Neutral citation number [2024] EWHC 1654 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No: BL-2022-002089**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Before Andrew Lenon KC
Sitting as a Judge of the High Court

Date: 27 June 2024

B E T W E E N :-

(1) MARIA HELENA GROEN
(2) DAVID CHRISTOPHER LANE
(3) HENRY CHARLES WOODS

Claimants

-and-

MARTIN CHARLES HEATH

Defendant

Jason Evans-Tovey and Hamish Fraser (Direct Access) appeared for the Claimants

Stuart Adair instructed by Keystone Law appeared for the Defendant

Hearing dates: 11 – 15, 18 - 21, 26, 27 March 2024

APPROVED JUDGMENT

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

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 27 June 2024 at 14:00.

Contents

Introduction 3
The Witnesses 3
Elements of the tort of deceit 11
Pleading fraud 17
Application to amend the Particulars of Claim 21
Application to amend the Defence 23
The Facts 26
SML's business 2014 – 2015 26
Mr Evans' investment in SML 27
Staffing and management of SML 30
SML's Clients 32
The state of development of SML's software 35
Mr Lane's investment 37
Preparation of investor materials 45
Ms Groen's investment 50
Mr Woods' investment 59
The Coty trial 61
SML subsequently 65
Mr Lane's claim 66
(1) Representation as to the Case Studies 66
(2) Representation that SML's software was scalable and SaaS 70
(3) Representation as to SML's customers 72
(4) Representation as to Mr Evans' investment 76
(5) Representation as to Mr Heath's status as an investor 78
(6) Representation as to positive cash flow 79
Claim for £6,000 81
Ms Groen's claim 82
(1) Representation as to the Case Studies 82
(2) Representation that SML's software was scalable 84
(3) Representation as to SML's customers including Coty 84
(4) Representation as to positive cash flow 88
(5) Representation as to absence of disputes 90
(6) Representation that SML's software was GDPR Compliant 91
Mr Woods' claim 93
Conclusion 97

Introduction

1. In these proceedings, the Claimants are claiming damages for misrepresentations which they say were made to them by the Defendant ("Mr Heath") fraudulently in order to induce them to invest in a start-up company, Seed Media Limited ("SML") which Mr Heath had founded and of which he was a shareholder and director.

2. The Claimants invested at slightly different times and the representations allegedly made to them were not exactly the same but in general terms they included representations as to the nature and capabilities of the software developed by SML, the identity of its customers, the state of development of its business and its finances.

3. It is Mr Heath's case that the Claimants' allegations are inadequately pleaded, that they lack merit and essentially that the Claimants knowingly made a high-risk investment in a start-up tech company which, like many other such companies, failed because it ran out of money and that they really have nothing to complain about in relation to the information which was provided to them.

The Witnesses

For the Claimants

(1) Paul Evans

4. Mr Evans was originally a Claimant in the proceedings but he subsequently discontinued his claim. He invested before the other Claimants and later fell out with Mr Heath. The facts of his investment and subsequent dispute are relevant background to the claims of Mr Lane and Ms Groen. Mr Evans clearly felt considerable resentment towards Mr Heath because of what he considered to be Mr Heath's mistreatment of him. It was suggested to Mr Evans in cross-examination that he was trying to give a bad impression of Mr Heath and was using material for its prejudicial value but I consider that Mr Evans gave considered evidence and was a reliable witness.

(2) David Lane

5. Mr Lane, the first of the three remaining Claimants, is a businessman who at the time when he was first introduced to SML was interested in making an early-stage investment for the first time. Shortly after making his investment in SML, Mr Lane was recruited by Mr Heath to help with SML's strategic planning and with raising money from other investors. He was involved in the preparation of materials sent to other potential investors including the other two remaining Claimants. To the extent that these materials were misleading, Mr Lane's evidence, which I accept, was that they were based on materials which he was given by Mr Heath and which he did not fully understand at the time. It was put to Mr Lane in cross-examination that he never complained to Mr Heath that he had been lied to, even after he must have acquired detailed knowledge of SML's business. Mr Lane's evidence in response, which I also accept, was that he did have a major argument with Mr Heath in about March 2017 about Mr Heath's exaggerations and misstatements of facts, after which Mr Lane's role in fund-raising diminished and that his priority thereafter was trying to turn the business round. It would appear that Mr Lane continued to have some belief in the potential of SML's product even after he had acquired a detailed knowledge of the business, since he was prepared to contemplate returning to manage SML in 2018. That does not undermine his evidence as to the misrepresentations that induced him to invest in the SML in the first place. I consider that Mr Lane was an honest witness with a good recall of events.

(3) Maria (Marleen) Groen

6. Ms Groen was at the time of her investment in SML an experienced private equity investor although she described herself as "not a techie" and said that she could not have a done a "tech" due diligence. She was an articulate witness who gave a realistic assessment of the risks involved in start-ups and of the importance of trust, ethics and transparency in corporate investments. It was submitted on behalf of Mr Heath that

Ms Groen must have colluded with Mr Lane in the preparation of her witness statement, parts of which referred to Ms Groen as "MG" rather than in the first person and because of certain minor textual similarities between their respective witness statements. These points did not constitute compelling evidence of collusion and I accept Ms Groen's evidence that there was none. I consider that Ms Groen was an honest and reliable witness.

(4) Henry Woods

7. Mr Woods described himself as a property developer and occasional investor who also engages in yacht racing. He was approached by Piers Hooper, an acquaintance at the Royal Thames Yacht Club, and, on the basis of information about SML supplied via Mr Hooper, decided to invest in SML. He provided a short witness statement. I consider that Mr Woods was an honest and reliable witness.

(5) Piers Hooper

8. Mr Hooper advises companies on their communications. He knew Mr Heath as a family friend, his wife is a great friend of Mr Heath's wife and he is still friends with Mr Heath. He was asked by Mr Heath to assist with raising money from investors and, like Mr Lane, was involved in the preparation of materials provided to Ms Groen and Mr Woods. It was put to Mr Hooper that he had concocted his evidence merely to cast Mr Heath in a bad light. Mr Hooper's response, which I accept as truthful, was that he was attempting to give a true account:

> *Q: So I couldn't point to you but suggest to you that that is a narrative that has been developed to cast Martin in a bad light.*
> *A: Not at all. Not at all. My job here, as I see it, is to simply represent what. The reality of what I remember and to explain that. And I'm. That's what I'm trying to do. So I'm not making stuff up. I'm not trying to throw him under the bus.*
>
> [Day 5 page 67]

I consider that Mr Hooper's evidence was objective and reliable.

(6) Lucy Nolan

9. Ms Nolan worked for SML between December 2016 and June 2018 as an account manager. She came across as an intelligent and articulate individual. She previously had ten years' experience of working in the field of digital media and marketing. She provided an insider account of what it was like working for SML and gave evidence about the technical limitations of SML's product. She resigned from SML in June 2018 on the basis that she had been constructively dismissed. Her witness statement was highly critical of Mr Heath. It was put to Ms Nolan in cross-examination that she had an intense dislike of Mr Heath and that her evidence was therefore framed with the intention of doing the maximum amount of damage to his reputation. She rejected these suggestions:

I would say my evidence is the truth. I wouldn't say it's about damaging his reputation. It's just sharing the truth of my experience working with him, for him; and I have - - I feel I have a moral obligation to share that.

[Day 6 page 5]

I consider that Ms Nolan was an honest and reliable witness.

(7) Shane Higgon

10. Mr Higgon, who is a distant relation of Mr Evans, worked for SML on a four-day week basis between May 2016 and March 2017. He was described in SML's promotional materials sent to potential investors as SML's Chief Financial Officer. The main thrust of Mr Higgon's evidence was that the information contained in the financial projections which he prepared and which were included in the investor materials was based on what he was told by Mr Heath. Mr Higgon's evidence, which was not challenged in cross-examination, was that SML stopped paying his wages in early 2017, that he entered a settlement agreement with SML but was not paid any amount of what he was owed, ending up a creditor in SML's liquidation. Perhaps unsurprisingly against this background, Mr Higgon clearly felt considerable animus towards Mr Heath. It was put to him that he was trying to portray Mr Heath in a bad light:

Q. I think you're - - I would suggest that you're trying to portray Mr Heath in a bad light before the court in order to further the claimant's case, for whom you're giving evidence.

A. No, I have been asked to give a statement of truth and I have affirmed that in front of your Lordship, and I'm happy to say that's exactly what I'm doing.

[Day 6 page 60]

11. I accept that Mr Higgon's witness statement contains material which is not relevant to the issues in the case and which appears to have been included in order to prejudice Mr Heath. I consider nevertheless that, on the relevant issue of his and Mr Heath's respective roles in the preparation of financial information, his evidence was reliable.

For the Defendant

(1) Martin Heath

12. The Defendant, Mr Heath, is a businessman with previous experience of the music, media and software industries. He caused SML to be incorporated and was its director and majority shareholder. SML was very much his creation and brainchild.

13. The evidence about Mr Heath as he was at the time of the material events in this case (2016 – 2017) established that he was a dynamic, hard-working individual with an unusual capacity to persuade and enthuse other people. He had a vision of what he saw as the huge potential of SML's product and was able to communicate this vision successfully to others. Mr Hooper's evidence was as follows:

[SML] .. . was absolutely led by Martin. And that's what I got excited by and what investors would get excited by, because he was the visionary. Visionaire, as they used to call it in those days.

