may be imprecision in the choice of words. That said, I do attach significance to the fact that there is no dispute that, in the April e-mail, Mr Nuzzo used the words: "actively managed the funds" (or "gestivate attivamente I fondi" in Italian). In his evidence, Mr Nuzzo sought to distance himself from the use of this expression, or to downplay it. He said in cross-examination by Mr Cloherty that this was the wrong wording. In cross-examination by Mr Weekes, he said that he did not understand XY to be involved in the administration of the Skew Base Fund or its management; that they were not involved in managing the investments either inside or outside the Skew Base Fund, and were not involved in the administration of the investments in the Fund. He said that the relevant paragraph of his April e-mail was not dealing with two different things: i.e. active management and "controllo". He said that they were "part of the same thing". As he explained:

> "My point is, you were supposed to monitor these investments every single day and make sure that everything was going in the

> right direction. And thanks to the technological platform, because this is what they were … saying all the time, it should be able to tell me if the market is going bad, so I can sell my investments."

749. I did not think that Mr Nuzzo's attempt to distance himself from, or explain, the use of the expression "actively managed the funds" was convincing. In my view, "active management" goes beyond a process of checking on what investments were being made by VP which, on Mr Nuzzo's approach, was the only party who was managing the fund and was doing so entirely independently of XY. The expression connotes that, as Mr Nuzzo saw it, XY was concerned with the active management of the Fund itself, and in particular the investments that the Fund was making. In fact, this was a perception that was very close to the true position. In fact, it was not XY, but rather Twinkle, the sister company of XY (both of which were owned by Mr Migani) which was concerned in a broad sense with the active management of the Fund, as indeed was SB GP (owned by Twinkle) which had ultimate supervisory responsibility for the Fund and was responsible for determining its strategy. As discussed in Section F below, it was Twinkle that acted as "Investment Advisor", and it was that body that negotiated potential trades with counterparties and presented them to the portfolio manager (VP Liechtenstein) in the expectation that they would then be concluded.

750. Mr Nuzzo's perception would have been that, in relation to the trades which he had himself carried out over a period of a year and half prior to GIG's investment in the Skew Base Fund, and also thereafter, XY was involved in the "active management" of those investments: XY was doing the work to source them, had told Mr Nuzzo that it carried out "beauty contests" with various banks, and XY then proposed those trades to Mr Nuzzo for execution (and in Mr Nuzzo's view, were recommending or advising him to conclude those trades). XY was indeed monitoring those investments, but that was not the only thing that XY was doing.

751. In my view, Mr Nuzzo's perception was that XY would have been doing exactly the same (or at least essentially the same) kind of work for the Skew Base Fund itself, again not limited simply to monitoring. Indeed, a significant attraction of investing in the Fund, as far as Mr Nuzzo was concerned, was that investment in the Fund would simplify his task of investing the very large new liquidity which became available in early 2018. I consider that as far as Mr Nuzzo's perception of XY's role was concerned, that role was not fundamentally different to the work that XY was doing in relation to the non-Skew Base Fund investments; save that they were doing it for the Fund, rather than for Mr Nuzzo. In Mr Nuzzo's perception, the relevant work – whether it related to the investments in HFPOs and MINs which Mr Nuzzo was making directly for GIG or LDM, or to the investments in HFPOs and MINs which the Skew Base Fund was making – involved and required "active management" by XY. In my view, this also explains why Mr Nuzzo referred, in his April e-mail to MDM, to the Skew Base Fund as the "XY funds". This was not, in my view, simply a reference to XY giving advice on those funds. It shows that Mr Nuzzo regarded the Skew Base Fund as in effect synonymous with XY.

752. It also seems to me that the use of the expression "actively managed the funds" assists in understanding why Mr Nuzzo also used the word "controllo" or "controllato". Whilst I accept that this word can and often does mean monitoring or checking, it can also mean "control". I consider that Mr Nuzzo's perception was that XY's work in relation to the Skew Base Fund went significantly beyond the task of checking what the independent manager, VP Liechtenstein, was doing; and that his perception was XY did indeed have (contrary to Mr Nuzzo's evidence) a significant role in the management of the investments that the Skew Base Fund was making. Mr Nuzzo accepted in his evidence that he believed that XY was very close to both the GP of the Fund, and VP Bank. In my view, the word "control", rather than monitor or check, captures the essence of the way in which Mr Nuzzo perceived the position to be. Again, this conclusion is consistent with his reference to the "XY funds".

753. In my view, the above conclusions are also consistent with the inherent probabilities, discussed further below in Section H. Mr Nuzzo's perception that XY was concerned with the "active management" of the Fund, in the same way that it had been concerned in the "active management" of the non-Skew Base investments, provides a sensible explanation of why there is no evidence of Mr Nuzzo (or indeed MDM) carrying out any real due diligence into VP, not even to the extent of wanting to meet someone from VP in order to form some view of them.

754. The conclusion is also consistent with the context of Mr Nuzzo's three e-mails to Mr Dalle Vedove. Each of them was premised on the basis that, as Mr Nuzzo perceived it, Mr Dalle Vedove should have been in a position to provide detailed granular information as to exactly what investments had been made by the Fund. It is in my view far more likely that this perception stemmed from Mr Nuzzo's belief that XY controlled the Fund, rather than that they simply had some special and enhanced monitoring capability in relation to a fund which was completely in the hands of VP.

755. One other feature of the third of these e-mails, sent on 27 June 2020, is noteworthy. Mr Nuzzo's evidence is that by around this time (he put the time as May, June or July 2020, he was not sure exactly when) he had heard rumours (or "voices" as he described it) as to Mr Migani's connections to the Skew Base Fund. He did not, however, raise any concerns about that connection with Mr Dalle Vedove in the 27 June 2020 e-mail, or the later e-mail in that chain (10 July 2020) or indeed on 22 September 2020 when Mr Nuzzo complained to Mr Dalle Vedove that the latter had "disappeared" and that there had been an unacceptable delay in receiving the funds redemption from the Tangible Credit Compartment. Indeed, the evidence was that the first time any complaint was made about lack of independence, in relation to the Skew Base Fund, was when the Particulars of Claim were served in April 2021. Mr Nuzzo's correspondence in the May – July period is focused on the performance of the Skew Base Fund, and its significant losses, and there is no complaint about lack of independence. Given that Mr Nuzzo was making points as to the ability of Mr Dalle Vedove and XY to provide detailed information to him, it is somewhat surprising that if Mr Nuzzo now had concerns about XY's lack of independence from the Skew Base Fund, he did not raise them specifically with Mr Dalle Vedove or indeed Mr Migani.

*The end of the relationship and the litigation*

756. In his witness statement, Mr Dalle Vedove said that the relationship with the clients after April 2020 was not strong, although he described the somewhat different approaches of Mr Nuzzo and MDM. In relation to the MDM, a recovery plan was prepared, although in the end Mr Facoetti said it would not be pursued. He said that there was no formal termination of the relationship between XY and the Claimants: it just faded out. Mr Migani said that after March/April 2020, GIG continued to use, but not pay for, XY's technology under its contract with XY Ticino. XY continued to operate and update the portal provided in 2016, and did so even after GIG stopped paying in October 2019. Mr Migani's last contact with Mr Nuzzo was in late 2020 and he did not recall speaking to MDM at any time during or after the Covid-19 crisis.

757. The present proceedings were commenced in December 2020 and served in 2021.

## Section E: The Skew Base Offering Memoranda

### E1: Introduction

758. The terms of the Skew Base Offering Memoranda were relied upon by the parties in a number of contexts. The broad themes of that reliance can be summarised as follows.

759. The Claimants' misrepresentation case did not allege that there was a false statement made in the Offering Memoranda. However, the Claimants relied on the Offering Memoranda in support of their argument concerning concealment, in particular that there was concealment of the involvement of Twinkle as Investment Advisor and (as the Claimants would contend) de facto Investment Manager.

760. XY drew attention to various provisions in which the investment policy of the Compartments was described, and where the risks of investment were set out. These were relied upon in relation to the Claimants' case based on investment representations and various contractual and tortious claims. XY contended that the nature of the investments, and the risks of investing in the Skew Base Fund were communicated to the Claimants, and indeed understood by them. This included the fact that the Skew Base Fund might itself borrow money in order to fund its investment strategy.

761. In relation to the Claimants' conspiracy and concealment argument, the Defendants said that the Offering Memoranda (and the drafting process which led to the Offering Memoranda, as described in Section F below) showed that there was no deliberate concealment of the involvement of Twinkle. The Offering Memoranda contained a number of references to the "Investment Advisor": this was a clear reference to Twinkle, albeit that Twinkle was not identified or defined as the "Investment Advisor". The Defendants also submitted that the Offering Memoranda identified the significant role of SB GP, and that VP Lux as AIFM

was "external" to SB GP. Accordingly, the Skew Base Fund was not, and was not portrayed as being, purely and simply a VP operation.

762. There was a separate Offering Memorandum for each compartment of the Skew Base Fund. However, the bulk of the document, running to 74 pages (including the Table of Contents) was common to all of the Compartments. It was divided into 11 sections, preceded by just over two pages of "Important Information". The 11 sections were then: (1) Table of Contents; (2) Management, Administration and Delegated Activities; (3) Definitions; (4) Investment Strategy and Restrictions; (5) General Risk Factors; (6) Management and Administration; (7) Shares; (8) Valuation and Net Asset Value Calculation; (9) Fees and Expenses; (10) General Information; (11) Tax Considerations. There was then a separate 5-page Appendix which related specifically to each Compartment.

**E2: The main body of the Offering Memoranda**

763. The following description and quotations are from the 74 pages which were common across all the Compartments.

764. Prior to the Table of Contents were just over 2 pages headed "**IMPORTANT INFORMATION"**. (Bold text in this section of the judgment indicates bold text in the original). This included the following:

> "The present Offering Document sets out information about ***Skew Base Investments SCA RAIF*** that a potential investor should take into consideration before investing in the Fund. It should be retained for future reference.
>
> The Fund is an investment company with variable share capital — reserved alternative investment fund (*société d'investissement à capital variable —fonds d'investissement alternatif résérve*) incorporated in the form of a partnership limited by shares (*société en commandite par actions*) under the laws of Luxembourg. It qualifies as an alternative investment fund (AIF) within the meaning of the AIFMD. As a consequence, it needs to appoint an external AIFM within the meaning of the Law of 2013. The Fund is subject to the Law of 2016, as amended from time to time.
>
> …
>
> The Fund is a single legal entity, set up as an umbrella fund with one or several separate Compartments. Therefore, shares in the Fund are always issued as shares in a specific Compartment. The Fund may issue Shares of different Share Classes in each Compartment. Such Share Classes may each have specific characteristics. Certain Share Classes may be reserved to certain categories of investors. Investors should

refer to the relevant Appendix for further information on characteristics of Share Classes.

The Fund is managed by Skew Base S.a r.1., a private limited liability company (*société à responsabilité limitée*) incorporated and existing under Luxembourg law, having it registered office at 6, rue Adolphe, L-1116 Luxembourg, Grand Duchy of Luxembourg and registered with the Luxembourg Trade and Companies Registry under number B 211370 (the **"General Partner"**).

…

No distributor, agent, salesman or other person has been authorised to provide any information or to make any representation other than those contained in the Offering Document and in the documents referred to herein in connection with the offer of Shares and, if given or made, such information or representation must not be relied upon as having been authorised.

The General Partner has taken all reasonable care to ensure that the facts stated herein are true and accurate in all material respects and that there are no material facts the omission of which would make misleading any statement herein, whether of fact or opinion. The General Partner accepts responsibility accordingly.

The Fund expressly disclaims any and all liability based on such information, errors in such information, or omissions from such information. In particular, no representation or warranty is given as to the accuracy of any financial information contained in this Offering Document or as to the achievement or reasonableness of any forecasts, projections, management targets, prospects or returns. The recipient shall be entitled to rely solely on any representations and warranties made to him by the Fund in any subscription or commitment agreement for Shares entered into with the Fund.

…

An investment in the Shares is only suitable for investors who have sufficient experience, knowledge and/or access to professional advisors to make their own financial, legal, tax and accounting evaluation of the risks of an investment in the Shares and who have sufficient resources to be able to bear any losses that may result from an investment in the Shares. Investors should not treat the content of this Offering Document as advice relating to legal, taxation or investment matters and

are advised to consult their own professional advisors concerning the acquisition, holding or disposal of an investment in the Fund referred to in this Offering Document. Accordingly, any investor should consider his own personal circumstances and seek additional advice from his financial advisor or other professional advisors as to possible financial, legal, tax and accounting consequences which he might encounter under the laws of the countries of their citizenship, residence, or domicile and which might be relevant to the subscription, purchase, holding, redemption, conversion or disposal of the Shares.

The Shares are reserved to Eligible Investors, as further described in section 7.3 (Eligible Investors) of this Offering Document. Eligible Investors include well-informed investors (*investisseurs avertis*) within the meaning of article 2 (1) of the Law of 2016. For further details please refer to the definitions "Eligible Investors" and "Well-Informed Investor" set out in section 3 Definitions) as well as to section 7.3 (Eligible Investors) of this Offering Document.

…

The General Partner is ultimately responsible for verifying each investor's eligibility as a Well- Informed Investor.

**THE VALUE OF THE SHARES MAY FALL AS WELL AS RISE AND AN INVESTOR MAY NOT GET BACK THE AMOUNT INITIALLY INVESTED. INVESTING IN THE FUND INVOLVES RISK INCLUDING THE POSSIBLE LOSS OF CAPITAL.**"

765. Section 2 identified the following under the heading "Management, Administration and Delegated Activities". I omit the addresses which were included there, and have used the version of the Offering Memorandum dated September 2017 (for the HFPO Compartment).

**General Partner**: Skew Base S.a.r.l

**Board of Managers of the General Partner**: Pietro Longo Manager.*

**AIFM**: VP Fund Solutions (Luxembourg) S.A.

**Board of Directors of the AIFM**: Christop Mauchle (Chairman), Eduard von Kymmel, Jean-Paul Gennari * (all with the same address as VP Fund Solutions (Luxembourg) S.A. and the Depositary Bank, VP Bank).

**Depositary**: VP Bank (Luxembourg) SA

**Administrator**: VP Fund Solutions (Luxembourg) S.A.

**Auditor**: Ernst & Young S.A.

**Legal counsel**: DLA Piper Luxembourg.

* In the March 2019 Offering Memorandum for the MIN (USD) Compartment, there was some updating. The Board of Managers identified Mr Longo, Mr Joachim Kuske and Ms Viviana Gaveni. The Board of Directors of the AIFM were now Mr von Kymmel as Chairman, Mr Ralf Konrad and Jean-Paul Gennari.

766. Section 3 contained a lengthy list of definitions. This included:

| | |
|---|---|
| "Investment Management Agreement | the agreement entered into between the AIFM and the Investment Manager governing the appointment of the Investment Manager, as may be amended from time to time. |
| Investment Manager | the delegate investment manager appointed by the AIFM with the consent of the Fund in accordance with the provisions of the Law of 2016 and the Investment Management Agreement. |
| Investment Manager Fee | the fee payable by the AIFM to the Investment Manager under the Investment Management Agreement, as described in section 9.4 (Investment Manager and Investment Advisor Fee) of this Offering Document." |

767. Section 4 was headed "Investment Strategy and Restrictions". It identified, among other things, the role of SB GP and the nature of the strategy. In the latter context it referred to the Appendix.

768. Section 4.1 was headed "Investment Strategy" and provided:

"**4.1 Investment strategy**

The General Partner has determined the investment objective and investment policy of each of the Compartments as described in the Appendices to this Offering Document. The General Partner may impose further investment restrictions or guidelines in respect of any Compartment from time to time. No assurance can be given that the investment objective of any Compartment will be attained.

> The pursuit of any Compartment's investment objective and investment policy must be in compliance with the limits and restrictions set out in section 4.2 (Investment restrictions) below and the section "Investment policy and specific restrictions" in the relevant Appendix. In case of discrepancies, the rules and limits of the relevant Appendix shall prevail."

769. Section 4.2 was headed "Investment restrictions". This contained reference to various restrictions, and also made reference to the Appendix which might supplement or qualify the restrictions in Section 4.2. The basic restriction, subject to exceptions, was that:

> "a) A Compartment shall not invest more than 30% of its net assets … in securities of the same type issued by the same issuer
>
> ….
>
> c) When using financial derivative instruments, a Compartment must ensure, via appropriate diversification of the underlying assets, a similar level of risk-spreading. Similarly, the counterparty risk in an over-the-counter (OTC) transaction must, where applicable, be limited having regard to the quality and qualification of the counterparty."

770. There were some qualifications on the restrictions, including that they were only applicable after a ramp-up period of 12 months after launch. As Mr Zehender explained in his evidence, such a qualification is necessary; because otherwise the initial investments (for example if there were just one or two of them) would inevitably breach the 30% restriction.

771. Section 4.2 also provided that a Compartment could subscribe, acquire and/or hold securities issued or to be issued by another Compartment, subject to certain conditions. It was, therefore, permissible (as described in Section C above) for the MIN (EUR) Compartment to invest in the MIN (USD) Compartment.

772. Indeed, looking at the position more generally, the Claimants' case was not based on an allegation that the investments made by the relevant Compartments were contrary to the restrictions contained in the Offering Memoranda, nor that they were not in accordance with the policies identified in those documents. In cross-examination, Mr Zehender accepted that, in the period of operation of the Fund between 2017-2020, there had been two occasions when the Fund had made an investment which was not permissible. When this happens, the regulator can become involved, because it is a serious matter. In both cases, immediate steps were taken to correct the error.

773. Section 4.3 dealt with Borrowing:

> "**4.3 Borrowing**

> Each Compartment may borrow within the limits further described in the relevant Appendix. Unless otherwise stated in the relevant Appendix, each Compartment may borrow for investment purposes as well as bridge financing and to fund expense disbursements when liquid funds are not readily available. The assets of a Compartment may be charged as security for any such borrowings."

774. Section 5 was headed "GENERAL RISK FACTORS", and contained the following:

> "The performance of the Shares depends on the performance of the investments of the Compartment, which may increase or decrease in value. The past performance of the Shares is not an assurance or guarantee of future performance. The value of the Shares at any time could be significantly lower than the initial investment and investors may lose a portion or even the entire amount originally invested and understand that there is no recourse other than to the assets of the relevant Compartment.
>
> Investment objectives express an intended result only. Unless otherwise specified in the relevant Appendix, the Shares do not include any element of capital protection and the Fund gives no assurance or guarantee to any investors as to the performance of the Shares. Depending on market conditions and a variety of other factors outside the control of the Fund, investment objectives may become more difficult or even impossible to achieve. The Fund gives no assurance or guarantee to any investors as to as to the likelihood of achieving the investment objective of a Compartment.
>
> An investment in the Shares is only suitable for investors who have sufficient knowledge, experience and/or access to professional advisors to make their own financial, legal, tax and accounting evaluation of the risks of an investment in the Shares and who have sufficient resources to be able to bear any losses that may result from an investment in the Shares. Investors should consider their own personal circumstances and seek additional advice from their financial advisor or other professional advisor as to possible financial, legal, tax and accounting consequences which they might encounter under the laws of the countries of their citizenship, residence, or domicile and which might be relevant to the subscription, purchase, holding, redemption, conversion or disposal of the Shares of the Fund.
>
> Investors should also carefully consider all of the information set out in this Offering Document and the Appendix of the Compartment before making an investment decision with respect to Shares of any Compartment or Share Class. The

following sections are of general nature and describe certain risks that are generally relevant to an investment in Shares of any Compartment or Share Class. Other risks may be described in the Appendix. This section and the Appendices do not purport to be a complete explanation of all risks involved in an investment in the Shares of any Compartment or Share Class and other risks may also be or become relevant from time to time."

**5.1 Market risk**

Market risk is understood as the risk of loss for a Compartment resulting from fluctuation in the market value of positions in its portfolio attributable to changes in market variables, such as general economic conditions, interest rates, foreign exchange rates, or the creditworthiness of the issuer of a financial instrument. This is a general risk that applies to all investments, meaning that the value of a particular investment may go down as well as up in response to changes in market variables. Although it is intended that each Compartment will be diversified with a view to reducing market risk, the investments of a Compartment will remain subject to fluctuations in market variables and the risks inherent in investing in financial markets.

…

**5.2.1 Volatility risk**

The volatility of a financial instrument is a measure of the variations in the price of that instrument over time. A higher volatility means that the price of the instrument can change significantly over a short time period in either direction. Each Compartment may make investments in instruments or markets that are likely to experience high levels of volatility. This may cause the Net Asset Value per Share to experience significant increases or decreases in value over short periods of time.

**5.3 Liquidity risk**

Liquidity refers to the speed and ease with which investments can be sold or liquidated or a position closed. On the asset side, liquidity risk refers to the inability of a Compartment to dispose of investments at a price equal or close to their estimated value within a reasonable period of time. On the liability side, liquidity risk refers to the inability of a Compartment to raise sufficient cash to meet a redemption request due to its inability to dispose of investments. In certain circumstances, investments may become less liquid or illiquid due to a variety

of factors including adverse conditions affecting a particular issuer, counterparty, or the market generally, and legal, regulatory or contractual restrictions on the sale of certain instruments. In addition, a Compartment may invest in financial instruments traded over-the-counter or OTC, which generally tend to be less liquid than instruments that are listed and traded on exchanges. Market quotations for less liquid or illiquid instruments may be more volatile than for liquid instruments and/or subject to larger spreads between bid and ask prices. Difficulties in disposing of investments may result in a loss for a Compartment and/or compromise the ability of the Compartment to meet a redemption request due to the fact that the redemption request may only be executed once (i) sufficient assets of the concerned Compartment are sold on the secondary market or (ii) a sufficient amount of underlying assets of the Compartment has reached its term and the relevant liquidation proceeds have been disbursed to the Fund. The payment of the redemption request may be (considerably) deferred since the General Partner may, at its discretion, defer payment of the redemption of Shares if raising funds to pay such a redemption would, in its view, not be in the best interests of the relevant Compartment.

**5.3.1 Economic risk**

The value of investments held by a Compartment may decline in value due to factors affecting financial markets generally, such as real or perceived adverse economic conditions, changes in the general outlook for revenues or corporate earnings, changes in interest or currency rates, or adverse investor sentiment generally. The value of investments may also decline due to factors affecting a particular, industry, area or sector, such as changes in production costs and competitive conditions. During a general downturn in the economy, multiple asset classes may decline in value simultaneously. Economic downturn can be difficult to predict. When the economy performs well, there can be no assurance that investments held by a Compartment will benefit from the advance.

…

**5.4 Operational risk**

Operational risk means the risk of loss for the Fund resulting from inadequate internal processes and failures in relation to people and systems of the Fund, the AIFM and/or its agents and service providers, or from external events, and includes legal and documentation risk and risk resulting from the trading,

settlement and valuation procedures operated on behalf of the Fund.

…

**5.4.2 Structured products risk**

The term structured product encompasses a broad scope of different structuring possibilities, so that different types of risks can apply. Given that structured products are often unsecured and are only backed by the credit of the issuer, they are subject to credit risk of the issuer. As consequence, investments in structured products may yield in significant losses, including total loss. Furthermore, there is normally no deep market for structured products, so that they might be subject to the liquidity risk. Consequently, it might be difficult to sell the structured product even in the normal market environment or only possible at a significant discount. In addition, the structured products may be highly customised. Accordingly, particular attention shall be paid to whether the envisaged structured product is

eligible for an investment and suits the fund's investment objective and investment policy appropriately. The structured products may also tend to have a very complex and in transparent structure.

…

**5.4.8 Reliance on management**

A Compartment may depend significantly on the efforts and abilities of the General Partner, the Investment Manager or the Investment Advisor. The loss of such entity's services could have a materially adverse effect on the Fund and on the relevant Compartment.

…

**5.5.4 Indebtedness**

When a Compartment is subject to the risks associated with debt financing, it is subject to the risks that available funds will be insufficient to meet required payments and the risk that existing indebtedness will not be refinanced or that the terms of such refinancing will not be as favorable as the terms of existing indebtedness."

775. Section 6, headed "Management and Administration" began with some "General Information" in Section 6.1, including that:

> "The Fund has elected to be treated as an externally-managed AIF within the meaning of the AIFM Law. The General Partner has appointed VP Fund Solutions (Luxembourg) S.A. as external alternative investment manager within the meaning of the AIFMD and AIFM Law (the "**AIFM**")"

776. The capital of the Fund was represented by two types of share: "General Partner Share", and "Limited Partner Shares". It explained the distinction between the two types of Shareholders. The General Partner (i.e. SB GP) was "responsible for the management of the Fund is liable for all liabilities which cannot be paid out of the assets of the Fund". The General Partner "may only be removed by an amendment of the Articles of Association approved at an extraordinary general meeting of Shareholders". In contrast to the General Partner, the liability of Limited Partners was "… limited to the amount of their investment in the Fund".

777. Section 6.2 described the General Partner in more detail:

> "**6.2 General Partner**
>
> Skew Base S. à r.1., a Luxembourg private limited company ("sociète à responsabilité limitée") is the General Partner, acting as unlimited partner ("associè commandite") for the Fund and in charge of the Fund's management.
>
> The General Partner shall have the broadest powers to act in any circumstances on behalf of the Partnership, subject to the powers expressly assigned by law to the general meetings of Shareholders.
>
> The General Partner is responsible, while observing the principle of risk diversification, for laying down the investment policy of the Compartments and for monitoring the business activity of the Fund and its Compartments. It may carry out all acts of management and administration on behalf of the Fund and its Compartments and in particular purchase, sell, subscribe or exchange any securities and exercise all rights directly or indirectly attached to the Compartments."

778. Section 6.3 described the AIFM (i.e. VP Lux) as follows:

> "The Fund has appointed the AIFM as its external alternative investment fund manager in accordance with the provisions of the law of 2016 and the law of 2013 pursuant to the management agreement, to perform the portfolio management, the risk management and the valuation function of the fund. the AIFM may, upon instruction of the company, delegate the performance of the operations involving, inter alia, (i) the

performance of the valuation function to external valuer(s), (ii) the day-to-day investment management of all or part of the portfolio of one or several compartment of the company to one or more portfolio manager(s), as further detailed in the relevant special section.

The AIFM is a public limited company (sociétè anonyme) incorporated under the laws of Luxembourg on 28 January 1993. The AIFM is authorised and regulated by the CSSF in Luxembourg under Luxembourg law. the AIFM is an affiliated company of VP bank group. Its main business activity is to fulfil the functions of AIFM for the fund and other funds as required under the AIFMD and to provide investment management expertise.

The relationship between the fund and the AIFM is subject to the terms of the management agreement. Under the terms of the management agreement, the AIFM is responsible for the portfolio and risk management of the Fund, subject to the overall supervision of the General Partner. This includes in particular the monitoring of the investment policy, investment strategies and performance, as well as risk management, liquidity management, management of conflicts of interest, supervision of delegates, financial control, internal audit, complaints handling, recordkeeping and reporting. The AIFM has authority to act on behalf of the Fund within its function.

…

For the purpose of a more efficient conduct of its business, the AIFM may delegate to third parties the power to carry out some of its functions on its behalf, subject to limitations and requirements, including the existence of objective reasons, in accordance with applicable laws and regulations. The delegated functions shall remain under the supervision and responsibility of the AIFM and the delegation shall not prevent the AIFM from acting, or the Fund from being managed, in the best interests of the investors. The delegation to third parties is subject to the prior approval of the CSSF.

…

**6.3.1 Risk management function**

The AIFM employs an appropriate risk management system consisting of mainly two elements: (i) an organisational element in which the permanent risk management function plays a central role, and (ii) a procedural element documented in the risk management policy, which sets out measures and

procedures employed to measure and manage risks, the safeguards for independent performance of the risk management function, the techniques used to manage risks and the details of the allocation of responsibilities within the AIFM for risk management and operating procedures.

The central task of the risk management function of the AIFM is the implementation of effective risk management procedures in order to identify, measure, manage, and monitor on an ongoing basis all risks to which the or each Compartment is or may be exposed.

In addition, the risk management function of the AIFM shall ensure that the risk profile of each Compartment as disclosed in this Offering Document is consistent with the risk limits as defined by the AIFM in compliance with the risk profile as approved by the General Partner.

…

**6.3.2 Leverage monitoring**

Furthermore, the risk management function of the AIFM is responsible for regularly monitoring the leverage exposure for each Compartment.

Under the AIFM Laws and Regulations, the term leverage is defined as being any method by which the AIFM increases the exposure of a Compartment whether through borrowing of cash or securities, leverage embedded in derivative positions or by any other means. Any leverage potentially creates risks for the relevant Compartment. A leverage (as defined by the AIFMD) of 100% means a leverage-free portfolio.

…

**6.4 Delegate Investment Manager**

With the consent of the Fund and under its supervision and responsibility, the AIFM may appoint a delegate investment manager for a specific Compartment, as specified in the relevant Compartment's Appendix.

**6.5 Depositary**

The Fund has appointed VP Bank (Luxembourg) SA as its Depositary within the meaning of the Law of 2016 and Law of 2013 pursuant to the Depositary Agreement.

VP Bank (Luxembourg) SA is in charge of (i) the safekeeping of the assets of the Fund (ii) the cash monitoring, (iii) the oversight functions and (iv) such other services as agreed from time to time and reflected in the Depositary Agreement and entered into for such purposes by the Fund and VP Bank (Luxembourg) SA.

…

**6.5.1 Duties of the Depositary**

The Depositary is entrusted with the safekeeping of the Fund's assets.

…

**6.6 Administrator**

The Fund has appointed VP Fund Solutions (Luxembourg) SA as administrative, registrar and transfer agent and as domiciliary agent of the Fund (the "Administrator") pursuant to the Administration Agreement.

The relationship between the Fund and the Administrator is subject to the terms of the Administration Agreement. Under the terms of the Administration Agreement, the Administrator will carry out all general administrative duties related to the administration of the Fund required by Luxembourg law, calculate the Net Asset Value per Share, maintain the accounting records of the Fund, as well as process all subscriptions, redemptions, conversions, and transfers of Shares, and register these transactions in the register of Shareholders. In addition, as registrar and transfer agent of the Fund, the

Administrator is also responsible for collecting the required information and performing verifications on investors to comply with applicable anti-money laundering rules and regulations.

…

**6.8 Conflicts of interest**

The General Partner, the AIFM, the Investment Manager, the Investment Advisor, the Depositary, the Administrator and the other service providers of the Fund, and/or their respective affiliates, members, employees or any person connected with

them may be subject to various conflicts of interest in their relationships with the Fund."

779. Section 7 had provisions concerning the Shares:

"**7.1.1 Shares**

Pursuant to the Law of 2016, Shares may only be subscribed and held by investors either (i) fulfilling the criteria of Well-Informed Investors or (ii) being members of the Board of Managers or being otherwise involved in the management of the Fund and its Compartments, The General Partner may further set additional eligibility criteria for investors.

…

**7.1.4 Changes to Compartments and Share Classes**

The rights and restrictions attached to Shares may be modified from time to time, subject to the provisions of the Articles of Association. Any changes to the Articles of Association will require a resolution of the general meeting of Shareholders, as further described in section 10.2 (Meetings of Shareholders) below.

Subject to the above, the General Partner may change the characteristics of any existing Compartment, including its objective and policy, or any existing Share Class, without the consent of investors. In accordance with applicable laws and regulations, investors in the Compartment or Share Class will be informed about the changes and, where required, will be given prior notice of any proposed material changes in order for them to request the redemption of their Shares should they disagree. This Offering Document will be updated as appropriate.

…

**7.3 Eligible investors**

Shares may only be acquired or held by investors who (i) are Well-Informed Investors, as further described below, and (ii) satisfy all additional eligibility requirements for a specific Compartment or Share Class, if any, as specified for the Compartment or Share Class in the relevant Appendix (an Eligible Investor).

…

**7.5.1 Redemption application**

Investors may apply for redemption of all or any of their Shares on each Redemption Day at a Redemption Price equal to the Net Asset Value per Share for that Redemption Day. The Net Asset Value per Share for the Redemption Day at which an application will be processed is unknown to the investors when they place their redemption applications.

…

**7.8.3 Suspension of issue, redemption or conversion of Shares**

The issue, redemption or conversion of Shares in a Share Class shall be suspended whenever the determination of the Net Asset Value per Share of such Share Class is suspended by the Fund in accordance with section 8.4 (Temporary suspension of the Net Asset Value calculation) below and in other circumstances specified in the Articles of Association and this Offering Document."

780. Section 8 addressed Valuation and Net Asset Value Calculation. Section 8.4 provided that:

"The General Partner, upon consultation with the AIFM may temporarily suspend the calculation and publication of the New Asset Value per Share of any Share Class in any Compartment and/or where applicable, the issue, redemption and conversion of Shares of any Share Class in any Compartment in the following cases …"

There then followed 13 cases, including "exceptional circumstances" which were then further explained.

781. Section 9 addressed Fees and Expenses. It included the following:

"**9.2 General Partner Fee**

The General Partner will be entitled to an annual fee and a performance fee as specified in the Appendix for each Compartment or Share Class, the fee will be paid out of the assets of the Fund and allocated to the relevant Compartments and Share Classes as described in section 8.2.5 (Allocation of assets and liabilities to Compartments and Share Classes) above

**9.3 Management Fee**

The AIFM will be entitled to an annual fee for each Compartment or Share Class, and which will be paid by the General Partner out of its own fee. The AIFM will also be entitled to reimbursement by the General Partner of reasonable out-of-pocket expenses properly incurred in carrying out its duties.

**9.4 Investment Manager and Investment Advisor Fee**

The fees of the Investment Manager and the Investment Advisor, if applicable, will be borne by the General Partner out of its own assets.

**9.5 Performance Fee**

The AIFM may be entitled to receive a Performance Fee with respect to certain Compartments or Share Classes. It will be paid by the General Partner out of its own assets."

782. Section 10 was headed "General Information". It included the following:

"**10.4 Changes to this Offering Document**

The General Partner, in close cooperation with the AIFM, may from time to time amend this Offering Document to reflect various changes it deems necessary and in the best interest of the Fund, such as implementing changes to laws and regulations, changes to a Compartment's objective and policy or changes to fees and costs charged to a Compartment or Share Class. In accordance with applicable laws and regulations, investors in the Compartment or Share Class will be informed about the changes and, where required, will be given prior notice of any proposed material changes in order for them to request the redemption of their Shares should they disagree.

For Compartments in which the right for investors to request a redemption of their Shares is excluded, the General Partner will seek the prior written consent of any concerned investor(s) for any material changes to the Offering Document which have a bearing on the relevant investor's interests."

783. Section 10.6 was headed "Data protection", and it contained a further reference to the "Investment Advisor":

"… Personal Data may be transferred to affiliated and third-party entities supporting the activities of the Fund which include, in particular, the AIFM, the Administrator, the Investment Manager and the Investment Advisor that are located in the European Union".

## E3: The HFPO Compartment Appendix

784. The first investment made by any of the Claimants in the Skew Base Fund was SRL's investment in the HFPO Centaurus Compartment. The Appendix relating to that Compartment was sent to MDM and Mr Facoetti in early 2017. Later in 2017, the Compartment was re-named the High Frequency Price Opportunity or HFPO Compartment, and MDM received a prospectus dated September 2017. The following quotations are taken from the Appendix to the September 2017 document, which was materially identical to the HFPO Centaurus Appendix.

> "**1. Investment objective**
>
> The compartment Skew Base Investments SCA RAIF - High Frequency Price Opportunity (the "Compartment") has the objective to generate a positive return by investing in structured products such as certificates close to their maturity on the secondary markets and subsequently holding them up to their maturity, taking advantage of the microstructure of this kind of market which is dominated by sellers. The Compartment may use leverage to enhance the return of the strategy.
>
> **2. Investment policy and specific restrictions**
>
> **2.1 Investment policy**
>
> The Compartment will primarily invest in listed and unlisted structured products such as bonus certificates, bonus cap certificates, reverse bonus certificates, reverse bonus cap certificates, discount certificates, reverse convertibles, investment certificates and other similar investment certificates with a maximum residual maturity of 12 months. The underlying assets of each certificate may be equity indices (including but not limited to specific sectors and countries), commodities, single stocks or any combination of the above. The maximum potential loss of any certificate cannot exceed the amount paid to purchase the certificate. To provide an efficient capital allocation, in addition, the Compartment may also hold cash or liquid assets (including investment funds with at least weekly liquidity) or fixed income securities and other investment certificates with maximum residual maturity up to 36 months. Cash and money market funds may represent more than 50% of the portfolio.
>
> **2.2 Investment restrictions**
>
> The Compartment will invest according to the following geographical and underlying diversification:

- Min 0% - Max 20% Emerging market aggregate exposure
- Min 0% - Max 10% Single commodity exposure
- Min 0% - Max 30% Commodities aggregate exposure
- Min 0% - Max 5% Single stock exposure
- Min 0% - Max 50% Single stocks aggregate exposure

The Compartment will invest according to the following issuer diversification:

- Maximum 30% of its assets or commitments in the same types of securities issued by the same organisation.
- However, this restriction is not applicable to investments in securities issued or guaranteed by OECD Member States, their local authorities or supranational bodies or organisations. Nor is it applicable to target UCIs which are subject to risk diversification principles that are least comparable to those relevant to SIFs.

The investment strategy of the Compartment will be carried out by applying a technological and quantitative approach to identify the most efficient instruments at any time during the trading hours, with the objective to maximize the expected return, minimizing the probability of reaching the barrier of each instrument. The short term residual maturity of the investments implies a turnover of the portfolio up to (but not limited to) 10 times of the total assets.]

The Compartment may use financial derivative instruments, including derivatives, limited to options, forwards and futures for hedging and investment purposes. The Compartment may also retain amounts in cash or cash equivalents if it is considered appropriate to achieve the investment objective, including, without limitation, during portfolio rebalancing or to pay for any margin requirements.

The restrictions set out under this section 2.2 are only applicable after a ramp-up period of twelve (12) months following the end of the Initial Offer Period (as defined below).

**2.3 Leverage**

The Compartment may use leverage to enhance the return of the strategy. The maximum allowed leverage is 400% under both the gross exposure and commitment approach. The level of leverage will be calculated on a regular basis by the AIFM applying two different methods:

- Gross method (as defined by the AIFM Laws and Regulations): the leverage is calculated as the ratio between the Compartment's investment exposure (calculated by adding the absolute values of all portfolio positions, including the sum of notional of the derivative instruments used but excluding cash and cash equivalents) and the Net Asset Value; and
- Commitment method (as defined by the AIFM Laws and Regulations): the leverage takes into account netting and hedging arrangements and is defined as the ratio between the Compartment's net investment exposure (not excluding cash and cash equivalents) and the Net Asset Value.

For the avoidance of doubt, the Compartment may also invest in other assets in accordance with the rules and restrictions set out above in section 4 (Investment strategy and restrictions) of the general part of the Offering Document.

…

**3. Investor profile**

The Compartment is an investment vehicle for investors:

- who wish to invest on a diversified portfolio of structured products worldwide;
- who are willing to bear variations in market value and are able to sustain significant loss; and
- who have a medium-term investment horizon (at least three (3) years).

…

**5. Specific risks**

Investors should carefully read section 5 (General Risk Factors) of the general part of the Offering Document before investing in the Compartment.

Furthermore Shareholders of the Compartment should carefully consider that the high frequency opportunity strategy's success involves a specific execution risk: the time to market of the orders has to be as short as possible. Any delay in the execution of the transaction may impact the probability of an execution at the determined price and the executed volumes may be different and lower that determined.

…

**13. Delegate Investment Manager**

With the consent of the Fund, the AIFM has appointed VP Fund Solutions (Liechtenstein) AG as Investment Manager for the Compartment pursuant to the Investment Management Agreement.

VP Fund Solutions (Liechtenstein) AG is a public limited company incorporated under the laws of Liechtenstein (the "Investment Manager"). The Investment Manager is authorised for the purpose of asset management and regulated by the competent authority in Liechtenstein under Liechtenstein law. The Investment Manager is an affiliated company of VP Bank Group. Its main business activity is asset management.

The relationship between the Fund, the AIFM and the Investment Manager is subject to the terms of the Investment Management Agreement. Under the terms of the Investment Management Agreement, the Investment Manager has full discretion regarding investment decisions but shall at all times act in the interest of the Fund and its investors. Within this function, the Investment Manager has authority to act on behalf of the Fund.

The AIFM monitors the Investment Manager's activities, in particular compliance with the investment restrictions and the risk profile of the Compartment. This monitoring is carried out by the business unit of the AIFM responsible for controlling the portfolio management. The AIFM has at all times a complete right of inspection and control over the Investment Manager's activities regarding the Fund and may provide instructions to the Investment Manager regarding investment decisions.

…

The liability of the Investment Manager towards the AIFM and the Fund will not be affected by any delegation of functions by the Investment Manager."

**14. Management Fee**

The General Partner will be entitled to an annual fee equal to a percentage of the average asset gross of any fees (cost and taxes) (the "Total Asset") of the Compartment and paid out of the assets of the Fund and allocated to the Compartment (as described in section 8.2.5 (Allocation of assets and liabilities to Compartments and Share Classes) of the general part of the Offering Document. The General Partner will pay other service providers' fees, such as the fees of the Management Company /

> AIFM Services, Central Administration Services, Portfolio Management, Portfolio Execution Management and Creating Accountability Report, out of such fee.
>
> The Management Fee will accrue on each Valuation Day and will be 1% per annum of the Total Asset payable each semester in arrears.
>
> In the first semester of activity and in case of early redemption (partial or full) or discontinuance of the Agreement Management Fee on redeemed amounts will be calculated on a pro-rata basis (actual/183).
>
> The General Partner will also be entitled to reimbursement of reasonable out-of-pocket expenses properly incurred in carrying out its duties.
>
> …
>
> **15. Performance Fee**
>
> The General Partner will be entitled to receive a Performance Fee with respect to the Compartment. The payment and size of the Performance Fee depends on the performance of the Compartment over a specified time period.
>
> Should the Half-Year Return be greater than an annual rate of 3.000%, the Performance Fee for the semester will be calculated as:
>
> > 15% * (Half-Year Return - 3.000% p.a. pro rata temporis) * average Net Assets over the period
>
> Should the Half-Year Return be lower or equal to 1.500% the Performance Fee for the semester is equal to 0."

### E4: The MIN (EUR) Compartment

785. The Offering Memorandum for the MIN (EUR) Compartment was dated February 2018. The Appendix was similar in structure to the Appendix for the HFPO Compartment described above. It contained 15 sections, some of which were materially identical to the equivalent paragraphs in the HFPO Compartment. For example, Section 2.3 (Leverage), Section 3 (Investor Profile) and Section 13 (dealing with VP Liechtenstein as the Delegate Investment Manager) were identical in both Appendices. Similarly, Sections 14 and 15 were largely identical, save that the management fee for the MIN (EUR) Compartment was 0.6% rather

than 1% for the HFPO Compartment. The following sets out paragraphs which were materially different when comparing the MIN (EUR) Appendix to the HFPO Appendix.

> “**1. Investment objective**
>
> The compartment Skew Base Investments SCA RAIF — Market Insurance Note (EUR) (the "**Compartment**") has the objective to generate a positive return by investing in structured products that extract returns by insuring other market participants from market events that have a very low occurrence probability. The Compartment may use leverage to enhance the return of the strategy.
>
> **2. Investment policy and specific restrictions**
>
> **2.1 Investment policy**
>
> The Compartment will primarily invest in listed and unlisted structured products such as stability notes, gap notes, reverse convertibles, dispersion, dislocation swap certificates and other similar investment certificates with a maximum residual maturity of 36 months. More in detail, stability and gap notes pay the investor a coupon for insuring a counterparty against a one day (in some cases, 2 or 3 days) index price drop; reverse convertible pay the investor a coupon for being exposed to a cumulative negative performance of the underlying(s); dispersion certificates pay the investor a return in exchange of being exposed to dispersion level of basket of underlyings; dislocation swap pay the investor a coupon in change of insuring a counterparty against a change of realized volatility (above a Certain level) of a certain underlying, when the underlying is below a certain level. The underlying assets of each certificate may be equity indices (including but not limited to specific sectors and countries), commodities, fixed income indices, funds and any combinations of the above. The maximum potential loss of any instrument cannot exceed the amount paid to purchase the certificate. To provide an efficient capital allocation, in addition, the Compartment may also hold cash or liquid assets including investment funds with at least weekly liquidity) or fixed income securities and other investment certificates with a maximum residual maturity of up to 48 months.
>
> **2.2 Investment restrictions**
>
> The Compartment will invest according to the following criteria:

o Min 30% Issue with rating >= A- (lowest rating among S&P/Moody's/Fitch)
o Min 90% Issue with rating >= BBB- (lowest rating among S&P/Moody's/Fitch)
o Min 0% - Max 15% Single commodity exposure
o Min 0% - Max 30% Commodities aggregate exposure
o Min 0% - Max 5% Single stock exposure
o Min 0% - Max 15% Single stocks aggregate exposure
o Min 0% - Max 25% Emerging market aggregate exposure

The Compartment will invest according to the following issuer diversification:

• Maximum 30% of its assets or commitments in the same types of securities issued by the same issuer.

• However, this restriction is not applicable to investments in securities issued or guaranteed by OECD Member States, their local authorities or supranational bodies or organizations. Nor is it applicable to target UCIs which are subject to risk diversification principles that are at least comparable to those applicable to RAIFs.

The investment strategy of the Compartment will be carried out by applying a technological and quantitative approach to identify the most efficient instruments with the objective to maximize the expected return, minimizing the probability of reaching the barrier of each instrument.

The above mentioned criteria such as rating and other investment restrictions must be valid only at purchase; in case of downgrade below the limit, no increase of that issuer is allowed; if rating will go below BBB- on any agency, a sale of the instrument must be immediately evaluated.

The Compartment may use financial derivative instruments, limited to options, forwards and futures for hedging and investment purposes.

The Compartment may also retain amounts in cash or cash equivalents if it is considered appropriate to achieve the investment objective, including, without limitation, during portfolio rebalancing or to pay for any margin requirements.

The restrictions set out under this section 2.2 are only applicable after a ramp-up period of twelve (12) months following the end of the Initial Offer Period (as defined below).

…

**3. Investor profile**

The Compartment is an investment vehicle for investors:

- who wish to invest on a diversified portfolio of structured products worldwide;

- who are willing to bear variations in market value and are able to sustain significant loss; and

- who have a medium-term investment horizon (at least three (3) years).

…

**5. Specific risks**

Investors should carefully read section 5 (General risk factors) of the general part of the Offering Document before investing in the Compartment.

Furthermore, Shareholders of the Compartment should carefully consider that even considering the very conservative approach, extreme or unprecedented market development may affect the strategy.

Specific risks on different products:

• Stability/gap notes: shareholder of the compartment must be aware that in case of a drop of the underlying index below the barrier in the determined horizon (usually, but not limited to, (1) one day, up to (3) three days), the value of the investment may be affected and could potentially go to zero (anyway the potential loss cannot exceed the amount paid to purchase the instrument).

• Reverse convertibles: shareholder of the compartment must be aware that in case of a cumulated decrease of the underlying index below the barrier before the end of the

observation period, the value of the investment may be affected and could potentially go to zero (anyway the potential loss cannot exceed the amount paid to purchase the instrument).

• Dispersion certificates: shareholder of the compartment must be aware that in case of a realized dispersion among the basket of the underlyings below (or above) the defined

> barrier, at the end of the observation period, the value of the investment may be affected and could potentially go to zero (anyway the potential loss cannot exceed the amount paid to purchase the instrument).
>
> • Dislocation swap certificates: shareholder of the compartment must be aware that in case of a negative cumulated performance of the underlying below a certain barrier over the observation period, the certificate may be impacted by the realized volatility (above a certain level) of the underlying, and the value of the investment may could potentially go to zero (anyway the potential loss cannot exceed the amount paid to purchase the instrument). Finally, Shareholders of the Compartment should carefully consider that for stability/gap Notes and other investment certificates, the liquidity of the market is limited and provided mainly by the issuer of the certificate or by OTC transactions."

786. The Offering Memorandum for the MIN (USD) Compartment was dated March 2019. The Appendix contained materially identical provisions to the MIN (EUR) Compartment described and quoted above. There was an additional section, dealing with conversion of shares, but this is not material to the parties' dispute.

## F: The origins and operation of the Skew Base Fund

787. The Claimants' allegations of fraud and conspiracy are concerned with the Skew Base Fund. This section considers a number of aspects of the origin and operation of the Fund which are relevant to the allegations concerning the alleged concealment of the connections between Mr Migani/XY and the Skew Base Fund, and which form the basis of the claim made in respect of the "independence" representations and conspiracy. An important feature of the Claimants' case in that regard is that there was concealment of the role that Twinkle played in relation to the operation of the Fund, and of its connection to Mr Migani.

## F1: Luxembourg investment funds

788. There was evidence from a number of witnesses called by VP (Mr Ries, Mr Konrad, Mr von Kymmel and to some extent Mr Kone) as to the nature of Luxembourg investment funds, and the way in which they are created and operate. There was no significant challenge to those aspects of their evidence, or to the evidence of Mr Kuske which covered much of the same ground. That witness evidence was supplemented by other materials to which I was referred, including an Ernst & Young technical guide ("the EY Guide") to Luxembourg investment funds which is published on an annual basis. In Section F5 below, I summarise the evidence which Mr Konrad gave on this topic. The evidence, taken as a whole, establishes the following.

789. Luxembourg is a leading European centre for investment funds. There are numerous forms that a fund can take. The Skew Base Fund is a form of alternative

investment fund or AIF. It is a particular type of AIF available in Luxembourg since the second half of 2016, a RAIF. It was established in early 2017 and was among the first hundred RAIFs.

790. In the investment fund industry, the person or entity responsible for coming up with the concept for an investment fund, and setting it up, is known as the "initiator" of the fund. "Initiator" is not a term defined in law. However, the Luxembourg financial regulator, the CSSF, defines "initiator" as the "person or entity who is at the initiative of the set-up of the fund; who has an interest in its creation; and determines the conduct of its activity".

791. The EY Guide for 2017 (the year that the Skew Base Fund began operation), and indeed for subsequent years, describes the initiator's role as follows, in the context of an undertaking for collective investment or "UCI" (an expression which includes a RAIF):

> "The initiator or promoter generally plays one or more important roles in the activity of the UCI. For example, the initiator or promoter may:
>
> - Be the portfolio manager or advisor;
> - Play a role in the oversight of the activity of the UCI, generally by being represented on the Board of Directors of the UCI or its management company and/or Alternative Investment Fund Manager (AIFM);
> - Be a shareholder of the management company;
> - Play a role in the distribution of the UCI".

792. Initiators mostly come from outside Luxembourg. Such non-Luxembourg initiators require local third-party service providers (such as VP Lux) to perform certain functions, many of which are mandated by law. The initiator will, however, (as indicated by the EY Guide) retain key roles in the operation of the fund. The initiator will also receive a major part of the fees.

793. Mr Konrad's evidence on the nature of Luxembourg investment funds is summarised in Section F5 below. The following paragraphs summarise Mr Ries' evidence, which is consistent with the evidence as a whole and which I accept without hesitation.

794. A fund is the initiator's product. There are various types of initiators, including institution initiators, and wealth managers for ultra-high net worth individuals. It is the initiator who introduces the capital to the fund, designs the investment strategy of the fund, and has an important role in implementing it. The initiator is normally specialist in particular assets or has other specific expertise relating to investing. It is therefore the initiator who creates the investment strategy of the fund described in the offering document. If the initiator has a licence to perform the function of portfolio manager, then the portfolio management function will normally be delegated to the initiator. If not, then the initiator will normally be an advisor to the party performing the portfolio management function. The initiator will normally have a role on the governing body of the fund: for example, a

representative on the board of directors of the general partner of the fund. Since the fund is ultimately the initiator's product, it is normal for the initiator to want to have some control over that product.

795. The initiator also selects the service providers for the fund and negotiates their fees. Any fund requires service providers to perform certain functions, some of which are mandated by law. These service providers will or may include legal counsel, an AIFM (in the case of an AIF), a portfolio manager, and investment advisor to the portfolio manager.

796. Legal counsel will be responsible for drafting all the fund documentation, and in particular the prospectus for the fund. In the present case, legal counsel were DLA Piper, and they were responsible for drafting the Offering Memoranda described in Section E above.

797. Where (as here) the fund is intended to invest in alternative investments (i.e. alternatives to ordinary investments such as equities and bonds), there will need to be an AIFM. The AIFM's role is defined in law, and has two mandatory functions: portfolio management and risk management. The AIFM is allowed to delegate one of those functions, but must perform the other one itself. The AIFM remains ultimately responsible for any delegated function. In the present case, VP Lux was the AIFM and it delegated the portfolio management function, as it was entitled to do, to VP Liechtenstein. It is the role of the portfolio manager to make the ultimate decision on whether the fund should make an investment or not.

798. As described above, another service provider is an investment advisor to the portfolio manager. If the initiator is not the portfolio manager, then the initiator (or a company linked to it) will invariably be the advisor. The advisor is the specialist in the investment strategy or the asset class in which the fund intends to invest. Its job is to research and identify investment opportunities and send them to the portfolio manager. However, the advisor is not allowed to make the final decision on whether to make an investment or not. Since about 2021, the CSSF has started to indicate that it prefers there to be a delegation of the portfolio management function to the initiator, rather than the initiator acting as an advisor to a portfolio manager. However, that is a recent development, and was not the position in 2017, when the Skew Base Fund was established.

799. Mr Ries' evidence was that it was normally the case that, where the initiator acts as advisor, the advisor receives more by way of fees, often a lot more, than the portfolio manager. Indeed, it was very normal for the initiator, whatever role it had in relation to the fund, to expect to receive a major part of the fees paid by the fund. The initiator normally receives whatever is left over from the global fee after all the service providers have been paid. The initiator needs then to pay all of its own costs, such as staff, rent, advisors and all other operational costs. It hopes to make a good profit, but does not always do so. If the initiator did not have the potential benefit of being well paid for all of its work and risk, there would be no commercial incentive for them to set up a fund at all and the whole industry, not just in Luxembourg but across Europe, would not work. It was also the initiator who decided the total fees that a fund would charge: i.e. the 0.6% and 1%, and the performance fees, set out in the Appendix and described in Section E above. Mr Ries said, in cross-examination, that "the fact that the investment

advisor and the initiator is receiving the most amount of the money is quite a commercial normality". He said that in the end "it's them who own the product, it's them who have a major part of the work". In no case "it is the service providers receiving most amount of the money, it is always the initiator and the adviser".

800. The other services to be provided were as follows. There needs to be a depositary bank, which must be in the same country as the fund's domicile. The role of the depositary bank is safekeeping of the fund's assets. The depositary bank in the present case was VP Bank. A number of other services were provided by VP Lux: administrator, responsible for the bookkeeping of the fund, and performing the net asset value calculation for the fund; transfer agent, responsible for registering investors, receiving KYC documentation, and maintaining the shareholder register; domiciliation (which effectively gives the fund a physical address in Luxembourg) and corporate secretarial services. The fund also needs a statutory auditor: here EY.

801. The initiator can choose from a number of legal vehicles for its fund. The Skew Base Fund was incorporated as a partnership limited by shares, as described in the Offering Memoranda. It usually has one General Partner, which is responsible for managing the fund, but it may delegate certain management functions. In the case of a RAIF, it must delegate certain functions to the external AIFM: here VP Lux.

802. Pausing there, the evidence shows that the structure of the Skew Base Fund was a typical structure for a Luxembourg RAIF. The various agreements which were concluded in February 2017 are set out in Section A above, and the Offering Memoranda in Section E. In summary:

(1) The Skew Base Fund was the investment vehicle itself;

(2) The Skew Base Fund is a limited partnership. It had a general partner, SB GP. As stated in the Offering Memoranda, SB GP was ultimately responsible for managing the Skew Base Fund.

(3) SB GP was owned by Twinkle, which was itself owned by Mr Migani.

(4) SB GP was paid a global fee, comprising a management fee and a performance fee, to be paid out of the assets of the Skew Base Fund. The global fee, including how it was calculated and the fact that it was paid to SB GP, was disclosed in the Offering Memoranda.

(5) As the Skew Base Fund is a RAIF, SB GP appointed VP Lux as the AIFM. The Offering Memoranda made it clear that VP Lux was external, that it would perform the two core functions of portfolio and risk management, and would also perform the valuation function of the Skew Base Fund. VP Lux was entitled to and did receive professional fees for its role as the AIFM, and (as stated in the Offering Memoranda) these were paid by SB GP out of its own assets.

(6) VP Lux sub-delegated the portfolio management function to VP Liechtenstein. VP Liechtenstein's role was to invest and manage the assets of the Skew Base Fund as portfolio manager, under the supervision of the AIFM. VP Liechtenstein was entitled to receive fees for its services, and this entitlement was referred to in the Offering Memorandum.

(7) VP Lux and VP Liechtenstein engaged Twinkle to provide a technological system and portfolio management support services. Twinkle was entitled to be paid, and was paid for those services. Although Twinkle was not identified by name as "Investment Advisor" in the Offering Memorandum, Section 9.4 referred to the "fees of … the Investment Advisor, if applicable" and that these would be borne by SB GP out of its own assets.

803. There was, in my view, nothing unusual about this structure, and there is nothing in the evidence which leads me to conclude that it was a façade, nor that anyone involved in its creation intended that it should be a façade.

804. The evidence also establishes that there was nothing unusual about the roles that the various service providers played in the present case. In particular, there was nothing unusual in VP Liechtenstein engaging the services of Twinkle as Investment Advisor. Nor was there anything unusual in Twinkle, as Investment Advisor, being connected to Mr Migani and one or more companies within the XY Group: it was with XY S.A. that Mr Ries and his colleagues discussed (in 2015 and 2016) the idea of setting up the fund. They considered XY (and they were referring here to XY S.A. or the XY Group, rather than the UK company) to be the initiator of the fund, and the discussions in 2015 and 2016 (described further below) were with various representatives of XY. However, at some stage in 2016, XY said that it wanted Twinkle to be the initiator of the fund formally. Since the role of initiator is not defined by law, it does not really matter from a legal or regulatory perspective who the initiator is, but it can be important for practical purposes to identify one company as the initiator in the set-up phase. Mr Ries' understanding was that Twinkle (then called Ziusudra SA) had been set up specifically for the purpose of the fund. Mr Ries said that it was "not that common" for initiators to set up a separate company for the purposes of a fund, but that he did not consider it to be unusual.

## F2: Events leading to the creation of the Skew Base Fund and the Offering Memoranda

805. I now summarise some of the important events which led to the creation of the Skew Base Fund, and the Offering Memoranda which were in due course provided to potential investors. It is not necessary to do this in enormous detail, and I will focus on particular aspects of these events which in my view are most material to the question of whether there was a conspiracy – in particular a conspiracy to which VP Liechtenstein and VP Lux were party – to conceal matters from investors; in particular to conceal the involvement of Twinkle and the connections which Mr Migani and XY had to the Skew Base Fund.

806. In May 2015, a contact of Mr von Kymmel at Credit Suisse introduced him to Enrico Viganò of "XY". From his perspective, "XY" was the company

headquartered in Switzerland (XY S.A.), although he understood that they had offices in other countries. Where I refer to "XY" in this section dealing with the creation of the fund, it refers to the Swiss rather than the UK company. At this point in time, Mr von Kymmel understood that XY was talking about a fund with € 50 – 70 million under management, which was too small for Credit Suisse. The idea at that stage was for the fund to be a "feeder" fund for private equity; a fund which collects capital and then invests it into other funds. Mr von Kymmel had not previously been aware of, or had any dealings with XY. This was, therefore, a new prospective client. Mr von Kymmel was pretty sure that he would have looked at the homepage of XY's website in 2015, but he did not actually remember doing so.

807. After this initial introduction, the client relationship on VP's side was taken over by Mr Ries.

808. The original idea of a fund was that of Mr Viganò, who had specialised in private equity investments before joining XY in 2015. He had proposed to Mr Migani the idea of a fund which would invest in funds which were managed by HarbourVest, an asset manager. Mr Viganò had explored the idea with HarbourVest. Mr Migani was receptive to the idea, and it was taken forward by Mr Viganò and two colleagues in the XY Group - Mr Stefano Sampietro and Ms Valleria Talleri.

809. There was then a "meet and greet" meeting with VP in 2015 at the XY Group's offices in Chiasso, Switzerland. Mr Ries attended with two colleagues, including Mr Konrad. XY's attendees were Mr Viganò, Mr Sampietro and Ms Talleri. Nothing very concrete was discussed. XY explained in high level terms their idea for a fund, and the possible investment strategy. VP introduced their services. Mr Ries had a good impression from the meeting with XY, which appeared to him to be a professional and credible company. He also had a good impression of the three individuals that they met.

810. For a long time after this initial contact, VP did not hear from XY. Contact was resumed in 2016. There was a meeting in April 2016, described in an e-mail from Mr Zorzi of XY as a "kick-off" meeting. Mr Ries said that he had quite a few discussions by phone with Mr Sampietro, Mr Viganò and Ms Talleri. There was no discussion with Mr Migani, of whom Mr Ries was unaware until some point in 2016, which Mr Ries thought might be mid-late 2016. He was then told that Mr Migani was the founder and owner. He later met Mr Migani, but he only recalled 2 meetings: a meeting in late 2016 in Chiasso, and in February 2017 when Mr Migani came to VP Lux's offices to sign some of the contractual agreements for the Skew Base Fund.

811. Mr Ries described how, during this period in 2016, XY were providing bits and pieces of information, giving the impression that they were gradually defining in their own minds the setup of their new fund business, how they wanted to structure the fund, and what they wanted the investment strategies to be. For example, one day the idea was for the private equity feeder fund. Another day, they wanted to talk about investing in something else completely. There would be long time periods until they heard from them again. This was, in my view, consistent with the contemporaneous documents. For example, on 15 July 2016, there was an exchange between Mr Ries and Mr Zorzi of XY headed: "Lux feeder

fund discussion". On 3 August, Mr Viganò was asking various questions about a dedicated compartment investing in a bond strategy, not private equity.

812. In mid-late 2016, Mr Ries began to have more focused discussions with XY, several of which were in-person meetings. The documents showed that there in fact were 2 meetings in the second half of 2016: on 5 September 2016 and 6 December 2016. Mr Ries said that XY had decided that they wanted to establish an umbrella fund with compartments dedicated to different investment strategies, and there were discussions about the services that entities with the VP group could provide. Various fee proposals were given to XY, and these were discussed at the meetings. The discussions focused on the proposed fund, rather than XY's existing business. However, Mr Ries was told that XY did wealth management for ultra-high net worth individuals and very large companies. They were looking to set up a fund to pool their clients' assets together to improve efficiencies. Mr Ries explained that this was often a reason given by wealth managers for why they want to set up a fund.

813. Mr Ries did not know the details of the agreements between XY and its clients. Although he was not in the wealth management business, his dealings with wealth managers over the years had led him to understand that wealth managers can have different types of mandates from their clients. The details of any client's individual mandate were confidential information that VP would not be entitled to receive. Mr Ries said that it was very common for wealth managers of ultra-high net worth individuals to be secretive about who their clients are and the arrangements they have with them. For such clients, confidentiality is very important. Information about XY's mandates from their clients was not something that VP needed to know.

814. The main factors in VP Bank's onboarding process were the professionalism and investment expertise of the initiator, and whether the initiator was likely to have access to sufficient capital for the fund to succeed in principle. Mr Ries was satisfied about both of these matters. In relation to the latter, he understood that the investors in the proposed fund would come from XY's existing client network of high net worth individuals and companies.

815. Mr Ries and his colleagues assumed, during these discussions in 2016, that XY would be the advisor to VP Liechtenstein as portfolio manager. He was told that XY did not have a licence in Switzerland to act as portfolio manager, and therefore the set-up would be the normal and straightforward advisor/portfolio manager arrangement. In the event, it was not XY, but Twinkle, that became the Investment Advisor.

816. Mr Ries was introduced to Ziusudra SA, which later became Twinkle, in 2016. He understood that XY had set up Twinkle specifically for their proposed fund. He did not think that this was suspicious or concerning. In fact, it gave him a good impression, because it indicated to him that XY wanted to make their new fund business as professional as the rest of their business, by having a dedicated company for the fund. Mr von Kymmel said that he did not know why Twinkle was incorporated as a separate company, but he assumed that they wanted to have their specialist technical services separate from their wealth management business. He did not think that there was anything strange about this. All

companies structure themselves in particular ways for many different reasons. He said that it was not unusual in the funds business to have connected companies performing different roles and operating different functions, as illustrated by the various VP companies themselves.

817. Mr Ries was told that Twinkle would be initially set up by moving a small group of people across from XY. Mr Ries did not draw any distinction between Twinkle and XY, or indeed SB GP. He and his colleagues, including Mr von Kymmel, understood them to be part of the same group of companies. VP Lux and VP Liechtenstein did not conduct initial due diligence on Twinkle, beyond obtaining all required compliance documents. This was because they knew that Twinkle would initially be staffed at a managerial and operational level by employees of XY, and Mr Ries and his colleagues had formed the view that XY and the individuals that they had met were credible and professional.

818. There was a meeting in Chiasso in September 2016 which Mr von Kymmel attended with Mr Ries and others. Mr Migani and a number of other XY people attended. VP prepared a slide presentation for that meeting, and subsequently (on 14 September 2016) sent an offer and later a revised offer in respect of their services.

819. On 16 November 2016, an e-mail was sent from the Skew Base Team to Mr Ries enclosing the completed VP Lux's "Initiator Check List" questionnaire. The questionnaire identified Ziusudra SA as the initiator. The questionnaire was signed by Mr Grasso, who was at that time the sole director of Twinkle and had been Mr Migani's private accountant for many years. Twinkle had been incorporated on 28 October 2016. In response to a question as to the history of the company, the answer was that: "the company has been incorporated … in order to launch the Skew Base Fund". Mr Migani in his evidence did not seem ultimately to dispute that Twinkle was incorporated for that purpose.

820. A further meeting took place in Chiasso on 6 December 2016, and the attendees included Mr von Kymmel, Mr Ries and Mr Konrad of VP. There was correspondence prior to the meeting which addressed the agenda items. Mr von Kymmel referred in his evidence to a meeting in Chiasso (although he could not remember its exact date), describing it as a "perfectly ordinary business meeting". In my view, the correspondence leading into the meeting seems perfectly ordinary as well, with a variety of ordinary business issues being identified for discussion. Mr Ries and Mr von Kymmel were both cross-examined about this meeting. There is nothing in the evidence which suggests that there was any discussion about any plan to withhold any information from investors, in particular any plan for the connections between Mr Migani and the Skew Base Fund to be concealed in some way.

821. The process of drafting the Offering Memorandum started in late 2016. On 25 November 2016, Mr Ries was copied in on some responses which the Skew Base team had given to questions which Mr Bartnik of DLA Piper had asked. The questions arose in the light of a review of structure charts which DLA Piper had received. The trial bundles did not contain a full set of the correspondence between DLA Piper and its client, SB GP. SB GP, as it was entitled to do, had claimed privilege in that correspondence, although there was in certain respects

(as discussed below) a waiver of privilege. However, some of the correspondence involving DLA Piper had been sent, at the time, to VP (in particular Mr Ries). I was told that any such correspondence had been disclosed by VP, and in that regard no point on privilege had been taken by VP (or indeed SB GP). The e-mail copied to Mr Ries on 25 November 2016 is an example of such a document.

822. An important area where there was a waiver of privilege concerned the materials relating to the inclusion, and then deletion, of Twinkle as the named Investment Advisor.

823. On 7 December 2016, Mr Bartnik sent a first draft of the Offering Memorandum to the info@skewbase.com e-mail address and Mr Viganò. In his covering e-mail, Mr Bartnik said that there were a number of points that needed to be decided or confirmed. On 15 December 2016, an e-mail was sent from Mr Sampietro and Ms Talleri to their colleague Mr Viganò. This contained their "first comments", and Mr Viganò was requested to add his own. On 20 December 2016, info@skewbase.com sent the draft back to Mr Bartnik "with some notes and points to be discussed". Comments were provided in "comment" boxes (which will be familiar to users of Microsoft Word). The first comment (comment 1) was:

> "As a general comment we believe that it has been included in the general documents many specifics that relate to the STA [short-term arbitrage] compartment only. Please bear in mind that everything that is specific of a compartments should be segregated in the specific Appendix as investors of STA are different from investors in PE/other compartments".

824. Mr Bartnik's draft sent on 7 December 2016 contained a proposed Section 2 of the Offering Memorandum. This contained a list of "Management, Administration and Delegated Activities". (Section 2 as it ultimately appeared is described in Section E above). One of the parties identified, under the heading Investment Advisor, was Ziusudra SA (i.e. the company that became Twinkle). The response to Ziusudra's inclusion, in the 20 December 2016 response, was a comment box (comment 5) against Ziusudra, with the comment: "Ziusudra is an advisor only for specific compartments. It is not a general advisor, it should not be mentioned here". This comment had originally been made by Mr Sampietro and Ms Talleri in the version that they had sent back to Mr Viganò on 15 December 2016, and it was then included in the draft that was sent to Mr Bartnik on 20 December 2016.

825. Accordingly, the Skew Base team were not proposing that Ziusudra should not be mentioned at all: as Mr Weekes pointed out, Ziusudra was not deleted in the 20 December 2016 response. Rather, the suggestion was that because Ziusudra was not necessarily going to be the advisor in relation to all the compartments, it was not appropriate to mention them at the front of the Offering Memorandum in the general section. When seen in the light of comment 1, it is in my view clear that there was no proposal that Ziusudra's role as Investment Advisor should be concealed from investors, but rather that it should not appear in the general section for the reasons stated in comment boxes 1 and 5.

826. This is confirmed by comment 20, which said:

> "Ziusudra is a in the [sic] STA Compartment a technology provider. It could be an advisor only for specific compartment. It should only be mentioned in the compartment appendix"

Accordingly, far from proposing the complete deletion of Ziusudra, the Skew Base team's proposal was that it should be identified in the relevant appendix to the Offering Memorandum.

827. On 21 December 2016, Mr Bartnik sent an amended draft of the Offering Memorandum to info@skewbase.com, Mr Viganò and Mr Ries (who was now seeing the document for the first time). DLA Piper had picked up on the comments about Ziusudra by deleting the identification of the Investment Advisor in Section 2, and also deleting a part of Section 6 which had described Ziusudra's appointment as investment advisor. However, DLA Piper had not fully carried through the proposals made by the Skew Base team, because the Appendix had not been amended so as to include reference to Ziusudra. The individual at DLA Piper who had worked on the revised draft was Ms Bahya Bouharati, who features again much later in the story in 2020 (when questions were asked as to whether it was necessary to name Twinkle in the Offering Memorandum).

828. There are no further documents that bear on the deletion of Ziusudra from the Offering Memorandum. In my view, it is clear on the documents that the relevant individuals on the XY/Skew Base Team side of the fence – Mr Sampietro, Ms Talleri and Mr Viganò – had all intended Ziusudra to be referred to, in the appendix dealing with the specific compartment, rather than in the main body of the Offering Memorandum which was general to all compartments. The deletion was made by DLA Piper, and there was a drafting error in failing then to carry through the proposed change in the Appendix. Drafting errors are not unusual, and one should not be surprised that, with a quick turnaround of the document by DLA Piper on 21 December 2016, just before Christmas, an error occurred and was not spotted.

829. It is in my view plain that there was no intention to conceal the fact that Ziusudra/Twinkle was the Investment Advisor. Indeed, the Offering Memorandum contained a number of references to 'Investment Advisor', notwithstanding the deletions which DLA Piper had made. Given that the role of an investment advisor is very common in Luxembourg funds, and given that the Offering Memorandum retains references to 'investment advisor' in a number of places, any investor could have asked a straightforward question: who is the investment advisor? Had that question been asked of VP, I have no doubt that it would have been answered in a straightforward way. Mr von Kymmel said, and I accept, that if on due diligence an investor had asked to learn more about the investment strategy or the set-up, there was no reason for him not to disclose it.

830. The process of drafting the Offering Memorandum continued, and there is one other episode of significance in the context of the conspiracy case. On 6 February 2017, Mr Ries sent an e-mail to Mr Bartnik. He copied various others, including Mr Kone who was by now part of the VP team. Mr Ries asked 3 questions on the latest draft of the Offering Memorandum. One question was:

> "the fixed fee for the Technological Service is not mentioned in the Offering Memorandum. Don't we need to show that in the Prospectus"

He raised the same point in a comment box. The reference to the "Technological Service" was to the STA (i.e. the Service and Technological Agreement) which is described in Section A above; i.e. the agreement pursuant to which Ziusudra would provide services to VP.

831. On 7 February 2017, Mr Ries (and Mr Bartnik) were sent an e-mail from the Skew Base team. They said:

> "We already discussed that it is not necessary to mention the tech. fee in the offering".

832. In the evening of 7 February 2017, Mr Bartnik e-mailed an amended version of the Offering Memorandum. This included, in a comment box, his response to Mr Ries' question:

> "If it is not paid by the Fund, it does not need to be mentioned in the offering document."

833. The episode is of significance in relation to Mr Ries' state of mind, in the context of the case that there was a conspiracy and that VP was party to it. In my view, the fact that Mr Ries asked the question shows that he cannot have been party to a conspiracy to conceal from investors either the existence of Twinkle, or the fact that Twinkle was being paid fees. He was positively raising the question of whether their fees needed to be disclosed. Had he been party to such a conspiracy, it is impossible to see why he would have raised the question at all.

834. In fact, the advice from Mr Bartnik was that the fees did not need to be disclosed. This was because the fees under the STA were being paid by VP. The Fund was not party to the STA, and the fees were not being paid by the Fund itself. The substance of Mr Bartnik's advice was subsequently repeated by Ms Bouharati of DLA in October 2020, in an e-mail which was subsequently passed (in 2022) to Mr Ries. The background to Ms Bouharati's e-mail was that, following the collapse of the HFPO and MIN Compartments in 2020, questions had been asked by the Luxembourg regulator (the CSSF) in relation to disclosure of the role of Ziusudra/Twinkle in the Offering Memorandum. Ms Bouharati's advice in 2020 included the following:

> "In addition we understand that:
>
> - the Fund is not party to the Service and Technological Agreement (the "**ST Agreement**");
> - the fees paid to Ziusudra for the services rendered under the ST Agreement is paid directly by the AIFM and the Fund will not be charged with any fee in addition to those disclosed in the Fund documents;

> - the services rendered under the ST Agreement constitute an advice to the AIFM/Portfolio Manager and the investment decisions are taken at the level of the AIFM/Portfolio Manager.
>
> Based on the above, the role of Ziusudra should not be captured by the disclosure obligations under article 21 of the AIFM Law."

835. Mr Ries' evidence, which I accept, was that once DLA Piper had given its advice (i.e. the advice in 2017), he did not consider that there was any need to raise the issue again. He said that if specialist fund lawyers from a global law firm like DLA Piper say clearly that there is no need to disclose these matters, and their client takes the decision not to do so, then he did not consider in his position as a service provider that he should interfere – unless he had any reason to believe that the legal advice was wrong. He had no reason to believe that it was wrong. I do not consider that there is any force in the Claimants' submission that DLA Piper were advising on the basis of false or incomplete information. Each of the factual points referred to by Ms Bouharati, in her 2020 e-mail above, was factually accurate. (I deal below with the argument that Twinkle was the de facto portfolio manager). Nor do I accept that Mr Ries somehow appreciated that DLA Piper's advice was wrong or was not soundly based. Given that he had raised the point in the first place, if he had concerns about the accuracy of DLA Piper's advice, he would have raised them.

836. Furthermore, I am satisfied on the evidence that there was no obligation for the Offering Memoranda explicitly to identify Twinkle as the Investment Advisor, or to set out their fees. Until a late stage in the trial, the Claimants were advancing a case that Luxembourg law required Twinkle to be identified, and there was a dispute between Luxembourg lawyers as to whether that was in fact the case. In the event, however, that point was not pursued, and I did not hear any evidence from the Luxembourg lawyers.

837. Mr Ries also said, and I accept, that in his experience sometimes advisors to the portfolio manager are named and sometimes they are not; and that sometimes the prospectus breaks down the fees that are paid to each service provider, and sometimes it does not and only includes a global fee. It is therefore not out of the ordinary for the advisor and its fees not to be stated in the prospectus.

### F3: The contractual agreements

838. In February 2017, the agreements were signed which related to the structure and operation of the Skew Base Fund: in particular, the AIFMA, the ASA, the STA and the SSA. In view of the arguments of the parties as to whether the STA was or was not a genuine agreement, I must describe it in a little more detail.

839. The STA was an agreement between Ziusudra (referred to therein as the Supplier), VP Lux (referred to therein as AIFM) and VP Liechtenstein (referred to therein as Asset Manager). Under Preliminary Remarks, there was the following:

> "The AIFM has expressed an interest in employing technological instruments and services to support its financial assets portfolio management activities. The Supplier believes it can assist the through:
>
> - the implementation and maintenance of a development plan for a technological system (hereinafter the "**Integration Plan**") capable to acquire the financial information concerning financial instruments available on the market and to propose tactical allocations and the appropriate execution parameters;
>
> - the roll-out and operational management of the portfolio management support service (hereinafter "**Roll-Out and Operational Management**").
>
> The features of the service and technological system (hereinafter the "**Management System**") will meet the requests expressed by the AIFM and the Asset Manager during the latest meetings and communicated and agreed on a later stage. In particular, the Management System will handle financial instruments, enabling:
>
> - the acquisition and processing in real time of market information regarding the instruments available on the market, e.g. prices, underlying, barriers or credit risks applicable to market makers;
>
> - the selection of financial instruments in accordance with the AIFM and Asset Manager's investment profile, based on the investment universe;
>
> - the tactical allocation of investments, indicating the resulting purchase/sale transactions".

840. There were then some further bullet points setting other features of the "Management System". Clause 2 was headed "Integration Plan" and said that the plan consisted of 3 phases of work: analysis of requirements and … of integration processes; Management System set up; pilot testing and fine-tuning. Clause 3 dealt with Roll-Out and Operational Management. Clause 4 provided for the duration of the contract: 1 year and renewed tacitly on an annual basis. Clause 5 provided for the fees payable, and these were further set out in a Schedule to the STA. The STA was governed by Luxembourg law. The STA had been drafted by those on the XY/Skew Base/Ziusudra side of the fence and it was not based on VP Lux's standard form for such agreements.

841. Mr Ries' evidence was that the STA was intended to be the agreement that defined the relationship between Ziusudra (later Twinkle) and VP. VP had been told at the start that Ziusudra wanted to structure the agreement so as to reflect

the fact that they had a specific technological and algorithm-based system for researching and analysing investments. They wanted the implementation of this system to be referred to in the agreement. However, over time, it became clear to VP that, in reality, Twinkle was "acting like any normal investment advisor, whereby it was making investment proposals" which would then be reviewed by VP Liechtenstein (and also, where the investments were illiquid, by VP Lux as well). As matters developed, it appeared to Mr Ries and his colleagues that the technical system used by Twinkle to identify the investment proposals was not particularly relevant to the description of the relationship as it actually operated, which was like any other advisor/portfolio manager set up. Mr Ries wanted the agreement to reflect the reality of the relationship. He therefore spoke to Ms Gaveni in late 2019 about changing the STA to a standard form advisory agreement. Ms Gaveni agreed in principle. However, this was then overtaken by the events of early 2020, and the parties did not get round to changing the agreement. However, this did not mean that the STA was not a genuine agreement. Ziusudra/Twinkle did provide substantial services, and Mr Ries' understanding was that this did involve the use of a technology-based system. The fees which were paid to Twinkle were much greater than those paid to VP Liechtenstein, but there was nothing unusual about that. It is very normal for the initiator, whatever role it has in relation to the fund, to expect to receive the major part of the fees.

842. I accept that evidence. The Claimants referred to an e-mail which Mr Ries sent to Mr Konrad on 13 November 2019, where he reported that the "set up" would not be changing, and that Mr Migani had confirmed that VP would be staying as portfolio manager. The background to this e-mail was a suggestion that Twinkle might apply for its own licence, and then become portfolio manager itself, rather than advisor. Mr Ries went on to say, in his e-mail, that the "internal relationship will be raised to a different level by a proper advisory agreement". In another translation (by machine rather than human) the relevant sentence read: "However, the internal relationship using a genuine advisory agreement is raised to another level", and Mr Ries said in his evidence that "genuine" was the right translation of the German word. I did not consider that this e-mail should be read (whether the relevant word is translated as "proper" or "genuine") as indicating that the STA was regarded as being in some way a sham contract. That was plainly not the case. Twinkle did provide significant services to VP pursuant to the agreement, including the identification of investment opportunities and proposals. Those services are covered by the language of the STA, even though it is also the case that some of the language, relating to aspects of the technology, proved in the event to be rather overblown.

843. Mr Ries' e-mail, sent in 2019, did no more than reflect the fact that he wanted an agreement which properly matched the services which were actually being provided. There was a recognition that the STA needed replacing, and the parties were in principle agreed that this should happen. However, the substance of the relationship or "set-up" was not going to change. The existing STA contained provisions relating to a proposed technological system which had not in fact been implemented, and which did not reflect the way in which business was actually being carried out. However, the fact that a contract was not operated precisely in accordance with its terms does not begin to mean that it was not a genuine

agreement when concluded. Furthermore, when sham agreements are concluded, that is usually for the purpose of deceiving some other persons. However, there is no evidence that the STA was ever shown to any relevant third party, and it remained an internal agreement as between VP and Twinkle.

844. Furthermore, as described later in this section, the Claimants abandoned their allegation that Mr Konrad was party to a conspiracy. However, the e-mail sent by Mr Ries (referring to a proper/genuine agreement) was sent to Mr Konrad. He was fully aware of the STA, as described in the next sections. Since he was not party to any conspiracy, the e-mail cannot sensibly found a case that the STA, or Mr Ries' e-mail referring to it, evidenced VP's participation in a fraud or conspiracy.

### F4: The witness evidence concerning the operation of the Skew Base Fund

845. Having described the background to the Skew Base Fund in the period up until February 2017, when the agreements relating to its structure and operation were signed, I will now describe in subsequent sections the evidence given by witnesses who were concerned with the operation of the Skew Base Fund in practice.

846. It will be apparent from the foregoing that much of the work concerning the operation of the Fund was carried out by VP Lux and VP Liechtenstein, because Luxembourg law concerning RAIFs requires a delegation of risk management and portfolio management to an external party, the AIFM. I shall therefore start by describing the evidence of the VP witnesses which relates, in particular, to those functions, including as to the nature of Twinkle's involvement. This review will also address their evidence which bears on the question of whether there was a conspiracy to which they were party.

847. I shall then describe the evidence concerning how the residual functions of the general partner, SB GP, were carried out. By "residual functions", I am referring to those matters which were not delegated to the external AIFM.

848. It is not necessary to describe the evidence of all the witnesses in detail, not least because some of the witnesses covered much the same ground as others.

### F5: The evidence of Mr Konrad

849. Prior to their written closing submissions, the Claimants had consistently maintained that Mr Konrad was party to the conspiracy on which they relied. In their opening submissions, the Claimants described him as being "heavily involved in the arrangements for VP Liechtenstein to provide purported portfolio management services for the Skew Base Fund". He was cross-examined for an afternoon, and it was clear to me at the time that he was an honest, extremely knowledgeable and impressive witness. He gave clear and honest answers to all the questions which he was asked. As I listened to the evidence, I had no doubt that he was a reliable witness, and this has been confirmed by my re-reading of his witness statement and oral evidence.

850. Following his evidence, the Claimants took the view that it could not realistically be submitted that he was party to any conspiracy. In his oral closing, Mr Saoul confirmed that no such allegation was maintained against Mr Konrad (or against Mr Kone). Indeed, in their closing submissions, the Claimants relied upon various aspects of Mr Konrad's evidence in support of their case as to the inappropriateness of the Claimants investing in the MIN and HFPO Compartments of the Skew Base Fund. The Claimants' written and oral closing submissions gave me no reasons as to why I should reject Mr Konrad's evidence as a whole, or on key issues in dispute.

851. Mr Konrad's evidence addressed a number of matters, which I consider to be important, in relation to the market background to the Skew Base Fund, the nature of products which were within the relevant compartments, the importance of an Offering Memorandum in the context of an investment into a fund of the present kind, and the relationship between VP Liechtenstein (and VP more generally) and Twinkle. Much of his evidence on these issues was confirmed by other witnesses in the case, as well as the contemporaneous documents. Mr Konrad's evidence therefore provides both a useful, and reliable, basis for factual findings which are relevant to the issues in the case. I have grouped (below) Mr Konrad's evidence under a number of headings, although there is inevitably some overlap between them.

852. I also bear in mind that Mr Konrad was called as a factual witness, and not an expert witness, and I should be cautious about ascribing too much weight to Mr Konrad's evidence, in so far as he expressed opinions.

*Mr Konrad's role and relationship with Mr Ries*

853. Mr Konrad has worked in the financial services industry for around 28 years, initially as a proprietary trader, and then as a hedge fund manager. He worked for various entities within VP between 2008 and 2022, but then left and is now the CEO of a boutique asset manager and family office. When at VP, he had worked for both of the VP entities in the trial. In February 2013, he was appointed Head of Investment Management for VP Liechtenstein. In December 2016, he became the Chief Executive Officer of VP Liechtenstein. In July 2017, he became a director of VP Lux.

854. As Head of Investment Management and CEO of VP Liechtenstein, he was responsible for the management of that company's business in Liechtenstein. This included the management of what he described as "private label funds". This term included AIFs – such as the Skew Base Fund itself – that were originated by external parties (rather than being originated or established by VP). He was also responsible for supervising and managing the members of VP Liechtenstein's team. In that role, he described how he worked closely with his then colleague, Torsten Ries, whom he had recruited to join his team. After Mr Ries moved to VP Lux in 2016, where he became head of Private Equity and Real Estate Administration, Mr Konrad said that he continued to work closely with him and to collaborate where necessary in order to provide the most coherent offering that they could to the clients of VP Lux and VP Liechtenstein.

855. In his witness statement, Mr Konrad went on to describe (amongst other things) his involvement, in late 2016 and early 2017, in discussions concerning the possible involvement of VP in the Skew Base Fund; the appointment of VP Lux and VP Liechtenstein; the way in which decisions were taken as to which investments, both "liquid" and "illiquid", should be bought for the Skew Base Fund; and the role and work carried out by Twinkle, and the SOAP interface. In his closing submissions, Mr Blakeley (correctly in my view) described Mr Konrad as being "at the coalface" as far as the arrangements between Twinkle and VP Liechtenstein were concerned. Indeed, that was the effect of the submission made in the Claimants' opening described above.

856. The Claimants' abandonment of allegation of conspiracy against Mr Konrad has led to an attempt to relegate Mr Konrad to a position of relative unimportance, and thereby to postulate that the alleged conspiracy involved (and only involved) the two individuals (Mr Ries and Mr von Kymmel) against whom the allegation still remains. I consider that this attempt fails. Mr Konrad was not cross-examined on the basis that he was an unimportant person, operating only on the side-lines. He was not. He had both knowledge and responsibility for the arrangements which were put in place, and operated, between VP Liechtenstein and Twinkle. If, as aspects of the Claimants' argument postulate, those arrangements were not genuine, and if they were part of the overall façade which they allege was put in place, then Mr Konrad would be at the heart of the conspiracy alleged. The more obvious conclusion, which I reach, is that there was no such conspiracy, and certainly none that involved VP.

857. This conclusion is reinforced by Mr Konrad's evidence as to his close working relationship with Mr Ries. Since they worked closely together, it is in my view improbable in the extreme that Mr Ries would be party to the alleged conspiracy, but Mr Konrad would not.

858. Furthermore, the Claimants in their written opening, and in cross-examination, attached importance to the concerns which Mr Konrad had articulated, in particular in 2018, as to the degree of risk being taken by the Skew Base Fund. This was in the context of the lending decision by VP Bank. Mr Konrad had raised his concerns in writing with his colleagues, although – as he said in evidence – others took a different view. However, the episode shows that Mr Konrad was a person who would have raised concerns if he had them. As Mr Blakeley submitted, had he known of any misleading of investors or about the independence of XY or about Twinkle, he would have raised this too. The absence of any allegation of conspiracy against Mr Konrad, and the fact that he would have raised concerns if he had them, supports the conclusion that there was no such conspiracy, and provides powerful support for the factual findings which VP seeks in its favour.

*Mr Konrad's evidence that there was nothing unusual about the way in which the Skew Base Fund was set up or organised.*

859. Mr Konrad's evidence was, in summary, that there was nothing unusual about the way in which the Skew Base Fund was set up or organised. I have covered much of this ground in Section F1 above but will nevertheless describe the evidence that Mr Konrad gave.

860. He described how, in the investment funds industry, the person or entity who is responsible for coming up with the concept for an investment fund, and setting it up, is known as the initiator of the fund. Part of the process of setting up a fund requires the initiator to source professional service providers, such as lawyers, auditors, tax advisors, fund administrators and fund management companies to (amongst other things) prepare the necessary documents for issuing to prospective investors, administer the fund, manage the fund's investment portfolio (if the initiator does not wish to, or cannot, perform portfolio management services itself) and carry out the various other activities mandated by the laws of the EU (for a fund operating in Luxembourg or Liechtenstein), such as risk management and auditing the fund.

861. He went on to explain that the initiator of the fund is responsible for setting up the fund and developing its investment strategy, but engages a professional fund manager (such as VP Lux) to administer and manage the fund. The initiator may act as the portfolio manager and manage the investments themselves, but if they do not want to do this, or cannot, they will ask the AIFM (in the case of an alternative investment fund) to appoint a professional portfolio manager (such as VP Liechtenstein). In such a case, the initiator then normally acts as an "advisor" to the portfolio manager providing investment proposals for consideration by the portfolio manager. The portfolio manager reviews the advisor's investment proposals and assesses whether the proposals are compliant with the investment strategy and the investment restrictions for the fund. If no restrictions have been breached, and provided that there is no other good reason not to proceed, the portfolio manager will generally make the proposed investment. This was a structure that VP Liechtenstein offered (and, he believed, still offers) to the initiators of private label funds who did not wish to, or could not, deal with portfolio management of the investments themselves — for example, because they did not have the in-house capacity or requisite licence from a regulator. He stressed that an advisor is never allowed to make investments directly — the decision as to whether or not to make investments is always taken by the portfolio manager alone. And although his former colleagues at VP would sometimes talk about receiving "orders", this was just a colloquial and convenient short form word for an investment proposal.

862. He also said that he would have expected the investors in the Skew Base Fund to be drawn from XY's existing or future clients. That is a normal thing for a fund initiator to do. In fact, it is not uncommon for an initiator to conceive of one or more funds purely to serve its clients (known as a "captive" investment fund), particularly when the initiator has a discretionary mandate to manage its clients' wealth. In relation to the Skew Base Fund itself, he described how the number of compartments grew, and how some compartments were established for a single investor. This could make good sense for investors who choose to invest very large sums of money. Therefore, they would not be exposed to the risk that the fund performance and liquidity may be negatively impacted by the redemptions of other investors.

863. In cross-examination, he confirmed that it was very common in the private label fund industry for the investors to be drawn from the initiator's client base. He said

that it was normal for XY, or a connected company, to be receiving substantial fees, in its advisor capacity, if investors made investments:

> "That's normal that you have to be paid if you have developed a strategy and you need to pay your research analysis and all that stuff. That's absolutely normal that the advisor gets a fee".

864. In the course of his evidence, the only thing that he identified as unusual was that none of the investors, as far as he was aware, performed any due diligence on VP. When asked what steps he personally (as CEO of VP Liechtenstein and a board member of VP Lux) had taken to satisfy himself that the product had been properly explained to clients, he said that what he would have been expecting was for investors to "approach us and start a due diligence process, and they ask us questions". As portfolio manager, he does not normally know who the investors are. He said that:

> "if they invest large amounts of money in a product, they call you and ask questions: how are you set up? What is the strategy? What do you think about leverage? And all that stuff.
>
> No one called us, no one was interested in our view and no-one performed any due diligence process at VP. That was a surprise to me, to be honest yes".

865. He agreed that this was quite an unusual situation; "because when you give away a lot of money, then normally you should, first of all, know the strategy, know the risks, and then know the people behind the structure".

866. This evidence, as to the ordinariness of the way in which the Skew Base Fund structure was set up and organised, is important for a number of interrelated reasons.

867. First, if, as indeed I conclude, there was nothing unusual about the structure, then it seems to me that this is a reason to reject the case – which is central to the pleaded conspiracy case – that there was any "façade" at all. Mr Konrad clearly did not consider that there was any element of the structure, including the fees paid to Twinkle and more generally the involvement of Twinkle described below, which involved a façade. Moreover, given his senior position in VP Liechtenstein, and that company's role as the delegated portfolio manager, any such façade would have required both his knowledge and active participation.

868. Secondly, if there was nothing unusual in the structure, it is a telling point against the argument that anyone at VP (including the only two individuals who remain as alleged co-conspirators) thought, or shut their eyes to the alleged fact, that there was a façade to conceal XY's connection to or involvement with the Fund; or that they knew or suspected that XY was misleading anyone, including the Claimants, about its connections to the Fund.

869. Thirdly, his evidence that no investors asked any questions of VP Liechtenstein seems to me to provide objective support for the evidence of Mr Dalle Vedove

(and indeed Mr Migani) as to what investors were told about the connection between the Skew Base Fund and Mr Migani. The logical reason why none of the investors asked any questions of VP Liechtenstein is that they did not view the Fund as an operation being carried out wholly independently by VP.

*The due diligence and awareness that would be expected of investors in the Fund*

870. Mr Konrad explained, in both his witness statement and in answer to various questions in cross-examination, what he would expect an investor in a fund, such as the Skew Base Fund, to do prior to deciding to invest.

871. In his witness statement, he addressed the Claimants' allegation that XY was their financial advisor, and that they had advised them to invest in the Skew Base Fund, but had concealed its connections to the Fund, which was understood to be a fund essentially setup, operated and managed exclusively by VP. He said that if this had been the case, he would have expected the Claimants to have carried out extensive due diligence on VP, before investing many millions of euros in the Fund. He would also have expected them to have wanted to discuss with VP Liechtenstein the investment strategy and risk profile of the Fund. He went on to say:

> "In my view, no sophisticated investor would have invested such large sums of money in a fund such as the Fund on the understanding that it was, in essence, managed by VP fund, without carrying out this type of extensive due diligence in addition simply to reading the Offering Documents. The Fund was not accessible to inexperienced investors. If I was told that a sophisticated investor had invested in the Fund on this understanding and without carrying out proper due diligence of their own, I would be very surprised indeed. I am also mindful of the fact that the financial instruments utilised and the risks of losses involved in making an investment in the relevant sub-compartments of the Fund were explicitly and clearly documented and noted in the Offering Documents."

872. In cross-examination, he referred on a number of occasions to the need for an investor to read the Offering Memorandum when subscribing to a fund such as the Skew Base Fund.

> "Normally, investors should know what they buy, if they have subscribed to such a fund, because in the offering memorandum it's clearly stated the maximum 400% leverage is possible, and that the fund invests in such products. So if any investor had done the proper due diligence or had spoken with us or looked at the portfolio, they would have known and they should be, well they were aware of the risks they take. It's very unusual that you invest such large sums into a fund without knowing anything about it."

873. Later in his evidence, he said that if the investor reads the Offering Memorandum, then he should have been aware of the risks. He said that if you were an aggressive

investor then there is no reason not to invest in these compartments. If you are very conservative, then you would never subscribe to such an Offering Memorandum. It was, however, very easy to read the Offering Memorandum:

> "it's 2 pages in the offering memorandum you have to read and then you know exactly what you buy".

He said that sophisticated investors would not generally invest in alternative investment funds if they are only seeking a 3.2% return (a figure to which he referred in his witness statement). He agreed that investors seeking, say 3% return on capital, and a desire to safeguard capital, should not be investing "in a compartment like this".

874. It was put to him that if he had had total control over the compartments, then they would have looked quite different. His view was that "you can have all the stability notes in the portfolio. That was okay". His view was that the leverage amplified the risk, and "you don't need to amplify the risks with a different leverage". But he added:

> "But that was part of the strategy stated in the offering memorandum … The leverage was part of the strategy in order to enhance better returns. So you can have a different view on that – and I'm more conservative in that sense. It differs on what the investor wants. And if you buy such a fund, which can have 400% leverage, then this is aggressive".

875. He readily agreed that investors were entitled to expect transparency from its wealth manager, XY. He said that he would expect there to be a presentation by the wealth manager to its clients, and said that the fee structure should be disclosed "in a tangible way". He added that "if the investors don't receive such documentation, they have to ask questions. And if they are still not satisfied, then they shouldn't invest in such a product". He said that it was absolutely clear to him that "no-one invests 10 million or more in a fund without asking these questions".

876. This evidence is, in my view, of importance when I come to consider the inherent probabilities of important aspects of the case advanced by the Claimants; in particular, the allegation (relevant to the Investment Misrepresentation case, and also the non-fraud claims) that the Claimants did not understand the risks of investing in the Fund.

*VP Liechtenstein's work as portfolio manager and the role of Twinkle*

877. In his witness statement, Mr Konrad gave evidence as to how VP Liechtenstein performed its work as delegated portfolio manager. He distinguished between liquid and illiquid investments. Liquid investments were relatively straightforward, standard investments, such as short-term investments, bonds and structured products. VP Liechtenstein dealt with these. Where there were proposals for illiquid investments, which were more complex bespoke investments, these were processed together with VP Lux, as they had specific expertise in that area. For example, Mr Ries had a background in private equity.