[Day 5 page 58]

14. Mr Heath's style of management was highly controlling. Mr Hooper's evidence was as follows:

So he may have been delegated pieces of the jigsaw. Of course, that's called management. And he would have done that. He would have had oversight on the final documents we all agreed. And bear in mind, a lot of it was done in a room where we're all sitting around and having coffee and eating sandwiches and sharing and coming up with the final edits. So, I don't know how you want to describe that. But for me, he was the absolute architect of the business

As I said before, you know, in the panoply of managers and CEOs I've worked with, there are some who are kind of hands off and George, you do this. And there are others who are like frenetically managing literally everything to some degree or other. And Martin, he's got this brilliant but crazy brain where he rushes around doing everything. Absolutely, he was involved in micromanaging the business.

[Day 5 pages 57/58]

15. There was a darker side to Mr Heath's management style. The evidence of Ms Nolan and Mr Higgon was that Mr Heath was frequently confrontational and aggressive towards members of SML's staff who were mostly young. In an email to staff dated 11 April 2016 Mr Heath acknowledged that "On a personal note I realise that my behaviour has been variously described as controlling, unable to delegate erratic etc. And because I am stressed its caused what I know to be aberrations in my behaviour and character." In the following year Deby Green, who had worked with Mr Heath for many years, wrote in an email dated 18 February 2017:

"I am trying my best to protect you and your businesses under your direction from the constant drama. Why then you think it fair that I deserve to be talked over, challenged aggressively or disrespected almost every time I attempt to speak to you about a business matter, I do not know. You should record yourself next time and maybe you will get an idea of your tone."

16. As set out later in this judgment, numerous statements made or approved by Mr Heath about SML, its product and finances were untrue. An important issue in the case is as to whether Mr Heath knew that the statements were untrue, was reckless as to whether they were untrue or genuinely believed in their truth. It was submitted on behalf of Mr Heath that the fact that he or his family invested a total sum of £1,763,290.02 by the time that SML went into creditors' voluntary liquidation, of which some £500,000 was invested between June 2017 and September 2018, after the Claimants had invested, when there were no other investors, with Mr Heath keeping SML afloat

while taking no salary, undermined the Claimants' case that he had made fraudulent representations to them. This was on the footing that Mr Heath must have believed that what he was saying was truthful otherwise he would not have been investing so much of his own money.

17. I do not accept this submission. It is clear that Mr Heath believed in the potential success of SML's product, his vision, but it does not follow that he believed that the information which he was providing to potential investors was true. He repeatedly overstated what had been achieved by SML in terms of its product development, clients and finances to an extent that went well beyond legitimate "puffs" and was thoroughly misleading. He must have known this or was at the very least reckless as to the falsity of what he represented.

18. It was also submitted on Mr Heath's behalf that the allegation that Mr Heath acted fraudulently is undermined by the fact that Mr Lane was involved in the preparation of allegedly fraudulent materials provided to Ms Groen and Mr Woods: if Mr Lane believed in these documents, surely Mr Heath must have done so as well. I do not accept this submission. My impression of Mr Lane is that, despite his evidence in his witness statement that he intended to do a "good job of due diligence", his approach to the investment was rather superficial; he did not examine SML's accounts or question SML's staff prior to investing as he could have done. Mr Lane's evidence, which I accept, was that in the ensuing months when he was involved in the preparation of the materials for the investors, he was still enthused by what he had been told by Mr Heath and it was only later that he came to realise that he had been misled. His state of knowledge at the time he prepared the materials for investors is not to be equated with Mr Heath's.

19. Mr Heath was an unsatisfactory witness. There were assertions in his Defence that Mr Heath must have known were untrue, for example the contention that there was no agreement with Mr Evans as to the terms on which he was investing or the assertion that he did not authorise Mr Hooper to make representations about customer numbers, which were demonstrably wrong by reference to the contemporaneous correspondence. His witness statement also included a number of significant misstatements, for example the assertion that when Ms Groen invested it was hoped

to retrieve the situation with Coty when (as set out later in this judgment) there was clearly no possibility of doing so. In his oral evidence, he sought to take advantage of misleadingly ambiguous language in SML's promotional materials such as the phrase 26 retailers "engaged":

> *Q. Do you see that? Then the first bullet point, SEEDStyle, initial retailers engaged?*
> *A. Engaged, yes.*
> *Q. Yes. The average person would understand that to be indicating that you have 26 -- you have contracts with retailers?*
> *A. Well, it says engaged, and we did have 26 initial retailers engaged.*
> *Q. You didn't have 26 contracts?*
> *A. No, it says "engaged"; it doesn't say "contracts".*
> *Q. Well, what do you now say that the word "engaged" is intended to mean?*
> *A. It means that we -- that they're in our pipeline.*
> *Q. Would you accept that the ordinary person reading this would understand "engaged" to mean that you have a contract with them?*
> *A. I don't think that necessarily means that we have a contract. It doesn't say that. It says "engaged".*
>
> [Day 7 page 83]

20. Similarly in relation to the word "traction", Mr Heath's evidence was as follows:

> *Q. We'll break it up. Let's go back. You accept traction in the marketplace to an ordinary reader would mean that the product has been sold or licensed and is being used by that customer in the market?*
> *A. Well, no. It could mean that it's been very well received, rather than anything else. It doesn't actually say 'sales' or 'contracts' or anything else; it just says "traction".*
> *Q. Well, traction means it's got hold of something?*
> *A. It means it's attracted attention, yes.*
> *Q. No, come on. It means more than that?*
> *A. Not necessarily, no.*
> *Q. Isn't this the whole point: that you are using words here –*
> *A. Yes.*
> *Q. – to create one impression to the average reader, and now trying to spin them to a completely different interpretation for the purposes of this case?*
> *A. No, I don't agree. I think traction in the marketplace can mean it's attracted interest rather than sales. It doesn't say 'sales' in this document. It's a generic statement*
>
> [Day 7 pages 81 – 82]

21. No other witnesses were called to support Mr Heath's case. There was therefore no-one from among the various individuals who worked for SML at the relevant time to corroborate his evidence concerning SML's business, its clients, the state of development of its software or its finances or to rebut the evidence of Mr Higgon and Ms Nolan concerning his management style.

Elements of the tort of deceit

22. Apart from the claims in deceit, the Particulars of Claim included claims in negligence, breach of directorial duties and unlawful means conspiracy. An application (considered later in this judgment) was made to add a claim under the Misrepresentation Act 1967. The claims in negligence could only succeed if Mr Heath assumed personal responsibility for statements made so as to create a special relationship between him and each investor: *Williams v. Natural Life Health Foods* [1998] 1 WLR 830 (HL) at p.835C; *Barclay-Watt v. Alpha Panareti Public Ltd* [2022] EWCA Civ 1169 at [39]. I was not satisfied that Mr Heath or anybody on his behalf did convey directly or indirectly to any of the investors that he was assuming personal responsibility for the statements he made: *Williams* p.835H. The claims in negligence therefore fall to be dismissed. Ultimately, it was the claims in deceit that were at the forefront of the Claimants' cases.

23. The elements of the tort of deceit are as follows:

    1) There must have been an express or implied representation of present fact or law.
    2) That representation must have been made with the intent (including appreciation) that it would be relied upon by the Claimant in some way.
    3) The representation must have been false when made, or falsified by later events and not corrected, and false in the sense of the meaning which a representee was intended to take from the representation was untrue.
    4) The false representation must have been made:

(a) knowingly;

(b) without belief in its truth; or

(c) recklessly, careless whether it be true or false,

(4) The claimant must have been influenced by the representation, which need not be the sole influence or cause, and acted to his detriment.

See generally *Clerk & Lindsell on Torts*, (24th Ed) ("*Clerk & Lindsell"*) Ch 17; *Cartwright*, *Misrepresentation and Mistake* (6th Ed) ("*Cartwright"*).

Representation made in a representative capacity

24. A person who makes a representation in a representative capacity, such as a company director, is personally liable for it and is liable in deceit if the person makes the representation with the necessary fraudulent intention; see *Cartwright* at [5-07]:

> " … The representation which founds a claim in the tort of deceit must be one for which the defendant is in law responsible. …Even if a person signs a document in a representative capacity, such as a company director or an employee signing on behalf of his company or employer, he is still personal liable in deceit if he makes the representation with the necessary fraudulent intention."

Representation made to third parties

25. Where a representation made to a third party is intended to be passed on to the claimant and is in fact passed on to him, the representor will be liable in deceit if the other ingredients of the tort are present: see *OMV Petroleum Ltd v Glencore International AG* [2015] EWHC 666 (Comm) at [133].

Representations made by third parties

26. A person may also be personally liable for representations made by a third party which he "manifestly approves and adopts". The principle is referred to in *Cartwright* (5-07) as follows:

> *"*...Therefore if [the Defendant] manifestly approves and adopts a representation made by a third party, he is responsible for it and is liable in the tort if the other elements of the claim against him are established."

27. The expression "manifestly approves and adopts" is taken from the judgment of Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 HL ("*Bradford Third Equitable"*). In that case, the builders of houses on a building estate issued a brochure to an intending purchaser containing misrepresentations as to the high quality of the building work and the willingness of the building society to advance money towards the purchase price of the houses, because they were so well built. The claimant building society had been in correspondence with the builders. The issue in the case was whether the claimant building society was liable in respect of the misrepresentations in the brochure which had been seen by an officer of the society. The Court of Appeal allowed the pleadings to be amended to include an allegation that the statements in the brochure were false to the knowledge of the appellant society and were made with its authority to be inferred from the correspondence. The House of Lords allowed the appeal on the grounds that the necessary elements of inducement and knowledge of falsity were not proved. Viscount Maugham went on to hold as follows:

> "My Lords, we are dealing here with a common law action of deceit, which requires four things to be established. First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit: *Peek v Gurney*, at p 390 *per* Lord Chelmsford, and at p 403, *per* Lord Cairns, and *Arkwright v Newbold*, at p 318. (p.211)."

28. The issue of what is meant by "manifestly" in this context, in particular whether it is necessary for the representor's approval of a representation to be communicated to the representee, has been considered in two recent cases. In *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 ("*Nielsen"*) emails containing fraudulent representations were sent by a defendant, Mr Bennett, to the claimant, copied to one co-defendant (Mr Mantell) and blind copied to the other (Mr Baldorino). Jacobs J held as follows:

> "382. There was, however, no dispute that the relevant question was whether Mr. Baldorino and Mr. Mantell had manifestly approved and adopted the representation. This expression comes from the judgment of Viscount Maugham in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER

205, 211. I do not consider that there is any special significance to the word "manifestly": it was used in that case to distinguish "mere silence, however morally wrong". If I am satisfied that the relevant representations were made by Mr. Bennett with the agreement of the other Defendants, then this would be a case of manifest approval and adoption."

383. I am satisfied that this is the case in relation to both the 20 April and 3 June e-mails, essentially for the reasons given by Mr. Booth as summarised above. The evidence in the case shows that, even before the 20 April e-mail, the Defendants were withholding information from Updata Europe, and that Mr. Mantell was willing positively to mislead Mr. Holm as to existence of a cash-flow statement: see Section F4 above. When Mr. Johnsen's request for information came in on 20 April 2009, it is inherently probable that the response would have been discussed and agreed by Mr. Baldorino and Mr. Mantell with Mr. Bennett. It was an important request, at a very sensitive time; i.e. around the time when the LMS offer had come in, Mr. Holm had indicated that Mr. Nielsen had been given exclusivity, and Mr. Johnsen was seeking outside investment. It was also somewhat unusual for Mr. Johnsen to ask for information. I consider it improbable that Mr. Bennett would not have told the other Defendants about the request, or that he would acted alone in deciding how to respond. This would indeed run the risk that a request might be made by another route (for example, Mr. Holm had a channel of communication with Mr. Mantell), and different information might be provided.

384. I also have no doubt that both Mr. Baldorino and Mr. Mantell were comfortable with Mr. Bennett providing figures, on 20 April, which were out of date and which did not represent their genuine and current views as to the prospects of the company. This is what Mr. Bennett did, again, when he sent the Updated Kelso Presentation on 3 June. Neither Mr. Baldorino or Mr. Mantell sought to disassociate themselves from this. This was so, notwithstanding that Mr. Mantell had printed a copy of the March Weighted Budget on 2 June, and notwithstanding the advice from Tenon. The provision of out-of-date and low figures on 3 June was therefore of a piece with the provision of out-of-date and low figures on 20 April. Indeed, the figures provided on 3 June were the "Best Case" figures taken from the Financial Overview provided on 20 April.

385. Furthermore, the e-mail traffic (see Section E above) which had started with Mr. Birkeland's e-mail on Friday 29 May, and which ended with the e-mail of 3 June, involved both Mr. Baldorino and Mr. Mantell – and the 3 June e-mail was copied to both of them. Mr. Baldorino was clearly interested in, indeed worried by, what Mr. Birkeland was asking for. Mr. Mantell had sent out the first response on 1 June. It is overwhelmingly likely that all aspects of Mr. Bennett's response on 3 June were agreed by all of the Defendants.

386. Accordingly, in my judgment all of the Defendants are responsible in law for the deceit arising from the representations in the 20 April and 3 June e-mails."

29. In *Ivy Technology v Martin* ("*Ivy Technology*") [2022] EWHC 1218 (Comm) Henshaw J commented on Jacobs J's statement of the law in the following passage:

> "354. Notwithstanding the focus on agreement in the passages to which I have referred (which may have been relevant also to the claim of unlawful means conspiracy), I do not read Jacobs J's judgment as suggesting that the approval and agreement need not be communicated to the representee in order for the approving and agreeing party to be liable in misrepresentation. The need for there to be such communication is consistent with the starting point of Jacobs J's analysis of the law of deceit: "*A representation is a statement of fact made by the representor to the representee…*" (§ 132). That, in my opinion, is the significance of "*manifestly*": the approval and agreement of the party alleged to be liable must have been manifested or communicated to the claimant."

30. An issue in *Ivy Technology* was as to the liability of one co-defendant, Mr Bell, for the fraudulent misrepresentations made by another, Mr Martin, at a meeting attended by both defendants. Henshaw J held as follows:

> "458. Mr Bell, by participating in the discussion in the way indicated in (iii) above, was, by clear implication, both (a) manifestly endorsing Mr Martin's statement to the effect that the Business was profitable and (b) himself representing that the business was profitable. An expression of concern that Ivy would affect the earn-out (which depended on positive EBITDA) by reducing the Business's EBITDA clearly implied that there was currently positive EBITDA of some kind, even if not at the level of £1.6 million. Moreover, I have no doubt that Mr Bell understood himself to be conveying this message to Ivy, and did so in order to help persuade Ivy to go ahead with the transaction, and preferably to do so on terms which maximised the fixed element of the price and minimised any element dependent on future EBITDA.
>
> 459. I conclude that both Mr Martin and Mr Bell made the Prague Profitability Representation, and that Mr Martin (at least) made the Prague EBITDA Representation. These too were representations of fact.
>
> 460. For the avoidance of doubt, in stating that at least Mr Martin made the Prague EBITDA Representation, I do not positively conclude that Mr Bell did not also make it. Rather, I conclude that the evidence in my view does not establish, on the balance of probabilities, that Mr Bell's contributions to the discussion referred to in §456.iii) above implicitly included or endorsed Mr Martin's making of) a statement as to the Business's current EBITDA being at the specific level commensurate with £1.6 million for the year."

31. These cases indicate that whether or not a defendant is liable in deceit on the basis of the approval and adoption of a representation made by a third party depends on the defendant's level of involvement in the third party's representation, which is a fact-specific matter. For a defendant to be liable in respect of a past representation made by a third party, as in *Bradford Third Equitable*, some active manifestation of approval may be required. Similarly, participation at a meeting at which a fraudulent representation is being made by a third party, to the knowledge of the defendant, may not be sufficient without some overt manifestation of approval (*Ivy Technology*). Conversely, passive assent to the sending by a third party of an email containing representations which are known by the defendant to be fraudulent may be sufficient to amount to adoption and approval of the representations (*Nielsen*).

Continuing representations

32. A failure to correct or reveal that a fact stated was no longer true may be held to be fraudulent; see *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [213]–[214]). Thus, in *Foodco*, a senior executive of a company who knew that a forecast had been falsified by events to which he was privy but remained silent, intending that the forecast should be relied on by persons to whom the forecast was directly communicated, was liable in deceit. Dishonesty on his part was proved without it being necessary to show a conscious awareness of a duty to correct the statement.

33. Whether a representation is treated as continuing at the moment it is acted on is a matter of interpretation of the representation. A representation made during the course of negotiations with a view to inducing the representee to enter into the contract will generally be characterised as continuing to the point when the contract is concluded; the general principle is that a representation will be regarded as continuing until fully acted upon: *European Real Estate Debt Fund (Cayman) Ltd (in liquidation) v. Treon* [2021] EWHC 2866 (Ch); *Ivy Technology* at [355].

Ability to discover the truth

34. It is no defence to show that a claimant could have discovered the truth. In *Redgrave v Hurd* (1881) 20 Ch D 1 Baggallay LJ held as follows:

> "The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, 'You chose to believe me when you might have doubted me and gone further.' The representation once made relieves the party from an investigation, even if the opportunity is afforded."

35. As Jacobs J held in *Nielsen* [143]:

> "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."

Inducement

36. A claimant has the benefit of an evidential presumption that he was influenced at least to some extent by the deceptive statement: a presumption that has been said on high authority to be very difficult to rebut" see *Clerk & Lindsell*, 17-28. Jacobs J observed in *Nielsen* as follows at [153]-[157]:

> "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."

37. In order for a representation to be "actively present" to the representee, the representee must have given it contemporaneous conscious thought; see *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm) at [281]; *Leeds City Council v Barclays Bank Plc* [2021] Q.B. 1027 at [102], [146].

Pleading fraud

38. It was submitted on behalf of Mr Heath that the way in which the fraudulent misrepresentations had been pleaded in the Particulars of Claim was inadequate. The

requirements in relation to the pleading of fraudulent misrepresentations are succinctly summarised at paragraph 58-12 of the 19th Edition *of Bullen & Leake & Jacob's Precedents of Pleading*:

"The particulars of claim must show the nature and extent of each alleged misrepresentation and contain particulars showing when, where (if relevant) by whom and to whom it was made, and how it was made, whether orally or in writing, and if in writing, identifying the relevant document".