Mr Konrad described how liquid investments can be liquidated or realised within a short period of time, whereas the analysis of illiquid investments (such as private equity or real estate investments), takes much longer: normally several days or weeks longer, due to the necessary verification of information and the due diligence that is required prior to making the relevant investment.

878. He was not involved in preparing the STA between Twinkle and VP Liechtenstein, but learnt of Twinkle's involvement as advisor when he saw a copy of the agreement. Most of the contact between the two companies was between Mr Negro and Mr Zehender. He described the specific interface (known as SOAP) which enabled Twinkle to send investment proposals quickly, directly and in a uniform manner to the IT system used by VP Liechtenstein, known as Avaloq. This meant that, once a proposal was received from Twinkle via SOAP, certain initial checks could be processed in the Avaloq system in a semi-automated way. He said, however, that VP Liechtenstein was "never obliged to make any of the investments proposed by Twinkle and the final decision as to whether or not to make any of the investments proposed remained (as it always does, even when an external advisor is involved) with the portfolio manager, VP Liechtenstein".

879. He then gave an overview of the process. Other VP witnesses – in particular Mr Zehender and to some extent Mr Eisele – gave more detailed evidence about this, consistent with Mr Konrad's overview, and I do not consider it necessary to set out the detail. The overview was as follows:

(1) If an investment proposal received from Twinkle was judged to be compliant and appropriate, Mr Zehender would approve it and send the proposal to VP's trading department (who sit within VP Bank AG in Liechtenstein). They would also perform second-layer checks to ensure that the proposal complied with the Fund's investment strategy and restrictions. Depending upon the outcome of those final checks, the investment proposal was either accepted and executed, or rejected (and the rejection was communicated to Twinkle).

(2) Proposals for straightforward or "plain vanilla" investments, which tend to be less complex and more liquid, were generally received via SOAP. He referred in that context to an e-mail which he had sent in 2018. This contained the following description:

> "The SOAP interface was provided to Skewbase by VP Bank IT to make investment suggestions using a (largely) automated process for the liquid Skewbase compartments and import them into Avaloq. As delegated portfolio managers, we then examine these suggestions with regard to investment restrictions/ investment strategy. If all conditions are met we give the investment proposal for execution by both VP Bank".

(3) Proposals for "non-plain vanilla'' investment – which are more complex and often, in this context illiquid – were generally received by e-mail, because the required level of detail for proposals could not easily be transmitted via SOAP and a more detailed review was needed.

(4) If an investment proposal received from Twinkle involved more complicated products, or proposed investments in asset classes that VP Liechtenstein had not previously made, Mr Konrad reviewed the proposal in more detail, together with Mr Ries, to examine its suitability and risk profile. He recalled a number of exotic proposals, which they could not assess quickly. There were a number of occasions when VP Liechtenstein rejected investment proposals received from Twinkle as being inappropriate, for a variety of reasons.

880. It did not seem to me that any of this evidence was in any way dented during cross-examination. Indeed, it accords with the evidence given by other VP witnesses, and with the documents on which the witnesses were cross-examined. There was nothing in those documents which evidenced a delegation to Twinkle of VP Liechtenstein's role as portfolio manager. Indeed, in relation to illiquid investments, there was no challenge to the evidence as to how these were dealt with VP Liechtenstein in conjunction with VP Lux, and no suggestion that Twinkle was acting as the real portfolio manager in relation to those investments. The Claimants' real complaint, as it seemed to me, was that VP Liechtenstein should have been doing more work than it actually did when investment proposals for the HFPO and MIN Compartments were being put forward by Twinkle. It should not, therefore, have put procedures in place which enabled decisions to be taken easily and quickly. That, in my view, is essentially a complaint of negligent portfolio management by VP Liechtenstein, and it is not the claim with which I am dealing.

881. In cross-examination, Mr Konrad was asked various questions which were aimed at demonstrating that VP Liechtenstein was not really the portfolio manager, or had not been doing its job properly. Mr Konrad, convincingly in my view, rejected these points.

882. Thus, when it was put to him that he must have appreciated that, in reality, it was Twinkle that was the real portfolio manager here, he responded:

> "No, that's not right … They had the role to select the products, but they – they were not entitled to do any trades and they didn't do any trades".

883. I do not consider that the evidence shows that Twinkle was the real portfolio manager. However, as Mr Blakeley submitted, the relevant question in the context of the conspiracy case against VP is whether VP believed that VP Liechtenstein was the portfolio manager (i.e. the real portfolio manager). That was clearly, in my view, the belief of Mr Konrad, who was the CEO of the company which acted as portfolio manager. Mr Konrad was not in any way detached from the arrangements which were in place. He was fully aware of the arrangements with Twinkle and how they operated. He also explained in his evidence that he knew and dealt with Mr Negro, whom he described as the lead analyst for the HFPO Compartment. I have no doubt that everyone at VP believed, as did Mr Konrad, that VP Liechtenstein, not Twinkle, was the real portfolio manager.

884. When asked questions which were aimed at showing that the investment approach should have been questioned, he made (what to my mind is) the important point

that investors who invest in a fund, such as the present, want the investment approach set out in the Offering Memorandum to be followed:

> "When you are looking at the offering memorandum, the strategy was … exactly what is written down there … [I]ts not my role to say your 8% return is not realistic or its too risky, you have to accept 2%. That's not my role. Our role was to ensure that no investment restrictions are violated and that the strategy which is mentioned in the offering memorandum is executed in the right way".

885. He said that it was the advisor's job to identify instruments that should be bought or sold. It was part of Twinkle's analytical skill to identify the right barriers and so on within their market view. If it had been VP Liechtenstein's job, then they would not have needed an advisor. He agreed that VP Liechtenstein had not set parameters for barriers or embedded leverage in the products:

> "The leverage and everything is defined in the offering memorandum. When I'm the promoter of the fund, then I decide which risk profile the product has. But if a commingled fund is set up by an external party, with external investors, then we have to mirror their view and what they want to achieve, but it's not helpful that I tell them which return they have to expect".

886. When it was put to him, that the plan had been to minimise restrictions (that is, the investment restrictions set out in the Offering Memorandum), he said that "you don't need too complex restrictions, normally".

887. This evidence is important in the context of various issues in the case, in particular the line of argument based on the notion that Twinkle was the de facto portfolio manager, and that investors were thereby misled into believing that this was VP Liechtenstein. I reject that argument.

*The characteristics of the products in the relevant compartments*

888. In cross-examination, Mr Konrad was asked various questions which were aimed at eliciting support for the proposition that the relevant compartments were too risky and should not have been recommended to investors such as the Claimants. Mr Konrad gave some evidence, which I have found helpful, as to the characteristics of the products in which those compartments had invested.

889. In relation to the products generally, he referred to the different views that might be held by people as to what the market might do. He said it was his view that Skew Base was being extremely aggressive and that they must have been assuming that these tail risks will never happen. That was, he thought, the Skew Base theory; that the markets would stay benign, and there would not be any problems going forward. He said that if you think that the markets will be benign and nothing happens, then a more aggressive stance is the right strategy:

> "But then you have the tail risk, if something happens like the corona crisis, then you have a problem. That's clear".

890. He was asked about the degree of correlation between different underlying share indices. In 2019, he had e-mailed one of his colleagues at VP Bank, in the context of potential lending at a 50% loan to value ratio. He said this in his e-mail:

> "Thank you for your explanations. I think it is very dangerous to treat stability notes in the same way as a share index. The share index can recover after an event (crash, etc.), where the value of 50% also makes a lot of sense. The Stability Note, on the other hand, can become worthless and is guaranteed to stop recovering.
>
> The entire nominal can therefore be completely lost overnight.
>
> The diversification in the portfolio with regard to various stock markets is merely an illusion of diversification — in an event of a crisis, correlations will tend to approach 1.
>
> I would proceed as follows:
>
> -Break down each stability note with regard to its terms
>
> -then stress with an event (e.g. stock market -10%. -15%)
>
> => It is a lot of work, but afterwards, you will probably not be able to sleep well at an LTV of 50%.
>
> I recommend being more careful here. In my opinion, there are significant risks lurking here."

891. In cross-examination, he said that "in a crisis scenario", indices such as Euro Stoxx 50, the S&P 500 and the MSCI will all tend to move in a similar way. This does not happen in "normal market conditions". In the crisis context, correlation will tend to approach 1. He agreed that, with these products, a crisis was a situation to which it was necessary to have regard, because they are triggered by significant adverse market shifts. He said, however, that the risk appetite of VP Bank AG was different to his personal risk appetite, and he made the point in his evidence on a number of occasions that different people can take different views. He also said that the drop in the German Dax index, or the S&P 500, of 35% over a period of 4 weeks as a result of the Covid pandemic, was "very very extreme".

892. He was asked some questions bearing on the liquidity of the notes which were purchased for the Compartments of the Fund. It was put to him that the "worst of" notes and the stability notes did not have a listed recognised exchange over which they could be traded. He said that often they did have an exchange where they could be traded: there were exchange traded notes, and the market was not confined to "over the counter" trades. But even if a product was exchange listed,

there might be a situation where there was no market-maker, and therefore no bid price. A product is not liquid only because it is listed. In other words, even if a product is listed, there may in particular circumstances be no buyer for it. His evidence did indicate, however, that a market may exist even in difficult or volatile market conditions. He said, in relation to the period in around March 2020, that the portfolio was very dynamically managed. He said that when the market started to go down, "we rolled the barriers to new levels below the actual market prices". He went on to describe the "turbulent phase of 2020". He said that:

> "the volatility was really severe, and the markets were super fast at this time; and we tried to restructure the products, which means to roll down the knockout barriers, which sometimes was successful but sometimes, when you don't get any quotes from the investment banks, was extremely difficult, because of the liquidity issues".

893. When asked about what the barriers generally were, and it was put to him that they were mostly at 10%, he said that he had thought that they were more 15% or 20%. He went on to say that "that depends on which spot in the portfolio you take". I understood this to mean that the precise composition of the portfolio would likely vary from time to time. This seems to me to be very likely, given that the products which are on offer, and the precise deals which are available, will depend upon market conditions. Mr Konrad made the point that the markets can move quickly, and indeed this was a reason why deals for the products in issue had to be executed quickly. That deal might or would not be there in a few days' time. He said:

> "… it's very important to have the time to market, which is very near the market price, then you need to be quick or relatively fast. If you execute such an order – such an advice two or three days later, then you can't implement the investment strategy accordingly".

## F6: The evidence of Mr Ben Kone

894. I turn next to the evidence of Mr Kone. Although originally alleged to have been part of the conspiracy, that case was abandoned in the Claimants' closing argument. The Claimants submitted that Mr Kone was relatively junior and that therefore he was not and would not have been aware of the conspiracy to which Mr Ries and Mr von Kymmel were alleged to have been party.

895. Mr Kone is now the Head of Private Equity and Real Estate (or PERE) Fund Administration at VP Lux, a position which he has held since April 2020. He was appointed to that position when he was around 37 years of age, and he was in his mid-30s at the material times (2017 – 2020) that the Skew Base Fund was operating as material to the present case. Although he was junior to Mr Ries, I do not accept that he was in such a junior position that he would have been oblivious to any conspiracy, if it had existed.

896. In fact, he had considerable responsibilities. Mr Kone joined the PERE team in 2016, and at that time there was only one team, and it was headed by Mr Ries. It is clear from the e-mail traffic that Mr Kone worked closely with Mr Ries, as one would expect given that Mr Ries headed the team and Mr Kone was carrying out a great deal of work on various aspects of the creation and in particular the operation of the Skew Base Fund. Mr Ries explained that whilst Mr Kone usually dealt with requests from investors, there were occasions when he would do so if Mr Kone was on holiday.

897. Mr Kone described his role, towards VP's clients (namely the initiator of the fund) as including: performing the net asset value (NAV) calculation, and then sending out reports to investors when that had been concluded (although in the case of the Skew Base Fund, the NAV was done by VP's UCITS fund administration team, rather than by Mr Kone); performing anti-money laundering and compliance checks on investors prior to subscription; processing subscription, redemption or share transfer requests from investors; dealing with any request received externally in relation to the Fund – whether from the client, the general partner, the auditor, tax advisor or someone else. He communicated on a day-to-day basis with the "Skew Base Team", and he knew that Mr Sampietro and Ms Talleri were recipients of e-mails sent to that address, and that there may have been others as well. Before the Fund was set up, his job included co-ordinating between the various internal parties at VP, as well as external parties in relation to the documents that had to be prepared. Once the Fund was set-up, he: assisted with due diligence work in relation to illiquid investments; was responsible for collecting and processing invoices charged to the Fund or the service providers; had a co-ordinating role on the NAV calculation; and was usually responsible for attending and taking minutes of the board meetings of SB GP.

898. Mr Kone was copied on Dr Bartnik's e-mail of 8 February 2017, in which he advised that the advisor's fees did not need to be mentioned in the Offering Memorandum. Mr Kone said that, based on his experience of other funds, it was the fees paid directly by the fund which must be named in a prospectus. So if, as here, one all-in fee is paid, that needs to be shown, but it is not necessary to show the breakdown. He was not therefore surprised by DLA Piper's response to Mr Ries' question.

899. More generally, Mr Kone said that it was "absolutely not my understanding that there was any intention (by anyone) to conceal Twinkle's involvement or the fees it received from investors. This was not something I ever even thought about". He did not know what XY, Twinkle or the Skew Base Fund told investors about the Fund. He had no reason ever to believe that any individuals who were part of the Skew Base Team, or anyone connected with XY or Twinkle, hid the connections between the Skew Base Fund, XY, Twinkle or any individuals from those companies. He said that he would have assumed that the investors were coming to the Skew Base Fund because they knew the individuals who had set it up. He did not recall any investor contacting VP Lux for a meeting, or to discuss their experience, or to discuss their investment aims or risk profile, or to discuss anything about the strategies of the compartments in which they invested. He said that neither he, nor (to the best of his knowledge) anyone at VP had any intention

to conceal these connections. He pointed out that if an investor had copied anyone other than the Skew Base Team into an e-mail, he would keep that person copied in. He referred to e-mails where he had copied in Mr Negro at a twinklecapital.com address.

900. Mr Kone was an impressive witness in cross-examination. He answered all questions directly and clearly. He was cross-examined about the e-mail which he had sent to Mr Nuzzo, in September 2018, when the latter requested documents concerning VP's policies in relation to liquidity management, valuation and collateral management. Mr Kone accepted that the Skew Base Team had drafted the text of his response to Mr Nuzzo, but he denied that he was just providing a front – a façade of independence – from VP in respect of the Fund. He said that he had never consciously or unconsciously failed to mention the involvement of Twinkle in the Fund. He said that VP had not failed to disclose a relationship between the Fund and XY. He did not believe that he had ever been asked to disclose such a relationship, and he referred to the fact that he had frequently copied in XY on communications to investors. He said that the reason that VP did not disclose or mention the existence of Twinkle was simply because "it's no part of the offering document, nor the financial statement".

901. I accept this evidence. Mr Kone did not know about any conspiracy not to reveal information (in particular Twinkle's involvement) to investors, because in my view VP was not party to any such conspiracy, and indeed there was no such conspiracy.

**F7: Mr Ries' evidence**

902. Mr Ries was cross-examined for the best part of 2 ½ days, and he gave his evidence well. He was in my view a patently honest witness, and I consider that I can rely on his evidence and, on the key issues, I have no hesitation in accepting it. I have already, in this section F, referred to aspects of Mr Ries' evidence. For example, my description (and findings) in Section F1 above as to the usual arrangements for Luxembourg funds is substantially based on Mr Ries' evidence. That evidence was very much in line with the evidence of Mr Konrad on that topic, also summarised above.

903. The evidence shows, in my view, that neither Mr Ries – nor indeed anyone else at VP – thought that there was anything unusual, let alone suspicious, about the arrangements which were put in place for the Skew Base Fund, or the information given to investors in the Offering Memorandum. The broad shape of the arrangements was entirely orthodox: for example, the role of Ziusudra (Twinkle) as Investment Advisor, and the fact that the lion's share of the monies paid by the Fund to the General Partner would ultimately benefit the initiator. When compared to other funds, the Skew Base Fund had a different advisory agreement: the STA, which was not based on VP's standard form. However, for reasons already given, this was of no consequence, and is certainly not indicative of any conspiracy. Indeed, the parties had agreed in principle to put a new agreement in place, but the finalisation of the arrangements (which was clearly not perceived to be urgent) was overtaken by events.

904. The key issue on which Mr Ries was challenged was, in summary, that he knew or shut his eyes to the fact that XY was not disclosing to investors the connections between the Skew Base Fund and XY/Mr Migani. I have no doubt that, on this key point, Mr Ries was in no different position to Mr Konrad or Mr Kone, or indeed any other VP witness. He (and they) did not know or suspect that there was a façade to conceal XY's connection to or involvement with the Skew Base Fund. He (and they) did not know or suspect that XY was misleading the Claimants, or indeed anyone else, about its connections to the Fund.

905. In his witness statement, Mr Ries explained that the info@skewbase e-mail address was generally used, because the Skew Base team had asked VP to use it for all communications relating to the Fund. However, very often investors copied different e-mail addresses, such as addresses from people at XY, and then the e-mail would be copied to that address. There were occasions when Mr Kone or Mr Ries copied Twinkle when sending out the prospectus and share application form to investors or their representative. At no stage did anyone from the Skew Base team or XY or Twinkle ask VP not to copy XY or Twinkle to communications with investors.

906. Mr Ries said that he assumed that most, if not all, of the investors were clients of XY. XY had told VP during the initial discussion that the investors would come from their existing client network. However, Mr Ries did not actually know whether all of the investors were clients of XY. He referred to the fact that Mr Negro of Twinkle became a sub-distributor of the Skew Base Fund in 2019, and it was Mr Ries' understanding that Mr Negro was personally actively marketing the Fund to potential investors (and so they may not have been clients of XY).

907. Mr Ries explained that he was not privy to the discussions that took place between XY or others and potential investors. But it was his assumption that XY or Twinkle at least told investors that the Skew Base Fund existed, that it was a fund that they had initiated, and that they were involved with implementing the investment strategy of the Fund. In fact, as discussed in Section H below, there is direct evidence from a number of investors that, broadly speaking, this is what they were in fact told. Mr Ries said that neither he, nor anyone at VP, intended to conceal, or knew of any intention to conceal, connections between XY, Twinkle and the Skew Base Fund from any investors.

908. He gave a number of (what, in my view were) cogent reasons which lay behind this assumption. Indeed, his evidence in this regard was very much in line with the evidence of Mr Konrad, whose evidence the Claimants do not substantially challenge. Mr Ries' reasons included the following.

909. Initiators set up AIFs in Luxembourg because it gave them a significant offering to their existing and new clients, and a potentially huge competitive advantage. If an initiator were to conceal the fact that it has setup a fund, it would effectively be concealing this additional offering, for no obvious reason, and depriving itself of that competitive advantage. This made no sense to Mr Ries.

910. Ultra High Net Worth Individuals, and investors with large amounts of capital, invariably want to know the people who are looking after their money. Such people often invest in a Luxembourg AIF precisely because their wealth manager,

whom they know and trust, has set it up, designed the investment strategy, and has a role in implementing that strategy, whether as portfolio manager or as advisor to the portfolio manager.

911. A fund can also be tailored to the specific needs or preferences of a client and this can even involve establishing a specific compartment for just that client; something which Mr Ries understood had happened with the Skew Base Fund. He referred in that regard to the Uranus compartment, about which he and Ben Kone had received an e-mail in 2018. An investor in such a compartment could not think that it had been designed purely by VP, without any involvement from the individuals at XY or Twinkle that they were in contact with.

912. At no stage did any of the investors contact VP Lux before investing, to discuss anything about the investment strategy, risk profile or asset classes of the Fund or the specific compartments in which they wished to invest. Nor did anyone contact VP Lux to speak to them about who they were, their investment experience, or their expertise in the asset classes in which the Fund invested. Mr Ries said that he assumed that none of the investors would have heard of VP Lux or VP Liechtenstein or VP Bank, which is a relatively small private bank headquartered in Vaduz. Ultra High Net Worth Individuals and large corporations do not, in his experience, invest huge sums of money in an unknown fund, run by people they had never met, from a small company in Luxembourg, and without ever having discussed any of these matters.

913. As evidence that Mr Ries was not intending any investor to be misled, he drew attention to an e-mail which he had sent after he had been asked to give some input to Mr Negro in relation to his appointment as sub-distributor. He commented on a PowerPoint that had been prepared. Mr Ries said that Mr Negro "would need to inform the potential investor about conflicts of interest concerning himself as a sub-distributor". He said, and I agree, that this showed that he was not intending to conceal connections between Twinkle and the Skew Base Fund. He also referred to various e-mails where Mr Ries or Mr Kone had copied Mr Negro, at his twinklecapital e-mail address, with communications to investors.

914. In cross-examination, Mr Ries accepted that he knew that XY would be introducing clients to the Skew Base Fund in circumstances where its sister company, Twinkle, would be receiving payments as Investment Advisor. He accepted that there was a conflict of interest that would need to be disclosed to investors, but he said that he thought that it would be very clear to investors: "When they see that it is a fund which relates to XY or any affiliated company, they would assume that they cannot do that for free". He said that he would assume that professional clients know that a fund structure costs money and fees need to be paid out of that. When asked why investors would see that it was a fund which related to XY or an affiliate, he said: "our assumption is that this has been part of the discussion between XY and their respective clients". He said that he had no doubt that there would be a discussion. He denied that he had "looked away". He accepted that the clients were entitled to expect transparency: this was "my assumption … how a wealth manager works".

915. He was asked in cross-examination about the need to read the Offering Memorandum. Similar to Mr Konrad, he said that he would expect every investor,

thinking about investing into any fund, to read, carefully read, the fund documentation.

916. It was put to him that VP was providing a façade, a public face for the fund, whilst Twinkle was really doing the work behind the scenes. He strongly disagreed: "If this would be a façade, this would be a façade for the whole fund industry". He denied that he had participated in an ongoing façade, saying that he had no reason to believe that investors were not informed about the set-up of the fund. It was put to him that he was aware of a vast number of highly irregular features about the way in which this fund was operated. His response was that he was not: this was a "set-up which is not unusual and which is allowed by Luxembourg market practice". VP Lux was simply providing the same service that they provided to other funds as well.

917. Overall, I consider that Mr Ries acted honestly at the time, and that he gave honest evidence to the court. At no stage did he consider that VP was assisting in any form of façade. He did not give any thought, at the time, to the question of whether XY had a conflict of interest, in circumstances where its sister company Twinkle would be receiving income via the contractual structure. This was essentially because the contractual structure was, from his perspective, entirely normal. It did not occur to him that XY, which he regarded as professionally run, would not be explaining the set-up of the Fund to its clients. Also, it did not occur to him that investors would be investing substantially in a fund of this kind, run by a relatively small banking group which is not well-known, without understanding the set-up of the fund and its connection to XY.

**F8: Mr von Kymmel's evidence**

918. Mr von Kymmel joined VP in 2015, and was the CEO of VP Lux and Chairman of the Board of VP Liechtenstein. He worked there until 2021, and is now a self-employed independent director. He was senior to Mr Ries, who had taken over the client relationship at a relatively early stage in the discussions about the possible fund. Mr von Kymmel was responsible for the entire third-party fund business within the VP group.

919. In his witness statement, he explained (as did a number of VP witnesses) that he did not know what relationship XY or Mr Migani had with their clients. This is perfectly normal. Initiators do not tell you what relationship they have with their clients.

920. He did not know whether all investors in the Fund were clients of XY. But he would have assumed that those investors who were XY clients would have done so under the terms of their existing relationship with XY, knowing it had been set up by XY, who had designed the investment strategy of compartments and who they trusted with their money. He said that the "idea that there were links hidden by XY or anyone at XY makes very little sense to me"; and that, certainly, "I had no reason to think that XY, Twinkle or Mr Migani lied to their clients or hid their connections to the Skew Base Fund".

921. He said that he was very surprised at the allegation that VP were said to have conspired with other Defendants to maintain a façade that the Fund was independent of XY and managed by VP without any connection to or involvement from XY. He said that he did not participate in or know of any conspiracy to maintain this alleged façade.

922. He went on to explain why it made little sense to say that there were links hidden by XY. VP are service providers to the Fund, and they had no communication with investors before they invested in any of the funds they managed; because there was an internal policy which meant that VP did not do active distribution. To the best of his knowledge, no investor in the Skew Base Fund did any due diligence on VP Lux or VP Liechtenstein. If investors had thought it was a fund that VP had initiated, he would have expected that all of them would have conducted extensive due diligence on VP, and would have wanted to meet with them and find out about their experience and expertise. He would also have expected them to want to discuss with VP Lux the investment strategy (which is always designed by the initiator) and to satisfy themselves in discussion with them that it was appropriate for their needs and within their risk tolerances, before investing large amounts of money in it.

923. Mr von Kymmel was cross-examined for just under a day. I consider that he too gave his evidence well, particularly in the major part of the cross-examination which took place on the morning of Day 23 when his answers were rather shorter and more focused than in the earlier part of his evidence on the previous afternoon.

924. In cross-examination, he said that he would expect that if somebody presents this investment fund, he would present the investment strategy, parties involved and so on.

925. He was asked about the 6 December 2016 meeting, and said that Mr Konrad had attended. Mr Konrad focused on the investment strategy, and Mr von Kymmel more on long-term relationships. I note in passing that since Mr Konrad is no longer alleged to have been party to any conspiracy, it cannot realistically be suggested that there had been any discussion at that meeting about any plan to conceal information from investors. Indeed, such a plan is also inconsistent with the comments made on the first draft Offering Memorandum, sent through two weeks later to DLA Piper, which said that the Investment Advisor should be identified in the relevant Appendix.

926. He said that he would expect an investor to know, from his relationship manager, who had initiated the Fund. He said: "this is not a publicly available fund, and if I would invest a material amount into a fund and – because I'm interested in the investment strategy applied, I would ask the parties involved". He said that he would have expected an investor to ask questions of his counterparty who had offered, promoted, and presented the product. It is a standard process of due diligence for a professional investor. He would expect the person offering the product to be transparent with his investor, and to raise funds in an ethical manner. He said that the arrangements in place, involving payment of fees to Twinkle, was a common standard investment advisory set-up by the initiator. He denied that he had turned his mind away from a problem of conflicts of interest in order

to land the business. He said that the arrangements in place were not highly unusual.

927. I found Mr von Kymmel's answers in cross-examination to be persuasive at the time, and this has been confirmed by my re-reading of the evidence. His evidence was in my view consistent with the documents, the inherent probabilities and the evidence of other VP witnesses who are not alleged to have been party to a conspiracy. There is no indication in the documents that anyone at VP thought, at the time, that the structure that was being put in place was out of the ordinary. Nor is there any documentary evidence which begins to suggest that anyone in VP thought that information was being hidden from investors.

928. Mr von Kymmel was in charge of the VP funds business, and he had a background as both a lawyer and in financial services. When the Skew Base Fund was being discussed in 2016 and early 2017, he was dealing with a new client whom he had not previously even met prior to the introduction from Credit Suisse. It was unclear at that time whether the Skew Base Fund would prove to be as successful, in terms of attracting investment, as it actually turned out to be: at its height prior to March 2020, it had approximately € 1 billion invested in the various compartments. Against this background, it is in my view most improbable that Mr von Kymmel would have decided to participate in a scheme whose ultimate purpose, on the Claimants' case, was to mislead investors into concealing connections between the initiator and the Skew Base Fund. Such a scheme is also inherently improbable, given that an initiator's involvement in the running of a fund which he has initiated is a typical feature of Luxembourg funds, as confirmed by the EY Guide and the other evidence in the case. I shall return to these matters when considering the conspiracy case, but my discussion of the VP evidence in Sections F5 – F8 anticipates the conclusions which I have reached.

## F9: Ms Gaveni's e-mails concerning Twinkle

929. It is convenient to address, at this stage, a number of e-mails sent by Ms Gaveni, in 2019 and 2020, and upon which the Claimants relied in support of their argument that there was intentional concealment of the role of Twinkle.

930. In May 2019, Ms Gaveni was discussing Skew Base's brand positioning with a media consultant involved in branding and websites. A kick-off meeting took place, and Ms Gaveni was asked to provide some further information, including "the names, titles and eventually CV's of Skew Base board members". Ms Gaveni provided some details, saying that she was "more focused on audit, controlling, with economical background – I wouldn't mention I am directly working for Twinkle". She was requested to, and did, provide a slide dealing with "Tactical Allocation". When providing this, Ms Gaveni said: "Please keep in mind that this activity is technically done by Twinkle. So in this case, the overall message here is to say that Skew Base selects the best suppliers capable to find the best opportunities (in this case the best financial instruments in the market)". In cross-examination, Ms Gaveni said that the reason that Twinkle was not going to be referred to was that it was really a "sort of unknown entity"; i.e. that was not known to the public.

931. I did not consider that this exchange, or the fact that Twinkle was not thereafter referred to in a draft of the web-pages for a possible website, was of any real significance. The branding and website discussions with this agency did not lead anywhere, and it is not obvious that the branding of the Skew Base Fund would naturally have called for reference to be made to the role of Twinkle.

932. In February 2020, Ms Gaveni was involved in some correspondence with a Mr Bonzano of Societe Generale. Ms Gaveni said in evidence that this was in connection with a possible change in the depositary bank. Some questions arose in the relation to anti-money laundering, and Mr Bonzano wrote "if we could represent that behind the orders you are there, we would elude the problem". Ms Gaveni passed the message on to Mr Migani, saying that she was trying to figure out how to resolve this with Societe Generale adding in parentheses "(I guess we can't/don't want to send an Offering Memo and we can't/don't want to explicitly state TC's advisor role)". There was no e-mailed response to this e-mail from Mr Migani.

933. I do not consider that any conclusions can be drawn from Ms Gaveni's "guess", and I have no reason to doubt her evidence that the anti-money laundering issue was resolved when it was explained to Societe Generale that this was carried out in Luxembourg. Moreover, Ms Gaveni's "guess" was that Mr Migani would not want to send Societe Generale the Offering Memorandum. It is not clear what led her to this view. It cannot, however, be said that there was any concealment from investors of the terms of the Offering Memorandum, and therefore the e-mail as a whole does not support the idea that information was being deliberately concealed from investors.

934. On 29 October 2020 (i.e. some time after the collapse of the HFPO and MIN Compartments) Mr Ries e-mailed Ms Gaveni to follow up on a call earlier that day, and outlining a number of steps to be taken. One of these was:

> "Review and adopt the prospectus by end of November. Items to be adopted would be to mention Twinkle as advisor to the PF Manager, Fund and AIFM as well as to add an information that the RAIF is not being supervised by CSSF (obligation under the RAIF law)".

935. Ms Gaveni's response was: "As mentioned, if it's on a going forward basis (i.e. for new subscriptions), it is acceptable".

936. This was a puzzling response, since it is not easy to see how there could be a reference to Twinkle as advisor only on a "going forward basis". If the Offering Memorandum was to be changed, then (as Ms Gaveni correctly said in her evidence), a copy would need to be provided to every investor. Ms Gaveni could not remember the thought process which led to her response, and in the event there was no change to the Offering Memorandum in that respect. I do not consider that I can draw the conclusion, from this comment, that there was deliberate concealment of the role of Twinkle; not least because Ms Gaveni was herself proposing that Twinkle's role as Investment Advisor should be revealed, at least for the future.

937. In any event, when considering these e-mails, I bear in mind Ms Gaveni's relative lack of experience in the matters with which she was dealing, and the fact that she was not at Twinkle or SB GP until mid-2018. They must also be set in the context of other, in my view, more significant evidence that Twinkle's role was not deliberately concealed, in particular: the intended disclosure of Twinkle as Investment Advisor at the time when the Offering Memorandum was drafted; the references to the Investment Advisor in the Offering Memorandum, leading to the possibility of an investor asking who the Investment Advisor was; the fact that an Investment Advisor, associated with the initiator, is a common feature of funds such as the Skew Base Fund; Twinkle being copied in on e-mails sent by VP to some investors; and the evidence of Mr Kone and Mr Ries (which I accept) that there was no plan or understanding that Twinkle's role would not be revealed.

## F10: The work of the General Partner (SB GP)

938. The required delegation to the AIFM of portfolio management and risk management of the Skew Base Fund meant that much of the day-to-day work involved in running the Fund did not involve the SB GP. However, SB GP retained responsibility for various matters as set out in the Offering Memorandum. Thus, Section 6.3 provided for the AIFM to be responsible for portfolio and risk management "subject to the overall supervision of the General Partner". Other provisions concerning the role of the General Partner included the following: responsibility for verifying each investor's eligibility as a Well-Informed Investor (in the "Important Information" section); any further restrictions or guidelines concerning the investment strategy previously determined by the General Partner (Section 4.1); deferring redemptions (Section 5.3); laying down the investment policy of the Compartments and monitoring the business activity of the Fund and the Compartments (Section 6.2); establishing new Compartments (Section 7.1.2); temporarily suspending the calculation of Net Asset Value and the redemption of shares (Section 8.4); reporting on the activities of the Fund (Section 10.1); making amendments to the Offering Memorandum "in close cooperation with the AIFM" including changes to a Compartment's objective and policy (Section 10.4); matters concerning merger and reorganisation (Section 10.7); termination and liquidation of Compartments or Share Classes (Section 10.8); exercising discretions in relation to minimum subscriptions (Appendix para 4).

939. Evidence as to how SB GP carried out its work was given by Mr Longo, Mr Kuske and Ms Gaveni. Initially, and at the time when SRL subscribed to the Fund, Mr Longo was the sole member of the Board of Managers. By the time that GIG subscribed to the Fund in 2018, and also when MDM subscribed personally (by receiving the dividend in specie from SRL in 2019), there were 3 members of the Board of Managers. Ms Gaveni and Mr Kuske joined the board in July 2018. Each of those witnesses gave evidence as to the tasks performed by the Board, and as to how it functioned. There was no significant difference between their evidence in that regard.

940. Both Mr Kuske and Mr Longo had considerable experience of Luxembourg funds. Mr Kuske was a qualified lawyer, and his professional activities involved providing governance and regulatory advice to professionals contemplating

setting up investment structures in Luxembourg and assisting them in various aspects related to the implementation of investment funds or their management entities. He had been involved in the financial sector since 2000. In September 2017, he started a professional practice acting as a certified independent director of various Luxembourg corporate entities, predominantly operating in the financial and asset management sectors.

941. Mr Longo was an INSEAD certified director, and had a Master's degree in taxation and an MBA degree. He had well over 20 years professional experience working in the Luxembourg financial sector. Neither Mr Longo nor Mr Kuske had worked as portfolio managers or traders.

942. Ms Gaveni had no significant prior experience of Luxembourg funds: as described in Section B above, she was relatively young, and was in a relationship with Mr Faleschini (and they have since married and had a child). Both Mr Longo and Mr Kuske knew that Ms Gaveni was, in effect, the shareholder's representative on the Board: the shareholder being Twinkle. Neither of them saw anything unusual in that. They both knew that, in contrast to themselves, Ms Gaveni could not be regarded as an independent director. They knew that she was employed by Twinkle. Accordingly in view of her connection to Twinkle, Ms Gaveni played a more active role in day-to-day operations than Mr Kuske or Mr Longo. Mr Kuske said that she was a representative of the initiators, in the sense that she was able to, and did, act as the communication link between the Board and the other parties involved in the operation of the Fund. This meant that if either of them had questions about the Fund, they could be put to Ms Gaveni "who would be able to escalate those questions with the competent stakeholders and then report back to the board". He said (and I accept) that there was nothing unusual about having such a representative on the board of a general partner. He described Ms Gaveni as "the voice of the initiator". In contrast to Ms Gaveni, both Mr Longo and Mr Kuske were, and regarded themselves as, independent directors.

943. As far as the way in which the Board functioned is concerned, what follows is a summary of the position, largely but not exclusively based on the evidence of Mr Kuske, who answered questions clearly and honestly, and whom I consider to be a reliable witness.

944. Mr Kuske's appointment as director of the Skew Base Fund started with an approach by a former colleague at VP. Mr Kuske was then told that the initiators of the Fund were Italian. Mr Kuske described the initiators as "the entrepreneurs that were behind the setting up of the Skew Base Fund". At the time of his appointment, he knew that Twinkle was the sole shareholder of SB GP, but he only later found out (in 2019) that Mr Migani was the ultimate beneficial owner of Twinkle. As far as he was concerned, Twinkle was a corporate representative or emanation of the initiators of the Fund. In his experience of dealing with similar funds, there will often be a special purpose entity put in place as the sole shareholder of the general partner. There was therefore nothing unusual about the existence of Twinkle or its place in the ownership structure.

945. Mr Kuske described how SB GP had ultimate responsibility for the management of the Fund, but that most of the management responsibility was delegated to third

parties. He said that the delegation model was and is a very common structure in the context of Luxembourg funds, and was very much the standard operating model for funds of this nature. There had been a delegation to regulated specialists who were strictly regulated in their home jurisdictions, and experienced in dealing with investments into, and the management of assets held by, funds such as Skew Base. This meant that it was not the job of SB GP to have active involvement in managing the Fund's investments, or in any other delegated responsibilities. Rather its role was limited to supervising the AIFM since, notwithstanding the delegation, the ultimate responsibility for the Fund remained with SB GP. In terms of its supervisory role, SB GP received information and reports from the AIFM about the decisions taken.

946. Mr Kuske did not recall the STA, in which Twinkle was appointed to provide investment advice. He said (consistently with the evidence of the VP witnesses described above) that it was quite common for initiators, or a representative of the initiators, of a fund to be involved in terms of providing investment related services or advice. Indeed, initiators often act in an advisory function as they know the assets and the markets and can therefore support the portfolio managers on the performance of their regulated activities.

947. As far as the discharge of its management responsibilities was concerned, SB GP acted through its Board of Managers. As Ms Gaveni explained, SB GP had only one employee: a part-time accountant whose role was to provide help and support to the administration and accounting function of SB GP. Mr Kuske said that the Board itself did not delegate any of its responsibilities to any individual. Accordingly, as and when a decision was required on any of the matters which were within the scope of SB GP's residual responsibilities (i.e. those which had not been delegated to the AIFM), this required a resolution of the Board of Managers. There were, in the course of 2018 and 2019 a very large number of such resolutions. SB GP's written opening listed these in an annex, and they occupied many lines on a number of pages.

948. A principal issue, to which the Claimants' cross-examination of Mr Longo and Mr Kuske was largely directed, was the extent to which the Board of Managers did or did not function as an independent board. The suggestion to both Mr Longo and Mr Kuske was that they were simply rubber-stamping decisions made by others. Both of them strenuously denied this. The underlying reason for this line of cross-examination was that the Claimants were seeking to show that Mr Migani, the owner of Twinkle, was the directing mind and will of SB GP (and thereby both SB GP and the Fund itself). The Claimants thus sought to establish, as part of their conspiracy claim, that the Second and Third Defendants were (essentially via Mr Migani) party to the conspiracy.

949. I do not consider that the work which the Board carried out, and in particular the work of Mr Longo and Mr Kuske, can fairly be described as rubber-stamping. Furthermore, neither Mr Longo nor Mr Kuske had any dealings with Mr Migani. He did not attend any of the board meetings that took place. Mr Longo only met him once or twice. Mr Kuske only ever had one conversation with him, about D&O insurance. Mr Longo and Mr Kuske took their responsibilities as board members seriously, and I have no doubt that, at the time, they believed that they were taking independent decisions as independent directors.

950. Mr Kuske said that he did not see his role as being to challenge investment decisions being made on behalf of the Fund: that was not his area of expertise, and it was not the role of SB GP. He did, however, receive a fair amount of information about the investments that were made by the Fund, particularly from VP Luxembourg for the purposes of the quarterly board meetings.

951. Mr Kuske's primary focus was on making sure that all relevant processes pertaining to the operation of the fund (such as reporting on portfolio and risk management and anti-money laundering/KYC checks) were in place from a legal and regulatory perspective under Luxembourg fund law, were in the interest of investors and were properly documented. He produced his time records for the period from July 2018 to 1 May 2020. This showed that he did, indeed, carry out a significant amount of work in his capacity as director. He was very clearly spending time reviewing and dealing with the necessary corporate documentation, including reviewing board minutes, dealing with the organisation and governance of the Fund and the GP, reviewing board packs, and drafting and re-drafting resolutions, as well as attending board meetings themselves. I have no doubt that, as he worked his way through these materials, he was applying an independent mind to the materials that he was considering, and not simply rubber-stamping what others were proposing. His evidence was that he found himself spending such a disproportionate amount of time in preparing and drafting documentation that his level of remuneration was increased to cover the extra work involved. Similarly, Mr Longo found himself spending far more time than he had originally anticipated. In January 2018, he documented the amount of work that he was doing in an e-mail to Mr Sampietro, and requested an increase in his fees.

952. Although the Claimants identified a number of resolutions, signed by Mr Kuske, on which there was no corresponding time entry, I did not consider that this cast any doubt on Mr Kuske's evidence. Mr Kuske explained that some of the resolutions could be dealt with very quickly by him, and that this was the likely reason why there was no time entry on his timesheets. I accept that explanation. The cross-examination of Mr Kuske did not identify any particular resolution, where there was no corresponding time entry, which would have required a great deal of work. In any event, however, the time sheets showed many entries where considerable work had been carried out, and in my view, these were inconsistent with the Claimants' submission that any involvement of the Board in the running of SB GP was perfunctory at best.

953. The documentary evidence of some particular episodes, which were to some extent explored in the trial, bears this out. For example, Mr Kuske was involved in considering the request, emanating from Mr Nuzzo in September 2018, concerning the request for a waiver of the performance fee (see Section D above). Mr Kuske sent a number of e-mails on this, and his work included redrafting the cover letter which was to be sent to Mr Nuzzo. There was a fair amount of cross-examination directed towards e-mail correspondence in August 2018 relating to a proposed settlement with an investor shortly after Mr Kuske had joined. Both Mr Kuske and Mr Longo had concerns about this, and voiced their concerns in correspondence, with the end result being that indemnities were requested and provided by the shareholder, Twinkle.

954. Mr Kuske said (and I accept) that the reason that he paid such close attention to the GP's documentation was firstly because of his background as a lawyer (which meant that he was careful about details), but also because "I took seriously my personal and collective responsibility as an independent director and a member of the board". He wanted therefore to be comfortable with what the Board was deciding, and did not want to just sign something which he thought was "half-baked" and might have prejudicial effects on the Fund or its investors. Although Mr Longo was not a lawyer, and in my view did not have the same attention to detail as Mr Kuske, I have no doubt that he too took his responsibility as an independent director seriously, both at the time when he was sole director and later when joined by the two other members of the Board. I do not accept that either of them thought that they were, or were in fact, simply rubber-stamping decisions made by others.

955. In relation to the decision-making process of the Board, Mr Kuske said that the Board was not acting as an 'island'. There was a cooperative process, with advice and assistance being sought from other parties (such as VP Lux or DLA Piper) as required. He also referred to the support services provided by Twinkle, and subsequently by the Leader Logic companies. He said that there was nothing unusual about an entity, connected with the initiators, providing support services to the general partner in return for a fee. It is a not uncommon arrangement. Initiators are often involved in some shape or form in the operation of a fund, and it is often the case that initiators, acting through one of their companies, will receive some form of contractual remuneration for their input and services provided.

956. Mr Kuske said that he did not have visibility over what Twinkle, and then the Leader Logic companies, were doing in terms of their involvement in the operation of the Fund. However, that did not mean that Twinkle and Leader Logic were not providing services. Mr Longo's evidence was that he knew that Twinkle must have been providing back office services, including dealing with the ongoing administration of the Fund and interacting with the AIFM and the various service providers, because: (i) he saw the output of that work, for example in the form of board resolutions and offering memoranda or fee calculations to be reviewed and approved; and (ii) SB GP did not have capacity or resource to carry out the work itself. He said in evidence that the back-office work was substantial, with a lot of things to do; but he was "not aware on a day-to-day basis what really all the things were".

957. In my view, Mr Longo's evidence makes sense. The Skew Base Fund was a substantial operation, with ultimately around € 1 billion under management. It is not reasonable to expect Mr Longo and Mr Kuske, as members of the board, to be doing all of the groundwork without any assistance. That is rarely how companies operate. Some companies will have a substantial number of employees, but this was not the case with SB GP. Instead, as it seems to me, work that might otherwise have been done by employees was covered by the work to be performed under the Support Services Agreements, initially with Twinkle and later the Leader Logic companies. All of the materials that Mr Kuske was reviewing, and then deciding upon, had to have their origin somewhere.

958. For example, revisions to an Offering Memorandum to create a new Compartment would not have been the work of SB GP's part time accounting employee. It would necessarily have involved instructing and liaising with DLA Piper, and in my view such work would be encompassed by the terms of the SSAs. Mr Kuske described the GP's decision, in relation to the creation of a new Compartment, as the "tip of the iceberg … the outcome of the dialogue that exists". It is also clear that once she joined, Ms Gaveni (an employee of Twinkle) was doing a considerable amount of work herself: Mr Kuske described speaking to her almost every day. She continued to do that work after the Leader Logic companies replaced Twinkle under the SSA, because there was a delegation to Twinkle by those companies.

959. It is fair to say that this delegation was questionable as a way of solving the perceived issue of a conflict of interest. The reason for the replacement of Twinkle was a concern on the part of Mr Kuske (shared by Mr Longo) that a conflict arose because Ms Gaveni was on the board, and she was an employee of Twinkle which was providing services under the SSA to SB GP. Mr Kuske said in cross-examination that the conflict was not dramatic: there were 2 independent directors, and they were a majority. But they thought that it was good governance to reduce the conflict. His evidence that the conflict was not seen as dramatic is borne out by the fact that Ms Gaveni became a board member in July 2018, and it was not until October 2019 that Twinkle was replaced by a Leader Logic company.

960. Both Mr Kuske and Mr Longo were, however, unaware at that time that there had been a sub-delegation by Leader Logic to Twinkle. Mr Kuske was certainly aware that Leader Logic was connected to the initiators, and by late 2019 he knew that Mr Migani was the ultimate beneficial owner of Twinkle. Mr Kuske described Leader Logic as "in the end another emanation of the group of companies linked to the initiator". Both Mr Kuske and Mr Longo had assumed that the conflict had been resolved, because Ms Gaveni was not an employee of Leader Logic. However, it is doubtful that the conflict had been resolved in circumstances where Leader Logic had sub-delegated to Twinkle, although there may be an argument (as Mr Weekes submitted) that the appointment of the Leader Logic companies did resolve the conflict because Twinkle was no longer an obligor towards SB GP. I do not think that, ultimately, this is an important point in relation to the resolution of the key issues between the parties, although (see Section B above) Ms Gaveni should have explained to her co-directors that there had been the sub-delegation to Twinkle which was therefore still significantly involved in the work for SB GP.

961. There was some cross-examination, in particular of Mr Longo, directed at the proposition that Twinkle and then Leader Logic were being paid too much for the work that they were doing. Mr Longo's evidence was that the amount that they were paid depended on the success of the Fund in terms of attracting investment funds. At one stage in his evidence, he was asked whether the monies paid were effectively a dividend for the shareholder. His response was that "you could say that", but later in his evidence he said that it was not actually a dividend but that a dividend could have been distributed. I did not consider that the question of whether Twinkle and Leader Logic were paid too much, or whether it would have

been more appropriate for profits to be distributed to Twinkle (and then to Twinkle's shareholder Mr Migani) by way of dividends – rather than as payments under the SSAs – was of any real assistance in resolving the key issues between the parties.

## F11: The "Connections" between XY/Mr Migani and the Skew Base Fund

962. The RAPOC contained some 11 pages under the heading: "XY's undisclosed connections to the Skew Base Fund". This set out detail of the connections (defined as the "Connections") between XY, Mr Migani, the Skew Base Fund, SB GP, VP, Twinkle, Mr Faleschini and the Leader Logic companies. It also pleaded the receipt of mutual benefits from the connections between them, including "Undisclosed Payments", and the existence of "Undisclosed Agreements".

963. A large part of this section of the RAPOC was addressed to how Twinkle operated vis a vis VP Liechtenstein. I have already addressed that issue. There was, however, no dispute that Twinkle had a significant involvement in the operation of the Skew Base Fund in its capacity as Investment Advisor. (The Claimants said, as discussed above, that Twinkle was not simply the advisor, but was the de facto portfolio manager – but I have not accepted that argument). The evidence of Mr Negro was that Twinkle acted as advisor in relation to all the Compartments, and not simply the HFPO and MIN or similar Compartments.

964. There was also no substantial dispute as to the existence of connections between Mr Migani and the Skew Base Fund. Thus, it was common ground that (as pleaded in RAPOC paragraph 68aa) Mr Migani (directly or indirectly) owned XY, XY SA, Twinkle, SB GP, Leader Logic and Leader Logic Holding. It was also alleged that Mr Migani owned the Skew Base Fund. In my view, it is more accurate to say that Mr Migani owned SB GP, the general partner of the Fund. There were, of course, other shareholders, namely those who invested in the Fund.