39. It was also submitted that where an implied representation is alleged, it is essential that the words or conduct in question are specifically pleaded in order that they can be viewed objectively (and in context) to determine whether a representation can be implied in the circumstances.

40. Paragraph 3 of the Defence set out Mr Heath's objections:

3. This Defence is pleaded without prejudice to MH's contention that the pleading of the alleged fraudulent and/or negligent misrepresentations in the Particulars of Claim is completely lacking in particularity and, therefore, embarrassing and liable to be struck out. In particular:

(1) The alleged misrepresentations are pleaded in very general terms rather than by reference to the precise words used;

(2) The Claimants fail to plead whether the alleged misrepresentations were made orally or in writing;

(3) The particular document or documents in which an alleged misrepresentation is said to have been made or implied are not identified with adequate precision. By way of example, the misrepresentations alleged to have been made to PE are merely stated to have been made "*Through such documents and statements as those identified in Schedule 2*"; and

(4) In the premises, MH cannot understand the case he has to meet. In particular, he cannot know the precise words alleged to constitute the misrepresentation, the date on which the alleged misrepresentation is said to have been made, whether the alleged misrepresentation was made orally or in writing or, if it was made in writing, the identity of the document in which it is said to have been made.

41. It was submitted on behalf of Mr Heath that the pleading of the fraudulent misrepresentations was embarrassing and inadequate, that no steps have been taken by the Claimants to remedy the defects in the pleaded case and that in the circumstances the claims for fraudulent misrepresentation must necessarily fail.

42. In my judgment, the Claimants' case is pleaded (not by Counsel who represented the Claimants at the trial) in a way that is both unconventional and unsatisfactory. The main body of the pleading sets out in relation to each Claimant various categories of representations (software representations, customer representations, investment representations etc), identifying the representations in general terms and prefacing them with the following words:

> "By such documents and statements identified in Schedule [3/4/5], MH made express representations alternatively implied representations as to [the relevant subject matter]."

43. Each Schedule relates to a different Claimant and consists of a discursive chronological narrative of events interspersed with allegations of representations made orally or in documents. The Schedules are prefaced with the words:

> "In their Particulars of claim the Claimants refer to the meetings and documents particularised below with regard to [relevant Defendant's] claim. This is particularisation by way of advance further information only and the Defendant is not required to plead to the same. It is not an exhaustive list of evidence to be provided."

44. There is no attempt to link particular paragraphs in the Schedules to the generalised allegations of misrepresentation in the Particulars of Claim. The reader is left to work out which paragraphs of the Schedule were intended to substantiate any given representation in the Particulars of Claim. A further unsatisfactory aspect of the way the Claimants' claims were advanced is a lack of correlation between the pleading and the witness statements so that, for example, a material conversation is referred to in the witness statement but referred to differently in the corresponding Schedule and vice versa; see for example paragraph 10 of Schedule 4 referring to a conversation about an influencer tree at a meeting on 8 February 2017 with paragraph 8 of Ms Groen's first witness statement which does not mention it; similarly paragraph 95 of

the Particulars of Claim which refers to a series of detailed representations which are not mentioned anywhere in Mr Woods' witness statement.

45. It was submitted on behalf of the Claimants that the approach adopted in the Claimants' case was mandated by the Chancery Guide which states that schedules are the appropriate mechanism "*in a rare case where it is necessary for the proper understanding of the statement of case to include substantial parts of a lengthy document the passages in question should be set out in a schedule rather than in the body of the statement of case*". This Guidance plainly has no application to the pleading in this case. The Schedules do not contain lengthy citations from documents. Rather they include narratives of material events, coupled with a direction that it is not necessary for the Defendant to plead a response.

46. It was further submitted on behalf of the Claimants that there were no grounds for complaining about a lack of particulars as the requisite particulars were contained in the Schedules and that Mr Heath responded paragraph by paragraph to the allegations in the Schedules in his witness statement, that he cannot have been in any doubt as to the case alleged against him and that no application was ever made for further particulars or to strike out the claim.

47. In my judgment, given that (i) by reading the Schedules together with the Particulars of Claim, it is possible to link the general allegations with the particulars in the Schedules and (ii) Mr Heath did address the particular allegations in the Schedules in his witness statement, I consider that, despite the unsatisfactory features of the pleading, the claims against Mr Heath were sufficiently clear and detailed for him to have understood and responded to the case against him, which is what he actually did. I do not consider that there was any unfairness to Mr Heath in trying and adjudicating on the claims against him.

48. A further criticism made of the way the Claimants' case has been advanced is that it has adopted a "scattergun" approach leading not only to prolix and repetitive pleadings but also to a twelve-day trial which was disproportionate to the relatively modest sums claimed. In my view, there is considerable force in this criticism. Given

that each Claimant would only need to succeed in relation to a single misrepresentation in order to recover the damages claimed, it would have been better to run the case by reference to a small number of "specimen" representations rather than proceeding in relation to all of them.

Application to amend the Particulars of Claim

49. The Claimants sought permission to amend paragraph 21 of the Particulars of Claim by the insertion of the following underlined words:

> "The Claimants paid over funds and/or entered into agreements with Mr Heath in the form of a written "Investment Agreement" entered into by all parties on 28 June 2016 alternatively by 10 August 2017 and/or SML's Articles of Association on the basis of these representations and each of them which were in fact untrue."

50. The application was opposed on the following grounds:

(1) The proposed amendment is inadequate in terms of its drafting because the date is clearly wrong, there is no proper pleading as to when the Claimants became bound by the Articles of Association and there is no reference to section 2(1) of the Misrepresentation Act 1967 (" the 1967 Act").

(2) The claim does not arise out of the same or substantially the same facts as the previously pleaded case and is therefore time-barred.

(3) The application is too late. No explanation has been given for the lateness.

(4) The application has no real prospects of success. Articles of Association are not a contract for the purposes of the 1967 Act..

51. In reply, the Claimants submitted, in summary, as follows:

(1) The 1967 Act is already referred to as the basis of the claim in the claim form. The existing Particulars set out the facts which form the basis of the proposed amendment.

(2) The proposed amendment has real prospects of success. Articles of Association are a contract for the purposes of the 1967 Act.

(3) The lateness of the proposed amendment does not prejudice Mr Heath.

(4) The proposed amendment arises out of substantially the same facts as the current claim so it is not time-barred.

52. I refuse permission for the proposed amendment for the following reasons. First, the draft pleading is unsatisfactory. No explanation was given for the 2016 date. The date of 10 August 2017 appears to be the date when an unsigned Investment Agreement was sent to Ms Groen but its relevance is otherwise unclear. Moreover, although the draft amendment asserts that all the Claimants entered into Investment Agreements, the Claimants' case was that only Ms Groen and Mr Woods did so. There is no signed copy of the Investment Agreement in the trial bundles and no indication of when the Claimants are alleged to have become bound by the Articles of Association.

53. Second, the proposed amendment is made too late. Mr Heath has had no adequate opportunity to set out his defence to a claim under the 1967 Act, in particular by identifying, in relation to each alleged representation, the reasonable grounds on which he may contend that he had for believing that each of the representations were true. Because of the way in which the existing claim has been pleaded, it is not possible simply to treat Mr Heath's pleaded defence to the deceit claim as a defence to claims under the 1967 Act.

54. Third, the obvious forensic purpose of the proposed amendment was to provide a "fall back" for the Claimants in the event that I found that Mr Heath was not guilty of deceit. Given my findings in this judgment, the amendment is unnecessary.

Application to amend the Defence

55. Mr Heath seeks permission to add the following new paragraph 133 at the end of the Defence:

> "133. With regard to the claims in respect of the £50,000 and £35,000 respectively invested by MG and HW as convertible equity notes (i.e. as debt) and referred to at paragraphs 119.2 and 120.2 of the Particulars of Claim, the alleged misrepresentations were not signed by MH and, without prejudice to the matters set out above, he relies on section 6 of the Statute of Frauds Amendment Act 1828 as a complete defence to those claims."

56. The amendment relies on section 6 of the Statute of Frauds Amendment Act 1828 (also known as Lord Tenterden's Act) which essentially prevents an action for fraud being brought in respect of a representation directed at obtaining money or goods on credit (i.e. a loan). It was submitted that no prejudice was caused by the lateness of the application to amend, since it did not require any response.

57. Section 6 provides as follows:

> No action shall be brought whereby to charge any person upon or by reason or any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing signed by the party to be charged there with.

58. As explained by Longmore LJ in *Roder UK Ltd v Titan Marquees Ltd* [2012] QB 752 ("*Roder*") at [1], the mischief which the section was designed to address was that of creditors eluding the provisions of the Statute of Frauds, which prevented enforcement of a guarantee that was not in writing, by suing the would-be surety for fraudulent misrepresentation as to the debtor's credit instead.

59. The Claimants made the following submissions in relation to the correct construction of Section 6:

(1) The scope of application of Lord Tenterden's Act is set out in *Cartwright*

as follows (5-30):

"The defence is available where the claim in deceit is based on an unwritten representation made to the claimant by the defendant ... about the creditworthiness of a third party, which was intended to induce, and did induce, the claimant to provide money or goods on credit to that third party'; citing *Tatton v Wade* (1856) 18 C.B. 371."