965. There was also no substantial dispute as to connections between individuals who worked for XY and for companies relevant to the operation of the Skew Base Fund. Thus, Mr Faleschini – the Company Secretary of XY and CFO of XY SA – was a director of Twinkle from December 2017 onwards. Mr Negro had worked for XY and then joined Twinkle. Ms Gaveni worked for both Twinkle and SB GP. A number of other individuals were referred to in the RAPOC, but they do not add materially to the picture.

966. Nor was there dispute as to the existence of agreements, with companies beneficially owned by Mr Migani, relating to the Skew Base Fund. The RAPOC referred, in particular, to the STA, and the SSAs between SB GP and Twinkle and later the Leader Logic companies.

967. There was also no dispute as to various payments which were made pursuant to the STA and the SSAs. The RAPOC went into some detail in outlining the flow of funds. Although it was pleaded that XY and XY SA received remuneration from the operation of the Skew Base Fund, the evidence did not establish that this was in fact the case. It was the case, however, that monies were received by SB

GP (which was beneficially owned by Mr Migani); by Twinkle, who were paid both by VP Lux pursuant to the STA, and by SB GP pursuant to the SSA; and by the Leader Logic companies, who were paid by SB GP pursuant to the later SSAs.

968. It was also common ground that most of the detail pleaded in the RAPOC had not been disclosed to the Claimants. However, the Defendants contended that the Claimants did know of the significant connections between Mr Migani and the Skew Base Fund. They knew that he was the entrepreneur behind the Fund, and that he was the owner of the general partner, SB GP. I address this issue in Section H below, but before doing so I turn to the case concerning the "investment representations".

## G: The claim in deceit concerning the "Investment Representations"

### G1: Deceit – legal principles

969. I was referred by the parties to a number of authorities concerning the law of deceit, but ultimately there was no real dispute as to the legal principles. The following is substantially based upon my summary of the principles in *Vald. Nielsen Holdings and Ors v Baldorino* [2019] EWHC 1926 (Comm) at paras [130] – [159], which was one of the cases to which I was referred.

*The basic requirements*

970. The tort of deceit requires the claimant to show that: (i) the defendant made a false representation to the claimant; (ii) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false; (iii) the defendant intended the claimant to rely on the representation; (iv) the claimant did rely on the representations; and (v) as a result the claimants have suffered loss and damage.

*Representation*

971. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. Determining whether any, and if so what, representation was made by a statement requires (i) construing the statement in the context in which it was made, and (ii) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee. It is essential in any case of fraud for the dishonest representation to be clearly identified.

972. In order to be actionable a representation must be as to a matter of fact. A statement of opinion is therefore not in itself actionable. However, as stated in *Clerk & Lindsell* 24th edition, at para [17-14]:

> "A statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud. And the same goes

> for projections as to the future: if a defendant says he expects an event to take place when he does not, he makes an untrue statement of fact. The only serious obstacle in the way of maintaining an action for a false representation on this basis lies in the difficulty of proving what the defendant's real opinion was."

973. In addition, at least where the facts are not equally well known to both sides, a statement of opinion by one who knows the facts best may carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it. In the context of deceit, *Clerk & Lindsell* at paras [17-15] expresses this in the following terms:

> "Furthermore, at least where the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best will often carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it. If he does not actually believe in such facts, it follows that he will be liable in deceit. In such a case, the test as to whether a statement of opinion involves such a further implied representation will involve a consideration of the meaning which is reasonably conveyed to the representee. The material facts of the transaction, the knowledge of the respective parties, their relative positions, the words of the representation and the actual condition of the subject-matter are all relevant to this issue."

974. Since a representation must be a representation of past or existing fact, a representation as to the future will not as such found liability in deceit. Nor will a broken promise as such. However, it is clearly established that a representation of present intention is a sufficient representation of an existing fact to form the foundation of an action for deceit. A statement as to the future will often imply a statement as to present intention. However, this principle cannot be taken too far. The mere fact that an expressed intention is not eventually carried into effect is little evidence of the original non-existence of the intention, since the representor may have subsequently changed his mind. (See *Clerk & Lindsell* at paras [17-12] and [17-13]).

975. Where a representation has been made, it has the capacity to have continuing effect: see *Clerk & Lindsell* paras [17-19]; *Spice Girls Ltd v Aprilla World Service BV* [2002] EWCA Civ 15. However, some care is required here in order to avoid circumventing the distinction between representations of existing fact and promises as to future conduct. In *WPP Group plc v Reichmann* [2000] All ER (D) 1409, Ferris J considered a statement by a landlord to a potential tenant that no other parties were interested in certain floors of a building and that the landlord would alert the tenant if any other parties expressed an interest. The statement that no other parties were interested was a representation of fact, relating to the position at the time of the statement. However, the tenant alleged that there was

also a continuing representation, and that the landlord was fraudulent in failing to alert the tenant when, at a later stage, another party did express an interest. Ferris J rejected the argument:

> "There is, in my judgment, a complete artificiality about an argument which starts with a statement which appears to amount to a promise, accepts that such promise has no contractual effect, proceeds to extract an implied statement of fact out of the promise, treats that as a statement that, unless corrected, the fact continues to exist, and concludes by stating that the legal effect is substantially the same as if the promise had been enforceable in the first place. As a basis for a claim in fraud it is, in my judgment, unsustainable."

976. Silence by itself cannot found a claim in misrepresentation. But an express statement may impliedly represent something. For example, a statement which is literally true may nevertheless involve a misrepresentation because of matters which the representor omits to mention. The old cases about statements made in a company prospectus contain illustrations of this principle: for example, *Oakes v Turquand* (1867) LR 2 HL 325, where Lord Chelmsford said (at 342–3):

> "… it is said that everything that is stated in the prospectus is literally true, and so it is; but the objection to it is, not that it does not state the truth as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of falsehood."

977. In the context of fiduciary relationships, non-disclosure of matters which ought to be revealed may amount to fraud: *Clerk & Lindsell* at paras [17-10].

978. In relation to implied representations the "court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context": per Toulson J in *IFE v Goldman Sachs* [2006] EWHC 2887 (Comm) at para [50]. That involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged. The test for implied representations was reviewed by the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland PLC* [2018] EWCA Civ 355 at paras [122] – [132]. The Court of Appeal approved as "helpful" a formulation of Colman J in a previous decision, namely "whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it". But this was not to "water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied."

979. In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged.

A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary "to show that the representor intended his statement to be understood by the representee in the sense in which it was false": per Morritt LJ in *Goose v Wilson Sandford & Co* [2000] EWCA Civ 73 at para [41] ("*Goose*").

980. It is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In some cases, for example, the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus, the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on.

981. The courts have noted that "a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood. It is also difficult to detect": *Smith New Court Securities v Citibank* [1997] AC 254, 274 per Lord Steyn.

982. Deliberate ambiguity – where the representor uses language intending to rely on its literal meaning, but hoping that the representee would understand it differently – is often a hall-mark of fraud: *Spencer, Bower & Handley, Actionable Misrepresentation*, 5th Ed at paras [4.15] – [4.24] ("*Spencer Bower*"). At para [4.15], the authors state:

> "There is another type of ambiguity when the inference is open that the representor deliberately used ambiguous language intending to rely on its literal meaning, but hoping the representee would understand it differently. The contrast is between ambiguity that appears spontaneous, and that which appears contrived. In the latter case every presumption is made against he who used dubious language."

983. In the case of an ambiguous statement, it is "essential that the representor should have intended the statement to be understood in the sense in which it was understood by the claimant (and of course a sense in which it is untrue) or should have deliberately used the ambiguity for the purpose of deceiving him and succeeded in doing so": per Rix LJ in *AIC Ltd v ITS Testing Services (UK) Ltd "The Kriti Palm"* [2006] EWCA Civ 1601 at para [253] ("*The Kriti Palm*").

984. Different statements at different times must frequently be read or construed together in order to understand their combined effect as a representation. At paragraph 4.24 of *Spencer Bower*, the authors state:

> "Statements connected by express or implied reference may form a single representation and their combined effect must be considered. This rule applies to statements in one document such as a prospectus, to statements in a number of documents

> such as a series of letters … This may render the composite representation false, though the components by themselves are true, or render it true, though some of the components, by themselves, are false. The composite representation may also be as false as every part, and every part as false as the whole."

985. Where one person has made a misrepresentation, it is open to him to correct the misstatement prior to the contract and to rely on the correction as a defence to a claim in deceit (effectively on the basis that the misrepresentations cannot have induced the claimant to enter the contract: see below). However, in those circumstances "it is not enough to show that the claimant could have discovered the truth, but that he did discover it." It is not sufficient just to provide documents from which the claimant could work out the truth: the correction must be made fairly and openly: see *Peekay Intermark Ltd & Anor v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 at paras [29] - [40]. The explanation must be "quite clear": *Arnison v Smith* (1889) 41 ChD 348, 370 per Lord Halsbury.

*Falsity*

986. The representation must be false. A representation may be true without being entirely correct, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts: *Avon Insurance v Swire Fraser* [2000] Lloyd's Rep IR 535 at para [17] per Rix J.

*The mental element*

987. The classic statement of the mental element required to found a claim in deceit remains that of Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337, 374:

> "First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."

988. As to recklessness, even if the party making the representation may have had no knowledge of its falsehood, he will still be responsible if he had no belief in its truth and made it, "not caring whether it was true or false": see *Clerk & Lindsell*, at paras [17-22]. As Lord Herschell put it *Derry v Peek*, at 368:

> "Any person making such a statement must always be aware that the person to whom it is made will understand, if not that

> he who makes it knows, yet at least that he believes it to be true. And if he has no such belief he is as much guilty of fraud as if he had made any other representation which he knew to be false, or did not believe to be true."

989. It is not necessary that the maker of the statement was "dishonest" as that word is used in the criminal law: *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] 1 All ER (Comm) 1; [2000] CLC 133. Nor is the defendant's motive in making the representation relevant. "If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made": *Clerk & Lindsell* at paras [17-21], quoting *Bradford Third Benefit Building Society v Borders* [1941] 2 All ER 205, 211 per Viscount Maugham. What is required is dishonest knowledge, in the sense of an absence of belief in truth: *The Kriti Palm* at para [257] (Rix LJ). It is in that sense that I use the word "dishonest" in this judgment.

990. The ingredient of dishonesty (in the above sense) must not be watered down into something akin to negligence, however gross: *The Kriti Palm* at para [256]. However, the unreasonableness of the grounds of the belief, though not in and of itself supporting an action for deceit, will be evidence from which fraud may be inferred. As Lord Herschell pointed out in *Derry v Peek* at 376, there must be many cases:

> "where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one."

991. The standard of proof in a case of fraud is the balance of probabilities. Whilst the court of course considers what is alleged when deciding on inherent probability, this is purely an aspect of common sense, not the standard of proof, *In Re B* [2008] UKHL 35 at para [15] ("*In Re B*") per Lord Hoffmann. There is no necessary logical connection between seriousness of the allegation and the likelihood of its having occurred, nor should the court talk about more serious allegations requiring more cogent evidence: *In Re B* at paras [64] and [72] per Baroness Hale. This approach was reaffirmed in *Re S-B* [2009] UKSC 17 at paras [12] - [13]. See too *Arkhangelsky* referred to in Section B above.

*Intention*

992. Actionable fraud involves an intention on the part of the representor to induce the representee to act as he did.

993. The nature of this requirement was considered by the Court of Appeal in *Goose,* and subsequently *Mead v Babington* [2007] EWCA Civ 518 ("*Mead*"). Where a fraudulent misrepresentation has knowingly been made, there is a rebuttable presumption that the representor intended the representee to act in reliance on the representation: *Goose* at para [47]. It is not necessary for the representor to intend to induce the specific action taken by the representee in reliance on the misrepresentation: see *Goose* at para [48], where the Court of Appeal held that the "the more normal formulation is that the representor should intend to deceive

the representee, with intent, that is to say, that it shall be acted upon by him." In *Mead,* Longmore LJ applied *Goose*, holding that there "was no requirement that the representation had to be intended to be acted on in the manner in which damage resulted to the claimant. It was not the specific action of the claimant which had to be intended: it was only necessary that there should be an intention that the representation should be acted on…"

*Inducement*

994. A representee must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it, and that, having that understanding, he relied on it: *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2010] EWHC 1392 (Comm) at para [87]. This requirement is of particular significance in the case of implied representations.

995. In *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises* [2019] EWCA Civ 596 at para [43] ("*BV Nederlandse*"), the court held that, in a case of deceit:

> "there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter the contract and that the inference will be "very difficult to rebut" to use the words of Lord Clarke."

996. While the onus of proof is on the representee to prove inducement, he has the benefit of that evidential presumption, and he only needs to show that the misrepresentation was "actively present in his mind" when he made the decision to enter into the transaction (*BV Nederlandse* at para [45]). The phrase "actively present in his mind" is taken from the judgment of Bowen LJ in *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 where he explained the principle as follows:

> "But such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference".

997. It is sufficient for the misrepresentation to be <u>an</u> inducing cause of the claimant entering into the transaction on the terms that he did. It is not necessary for it to be the sole cause (*Hayward v Zurich* [2016] UKSC 48 at para [33] ("*Hayward*").

998. As Lord Clarke indicates in para [36] of *Hayward*, in the context of his discussion as to what is required to rebut the presumption of inducement, "the authorities in this area are not entirely consistent as to "whether what must be proved is that the misrepresentation played "no part at all" or that it did not play a "determinative part", or that it did not play a "real and substantial part"". This issue was not directly addressed in *BV Nederlandse*, although Longmore LJ did refer to the relevant part of Lord Clarke's judgment: see para [42]. The inducement issue in

*BV Nederlandse* was determined in the claimant's favour because the representation was "one of the reasons why the representee made the relevant contract": see para [49]. This – combined with the statements that "it is very difficult to rebut the presumption" – indicates that it is not appropriate to try to measure the precise weight of a representation where it is one of the reasons why a representee has entered a contract. If the representation is of no real significance, then a court will decline to hold that it was one of the reasons which induced the contract. If, however, it was a matter of significance, the decision will be the other way.

999. It is no answer to a claim in fraud that the representee could have discovered the falsity of the statement by exercising reasonable care and skill (e.g. by inspecting books or records available to him) *Hayward* at para [39]. It therefore does not lie in the mouth of a liar to argue that the claimant was foolish to take him at his word: *Clerk & Lindsell* at paras [17-41]. Nor can the representor escape liability (or argue that the representee was not induced by the false statement) simply because the representee's agent (such as his solicitor) is in receipt of the truthful information to correct a previous misrepresentation: *Wells v Smith* [1914] 3 KB 722, 725 per Scrutton J; *Clerk & Lindsell* at paras [18-37].

*Causation and loss*

1000. Often, as in the present case, a claimant's case in deceit will be that the representation caused or induced it to enter into a contract when it would not otherwise have done so. The claimant must show that "but for" the representation, the claimant would not have entered into the contract in question, or would only have done so on different terms. The relevant enquiry is whether the claimant would have entered into the contract if the representation had not been made at all, and not whether it would have done so if a different representation (i.e. the truth) had been made to it. If therefore the claimant would have entered into the relevant contract even if the representation had not been made, the claimant has no valid complaint. See *Leni Gas & Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm) at paras [16] – [19]; *Chitty on Contracts* 35th edition, Volume 1, at para [9-046].

## G2: The case on "Investment Representations" pleaded in the Re-Amended Particulars of Claim

1001. The Claimants' case of fraudulent misrepresentation (and indeed negligent misrepresentation) concerned the investments which the Claimants made in the Skew Base Fund, rather than the non-Skew-Base investments.

1002. A central aspect of that case was a trilogy of Investment Objectives which the Claimants alleged that they explained at a number of meetings, including the very first meeting in May 2016. This trilogy was that the di Montezemolo family's Investment Objectives were to: (i) preserve capital, (ii) invest in highly liquid products, and (iii) generate modest periodic returns. These objectives were repeated in the discussion at the June 2016 meeting. At the September 2016 meeting, when XY set out its recommendations, the Claimants allege that Mr Migani confirmed to Mr Nuzzo, MDM and LDM that "the strategy XY was

recommending was consistent with the Investment Objectives". Similarly, at subsequent meetings and in further documents, the Claimants made similar statements as to what their Investment Objectives were, and XY made similar statements as to how the strategy and investments that they were proposing were consistent with those objectives. The Claimants referred in that connection to the meetings on 26 October 2016; the 2 December 2016 phone call between MDM and Mr Migani; Mr Dalle Vedove's 14 December 2016 e-mail sent to MDM following the call; the 28 March 2017 meeting, where XY told MDM (and Mr Facoetti) that investing in the HFPO Centaurus Compartment was consistent with the Investment Objectives; the March 2018 meeting, where the new liquidity was discussed, and Mr Nuzzo was told that investing approximately 25% of the available money in MIN and HFPO products was "a good strategy that was consistent with the Investment Objectives"; the letter dated 23 May 2018 which stated that the investment strategy devised was "consistent with the objectives expressed by GIG"; the 6 June 2018 meeting; the slides sent to Mr Nuzzo for the purposes of the presentation which he and MDM were going to make to the di Montezemolo family; and the 18 September 2018 meeting, held following the concerns which Mr Nuzzo had allegedly conveyed to Mr Migani after reading the Offering Memoranda.

1003. In addition, the Claimants relied upon a number of other specific documents, including aspects of the presentations given by XY during the course of the relationship.

1004. In paragraph 77 of the RAPOC, the Claimants identified 6 representations which, separately and together, they described as the "Investment Representations". These were as follows:

(i) Investing in the Skew Base Fund HFPO and MIN Compartments was consistent with the Investment Objectives. Further or alternatively, XY and Mr Migani impliedly represented that, as a matter of fact, they honestly held the opinion that investing in the SB HFPO and MIN Compartments was consistent with the Investment Objectives and/or that they had reasonable grounds for their opinion;

(ii) The Skew Base Fund HFPO Compartment was highly liquid;

(iii) The Skew Base Fund MIN Compartment was highly liquid;

(iv) There was no real risk of capital losses;

(v) There were "Capital Risk Representations" in the slide, headed "Example of An Insurance Note" used at the June 2018 meeting.

(vi) That the risk disclosures in the HFPO and MIN Offering Memoranda were "standard", and this was intended to mean (and was understood to mean) that the risks could safely be disregarded and/or were insignificant. Alternatively, there was an implied representation that XY and Mr Migani honestly held the opinion that the risks were "standard" and/or had reasonable grounds for their opinion.

1005. Each of these representations was said to have been false.

1006. In relation to the Investment Objectives: the investments were not compatible with those objectives by reason of the following matters.

(i) The HFPO and MIN Compartments did not preserve capital: Investments in the HFPO and MIN Compartments were at risk of suffering significant capital losses due to the nature of products in the portfolio. The products were illiquid (or had limited liquidity), not diversified in terms of risk and purchased close to their expiration date. Consequently, in the event the market was disrupted or crashed, GIG could neither sell the products nor hold on to them until they regained their value, thereby exposing GIG to significant capital losses. The risk of capital loss was compounded by the high level of leverage in the fund, which was at all material times 400%.

(ii) The HFPO and MIN Compartments did not ensure a high level of liquidity nor protect GIG against systemic crisis in the market. The products in which the compartments traded were primarily complex financial instruments traded over-the-counter, which had limited liquidity. In respect of the Skew Base Fund HFPO Compartment, the low level of liquidity in the HFPO Fund was a primary reason why the compartment was unable to dispose of assets and meet the collateral shortfall in 2020 and had to be liquidated as stated in the notice to shareholders.

1007. The Claimants alleged that since XY and Mr Migani knew the true nature of the risks and investments, they did not and could not honestly have believed that investing in the HFPO and MIN Compartments of the Skew Base Fund was consistent with the Investment Objectives, and they had no reasonable grounds for so believing.

1008. The Claimants also said that, contrary to statements which had been made to them, the HFPO and MIN Compartments were not highly liquid.

1009. In relation to the risk warnings in the Offering Memoranda, these were not "standard" in the sense that they could safely be disregarded or were insignificant. The Offering Documents set out real risks relating to investing in the HFPO and MIN Compartments, and the Claimants would have known that they were not just standard.

1010. Contrary to the alleged representation that there was no real risk of capital losses, there was in fact a "significant" risk of capital losses.

1011. In relation to the Capital Risk Representations, contained in the "Example of an Insurance Note" slide, there was a false presentation of the position. First, markets other than the MSCI World index had fallen by over 10% on at least two occasions in the past, and the MSCI World index itself fell by 9.8% in 1987. Secondly, the statement that capital losses would be limited to 10% for every 1% that the market fell below the default barrier misrepresented the position "given the failure to explain that there would be significant or complete losses of capital due to the compartment being leveraged".

1012. The Claimants alleged that each of the Investment Representations had been made fraudulently. By a relatively late amendment, made in July 2024, the Claimants also alleged that the representations had been made negligently. They pleaded a case of inducement and reliance. In paragraph 81, the Claimants reserved their rights to allege that the advice and/or representations made by XY and Mr Migani in relation to the non-Skew Base HFPO and MIN investments were also made fraudulently. In the event, no such case was advanced.

### G3: The parties' arguments

1013. In broad summary, the Claimants contend that the representations pleaded in the RAPOC were indeed made, and they were false. They say that the investments in the Skew Base Fund were inconsistent with the Investment Objectives, due to amongst other things: (i) the risk to capital, which was very real (caused/amplified by the lack of diversity, the leverage/gearing embedded in each product and the credit provided by VP Bank); and (ii) the illiquidity of the products, which were not "highly liquid" as had been represented (and were particularly unlikely to be liquid in distressed market conditions, which would be when the professed liquidity would be most important).

1014. They also contend that the "example" repeatedly given of a MIN, gave a distorted and misleading impression, due to amongst other things (i) the embedded leverage in the majority of MINs meaning the capital loss was, in the majority of cases analysed for the Skew Base Fund investments as at March 2020, more than 10% for every 1% above the barrier and in fact double that amount; (ii) the MSCI World Index being relevant to only a minority of MINs in the Skew Base Fund, and that index having historically come very close to a 10% daily loss; (iii) many more MINs were tied to the Euro Stoxx 50 index (which had suffered an 8.617% drop on 24 June 2016) and the S&P 500 (which had dropped by 20.48% on 19 October 1987, and had suffered daily losses of between 8.79% and 9.04% throughout 2008); and (iv) there could be no expected "recovery rate", let alone one of 75%, because once a barrier event occurred on a stability note, the capital lost based on the redemption value of the note could not be regained.

1015. They also contend that warnings in the Offering Documents were not "standard": rather, they highlighted the numerous and significant risks involved in investments in the Skew Base Fund.

1016. XY and Mr Migani cannot have held a genuine belief that there were reasonable grounds for representing that the Investments in the Skew Base Fund were consistent with the Investment Objectives, given the matters set out above.

1017. The Claimants submitted that XY and Mr Migani made the investment representations knowing them to be false, alternatively without belief in their truth or recklessly in the sense of not caring whether they were true or false. They say that the requirement of inducement and reliance is made out on the evidence.

1018. In their written and oral closing submissions, the Claimants placed considerable emphasis on the lack of diversification of the products in the relevant Compartments. They submitted that the strategy adopted was highly

undiversified. The Compartments were heavily concentrated around two Underlyings, the Euro Stoxx 50 and S&P 500 indices. Those two indices had historically been highly correlated. Furthermore, the core risk across all the products was really the same: a sharp global market downturn in the equity markets. The lack of diversification was compounded by the fact that a number of the products were common to both Compartments, and MIN (EUR) itself held an investment in MIN (USD). In the HFPO Compartment, there was perfect correlation; because they were all exposed to the same risk, being the performance of the worst underlying index. Thus, the HFPO and MIN Compartments were neither diversified internally, nor against one another. All the products were exposed to the same event of default, and the Claimants were being encouraged to "place all the eggs in a single basket".

1019. In relation to the risk of capital loss, the Claimants alleged that the HFPO/MIN-type products were never explained. Two critical factors were the failure to explain gearing, and a continued downplaying of the risks of significant and total capital loss. The majority of the products in the HFPO Compartment in March 2020 contained embedded gearing, and this compounded the capital loss. It was not sufficient for the Claimants simply to understand that there could be a breach of the barrier. They needed to understand just how much capital could be lost (all of it) on the breach of essentially one barrier.

1020. The Claimants also submitted, relying on answers given by Mr Konrad in cross-examination, that the relevant Compartments (as at March 2020) appeared to be chasing returns which were much higher than 3%. They submitted that it was unconscionable for XY/Mr Migani to advise and encourage the Claimants to invest in Compartments that chased returns which, as they calculated, were of the order of 10.89% taking into account VP Bank's lending.

1021. In relation to liquidity, the Claimants submitted that the products had no reliable liquidity: no issuer of the products found in the MIN/HFPO Compartments as at 13 March 2020 guaranteed a secondary market. The MIN and HFPO investments, both inside and outside the Skew Base Fund, were illiquid especially in a volatile market which was precisely when they would need to be sold.

*XY and Mr Migani's arguments*

1022. XY and Mr Migani contend, again in broad summary, that none of the alleged misrepresentations were in fact made in the terms pleaded, and that each alleged misrepresentation involves either or both a false assertion as to what was stated by Mr Migani to Mr Nuzzo/MDM, or misconstruing statements lifted out of context. They submit that the Claimants' true objectives were markedly less cautious than they now seek to portray, and they were more than willing to take significant risks as a means to pursue higher return. They also contend that the straightforward risks and rewards of investing in MIN and HFPO products were explained to the Claimants as early as 20 September 2016.

1023. In relation to the Investment Objectives, they contend that the strategy of investing in the Skew Base Fund HFPO and MIN Compartments was consistent with the objective of preserving capital and high liquidity, within the context of a strategy in which the Claimants wished to target high returns and were

comfortable with the risk of making barrier-based structured investments. More generally, the investments were consistent with the objectives that were actually discussed between the parties: they provided the Claimants with predictable and fixed returns and would keep their value in all but the most extreme circumstances. The investments in the HFPO and MIN Compartments were, in all but exceptional circumstances, highly liquid and did preserve capital. The investments became illiquid and resulted in capital losses because the risks associated with the investments transpired in the exceptional market conditions at the onset of the Covid-19 pandemic.

1024. XY and Mr Migani contend that there was no misrepresentation as to the liquidity of the HFPO and MIN Compartments. The presentation in June 2018 referred to periods of 1 month and 3 months as being the time when it would typically take to redeem shares in the HFPO and MIN Compartments of the Fund. Those estimates were reasonably based.

1025. They deny that there was any representation that there was no real risk of capital losses, and they contend that the pleaded "Capital Risk Representations", based on the "example" slide, are quotations taken out of context from the 6 June 2018 slide presentation. They deny that Mr Nuzzo was told that the risk disclosures in the Offering Memoranda were "standard", or that any such statement could be understood to mean that the risks could be disregarded.

1026. Overall, they contend that none of the claims based on the investment representations had any merit. There was no false representation; neither XY nor Mr Migani was aware of (or reckless to) the falsity of any representation; neither of them had intended that GIG or MDM should act in reliance on any false representation; and neither GIG nor MDM did in fact act in reliance on any false representation.

1027. In their closing submissions, XY and Mr Migani submitted that the key factual finding which they invited the court to make was that the Claimants understood (i) that the barrier risk was the fundamental premise of MIN and HFPO investments, (ii) that in extreme market conditions, there was a risk that the barriers of the products might be breached; and (iii) that substantial or even total capital losses could follow from such breach. They submitted that it was unbelievable that the Claimants would have been willing to invest significant sums of money in products which they did not understand. It was, however, clear that they understood the risks. Mr Cloherty also emphasised the prominent warnings in the Offering Memoranda as to the risks of investing in structured products. Overall, he submitted that it was blindingly obvious that the risk of these products was that the barrier would be breached. The relevant HFPO and MIN products, on which the Claimants suffered losses, were all providing protection insurance against the risk of movements in market indices. It did not require a great deal of explaining, to people as sophisticated as Mr Nuzzo and MDM, that the essential risk was that the market index would crash below the barrier.

1028. In response to the Claimants' arguments on diversification, Mr Cloherty submitted that there was no pleaded representation about diversification as such. He submitted that the overall strategy on which XY advised was diversified. He

questioned whether there had been an adequate pleading of the case which the Claimants sought to make by reference to the precise composition of the relevant Compartments in March 2020. However, he submitted that the precise composition was not relevant, because the case of misrepresentation needed to be considered at the time that the representations were made. He also submitted that there was no logic to the Claimants' argument on lack of diversification. If (as the Claimants had submitted and had put to witnesses) market indices were correlated, then it would not be possible to diversify so as to avoid the impact, on markets generally, of a market crash. Since the complaint was about not explaining the risks of loss in the event of a market crisis, the argument on diversification did not lead anywhere.

## G4: Discussion

*Introduction*

1029. When one stands back from the detail of the case based on the allegations of fraudulent investment representations, there are a number of features which in my view make the case an improbable one.

1030. First, the case needs to be considered in the light of the fact that the Claimants were provided with a lengthy document which set out in some detail the investment policy that was to be applied to the HFPO and MIN Compartments in which they were proposing to invest. The Offering Memoranda identified the risks which were associated with the proposed investments. Mr Nuzzo accepts that he read the Offering Memoranda, and his signature on the share subscription forms acknowledges his understanding of the risks. MDM's evidence (which in this respect I have not accepted) is that he did not look at the Offering Memoranda at all, despite his signature of the share subscription forms indicating to the contrary and also indicating that he too had understood the risks of the proposed investment. As discussed in Section D above, whilst I have no doubt that MDM's review of the Offering Memoranda was less thorough than that of Mr Nuzzo, he would in all likelihood have read (at the very least) the Appendices which set out, in relatively straightforward terms, the nature of the proposed investments and the risks of investment. The RAPOC itself acknowledges that "the Offering Documents set out real risks relating to investing in the HFPO and MIN compartments" and positively asserts that these risks could not safely be disregarded or be considered insignificant.

1031. These matters have a bearing on various aspects of the Claimants' investment misrepresentation case, including the case concerning inconsistency with investment objectives, that there was no risk of capital loss, and liquidity. I have rejected Mr Nuzzo's case that he raised concerns, having read the Offering Memoranda, with Mr Migani as to the compatibility of investing in the Skew Base Fund with his investment objectives. However, it seems to me that (at least as far as GIG is concerned) this makes any case of misrepresentation, concerning compatibility with the Investment Objectives, very difficult if not impossible. Put simply, after a thorough read of the Offering Memoranda, Mr Nuzzo did not suggest that the proposed investments were not compatible with what he was seeking to achieve. The natural conclusion is, therefore, that – in his perception

at that time – they were compatible. This was the case notwithstanding the fact that, as was obvious to Mr Nuzzo, the proposed investments did carry some degree of risk, and that a successful outcome to the investment was not a matter that could be guaranteed. I do not consider that MDM's perception was any different, albeit that he did not carry out the same depth of review as Mr Nuzzo. The important point, in my view, is that the perception at the time was that these investments were indeed compatible with what the Claimants were seeking to achieve.

1032. The point does, however, go somewhat further. This is not a case where the only information that was provided to the Claimants was the information that was contained in the XY presentations and whatever may have been said at the meetings where they were presented. Rather, very detailed information was provided in the Offering Memoranda, explaining the risks of the proposed investments. These were documents which Mr Migani and XY were entitled to think that serious and experienced investors, such as Mr Nuzzo and MDM, would read for themselves; if not in every detail, then at least sufficiently to understand the nature of the risks which were being undertaken, and which the subscription form acknowledged that they understood. Against this background, it seems improbable for a party to seek to commit a fraud by misrepresenting the nature of the proposed investments, or their compatibility with what the investor is seeking to achieve, when the nature of the investments and the risks involved are going to be and have been explained in detail.

1033. Secondly, it is striking in my view that no allegation of fraud is made in relation to the non-Skew Base Fund investments. Prior to investing in the HFPO and MIN Compartments, and indeed at the same time as they were investing in those Compartments, the Claimants were all making MIN and HFPO investments outside the Skew Base Fund as well. Indeed, Mr Nuzzo (on behalf of GIG and LDM) was investing in these products for around 18 months before GIG invested in the Skew Base Fund. There was, in my view, no fundamental difference between the investments which were made by GIG, SRL and MDM prior to their decision to invest in the Skew Base Fund, and in parallel with their investments in the Fund, and the investments which the Skew Base Fund was itself proposing to make and did make.

1034. It is, in my view, difficult to see any logical reason why, if there was no case of fraudulent investment representations in relation to the non-Skew Base Fund investments, there was nevertheless a sustainable case of fraud in relation to the Skew Base Fund investments. I agree that this is not a complete answer to the case, not least because it is open to a party to decide to confine a case of fraud to one category of investment, and not to pursue a case of fraud in relation to another similar category. However, it does cause one to question whether there is any sustainable case of fraud in relation to the Skew Base Fund investments. Indeed, one of the odd features of the Claimants' case is that fraud is alleged in relation to what was said in a slide used in 2018 (at a time when possible investment in the Skew Base Fund was being considered), when materially the same slide had been used in 2016 (when the nature of a MIN was being explained) and no fraud is alleged at that time.

1035. In my view, one reason why there is indeed no sustainable case of fraud in relation to the non-Skew Base Fund investments is because XY and Mr Migani had no obvious motive to mislead the Claimants into making those investments. As Mr Saoul acknowledged in his closing submissions, there was no evidence that XY or Mr Migani or anyone connected with him had received any kickbacks from counterparties in relation to those investments. Whilst it is true that motive is not a necessary ingredient of a claim for fraudulent misrepresentation, a party does not usually commit a fraud without a good reason to do so: see *Suppipat* (quoted in Section B above). In the present case, the strategy of proposing investments in HFPO and MIN products started with the presentations made (in relation to GIG and LDM) in the autumn of 2016. I have no doubt that, at that time, Mr Migani and indeed Mr Dalle Vedove believed that this was a sensible and appropriate strategy for GIG and LDM, and that it was consistent with the discussions which were taking place (see Section D above) concerning their objectives. It was in the interests of XY and Mr Migani for the investment strategy to work, and to be seen to be working. That is what a consultant, advising on strategy, would hope to achieve for its client, with the concomitant expectation that the client would be happy to continue the relationship which would then strengthen. There was in my view no reason, and certainly no obvious reason, for Mr Migani to suggest a strategy which was contrary to his understanding of what his clients were seeking to achieve.

1036. Thirdly, it is in my view important to bear in mind that the Skew Base Fund, including its MIN and HFPO Compartments, was intended to be and, in fact, became a very substantial, legitimate and professionally run operation. It was not a Ponzi scheme or anything like that. It was established in the hope and expectation that its investors would make substantial profits from their investments. Indeed, prior to the market turmoil caused by the Covid pandemic in early 2020, investors were making substantial returns from their investments in these Compartments. As described in Section D above, at the final meeting that took place between the parties prior to the pandemic (on 22 January 2020) XY reported very healthy returns to Mr Nuzzo and MDM. The overall net return produced in 2019 by GIG's financial assets was 3.84%. The MIN Compartment had performed in line with the target return of 3.1%. The HFPO investment had outperformed the target return, and achieved 4.8%. The MIN (USD) Compartment had also outperformed its target return, achieving a 7.3% return. Healthy returns had been reported at previous meetings in 2019. There is no reason to doubt that both MDM and Mr Nuzzo were pleased with the performance: there is no evidence of any concern or complaint that the returns were too high. There is also no suggestion or evidence that these reported results were in some way inflated, and did not represent the true performance of the relevant Compartments of the Skew Base Fund. If the Covid pandemic had not hit, with its significant impact on financial markets, the Claimants would no doubt have continued to enjoy the strong returns that their investments in these Compartments were capable of achieving.

1037. With that background, I turn to the particular misrepresentations relied upon. In so doing, I shall focus on the pleaded case of misrepresentation. It seemed to me that a fair number of the points which the Claimants sought to develop in closing did not reflect the misrepresentation case that had actually been pleaded. For

example, there was no pleaded case based on the proposition that the Skew Base Fund was in fact chasing returns which were in excess of the percentage returns which had been discussed as part of the Investment Objectives. There was also no pleaded case of a false representation as to the intended diversification of investments in the MIN and HFPO Compartments. The case as to why the "Example" slide was misleading also, as it seemed to me, departed from the pleaded case. I consider that in a case such as the present, where a serious allegation of fraud is made, it is appropriate to consider the parties' arguments by reference to the case which has actually been pleaded.

*Investment objectives*

1038. Section D above contains my findings as to the extent to which there was identification and discussion of the Claimants' investment objectives at the various meetings which took place between 2016 and 2018. There is no difficulty in principle in the Claimants seeking to distil, from these various meetings, a set of investment objectives, or shared goals, which were the subject of a representation by XY. As set out above, different statements at different times can be read or construed together in order to understand their combined effect as a representation.

1039. It is, however, necessary to exercise a degree of caution in so doing, in circumstances where there was a series of meetings and discussions over a long period of time, with an iterative process underway, and the parties reacting to events which occurred during that time – in particular the availability of new liquidity which was the subject of discussion which began in early 2018. In *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601, Rix LJ said that special care must be taken in respect of alleged oral representations as "the natural ebb and flow of conversation as part of an essentially interactive process means that it differs significantly from a written document. It does not necessarily have a single writer's logic, it is not composed and it cannot be read as a whole before its communication". In my view, that applies with particular force in the context of representations derived from a lengthy series of meetings.

1040. I think that the evidence shows that, by the time that the Claimants came to invest in the Skew Base Fund, the process of discussion had resulted in broad agreement on what could be regarded as the high-level overall investment objectives of the Claimants, and what XY's strategy was aimed at achieving. These were conveniently set out in the slide presentations which were close in time to the decision, which was made first by MDM, and then by Mr Nuzzo, to invest in the Skew Base Fund.

1041. As far as MDM is concerned, the presentation for the 28 March 2017 meeting set out the "Shared Goals at the Start of 2017". This had 4 bullet points (which were very similar (but not identical) to those contained in the slide for the 2 March 2017 meeting). They were:

> "• To generate stable and measurable growth in the real purchasing power of assets with safeguard-oriented and readily liquidated investment strategies

> • To produce regular cash flows that, when supplemented by salary and other income, will enable the company to meet its commitments and spending requirements in Italy and the UK
>
> • To fully benefit from UK RND tax status, including overcoming the limitations of the current architectural model with efficient and robust solutions
>
> • To optimise costs weighing on assets, including through targeted interventions on existing real estate mortgages".

1042. As far as Mr Nuzzo and GIG are concerned, the presentation for both the April and June 2018 meetings contained an identical slide which set out the "Investment Strategy Guidelines for New Liquidity". These had 4 bullet points, the relevant ones being as follows:

> "1. **Preserve** capital and generate a periodic **income stream**
> - Target cash income of 3% net of costs, to be distributed to members on an annual basis
> - High liquidity of the strategy
> - Prevalence of investments with very predictable returns
>
> 2. Manage Any A**dvances** of Income to Shareholders, **Without Affecting Capital**
> - Use of purpose-designed funding
> - Design of financing repayment plans through income generated from year to year"
>
> "4. Seize Possible **Entrepreneurial Investment Opportunities** Over Time
> - Consider 20-30 M€ as potentially amount to place
> - Maintaining flexibility on funding sources: capital vs. Lombard credit".

1043. There is a considerable degree of overlap between these objectives, set out in the slides, and those which have been pleaded by the Claimants. Thus, the "preserve capital" objective, pleaded by the Claimants, is reflected in "safeguard-oriented … strategies" (slide for MDM meeting) and "Preserve Capital" (slide for GIG meetings). The "highly liquid products" is reflected in "readily liquidated investment strategies" (MDM presentation) and "high liquidity of the strategy" (GIG presentation). The "generate modest periodic returns" is reflected in "produce regular cash flows …" (MDM presentation) and "Generate a Periodic Revenue Stream" (GIG presentation).

1044. Although there is a degree of overlap, they are not precisely the same. The slides also refer to some other objectives. For example, in the case of MDM, there is reference to "stable and measurable growth in the real purchasing power of assets", as well as "overcoming the limitations of the current architectural model with efficient and robust solutions". There is also reference, in the case of GIG,

to using "purpose-designed funding", and seizing entrepreneurial investment opportunities. Furthermore, the slides do not refer to "modest" periodic returns. The MDM presentation slide refers to using cash flows which, when supplemented by salary and other income, will enable SRL to meet its commitments and spending commitments in Italy and the UK. The GIG presentation slide refers to a target of 3%. This could not necessarily be described as "modest" at the time: when Mr Nuzzo gave his presentation to the family in July 2018, he described 2.5% as being difficult to achieve in the then current market conditions.

1045. Ultimately, however, I do not consider that these differences between the pleaded representations, and their formulation in the slides, affect the analysis of whether – in relation to the areas where there is unquestionably an overlap – there was a fraudulent misrepresentation. It is, however, important also to bear in mind that the high-level objectives identified in the slides were also fleshed out in the discussions between the parties.

1046. The slides for the 31 March 2017 meeting with MDM (and Mr Facoetti) proposed that there should be an investment by SRL in the HFPO Compartment. The slides for the April and June 2018 meetings similarly proposed investment by GIG, with the new liquidity, in the HFPO and MIN Compartments. I consider that there is no real difficulty in concluding that the slides to which I have referred contain an implied representation which is very similar to that pleaded by the Claimants: that investing in the Skew Base Fund HFPO and MIN Compartments was consistent with the high-level investment objectives which had been identified by the parties and which were set out in the slides. Furthermore, in relation to GIG, there was later an express representation, contained in the draft letter sent by Mr Dalle Vedove on 29 May 2018 – and which was then discussed at the June 2018 meeting – which stated: "XY hereby certifies that the investment strategy is consistent with the objectives expressed by the Client". Although the letter does not expressly identify those objectives, I consider that it naturally refers to the objectives which had been discussed at the various meetings, and (at a high level) were summarised in the slide for the previous meeting in April 2018, and which was repeated in the presentation for the 6 June 2018 meeting which took place shortly thereafter.

1047. Although I consider that this representation was made, I do not consider that it can properly be said to be a statement of fact. The question of whether a proposed investment is consistent with a series of objectives, such as those set out in the slides referred to above, is in my view quintessentially a matter of opinion. The slides set out a range of objectives, and the question of whether any particular investment was one which met all of the identified objectives is in my view a matter of judgment or opinion, rather than fact. It is also not difficult to see that it is an area where different professionals may have different views. It is not a question to which the answer is objectively verifiable. This representation, although made, cannot itself ground a claim in deceit.

1048. Accordingly, as recognised in the Claimants' alternative formulation of this plea, there was an implied representation that, as a matter of fact, XY and Mr Migani honestly held the opinion that investing in the Skew Base Fund HFPO and MIN Compartments was consistent with the investment objectives which had been

discussed between the parties and which were then summarised in the relevant slides. On that issue, I have no doubt that XY and Mr Migani did honestly hold that opinion. I consider that the evidence is clear that Mr Migani was a great believer in the wisdom of making investments in HFPO and MIN products. They would potentially, if no extreme event occurred, produce a much better and consistent return than was then available through investing in more traditional asset classes such as bonds. They would also provide a very significant degree of capital protection, since they would not be affected by market falls unless they were "extreme". This is because losses would only potentially arise if there was a breach of the barrier, and the barriers were set in such a way (so it was perceived) that they would only be breached in extreme circumstances: for example, in the case of MIN, a 10% fall in an equity index, which itself contained a wide spread of different companies; or, in the case of HFPOs, falls (during a relatively short period of time) of between 32% and 38% (in the examples given on Slide 43 for the September 2016 presentation, repeated in later presentations), or between 24.4% and 35.6% (in the information on Slide 18 for the October 2016 presentation). It was because of his belief in the wisdom of investing in those products that the Skew Base Fund HFPO and MIN Compartments were created, and why Mr Migani proposed to other XY clients that they should invest in those compartments. Indeed, Twinkle itself invested in the Short-Term Arbitrage Compartment of the Skew Base Fund, and this invested in HFPO products.

1049. It is of course true, as the Claimants have pleaded, that Mr Migani was aware of the risks of investing in such products, whether directly or indirectly via the Skew Base Fund. Indeed, those risks were set out in detail in the Offering Memoranda. However, awareness of those risks does not mean that investment in the HFPO and MIN Compartments was inconsistent with the investment objectives. Mr Migani believed that there was a very low risk of these products losing money, and this belief was reflected in the Appendix to the Offering Memoranda for the MIN (EUR) and MIN (USD) compartments. That Appendix described (under "Specific risks") the risks on different products, including both "Stability/gap notes" and reverse convertibles (i.e. both MINs and HFPOs). It identified the investment objective as being to "generate a positive return by investing in structured products that extract returns by insuring other market participants from market events that have a very low occurrence probability". Mr Migani believed that his strategy was a conservative approach: the Appendix told investors (under Specific Risks) that they "should carefully consider that even considering the very conservative approach, extreme or unprecedented market development may affect the strategy".

1050. However, even though Mr Migani (and through him XY) genuinely held this opinion, the question arises as to whether or not they had reasonable grounds for their opinion, and, if not, whether Mr Migani was dishonest (in the sense described in Section G1 above) in expressing it. I accept the Claimants' argument, applying the principles and case-law referred to in *Clerk & Lindsell* at paras[17-15] (including *Brown v Raphael* [1958] Ch 636) that the relevant representation was not only that Mr Migani/XY did hold the opinion that they expressed, but that the opinion was based on reasonable grounds.

1051. In my view, Mr Migani did have reasonable grounds for the opinion that the investment in the Skew Base Fund HFPO and MIN Compartments was compatible with the investment objectives as set out in the slides, and in any event there was no dishonesty on his part (or indeed on the part of Mr Dalle Vedove, against whom no allegation of fraud is made) in taking that view.

1052. In considering whether it was reasonable to think that the proposed investment was compatible with the investment objectives, it is important to look at the various objectives as a whole, and not simply in isolation. It is also important to look at these objectives in the context of the market which then existed and the range of investment options open. A theme which runs through the Claimants' case, and their evidence, is that the preservation of capital, or a "safeguard-oriented" investment strategy, was the paramount consideration; and that therefore it was unreasonable for XY to propose a strategy that would expose the capital to any risk or any "significant" risk of losing capital. However, the Claimants were clearly not interested in just putting their money in the bank or in buying government bonds. Given low interest rates on bank deposits and in the European bond market, such a strategy would not in fact have preserved capital. The capital would have been eaten away by negative interest rates, inflation and also the payments or distributions which were referred to in the slides: whether to meet Italian and UK expenses (in the case of MDM), or to "manage advances" to shareholders (in the case of GIG). Furthermore, it would not have satisfied one of the other objectives (which was related to the payments of expenses and distributions), namely to generate a revenue stream (with a target of 3% net of costs in the GIG slides). It is also the case that if these various objectives were to be achieved, there would necessarily have to be some exposure to risk. It is unrealistic to imagine that any investment, which would pay substantially in excess of then market rates for high quality bonds, would be entirely risk-free. Indeed, one would not have to look at the Offering Memoranda for very long in order to understand that there were risks involved in the proposed investment, and indeed risks were expressly referred to in the declaration in the subscription form.

1053. Against this background, I turn to each of the objectives on which the Claimants have focused, with a view to asking whether – in the context of the objectives as a whole and the overall market context – it was reasonable for Mr Migani to take the view that the proposed investment in these Compartments was compatible with the objectives.

*The "safeguarding" objective*

1054. In relation to the "safeguarding" of capital, it is obvious now – and would have been obvious to the Claimants at the time – that there was no absolute assurance that no capital would ever be lost as a result of investing in HFPO or MIN products, whether directly or via the Skew Base Fund. The possibility that capital, in significant amounts, might be lost was apparent from a variety of documents that the Claimants were shown or received: for example, the "Example" slide; the term sheets for the non-Skew Base products; and the Offering Memoranda. It was also apparent as a matter of common sense for reasons already explained; in summary because the Claimants could not realistically expect to receive a coupon, significantly higher than the market rate for high quality bonds, in return for taking no risk at all. In my view, the concept of "safeguarding" or preserving

capital cannot reasonably be understood, and was neither intended nor reasonably understood to mean, that there was no risk at all.

1055. The essential reason why Mr Migani and XY took the view that investment in HFPO and MINs, whether inside or outside the Skew Base Fund, was compatible with the investment objectives was as follows. The barrier mechanism provided a very considerable protection against any loss of capital at all. Whilst this was not an absolute protection, so that there was indeed a risk of capital loss, that risk had a "very low occurrence probability" (to use the language of the MIN Offering Memoranda). The very low occurrence probability was illustrated, in the presentations, by various slides (see Section D above) which identified, in mathematical terms, what the probability was of the occurrence of the event which would potentially cause loss. In all cases, the probability shown on the slides was indeed extremely low.