(2) Section 6 is to be narrowly construed, for the obvious reason that if held applicable it provides an unattractive shield for undeserving fraudsters (see *Clerk & Lindsell* (17-60).

(3) The section is limited to *"any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person".* This has been interpreted as extending only to representations which go to the creditworthiness of the potential debtor. As per Shaw LJ in *Diamond v. Bank of London & Montreal* [1979] QB 333 at p 251A: *"That statute, despite its comprehensive language, applies only to representations as to creditworthiness".*

(4) The section is limited to representations or assurances *"to the intent or purpose that such other person may obtain credit, money, or goods upon".* Nowadays, that is to be read as saying *"to the intent or purpose that such other person may obtain money or goods upon credit." Roder* at [16]. Accordingly, for a representation or assurance to fall within the scope of the section the representation must have been made with a specific intent, namely the intent or purpose that a potential debtor may obtain money or goods upon credit from another person.

(5) There is a carve out from the bar if *"such representation or assurance be made in writing, signed by the party to be charged therewith':* As to the scope of "*signed by the party'* in the modern world Flaux J held in *Lindsay v O'Loughnane* [2010] EWHC 529 (QB) as follows:

"[95] In a modern context, the section will clearly be satisfied if the representation is contained in an email, provided that the email includes a written indication of who is

> sending the email. It seems that it is not enough that the email comes from a person's email address without his having "signed" it in the sense of either including an electronic signature or concluding words such as "regards" accompanied by the typed name of the sender of the emaiL· see the decision of HHJ Pelling QC (sitting as a High Court Judge) in *Pereira Fernandes v Mehta* [2006] 1 WLR 1543."

60. The application to amend was resisted essentially on the grounds that Section 6 has no relevance to the facts of this case. Ms Groen and Mr Woods did not advance money by way of loans and there was no evidence of representations being made with the intention that SML should obtain money upon credit.

61. I accept the Claimants' submission that, in order for the proposed amendment to have any prospects of success, it would be necessary for Mr Heath to establish the following:

    (1) that Ms Groen and/or Mr Woods are making a claim in deceit based on oral representations as to the creditworthiness of SML;

    (2) that the representations were allegedly intended to induce Ms Groen and/or Mr Woods to provide money on credit to SML;

    (3) that the representations allegedly induced them to provide money on credit to SML.

62. In my judgment, none of these elements is established.

    (1) It is not clear from the proposed amendment which representations are alleged to be representations as to SML's creditworthiness. Representations as to SML's financial circumstances would not be sufficient.

    (2) It is not alleged that representations were made to induce Ms Groen and/or Mr Woods to provide money on credit to SML.

    (3) Ms Groen and/or Mr Woods did not provide money on credit to SML. The sums advanced pursuant to the terms of the Advance Equity Subscription Notes were

to be converted automatically into Conversion Shares. They were not repayable in any circumstances. Clause 5.1 provided as follows:

> "5.1 Status of funds
>
> For the avoidance of doubt, no interest is payable on the Advanced Subscription Funds in any circumstance, and no amount of the Advanced Subscription Funds Is repayable by the Company in any circumstance but such amount will be converted into shares in the Company as set out in clause 3."

(4) The fact that the sums advanced were eventually treated as loans in SML's liquidation was the consequence of SML entering into liquidation before the closing of a qualifying completion round.

63. For these reasons, I consider that the proposed amendment has no prospect of success and I refuse permission to amend.

The Facts

SML's business 2014 – 2015

64. In November 2014 Mr Heath left a software business called Digital Animal which he had founded in 2011 in order to start SML which he had incorporated in 2008. Mr Heath described Digital Animal as operating in a similar field to SML but using less sophisticated technology. Digital Animal would build clients a bespoke website on which customers would transact. Typically, customers coming to the site would be invited to "share with a friend and get a discount". The software would enable a retailer to monitor whether a customer had shared information about the discounted offer with a second customer but could not tell whether the second customer had also shared or, if so, how many subsequent customers were introduced by the first or second customer.

65. SML was managed by Mr Heath from inception and was initially funded by him. His wife Izzy was also a director but played no part in the company. Mr Heath's plan was

for SML to develop the technology used by Digital Animal. After about five months SML had started to develop its own software which was distinct from Digital Animal's. It was intended to provide a tracking service across multiple networks, enabling clients to identify "influencers" who would bring in other customers.

Mr Evans' investment in SML

66. Mr Evans first met Mr Heath in about July 2015. Mr Evans was impressed by Mr Heath and what he was told about SML's business and prospects. He was shown case studies according to which SML's technology was "in market" and had already delivered exceptional results together with other promotional material from which Mr Evans got the impression that SML had signed up retail customers form the fashion industry and would soon be making large profits.

67. In November 2015 Mr Evans agreed with Mr Heath to invest £200,000 in SML in return for a 5% shareholding in SML on the basis of a valuation of £4 million for SML. In his witness statement, Mr Heath asserted that there was just a discussion rather than an agreement about the valuation but in cross-examination he admitted that there was an agreement:

Q. But it was more than a discussion, it was an agreement, wasn't it?
A. At that time for 4 million, yes.

[Day 7 page 124]

68. Following his investment, Mr Evans had regular meetings with Mr Heath which were generally upbeat but in April 2016 Mr Evans received an email from the then Chairman of SML, Mark Timbrell, who was in dispute with Mr Heath over payment of his fees, which read as follows:

"Hi Paul

I'll be resending this mail from my laptop when I can use it.
I'm on the road at the moment.
Something has been concerning me deeply over the last couple of months.
We have touched on it in meetings and calls over the last month or so and I

believe now is the time for me to write to you formally.
I am concerned that the equity deal you bought into with your £200k
Investment should be revisited in the light of the true development stage of Seed at the time of your buy in.
An investment was presented to you based on:
- tech dev status
- revenue projections
- additional investors in the pipeline
What is clear to me now is that none of the above were as described to you as accurately as they should have been:
- the tech wasn't fully built / scaleable
- revenues were not real
- additional investors weren't waiting to come in
This raises an interesting question.
Janna believes a fair value at the moment is probably 4 pre money.
The stage you came in at I believe is significantly lower than this bearing in mind you came on fast to gain a short term uplift and to support the business with time and reputation.
In fairness your equity position needs to be addressed immediately in my view.
Best Regards
Mark"

69. This email led to discussions between Mr Heath and Mr Evans in the course of which Mr Heath acknowledged that Mr Evans had been misled in relation to the £4 million valuation of SML. It was agreed between Mr Evans and Mr Heath that (i) Mr Evans' £200,000 investment would be treated as having been invested at a valuation of £2 million rather than £4 million; (ii) Mr Evans would invest a further £100,000 at this £2 million valuation, providing him with a 15% shareholding; and (iii) Mr Evans would receive a further 5% shareholding in recognition of his efforts for the company, making a total of 20% shareholding. This agreement is evidenced in an email dated 22 July 2016 from Mr Heath to Mr Evans ("Investment of £300k at £2mio valuation, thanks agreed, and yes wait for tax advice."). Mr Heath alleged in his Defence and his witness statement that no agreement was reached with Mr Evans at this point and that there were merely discussions. The Defence refers to discussions about a £2 million investment contingent on SML achieving certain aims (which it failed to do). I reject Mr Heath's evidence on this point. It is inconsistent with the email of 22 July 2016 and not evidenced in the contemporaneous documents. I also reject the evidence in Mr Heath's witness statement that Mr Evans "kept changing his mind about what

the valuation should be and it was almost impossible to pin him down". Mr Evans duly invested a further £100,000 in August 2016.

70. By October 2016 Mr Heath was apparently regretting his agreement that Mr Evans should have a 20% shareholding in SML and took legal advice from solicitors Fletcher Day on what he had agreed with Mr Evans. He was provisionally advised that Mr Evans was indeed entitled to a shareholding of 20%.

71. In his Defence, Mr Heath asserts that "after new investors agreed to invest in SML on the basis of a valuation of £6 million it became very difficult to conclude an agreement with Mr Evans because concluding an agreement on a lower valuation would have damaged their interests." Mr Heath accepted in cross-examination that this assertion was untrue given that he had agreed the valuation and investment by Mr Evans at a valuation of £2 million. [Day 7 page 144]

72. On 22 November 2016 Mr Heath sent an email to Deby Green, whom Mr Heath described as head of business affairs, which read as follows:

"We now need to figure out where we are with investors. Ed £120k Tony £50k David £100k Paul £100k, £470k at £6mio."

"Paul" was a reference to Mr Evans. When asked in cross-examination why he had portrayed Mr Evans as investing at £6 million, Mr Heath accepted that he knew Mr Evans had invested at 2 million:

Q. *But you'd had his 100,000 by this stage for some four months?*
A. Yes.
Q. And you knew it had been at 2 million?
A. … but we were -- I was suggesting he invested at 6 alongside everyone else, which is why it's in that particular number.