1056. There is no evidence, and indeed no pleaded case, that these very low probabilities were wrongly calculated by XY, or that the probability was significantly higher than what it was represented to be. In the correspondence subsequent to the events of March 2020, and as described in Section D above, Mr Nuzzo did take issue with the way in which the probabilities had been calculated, and his points were dealt with in detail by Mr Dalle Vedove at the time. Neither the points which Mr Nuzzo then put forward, nor any other points as to miscalculation of the probabilities, have been advanced in this litigation. Instead, the Claimants' pleaded case is that there was a representation that "there was no real risk of capital losses". As discussed below, I do not accept that this representation was in fact made. But for present purposes, the important point is that there is no pleaded case concerning false statements that the probability of a loss of capital was very low, nor that it would take "extreme" circumstances for barriers to be breached.

1057. Against this background, it was in my view reasonable for XY to consider (as they genuinely did consider) that investment in HFPOs and MINs, whether directly or indirectly via the Skew Base Fund, was compatible with the "safeguarding" or "preserve capital" objective. The barrier mechanism provided a very significant "safeguard" since it had the effect of preserving capital even if there were adverse downward market movements. Thus, when equity markets suffered a downturn in 2019, the capital invested in MINs and HFPOs remained fully intact, and at the same time produced a coupon which was very attractive in comparison with the returns on investment grade bonds and other similar investments. Whilst these investments did expose the Claimants to a risk of capital loss, there was only a very low probability of the occurrence of the extreme events which would make that risk a reality.

1058. It is also the case, in my view, that the Claimants themselves took the view that investment in HFPOs and MINs was consistent with the safeguarding objective. In Section D above, I have concluded that the Claimants were aware that such investments did carry a risk of capital loss, indeed substantial capital loss. However, they also understood how the barrier mechanism meant that there was a very substantial shield against any loss at all. This meant that these products were significantly different to, for example, "tracker" investments which track an equity index, and which are familiar to retail and indeed more sophisticated

investors. With an ordinary investment in equities, or in an equity tracker, an investor is exposed to all falls in the market, so that there is no element of capital being "safeguarded". However, the position is different with these barrier products, in that ordinary market falls will not impact upon the investor's capital. The safeguard was, of course, not absolute. Nor could it reasonably be expected to be absolute: there had to be some quid pro quo for the coupon that was payable, and the fact that the investor was not being exposed to ordinary market falls. That quid pro quo was the risk that the investor was taking. I consider that the Claimants clearly took the view (consistent with Mr Migani's approach) that the risk had a very low probability of eventuating, and that it was therefore a risk that was worth taking in view of the potential rewards. Since the Claimants themselves took that view, it cannot be said that it was unreasonable for Mr Migani to have the same view.

1059. This conclusion is, at least to some extent, reinforced by the fact that there is no allegation of fraudulent or negligent misrepresentation in relation to the MIN and HFPO investments which were made outside the Skew Base Fund. In other words, it is not being said that XY made dishonest (or indeed negligent) misrepresentations as to whether the MIN and HFPO investments made outside the Skew Base Fund were consistent with the Investment Objectives relied upon. I consider that those investments were indeed consistent with the investment objectives and were so perceived by the Claimants notwithstanding the risk involved.

1060. I also agree with XY's submission that it is not surprising that the Claimants should be willing to take this risk, because it would be wrong to regard them as being entirely risk-averse. There is a considerable amount of evidence which indicates a willingness on the part of Mr Nuzzo and MDM to take a degree of risk, sometimes a considerable degree, in relation to investments. For example, they (including LDM) were attracted towards investment in equities, including substantial equity investments in single companies. MDM was attracted to reinsurance instruments. He was also attracted to investments which were described in the documents as "speculative". That is not to say that the MIN and HFPO products were regarded as being speculative: they were always categorised by XY as being in a category of "safeguarded" assets. However, that does not mean that they were understood to be risk-free.

1061. I accept that it does not automatically follow, from the fact that investment in HFPOs and MINs was consistent with the safeguarding objective, that investment in those products in the Skew Base Fund was consistent with the investment objectives. However, I do not consider that there is any significant difference in the present context between investing directly in the products, and investing indirectly via the Skew Base Fund. The HFPOs and MINs inside the Skew Base Fund were the same type of instruments as those which were invested in outside the Fund. If (as I consider to the be the case) Mr Migani and XY reasonably held the view that direct investment in MINs and HFPOs was consistent with the investment objectives, there was no reason for them to take a different view when considering whether investment in the same products, but within the Fund, was consistent with those objectives.

1062. It is necessary in this context, however, to consider particular points which the Claimants have made as to the specifics of the Skew Base Fund, and which (possibly) could be said not to apply to the individual investments.

1063. The Claimants advance an argument in relation to the lack of diversification of the investments in these Compartments in the Fund. There is, however, no pleaded representation or misrepresentation as to diversification.

1064. Lack of diversification is, however, pleaded as a reason why there was falsity in the representation as to consistency with the objectives. The Claimants plead that: "The products were illiquid (or had limited liquidity), not diversified in terms of risk and purchased close to their expiration date". The Claimants' argument, as it developed (and as summarised above), focused on the fact that the investments in the Skew Base Fund, in both the HFPO and MIN Compartments, were (at least at the time of its collapse in March 2020) largely based on two equity indices: S&P 500 and Euro Stoxx 50, with only a minority of investments in the MSCI World index. They contend that there is a "correlation" between, in particular the S&P 500 and the Euro Stoxx 50 indices, in the sense that they may follow a similar pattern of rising and falling. Specifically, they contend that if the market "was disrupted or crashed", then the market disruption or crash would be likely to affect all equity markets and hence the indices on which the Skew Base Fund investments were based.

1065. Different witnesses expressed different views as to the extent to which markets are correlated, and in what circumstances. Mr Konrad's view was that in extreme market conditions, different equity markets were very highly correlated. This means that the fact that investments are apparently "diversified" because they are based on different indices does not provide any substantial degree of protection. It appears that a senior colleague at VP Bank took a different view. Mr Migani made the point in his evidence that the MIN and HFPO products, in which the Claimants invested both inside and outside the Fund, were inherently or internally diversified. This was because the underlying asset was in each case a broadly-based equity index, rather than (for example) the equity in a single company or a handful of companies. He also said that in ordinary market conditions, equity markets did tend to be correlated. This was, however, not the case, or at least not always the case when there was an external shock. Mr Dalle Vedove agreed that the 3 indices (Euro Stoxx 50, S&P 500 and MSCI World) were correlated, but he said that they were not highly correlated in that there could be events which can be meaningful for one index but not another. He referred in that context to Brexit being very meaningful for the Euro Stoxx index, but less impactful on the S&P 500.

1066. In my view, the evidence does suggest that different asset classes, and different equity markets and indices, may well all be significantly affected by market disruption or crashes, and that therefore markets are to some extent correlated. The Offering Memoranda make this point in the context of "Economic risk" (Section 5.3.1):

> "The value of investments held by a Compartment may decline
> in value due to factors affecting financial markets generally …

> During a general downturn in the economy, multiple asset classes may decline in value simultaneously".

Indeed, as Mr Konrad explained in his evidence, the impact of Covid-19 adversely affected a very broad range of assets and asset classes, and there were few which escaped unscathed.

1067. I do not consider that any of this is surprising. Anyone who listens or watches news reports concerning financial markets will have heard, for example when there is bad news, of simultaneous falls in equity markets around the world. One of XY's slides, described in Section D above, showed the movements of the Euro Stoxx 50 and S&P 500 over a period of time, and this showed that the indices did frequently (but not always) move upwards or downwards at more or less the same time. The Claimants were experienced equity investors. The portfolio first examined by XY in 2016 was heavily concentrated in Italian equities, including substantial investments in a single company. The Claimants continued to invest part of their assets in equities throughout, and one of the attractions of Lombard credit was that it would enable equity investments to be made. There is nothing in the evidence which suggests that the Claimants were unaware that there was a degree of correlation between different equity markets, or unaware that a significant fall in one equity market might well be replicated by falls in others.

1068. I am not persuaded, however, that the correlation between equity markets, or the fact that the Skew Base Fund was primarily invested in assets based on two equity indices, and that these were to a degree correlated, advances the Claimants' case on the question of whether investment in the Skew Base Fund was consistent with the investment objectives, and whether there was a fraudulent or negligent misrepresentation to that effect. The Claimants' plea on diversification is linked to a consequence: namely that "in the event that the market was disrupted or crashed, GIG could neither sell the products nor hold on to them until they regained their value, thereby exposing GIG to significant capital losses". However, the essence of the risk which was inherent in these instruments was that there might be an extreme event or circumstances; in other words, a market crash, causing a capital loss in the investments in HFPO and MIN products. For reasons already explained, the existence of this risk did not mean that investment in the Skew Base Fund HFPO and MIN Compartments was inconsistent with the relevant objectives. The fact that equity markets may move in a similar way, and therefore may be correlated, is simply one aspect of the essential risk that was undertaken. The fact that all (or nearly all) of the products within the HFPO and MIN Compartments were based on 2 (or 3) equity indices, and were therefore exposed to a risk that equity markets around the world would crash at the same time, does not mean that there was an inconsistency between the investment in those compartments and the investment objectives. This was, in essence, the risk that the Claimants were taking by investing in these products both inside and outside the Fund, and was the quid pro quo for the benefits of these products.

1069. There was no significant difference between the products in which the Claimants invested outside the Fund, and those in which the relevant Compartments of the Skew Base Fund invested. The parties' agreed schedule identified the underlying asset upon which the non-Skew Base HFPO and MINs were based. There was the

occasional investment in an oil-related instrument, but the overwhelming majority were in one of 4 equity indices: S&P 500, Euro Stoxx 50, MSCI World index and the DAX index. Of those, the S&P 500 and Euro Stoxx 50 formed the substantial majority. For example, in the period between February and July 2018, there were 40 investments, of which 32 were in Euro Stoxx 50 (26) and the S&P 500 (6). When making the decision to invest in these products, following XY's proposal, the Claimants were usually given details (in XY's proposal e-mail) of the underlying index on which the product was based. It is apparent that they did not consider there to be any inconsistency between their investment objectives and investments which were concentrated in a small number of equity indices, in particular Euro Stoxx 50 and S&P 500. I consider that XY and Mr Migani could reasonably take the view that, if the Skew Base Fund Compartments were to follow an approach of making similar investments, that would be compatible with the Claimants' objectives.

1070. A key reason why the Claimants would not have perceived that there was any inconsistency with their investment objectives, notwithstanding the apparent concentration of risk in the Euro Stoxx 50 and S&P 500 indices, is that an investor in this type of structured product will be taking a view on the probable performance of the equity index in which he is investing, and the unlikelihood of a market crash which will impact upon the barrier contained in the instrument. If the investor considers that the risk is very low, then he may well invest a fair sum of money in instruments which are linked to the same index; just as an equity investor might take a substantial stake in a company that he believes is sound and will perform well (as LDM did, as he explained in evidence, in relation to one of the Italian companies). The investor will be taking that view in the knowledge that if there is a market crash which affects that particular equity index, there is a very strong possibility, if not a likelihood, that other equity market indices will be similarly affected, since (as discussed above) it is no secret that equity markets around the world can rise or fall in a similar way at a similar time, responding to particular events or circumstances.

1071. Ultimately, therefore, the investment is linked to whether or not there is likely to be an equity market crash which will impact the barrier. If such a crash does occur in a particular equity market, then it may well occur elsewhere. Mr Saoul made the point, in his oral argument concerning diversification, that the equity investments in the Skew Base Fund were all "at risk of a single event of default": they were exposed to "the very same event of default". This argument was, as it seemed to me, based on the notion that if there was a market crash of such severity as to impact the barrier in respect of one equity index, then there was a likelihood that it would affect more than one equity index, and that therefore investment in more than one index would not provide any real protection. Broadly speaking, I agree. However, it does seem to me that this was the essence of the risk that the Claimants were taking, and of which they were aware.

1072. Furthermore, there is nothing in the evidence which suggests that, in the event of a market crash, a different make up of structured products within the Compartment would have fared any better, and if so, what that make-up would or should have been.

1073. Another argument advanced by the Claimants, as to why investment in the Fund was not compatible with the Investment Objectives, concerns the high leverage in the Fund. For reasons discussed in Section D above, Mr Nuzzo and the Claimants were wrong to suggest that the leverage was 400% on a conventional loan to value basis. Rather, as Mr Nuzzo was told in the letter sent by Mr Ries and Mr von Kymmel, borrowings would not exceed 80% on loan to value basis.

1074. I do not consider that the ability of the Fund to have significant leverage is a reason why investment in the Fund was not compatible with the investment objectives. When investing outside the Fund, the Claimants were attracted to using Lombard credit in order to increase the returns on their assets. In relation to the Fund itself, XY's presentations clearly set out the intended use of leverage to increase returns, and Mr Nuzzo accepted that he was attracted to the idea that there could be leverage on the part of the Fund itself, but without exposing the investor beyond the value of the investment. Furthermore, the use of leverage was clearly stated in the Offering Memoranda, and indeed it led Mr Nuzzo to ask questions in September 2018. It was these questions which then led to the provision of the letter signed by Mr Ries and Mr von Kymmel referring to 80% leverage. Against this background, where the use of leverage within the Fund was explained and was attractive to the Claimants, I do not consider that there was any incompatibility with the relevant investment objective, or that XY or Mr Migani should reasonably have considered that there was.

*The liquidity objective*

1075. The second aspect of the Investment Objectives was (to use the language of the relevant slides) "high liquidity" or "readily liquidated investment strategies". The alleged illiquid nature of the products, or their limited liquidity, is also relied upon as part of the argument as to why the HFPO and MIN Compartments did not preserve capital investment.

1076. I will start by summarising the most relevant evidence which bears on this point. There were various sources of evidence concerning the extent to which the underlying MIN and HFPO products, in which the Compartments were intending to invest and did invest, were or were not liquid.

1077. There was, clearly, a liquidity risk which was associated with these products. This was made clear in a number of places in the Offering Memoranda, including the Appendix for the MIN Compartments.

1078. Section 5.3 described the Liquidity risk in some detail, and I have quoted this in full above. It included the following:

> "In certain circumstances, investments may become less liquid or illiquid due to a variety of factors including adverse conditions affecting …. the market generally. In addition, a Compartment may invest in financial instruments traded over the counter or OTC, which generally tend to be less liquid than instruments that are listed and traded on exchanges … Difficulties in disposing of investments may result in a loss for

> a Compartment and/or compromise the ability of the Compartment to meet a redemption request …".

1079. Section 5.4.2 (again set out above in full) described the Structured products risk. This included:

> "… there is normally no deep market for structured products, so that they might be subject to the liquidity risk. Consequently, it might be difficult to sell the structured product even in normal market environment or only possible at a significant discount. In addition, the structured products may be highly customised".

1080. The Appendix for the MIN Compartments, under the heading Specific risks, said:

> "Finally, Shareholders of the Compartment should carefully consider that for stability/gap Notes and other investment certificates, the liquidity of the market is limited and provided mainly by the issuer of the certificate or by the OTC transactions".

1081. The term sheets for the MIN and HFPO Products are another source of information as to the liquidity of these products. For some of the products, the issuer expressly agreed to provide a secondary market. For example, the Commerzbank's term sheet for one of the early MIN transactions stated that: "Commerzbank AG will provide a secondary market; the prices on the secondary market will be dependant on the market conditions".

1082. Other term sheets indicated that a market would be provided on a reasonable endeavours basis. For example, the Morgan Stanley term sheets, about which Mr Nuzzo asked questions in January 2018, provided the following against "Market Making":

> "Under normal market conditions, and subject to applicable law and regulations and Morgan Stanley internal policy, Morgan Stanley & Co. International plc will use reasonable endeavours to quote bid and offer prices. However, Morgan Stanley & Co International plc will not be legally obliged to do so."

1083. The term sheets then identified the "Liquidity Risk", stating that the securities would not be traded on an organised exchange and that: "Any secondary market in the Securities made by the Dealer will be made on a reasonable efforts basis only and subject to market conditions".

1084. Similarly, the term sheet for the UBS "worst of" product, which was discussed between Mr Chardigny and MDM in April 2017, contained a "Secondary Market" provision which provided that the "Issuer or the Lead Manager, as applicable, intends, under normal market conditions, to provide bid and/or offer prices for this Product on a regular basis". However, there was no legal obligation to do so. It also provided that "under normal market conditions, as reasonabl[y] determined

by the Calculation Agent, the spread between the bid and offer prices will not exceed 0.5%".

1085. In the course of his opening submissions, Mr Cloherty referred to the XY slide dealing with "Short Term Arbitrage Strategies" (see Slide 43 of the September 2017 presentation, reproduced in Section D). This referred to "High Liquidity (market bid-ask spread [less than] 1%)". He submitted, and I accept, that a bid-ask spread of less than 1% is an indication of good liquidity; because the buying and selling prices are close together.

1086. In Annex C to their opening submissions, the Claimants listed all of the instruments in the HFPO and MIN Compartments as at 12 March 2020, and helpfully included a column headed: "Liquidity/Secondary Market" in relation to the MIN products. This showed a variety of approaches by different issuers. A fair summary of the position is that a large majority of the instruments contained language similar to the Morgan Stanley term sheet; i.e. indicating that the issuer would endeavour or make reasonable endeavours to provide a secondary market in normal market conditions. An exception (applying to relatively few of the investments) was the position of Credit Agricole: that no secondary market would be provided.

1087. In addition to the existence of a secondary market for the MIN products, there was evidence from witnesses that some structured products are traded on exchanges. Mr Konrad gave some evidence about this, and liquidity, as summarised in Section F above. Mr Dalle Vedove gave evidence on the topic of liquidity, saying that some of the products were listed on official exchanges and so they were very liquid. He said that "bonus caps", which were a typical HFPO, were listed on the Frankfurt exchange. Other instruments were traded over the counter, and so these were liquid but obviously with lower liquidity. He said that for stability notes, the issuer was the main secondary market, but not the only one. He accepted that, at least for some of these notes, there was no guarantee of a secondary market. However, he had seen many examples of these notes being sold in the secondary market.

1088. Mr Dalle Vedove's evidence as to the Frankfurt exchange is consistent with information provided by Mr Zorzi of XY to Mr Ries in September 2016 at a time when there was no dispute and steps were being taken to set up the Skew Base Fund. Mr Zorzi advised that "certificates" were traded and listed publicly on stock exchanges in Germany, and that bonds "follow the market practice and are traded OTC and listed on main date provider" such as Bloomberg. Some of the notes to which I was referred also indicated that instruments would have prices regularly available. The term sheet for the transactions concluded in June 2017, based on the S&P GCSI Crude Oil ER Index, provided – against the heading "Secondary Market" – that there would be daily price indications in a number of places, including Thomson Reuters and Bloomberg.

1089. There were other aspects of the evidence which in my view had some relevance to the liquidity issues. There was nothing to suggest that, in the period up until March 2020, there were any liquidity difficulties, either in relation to the Skew Base Fund or non-Skew Base Fund investments. That included a period when, as

reported to the Claimants in XY's meetings, equity markets were falling. It cannot therefore be said that market conditions in this entire period were entirely benign.

1090. The evidence is also that, throughout that time, banks were willing to lend on the security of the notes: hence the ability of the Claimants to use Lombard credit, and indeed of the Skew Base Fund itself to borrow from VP. This indicates, as Mr Cloherty said, that banks regarded the notes as good security, and I think that it can fairly be inferred that the banks may well have formed the view that, if necessary, there were reasonable prospects that the notes could be sold in order for their security to be realised.

1091. There was also evidence of the redemptions from the Fund by GIG in May and June 2019: shares in the value of € 14.8 million were redeemed without difficulty and without delay.

1092. There is also, even after the market drop in March 2020, some evidence of an issuer being willing to repurchase notes. On 26 March 2020, Mr Facoetti sent MDM the term sheets for 6 stability notes where the issuer was Unicredit. The term sheets contained a "reasonable endeavours" provision in relation to a secondary market: "Under normal market conditions … issuer will use reasonable efforts to quote daily bid and offer prices with a 1% bid-offer spread". Mr Facoetti's e-mail referred to the "immediate repurchase price" that the dealer had proposed.

1093. In the light of the evidence, it seems to me that XY and Mr Migani could reasonably take the view that, certainly in normal market conditions, the notes were highly liquid. The notes could reasonably be expected to be tradeable either on an exchange (if they were listed) or on the secondary market which the majority of issuers were willing to offer. It is true that there was no guarantee of liquidity and that circumstances might arise when that liquidity could be much reduced or non-existent. However, I do not consider that a representation of "high" liquidity, or "a readily liquidated investment strategy" is to be equated with, or could reasonably be understood to be, a guarantee of liquidity in all circumstances. That is particularly so when there were express warnings in the Offering Memoranda that circumstances might exist where there might be liquidity issues. In fact, there were no liquidity issues until after around 3 years of the Claimants investing (directly and indirectly) in these products. When those issues arose, it was the result of market conditions which Mr Konrad described as "very very extreme".

*The income stream / periodic returns objective*

1094. The third investment objective relied upon by the Claimants concerns the income stream or periodic returns. It does not seem to me that any of the pleaded allegations of falsity relate to the representation as to the income stream or periodic returns which were part of the objectives as set out in the relevant slide presentation.

1095. Towards the end of the trial, the Claimants started to develop a case that one or more of the Compartments were in fact targeting returns which were well in excess of the 3% referred to in the GIG slide, particularly when taking into

account the use of the finance or leverage provided by VP Bank. This line of argument was based on the composition of the Skew Base Compartments on 12 March 2020. There was no pleaded misrepresentation to the effect that there was a fraudulent or negligent misrepresentation as to the intended returns. Nor do the allegations of falsity (in paragraph 78 of the RAPOC) allege falsity by reference to the target returns of the Skew Base Fund. It was not, therefore, an issue to which the factual evidence was directed. Nor is it reasonably possible to discern such a case in the Claimants' written opening. Had it been a pleaded issue, then questions would have arisen, for example, as to the Claimants' knowledge (as reported in at the January 2020 meeting) that the HFPO Compartment was achieving a 4.8% return, and the MIN (USD) Compartment a 7.3% return, and the fact that there was no complaint expressed about this. Returns in excess of 3% were also reported at earlier meetings in 2019. It is also relevant that the 3% referred to in the GIG slide was an overall return, rather than a target return for each element of the investment strategy, still less for each individual investment.

1096. I do not accept that it was open to the Claimants, on the pleadings, to start to develop this case.

1097. In conclusion on the misrepresentation case concerning the investment objectives, I conclude that Mr Migani and XY did have reasonable grounds for the opinion that investment in the MIN and HFPO Compartments was consistent with the relevant investment objectives.

1098. I also consider that there were additional reasons why Mr Migani was entitled reasonably to consider that investment in the Skew Base Fund was an appropriate way for the Claimants to proceed, rather than simply continuing to invest on their own account in MINs and HFPOs outside the Skew Base Fund. MDM had expressed, as soon as he heard about the existence of the Fund in December 2016, a considerable liking for the idea. One reason for this, and his liking for investing in a fund rather than directly, was his tax position. One of the goals identified in the 28 March 2017 slide presentation to MDM was "overcoming the limitations of the current architectural model with efficient and robust solutions". It seems to me that investment in the Skew Base Fund would meet this goal. Mr Nuzzo was also attracted to the Fund when the new liquidity became available in 2018. The liquidity was so substantial that life would be considerably simplified by investing through a fund, rather than taking individual decisions. Mr Migani and XY could see that both MDM and Mr Nuzzo were attracted to the types of structured products which were being discussed in the XY presentations, and which were then the subject of direct investment starting in March 2017. Given their attraction to the products, it is not difficult to see why they were attracted to the idea of a fund which would be investing in those products. Equally, it is not difficult to see why, given that these products were attractive to the clients, Mr Migani reasonably concluded that investment in the relevant Compartments was consistent with the relevant investment objectives.

1099. Even if I had reached a contrary conclusion on that issue, I would reject the argument that the representation was made dishonestly. Dishonesty in this context must not be watered down so as to be equated with negligence. Accordingly, a finding that there were no reasonable grounds for the opinion expressed would not in and of itself establish fraud, but only negligence. Fraud would require

something considerably more: for example, Mr Migani and XY simply not caring whether there were reasonable grounds for their opinion. There is nothing in the facts which would justify any such or similar conclusion. On the contrary, the presentations given to the Claimants show that considerable thought was given as to the strategy to be proposed by XY. This was not a case of XY and Mr Migani simply promoting the MIN and HFPO Compartments of the Skew Base Fund to the exclusion or substantial exclusion of other investments. Indeed, the Fund was not proposed to Mr Nuzzo at all until early 2018. And when it was proposed, the Compartments were proposed in the context of a diversified selection of investments, which differentiated between Euro and USD tranches of investment. In the context of USD investments, for example, there was no HFPO component, and there was a substantial traditional market bond component. The Claimants make no complaint in these proceedings about the elements of the investment strategy other than those concerned with MIN and HFPO investments.

*Liquidity of the Compartments*

1100. The Claimants alleged that there were fraudulent misrepresentations as to the Skew Base Fund HFPO and MIN Compartments being "highly liquid", and that they were not in fact highly liquid.

1101. I do not consider that this raises any different issues to those which I have already discussed in the context of the "liquidity" investment objective. That discussion is essentially concerned with the liquidity of the HFPO and MIN products in which the Compartments were invested, rather than with the liquidity of the Compartments themselves. However, as appeared to be common ground in closing arguments, the liquidity of the Compartments was dependent on the liquidity of the underlying instruments, and that is the issue which I have already addressed.

1102. In so far as the case advanced was different or wider, I do not accept that any representation was made, or was understood to be made, that the Compartments themselves were "highly liquid". The Compartments themselves could not be bought and sold in the market nor could the shares which the Claimants held as investors in the Fund. This must in my view have been obvious to the Claimants, and indeed I did not understand them to assert the contrary. When XY's presentation spoke about high liquidity, this was in my view referable to the underlying products which would form part of the investment strategy, whether inside or outside the Fund. Thus, the 6 June 2018 presentation refers to "High liquidity" on Slide 29 (which had also been used previously) in the context of describing HFPO products, rather than when describing a Compartment. For the reasons already given, these could properly be described as "highly liquid", albeit that this was not a guarantee of liquidity in all circumstances.

1103. When the proposed Skew Base Fund MIN and HFPO investments were proposed to the Claimants, XY's presentation did refer to the "Liquidability" of the various proposed investments. Slide 11 of the slides for the 6 June 2018 meeting gave various timescales under the heading "Liquidability within": 1 month for HFPO, 3 months for MINs and (for example) greater than 2 years for "Real Estate Indirect". These were, as Mr Cloherty submitted, estimates of the timescale for

redemption of the investment in the relevant Compartments, which would itself be dependent on the liquidity of the underlying investments.

1104. I do not consider that there was any misrepresentation here. The periods there referred to were an estimate of the period of time that it would ordinarily take to redeem an investment in these Compartments. The 3-month period for the MIN Compartments may (as Mr Cloherty submitted) have been derived from the Appendix to the MIN Offering Memorandum. This referred, under the heading "Redemption", to a normal period for settlement of a redemption application 90 days (at the latest) following the relevant "Redemption Day". The 3-month period does not precisely match, because the 90 days is "90 Business days". Similarly, the 1-month period given in XY's presentation, for the HFPO Compartment, does not match the 60 Business days referred to in the HFPO Appendix. However, these differences were not explored in evidence or in the case advanced by the Claimants. In fact, when redemption was sought in 2019, it was accomplished more quickly than 1 month and 3 months. Redemption was accomplished in 1 week (HFPO) and 2 weeks (MIN). This indicates that the estimate given was a fair estimate as to how long redemption would normally be expected to take.

1105. XY also submitted, correctly in my view, that the 1-month and 3-month periods, referred to in XY's presentation, did not mean, and could not reasonably be understood to mean, that circumstances would never arise where redemption might take longer, or indeed not be possible at all. The Offering Memoranda contained provisions which entitled the General Partner to suspend redemptions, and there was no representation that this could never happen. In due course, as a result of the exceptional market conditions in March 2020, this is what did happen.

*No real risk of capital losses*

1106. The Claimants plead that there was a representation that there was "no real risk of capital losses". It seems to me that this alleged representation was at the heart of the Claimants' case, and that it is related to many if not all of the other misrepresentations on which they rely. They contend that was a false representation because in fact there was a "significant" risk of capital losses.

1107. I have to a large extent already covered this ground, including in Section D and in the above discussion of the "investment objectives". I reject the case that there was a representation that there was "no real risk of capital losses". This was, in my view, not the way in which XY presented the risk, and it is (in my view, completely) inconsistent with the Offering Memoranda. The Offering Memoranda made it clear that there was a risk of the loss of capital, indeed all capital. This had also been made clear in the various term sheets which had been sent to Mr Nuzzo or MDM in the course of their direct investment in MIN and HFPO products.

1108. The way in which XY presented the risk was not that it was non-existent, but rather that there was a very low probability of the barrier being breached and therefore capital being lost. A word used on many occasions by XY was "extreme" event. This approach is, in my view, significantly different from a representation that there was "no real risk", or that that there was "zero" risk, or

that it was "impossible" for the barrier to be breached. I do not consider that XY ever went that far. There is no document where one sees language such as "no real risk", or zero risk, or impossibility. Indeed, as intelligent and sophisticated investors, Mr Nuzzo and MDM would have understood that there was, of course, a risk with these investments. Mr Facoetti, in his witness statement, acknowledges the risk that all the capital might be lost: describing this as a "very, very small risk".

1109. Accordingly, not only did XY not make the representation relied upon, but the Claimants understood that there was indeed a risk with these investments. They understood that this risk was, in essence, that the barrier would be breached and that this would then potentially expose their investment to significant capital loss, including a total loss of capital. This was clear, for example, from the term sheets which the Claimants received and from the Offering Memoranda. The fact that a significant capital loss might arise was spelt out clearly in the Example slide which I discuss below in the context of the "Capital Risk Representations".

1110. It is true that there is no equivalent slide which explains, in simple terms, the way that HFPO products worked. However, it was clear to the Claimants, from XY's presentations, that these products also involved a barrier mechanism and that this was critical to the preservation of capital. Mr Nuzzo said in his evidence that he understood HFPOs to work in a similar way to MINs. In my view, he appreciated that their mechanism was different, not least because he was considering (and was attracted towards) products, similar to XY's proposed HFPOs, and discussed these with Mr Dalle Vedove in the e-mail correspondence referred to in Section D above. Mr Nuzzo would have understood that there were differences between MINs and HFPOs. He would have understood that a breach of the barrier in the case of an HFPO was (unlike a MIN) not dependent upon a 1-day fall, but might happen over a longer period. He was also aware that the instrument might look to the 'worst of' a number of different indices or other assets. He (and indeed MDM) could also see, from the details provided to him when XY proposed investments in MINs and HFPOs, that MINs usually had a maturity of 1 year ahead, whereas HFPOs would generally have a shorter maturity period, often around 3 months.

1111. I have no doubt that, in the case of HFPO Products, Mr Nuzzo did understand the significance of the barrier – both in terms of protecting against capital loss if it was not breached, and also exposing to a significant capital loss if it was breached. He accepted in cross-examination that the point of a barrier trade was that "you are effectively making a bet … that whatever index the trade is referenced to won't fall below the barrier". I also consider that, despite his professed lack of understanding of barriers, MDM also understood this. It was, for example, well explained in the Fact Sheet which MDM received from Mr Chardigny in April 2017.

1112. Mr Dalle Vedove's evidence was that the effect of breaching a barrier in an HFPO product was explained to the Claimants, and I think that it is more likely than not that it was explained. Indeed, given that the Claimants were making very significant investments in these types of products, it would be very surprising indeed if they did not understand the basics. If they did not understand the basics, there was plenty of opportunity to ask XY, or indeed to ask the other financial

professionals with whom they were dealing (for example, Mr Presta of UBP or Mr Chardigny of Lombard Odier) about them.

*Capital Risk Representation*

1113. The Claimants' case here focuses on the slide headed "Example of An Insurance Note" that was used in the June 2018 presentation. In fact, a very similar slide had been used much earlier (Slide 41) for the September 2016 meeting, prior to discussion of any investment in the Skew Base Fund. As I have already indicated, an oddity about the Claimants' case in this regard is that it is not alleged that the September 2016 similar slide was fraudulent.

1114. In my view, the June 2018 slide does not contain any misleading statements at all. It was headed: "Example of an Insurance Note". Mr Nuzzo accepted in evidence, unsurprisingly, that this was only an example, and that the terms of any particular note depended upon what was agreed and set out in a term sheet. In fact, by June 2018, Mr Nuzzo had personal experience of a variety of different insurance notes. The example given in the slide was an MSCI World index note with a 10% barrier, and a 10% loss for every 1% below the barrier. However, Mr Nuzzo knew by that time that there were notes based on indices other than the MSCI World index; that there were barriers which were higher than 10%; and also (as a result of his questions to Mr Dalle Vedove in January 2018, and Mr Dalle Vedove's responses) that the "gearing" in a note could be higher than 10% for each 1% fall beyond the barrier.

1115. He also appreciated, certainly by June 2018, that there was a possibility that there may be falls which were in excess of 10%. His questions to Mr Dalle Vedove in January 2018 posited falls of 17% and 15%. Mr Nuzzo appreciated that issuers of notes with (for example) a 15% barrier must be taking the view that a daily fall in excess of that barrier was at least a possibility. Otherwise, it is impossible to see any commercial reason for issuing the note and paying the coupon which the issuer was prepared to pay. At one stage in his cross-examination, Mr Nuzzo agreed (in relation to Slide 16 in the October 2016 presentation, which concerned an insurance note related to the commodities market) that the note was "selling protection insurance". Indeed, it seemed to me that the description of these products as "Market Insurance Notes" showed that their nature was to insure the counterparty against a risk. This, too, was the description of a stability/gap note in the MIN Offering Memoranda. They "pay the investor a coupon for insuring a counterparty against a one-day (in some cases, 2 or 3 days) index price drop". Insurance involves, of course, the existence of a risk (obviously a real risk) which is transferred to another party in return for the premium paid.

1116. The Claimants' pleaded misrepresentation case focuses on three statements within the slide. The slide stated, in relation to the MSCI World index, that a fall of 10% in a day was an "unprecedented historical event". It was not suggested that this was, in itself, a false statement. There is no evidence that this particular index had ever suffered a daily fall of more than 10%. Indeed, the Claimants acknowledged that even in March 2020, there was no daily fall of this particular index which breached the barrier: it was the S&P 500 and Euro Stoxx 50 indices where daily falls in March 2020 breached the 10% barrier.

1117. However, the Claimants submit that the slide (fraudulently) misrepresented the position because markets other than the MSCI World index had, historically, fallen by over 10% on at least two occasions, and also because the MSCI World Index itself fell by 9.8% in 1987. I do not consider that these matters meant that the slide contained a misrepresentation. The representation was that the MSCI World index had never fallen by 10%, and this was true. There was in my view no representation which was being made about whether or not other market indices, at some point in history, had ever fallen by 10% in a day, and I do not consider that a reasonable recipient would have understood the slide to contain a representation about other market indices.

1118. Even if this slide were (contrary to the above views) to be interpreted as containing a representation as to the performance of markets other than the MSCI World index, I do not consider that XY intended to make such a representation, nor that the Claimants understood such a representation to have been made. It is not the natural interpretation of the slide that it is referring to markets other than the MSCI World index, and there is nothing in the evidence which suggests that anyone at XY understood the slide to be making any statement about other markets.

1119. In so far as the Claimants were suggesting that, in the "example" slide, XY were seeking fraudulently to conceal the historical position of any particular index, or to suggest that a 10% fall could never happen, I reject that suggestion. Indeed, XY had previously illustrated, in at least one of their presentations, how a variety of different markets had performed over a number of years. The presentation for the 2 March 2017 meeting with MDM included a chart, headed "Negative Daily Returns" and showed the Euro Stoxx 50, S&P 500 and Nikkei indices since 2011 including daily falls. As described in Section D above in relation to this meeting, this did show some significant falls, including a near 10% fall in the Euro Stoxx 50 index in 2016. Historically, as the Claimants pointed out in their closing submissions, the Euro Stoxx 50 index had never suffered a daily fall of more than 10% in its existence: it had started in 1998. However, the slide showing a fall of close to 10% in 2016 indicated that a significant daily fall was indeed possible, and it also illustrated the overall uncertainty of equity markets.

1120. It is also true that historically, there had been daily falls of over 10% for the S&P 500 index (or earlier equivalents). The Claimants referred to what had happened in 1929 (the famous Wall Street crash), and also Black Monday in 1987. But the Wall Street crash was a very well-known historical event, and Black Monday is also a well-known event in relatively recent history (within the lifetime of LDM, MDM and Mr Nuzzo). It is difficult to see how XY could have sought to conceal these matters from the Claimants. Furthermore, Mr Migani made the point that historical falls were reflected in the probability figures which were presented, and this evidence was consistent with Mr Dalle Vedove's explanation to Mr Nuzzo in 2020 when the latter raised issues concerning those probability figures. The probabilities of a breach of the barrier, which were set out in the slides to which I have referred in Section D above, were never shown as being zero.

1121. The "example" slide was a standard form slide intended to explain how a MIN worked, by way of a worked example. I accept that it was intended to illustrate the improbability of a 10% barrier being breached, certainly in the case of the

MSCI World index. However, there was nothing in the slide which represented that, in the case of that index, it could never be breached. The slide indicates that it would take an extreme event to breach it, but also that it might be breached. Hence, the "expected recovery" footnote reference to 75% connotes that there has been a daily 12.5% fall in the MSCI World index, thereby producing a capital loss of 25% which can properly be regarded (as Mr Nuzzo accepted) as a significant loss of capital.

1122. In relation to that "expected recovery", I reject the Claimants' argument that there was a misrepresentation in the slide because there could be no expected "recovery rate", because of the nature of a MIN. This was not a pleaded point (as per the pleading in paragraph 78 (f) of the RAPOC, in relation to the falsity of the representations in the slide). It is true that once a barrier event occurred on a MIN, the capital lost could not be regained. I do not consider that the Claimants, whether on the basis of that slide or anything else, understood matters differently. The slide said that the instrument "stopped", and this was intended to mean, and would have been understood to mean, that the loss was then crystallised. Mr Nuzzo accepted in cross-examination that he understood what the capital loss would be, when there was a multiple of 10: "I understood that 10X meant 10% loss for each point". He was there referring to each percentage point. Indeed, Mr Nuzzo had asked questions, on a number of occasions (see Section D above) as to what the losses on particular notes would be in the event of market drops which breached the barrier. In each case, he was correctly told what the capital loss would be, and there was no suggestion that the position would be improved, once the barrier had been breached, by later improvements in the market. In context, therefore, the representation as to "Expected recovery rate" meant no more than there was an expectation that the market drop would not exceed 12.5%, so as to produce a crystallised loss of 25% and therefore a recovery of capital of 75%.

1123. The Claimants also allege a misrepresentation in the statement in the slide: "Non-cumulative extreme events (in case of first occurrence the instrument stops with a 10% capital loss every 1% below the barrier)". The pleaded allegation of falsity in this regard is that this "misrepresented the position given the failure to explain that there would be significant or complete losses of capital due to the compartment being leveraged".

1124. I reject this argument. The slide was explaining the mechanics of the way in which a MIN worked. The relevant explanation here was accurate. It explained that there was (in this example) a 10% capital loss for every one 1% below the barrier. It was therefore clear from this explanation that there was a very significant gearing which would ratchet up the loss, if the extreme event did actually occur. It was therefore clear from this slide that (contrary to the Claimants' pleaded case discussed above) there was indeed the potential for a significant capital loss.

1125. The slide was not making any representations as to the effect of leverage within the Skew Base Fund, and it would not reasonably have been understood as doing so. The explanation of how a MIN worked, as set out in this slide, was equally applicable to a MIN which was inside or outside the Fund. The MINs in the Skew Base Fund worked in the way described in the slide. There was nothing in the evidence which suggested that they worked in a different way, because of the leverage within the Fund.

1126. Furthermore, the existence of leverage within the Fund was disclosed in XY's presentations and in the Offering Memoranda, and Mr Nuzzo asked questions about it. The leverage did not alter the way in which MINs worked. Rather, it enabled the Fund to make more investments than it would have been able to make if, without any borrowing, it simply had at its disposal the sums which investors had invested. It meant that the Fund had more exposure, because there would be more investments and also a borrowing liability. But this did not falsify anything that was in the slide.

1127. The slide does say: "the instrument stops" with (in this illustration) 10% capital loss for each 1%. That was a description of how the instrument worked, and it was accurate. The point being made was that (in this illustration), the daily fall would crystallise the loss. Even if the market fell thereafter, the loss on the MIN would not increase. So it was in that sense that the instrument "stopped". It was "non-cumulative", the expression used earlier in that bullet point. This was the case in relation to all the MINs: there was no evidence that any of them exposed an investor to a further loss beyond that crystallised by the 1-day fall. The existence of leverage had no impact on this principle. Each instrument did "stop" with a crystallised loss. The effect of the leverage was essentially that there were more instruments which stopped in this way, than there would have been if borrowing had not been available.

1128. The Claimants also argued that the slide gave a distorted and misleading impression, based on their analysis of what was in the Skew Base Fund as at March 2020. They referred to the fact that the capital loss, in the instruments then in the Fund, was in the majority of cases 20%, and also that the MSCI World index was only relevant to a minority of the MINs in the Fund at that time. I did not consider that this was a permissible line of argument. There was no pleaded case that any representation in the slide was misleading by reason of the nature of the investments which were in the Skew Base Fund as at March 2020. In a case of fraudulent misrepresentation, it is critical for the dishonest representation to be identified precisely. I have therefore focused on the Claimants' pleaded claim since that is the case that XY and Mr Migani prepare to meet.

1129. Furthermore, leaving aside the pleading, I did not consider that I could conclude that the falsity of this slide, which was first shown (in more or less the same form) in September 2016, and then shown again in early 2018, could be proved by showing what was actually in the Fund in March 2020. I cannot infer that, when the relevant representations were made, it was known that the composition of the Fund would be as it proved to be in March 2020. That composition was the subject of investment decisions taken at a later time, in the context of a market where rates and market conditions were constantly changing. Those investment decisions were also the consequence of work that was carried out by Twinkle as Investment Advisor, and in particular by Mr Negro who had no involvement in the preparation of the relevant slide. Mr Saoul submitted that I could infer or assume that the composition in March 2020 reflected the composition of the Fund at earlier periods, but I do not consider that I have any basis for drawing that conclusion.

1130. It was also argued that Mr Migani was so heavily involved in Twinkle that he was the ultimate decision-maker in relation to the trades which Twinkle proposed, and

therefore would have known (for example) that the gearing on many of the investments was 20% rather than 10%. It seemed to me, however, that there was insufficient evidence to justify that conclusion. In particular, the day-to-day work of negotiating with counterparties, and then proposing trades to VP Liechtenstein, was carried out by Mr Negro, not Mr Migani. There is nothing in the documents, including Mr Negro's internal e-mails, which indicates a significant involvement by Mr Migani in that process. Furthermore, I must bear in mind that the Skew Base Fund had, in 2020, about € 900,000 - 1 billion invested, and that there were (as Mr Negro said in evidence) some 23 Compartments. The evidence does not enable me to conclude that Mr Migani's knowledge extended to the details of each individual instrument in which each Compartment of the Skew Base Fund invested.

1131. Accordingly, I reject the Claimants' case based on this slide and the pleaded "Capital Risk Representations". There was no false representation, and in any event no evidence that XY or Mr Migani acted fraudulently.

*Risk disclosures "standard"*

1132. In Section D above, I have discussed and rejected the Claimants' case as to an oral representation made by Mr Migani, in September 2018, that the risks set out in the Offering Memoranda were "standard"; and that this meant that they could safely be disregarded and/or were insignificant. I do not accept that Mr Nuzzo queried the risk warnings in the Offering Memoranda, or that Mr Migani told Mr Nuzzo that they were standard. Even if this had been said, I would reject the case of fraud. A representation that the risk warnings were "standard" would simply mean that these are the warnings that one would expect to see with this kind of investment. It would not mean, or carry the implication, that the warnings could be disregarded or were insignificant.

1133. However, my rejection of this aspect of the case has a wider impact on all of the investment representations relied upon. Mr Cloherty submitted that if the Claimants are to succeed on their investment misrepresentation case, then it is essential that they establish that this conversation took place. Broadly speaking, I agree, for the following reasons.

1134. Mr Nuzzo accepts that he read the Offering Memoranda, and the Claimants correctly say in the RAPOC that these did set out "real risks relating to investing in the HFPO and MIN compartments", and that they could not safely be disregarded and were not insignificant. Mr Nuzzo did not, however (as I find) raise any concerns with Mr Migani. This was because he remained attracted to the Skew Base Fund, and more generally to HFPO and MIN investments, notwithstanding the warnings contained in the Offering Memoranda. He considered that, notwithstanding the risks identified, an investment in such products, and in a Fund which was investing in such products, was consistent with GIG's investment objectives. By reading the documents, he was aware of other matters about which complaint is now made in the context of the investment representations: that there was a real risk of capital losses, and that there may be circumstances in which the products would be illiquid. In short, in the light of the evidence that Mr Nuzzo did read the Offering Memoranda, and my finding that

he raised no concerns about it, it is difficult to see how GIG's case can succeed in relation to any of the investment representations.

1135. As far as MDM is concerned, the position is in my view no different. Whilst I accept that he did not read the Offering Memoranda as closely as Mr Nuzzo, I do consider that he read and was aware of the risks of the investment described therein, and that he too raised no concerns about it. He too considered investment in these compartments attractive, notwithstanding the risks.

1136. Accordingly, the case based on fraudulent misrepresentation fails.

1137. The Claimants also advanced a case based on negligent misrepresentation. Since I have not accepted that there was any misrepresentation, for the reasons set out above, the claim in negligent misrepresentation must also fail.

1138. Had there been a negligent misrepresentation, GIG's claim in respect thereof would not succeed, by reason of Clause 3G of XY's standard terms. I address this issue in Section K3 below in the context of the Claimants' case based on breach of an implied term or duty of care. I also conclude that Clause 3G would be effective as against MDM and LDM, in the context of the negligent misrepresentation claim. It would not, however be effective in the context of a claim under Financial Services and Markets Act 2000 ("FSMA") s 138D. These issues are addressed in Section K below.

1139. I also conclude in Section K that the disclaimer in XY's presentations is ineffective to protect against a breach of the implied term or tortious duty of care in the context of the advice that XY was giving when providing its consultancy services; so that if there was a breach of the implied term or duty of care in giving that advice (for example because there was a misrepresentation as to the nature of the risk), then the disclaimer would not provide protection.

## H: The claim in deceit concerning the "Independence Representations"

### H1: The key issues

1140. The Claimants claim against XY, Mr Migani and Mr Faleschini in deceit in respect of "Independence Representations". They contend, as summarised in their opening submissions, that they represented that (i) XY was an independent financial advisor; and (ii) XY was in a position to and would provide unbiased advice in relation to investments. These representations were made at the May and June 2016 meetings, and in the XY website that existed at that time. XY, Mr Migani and Mr Faleschini intended, by those representations – and the Claimants understood – that (i) the investments XY recommended or might recommend to its clients were not connected to XY or to persons related to it; and (ii) the investments XY recommended or might recommend to its clients did not result in commissions or similar benefits accruing to XY or persons related to it from the relevant platforms or institutions whose products were the subject of recommendations.

1141. The Claimants contend that these representations were false. XY was not independent of the Skew Base Fund, and XY was not in a position to, nor did it, provide unbiased advice in relation to the investments in that Fund. The Claimants say that the representations were false at the time when they were made: the development of the Skew Base Fund was in train prior to the meetings in May and June 2016. However, even if they were not false when made, they were continuing representations and had become false when relied upon by GIG and MDM when making the investments, and subsequently retaining them.

1142. The Claimants alleged that XY, Mr Migani and Mr Faleschini made the representations knowing them to be false, alternatively without belief in their truth or recklessly in the sense of not caring whether they were true or false. They were made with the intention of inducing GIG, MDM and LDM to enter into the various contracts which they concluded, and they were so relied upon by the Claimants with: (i) GIG and MDM investing in the HFPO and MIN Compartments; (ii) MDM electing for his entitlement to a dividend to be satisfied by the transfer of the shares in the Skew Base Fund held by SRL to himself, by way of dividend in specie; (iii) MDM and LDM investing in non-Skew Base HFPO and MIN products; and (iv) GIG, MDM and LDM then retaining those various investments.

1143. The Claimants claim all losses directly flowing from the deceit. They contend that, but for the deceit, the Claimants would never have retained XY in the first place. On that basis, they would not have made or retained the investments which are the subject of this claim, whether inside or outside the Skew Base Fund. If they had known of the various connections between XY and Mr Migani and the Skew Base Fund, they would not have started their advisory relationship at all. Alternatively, if they had initially retained XY, they would not have invested in the Skew Base Fund, given the various connections. Had the connections only been revealed after the investments had been made, but prior to March 2020, the Claimants would have exited those investments without suffering the losses that occurred.

1144. XY and Mr Migani advanced a number of arguments as to why this claim could not succeed. Their principal answer is that Mr Migani's ownership of SB GP was not concealed from the Claimants, but was in fact disclosed prior to the Claimants' investments in the Skew Base Fund. They say that this was an important part of the reason why investors, including the Claimants, were attracted to investing in the Fund. They allege that although the RAPOC pleads a large number of different connections, undisclosed payments and mutual benefits, the only disclosure that actually matters was that Mr Migani was the entrepreneur behind the Fund; i.e. the general partner (of SB GP). If the Claimants were told that Mr Migani owned the general partner of the Fund, then the Claimants would have understood that the fees being paid to the general partner were being paid to a Migani entity, and that the Fund was not independent of Mr Migani. All the other connections relied upon simply flowed from that fact. If the court concluded that Mr Migani's ownership of the SB GP was in fact disclosed, that would dispense with the claim in deceit (and indeed the other claims).

1145. This central argument was also relied upon not only by those against whom the deceit claim was made, but also by the other Defendants in the context of the conspiracy case. The evidence and argument as to whether there was a conspiracy, involving in particular VP Lux and VP Liechtenstein, was relevant to the central question of whether the Claimants knew that (as it was frequently put in argument and cross-examination) Mr Migani was the "man behind" the Skew Base Fund; i.e. that the Skew Base Fund was his entrepreneurial initiative.

1146. In addition to this central argument, XY and Mr Migani advanced a variety of other points. In broad summary, they submitted that the representations relied upon blended statements as to present and future, fact and intention, and that care was required in order to identify a relevant representation of fact. They submitted that the representations as pleaded were not sustainable. They also raised issues as to whether: (i) XY and Mr Migani intended to make the representations relied upon; (ii) any representations could properly be regarded as continuing representations operative at the time when the relevant contracts were concluded; and (iii) the Claimants understood the various representations to have been made.

1147. Mr Faleschini advanced broadly similar arguments. However, he had additional lines of argument, in particular: (i) that he had not made any representations himself; and (ii) that, given his lack of involvement with the Claimants after meeting them initially in May and June 2016, he was not and cannot have been dishonest in failing to correct any continuing representations that were falsified by later events.

### H2: What representations were made and were they continuing?

1148. The legal principles relating to deceit are summarised in Section G above. I have addressed, in Section D above, the XY website (as it was in 2016) and the meetings in May and June 2016.

1149. The Claimants' pleaded case as to the representations made is as follows:

> "a. That XY was an independent financial advisor. This was intended, and was understood, to mean that:
>
> (i) the investments XY recommended to its clients (to include any investments it might recommend to the Claimants) were not connected to XY or to persons related to it, and
>
> (ii) the investments XY recommended to its clients (to include any investments it might recommend to the Claimants) did not result in commissions or similar benefits accruing to XY or persons related to it from the relevant platforms or institutions whose products were the subject of the recommendations.
>
> Alternatively, the matters identified at (i) and (ii) in this sub-paragraph were implied representations arising from the express representation that XY was an independent financial advisor;
>
> b. That XY was in a position to and would provide unbiased advice in relation to investments;
>
> (each individually a representation and together referred to as the ***Independence Representations***)."

1150. As far as the website is concerned, I consider that there was a representation made as to the way in which XY carried on its business at that time. The words "independent, unbiased and conflict-free" would indicate, to a reasonable recipient, that the services which XY provided were not influenced by financial connections to external parties such as banks. I consider that XY intended to make that representation, since it is essentially what the website says.

1151. This conclusion does cover some, but by no means all, of the ground covered by the pleaded representations. In so far as the pleaded representations go wider, I do not accept the Claimants' case. I do not consider that XY represented that it was an "independent financial advisor", at least as that expression would commonly be understood in the financial services industry in the context of retail investors. I also consider that the pleaded representations include aspects of, and to a large extent are focused on, what would or would not happen in the future. As discussed in Section G above, a claim in deceit can only be founded on a representation as to past or existing fact. Generally speaking, a representation as to future conduct can be the subject of a contractual promise, but not a claim in deceit.

1152. I also consider that the representation that was made, as to the way in which XY carried on its business at that time, was capable of being and was in the present case a continuing representation. The representation did not prevent XY from changing its business approach, or developing a new product. However, if there was a significant change as to the way in which XY carried on its business, so

that it was then influenced or potentially influenced by financial connections to external parties, then the recipient of the representation should be told of that change; since it would represent a shift away from the way in which the business had been represented. Indeed, Mr Migani readily accepted in evidence that his interest in the Skew Base Fund did need to be disclosed. Similarly, MDM in his evidence recognised the ability of an independent advisor to propose a product in which he has a financial interest, provided that he discloses the conflict: "In my mindset, an independent advisor …. selects the best market for you without any conflicts he has. And if he has, he has to share them."

1153. In relation to the two meetings in May and June 2016, I have concluded in Section D that Mr Faleschini did not himself make any relevant representation. However, at the first meeting, Mr Migani did give an introduction to XY which was along the lines of what was said in XY's website. Accordingly, there was a representation (this time by Mr Migani) as to XY being independent, and providing consulting services which were unbiased and free from conflict of interest. This representation therefore repeated (and did not go any further than) the representation on the website itself; i.e. the representation described above. Mr Migani intended to make that representation.

## H3: Was the representation false?

1154. I do not consider that, in the summer of 2016, that representation was false. There is no evidence which indicates that, at that time, XY was in fact carrying on business other than in the way described on the website. There is, for example, no evidence that XY was in receipt of commissions or "retrocessions" from counterparties in relation to products it proposed to its clients, and Mr Migani said in his evidence (and I accept) that XY did not receive such payments. Indeed, the Claimants have not advanced a case to the contrary.

1155. It is true that, at that time, XY and, to some extent Mr Migani personally, were working on the project which ultimately became the Skew Base Fund. However, this was a project which was a long way from fruition. No firm agreements relating to the Fund existed at that time, and there was still a large degree of uncertainty as to what shape, if any, the proposed fund would take. For example, there was still discussion as to whether it was going to be anything more than a "feeder" fund, aimed at enabling XY's clients to make private equity investments in a HarbourVest fund. In my view, a representation as to how a company carries on business at a particular time is not falsified by the possibility that, at some point in the future, the nature of its business might change. Moreover, as MDM's evidence recognised, even an independent advisor can recommend a product in which he has an interest, provided that the conflict is disclosed.

1156. I therefore conclude that there was no false representation at the outset. Also, given that the project was still on the drawing board, I do not consider that XY or Mr Migani was acting dishonestly (so as potentially to ground liability in deceit) in the description of XY's then existing business.

1157. However, since the representation was a continuing one, it was capable of being rendered false by subsequent events. If, therefore, there was a dishonest failure to

correct the representation made. This leads to what I have described as the central factual issue as to whether there was disclosure to the Claimants.

## H4: The central factual issue: the parties' arguments

1158. XY and Mr Migani contend that Mr Migani first disclosed his ownership of SB GP when he introduced the Fund to MDM on the video-call of 2 December 2016, and to Mr Nuzzo at the first meeting where the Skew Base Fund was discussed within him on 9 March 2018. The Claimants contend that this was never disclosed, and submitted that I should accept the evidence of MDM, Mr Nuzzo and Mr Facoetti to that effect. XY and Mr Migani (and the other Defendants) submitted that the evidence of Mr Migani and Mr Dalle Vedove should be accepted. Each side referred to different aspects of the evidence in support of their respective arguments that the inherent probabilities and contemporaneous documents supported their positions. I will not identify every point that was made, but will briefly summarise the main themes that were developed.

*The Claimants' arguments*

1159. The Claimants relied heavily on the absence of written disclosure of Mr Migani's connections with the Fund. At the end of his oral reply submissions, Mr Saoul posed the question: why was this important disclosure not made in writing? If the involvement of Mr Migani was really a selling point for the Fund, then this would have been emphasised in the presentations and at least put in writing. A deliberate decision had been taken not to make the disclosure in writing; XY had gone out of its way to avoid doing so.

1160. The slide presentations, for the various meetings, made no reference to Mr Migani's interest in Fund. The presentations described XY as having exclusive access to the Skew Base Fund, rather than XY or Mr Migani being behind the Fund. It was not simply the absence of any reference, but there were documents produced, subsequent to the creation of the Fund, which continued to represent XY as being independent, unbiased and conflict free or transparent: in particular, XY's revamped website and one of the slides that was given to Mr Nuzzo in May 2018 in the context of possible investment by GIG in the Skew Base Fund and presentation to the family. This, too, was the effect of the letter that Mr Nuzzo requested in May 2018.

1161. The Claimants also referred to a call which took place in April 2020 between Mr Migani (also attended by Mr Sampietro) and another investor, Finfloor. This was in the aftermath of the collapse of the HFPO and MIN Compartments. In that call, Mr Migani was asked about his relationship with the Fund, and he disclosed neither his ownership of SB GP nor the significant involvement of Twinkle in the investment process. The Claimants submitted that this showed that the connections between Mr Migani were being hidden at that stage, as they had (as far as the Claimants are concerned) from the outset.

1162. As far as concerns the various documents relied upon by the Defendants (for example the "controllo/controllate" e-mails in 2020 discussed in Section D above): the Claimants submitted that none of them, when properly analysed,

provided evidence that the connections between Mr Migani/XY and the Skew Base Fund were revealed.

1163. The Claimants submitted that the court should not accept the Defendants' argument that the Claimants must have known about the connections, because otherwise they would not have made investments in the Skew Base Fund, which had no track record. This fundamentally misunderstands the nature of the Claimants' relationship with Mr Migani and XY. It was precisely because the Claimants trusted Mr Migani and XY as their unbiased advisors that they invested, relying on the advice given. Furthermore, the fundamental premise of the relationship was independence: from the outset, the relationship was built on XY being unbiased and conflict-free.

1164. The witness evidence of other XY clients (described in more detail below) did not assist the Defendants: Mr Migani may have told some clients but not others, when it suited him, and in any event these other clients were not given the full picture, including in relation to the role of Twinkle. Nor was there any reason for the Claimants to search the public record, and in any event, this would not have revealed that Mr Migani owned Twinkle.

1165. As far as witnesses were concerned, the Claimants submitted that Mr Migani was a witness upon whom no reliance could be placed. They also submitted that Mr Dalle Vedove was an unreliable witness, and during the course of oral submissions identified a number of specific points, taken from Mr Dalle Vedove's evidence, which demonstrated this. They invited me to accept the evidence of Mr Nuzzo and MDM, and Mr Facoetti, as to what they were and were not told.

*The Defendants' arguments*

1166. The Defendants relied upon the evidence of a number of XY clients, who invested in the Skew Base Fund, that Mr Migani did orally disclose his involvement. That evidence corroborated the evidence of Mr Dalle Vedove and Mr Migani to the same effect. It was improbable that such disclosure would be made to some clients but not others such as the Claimants.

1167. That evidence confirmed that the involvement of Mr Migani, as the man behind the Fund, was a selling point. The Fund was brand new, with no track record. It was the connection to Mr Migani that gave XY clients confidence in the Fund. That is also borne out by subsequent events: in the light of the present proceedings, all of XY's clients who invest in the Fund (including 11 who invested prior to March 2020) have signed a document acknowledging their awareness of Mr Migani's ownership of SB GP, and none have declined to invest on the basis of his connection to the Fund.

1168. It was also inherently improbable that the Claimants would invest some € 102,500,000 in the Skew Base Fund without knowing anything about who was behind the Fund or who was going to manage or look after their money, save that it involved a Liechtenstein banking group of which they had not previously heard. The Claimants would not have been willing to invest such substantial sums in a fund with no track record without understanding who was behind the fund, and without meeting and trusting them. None of the Claimants sought to meet anyone

from VP, or the general partner, before investing. The evidence indicated that Mr Nuzzo, at least, understood that important role of the general partner in the management of a fund such as the Skew Base Fund, and also that VP was external to the general partner. That meant that the Skew Base Fund was not a VP product, and that some other party (not VP) was behind the Fund. That party was Mr Migani, as the Claimants would have understood. That was why the Claimants did no due diligence into who was behind, initiated or owned the Skew Base Fund. The Claimants' behaviour as regards the lack of due diligence, as far as concerns SB GP and VP, is consistent only with knowing that Mr Migani was behind the Fund, or not caring either way. The former was more likely, taking into account the evidence from the Claimants that they were impressed by Mr Migani and trusted him.

1169. Independence was not an important factor for the Claimants when they came to make their investments. They were in principle happy to invest in in-house funds proposed by banks or financial institutions such as Rothschilds. Independence as an important factor has been constructed only in hindsight. The disclosure of Mr Migani's connection to the Fund would not have been regarded by any of the Claimants as momentous or even memorable.

1170. It was inherently improbable that Mr Migani could realistically have hoped to conceal his connection to the Fund, in circumstances where the involvement of the initiator in a Luxembourg fund such as the present is well-known, and there were key parties (such as VP or Mr Longo or Mr Kuske) – independent of Mr Migani – who could have been asked at any time for details concerning the initiator of the Fund, or who owned the general partner.

1171. There were various examples in the documentary record which supports the case that there was disclosure. These included: the note of the 2 December 2016 call with Mr Dalle Vedove; the April 2018 correspondence where Mr Nuzzo enquired about fees; Mr Migani's e-mail to Mr Dalle Vedove suggesting how to respond; and the "controllo/controllate" and "actively manage" e-mails between March and June 2020.

1172. Other aspects of the inherent probabilities weigh against the Claimants' case. Mr Migani is a serious, highly qualified, regulated professional. Mr Dalle Vedove had similarly impressive experience and financial acumen. The reward for the alleged deception comes nowhere close to the extraordinary reputational and financial risks that would come with the deception alleged.

## H5: The central factual issue: discussion

1173. I consider, in the light of the evidence as a whole, that it is more likely than not that Mr Migani did disclose to MDM and Mr Nuzzo that he was the entrepreneur who was behind the Fund and had set it up, and that he was the owner of the general partner.

1174. The Claimants' evidence on this came from Mr Migani, Mr Dalle Vedove and a number of XY clients who had invested in the Fund.

1175. I have covered the evidence of Mr Migani and Mr Dalle Vedove, as to the important meetings, in Section D above. It is, however, convenient to summarise that evidence. Mr Migani's evidence was that he usually described himself as the entrepreneur behind the Fund, indicating that the Fund was his entrepreneurial initiative. He would also say that he was the owner of the general partner, and commonly that the general partner was a sister company of XY.

1176. Specifically in relation to the 2 December 2016 meeting, he told MDM that he was working on a project to set-up a fund in Luxembourg as an entrepreneur. In relation to the 2 March 2017 meeting (which was the first time that a slide presentation referred to a RAIF), Mr Migani could not recall precisely what was said about the connection between him and the Skew Base Fund at the meeting. However, he said that there could have been no doubt whatsoever that the Fund's general partner was ultimately owned by him; that he had introduced the Fund to MDM as a sister company of XY; and that the whole premise of the discussion about the dedicated compartment was that this was something that could be created for MDM because of Mr Migani's connection to the Fund. In relation to the March 2018 meeting, he said that he explained to MDM and Mr Nuzzo that he was the entrepreneur who had developed the idea of the Fund, and also that the General Partner was responsible for managing the Fund and that he ultimately owned the General Partner.

1177. Mr Dalle Vedove's evidence was that Mr Migani made presentations to clients in a similar way. He would always use phrases like "I created the fund" or "I own the general partner" or the "general partner is a sister company of XY". He said that it was always clear that Mr Migani owned the general partner in the same way that he owned XY. He said that clients responded positively or not at all to being told that Mr Migani was behind the Skew Base Fund. He described Mr Migani's ownership of the general partner and role in setting up the new structure as reassuring. It would, he said, have been impossible for them to present a new mutual fund like this to a client, with no track record, without explaining who the sponsor or developer of that fund was. Mr Dalle Vedove could not recall what was said at the 2 March 2017 meeting with MDM and Mr Facoetti. In relation to the March 2018 meeting with MDM and Mr Nuzzo, Mr Dalle Vedove did not recall the exact words used, but said that it was clear from what Mr Migani said, as it always was, that the general partner was set up and owned by him. He was certain that he would have used the same sort of language which he used with all of their other clients, and there was nothing unusual about the way that the Fund was introduced this time.

1178. I have considered whether, and to what extent, that evidence, as well as the evidence of the Claimants' witnesses, is consistent with the contemporaneous documents and the inherent probabilities. The substance of the Claimants' evidence was that they were told nothing about any connection of Mr Migani to the Skew Base Fund, and therefore did not understand that he was the entrepreneur behind it or that he owned the general partner. As far as they understood it, the Skew Base Fund was an operation that was presented as being run by VP, which was a third party bank, and had nothing to do with Mr Migani or XY. They were content to invest very substantial sums in the Fund, because they had come to XY for advice and they trusted the advice and their advisor.

1179. In reaching my conclusion on this central factual issue, the following matters seemed to me to be the most significant.

*The XY client witnesses*

1180. Witness statements were provided by 7 XY clients. Whilst their evidence as to what they recalled being told was not precisely the same in each case, their evidence as a whole does corroborate the evidence of both Mr Migani and Mr Dalle Vedove as to what was said in the oral presentations. Each of these witnesses had a substantial business background in various industries.

1181. Mr Maurizio Elia was a retired entrepreneur and chairman of the board of a transportation business which was a national leader. He had a business relationship with Mr Migani, and his companies, going back to 2009. At the beginning of 2017, he was told about the creation of a fund in Luxembourg which might be able to create efficiencies in relation to his investments. On 24 February 2017, he attended a meeting with Mr Migani and Mr Dalle Vedove and members of his family. He remembered Mr Migani saying, during the meeting that he was the entrepreneur behind the fund and still involved in the Skew Base Fund. He invested a significant amount of money in the Fund in the early summer of 2017, and this was after Mr Migani had told him that he was connected with the Skew Base Fund.

1182. Mr Andrea Chiesi was a director of Chiesi Farmaceutici Group, and had been a client of XY since 2014. Between the end of 2016 and the beginning of 2017, together with members of his family, he was considering an investment in a private equity programme. Even though he did not remember the exact words used, he could say that Mr Migani introduced them to the Skew Base project, explaining immediately that it was his entrepreneurial initiative and that he was the shareholder of the funds' general partner, as he believed so much in the quality of the initiative. In consideration of this, Mr Chiesi and his family decided to invest in the Fund, finding it positive that it was linked to Mr Migani, given mutual esteem. He later personally invested in the Fund, which then suffered considerable losses, but nevertheless he is still a client of the XY Group companies.

1183. Mr Edward Rossini is a specialist in corporate finance and M&A, and has held roles in various Italian financial institutions. He had been a customer of the XY Group companies since 2013. In 2018, the XY team introduced him to the Luxembourg Skew Base Fund, and to some strategies that predicted a certain return except in the event of particularly extreme market events. He remembered that they told him from the beginning that the fund was traceable to Migani and that the General Partner was a sister company of XY. This circumstance was appreciated and assessed positively by him. He suffered losses in 2020, but was still a customer of the XY Group.

1184. Mr Roberto Colli had owned, with his brother, a large Italian private security and surveillance company which was then sold in 2012 or 2013. He appointed the XY Group to assist with investing the money received. He had known Mr Migani since 2007, and the relationship with XY started in 2013. He had regular monthly meetings with XY. During one of those meetings, he believed around 2018, Mr

Migani informed him and his brother of the opportunity to invest in a fund in Luxembourg. He did not remember the exact words used, but he remembered Mr Migani informing them that he was directly and personally involved in the fund. He understood this to mean that he was part of the fund. Since he had a high degree of trust in Mr Migani, the fact that he explained that he was involved in the fund made Mr Colli feel quite confident about making an investment. They too suffered losses due to the pandemic, but they are still customers of the XY Group and he still has great esteem for Mr Migani.

1185. Mr Sergio Colli gave evidence, that Mr Migani was directly and personally involved in the fund. Knowing he was directly involved reassured Mr Colli that investing in the fund was a good idea.

1186. Mr Pierotti had been the CEO of a company called Metalcastello SpA, a company active in the production of power trains. He had sold his shareholding to, amongst others, a private equity fund. He had been a customer of the XY Group since 2015. Given the many years that have passed, he did not remember the exact words or circumstances. But, at the end of 2018, the XY team illustrated some investment strategies in which he then invested through the Luxembourg Skew Base Fund. It was presented to him as being associated with Mr Migani, a person whom he knew personally and trusted.

1187. Mr Gianni Giordano managed the Giordano Vini family company, a leading business in the wine industry, which he then sold. He had been a customer of XY for 10 years. In the summer of 2018, he was offered the opportunity to invest in the Skew Base Fund. He remembered that, among the first comments made, he was informed that the founder and shareholder of the general partner was Mr Migani. The connection was appreciated as he was not familiar with the fund. Over the years, he invested and positive results were achieved, even in 2020, and he is still a customer.

1188. All of these witnesses were made available to be cross-examined by video-link, and I understood at the start of the trial that they would indeed be cross-examined. However, I was subsequently informed that the Claimants did not intend to cross-examine them. The evidence that they gave was therefore unchallenged. In their closing submissions, the Claimants gave two reasons for not cross-examining these witnesses. They said that XY had refused to permit the Claimants to attend to invigilate their evidence, that XY would not negotiate on that point, and that this stood to compromise the integrity of their evidence. I disagree. I do not see any particular reason why it was necessary or appropriate for the Claimants to attend the place where these witnesses were to give evidence, and in any event any argument on that issue could have been raised with and resolved by the court.

1189. It was also submitted that there had been a refusal to give disclosure, and this undermined the credibility of their evidence and gave rise to the inference that any disclosures made to them may well have been in writing. It seems to me, however, that these were points that could have been made in cross-examination of the witnesses, and I would then have been able to assess the answers which they gave. In any event, however, all of the witnesses said that the disclosure was given orally, rather than in writing, and I have no reason to doubt that evidence.

1190. I therefore see no reason not to accept the evidence of these witnesses as to what they were told. Viewed as a whole, I consider that it provides evidence which corroborates the evidence given by Mr Migani and Mr Dalle Vedove; both as to the practice of making an oral disclosure, and as to what was said when that disclosure was made.

1191. Mr Saoul also submitted that the evidence did not assist on what the Claimants were told. Mr Migani had a longer-standing relationship with these clients than with MDM, who invested in the Fund in April 2017 which was less than a year after the first meeting. With these longer-standing clients, Mr Migani may have therefore felt able to be more forthcoming. The Claimants argued that Mr Migani may have told some clients, when it suited him, and not others for whom (like the Claimants) a key selling point of XY was its independent, unbiased, conflict-free service.

1192. I was not persuaded by this point. It is in my view inherently probable that Mr Migani would (as he and Mr Dalle Vedove said) have given a similar explanation to the clients to whom he was presenting the Skew Base Fund as a possible investment opportunity. To my mind, it is an improbable fraud where some clients are being told about Mr Migani's connections to the Fund, but others are not. There is, as Mr Cloherty submitted, an obvious danger of possible leakage, from the clients who knew the truth, of the information which they had been told. Mr Cloherty suggested that in the world of wealthy Italian businessmen, who perhaps knew Mr Tatò who had introduced LDM to Mr Migani, leakage might occur. Mr Saoul said that this was unrealistic, since there was no reason why one investor should become aware of who else had invested in the Fund. However, I note that the Offering Memorandum does provide (Section 10.2) for an annual general meeting of shareholders, and also for the possibility of other shareholder meetings. Accordingly, the possibility of leakage, if some investors are in the know but others are not, is in my view more than theoretical. There is, in any event, a more significant point on potential leakage, discussed further below, which concerns information that might be supplied to investors by VP or by the independent directors of SB GP.

1193. I was also unpersuaded by the Claimants' argument that Mr Migani would have chosen MDM and Mr Nuzzo as people to whom his connection to the Skew Base Fund should not be revealed, because a key selling point of the Fund had been XY's independent, unbiased and conflict-free advice. The factual position, as described in Section D above, is that Mr Nuzzo had looked at the XY website prior to the May 2016 meeting, and there is no evidence that he ever looked at it again. There was then a reference by Mr Migani, at the meeting itself, to the nature of XY's business, consistent with what the website said. I have accepted that this information was passed to MDM in a conversation with Mr Nuzzo shortly afterwards. MDM himself never looked at the website. There were then a number of meetings between the parties, but there is nothing in the evidence to suggest that there was any discussion as to the importance to the Claimants of XY being independent, unbiased and conflict free. MDM had himself never raised or emphasised this point, of which he was only aware as a result of a phone report of the first meeting. Thus, the May and June 2016 meetings are the only times when the Claimants have pleaded that relevant oral representations were made. I

do not think that there is anything in the background – either to the December 2016 call or the March 2017 or the March 2018 meeting – which would have indicated to Mr Migani that he needed to be particularly careful about giving the same information to the Claimants as he had or was giving to other investors. Indeed, the picture which emerged through the various meetings was that, generally speaking, the Claimants were far from averse to making investments in in-house funds.

1194. Mr Saoul also submitted that the XY clients were not given the full picture: they do not say that they were told about Twinkle or its role in the Skew Base Fund nor about the substantial payments made from the Skew Base Fund to companies ultimately owned by Mr Migani. It is true – and indeed not disputed – that neither the XY clients who gave evidence, nor the Claimants, were told about the role of Twinkle or the payments which were being made to companies ultimately owned by Mr Migani. However, in my view, the important point which I am here considering is whether, in the context of the independence representations, the clients (and the Claimants) were told of Mr Migani's involvement in the Skew Base Fund and its general partner. The general partner is the entity to whom all of the fees payable by investors into the Fund are paid over, and who therefore has ultimate control of these monies. Furthermore, as described in Section F above, it is the general partner which has significant responsibilities and powers in relation to the running of the Skew Base Fund. Once a person knows that Mr Migani owns the general partner, it becomes obvious in my view that he must have a significant financial interest in the Fund, and that it is substantially and in a very real sense connected to him. That is reinforced if the person knows that Mr Migani is the entrepreneur behind the Fund. An entrepreneur would be understood to be the person who has set up a business in the hope of making money from it. Against that background, I do not think that it is of any significance, certainly as far as concerns the independence representations and the relevance of the evidence of XY clients, that clients were not told of the internal arrangements whereby money paid to the general partner would potentially flow to its owner Mr Migani.

1195. In his oral closing, Mr Cloherty (when addressing the misrepresentation case) said that all the Claimants needed to know was that Mr Migani was the person behind the Fund and that he was behind the general partner, and that was enough. It was not relevant to enquire in enormous detail as to what then happened to the fees. Investors in the Fund knew: what they were paying, that they were paying it to the general partner; and that the general partner will pay other people out of its fee, including the investment advisor if there is one. It was irrelevant what the general partner then did with its surplus assets afterwards. It could have paid a dividend of the whole of it to Twinkle, perfectly legitimately, or it could have given it to a charity. That was a distraction from the fundamental question which is: were they told and did they know that Mr Migani was behind the Fund? Broadly speaking, and certainly in the context of the independence misrepresentation claim and the relevance of the evidence of the other XY clients, I agree with that line of argument.

1196. It also seems to me that there is other evidence in the case which corroborates the evidence of the XY clients as to what they were told, and in turn the evidence of

Mr Migani and Mr Dalle Vedove as to what they told clients including the Claimants. The evidence from the VP witnesses, including Mr Konrad, was that none of the investors, prior to investment, asked any questions of VP or carried out any due diligence in relation to VP, even though it is a small and not very well-known banking group. That tends to suggest, in my view, that investors considered, in substance, that they were looking to Mr Migani, as the entrepreneur who had started this line of business, to make it work. That is entirely consistent with the evidence, discussed in Section F, concerning the usual and significant involvement of an initiator (a word which Mr Kuske used synonymously with "entrepreneur") in a fund of this kind.

1197. In addition, Mr Cloherty referred to the (unchallenged) evidence of Mr Migani as to what has happened since the commencement of the present proceedings. He now requires clients to sign a document acknowledging that they know of his indirect ownership of SB GP before they invest in the Fund. Since November 2021, 15 clients have approved this document and none have declined to invest on the basis of his connection with the General Partner. Of the 15 clients who approved the document, 11 had invested in the Skew Base Fund before March 2020. Mr Migani's evidence that clients were told of his ownership of the General Partner prior to March 2020 is, in my view, consistent with the fact that a substantial number of clients, who invested prior to March 2020, are prepared to continue to invest and to sign the document described by Mr Migani.

*The size of investment and the importance of the General Partner*

1198. The Claimants invested a sum exceeding € 100 million in the Skew Base Fund. It is possible, but to my mind inherently improbable, indeed very improbable, that they did so without having any idea as to who was behind the Skew Base Fund, and in particular who was behind the General Partner.

1199. In cross-examination by Mr Blakeley, Mr Nuzzo accepted – when shown the Offering Memorandum – that he knew from the outset that the AIFM was an <u>external</u> party appointed by the Fund. He agreed that he knew that the external AIFM was still subject to the overall supervision of the general partner, although he said that he did not remember going into "so much details". He agreed that because the AIFM was external, that meant that it was not part of the Fund; that the Fund did not belong to the AIFM; and that the Fund was not the AIFM's product. In response to my questions, he said that usually a general partner in a fund is important. He acknowledged that the Offering Memorandum said that the general partner set the policy of the Fund, and can change the policy, and that he knew that the general partner was a different entity to VP. I asked him whether, in circumstances where he was investing many millions of Euros, he was interested in who owns and is running the general partner. His response was:

> "I can say today that it was a huge mistake that we have done at the time, and we made big investments without making the appropriate due diligence that we should have done, only relying on third party advice".

1200. MDM's evidence, when asked whether he knew that an alternative investment fund is managed by its general partner, said: "Yes, I do now". I consider that he

knew this at the time as well. Indeed, a little later in his evidence, MDM was asked about Charme Capital having set up Charme 1. He agreed that this was a Luxembourg incorporated fund, set up in 2003 and which had finished operating in around 2014. He said that it was managed by a general partner, which had been incorporated for that purpose: Charme Management SA, a Luxembourg company. It was put to him by Mr Blakeley that Charme was the initiator of a Luxembourg fund, and it incorporated a Luxembourg general partner with broad powers to manage. He agreed, although he didn't think it was a "fund", and said that he wasn't sure what the structure was. MDM's evidence that Charme 1 was not a "fund" was puzzling and I do not accept it. In the factual narrative agreed by the parties, it was agreed that Charme had established 4 private equity funds, known as Charme I, II, III and IV; and that they were all alternative investment funds for the purposes of the relevant EU Directive.

1201. In my view, both MDM and Mr Nuzzo appreciated the important role that a general partner plays in the management of a fund such as the Skew Base Fund in which they decided to invest. Although there was delegation of important matters to the AIFM, the Offering Memorandum made it clear that the general partner had important residual powers. It was also the entity to which substantial fees were to be paid.

1202. The evidence indicates that the Claimants did not ask a single question about who was behind the Skew Base Fund. The Claimants' fraudulent misrepresentation case is thus not based on a misleading answer given to a question that was asked, nor (for example) a statement by Mr Migani or anyone at XY to the effect that he had no connection to the Skew Base Fund or its general partner. The Claimants also did no due diligence on either VP Lux or VP Liechtenstein or SB GP. They never met or spoke with VP Lux or VP Liechtenstein or asked to do so. The Claimants' evidence was that they had no real knowledge, prior to making their investments, of VP.

1203. In my view, the most likely explanation for the above matters, in particular their failure to do any due diligence, is because they knew who was behind the Skew Base Fund and its general partner. They were told that it was Mr Migani, a man who had impressed them.

1204. Furthermore, by the time that MDM came to invest in the Skew Base Fund, he had met and spoken with Mr Migani on a number of occasions, and had made a number of investments following XY's proposals. By the time that GIG came to invest, the relationship with MDM and Mr Nuzzo was considerably longer and the number of meetings and investments was much greater. It seems to me to be implausible that Mr Nuzzo and MDM would think that, if they invested in the Skew Base Fund, they would now be placing their wealth in the hands of a banking group with which they were entirely unfamiliar, whose key personnel they never sought to meet or ask any questions about, and would be doing so on the basis that it was important that Mr Migani and XY had no connection to the Fund. The Skew Base Fund had no track record in 2017 or 2018 at the time when XY proposed the Fund to the Claimants, and there is nothing in the evidence which suggests that there was any discussion about the qualities or experience of VP in the selection and management of investments in HFPO and MIN products. The Claimants sought to explain these matters by saying that MDM and Mr

Nuzzo had complete trust in Mr Migani, as their advisor. I think that it is far more plausible that the decision was made because they knew of Mr Migani's strong connections with the Skew Base Fund: his ownership of the General Partner, and the fact that he was the entrepreneur behind the Fund. To my mind, this is also why Mr Nuzzo was later to use the expression "the XY funds" in his April 2020 e-mail, and why he sent the "controllo/controllate" e-mails.

1205. There is also a related point here concerning whether it would have been realistic for Mr Migani to have sought to conceal that he was the entrepreneur behind the Fund, and the owner of the General Partner. The evidence (see Section F above) shows that the initiator will usually have a significant role in the operation of a Luxembourg fund such as the present. The EY Guide says so clearly. Given that the involvement of the initiator is a common feature, it is in my view unrealistic to think that Mr Migani could have considered that he might be able somehow to hide his involvement. I am dealing in the present case (and Mr Migani was himself dealing) with professional investors, who are highly intelligent and (in the case of MDM) had experience of running a Luxembourg fund himself. At any stage, an intelligent investor could ask the simple question – whether to Mr Migani himself, or to VP, or to the directors of SB GP: who is the initiator of this Fund?

1206. This point goes somewhat further. The Offering Memorandum spells out the role of the general partner, and (as Mr Nuzzo accepted) the role of a general partner in a fund is usually important. If an investor does not already know the answer, then a very basic due diligence question would arise, given the importance of the general partner: who owns the general partner? Again, that question could have been asked to Mr Migani, VP or the directors of SB GP.

1207. The Offering Memorandum did not identify who owned the general partner. However (see Section A above), there was publicly available information that the owner was Twinkle. It is true that the ownership of Twinkle was not available publicly. However, information as to the directors of SB GP was publicly available. This meant that, once he was appointed in December 2017, investors could see that Mr Faleschini was a director. Mr Faleschini was closely associated with XY. He was the company secretary of XY, as well as CFO of XY SA and the XY Group. He was also head of XY's software development department, and Mr Nuzzo had met him at the early meetings. Although the Claimants made the point that Mr Migani was careful not to appoint himself as a director of Twinkle, he did appoint as a director someone who would likely be known by investors (and certainly was known by Mr Nuzzo) to be closely associated with XY. This is, in my view, a strange thing to do if there is an intention to avoid revealing any connection between XY and the general partner of the Skew Base Fund. I do not disagree with the Claimants' argument that they would not be expected to carry out research in public records so as to discover the ownership of the general partner, or its directors. However, given the importance of the general partner, and that the Fund was external to VP, one would expect them – in the context of the substantial investments made – to be interested in who was behind the general partner, and to ask a simple question (of Mr Migani or others) if they did not already know the answer.

1208. There was, as the evidence from XY's other clients and indeed Mr Migani and Mr Dalle Vedove indicates, a commercial incentive for Mr Migani to make the disclosure that he said he made. He was dealing with clients who had confidence in him, but who (as was certainly the case as far as the Claimants were concerned) would have had little or no knowledge of VP, and where the Fund had no track record that it could show investors. It can, in my view, fairly be said that Mr Migani's disclosure was a selling point. Indeed, it is difficult to see how a fund with no track record, run by a small relatively unknown Liechtenstein banking group, could realistically have been explained and sold to intelligent investors without some explanation and reassurance as to Mr Migani's involvement. However, even if that were not the case, it is unrealistic (for the reasons set out above) to think that Mr Migani could have thought that he could conceal his role as entrepreneur or owner of SB GP, when basic due diligence questions could be asked of himself or outsiders. It is therefore, in my view, inherently probable that these matters would indeed have been explained to XY clients who were potential investors.

1209. There was also evidence that some of the Compartments of the Skew Base Fund were established for a single investor. Indeed, there was discussion about that possibility with MDM at the start. If an investor had a single Compartment, then he would obviously be looking for the investment strategy to be tailored to his particular needs. It is not easy to see how this could be achieved without the significant involvement, in designing the strategy and implementing it, of XY or at least people associated with it. If the design and implementation of the investment strategy was to be completely in the hands of VP, an investor would be bound to want to meet with VP in order to discuss the approach. However, the evidence is that this never happened. The most probable reason was that investors did not consider that the Fund was completely in the hands of VP, and unconnected to XY/Mr Migani.

*Leakage*

1210. In his closing submissions in relation to the conspiracy case, Mr Weekes put forward a number of arguments as to why it was improbable that there was a conspiracy to conceal either the involvement of Twinkle as an investment advisor and his ownership (via Twinkle) of the general partner. His basic point was that Mr Migani's approach had been to engage a number of independent people, with whom he had no previous connection, in a highly regulated country (Luxembourg) which requires delegation to an external AIFM. He submitted that this was a strange approach to take if Mr Migani were intent on defrauding investors, since there would have to be a clear agreement that, to put it colloquially, none of them would spill the beans.

1211. I have touched on this to some extent already. It does seem to me that if Mr Migani was going to conceal the fact that he was the entrepreneur behind the Fund, or the owner of the general partner, he would need to obtain the buy-in, and indeed express agreement, of a very large number of people who were to be involved in various aspects of the fund. Prominent amongst those people would be a large number of people from VP Lux and VP Liechtenstein, and (as set out in Section F above), I accept the evidence of the VP witnesses that they were not

party to any conspiracy, and indeed it is no longer alleged that Mr Konrad or Mr Kone were party to any conspiracy.

1212. Mr Migani would also need to obtain the agreement of Mr Longo, the original independent director of SB GP, and later Mr Kuske when he was appointed in 2018. When Mr Longo was introduced to the Fund, he was told that the client was XY. At around the time of his appointment in early 2017, he learned that Mr Migani was the ultimate beneficial owner of Twinkle, and he met him for the first and only time. Mr Kuske, appointed in 2018, learned that Mr Migani was the ultimate beneficial owner of Twinkle a little later, in 2019. Neither Mr Longo nor Mr Kuske is alleged to have been party to a conspiracy, and I have no doubt that neither of them was. Either or both of them could have revealed, if asked, that XY or Mr Migani was behind the Fund.

1213. Since the agreement of these people would have been required in order to try to prevent leakage of the facts that Mr Migani was the entrepreneur behind the Fund, and the owner of SB GP, and since agreement was never obtained, it is in my view inherently probable that Mr Migani did not seek to conceal these matters but did communicate them to investors.

*Motive*

1214. I accept that, in theory at least, there was a possible motive for Mr Migani to seek to mislead investors into investing in the Skew Base Fund. He was seeking to raise money for a fund in which he had a significant financial interest, and the greater the funds under the management the greater the earnings that he could expect to receive. However, as Calver J explained in *Suppipat*, it is also necessary to consider the disincentives to participating in a fraud. Here, it seems to me, the disincentives were considerable, in terms of potential damage to the reputation of Mr Migani, XY and the Skew Base Fund itself in the event that the alleged fraud (i.e. uncovering Mr Migani's significant interest in the Fund) was discovered. As I have said, the Skew Base Fund was not a Ponzi scheme. It was intended to be a successful, legitimate investment fund. But for the Covid pandemic, MDM and GIG would have made very healthy returns from their investment. In addition, as discussed above, there was an incentive for Mr Migani's involvement to be explained to potential investors, since it could be viewed as a selling point. Also, the risks of leakage (also discussed above) would have operated as a strong disincentive to the commission of the alleged fraud. Overall, whilst a motive for committing the alleged fraud cannot be dismissed, I consider that there are powerful factors which would have motivated Mr Migani to make the disclosure that he and Mr Dalle Vedove say was in fact made.

*The contemporaneous documents*

1215. The Defendants relied upon a number of exchanges during the course of the relationship, beginning with Mr Migani's note of the 2 December 2016 conference call and finishing with the "controllo/controllate" e-mails in March – June 2020. I have discussed the key documents and related evidence in Section D above, specifically: the 2 December 2016 note; Mr Nuzzo's e-mails of 25 and 26 April 2018, and the conversation thereafter; the 1 April 2020 "XY funds" e-mail; and the controllo/controllate e-mails. These were the principal documents

on which XY relied in their closing. For the reasons given in Section D, I consider that these documents – both individually and taken as a whole – are better explained by MDM and Mr Nuzzo having knowledge of (as they perceived it) the connection of Mr Migani and XY to the Skew Base Fund, rather than having no such knowledge.

1216. I accept, as the Claimants submitted, that this is a relatively small collection of documents, certainly when compared to the large number of XY PowerPoint presentations and other materials where (as is common ground) there is no reference to the Skew Base Fund being connected to Mr Migani. I also accept that, as Mr Saoul submitted, it is very relevant – when considering the inherent probabilities – to take into account that the important disclosure allegedly made is not recorded, fairly and squarely, in any document including the PowerPoints, or the draft letter provided to Mr Nuzzo in May 2018 (or the revised signed letter which was not provided). I agree with the Claimants that it is surprising that there is no clear written statement.

1217. However, the Defendants' case is that the decision was made to deal with the matter orally at meetings and that this became the practice. Here, I have unchallenged evidence from a number of investors that that indeed happened, as far as they were concerned, and I consider (as set out above) that their evidence is corroborated by other aspects of the evidence. This disclosure was made to other investors during the same period when, and notwithstanding the fact that, the XY website, in both its earlier and later forms, referred to independence, absence of bias and conflicts of interest and transparency. Accordingly, the fact that the XY website so provided does not mean that disclosure was not made. I also bear in mind that this was a relationship which, over the years, did involve a large number of meetings and phone calls, and the documents do not and are unlikely to capture everything that was said. For example, Mr Nuzzo's 24 April 2020 e-mail refers to XY having "always told us that you actively managed the funds", but this not something which is clearly set out in a document passing between the parties. It is therefore reasonable to suppose that some matters may have been communicated orally at different times over the years, and that it cannot be assumed that the written record is fully comprehensive as to what was communicated.

1218. Mr Saoul asked a pertinent question at the end of his oral reply, namely: what is the reason that the disclosure was not made in writing? Mr Migani's evidence was that this was the practice, but I do not think that he actually gave a reason (or was in fact asked to state a reason) as to why this was the practice. The Defendants did not, in their submissions, make any submissions as to the rationale for the approach that was taken. The rationale, if indeed there was one, for making the disclosure, orally rather than in writing, is unclear to me. Since I consider that (i) there is sufficient evidence that this was indeed the practice; (ii) many important aspects of the inherent probabilities support the Defendants' argument that they gave the oral disclosure alleged by Mr Migani and Mr Dalle Vedove; (iii) a number of documents do support the Defendants' case as to the Claimants' knowledge; and (iv) Mr Migani was not directly asked the question, I do not consider it necessary to, or indeed that I can, provide a firm answer to that question.

1219. It does seem to me, however, that there are other possible explanations, other than a desire to conceal Mr Migani's involvement as entrepreneur and owner of the general partner, as to why this may have become the practice.

1220. One explanation is that Mr Migani thought that an oral explanation was sufficient, and that it did not occur to him that this would give rise to a later dispute, perhaps because he thought it was so obvious that there was someone behind a fund of this kind, and that someone was him. He said in evidence that in hindsight he would change things of course, but this was the practice at the time "unfortunately".

1221. Another possible explanation is that Mr Migani did not appreciate the fact that when XY was proposing the Skew Base Fund to potential investors, XY itself had a conflict of interest which XY needed to disclose. (Indeed, XY has argued in the present case, in the context of the Claimants' fiduciary duty case, that there was no breach; because XY was not itself receiving any benefits from the Skew Base Fund. I consider (and reject) that case in Section I below). In his evidence, Mr Migani accepted that there needed to be disclosure of his interest in the Fund. It was put to him (in cross-examination on Day 13) that "it was an important thing you needed to do, to disclose the conflict to my clients". Mr Migani agreed. In cross-examination on Day 12, however, he had been asked: "And what we know now is that XY was heavily conflicted when it recommended that my clients invest in the Skew Base Fund". Mr Migani said that he "didn't think so". A little later, in response to my question, he agreed that there was a conflict between XY and the Skew Base Fund, in the sense that there was a connection through him. He said, however, that once he made it clear that he was the owner, the conflict was fixed.

1222. It is possible that Mr Migani (wrongly in my view) thought that the existence of the conflict was something which he personally had to disclose, rather than it being something for XY to disclose. This might possibly explain why nothing was put in writing by XY. It may also be the case that Mr Migani was more focused on the need to explain his involvement in the Skew Base Fund as a reason for XY's clients to invest in the Fund, and to provide reassurance in that regard, and less focused on the need for disclosure in the light of representations made on the XY website or arising from fiduciary duties owed by XY (as to which see Section I below).

1223. Another possible explanation arises from the fact that, as I am persuaded on the evidence, Mr Migani was concerned that his new entrepreneurial initiative of creating an investment fund had the potential, if it went wrong, to expose XY to liability. He wanted to keep the two lines of business – XY's consulting business and the Skew Base Fund operation where Twinkle was the investment advisor – operating separately. I consider that this was the essential reason why the investment advisor was Twinkle, rather than XY. Twinkle came to have offices which were separate from that of XY. There is evidence that by the middle of 2017, Mr Migani and XY were thinking about liability issues. It was at that time that the disclaimer began to appear on the XY presentations. At a later stage, in May 2018 when Mr Nuzzo had asked for the letter discussed in Section D, Mr Migani was content with the letter (which was never sent) but recognised potential liability problems. It is possible, in my view, that Mr Migani thought

that oral disclosure, in an informal way – rather than by documents produced by XY – might assist in protecting XY from liability in case something went wrong with the Skew Base Fund.

1224. Ultimately, however, I have to answer the question: were investors (specifically the Claimants) told, rather than why were investors not told in writing. Whilst the latter question is relevant to the former, and although Mr Saoul was able to make some very fair points on the documents to which he referred, I am ultimately persuaded that it is inherently probable that disclosure was made in the manner described by Mr Migani and Mr Dalle Vedove, and that this is supported by the documents relied upon by the Defendants, referred to above and which I have discussed in detail in Section D. Although this is a relatively small collection of documents, I bear in mind that there are in fact very few documents emanating from the Claimants which give an insight into as to their understanding of the Skew Base Fund at the time.

*The key witnesses*

1225. The principal witnesses as to what was said in the relevant discussion and meetings were MDM, Mr Nuzzo, Mr Facoetti, Mr Migani and Mr Dalle Vedove. As described in Section B, my overall approach, in relation to their evidence both on the investment and independence issues, and indeed generally, has been to look closely at the inherent probabilities, contemporaneous documents and evidence that was not challenged on each issue, and to consider their evidence in the light of those matters. Section B above contains my general assessment of the evidence of those witnesses.

1226. The present case, as is not uncommon in cases in the Commercial Court, involves the assessment of evidence where there is reason to doubt the reliability of the evidence of key witnesses on each side. I have set out my views on the witnesses in Section B above.

1227. In my view, the evidence of both MDM and Mr Nuzzo involved a considerable downplaying as to their understanding of the risks of investing in the MIN and HFPO products in which they invested. It would, in my view, not be at all surprising if (as I consider to be the case) their evidence involved a similar downplaying as to their understanding of Mr Migani's involvement in the Skew Base Fund. Mr Facoetti's evidence does not assist in bolstering the evidence of MDM and Mr Nuzzo: he was not involved in key meetings, would not have cared if there was a commercial relationship between XY and the Skew Base Fund, and gave one answer (as to Mr Migani having selected VP Bank as custodian) which suggested knowledge of Mr Migani's significant connection to the Fund.

1228. On the Defendants' side, for reasons set out in Section B, I do not regard Mr Migani as a witness on whose evidence I can rely, unless corroborated by other reliable evidence in the case including the inherent probabilities. However, I have fewer reservations about the evidence of Mr Dalle Vedove. On the key issue which I have addressed in this section, I accept his evidence as to what investors (including the Claimants) were told, because the evidence overall, including the inherent probabilities, supports the account which he gave. In turn, that supports the evidence of Mr Migani as to what he told investors, including the Claimants.

## H6: Conclusion on the "Independence Representations" claim

1229. In the light of my conclusion on the central factual issue, the investment misrepresentation case must fail. There are a number of legal routes to that analysis, and it is not necessary to discuss each of them in detail. One obvious route is that since the Claimants were aware of Mr Migani's significant connection to the Skew Base Fund – in that he was the entrepreneur behind it and he was the owner of the general partner – it cannot be said that the Claimants relied upon the relevant representations when concluding contracts with XY, or making investments (whether into the Skew Base Fund or otherwise). Another route is that there was no relevant failure, and certainly no dishonest failure, to correct representations made on the website or in the May 2016 meeting. It is not therefore necessary to discuss, in detail, the Defendants' other responses to this claim.