[Day 8 page 117]

73. On 4 November 2016 Mr Evans had an acrimonious meeting with Mr Heath at which Mr Evans sought confirmation as to his shareholding. I accept Mr Evans' evidence that Mr Heath was aggressive and abusive. At a further meeting at a restaurant in Waterloo on 22 December 2016, Mr Heath told Mr Evans that he (Mr Evans) had to agree to the original valuation of £4 million for his initial investment of £200,000 and a £6 million valuation for the subsequent investment of £100,000 (i.e. 6.16% shareholding) failing which Mr Heath threatened to shut down the business. Mr Heath handed him a letter which repeated the terms put to Mr Heath orally and went on to say that if Mr Evans did not agree, he would be repaid the money received from Mr Evans which had been held "on account".

74. Eventually in March 2017 Mr Evans signed a settlement agreement with SML under which he was to be repaid £300,000. In the event, nothing was repaid and Mr Evans was listed as a creditor for £300,000 in SML's Statement of Affairs on its liquidation.

Staffing and management of SML

75. In 2016 the staffing of SML included the following individuals: Suzy Fox (Chief Operating Officer), Viraj Mistry (Head of Sales), Chris Cayliss (Head of Business Development), Alistair O'Grady (Sales), Ben Copley (Head of Marketing), Shane Higgon (Chief Financial Officer), Sam Prin (Chief Technology Officer), Filipe Diaz (Software Developer), Ren Reynolds (Software Developer), Deby Green (Head of Business Affairs). The development, marketing and sales, and finance functions all reported directly to Mr Heath. Mr Heath shared accommodation during the working week with Ren Reynolds, Sam Prin and Filipe Diaz. who were building the SML Software called Comhub and would have been well aware of its state of development at any given time.

76. As indicated earlier in this judgment, Mr Heath exercised tight control over all aspects of SML's operations. Mr Heath's evidence in his witness statement was that his primary role in the business was technology development rather than sales although

he did pitch to clients. He accepted in cross-examination that the presentation documents sent to investors were based on his input:

Q, You were also responsible for putting the presentation documents together, weren't you?
A. No, in fact I didn't put the presentation documents together. I contributed to them but I didn't actually put them together.
Q. But you set out the narrative for those documents?
A. Not always, no. Actually the narrative is sort of a product of Dan Allen, Mark Timbrell, and then later on Piers and David Lane.
Q. But you were the one who was actually dictating the narrative for the documents?
A. I think dictating is the wrong word. I think I was, you know, explaining the vision, the idea of the company, and other people were then creating these documents as a consequence.
Q. Based upon what you were setting out by way of vision?
A. Yes.

[Day 7 page 107]

77. Mr Heath also took the lead in deciding on what future revenue figures should be put into SML's financial forecasts:

Q. The sales figures were all coming from you, weren't they?
A. No.
Q. So that forecast, that was as Shane described it, put together by you telling him effectively what the numbers should be?
A. An extrapolation of where we thought they would end up, given those numbers of clients.
Q. Yes, but you were the one who was dictating extrapolation?
A. Yes

…

Q … you're the person who is generating the figures to go into the cashflow projections?
A. I'm not generating the clients, but I am making an assumption about the income that can be derived from those clients, yes.

[Day 7 pages 104/ 106]

78. Mr Heath's communication of his vision included regular detailed emails to all staff members painting a very positive picture of SML which he would often sign off with

a motivational aphorism (e.g. "*Waste no more time arguing about what a good man should be. Be one.*") and the nom de plume "Marcus Aurelius".

79. As noted in connection with Mr Heath's qualities as a witness, there was evidence that Mr Heath was sometimes aggressive and bullying towards members of staff. Mr Higgon's evidence was that staff members had to sign up to Mr Heath's version of events or else incur his wrath. It was suggested to Mr Lane in cross-examination that the fact that Mr Heath allowed him to speak to members of staff before he invested was inconsistent with fraud on Mr Heath's part as the members of staff would be expected to reveal the true facts. Given the relationship between Mr Heath and the staff, I do not accept this suggestion.

SML's Clients

80. The precise facts concerning SML's clients are unclear. Part of the difficulty arises from the ambiguity in the terms used to describe clients or potential clients, e,g. "pipeline" clients, "partnerships", "engagement", "traction" as well as the different stages to be gone through in establishing a client relationship. The process of acquiring a client involved a pitch, if successful signing an agreement, followed by a trial which if successful would lead to an ongoing contract, as Mr Heath accepted:

Q. Let's get this straight. What happens is you pitch to a client your product; yes?
A. Yes.
Q. And sometimes to do that you developed a demo site?
A. Yes, that's right.
Q. And then you would have conversations and discussions with the client about whether they were interested in a contract with you; yes?
A. Yes.
Q. And then you would have had discussions about the commercials of that contract?
A. Yes.
Q. How much they were going to pay?
A. Yes.
Q. On what difference income streams, if at all; yes?
A. Yes.
Q. And then you would put a contract in place; yes?
A. Yes.
Q. And then after that contract is in place, they would commence the trial,

wouldn't they?
A. Yes, that's correct.

[Day 8 pages 21-22]

81. In 2015 SML pitched to the toy manufacturer Mattel using Digital Animal software. It was originally intended that SML would build a "community hub" around the Bob the Builder franchise which would enable Mattel to identify and track fans engaging in e-commerce around the Bob the Builder. Following the pitch, in late 2015 SML ran a trial with Mattel using a prototype of its Comhub software. In a Statement of Affairs to creditors signed by Mr Heath at the time of SML's liquidation in October 2018, Mr Heath described the work for Mattel as having been at "proof of concept" stage, i.e. a stage where it was being determined whether the software was viable. The Mattel Performance Review, exhibited by Mr Heath, shows that the Mattel trial was run for 8 weeks from late December 2015 to February 2016.

82. The Review contained a table entitled "comparison and benchmarking" which purported to compare the results of the project with the experience of four other clients of SML in different sectors. This was misleading as SML did not have clients with which to compare results. Mr Heath admitted in cross-examination that he knew about and approved the Performance Review [Day 7, pages 160 – 161].When asked whether this document was "another example of your producing fictitious clients and fictitious results just to try and persuade somebody to do something, in this case Mattel maybe to come back to you", Mr Heath's response was that "it certainly looks like that, yes". [Day 7 page 161] The project was discontinued in early 2016 by Mattel, citing budget cuts. SML was paid £21,000 for the initial build costs.

83. In April 2016 Mr Heath emailed the services company Tata attaching a pitch deck presentation claiming that SML was working with "*Mattel, BT, Talk Talk, Tesco*", was "*tracking 600 bands a week for global phenomenon – Sofar Sounds*" and had "*trials starting for Dr Who and Sherlock*" . These claims were untrue and misleading, as Mr Heath accepted in cross-examination:

Q. You never worked with BT, did you?
A. No, not in Seed.
Q. No, Seed never worked with TalkTalk?
A. No.
Q. Tesco, never worked with Tesco?
A. No.
Q. Any arrangement with Sofar Sounds, you admit in paragraph 90 of your witness statement, never went live?
A. Yes.
Q. So you didn't track 600 bands a week for this global phenomenon that you called Sofar Sounds?
A. No.
Q. So that's untrue as well, isn't it?
A. Yes.
Q. Trials -- you never had a contract with the entity that runs Dr Who?
A. BBC Worldwide.
Q. You never had a contract with BBC Worldwide, did you?
A. No.
Q. There was never a trial, you never had a trial for Dr Who?
A. No.
Q. Neither did you ever have a trial for Sherlock, did you?
A. No

.
[Day 7 page 67]

84. SML does not appear to have clients apart from Mattel until August 2016 at the earliest. Mr Heath alleged in his Defence that the energy company SSE became a client in August 2016 but this was not supported by the documentary evidence. SSE were pitched to in August and again in January 2017 before signing a contract on 25 January 2017 for a 'February Test'.

85. On 3 October 2016 Mr Heath emailed SML's staff to announce SML's "*first contract*" in October 2016, purportedly with Lottoland. No contemporaneous contract was disclosed and there is no documentary evidence which confirms that it ever went live or that SML were ever paid by Lottoland. In November 2016 a 3 month contract was signed with FRE plc but the trial did not go ahead. A contract was signed with Big FM in November 2016 to promote three initial events. The campaign started in May 2017 but was not successful. In early 2017 SML entered into a small paid campaign with Independent Venue.

86. In late 2016 it was agreed that SML would carry out a trial campaign for Zenith, a subsidiary of Publicis, the advertising agency in connection with the company Coty and its brand Rimmel. This trial which ended in failure is referred to in greater detail later in this judgment.

87. Although there were very few actual clients, in early November 2016 the sales team appears to have been optimistic about the prospects of acquiring clients in the future. On 1 November 2016 Mr Mistry, who was in India at the time, sent an email to Mr Heath suggesting that SML was "closing in on some really exciting deals which will drive our cash flow in the right direction" as well as "potential high value clients such as Coty, Diagonal View, Singapore Airlines, Bauer Media to name a few".

88. In similar fashion, in an email dated 17 January 2017 Suzy Fox provided a current list of clients to be used with potential investors which in addition to five contracted clients referred to "soon to be clients" and "clients we are in talks with".

The state of development of SML's software

89. There were two main pieces of technology being developed by SML during 2015/2016. The first, Comhub, was a bespoke client by client product. The second, Embed, was intended to be a more universal technology that any client could use on any part of their site. It was an important next stage.