1230. Before leaving this part of the case, however, I should note that I am far from persuaded that the Claimants ever attached as much significance, as they now seek to do, to the importance of XY being independent, conflict-free and unbiased. In my view, what the Claimants, and certainly MDM, were really interested in was making investments which they considered to be sound and in accordance with the overall objectives as discussed with XY in the meetings. As I have said, they were not averse to investing in "in-house" funds. Their initial introduction to XY had been as a result of a personal recommendation. It was not because the Claimants were concerned about banks having a conflict of interest.

1231. As discussed in Section G, the Skew Base Fund was attractive to both MDM and Mr Nuzzo for a variety of reasons, including MDM's tax position and the ease of making substantial investments via a fund. When cross-examined by Mr Blakeley as to what mattered to him at the time that he first subscribed to the Skew Base Fund, MDM referred to his investment objectives, his non-dom status and his tax position. I think that this fairly reflected what mattered to MDM. Furthermore, MDM had not visited the website, and had not attended any meetings where representations had been made as to independence and being unbiased and conflict-free. The brief report by Mr Nuzzo, of his first meeting with Mr Migani in May 2016, would not have been a relevant factor in MDM's decision to move forward with Mr Migani.

1232. Against this background, there is no reason to think that any of the Claimants' witnesses would have reacted adversely to being told the information, as to Mr Migani's connection to the Skew Base Fund, that (in my judgment) was communicated to MDM and Mr Nuzzo. The evidence is that they liked the man, and they liked the strategy.

1233. I also think that my view – that the Claimants did not at the time attach anything like as much significance to XY's independence and being conflict free as they now argue in the present litigation – derives some additional support from the way in which the present allegation came to be made. Mr Nuzzo's evidence is that it was in around the spring/summer of 2020 that he started to receive information as to the possible connections between Mr Migani/XY and the Skew Base Fund. If this really was a surprising or shocking piece of information, one might have expected the Claimants at least to raise questions with XY as to

whether it was true. Mr Nuzzo was still communicating with Mr Dalle Vedove in June 2020 when he sent an e-mail referring to "un controllo maniacale": see Section D above. However, there were no questions asked, nor any expressions of surprise or shock. It was only when proceedings were actually served, in April 2021, that the Claimants first asserted that they knew nothing about Mr Migani's various connections to the Fund and that this was fundamental to their investment decision.

1234. I have also considered, particularly in the light of these matters, the question of causation. As discussed in Section G above, where a claimant alleges that loss has been suffered as a result of entering into a contract or contracts, the claimant must show that "but for" the representation, the claimant would not have entered into the contract in question, or would only have done so on different terms. The relevant enquiry is whether the claimant would have entered into the contract if the representation had not been made at all, and not whether it would have done so if a different representation (i.e. the truth) had been made to it.

1235. I consider that if XY's website had said nothing about being independent or unbiased or being conflict-free, or if nothing had been said on that topic at the May 2016 meeting, events would still have proceeded in the same way that they did, and that the Claimants would have suffered all the losses that they did eventually suffer as a result of the adverse market movements in March 2020. In my view, the relationship with XY would have started in the way that it did, not least because of the technology that XY could provide to assist Mr Nuzzo. It would then have developed as it did, because the Claimants were impressed by Mr Migani and XY, and were attracted to the investment strategy that was proposed, including investment in HFPO and MIN products. Accordingly, the claim based on the independence misrepresentations also fails on causation grounds.

## I: Fiduciary duty and dishonest assistance

### I1: Summary of principal arguments

1236. The Claimants submit that XY owed fiduciary duties to the Claimants, and that these were breached by their failure to disclose the various connections between Mr Migani and his companies and the Skew Base Fund. XY denies that any fiduciary duties were owed, and advances a number of other arguments as to why (if owed) there was no breach. XY's main argument is that there was sufficient disclosure of what really mattered (that Mr Migani was the man behind the Fund and the owner of the general partner), and that was sufficient to mean that the Claimants gave informed consent to his connections to the Skew Base Fund. Mr Migani submits that since there was no breach of any fiduciary duty owed by XY, there can have been no dishonest assistance. In any event, he denies that he acted dishonestly.

1237. There is a substantial overlap between the issues on independence, which I have addressed in Section H above, and the arguments here. Indeed, in the Claimants'

written closing submissions, the independence misrepresentation case and the fiduciary duty/dishonest assistance case were, sensibly, addressed together.

## I2: Discussion

1238. I consider that my conclusions in Section H effectively dispose of the case based on breach of fiduciary duty and dishonest assistance.

*Did XY owe fiduciary duties?*

1239. The initial question is whether XY owed fiduciary duties to the Claimants. I consider that XY did owe such duties.

1240. In *Bristol v West Building Society v Mothew* [1998] Ch 1, Millett LJ held at p18:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations…".

1241. This is a classic statement, quoted with approval by Lady Arden JSC in *Children's Investment Fund (UK) v Attorney-General* [2020] UKSC 33, paragraph [44] when describing what the term "fiduciary" means.

1242. It is clear that fiduciary duties may be owed despite the fact that the relationship does not fall within one of the settled categories of fiduciary relationships, provided the circumstances justify the imposition of such duties. In *Glenn v Watson* [2018] EWHC 2016 at [131(7)], Nugee J said:

> "… A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to 'the single-minded loyalty of his fiduciary'…: someone who has agreed to act in

> the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent…".

1243. A client's relationship with a financial advisor is not one of the settled categories of relationship where fiduciary duties are presumed by law. However, as Cockerill J said in *FM Capital Partners v Marino* [2018] EWHC 1988 (Comm) at para [427 i)], financial advisors "can (and in practice often do) occupy a fiduciary position vis-à-vis their clients". Cockerill J referred to the decision of the Supreme Court of New South Wales in *Aequitas v AEFC* (2001) 19 ACLC 1006 at [307]:

> "The fiduciary relationship between financial advisor and client arises because the financial advisor, having held itself out as an advisor on matters of investment, undertakes a particular financial advisory role for the client…. The advisory fiduciary relationship may arise whether or not there is an anterior fiduciary relationship between the parties, such as the relationship of broker and client. The relationship can arise even where parties are dealing with one another in a transaction in which the advisor has an obvious commercial self-interest. …".

1244. In the present case, XY was not an "independent financial advisor" or "IFA" of a kind that would usually come to mind when that expression is used in the context of retail clients. Mr Cloherty realistically accepted in his closing submissions, however, that XY was providing advice when it put forward its proposals for the Claimants' investment strategy. Indeed, the word "advice", or its derivative, is used in the contracts with the Claimants. Some of the contracts are headed "Advisory Agreement", albeit that the services were often referred to as "consulting services". The 2019 contract with MDM described the consulting services as "financial advisory and deal arrangement".

1245. In relation to the question of whether fiduciary duties were owed, I do not consider that there is any material difference between the position of XY and the position of financial advisors where a fiduciary relationship has been held to exist. Here, XY was providing consulting services concerning how the Claimants might invest very substantial sums of money. They were doing so in circumstances where, as Mr Migani acknowledged in many passages of his evidence, he was seeking to and did develop a relationship of trust with his clients, and they were putting their trust and confidence in XY. As he said in his witness statement in relation to the manner in which the Fund was presented to clients: "[T]hey already trusted XY by engaging us to provide services in respect of their assets and financial matters". These matters are, in my view, sufficient to establish the existence of a fiduciary relationship. That conclusion is reinforced by the fact that, at the start of the relationship, XY's website described its business in terms of XY being independent, unbiased and conflict-free.

1246. XY relied on the decision of Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), in particular paragraphs [1575] – [1576] in support of the

proposition that XY did not have, and could not have had, any conflict of duty and interest, because it had no interest at all in either the Skew Base Fund or SB GP. I reject that argument. The classic statement of Millett J is that "he may not act for his own benefit or the benefit of a third person without the informed consent of his principal" (my emphasis). Absent informed consent, if XY acted for the benefit of its owner, Mr Migani, there would be a breach of XY's fiduciary duties. The passages in *Ultraframe* to which Mr Cloherty referred are concerned with the remedy against the fiduciary, and in particular whether he is liable to account for profits made by others.

*Content of the fiduciary duty*

1247. In the RAPOC, the Claimants plead that, as a result of the fiduciary relationship, XY owed GIG and MDM: (i) a duty not to place itself in a position where its interests conflicted with those of GIG and MDM or where there was real possibility that that might occur; (ii) a duty not to profit from its position at the expense of GIG and MDM; and (iii) a duty of undivided loyalty, which included a duty to disclose to GIG and MDM all information relevant to their affairs.

1248. There was no real dispute as to (i) and (ii). However, XY submitted that any fiduciary duty did not include a positive obligation to disclose to GIG and MDM "all information relevant to their affairs". I agree. Snell's Equity, 35th edition, states (at 7-014):

> "Fiduciary duties are fundamentally proscriptive in nature, rather than prescriptive: fiduciary doctrine "tells the fiduciary what he must not do. It does not tell him what he ought to do"."

1249. The Claimants accept that the orthodox view is that fiduciary duties are proscriptive not prescriptive, but point out that prescriptive duties have been recognised by the courts. They referred to a line of authority, starting with *Fassihi v Item Software (UK) Ltd* [2004] EWCA Civ 1244, in which a director has been held to owe (as part of his fiduciary duty) an obligation to disclose his own misconduct. However, I am not dealing with a case involving misconduct in the context of the relationship between a company and a director. I do not consider that this line of authority provides any basis for imposing on XY a duty to disclose all information relevant to the affairs of GIG and MDM. In my view, the orthodox view as set out in *Snell* applies.

*Informed consent*

1250. XY's principal answer to the case on breach of fiduciary duty was that the Claimants were told about Mr Migani's connections to the Skew Base Fund: that he was the entrepreneur behind it and that he owned the general partner. They submitted that this was the key disclosure which it was necessary to make. The Claimants contended that no such disclosure was made, but that even if made this would not be a sufficient disclosure of all the facts that were required to be disclosed.

1251. Both sides referred to the discussion in *Snell's Equity* headed "Authorisation", now in para [7-019] of 35th edition. Under the heading: "Principal's consent", the authors state:

"(a) Principal's consent. The fiduciary's principal is competent to relax, or to forgo altogether, the protection which fiduciary doctrine provides him or her. The principal may authorise the fiduciary to act in a way which would otherwise be a breach of fiduciary duty, but the "relation must be in some way dissolved: or, if not, the parties must be put so much at arm's length, that they agree to take the characters of purchaser and vendor". The principal may bring an end to the fiduciary relationship completely, which avoids the application of fiduciary duties, or it may alter the fiduciary's non-fiduciary duties in respect of a particular transaction so that, for that transaction, there is no conflict between those non-fiduciary duties and the fiduciary's personal interest.

Consent can be inferred where the circumstances justify such an inference.

To provide the fiduciary with an effective defence to a claim for breach of fiduciary duty, the principal's consent to relaxation of the fiduciary's duties must be fully informed. "The key is disclosure—'sunlight bleaches'". The burden of establishing informed consent for conduct which would otherwise constitute a breach of fiduciary duty lies on the fiduciary. In order to show that the consent was fully informed there must be clear evidence that it was given after the fiduciary made "full and frank disclosure of all material facts". The principal's consent will be "watched with infinite and the most guarded jealousy" by the court.

The materiality of information to be disclosed is determined not by whether it would have been decisive (although, if it would have been decisive, then it clearly was material), but rather by whether it may have affected the principal's consent. Thus, it is no defence to a claim for breach of fiduciary duty for the fiduciary to argue that the principal would have acted in the same way even if the information had been disclosed. Further, consistent with equity's focus on substance rather than form, disclosure is treated in a functional, rather than a formalistic, way, so that the sufficiency of disclosure depends on the sophistication and intelligence of the person to whom disclosure is required to be made.

The fiduciary must disclose the nature of his interest in the transaction, not merely the existence of the interest.145 Where the existence of the interest is disclosed, but not the precise nature of that interest, the principal's fully informed consent may not have been obtained, although the fact that the existence of the interest is known to the principal can result in a reduced range of remedies being available to the principal.

> Where the principal is aware that the agent will receive a commission and could have discovered the level of commission by making inquiries, failure to do so (and consequent misapprehension as to the amount of commission) does not negate informed consent. This, however, does not apply where the commission is not a customary usage and is not readily ascertainable from an available source which the principal has failed to take the trouble to discover."

1252. The authors then state at para [7-020]:

> "There is no breach of fiduciary duty if the person creating the fiduciary position was aware that the fiduciary would thereby be placed in a situation of conflict between duty and interest, and the person who created the fiduciary position implicitly consented to and authorised the existence of the conflict".

1253. On the basis of my findings in Section H above, the Claimants were told that Mr Migani was the entrepreneur behind the Skew Base Fund, and that he owned its general partner. The question of informed consent must be applied, as *Snell* indicates, by looking at substance not form, and treating it in a functional rather than formalistic way. I must also take into account, as indicated in the cases cited in footnote 144 of *Snell*, the sophistication of the person to whom the disclosure is made.

1254. In Section H above in the context of the independence representations claim, I addressed the Claimants' argument that the other XY clients were not given the full picture; because they were only told of Mr Migani's involvement as the person behind the Fund, and his ownership of the general partner. I concluded, in that context, this was not a persuasive point. I accepted Mr Cloherty's argument, in that context, that all the Claimants needed to know was that Mr Migani was the person behind the fund and that he was behind the general partner, and that was enough. It was not relevant to enquire in enormous detail as to what then happened to the fees. I accepted that investors in the fund therefore knew: what they were paying, that they were paying it to the general partner; and that the general partner will pay other people out of its fee, including the investment advisor if there is one. It was irrelevant what the general partner then did with its surplus assets afterwards.

1255. I have considered whether, in the context of the claim for breach of fiduciary duty – bearing in mind that the onus is on the fiduciary to establish informed consent – the answer should be any different. I have concluded that it should not. I am concerned here with a case of professional investors with considerable experience of financial matters, where MDM ran his own Luxembourg fund, and Mr Nuzzo acknowledged that he understood the important role that a general partner plays. The disclosure that was made would have made it obvious that Mr Migani, as the entrepreneur behind the fund, had a significant financial interest in its success. The Offering Memorandum set out the fees that were to be paid to the general partner, and so investors knew that substantial sums were flowing out from the Fund into a company which Mr Migani owned. In the context of a disclosure

which revealed Mr Migani's significant interest and involvement in the Fund, I do not consider that the absence of disclosure of other matters – for example exactly how much money was being paid to each actual or potential service provider identified in the Offering Memorandum, or how any profits made by the general partner were to be distributed – means that there was not a sufficient disclosure of material facts to the Claimants.

1256. Accordingly, I consider that there was informed consent in the present case, and that therefore there was no breach of fiduciary duty. It follows that the claim for dishonest assistance must also fail.

1257. I have, however, considered what the position would be if I had concluded that the disclosure that was made was insufficient to give rise to informed consent, because further information should have been provided. If that were the case, then I would not have held Mr Migani liable for dishonest assistance. In circumstances where the important disclosure was made – of Mr Migani's involvement as the man behind the Fund, and owner of the general partner – I do not consider that he acted dishonestly in (in effect) failing to ensure that XY disclosed more details of his involvement, even if the law in fact required him to disclose more than he did.

1258. I also consider that, if the disclosure made was insufficient to give rise to informed consent, the Claimants' claim (based on breach of fiduciary duty) for all the losses flowing from their investment in the Skew Base Fund, and indeed other investments, would still fail. The premise of that claim is that the Claimants would never have invested if they had known of Mr Migani's connections to the Skew Base Fund. In my view, if the Claimants were content to invest, knowing what they did know about his connections, it is unrealistic to think that they would not have invested if further details (for example about how much was being paid to different service providers) had been provided. The Claimants losses would therefore still have been suffered.

## J: Unlawful Means Conspiracy

### J1: Legal principles

1259. The following summary of the legal principles reproduces or is derived from the recent judgments of Henshaw J in *Ivy Technology v Martin & Bell* [2022] EWHC 1218 (Comm) at paras [580] – [590] ("*Ivy*"), and Foxton J in *4VVV Ltd v Spence and others* [2024] EWHC 2434 (Comm) at paras [625] – [632].

1260. The ingredients of a claim for unlawful means conspiracy are set out in *Kuwait Oil Tanker Co SAK v Al-Bader (No 3)* [2000] 2 All ER (Comm) 271 at para [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons

> to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

1261. *Combination*: In *Ivy* at paras [582]-[583], Henshaw J summarised the legal requirements as follows (omitting internal citations):

> "i) The combination must be to the effect that at least one of the conspirators will use unlawful means.
>
> ii) It is unnecessary, in order for a combination to exist, that it be contractual in nature or that it be an express or formal agreement.
>
> iii) It is enough for liability to arise that a defendant be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. However, the conspirators do not need to have exactly the same aim in mind.
>
> iv) Direct evidence of the combination is not essential. It is also unnecessary for the claimant to pinpoint precisely when or where it was formed …
>
> v) Participation in a conspiracy is infinitely variable and may be active or passive. The courts recognise that it will be rare for there to be evidence of the agreement itself."

1262. It is necessary to look at all the particular facts of the case to establish whether there was a combination and whether someone participated, actively or passively, in the conspiracy. Being aware that someone was committing a potentially unlawful act, but (simply) not taking steps to stop it, may not suffice to demonstrate a combination, but it all depends on the circumstances, and in particular the position of the individual concerned.

1263. In order to establish a conspiracy to commit deceit, it is necessary to establish that the deceit was committed, and that it was part of a concerted action taken pursuant to the agreement: see acted upon: *European Real Estate Debt Fund (Cayman) Ltd (in liquidation) v Treon* [2021] EWHC 2866 (Ch) at para [381]. I consider that the same approach applies where it is alleged that the conspiracy was to commit a breach of fiduciary duty (including dishonest assistance in connection therewith).

1264. A director can conspire with a company of which he is a director: *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch), per Morgan J at Annex I para [77].

1265. *Intention*: In an unlawful means conspiracy, the required intention was summarised by Bryan J in *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm) at para [91] as follows:

> "…The intention to injure element will be satisfied simply where the '*gain to the conspirators is necessarily at the expense of loss to the victim'*- see *Palmer* at [219], and at [220]-[222] per Judge Russen QC. It is '*no defence for [a defendant] to show that their primary purpose was to further or protect their own interests …*' -see *Lonrho Plc v. Al-Fayed (No.1)* [1992] 1 A.C. 448, 466A per Lord Bridge. Whether a defendant had the requisite intention to injure "*and therefore had joined the combination turns on whether they knew about the alleged conspiracy. Knowledge includes "blind eye" or "Nelsonian" knowledge as well as actual knowledg*e": see *Manek v. Wirecard AG* [2020] EWHC 1904 (Comm), at [45] per Sir Ross Cranston."

1266. *Knowledge*: On the current state of the authorities below the Supreme Court, it is clear that it is not necessary for the conspirators to know that the means to be employed are unlawful, provided they have knowledge of all the facts which make the means unlawful: *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 at paras [133], [139] and [171] following *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393. Lewison LJ dissented, preferring observations in *British Industrial Plastics v Ferguson* [1938] 4 All ER 504 and *Meretz Investments v ACP* [2007] EWCA Civ 1303, to the effect that there might be a defence based on a belief that the defendant's acts were lawful.

1267. A defendant must, however, know all the facts which make the transaction unlawful. In *Ivy*, Henshaw J accepted the proposition that the requirement of knowledge of all the facts that make a transaction unlawful must (in that case) necessarily include knowledge of any contractual provision the breach of which is alleged to constitute the unlawful means. Applied to the present case, Mr Blakeley submitted that, in the context of breach of fiduciary duty, this means that a defendant must have both knowledge of the fiduciary relationship, and knowledge that it has been breached. I agree.

1268. As is usually the case, "blind eye" knowledge is sufficient, namely "a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence" (*Ivy* at para [589]).

1269. *Unlawful means*: the concept of "unlawful" means extends to "all acts a defendant is not permitted to do, whether by the civil law or criminal law" (*OBG v Allan* [2007] UKHL 21 at para [162]). It was not disputed before me that the tort of deceit, breach of fiduciary duty, and dishonestly assisting such breach, can constitute unlawful means for this purpose.

1270. *Loss*: Damages for conspiracy are at large (see e.g. *Capital for Enterprise Fund A LP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch) at para [14]).

## J2: The parties' arguments

1271. The Claimants allege that the Defendants combined together and/or acted in concert pursuant to an agreement or common understanding with an intention to maintain the façade that the Skew Base Fund was independent of XY and managed by VP Lux without any connection to or involvement from XY or related persons. Pursuant to that conspiracy, the Defendants carried out the alleged fraud and directed, procured and/or caused its proceeds to be transferred through a web of companies for the ultimate benefit of Mr Migani. The alleged conspiracy was ongoing and subsisted for the duration of the relationship between XY, GIG and MDM.

1272. They allege that all the Defendants participated in that conspiracy, and that the combination between them is to be inferred, from various facts, including:

(i) XY, Mr Migani and Mr Faleschini made the representations as to independence;

(ii) XY breached its fiduciary duties to GIG and MDM, and Mr Migani assisted in or procured the breaches of fiduciary duty;

(iii) Mr Migani, Mr Faleschini, XY and Twinkle were involved in the creation of the Skew Base Fund, with Mr Migani making critical decisions and Mr Faleschini acting as his right hand man;

(iv) the Skew Base Fund's day-to-day management was undertaken by individuals employed by XY;

(v) Twinkle was liaising with the counterparties, negotiating the pricing of trades, and selecting the trades in which the relevant Compartments of the Skew Base Fund would invest;

(vi) VP Lux delegated the investment management function to VP Liechtenstein, which in turn delegated that function to Twinkle, with the onward delegation to Twinkle being intentionally removed from the Offering Memorandum;

(vii) SB GP, Twinkle, VP and the Leader Logic Defendants entered into various agreements which allowed substantial payments to be made to entities owned by Mr Migani and connected to XY, with SB GP, Twinkle and the Leader Logic Defendants causing payments to be extracted from the Skew Base Fund for the ultimate benefit of Mr Migani;

(viii) the Defendants failed to disclose the connections between the Skew Base Fund and XY, or failed to stop the wrongful acts being carried out pursuant to the conspiracy at any stage prior to March 2020.

1273. The Claimants contend that the unlawful means employed were: (i) fraudulent misrepresentations in the form of continuing or repeated representations as to

independence; (ii) breach by XY of its ongoing fiduciary duties to GIG and MDM; and (iii) dishonest assistance by Mr Migani in facilitating the repeated breaches of fiduciary duty by XY.

1274. They allege, as their primary case, that XY, Mr Migani, Mr Faleschini, had full knowledge of the material facts which made the representations, acts and omissions unlawful. They also allege that the knowledge of Mr Migani is attributable to the Skew Base Fund itself (D2), SB GP (D3), Twinkle and the Leader Logic Defendants, since Mr Migani was the controlling mind and beneficial owner of all of those companies. They also advance an alternative case based on the knowledge derived from the website, and other sources, as to XY holding itself out as financial advisor providing unbiased advice to its clients. It was alleged that there was knowledge that the independence representations were made and were false. This latter argument was based on actual, blind-eye, or constructive knowledge. Ultimately, however, Mr Saoul accepted that constructive knowledge was not sufficient for the purposes of the tort of conspiracy.

1275. As far as the VP Defendants were concerned, the Claimants in their opening submissions alleged that 6 individuals (Mr Ries, Mr Konrad, Ms Weber, Mr von Kymmel, Mr Kone and Mr Karp) all had the "relevant constructive and/or blind-eye knowledge". By the end of the trial however, the case was no longer advanced against any individual other than Mr Ries and Mr von Kymmel, and it was not suggested that constructive knowledge was sufficient.

1276. The Claimants alleged that all of the Defendants realised that harm was caused to GIG and MDM. The relevant harm was that: GIG and MDM engaged the services of XY and proceeded to use those services, including in investing and retaining the investments in the Skew Base Fund, without knowledge of the connections between XY and the Fund, and believing the latter to be independent of the former; and were deprived of the benefit of independent investment advice prior to deciding whether to invest in the Skew Base Fund in circumstances where their investments stood to benefit the Defendants directly or indirectly.

1277. The Defendants challenged all aspects of this case. In particular, the Defendants denied that there was any conspiracy as alleged, or any intention to injure. Attribution of knowledge was also in issue in relation to the Fund (D2), SB GP (D3) and Twinkle. It was, however, accepted that Mr Migani's knowledge would be attributed to the Leader Logic companies, on the basis that he was the directing mind and will of those companies. In view of my conclusions summarised below, it is not necessary further to summarise the details of the Defendants' arguments.

### J3: Discussion

1278. Ultimately, the conspiracy case must fail because the Claimants have failed to establish the underlying wrongs (deceit, breach of fiduciary duty, dishonest assistance) upon which they rely.

1279. However, there are some additional reasons why, in my view, the conspiracy case must fail on the facts. My conclusions have to a large extent been foreshadowed

in earlier sections, in particular my discussion of the evidence of the VP witnesses in Section F and the deceit case in Section H. I will endeavour to set out my reasons as briefly as possible, and I do not consider it necessary to address all of the very many arguments that were addressed.

1280. At the heart of the Claimants' conspiracy case is the plea in paragraph 101 of the RAPOC that:

> "The Defendants combined or acted in concert with a common intention of maintaining the façade that the Skew Base Fund was independent of XY and managed by VP Fund without any connection to or involvement from XY or persons connected to it … Pursuant to this combination the Defendants used unlawful means with the intention of injuring GIG and/or MDM".

1281. Similarly, in their opening submissions, the Claimants identified the relevant combination as being an agreement or common understanding with an intention to maintain the façade that the Skew Base Fund was independent of XY and managed by VP Lux without any connection to or involvement from XY or related persons. As part of that argument, they submitted that the VP Defendants knew, or had constructive or blind-eye knowledge, that they were part of the façade to create a false impression of independence in respect of the Skew Base Fund, by reason of their participation in the structure.

1282. I do not consider that the evidence establishes that there was in fact anything that could properly be considered to be a façade at all. Mr Ries said in evidence that: "If this would be a façade, this would be a façade for a whole fund industry". His essential point was that the structure of the Skew Base Fund in the present case was an ordinary structure which was commonly used in Luxembourg, in the context of a market where it was well known that a fund of this kind is the product of an initiator, such as in the present case Mr Migani. The involvement of the initiator in the subsequent operations of such a fund, as investment advisor, is also part of this ordinary structure.

1283. Here, there was a detailed Offering Memorandum which described the structure, and the roles of the various parties. A reasonable reader of that Offering Memorandum, in particular recipients who were sophisticated and professional investors such as the Claimants, would understand that the general partner played a significant and important role in the structure and operation of the Fund. As discussed in Section H, Mr Nuzzo accepted that he knew the importance of a general partner in the context of funds generally, and also that the Skew Base Fund was not a VP product. He also accepted, and indeed it is clear from the Offering Memorandum, that VP Lux as AIFM was external to the general partner. Whilst it is correct that the Offering Memorandum identified the general partner as a Luxembourg company, and did not identify its ultimate beneficial owner, this does not mean that there was any façade, still less a façade that there was no connection to or involvement from XY or persons connected to it. In fact, any investor who did not already know who was behind the Skew Base Fund, or its general partner, could ask a simple question as part of ordinary due diligence when considering whether or not to invest. Here, as I have concluded, the

Claimants did not ask that question, because they had been told who was behind the Fund and who owned its general partner.

1284. The specific aspect of the "façade" which featured heavily in the Claimants' arguments concerned the role of Twinkle. I can see that if the facts established that Twinkle, rather than VP Liechtenstein (via delegation from VP Lux), was actually the portfolio manager, then a case might be advanced that the Offering Memorandum presented a false picture and that to that extent there was a façade. However, there was no allegation that the Offering Memorandum itself contained fraudulent misrepresentations. In any event, I have concluded on the basis of the evidence (including that of Mr Konrad, who is not alleged to have been party to any conspiracy) that VP Liechtenstein was indeed the portfolio manager, and carried out its duties as such. Whilst the Claimants have suggested, in their submissions, that VP Liechtenstein should have been doing its job as portfolio manager differently, and should have adopted a different decision-making process in relation to the investments made by the HFPO and MIN Compartments, any alleged shortcomings do not mean that VP Liechtenstein was not the actual portfolio manager.

1285. It is true that the Offering Memorandum does not identify Twinkle by name as the Investment Advisor. However, again I do not consider that this meant that there was a façade, still less that the Defendants were acting in concert to maintain a façade. As explained in Section F, the reason that Twinkle was not identified was that there was an error in the drafting process, not a conspiracy to hide its name as part of the maintenance of a façade. The Offering Memorandum continued to refer, in a number of places, to the Investment Advisor (or in one case Investment "Advisor"): see Sections 5.4.1, 5.4.8, 6.8, 9.5 and 10.6. This included reference to the potential significance of the loss of the Investment Advisor, including (clause 5.4.8). The Offering Memorandum therefore indicated that there was, or at least might well be, an Investment Advisor. If an investor had been interested in knowing the name of the Investment Advisor, then he or she could have asked a variety of people: XY, VP or the general partner or the members of its Board. Furthermore, the evidence shows that the existence of an Investment Advisor, connected to the initiator of the Fund, is a common feature of Luxembourg funds such as the present.

1286. It seems to me that if there was no façade, then the foundation of the Claimants' conspiracy case goes. However, there are other reasons for reaching a similar conclusion.

1287. The Claimants' case is that a central and, in my view, essential player in the alleged combination was VP: i.e. VP Lux and VP Liechtenstein. The key question which arose was summarised by Mr Saoul in his closing submissions: "whether one goes down the fiduciary duty route or the independence representations route, sets up the ultimate question: did they suspect that the claimants were being misled?" I have considered the evidence of the VP witnesses in detail in Section F, and I concluded that they neither knew nor suspected that the Claimants were being misled. VP assumed that investors such as the Claimants were being told of relevant connections between the initiator (whom they regarded as XY) and the Skew Base Fund. On the basis of my findings in Section H, that assumption

was essentially correct: investors were being told, in meetings with XY, about the key connections between Mr Migani and the Fund.

1288. Since VP Lux and VP Liechtenstein neither knew nor suspected that the Claimants or other investors were being misled, it must follow that neither of those companies was party to a combination that at least one of the alleged conspirators would use unlawful means.

1289. Once one has reached the conclusion that VP Lux and VP Liechtenstein were not party to any conspiracy – because they were not party to a combination to the effect that at least one of the conspirators will use unlawful means – then this in my view has wider implications beyond those two Defendants. It seems to me that the case in conspiracy only begins to make sense if VP Lux and VP Liechtenstein were involved. Those companies were key to the operation of the Skew Base Fund, which could not have existed as a RAIF without an AIFM. They were parties to the key contracts concerning the operation of the Fund. Their representatives, in particular Mr Ries, had seen and commented on the Offering Memorandum as it developed. VP Lux's role as AIFM, and the surrounding contracts, also gave VP Lux a significant role and responsibility in dealing with investors. Although it is always theoretically possible for one alleged conspirator to succeed in resisting a claim, but for other alleged conspirators to be found to have participated, I cannot see how that is a realistic possibility on the facts of the present case. Given the key and central role of the VP Defendants – once it is established, as is the case in my view, that neither VP Lux nor VP Liechtenstein were party to a combination that at least one of the conspirators will use unlawful means, it is not difficult to conclude (and I do conclude) that there was no such combination at all.

1290. That conclusion is reinforced by my view that, on the facts of the present case, the conspiracy case can only really work if the Claimants can show that there was express agreement by VP Lux and VP Liechtenstein that XY (the main alleged conspirator) would use the unlawful means alleged. It is true, of course, that an express or formal agreement is not required as matter of law. However, I cannot see how Mr Migani could have had any hope or expectation of successfully carrying through the alleged conspiracy unless VP Lux and VP Liechtenstein were clearly and expressly on board. A successful conspiracy to mislead investors such as the Claimants could not, in my view, work on the basis Mr Migani simply hoping that VP Lux would turn a blind eye. Since there was going to be significant potential interaction between investors and VP Lux, Mr Migani would need the assurance of Mr Ries and Mr von Kymmel (the only remaining conspirators) that they would not reveal the connections which Mr Migani/XY had to the Skew Base Fund, including that he was the entrepreneur behind it (i.e. the initiator of the Fund). Otherwise, the cover of Mr Migani/XY could be blown at any stage. There was, therefore, an obvious danger of "leakage" (see Section H above) unless there was express agreement by VP Lux to keep quiet. On the basis of the evidence that I have heard, I have no doubt that there was never any such agreement.

1291. Indeed, the previous point highlights a further difficulty in the Claimants' case on conspiracy. It would not actually have been sufficient for Mr von Kymmel and Mr Ries to have given their assurance that <u>they</u> would keep quiet. It would have

been necessary for Mr Migani to be assured that other persons at VP, connected to the running of the Skew Base Fund, would also keep quiet. That logic explains, in my view, why the Claimants' original conspiracy case, as opened, included a number of other individuals: Mr Konrad and Mr Kone, but also Ms Weber (against whom the case was dropped in closing submissions) and Mr Karp (who was not identified in the pleadings, but who was briefly and apparently mistakenly alleged to have been a conspirator in the Claimants' opening). It seems to me that as the number of alleged conspirators at VP has declined (and in particular declined so as to remove Mr Konrad and Mr Kone), so has any remaining realism of the Claimants' conspiracy case.

1292. Accordingly, I do not consider that the Claimants have proved that there was any combination to the effect that at least one of the conspirators would use unlawful means.

1293. The claim also fails on other grounds.

1294. *Intention to injure:* Conspiracy is a tort which requires an intention to injure. The pleaded intention to injure in paragraph 101 of the RAPOC is an intention "to deprive investors in the Skew Base Fund (including GIG and MDM) of independent financial advice", and that this intention was ongoing until at least March 2020. That plea of intention is repeated in paragraph 104 of the RAPOC, where it is alleged that the Defendants exposed GIG and MDM to harm or to a risk of harm because GIG and MDM (i) engaged the services of XY without knowledge of the various connections relied upon and/or (ii) were deprived of the benefit of independent advice prior to deciding whether to invest, in circumstances where investment in the Fund stood to benefit the Defendants. It was also alleged, to the extent necessary, that GIG and MDM formed part of a class of investors, namely clients of XY who invested in the Fund, whom the Defendants intended to injure in this way.

1295. I do not consider that this intention has been established against any of the Defendants. I do not see any realistic basis on which it can be said that XY or Mr Migani had this intention, in circumstances where (see Section H) Mr Migani did disclose to the Claimants that he was the entrepreneur behind the Fund and the owner of the general partner, and the Claimants were therefore aware of these significant connections. The intention of Mr Migani and XY was that the Claimants should invest, knowing of his involvement in the Fund, and that is what happened. It is correct that there was no disclosure of a variety of matters pleaded in the RAPOC: such matters being, essentially, the flow of funds from the general partner to other companies which Mr Migani owned (Twinkle and Leader Logic). However, once the key disclosure was made, I do not consider that any of these matters could lead to the conclusion that there was an intention to injure, as set out in the RAPOC, on the part of Mr Migani and XY.

1296. If the case on intention to injure fails against Mr Migani and XY, it is obvious that it is no better against the various entities to whom it is alleged that Mr Migani's knowledge and intention should be attributed. I do not need therefore need to address the arguments on attribution in detail. It suffices to say that:

(i) I would have been strongly inclined to hold that Mr Migani's knowledge and intention is attributable to Twinkle on the basis that he was the directing mind and will of that company. He was its sole shareholder, and I consider that the description of him as "General Manager" or "Managing Director", which was contained in the structure chart given to VP Lux when conducting due diligence, and in other documents, fairly reflected his position in the company.

(ii) I was not persuaded that Mr Migani was the directing mind and will of the Second and Third Defendants – directing mind and will being the Claimants' pleaded case. The evidence, discussed in Section F above, indicated that the relevant operating company, SB GP, made its decisions exclusively via Mr Longo as its sole director in the early phase, and then exclusively via the 3-person Board after Ms Gaveni and Mr Kuske joined. I do not consider that Mr Longo and Mr Kuske can fairly be said to have been simply rubber-stamping decisions made by Mr Migani. It is true that Mr Migani, as the owner of the SB GP, may have been influential behind the scenes, and that once Ms Gaveni joined he had his own representative on the Board. That does not mean, however, that he was the directing mind and will of the Board, in circumstances where decisions were taken initially by an independent director, and then a Board with a majority of independent directors.

1297. It follows from my earlier conclusion that any case that VP intended to injure must also fail. I do not consider that there is any evidence which would justify that conclusion.

1298. *Loss*: A claim in conspiracy must establish causation and loss. The Claimants' case on loss is based on actions that they would have taken if they had known of XY's lack of independence. Since, as I have held, the Claimants did know of the connections which Mr Migani had to the Skew Base Fund, their claim to suffer loss must fail.

1299. *Pleading in relation to fiduciary duty*: In their submissions, various counsel on behalf of the Defendants made points concerning alleged deficiencies in the Claimants' pleadings. I have focused, above, on the merits of the Claimants' arguments, and it is not necessary to discuss the pleaded case in any greater detail. I could see, however, that there was force in the arguments, advanced by Mr Blakeley and Mr Weekes; that the Claimants had not adequately pleaded particulars of their clients' alleged knowledge of the facts giving rise to the existence of a fiduciary duty, or the breach thereof. However, in view of my above conclusions, it is not necessary to address this point further.

## K: The non-fraud claims

### K1: Overview

1300. The Claimants advance 4 causes of action against XY (but not against other parties) which are not based on fraud, but rather on breach of contract, tort and regulatory duty. These causes of action are:

(i) Negligent misrepresentation;

(ii) Breach of implied terms and a duty of care in tort to provide investment advice services with reasonable skill and care;

(iii) Breach of the express terms of the agreements with XY;

(iv) Breach of obligations under the FCA COBS, giving rise to a claim under s 138D of the Financial Services and Markets Act 2000.

1301. The Claimants' argument in relation all of these causes of action was based, as Mr Smiley explained in his very helpful oral closing argument, on a number of core planks: (i) XY was acting as the Claimants' investment advisor; (ii) XY recommended the HFPO and MIN products and Compartments, on the basis that they were consistent with the Claimants' objectives and in the Claimants' best interests; (iii) the investments were inconsistent with the Claimants' objectives and contrary to their best interests; and (iv) the Claimants relied on those representations and suffered loss as a result.

1302. XY disputed each of these "planks". On behalf of XY, Mr Cloherty's central points were that the Claimants did understand the essential risk of all of the investments which they made, and in particular the risk of significant or even total capital loss if there was an extreme market crash. The existence of that risk did not mean that the strategy proposed by XY was inconsistent with the investment objectives identified during the parties' discussions. The strategy was reasonably understood by XY to be consistent with those objectives, and was also so understood by the Claimants, notwithstanding the risk that existed. There was, therefore, no negligence on the part of XY at any stage, and in any event no "gross negligence" which (pursuant to XY's standard terms) would be necessary to engage liability.

1303. XY also advanced a number of other points. Mr Cloherty accepted that strategic consulting services, and to that extent "advice", had been given. However, the relationship generally was not to be characterised as an advisory relationship so as to give rise to any relevant obligation under COBS. Nor was there any duty of care in tort, bearing in mind that (from mid-2017 onwards) XY's presentations always included a prominent disclaimer.

1304. I have already addressed the negligent misrepresentation case (as far as concerns the Skew Base Fund) in Section G above, and I have accepted Mr Cloherty's central points described above. I have there concluded that Mr Migani and XY did have reasonable grounds for the opinion that investment in the MIN and HFPO Compartments was consistent with the Claimants' investment objectives as they were at the time when those investments were made. I have also concluded that the Claimants understood that there was a risk with the investments being made: the risk being, in essence, that the barrier would be reached and that this would potentially expose their investment to significant capital loss, including a

total loss of capital. In relation to the Offering Memoranda, I have concluded that Mr Nuzzo considered that, notwithstanding the risks there set out, an investment in MIN and HFPO products, and in a fund which was investing in such products, was consistent with GIG's investment objectives; and also that he was aware of the real risk of capital losses and that there could be circumstances in which the products would be illiquid. I also concluded that the position was no different in relation to MDM, albeit that he did not read the Offering Memorandum as closely as Mr Nuzzo.

1305. These conclusions, and my underlying reasons for reaching those conclusions as set out in Section G, seem to me to remove one of the central planks of the architecture of the Claimants' case: namely, that the investments were inconsistent with the Claimants' objectives and contrary to their best interests. That was not how it was seen at the time either by the Claimants or XY. Those conclusions also, in my view, remove (substantially or completely) the final plank, namely that the Claimants suffered loss and damage by reason of alleged failings of XY: since the Claimants did sufficiently understand the risks of the investments which they were making, and decided to invest in the knowledge of the very low possibility that such risks may eventuate.

1306. In the course of closing submissions, I put to Mr Smiley that the fact that the Claimants were professional and experienced clients was relevant to the question of negligence; because if the risks are explained, and if the clients then say that they are happy to go along with an investment in the light of those risks, then it would be difficult to say that the person who made the recommendation was negligent. Unsurprisingly, he agreed; but said that the Claimants' case was very much that the risks were not properly explained. For the reasons set out in Section G, I disagree. In my view, the Claimants received sufficient information – in the XY presentations, the term sheets, and the Offering Memoranda – to understand the essential risk that they were taking by investing in the products, whether inside or outside the Skew Base Fund. It is the eventuation of that known risk, rather than any failings on the part of XY, which has caused the Claimants' losses.

## K2: The COBS rules

1307. Each of the three ways in which the Claimants advance their case, and in particular the claim under s 138D and for breach of an express term, requires consideration of the regulatory regime. I therefore outline the provisions, which featured in the parties' arguments.

1308. Section 138D FSMA provides that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention. XY was, at the material time, an authorised person. There is no dispute that, in the context of s 138D, both MDM and LDM are "private persons". GIG, a company carrying on investment business, was not a private person.

1309. The particular rules relied upon by the Claimants, in the context of their s 138D and breach of express term claim, were COBS 2.1.1 and 9A.2.1. The Claimants

also relied, in relation to their claim for breach of an express term, on the COBS Principles of Business.

1310. The COBS rules in March 2018, relevant to the parties' arguments, provide as follows:

> "**2.1.1(R)**
>
> (1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).
>
> **2.1.2(R)**
>
> A firm must not, in any communication relating to designated investment business, seek to:
>
> (1) exclude or restrict; or
>
> (2) rely on any exclusion or restriction of;
>
> any duty or liability it may have to a client under the regulatory system
>
> **9A.2.1(R)**
>
> When providing investment advice or portfolio management a firm must
>
> (1) obtain the necessary information regarding the client's
>
> > (a) knowledge and experience in the investment field relevant to the specific type of financial instrument or service;
> >
> > (b) financial situation including his ability to bear losses; and
> >
> > (c) investment objectives, including his risk tolerance,
>
> so as to comply with (2)
>
> (2) recommend investment services and financial instruments, or take the decision to trade, which is suitable for the client and, in particular, in accordance with the client's risk tolerance and ability to bear losses.
>
> **9A.2.2(R)**

Firms should undertake a suitability assessment not only when making a personal recommendation to buy a financial instrument, but for all decisions whether to trade, including making any personal recommendations about whether or not to buy, hold or sell an investment.

**Assessing the extent of the information required**

**9A.2.4.** Investment firms shall determine the extent of the information to be collected from clients in light of all the features of the investment advice … to be provided to those clients. Investment firms shall obtain from clients or potential clients such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for determining, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended … satisfies the following criteria:

(a) it meets his investment objectives of the client in question, including client's risk tolerance;

(b) it is such that the client is able financially to bear any related investment risks consistent with his investment objectives; and

(c) it is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction....

**Professional clients**

**9A.2.5 (R)**

Where an investment firm provides an investment service to a professional client it shall be entitled to assume that in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge or the purposes of point (c) of paragraph (2).

Where the investment service consists in the provision of investment advice to a professional client covered by Section 1 of Annex II to Directive 2014/65/EU, the investment firm shall be entitled to assume for the purposes of point (b) of paragraph (2) that the client is able financially to bear any related investment risks consistent with the investment objectives of that client."

1311. The above rules include expressions which were defined in a Glossary. This includes the following:

> *"advising on investments:* the regulated activity … which is in summary: advising a person if the advice is:
>
> (1) Given to their person in their capacity as an investor or potential investor …; and
>
> (2) Advice on the merits of their doing any of the following (whether as principal or agent):
>
> (a) Buying, selling, subscribing for … a particular investment which is a security, structured deposit or relevant investment …' or
>
> (b) Exercising or not exercising any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such investment …
>
> *Investment advice:* the provision of personal recommendations to a client, either upon the client's request or at the initiative of the firm, in respect of one or more transactions relating to designated investments.
>
> *personal recommendation:* in relation to advising on investments a recommendation:
>
> (a) made to a person in their capacity as an investor or potential investor …;
>
> (b) which constitutes a recommendation to them to do any of the following (whether as principal or agent):
>
> (i) buy, sell, subscribe for …hold … a particular investment which is a security, a structured deposit or a relevant investment …; or
>
> (ii) exercise or not exercise any right conferred by such a relevant investment to buy, sell, subscribe for, exchange or redeem such an investment;
>
> (c) that is:
>
> (i) presented as suitable for the person to whom it is made; or

(ii) based on a consideration of the circumstances of that person"

1312. The COBS principles were set out under the heading "PRIN 2.1: The Principles":

> "1. Integrity: A firm must conduct its business with integrity.
>
> 6. Customers' interests: A firm must pay due regard to the interests of its customers and treat them fairly.
>
> 7. Communications with clients: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading
>
> 8. Conflicts of interest: A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client."

1313. The specific COBS rules must be interpreted in line with these principles, and also in accordance with the understanding that, as stated by Newey LJ in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 at 115(i):

> "A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly."

## K3: Breach of express terms

*The parties' arguments*

1314. The Claimants rely on Clause 3H and 4A of XY's standard terms. These provide as follows:

> "3H. In accordance with the rules of the Financial Conduct Authority (the "FCA Rules"), we are required to notify you of your client classification. You will receive the protections afforded by the FCA Rules according to your client classification, as notified to you in the letter to which this Contract is attached.
>
> …
>
> 4A. The provision of the Services by the Company will be subject to any limit or restrictions which the Client may specify either in writing or orally, the terms of this Contract and any

applicable legal or regulatory requirement in force from time to time".

1315. The Claimants submit that each of these provisions can be straightforwardly interpreted in accordance with their natural meaning (in line with well-established principles). Each provision imposed a contractual obligation on XY: (i) under T&C 3H, that the Claimants would receive the protections afforded by FCA Rules according to their classification; and (ii) under T&C 4.A, that the services provided by XY would be subject to (among other things) any specified limit or restriction.

1316. The Claimants accept that they were each a "professional client" under the FCA Rules, and contend that the relevant protections included COBS 2.1.1R, COBS 9A.2.1R, and Principles 1, 6, 7 and 8.

1317. The substance of the Claimants' argument, based on Clause 3H, is that the Claimants thereby received a contractual promise by XY that it would adhere to the COBS rules and Principles referred to above, and that they can therefore recover damages for breach of the obligation which XY thereby undertook. The effect is therefore, as a matter of contract, to create rights to sue for breach of the COBS rules and Principles, even though such rights would not exist under s.138D of FSMA. Accordingly, GIG (which is not a private person) could sue for breach of the Rules, and all of the Claimants could sue for breach of the Principles, even though this would not be permissible under s 138D. The Claimants submit that there is no basis to equate the effect of Clause 3H (as a matter of contract) with the rights under s 138D of FSMA.

1318. In relation to Clause 3H, XY submits that the clause simply recites the fact that the counterparty would have such protections as were prescribed by the FCA from time to time according to the terms of those rules and the extent to which they applied to the counterparty. It did not incorporate those rules into the Agreements so as to allow any counterparty to sue for breach of the rules as if they were contractual obligations, and it did not give the counterparty rights that they would otherwise not have under the FSMA regime. Accordingly, it is not open to the Claimants to bring claims for breach of contract by reference to alleged breaches of the FCA rules.

1319. In relation to Clause 4A, the Claimants submit that the express limits and/or restrictions specified by the Claimants were the investment objectives which they communicated at the various meetings. In order to comply with Clause 4A, XY was required to ensure that the advice it provided was consistent with the investment objectives.

1320. XY's response, as a matter of construction, is that the investment objectives (as pleaded or otherwise) of a client would not constitute a "limit or restriction" for the purposes of Clause 4A. Clause 4A concerns limits/restrictions to the services provided; for example, the exclusion of asset management activities, or regulatory limits to the services that XY was able to provide; such as XY's authorisation only to provide services to professional clients, not investment objectives provided by or discussed with the clients.

*Discussion*

1321. The basic legal principles as to the interpretation of contracts were not in dispute. They are conveniently summarised in the judgment of Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (Ocean Neptune)* [2018] EWHC 163 (Comm), which is quoted in *Chitty on Contracts* 34th edition at para [15-053]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

1322. As far as concerns Clause 3H, I accept XY's submission as summarised above. The clause needs to be read as a whole. The first sentence refers to the FCA rules requiring XY to notify the investor of its client classification. The second sentence, when read as a whole, is advising the investor that its protections under the FCA rules will depend upon its client classification, and this is notified in the letter to which the contract is attached. The full terms of the letter are set out in Schedule D above. There is nothing in the language of Clause 3H, or the letter, which suggests that actionable contractual rights are thereby being created.