90. Ms Nolan described the state of Comhub after she joined SML in 2017 as follows:

> *Part of the technology existed. The technology did not exist in its entirety. So we would be selling -- as Seed Media, we would be selling to clients that we can track your full user journey from point of sharing to point of purchase, which required tracking and reporting at different points in the journey. But that tracking and reporting did not exist in all of the parts of the journey. So the product as a whole did not exist.*
>
> [Day 6 page 39]

91. The product did not provide the tracking service it was supposed to provide, as Ms Nolan explained:

… the point of Seed's tracking was that you would be able create reports that showed where the influence was and where the sales were. But that was not available on the dashboard and you would need manual reports … maybe the UI is 10% of the product. But 90% of it didn't -- the 90% that we were selling, that -- the USP of the product didn't work.
So when a client then went live, we would tell the client not to use the dashboard and we would have to give them manual reports, which was very time-consuming because it was only Sam Prin that could get those manual reports. So where we had claims of being able to provide, you know, realtime data that would help them make decisions on their marketing spend and this type of language, that wasn't correct because we were struggling to give them a report even once a week.

[Day 5 pages 28-29]

92. Embed was still a prototype and never advanced beyond the prototype stage at the time when the Claimants invested in late 2016 and 2017, as Mr Heath accepted in cross-examination [Day 9 page 12].

93. Embed was important to the "scaling" of the technology. It was recognised by Mr Heath, and by investors in SML, that in order for Comhub to be commercially viable it had to be "scalable", that is to say easily capable of being adapted to the needs of different clients without extensive further engineering or user optimisation. Mr Heath accepted in cross-examination that it was necessary to have data from twenty clients in order to establish Comhub's scalability.

JUDGE LENON: You need 20 clients to establish that it's scalable; is that the point?
A. Yes, because obviously, as you're working with those clients, you're developing applications with them and learnings that allow you to be able to scale the product. It's a question of -- that's how you develop the product in market.

[Day 8 page 28]

94. SML did not have twenty clients so its scalability had not been demonstrated at the time the Claimants invested in SML.

95. On 5 March 2017, Mr Heath emailed Mr Lane acknowledging that the business was far behind and was not presently scalable: "… case studies are a milestone on the road to building sustainable scalable tech in the form of seed embedd/ seed portal. We are

not past base one case studies that lead to the scale network that seeds was designed to be".

Mr Lane's investment

96. Angels Den is an investment platform designed to bring together start-up businesses and investors. Mr Evans was an occasional visitor to Angels Den. In October 2016, before his falling out with Mr Heath, Mr Evans approached Angels Den and suggested that SML should do a presentation with a view to attracting more investors.

97. On 20 October 2016 Mr Wheatcroft emailed Mr Lane who was also an occasional visitor to Angels Den with information about SML in which he introduced SML as a "pioneering entrepreneur in technology…" and in which he stated as follows:

> "The technology inside Seed.Media was created entirely in-house…
>
> Seed.Media technology is a scalable SAAS offering which can be quickly deployed with no client integration required, it is even possible to pitch to a client based upon a test on that client before any formal engagement…
>
> … Current active channel partners are in large agency groups (Publicis; WPP; Dentsu Aegis), media groups (Bauer; Mediaquest) and ecommerce clients (Sainsburys; Singapore Airlines).
>
> Sales traction is in fashion brands (Rimmel; H&M); gambling (Lottoland); financial services (FRE plc; Trinity Insurance); radio (BigFM); football talent (Adidas/Dele Ali); content platforms (Storyful; Daily Telegraph); events (Jockey Club Live; Mama Group)"

98. The information in the email came from a document entitled Investor Summary and a document with slides entitled "Seed.Media Investment Overview" ("the Overview Document") which had been provided to Angels Den by SML. Mr Heath's evidence was that he was not responsible for preparing these documents though I consider it likely that he was closely involved in their preparation, given his hands-on management style, and that he approved them.

99. The Overview Document included the following:

(1) A slide headed “Pre-launch results have been very impressive …” representing that SML had been involved in various campaigns, some transactional, some non-transactional for two telecoms business, a clothing brand, a ticketing agent and a food brand. Mr Heath admitted in cross-examination that the representations about the campaigns was misleading and that, if he had seen the slide, he would have known it was misleading. [Day 7 page 178]

(2) A slide headed “Seed has an impressive initial client base across multiple sectors ..” naming a number of businesses including several which Mr Heath accepted in cross-examination had never in fact been clients: Zalando for whom SML had developed a prototype, BBC World, Eventbrite, Brit Awards, Bundelsiga and Thinkers Live. [Day 7 page 182]

(3) A slide headed “Being a largely performance based business model customer adoption will drive scale quickly” which included the words “In partnership with Tata”. This gave the impression that there was a commercial partnership between SML and Tata. There was in fact no commercial partnership although Tata was a service provider to SML.

(4) A slide headed “Seeds’ low overhead model will drive significant financial return...” which referred to partnerships with Spotify, Paypal and Worldpay. Mr Heath accepted in cross-examination that there were no partnerships with these businesses. [Day 7 page 182]

(5) A slide headed “All of which presents an attractive investment opportunity” which claimed “Tech is built, scaleable with proven application and results across multiple sectors” and “Tech can be deployed quickly with minimal client integration”. In reality, the software had not been shown to be scalable and the only client for whom the software had been trialled to date was Mattel.

Meeting on 24 October 2016

100. Mr Lane was sufficiently interested by the information which he received to fix up a meeting with Mr Heath at SML's Soho offices on 24 October 2016. Mr Heath introduced himself as the founder and CEO of and spoke about his successful career in pop music, video games and now peer-to-peer marketing. Mr Heath got Mr Cayless to demonstrate the software which appeared to Mr Lane to have an impressive functionality capable of tracking customers sharing content and marketing offers across their personal networks such as Facebook and Twitter.

101. Mr Heath spoke about SML and its prospects. He made a number of representations about the product and the business which are referred to below in the context of Mr Lane's claim. In particular, Mr Heath took Mr Lane through some "Case Studies" slides ("the Case Studies"). Mr Heath denied showing the Case Studies to Mr Lane although he accepted in cross-examination that, had he shown them, Mr Lane would have been misled and that Mr Heath would have known that they were misleading [Day 7 page 75].

102. The Case Studies which were each headed with a "seed.media" strapline included the following.

(1) The first slide headed "Seed Media Case Studies" included the following: "Our technology is "in market" and has delivered exceptional results. Read our case studies from satisfied clients to see what Seed can do for your business."
(2) A slide with the heading "Telecommunications "Recommend a Friend" case study" included the following: "Seed was approached by one of the UK's largest telecommunications to create a campaign that drove sales and reduced the cost of customer acquisition".
(3) A slide headed "A large clothing brand" included the following: "A large clothing brand approached us with the aim of increasing sales on their website and increase awareness of their offers. As a result, we ran a campaign for them that had runaway success."

(4) A slide headed "London's largest ticketing agency" which included the following "The company wanted to increase awareness of the stage adaptation of Roddy Doyle's The Commitments, and build a database of the most influential theatre lovers for future marketing purposes. We ran a simple campaign for them focusing on a special St Patrick's Day show, with great success. … We are now constructing campaigns to drive ticket sales to numerous productions on their books."

(5) A slide headed "Leading food brand" which included the following: "Leading food brand & TV personality wanted a simple campaign to drive Facebook fans and their networks to website and sign up to their newsletter. We created a competition offering a signed book as a prize to the fan who drove the most traffic. The campaign was deployed pre-Christmas using Facebook banner and a single post. We are now working on multiple campaigns."

103. Mr Lane was not told that the Case Studies were not actually case studies carried out by SML with its customers using SML's technology but were cases studies carried out by Digital Animal using Digital Animal technology.

104. On the following day, 25 October 2016, Mr Heath informed Mr Lane by email that he would be attending the Angels Den meeting planned for the following day telling him that "as you know we are in the middle of a global data product and service deal with Publicis and just picked up two more clients today from them". Mr Lane was plainly impressed by the progress that he thought SML were making with Publicis, forwarding the email to his Adaptomy colleague on the same day: "*they are making very quick progress with Publicis*". Mr Heath admitted in cross-examination [Day 9 page 30] that in fact there were no heads of terms with Publicis in place. The reference to "picking up clients" was, according to Mr Heath's evidence in cross-examination, a reference to Publicis having recommended some other clients that SML could approach. Mr Heath admitted that this was very different from "picking up" clients which would suggest they had been signed up. Mr Heath sought to justify the email on the basis that he believed that SML was going to pick the clients up in the future.

The Angels Den meeting

105. On 26 October 2016 Mr Heath spoke to Mr Lane on the phone before the Angels Den pitch, stating that he (Mr Lane) would probably meet Mr Evans at the event and that Mr Evans was the "lead investor" for this round of funding. At the beginning of the Angels Den pitch, Mr Heath reiterated to Mr Lane that Mr Evans was the lead investor in this round and was following on from an earlier investment round. Mr Lane's evidence was that he understood this to be a "clear vote of confidence from someone close to the company".