1323. The FCA Rules, referred to in Clause 3H, provide the regulatory framework within which XY must operate. A failure to comply with that framework could, potentially, result in the loss of XY's authorisation or disciplinary action. Also,

the case-law recognises that a breach of the FCA Rules may be relevant to the question of whether a firm has been negligent: see *Rubinstein v HSBC Bank Plc* [2011] EWHC 2304 (QB) at para [87] ("*Rubinstein*"). A failure to follow the regulatory rules may be negligent, because the skill and care of a financial advisor would ordinarily include compliance with the rules of the regulator. Accordingly, irrespective of Clause 3H, it can properly be said that the Claimants were entitled to the protection of the FCA Rules. Clause 3H is, in my view, doing no more than making it clear that the Claimants are entitled to the protection of the Rules. If Clause 3H did not exist, the Claimants could still contend that they were entitled to receive the protections afforded by the FCA Rules.

1324. The effect of s 138D, however, is that a breach of the FCA Rules will only be actionable in certain circumstances. That does not mean that the Claimants are not entitled to the protection of the FCA Rules. But it does mean that a party such as GIG, which is not a private person, will need to base a case on something other than a breach of the Rules. I do not consider that there is anything in Clause 3H which, as a matter of language, has the effect of creating actionable rights for breaches of the FCA Rules which would not otherwise exist.

1325. When construing a contract, it is relevant to look at the commercial consequences of the parties' respective interpretations. The Claimants' argument has, in my view, very odd commercial consequences. The context of the Clause 3H is a regulatory regime whereby firms are required to comply with the FCA Rules (and indeed the Principles), but a breach of the Rules is only actionable by a private person. In addition, a breach of the Principles is not actionable at all. The FCA have made a specific rule which so states: PRIN 3.4.4R. FSMA s 138D (3) expressly provides that, where such a rule is made, a private person has no actionable right to sue as a result of a contravention. The Claimants' argument therefore produces a radical and very surprising change in the actionable rights of the Claimants, and the potential liability of XY, for contravention of the FCA Rules. This commercial consequence is a factor which favours XY's construction. If such a radical and surprising consequence was to result, the clause would in my view have required much clearer language.

1326. As far as concerns Clause 4A, I do not consider that "limits/restrictions" would be understood by a reasonable person to refer to investment objectives. An investment objective is a goal to be achieved. A limit or restriction is something which one party tells the other party it should not do, identifying what cannot be done. A reasonable person would not consider, as a matter of language, that a limit or restriction was synonymous with, or encompassed, an investment objective. Furthermore, the standard terms expressly refer to "investment objectives" in Clause 10A. The factual matrix includes the regulatory regime, and the COBS provisions set out above, which also refer to "investment objectives". It can reasonably be concluded that (in accordance with the ordinary meaning of the words), "investment objectives" is a different concept to a limit or restriction. Had the parties intended that limit or restriction should somehow encompass this very different concept, then this would need to have been spelt out clearly.

1327. Accordingly, Clause 3H and 4A do not advance the Claimants' case, and it is not necessary to consider in this context the other arguments which XY has advanced in relation to those provisions. However, some of those arguments (such as

whether XY owed advisory duties, and the effect of Clause 3G) do arise in other contexts, and that is where I will deal with them.

## K4: The claim for breach of implied terms and a duty of care in tort

*Background*

1328. It was common ground that it was an implied term of the various agreements between XY and the Claimants that XY would carry out its contractual services with reasonable care and skill, and that XY owed a concurrent tortious duty of care and skill. It was also common ground that the term fell to be implied under s 13 of the Supply of Goods and Services Act 1982.

1329. There was a dispute as to whether the same term was also to be implied under section 49 of the Consumer Rights Act 2015 (the "2015 Act"). The dispute there was as to whether MDM and LDM were "consumers" within the meaning of that Act. (It was not suggested that GIG was a consumer). That dispute is of importance in the context of XY's ability to rely upon the exclusion clause (3G) in its standard form contract, an issue which I address below. It does not seem to me to be important in the context of whether the implied term existed in the first place, since XY conceded that such a term was to be implied pursuant to the 1982 Act.

*The parties' arguments*

1330. The Claimants contend that there were various breaches of these duties.

1331. One aspect of the case is that there was a failure to disclose the connections between XY/Mr Migani and the Skew Base Fund. However, I have found that there was disclosure of the most important connections that existed, and I do not consider that a claim for breach of the implied term or duty of care in tort could succeed in circumstances where the claims in fraud, breach of fiduciary duty and conspiracy have failed.

1332. Another aspect of the case is that there was positive misrepresentation of the nature of the risks in the SB HFPO and MIN Compartments; in particular, the representation that the risk warnings in the Offering Memorandum were standard, and misrepresentations as to the Compartments being highly liquid and having no real risk of capital losses. This case raises the issues which I have addressed in Section G above, where I have concluded that there was no misrepresentation whether fraudulent or negligent. That section is addressed to the case of misrepresentation in relation to the investments in the Skew Base Fund Compartments, and I did not understand that a case of misrepresentation was being advanced in relation to the investments outside the Fund. (I note in that context that RAPOC paragraph 88c, where misrepresentation in the context of contractual and tortious duties is alleged, refers to the Skew Base Fund HFPO and MIN Compartments). In any event, there would be no reason for reaching a different conclusion, as to misrepresentation, in relation to the investments outside the Fund.

1333. The Claimants also contend that XY failed to provide investment advice that was suitable for the Claimants, by (i) advising GIG and MDM to invest in the Skew Base Fund HFPO and MIN Compartments, and (ii) advising MDM and LDM to invest in HFPO and MIN products generally. They also contend that XY failed to provide the Claimants with adequate warnings of the risks of the investments.

1334. In relation to the failure to provide investment advice that was suitable, the Claimants contend that the advice was unsuitable in that it did not meet the Investment Objectives. In relation to the Skew Base Fund Compartments, the Claimants repeat the case, advanced in the context of fraudulent misrepresentation, that the investments were not compatible with the Investment Objectives. In relation to the non-Skew Base Fund products, these were also unsuitable because they were not appropriately liquid and presented a significant risk of capital loss.

1335. In relation to the failure to warn case, the Claimants contend that there was no explanation of the risks which meant that investment in the HFPO and MIN Compartments was not compatible with the Investment Objectives, and that there was a similar failure to warn MDM and LDM of the risks of investing in non-Skew Base HFPO and MIN products (namely that they were illiquid and presented a significant risk of capital loss).

1336. XY, in summary, denied that there was any breach of the implied term or tortious duty, relying on similar arguments as advanced in the context of the misrepresentation claim, and in particular their central points (compatibility with the investment objectives, and the Claimants' knowledge of the risks) to which I have already referred.

1337. XY also relied upon a number of other arguments in response to these "advisory claims". They relied upon the Clause 3G exclusion: ("Under no circumstances shall the Company be held liable for any loss or damage resulting from the provision of the Services, except in cases of wilful misconduct, fraud or gross negligence"). They submitted that any negligence on the part of XY, even if established, could not be considered to be "gross" negligence.

1338. The Claimants' response to this point was that Clause 3G was ineffective as against LDM and MDM, because they were "consumers" within the meaning of the 2015 Act. This was disputed by XY. The Claimants accepted that the 2015 Act was not applicable to GIG, but contended that Clause 3G was ineffective pursuant to the Unfair Contract Terms Act 1977. XY contended that the term was fair and reasonable.

1339. XY also submitted the scope of any duties which it owed, pursuant to the implied term or tort, did not include advisory duties. They argued that XY did not assume a responsibility to act as the Claimants' Investment Advisor, and that therefore its duty to act with reasonable skill and care did not encompass the advisory duties which had allegedly been breached. XY's role was instead to support the Claimants in making their own investment decisions by providing them with ideas, information, and proposals for the Claimants to consider independently before reaching their own decisions. They relied upon various authorities in the context of alleged mis-selling by banks, including: *London Executive Aviation v*

*The Royal Bank of Scotland Plc* [2018] EWHC 74 (Ch) (Rose J); *Fine Care Homes Ltd v National Westminster Bank Plc* [2020] EWHC 3233 (Ch) ("*Fine Care*"): and my decision in *CJ and LK Perks Partnership v NatWest Markets Plc* [2022] EWHC 726 (Comm) ("*Perks*").

1340. XY submitted that in evaluating the Claimants' contention that XY owed advisory duties, it was relevant to take into account various matters. None of the agreements stipulate that XY was to act as the Claimants' financial advisor. XY's role was always only ancillary to the Claimants' own autonomous decision-making. This was made clear in clause 4F of the standard terms: "The Client shall always have full decision-making and executive authority with regard to all strategic and operational decisions relating to the Service". Also, all asset management activity was expressly excluded. The XY presentations, from mid-2017 onwards, contained disclaimers, which made it clear that XY's role was purely ancillary and that XY was not itself assuming any responsibility for the success or failure of the investments that the Claimants chose to make. The Claimants only consulted XY on a portion of their wealth, and they also had access to various other advisors including (internally) Mr Nuzzo and Mr Facoetti, and an array of other advisors.

1341. A separate point, which also arose in the context of the s 138D claims, was that the Claimants and SRL were all "professional clients" under the MiFID framework and FCA rules. As such, pursuant to COBS 9A.2.5 (set out below), XY was entitled to assume that the Claimants had the necessary level of experience and knowledge to understand the risks involved in the investments that they made. XY was only prepared to offer its services to professional clients, and chose not to take on the extra burdens and responsibilities of dealing with retail clients. Having engaged XY as professional clients, it was not now open to the Claimants to complain that XY did not advise them sufficiently of the risks involved in their investments, as is now their complaint.

1342. Another separate point concerned the investment that MDM made when SRL's Skew Base Fund investment was transferred to MDM by way of a dividend in specie. XY submitted that any duties owed by XY in respect of that investment were owed to SRL, as the entity making the investment in the first place, and not to MDM personally. SRL was not a claimant in the present case.

*Discussion*

1343. I start by considering the nature of the relationship between the Claimants and XY. I have no doubt that this was an advisory relationship, and that therefore a negligent failure to provide investment advice that was suitable for the Claimants, or a negligent failure to provide the Claimants with adequate warnings of the risks of investments, would – subject to the effect of Clause 3G – constitute a breach of the admitted implied term and tortious duties.

1344. In that regard, I agree with the Claimants that the mis-selling case-law relied upon by XY concerned a fundamentally different factual context to the present. Those cases relate to claims brought by customers against a bank or other financial institution which was selling its own product, often a swap transaction. In many of the cases, the existence of an advisory relationship was negated by the bank's

terms and conditions. The present case involves XY providing consulting services. That is a very different relationship. Consulting services are inherently advisory in nature. That is so, even if it would be a misnomer to describe XY as an "independent financial advisor", at least as that term is commonly understood in the context of retail clients.

1345. I did not consider that any of the matters relied upon by XY negated the existence of an advisory relationship. There is nothing to that effect in XY's standard terms and conditions. Indeed, those terms and conditions provide positive support for the advisory relationship. Thus, clause 4B provides that: "The recommendations and Reports provided to the Client shall be solely for the Client's benefit. No other party may place reliance upon such recommendations or Reports". The contract therefore envisaged, unsurprisingly in the context of a consulting contract, that XY would be providing recommendations. In my view, that is what they clearly did, when they put forward their proposals for the investment strategies for the Claimants, and this included the proposal for investment in the various Compartments of the Skew Base Fund. I also consider that advice was also being given, as a matter of substance, when XY put forward their proposals or suggestions for individual transactions to be concluded pursuant to the previously agreed strategy. It was, of course, always up to the Claimants to decide whether or not to conclude a particular contract, or make an investment such as the investments made in the Skew Base Fund. As with many other advisors, such as solicitors or accountants, the final decision is made by the client. But, as the Claimants submitted, that does not mean advice is not being given or relied upon.

1346. This conclusion, that the relationship was advisory, is not negated by any of the other matters on which XY relied. I do not consider that the disclaimer can be considered to negate the existence of an advisory relationship. It relates only to the information contained in the presentations themselves, and would therefore not extend (for example) to the May 2018 letter where XY advised as to consistency with the investment objectives. Nor would it extend to the proposals made that particular contracts should be concluded in order to give effect to the strategy.

1347. Perhaps more importantly, however, the disclaimer must be seen in the context of the contract to which the parties actually agreed. It is common ground that the contracts between the parties gave rise to the implied term and tortious duties relied upon by the Claimants. In the context of a contract to provide consultancy services between a client and an advisor, that term and those duties must encompass the recommendations that the contract envisaged that XY would be making, including recommendations made during the course of presentations to the client. The existence of an advisory relationship, giving rise to implied terms and a concurrent duty of care in tort in relation to the advice given, is in my view reinforced by Clause 3G. This positively provides for potential liability where there is gross negligence. That clause presupposes that, in principle, XY has an obligation to perform its work with reasonable skill and care, albeit that it is only if there is gross negligence that a liability will result. Given that these can be regarded as core contractual duties, I do not consider that a disclaimer in a slide presentation can negate the terms to which the parties are taken to have agreed.

1348. I also do not consider that there is anything in the argument that the Claimants' classification as "Professional clients" negates either the existence of an advisory duty, or a duty to provide risk warnings. COBS 9A.2.5 (set out in context above) provides:

> "Where an investment firm provides an investment service to a professional client it shall be entitled to assume that in relation to the products, transactions and services for which it is so classified, the client has the necessary level and experience and knowledge for the purposes of point (c) of paragraph 2."

This reference to point (c) in that context is to COBS 9A.2.4, which refers to the firm being entitled to assume "that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio".

1349. I agree with Mr Smiley's submission that there is nothing here which absolves an advisor of an obligation to give appropriate advice, including appropriate warnings. The relevant provisions concern the client's ability to understand risks. An advisor of a professional client can proceed on the basis that the client does understand the relevant risks, but it does not mean that they do not need to be communicated to the client.

1350. Nor do I consider that there is anything in Mr Cloherty's argument based on the manner in which MDM's initial investment in the Skew Base Fund came about. It is the case that the original investment was made by SRL, and SRL is no longer a claimant in the present proceedings. The investment then became an investment of MDM personally, in 2019, by virtue of the dividend in specie. I do not consider that there is any reason to treat this aspect of the case any differently from MDM's other investments: i.e. his other investments in the Skew Base Fund, and his investments outside the Skew Base Fund. XY was very much aware of the proposed dividend in specie, which was referenced in a number of presentations, and that MDM was proceeding with that arrangement. Whilst there were other advisors involved, in particular tax advisors, I do not consider that this affects the existence of XY's advisory duties in connection with MDM's proposed investment resulting from the dividend in specie. I see no reason why the advisory duties relied upon by the Claimants and the alleged breach thereof – in failing to provide investment advice that was suitable, or failing to provide adequate warnings – should be approached any differently in relation to the dividend in specie.

1351. Accordingly, and subject to the effect of the Clause 3G, XY's answer to the claim depends on what I have described as their central points: that the investments were suitable for the Claimants, that XY did not fail to take reasonable care in relation to the proposals which they made (and which resulted in the Skew Base Fund and non-Fund investments in issue), and that the Claimants were sufficiently told about and understood the relevant risks.

1352. In *Rubinstein* HHJ Havelock-Allan QC said (at [93] in the context of a case involving an IFA and a retail client) that:

> "The threshold test for the negligence of a professional is often expressed as being whether no reasonably competent IFA, in the position of [the Defendant's representative] could have advised that [the product] was suitable for [the Claimant]. That is not necessarily the same as asking whether reasonable care was taken in recommending [the product to the Claimant], because reasonable care might not have been taken but a competent advisor exercising all reasonable care would still have given the same advice."

1353. I do not consider – essentially for the reasons set out in Section G above, and summarised in the overview section (K1) above – that the advice given to the Claimants, as to investment in HFPO and MIN products both inside and outside the Skew Base Fund, was such that no reasonably competent advisor could have given. Bearing in mind the financial intelligence of the Claimants and their experience, and the course of events described in Section D above, I consider that an advisor in XY's position could reasonably take the view that the investments met the investment objectives, and also that the Claimants did understand the risks of the investments that they were making. I also consider that the Claimants did indeed understand the essential risks that were involved in these investments.

*Clause 3G: its validity and effect*

1354. These conclusions mean that it is not necessary for XY to rely upon the exclusion in Clause 3G. I will, however, state (as briefly as possible) my conclusions on that issue.

1355. The 2015 Act, s.2 (3) defines a "consumer" as follows:

> "Consumer" means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession".

1356. The important effect of being a consumer, in the context of the present case, is provided by s. 57 (1) of the 2015 Act:

> "A term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising from section 49 (service to be performed with reasonable care and skill)".

1357. Section 49 (1) of the 2015 Act provides (as summarised in s. 57):

> "Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable skill and care".

1358. Since GIG is not an individual, it cannot claim to be a consumer under s 2 (3) of the 2015 Act. Accordingly, clause 3G is effective as against GIG unless it is invalidated by the Unfair Contract Terms Act 1977 (an issue which I address below).

1359. *The parties' arguments:* XY contends that neither MDM nor LDM was a "consumer". (Their argument that LDM was not a consumer was advanced somewhat belatedly: XY's opening submissions indicated that this point was only being taken against MDM). XY draw attention to the very considerable volume of trading activity, in different types of instruments, that was carried out by MDM or by LDM (through Mr Nuzzo). This included not only the various structured product transactions, entered into pursuant to XY's proposals, as described in Section D above. XY also knew, as a result of the portal which they operated as part of their technology offering, of many other investments that were made. XY prepared an Excel spreadsheet, referred to in both opening and closing, which listed many hundreds of different transactions which MDM and LDM as well as SRL and GIG concluded. There are 2031 line entries, most of which (starting at line 35) are between January 2017 and May 2020. They include a large number of different trades, including in dual currency notes (another type of structured note), stability notes, reverse convertibles, as well as various types of bonds and equities. The spreadsheet highlighted those trades made pursuant to the proposals made by XY (and which are referred to in Section D, and which were the subject of a separate spreadsheet). The majority of these trades are by GIG, rather than MDM/SRL or LDM. However, as described below, there are a substantial number of transactions on behalf of MDM/SRL and LDM. (I also note that the spreadsheet lists both a "buy" and "sell" or redemption of an investment, and that therefore there are often two line entries in relation to the same investment).

1360. In relation to MDM's personal position (i.e. excluding SRL), XY summarised the trades as showing 71 bond (corporate and government) trades, 12 listed equity trades, 12 unlisted equity trades, 56 structured notes, and 7 unit trust trades. The total value was around € 60 million. In the early part of the relationship with XY, activity was also carried by MDM through SRL, although this substantially ceased by around the end of 2018. The position in relation to SRL was that there were 16 equity transactions (€ 4.27 million), 18 unit trust transactions (€ 9.79 million), 22 structured notes (€ 12.4 million), and 58 trades shown as passive Lombard loans.

1361. In relation to LDM, there were 81 bond trades, 410 listed equity trades, 33 exchange traded fund trades, 116 loan transactions, 29 options, 102 structured notes, 25 unit trust and 12 warrants..

1362. XY submitted that the volume of business carried out by or on behalf of each of MDM and LDM demonstrated that they were both engaged in the business of investment. This was, XY submitted, also supported by the fact that LDM's wealth was handled through the private office which Mr Nuzzo ran, and for which he received substantial remuneration. XY submitted that their case, that neither LDM or MDM were consumers, was supported by the decisions of Popplewell J in *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* [2014] EWHC 1085 (Comm) at paras [57] – [59] ("*AMT Futures*"), and Andrew Baker J in *Ramona Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm) ("*Ang*") in particular at paras [64] – [65].

1363. It was submitted on behalf of LDM and MDM that they were both consumers. In relation to MDM, Mr Smiley submitted that while he works in finance, he was acting for purposes entirely (or, if need be, mainly) outside his trade or profession.

MDM engaged XY for the purposes of advice on his personal assets and affairs, rather than for any business transaction. XY was not providing advice to Charme, and nor did MDM engage XY for that purpose. The two cases, *AMT Futures* and *Ang*, were not considering the 2015 Act, but rather they concerned EC Regulations 44/2001 and 1215/2012, where the definition of consumer did not include the words "wholly or mainly". In any event, *Ang* supports the Claimants' case on this issue. That case showed that wealthy people are private people too, and are consumers too. As far as LDM was concerned, he was not (or was no longer) a financial professional, such as MDM is.

1364. The Claimants also submitted that, in any event, XY's negligence was gross, and therefore clause 3G would not provide any protection. Whilst accepting that section 57 would not apply to their claim for negligent misrepresentation, clause 3G would be invalidated in that context (if LDM and MDM were consumers) by s 62 of the 2015 Act.

1365. *Discussion.* The question of who is a consumer, in the context of trades carried out on financial or similar markets by wealthy individuals, was considered by Popplewell J in *AMT Futures.* Whilst it is correct that the discussion occurred in the context of EU regulations where the wording is different, in that it does not refer to "wholly or mainly", I do not consider that this point gives rise to a material difference in the present context.

1366. In *AMT Futures*, Popplewell J referred (at para [57]) to the controversy that existed in relation to the application of the definition to "investors". He said at para [58]:

> "58. Wherever the dividing line is to be drawn in the case of investors, the result is likely to be heavily dependent on the circumstances of each individual and the nature and pattern of investment. At one end of the scale may be the retired dentist who makes a single investment for a modest amount by way of pension provision. At the other may be an investment banker or asset manager who plays the markets widely, regularly and for substantial amounts, for his own account. In between there are many factors which might influence the result, including the profile of the investor, the nature and extent of the investment activity, and the tax treatment of any profits or losses. The issue is fact specific."

1367. In the event, Popplewell J did not have to (and was not able to) decide how it applied to the investors in that case. His decision on jurisdiction was in fact reversed, but the Court of Appeal did not need to consider the issue discussed in the above passage.

1368. In *Ang*, Andrew Baker J carried out a very detailed review of the case-law. His conclusions at paras [62] – [65] were as follows:

> "[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, a "consumer" in that

definition. Wealthy consumers are consumers none the less and the amounts involved in this case do not mean Ms Ang was not a consumer. For example, in *Pammer v Reederei Karl Schlüter GmbH & Co KG* (Joined Cases C-585/08 and C-144/09) [2012] Bus LR 972; [2010] ECR I-12527, contracts for an ocean cruise and an alpine holiday were held to be consumer contracts. Of course, going on a family holiday, even if it is a very expensive holiday, could not sensibly be thought of as a business venture. But I reject any notion that speculative investment, putting capital at risk in the hope of achieving an investment gain, must necessarily be a business activity, i e cannot ever be a consumer activity.

[63] In my judgment, the investment by a private individual of her personal surplus wealth (i e surplus to her immediate needs), in the hope of generating 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, in the sense I believe intended by the ECJ in *Benincasa*, to invest such wealth with such an aim, i e that is an "end user" purpose for a private individual and is not exclusively a business activity. That means, as was also Popplewell J's conclusion in *AMT v Marzillier* [2015] QB 699, that 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, i e as a consumer, or was doing so for the purpose of an investment business of hers (existing or planned).

[64] The question is where, if at all, to draw the line. Take private equity investment made with a view to generating a return on capital (venture capitalism). I should have thought the making of such investments would be regarded, generally, as by nature a business activity; and no less so if for the venture capitalist in question that activity was not her primary occupation but a sideline through which to invest some or all of her wealth generated in some other way (e g out of earnings, inheritance or gifts). On the other hand, an individual shopping around the retail market for a better interest rate on a large lump sum she is happy to lock away for a year or two, because it is surplus to any shorter-term need for access to capital, or choosing with a view to a better return to invest in a FTSE 100 tracker fund instead, would surely be regarded as a consumer, applying faithfully all that the ECJ/CJEU has said on the point.

[65] I therefore agree, in general, with the observation of Popplewell J in *AMT v Marzillier*, para 58, quoted at para 40 above, although I would add this amplification, namely that the spread, regularity and value of investment activity cannot (I think) determine the issue, as that would replace the test of non-

> business purpose set by the language of the Brussels (Recast) (as it now is). It may be, on the facts of any given case, that widespread, regular and high-value trading will encourage a conclusion that the putative consumer was engaged in investing as a business, so that the contract in question had a business purpose. But that question of purpose is the question to be asked, and it must be considered upon all of the evidence available to the court and not by reference to any one part of that evidence in isolation."

1369. The authorities show that the mere fact that the investor is a private individual does not in itself mean that he is a "consumer". It is also clear that wealthy, including very wealthy, investors may still be consumers. Equally, the fact that an individual may be working full-time in employment, or that he may be retired, does not in itself mean that, when dealing with his investments, he is "acting for purposes that are wholly or mainly outside that individual's trade, business, craft". It may be that the nature and pattern of investment would mean that the private individual was, as well as carrying out the day-to-day work or profession which was his career, engaged (to use Andrew Baker J's words in paras [49] and [64] of *Ang*) in a "secondary trade" or a sideline outside a primary occupation. The position could be similar for a person who had retired from daily work.

1370. Popplewell J said that the result "is likely to be heavily dependent on the circumstances of each individual and the nature and pattern of investment". I think that the scale of trading, and the nature and variety of the instruments traded, is indicative that this was in substance a business. It is close to the example given by Popplewell J of an investment banker or asset manager who plays the markets widely, regularly and for substantial amounts for his own account. It is certainly a long way from the facts of *Ang*, where there were a handful of transactions, albeit high value.

1371. Here, both LDM and MDM were classified as "professional investors" under MiFID. They were investing, for their own account, in products which would not ordinarily be available to retail investors.

1372. As far as MDM is concerned: when MDM's relationship with XY started, his personal wealth was held substantially in a corporate vehicle, SRL. Up until around October 2018, most of the investment in the structured products proposed by XY were made through SRL, although there were some investments in the same type of product by MDM for his own account. There is no suggestion, in the pattern of trading, that there was any particular reason why a trade would be carried out by SRL, rather than MDM, save perhaps that the greater part of MDM's assets were in SRL. The main investment which has given rise to MDM's loss in the present case was the € 10 million investment in the Skew Base Fund that was originally made by SRL, and then transferred by way of a dividend to MDM. In my view, the substantial use which MDM made of a corporate vehicle, during the period of the relationship with XY as a whole, is indicative of a party acting for purposes inside his trade, business, craft or profession. The 2015 Act uses the word "craft", which is not contained in the regulations being considered

in *AMT Futures* and *Ang*. This word indicates that it is relevant to look at the individual's skills, and MDM's day-to-day business was an investment business.

1373. LDM's position differs from MDM's in a number of respects, but not fundamentally as far as the present issue is concerned. He did not use a corporate vehicle to invest. However, he was using the services of Mr Nuzzo, who was paid significant sums to run the family office. LDM's investments were made alongside those being made by Mr Nuzzo on behalf of GIG. Furthermore, LDM made significant use of Lombard credit: i.e. borrowing on the security of assets, in order to generate additional returns. This is indicative, in my view, of a person acting for business purposes. During the time that MDM was using SRL, he too used Lombard credit to generate additional returns. The use of Lombard credit means that the investments made were not simply of personal surplus wealth. Whilst LDM was not involved on a day-to-day business of Charme, he had been its co-founder and chairman.

1374. I conclude, looking at all the facts, that both MDM and LDM were not "consumers" for the purposes of the 2015 Act. Accordingly, XY is able to rely upon clause 3G as against MDM or LDM in relation to the contractual and tortious claims. As discussed below, the position is different in the context of s 138D and the regulatory claims.

*Unfair Contract Terms Act*

1375. The Claimants contend that Clause 3G is of no effect insofar as it would operate to exclude liability for negligence and/or breach of contract pursuant to sections 2 (2) and/or 3 (2) of the Unfair Contract Terms Act 1977 ("UCTA"). They submit that it does not satisfy the test of fairness or reasonableness in section 11, which requires that the term shall have been "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". In his oral submissions, Mr Smiley emphasised the unfairness, in the context of an advisory relationship, of the advisor being able to escape liability for negligence and breach of contract, unless there was gross negligence. There would be no recompense for XY doing a thoroughly terrible job or thoroughly incompetent job, but having no liability. It renders the contractual obligation valueless, which cannot be fair and reasonable. He also referred to the clause being buried in the standard terms, rather than at the start of the contract.

1376. XY contends that the term is fair and reasonable. XY relied upon the sophistication, financial might and bargaining power of the Claimants, including GIG, and relies in particular upon the judgment of Chadwick LJ in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 at para [55] ("*Watford*"), and also *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) at para [321] ("*Raiffeisen*").

1377. Schedule 2 to the UCTA provides some guidelines, which although not directly applicable by statute, are regarded as being of general application: see *Chitty on Contracts* at paras [17]-[101].

1378. I consider that the term is fair and reasonable. The parties here were of equal bargaining power. Indeed, given the size Claimants' wealth and the fame of LDM, and Mr Migani's obvious desire to have them as clients, it can be said that the Claimants were in a stronger bargaining position than XY. LDM and MDM were both very experienced in business, as indeed was Mr Nuzzo who had worked for the family office for a number of years. The Claimants would in my view have had no difficulty in finding other advisors if they did not wish to agree XY's standard terms. The Claimants were all well-connected in relation to financial services, and the spreadsheet to which I have referred (based on XY's portal) shows that they were concluding a very large number of financial transactions with various counterparties throughout the period with which I am concerned. There is evidence that MDM was talking to people who worked for financial institutions, such as Mr Chardigny, about his investments. When the new liquidity became available in early 2018, MDM and Mr Nuzzo approached a number of financial institutions for their proposals on an investment strategy. The strength of the parties' bargaining position is the first matter identified in Schedule 2 to UCTA. Although this Schedule does not automatically apply to clauses covered by sections 2 (2) and 3 (2), it is often used as a guide: see *Chitty on Contracts* at para [17-101].

1379. I consider that the strength of the Claimants' bargaining power is a significant factor in this case. *Chitty* at para [17-114] states:

> "A number of cases have emphasised the importance of upholding the agreed contract terms where experienced businessmen are involved and the parties are of equal bargaining power in terms of size and resources. In *Photo Productions Ltd v Securicor Transport Ltd* (a case which did not involve consideration of any provision of the 1977 Act) Lord Wilberforce stated that, in commercial matters generally, when the parties were not of unequal bargaining power, and when risks were to be borne by insurance, Parliament's intention in the Act seemed to be one of "leaving the parties free to apportion the risks as they think fit … and respecting their decisions".

1380. That approach is reflected in the well-known statement of Chadwick LJ in the lead judgment in *Watford* at para [55]:

> "Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one

> party has, in effect, taken unfair advantage of the other - or that a term is so unreasonable that it cannot properly have been understood or considered − the court should not interfere.”

1381. This decision was referred to by Christopher Clarke J in *Raffeisen*, and is referred to in the current edition of *Chitty* at para [17-155]. I do not consider that the approach in that decision is no longer appropriate, or that the obiter decision of Waksman J in *Eurasian Natural Resources Corporation v Dechert LLP* [2022] EWHC 1138 (Comm) indicates that a different approach should now be taken.

1382. Furthermore, I was not persuaded by Mr Smiley’s argument that the absence of a remedy for ordinary, as opposed to gross, negligence had the effect of making the term unreasonable. Investing is inherently uncertain. Where consultancy services are provided in relation to financial investments, it is not difficult to see (and the parties would have known) that things can go wrong, and that investments can lose their value. I do not consider it unreasonable for the parties to agree that the risk that this might happen in consequence of ordinary negligence should be borne by the investor rather than the consultant; particularly in the context of a contract where the consultant is not taking the investment decisions, and where the client is classified as a professional client and will ultimately be taking the decision as to whether or not to make an investment. These matters are reflected in the contractual terms: see Clause 4F (quoted above) and Clause 10. The latter is headed Risk Warnings and Disclosures, and states that “all investment is subject to risk and the degree of risk is a matter of judgment that cannot be accurately pre-determined”. The client was “encouraged to review its investment objective, evaluate its level of risk and exposure to loss on a regular basis”. Given the degree of involvement of the client in decision-making, and given that a fine line can often separate negligence from errors of judgment, I do not consider it unreasonable for the parties to agree that any negligence on the part of XY has to be gross in order to ground liability. If, as Mr Smiley posited, XY does a thoroughly terrible job, that might well amount to gross negligence.

1383. I was also not persuaded by Mr Smiley’s argument based on the clause being “buried” in the standard terms. The standard terms form part of a signed contract. Indeed, they form part of a number of signed contracts. Where contracts are signed, here by an experienced businessman, I do not consider that there is any room for an argument that sufficient notice of the relevant terms was not given: see *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB) (Saini J).

1384. As to Mr Smiley’s argument that there was gross negligence in the present case: it follows from my conclusion on ordinary negligence that I do not consider that there was gross negligence here. The authorities concerning gross negligence were reviewed by Cockerill J in *The Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2022] EWHC 1447 (Comm) at paras [326] – [334]. She concluded:

> “…One is moving beyond bad mistakes to mistakes which have a very serious and often a shocking or startling (c.f. “jaw dropping”) quality to them. The target is mistakes or defaults

> which are so serious that the word reckless may often come to mind, even if the test for recklessness is not met".

1385. Even if my conclusion on the negligence issue had been different, I would not have been persuaded that there was gross negligence in the present case.

1386. Accordingly, in so far as the Claimants are advancing claims (such as the negligent misrepresentation claim, or the implied term/duty of care case that I am considering here), such claims are barred by clause 3G.

1387. Before leaving this area of the case, I will briefly refer to one other aspect of the argument advanced by the Claimants. A number of the individual investments made by LDM and MDM, outside the Skew Base Fund, were made not long before the market collapse in March 2020 which resulted in significant losses on the MIN and HFPO investments both inside and outside the Fund. Some were made after Mr Migani had sent an e-mail referring, in the context of the finance provided by VP Bank, to prepare for the "storm". The preparation concerned the possibility that VP Bank might make a margin call, albeit that Mr Migani considered that at that stage there were still ample margins available.

1388. The Claimants contended that there was no justification for those particular investments, made late in the piece, given market volatility by March 2020. I do not consider that this was a point that was open to the Claimants on the pleadings. The case on the pleadings, and as set out in the Claimants' written opening, dealt with the MIN and HFPO products (inside out and outside the Fund) as a whole. There was no alternative case referable to the particular circumstances of individual transactions. Accordingly, as Mr Cloherty submitted in closing, the evidence in the case was not directed to – for example – the circumstances of specific transactions concluded in March 2020. Had such a case been pleaded, then it would have been necessary to explore, again by way of example, what Mr Nuzzo and MDM knew about market volatility at that time, and why (assuming, as I consider to be likely, that it was known) they were nevertheless comfortable with concluding transactions at that time. Indeed, I note that the latest non-Skew Base investments were made on 6 March 2020. That is a date on which (see Section D above), Mr Facoetti's evidence was that everyone was thinking about their business at that time in the light of the developing pandemic, and when he spoke to MDM about his investments. I also do not accept that the "storm" referred to in Mr Migani's e-mail was an anticipated collapse of equity markets, but rather the possibility that there might be a margin call by VP Bank and that it was necessary to prepare for that possibility.

1389. I therefore do not consider it necessary to address this aspect of the case further.

## K5: The claim under FSMA s 138D

*The parties' arguments*

1390. The Claimants rely upon breaches of COBS 2.1.1R and 9A.2.1R. They contend that COBS 2.1.1R was breached in numerous respects, in particular that XY acted in breach of clauses 3H and 4A of XY standard terms, in making the

independence and investment representations, and in breaching its fiduciary duty. In relation to COBS 9, the Claimants say that XY failed to make a suitable recommendation, relying upon the same matters as are relied upon in connection with the implied term and tortious duty of care. They refer to the evidence of Mr Dalle Vedove that XY never ran suitability of the Skew Base Fund for MDM.

1391. XY submits that this claim cannot produce a different result to the common law claims (for breach of the implied term and duty of care) previously discussed. The same matters are relied upon, in the RAPOC, in relation to these common law claims and the s 138D claim. The Claimants cannot show that there is anything that would be a breach of an obligation under the COBS rules which would not also be a breach of XY's obligations in contract and tort.

1392. XY submits that XY did not fail to act honestly, fairly and professionally in accordance with the best interests of MDM and LDM, and therefore did not breach COBS 2.1.1.

1393. They also submit that there was no breach of COBS 9A.2.1. They acknowledge that, in this context, there is not a complete overlap between COBS 9A.2.1. and obligations in tort. However, they submit that the only investments to which COBS 9A.2.1 could apply are the investments in the Skew Base Fund, and that no proper claims have been pleaded in relation to the non-Skew Base investments. They also say that XY did not make a personal recommendation to MDM in respect of SRL's investment in the Fund. MDM cannot circumvent SRL's lack of standing to sue under s 138D by virtue of the fact that the shares formerly owned by SRL were later transferred to him. In any event, none of the matters said to amount to a breach of 9A.2.1 have merit, for the same reasons as are advanced in relation to the common law claims and the case based on XY's standard terms. They submit that, pursuant to COBS 9A.2.5, XY was entitled to assume that the client had the necessary level of experience and knowledge to understand the risks involved in the transaction. Mr Cloherty, in his oral submissions, emphasised that this was the key point, since the risks involved in the transaction were (on the Claimants' case) the matters which were alleged to make the investments unsuitable. The also allege that the Skew Base Fund investment (which is the only one where there might be said to have been a personal recommendation) was suitable for MDM.

*Discussion*

1394. I consider that the Claimants' case, in relation to the non-Skew Base Fund investments, has been sufficiently pleaded in paragraphs 52 and 53 and Schedules 4 and 5 to the RAPOC.

1395. The Claimants' case is pleaded by reference to the same facts and matters as are alleged to give rise to breaches of the implied term and tortious duty of care, as well as breaches of clauses 3H and 4A of the standard terms. I consider that since those claims have failed, for reasons previously explained, it is difficult to see how the claim under s 138D can succeed.

1396. There are, however, some differences between the contractual and tortious claims, and the s 138D claim. First, GIG cannot advance a claim under s 138D,

since it is not a "private person". Secondly, the effect of COBS 2.1.2R is that clause 3G (and the disclaimer in XY's presentations) is ineffective and cannot be relied upon by XY: see *Parmar v Barclays Bank PLC* [2018] EWHC 1027 (Ch) at paras [122] and [132] – [134] ("*Parmar*"). Thirdly, the requirement under COBS 9A.2.1 (where a personal recommendation is provided) is to recommend instruments which are "suitable for the client and in particular, in accordance with the client's risk tolerance and ability to bear losses". It could therefore be said (albeit that this was not the way in which the Claimants advanced their case) that this is different to a contractual or tortious obligation to exercise reasonable care in the services provided. In practice, however, I doubt that this makes any real difference. If the investment is such that an advisor could reasonably take the view that it was suitable for the client, and was in accordance with his risk tolerance and ability to bear losses, then the investment will be considered suitable, so that there will be no breach of COBS 9.1.2.

1397. I do not accept XY's argument that the investments in the Skew Base Fund were the only investments to which a claim in respect of COBS 9A.2.1 could apply. COBS 9A.2.1 applies when a firm provides "investment advice". Investment advice is defined as "the provision of personal recommendations to a client, either upon the client's request or at the initiative of the firm, in respect of one or more transactions relating to designated investments". A "personal recommendation" is itself broadly defined, as set out above.

1398. The case-law establishes that the advice must be in relation to a specific product, rather than more general advice: see *Parmar* at para [120(5)]; *Fine Care* at para [111]; and *Perks* at para [280]. As Mr Hochhauser KC (sitting as a deputy judge) said in his thorough and valuable judgment in *Parmar* at para [118]: the question of whether such advice was given involves considering whether there has been a value judgment, an element of opinion, or some advice on the merits on the part of the person alleged to have given the advice. The test is an objective one looking at the evidence in the round, and one has to ask the question whether there has been advice, or simply the giving of information. Similarly, Bacon J in *Fine Care* (when considering the question of whether there was a duty to advise), said at para [107]: the "ultimate question is whether the particular facts of the transaction, taken as a whole and viewed objectively, show that the bank assumed a responsibility to advise the customer as to the suitability of the transaction". See also *Perks* at paras [406] – [409].

1399. Applying this test, I consider that all of the transactions, which form the basis of the Claimants' claim, involved the giving of investment advice by XY. This is scarcely a surprising conclusion in view of the fact that XY was providing consulting services. I can see if XY's advice had simply stopped at providing information, as part of their consulting services, as to a strategy that might be considered or followed by the Claimants, that would not be sufficiently specific so as to engage COBS 9A.2.1. However, XY's services did not stop at the strategy level. XY then went on to propose very many non-Skew Base investments to their clients as part of, and by way of implementing, that strategy. When doing so, XY would reasonably have expected that their clients would enter into the transactions which were proposed, on the basis that the transactions were consistent with and were implementing the strategy that XY had advised.

Furthermore, the information which XY provided to the Claimants in the e-mails that were sent, in relation to each proposed transaction, was relatively brief. In most cases, term sheets were not provided prior to the conclusion of the proposed transaction, and in many cases were never provided. XY would therefore have understood that the Claimants were acting on the basis of what XY was saying about the desirability of concluding the transactions. Although most of the covering e-mails, advising Mr Nuzzo or MDM of the proposed transaction, did not use the word "advise" or "recommend", I do not consider that this makes any material difference on the question of whether these were advised transactions. Considering the facts in the round, these did involve personal recommendations as defined by COBS.

1400. The position is even clearer when one considers the proposed Skew Base Fund investments. Here, it was part of the "strategy" that the Claimants should invest in particular Compartments of the Fund, and the structure set out in the Offering Memoranda involved their investments being held by way of shares. This was clearly advice which related to a specific product.

1401. I also do not consider that any distinction should be drawn, in the context of COBS 9A.2.1, between the original investment by SRL, and the later dividend in specie to MDM. As the Claimants pointed out, XY was involved in advising about that dividend in specie, as shown for example by Slides 24 and following from the 4 July 2018 "Daddy" meeting. One of the slides said that: "Holding financial assets and holding through an Italian company results in numerous inefficiencies" both in the UK and Italy. Looking at the facts in the round, the dividend in specie, which resulted in MDM receiving SRL's investment in the Fund, did involve XY giving investment advice.

1402. The question of whether COBS 9A.2.1 was breached must be considered as a matter of substance, not form. The same must in my view apply to COBS 2.1.1R. The question is therefore whether the various investments were in fact suitable, and not simply whether XY followed appropriate procedures. This is clear from the decisions cited in *Parmar* at para [114], including Cooke J in *Al Sulaiman v Credit Suisse Securities (Europe) Ltd* [2013] EWHC 400 at para [19]:

> "…Taking reasonable steps to ensure that an investment is suitable for a client involves taking reasonable steps to ensure that the client understands the risk involved in the transaction and that the rules are concerned with substance over form. If an investment is in fact suitable for the client, then it does not ultimately matter if there have been failings in the process".

1403. In fact, the Claimants did advance their case on suitability, under 9A.2.1R, on the basis of substance rather than failures in the process. It also seemed to me that if the products were suitable, then COBS 2.1.1R did not materially add to the case under 9A.2.1R, as far as suitability was concerned.

1404. Looking at the substance of the case on suitability, it is my view there was no real difference between the Claimants' arguments on breach of the implied term and tortious duty of care, and their arguments in relation to COBS. Since (for reasons set out above) I have rejected those claims, and also the case based on clauses 3H

and 4A, I consider that the claims of MDM and LDM under s 138D must also fail for the same reasons. In short, this is because MDM and LDM (through Mr Nuzzo) sufficiently understand the risks, and both they and XY took the view that (notwithstanding those risks) the investments were suitable.

1405. As indicated above, the Claimants' case was based on substance, not process. Had a case on process been advanced, it would have failed. Ultimately, I do not consider that any regulatory failings had any causative consequence in the present case. In particular, had there been a suitability assessment under COBS 9, I do not consider that XY's approach would have been any different in terms of the strategy and proposals that it put forward. Nor do I consider that the Claimants' investment decisions would have been any different.

## L: XY's counterclaim

1406. XY counterclaims in respect of various invoices for unpaid fees. The invoices, listed in Schedule 1 to XY's Re-Re-Amended Defence, listed the invoices which totalled: € 1,225,789.20 (GIG); € 12,188.40 (MDM); and € 62,855.00 (LDM).

1407. In their written opening and closing submissions, the Claimants identified four bases for denying the counterclaim: (i) the Claimants were induced by misrepresentation to enter the relevant agreements and so are entitled to rescind, and have rescinded them; (ii) in respect of the claims against LDM and GIG the relevant agreements expired on 1 July 2020, pursuant to the terms thereof, and therefore the invoices in respect of the 3rd and 4th quarters of 2020 were not payable; (iii) if and insofar as XY is entitled to any sums/damages for unpaid fees (which is denied), the Claimants are entitled to set off their losses which extinguishes any liability they would otherwise have; and (iv) XY forfeited its right to fees by its breach of fiduciary duty, acting in conflict of interest.

1408. Since I have rejected the Claimants' case of misrepresentation and breach of fiduciary duty, as well as the various non-fraud claims, the counterclaim succeeds, save in relation to the invoices in respect of the 3rd and 4th quarters of 2020. In relation to those invoices, I accept the Claimants' argument that the relevant contracts had expired, and indeed XY did not advance any submission which countered that argument. The effect is to reduce the counterclaim against GIG by € 113,698.80 plus € 115,915.20, and against LDM by € 13,541 plus € 13,295.

1409. This means that the counterclaim succeeds in the following amounts: € 996,175.20 (GIG); € 12,188.40 (MDM) and € 36,019 (LDM).

## M: Conclusion

1410. The Claimants' claims fail. XY succeeds in its counterclaim in the amounts set out in Section L above.

## Appendix 1: Main definitions in judgment

| Term | Definition |
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|---|---|
| **AER** | Automatic early redemption. |
| **AIFM** | Alternative Investment Fund Manager. |
| **AIFMA** | AIF Management Agreement dated 9 February 2017. |
| **AIFs** | Alternative Investments Funds. |
| **ASA** | Administrative Services Agreement dated 9 February 2017. |
| **Charme** | Charme Capital Partners SGR SpA. |
| **Compartment** or the **Compartments** | Compartments of the Skew Base Fund (e.g. HFPO Compartment). |
| **Euro Stoxx 50** (Bloomberg code SX5E) | Equity index. |
| **FCA** | Financial Conduct Authority. |
| **FSMA** | Financial Services and Markets Act 2000. |
| **FV** | Final valuation date. |
| **GIG** | First Claimant – G.I. Globinvestment Ltd. |
| **GP** | General Partner |
| **HFPO** | High Frequency Price Opportunity. |
| **IV** | Initial valuation date. |
| **Investment Objectives** | Investment objectives pleaded by the Claimants |
| **LDM** | Third Claimant – Luca Cordero di Montezemolo. |
| **Leader Logic** | The Tenth Defendant – Leader Logic AG. |
| **Leader Logic Holding** | The Ninth Defendant – Leader Logic Holding AG. |
| **MDM** | Second Claimant – Matteo Cordero di Montezemolo. |
| **MiFID** | The Markets in Financial Instruments Directives 2014 and 2018. |
| **MIN** | Market Insurance Note. |
| **MSCI World** (Bloomberg code MXWO) | Equity index. |
| **Offering Memorandum** or **Offering Memoranda** | Offering documents for the various Compartments. |
| **RAPOC** | Re-Amended Particulars of Claim. |
| **S&P 500** (Bloomberg code SPX) | Equity index. |
| **SB GP** | Third Defendant – Skew Base SARL. |
| **Skew Base Fund** or **the Fund** | Second Defendant – Skew Base Investments SCA RAIF. |
| **SMI** | Swiss Market Index. |
| **SRL** | Italian company Emmediemme Tre SRL. |
| **2015 Act** | The Consumer Rights Act 2015. |

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|---|---|
| **First Agreement** | Agreement entered into by GIG and XY dated 18 July 2016. |
| **Second Agreement** | Agreement entered into by XY and GIG dated 21 September 2016. |
| **STA** | Service and Technological Agreement dated 9 February 2017. |
| **Third Agreement** | Agreement entered into by XY and GIG dated 1 July 2018. |
| **SSA** | Support Service Agreement between Twinkle and SB GP dated 9 February 2017. |
| **UCTA** | The Unfair Contract Terms Act 1977. |
| **Underlying** | The underlying asset. |
| **Twinkle** | Sixth Defendant – Twinkle Capital SA. |
| **VP** | Reference to all companies in the VP group. |
| **VP Bank** | VP Bank AG. |
| **VP Liechtenstein** | Fifth Defendant – VP Fund Solutions (Liechtenstein) AG. |
| **VP Lux** | Fourth Defendant – VP Fund Solutions Luxembourg SA. |
| **XY** | First Defendant – XY ERS UK Ltd. |