106. At the Angels Den event on 26 October 2016, which was attended by Mr Evans, Mr Lane, Mr Heath and others, a presentation was made by Chris Cayless and Shane Higgon. The presentation included the Investor Overview slides referred to above. Mr Lane was provided with a one-page Executive Summary which contained similar representations to those contained in the Investor Overview document. It claimed, amongst other things, that "Current active channel partners are in large agency groups". Mr Heath was asked about this in cross-examination

A. What you're saying here is "current active channel partners"?
A. Yes.
Q. Yes? The reasonable person reading that -- and I assume you're a reasonable person -- the reasonable person reading that is going to understand that to mean you have agreements in place that are current and ongoing with these people.
A. Yes.
Q. And you didn't.
A. In my view, yes, we did. In my view they were channel partners.
Q. But you've already told his Lordship that you didn't have any such agreements.
A. They weren't agreements, but they were -- they were -- we had had those conversations with those groups, yes.
Q. Come on, Mr Heath, you're just dissembling here. You know the honest answer here is that you knew that this was false?
A. I mean, that's not what I believed, no, I thought they --
Q. This is the mantra for the day, is it not, what I believed?
A. Yes.
Q. What I'm saying to you is you knew that this was false. You knew you were conveying false information to the people in that room?
A. Well, as I said, I didn't see this until I actually got there.
Q. Yes. But you didn't stand up in the room and correct it

either, did you?
A. No.
Q. So you were quite happy for the people in the room to understand, wrongly, that you had active agreements with the agencies?
A. Yes.

[Day 8 page 41]

107. The Angels Den documentation carried a risk warning:

"There is a significant risk that you will lose your investment. Most start-up companies fail, and it can be many years before even the most successful start-up company begins to pay dividends. You are therefore much more likely to lose your investment than you are to see a return of your capital and a profit;

If you make an investment, you will probably not be able to sell it for many years. Although it is sometimes possible to sell shares in a startup company to other shareholder rs in the same company, it is much more likely that a share sale will be impossible unless and until the company is listed on a stock exchange or bought by another company. Even the most successful of start-up companies can take years to get to the point where it can be listed or sold;"

108. When this was put to Mr Lane in cross-examination with the suggestion that start-ups generally run out of money before the business can get established, Mr Lane's response was as follows:

If they are in a phase where they're building a product and they have no revenue coming in, then that is a particularly risky stage because then they are quite likely to run out of money if they do not successfully get to a point where they have a product they can sell and bring in revenue. It is very likely in an early stage that start-up can run out of money. But when a start-up is making money as a product in market and you know with a pipeline, then you de-risk that problem.

[Day 3 page 12]

109. Mr Heath's evidence in relation to the Angels Den meeting was that he was just told there was a meeting and Mr Higgon prepared the presentation material. It is, however, likely in my view, given Mr Heath's management style, that Mr Heath had overseen and approved the material. In any event, Mr Heath did not correct anything presented either to the audience or to Mr Lane after the presentation was given. On 31 October 2016, Mr Heath noted, "Last week I saw a very successful presentation of Seed to a

tech angels group, Angels Den". Consistent with the above, Mr Heath states in his witness statement that having reviewed the Investor Overview document he could not see anything incorrect or inaccurate.

110. Mr Lane was underwhelmed by the pitch and there was insufficient time to demonstrate the software. Immediately after the meeting, Mr Lane, Mr Evans and Mr Higgon met for a few beers in the pub.

111. On the following day, 27 October 2016, Mr Heath and Mr Lane along with his Adaptomy colleagues met Mr Heath at SML's offices for a two-hour meeting. Mr Lane's evidence was that the meeting was largely a repeat of that which had taken place on 24 October 2016 with Mr Heath giving his history, Chris Cayless stepping through the demo with Mr Heath's commentary and with further references to the Case Studies.

112. Mr Lane emailed Mr Heath on 28 October 2016 thanking Mr Heath for the meeting and stating, "I just love the size and impact of the vision here". Mr Heath replied and sent a number of documents to Mr Lane which set out SML's uses in music, television, and streaming.

113. On 31 October 2016, a week after their first meeting, Mr Lane met up with Shane Higgon at a café near St Paul's Cathedral and went through a series of sales and cash flow forecasts. Mr Heath was not present at the meeting although he knew it was happening. Mr Higgon told Mr Heath that the projected revenue lines were based on input from Mr Heath. Mr Heath agreed in cross-examination that he had been involved in putting them together [Day 7 page 76]. Mr Lane was very impressed by the spreadsheets and graphs he was shown. Mr Lane asked for, and was provided later the same day with, a copy of the three year financial projection. Revenue projections were said to be based on "client engagements" though Mr Heath accepted that there were no agreements apart possibly from Lottoland [Day 8 page 72].

114. On 6 November 2016 Mr Lane and his wife had a Sunday lunch with Mr Heath and his wife in Hampshire. Mr Hooper and his wife also came to the lunch. Mr Heath

spoke again about the level of SML's "traction" in the market and the scope for expansion into multiple industry sectors. This was followed by a number of further meetings between Mr Heath and Mr Lane in November.

115. On 22 November 2016, shortly before Mr Lane invested, Mr Heath went through SML's sales forecasts with Mr Higgon, sharply reducing the projected sales for October 2016 from £43,455 to £1,160 and November from £57,408 to £27,735. Mr Lane was not told that the forecasts he had been shown by Mr Higgon had not been reflected in the actual figures. Mr Heath accepted in cross-examination that he should have been told. [Day 8 page 100] The forecasts nevertheless continued to predict very substantial increases in sales in 2017.

116. On 24 November 2016 Mr Lane signed a private placing share application form ("the Application Form") under which he irrevocably offered to subscribe for 2330 shares in SML at a price of £42.92 per share making a total of £100,003.60 which he paid to SML on the following day.

117. The Application Form included the following provisions:

> "I/We hereby confirm that I am/we are an Investment Professional/a Certified High Net Worth Individual (in relation to stock or shares in an unlisted company)/a high net worth company/the trustee of a high value trust or a Self-Certified Sophisticated Investor, each as defined in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (and as described overleaf).
> …
> I/We confirm that in making this application, neither I/we nor any person on whose behalf I/we make this application is relying or has relied on any information or representation, including any statement, promise, forecast, representation, condition or warranty whatsoever and by whomsoever given concerning the Company and its assets and liabilities, financial position, profits and losses, prospects and rights attaching to the shares in the Company other than the information set out in pitch book and the articles of association of the Company and accordingly agree that the directors of the Company nor any other person acting on behalf of any of them, shall have any liability for any such information or representation.
>
> …

Nothing in this document is intended to limit or exclude any liability for fraud."

118. When these provisions were put to Mr Lane in cross-examination, his response was as follows:

,,,I think when you're signing this, you reasonably expect that you're being told the truth and you're making a decision based on risks associated with statements that are made to you truthfully.

[Day 3 page 13]

Preparation of investor materials

119. At the Sunday lunch on 6 November 2016 referred to above, Mr Heath asked Mr Hooper, who had been sent a set of slides referred to as the Investor Deck on 26 October 2016, if he wanted to be involved with SML. Mr Hooper's response was that he would assist with messaging. A written agreement was drawn up dated 1 November 2016 between SML and Equus Communication Limited ("Equus") (which was not signed by Mr Heath) which made provision for Equus to provide a team comprising Mr Hooper to provide "fund-raising preparation and introductory services as well as associated media, content, marketing support and advisory services in exchange for a fee of £4,000 per month together with 5% of capital raised". Thereafter Mr Hooper worked on the slides, to be shown to potential investors.

120. In late December 2016 Mr Lane also started working for SML. He was subsequently appointed Chief Strategy Officer. A service contract was entered into in March 2017 between SML and Profitable Publishing Limited ("PPL"), a company owned by Mr Lane, under which it was agreed that PPL would provide services including pitching to prospective clients and developing a strategy for the business in exchange for a fee of £9,000 per month and was paid for seven or eight months. It was suggested on behalf of Mr Heath that Mr Lane was a *de facto* director. I consider that this suggestion

is unfounded. Mr Lane had an executive role but he did not take part in the actual management of the company and did not attend management meetings.

121. Mr Lane produced a document entitled Seed Strategy the purpose of which was said in the Introduction to be to attempt to capture "Seed's high level strategy so it can be shared internally to support a common understanding across an expanding team". It went into considerable detail about the future direction of the company. Mr Lane's evidence, which I accept, was that this document reflected Mr Heath's thoughts. His knowledge of SML was still limited. In an email dated 8 January 2017 to Deby Green he said that he had not been involved in any revenue forecasting and was not close enough to the actual sales in progress to make any contribution at this stage. The Seed Strategy document appears to have gone down well with Mr Heath. On 15 January 2017 Mr Heath proposed by email to Mr Lane that he should be responsible for raising investment for SML in his first role as head of strategy.

122. During this period Mr Heath was involved in the preparation of plainly unrealistic financial forecasts for SML. On 28 November 2016 he sent an email to Mr Hooper and Mr Lane and others claiming that "Publicis have agreed the terms for Seeds global deal" and attaching a financial forecast predicated on this forecast deal. In fact, as Mr Heath accepted in cross-examination, there was no global deal although Mr Heath hoped that there would be [Day 8 page 118]. The email went on to say "We are already above trend ... We are assuming low numbers in the BP [business plan] compared to actual sales". When asked to explain the reference to being above trend, Mr Heath said in cross-examination that it was the "model" rather than the actual figures that were above trend.

> *A It was the model, rather than the actual numbers.*
> *Q. I'll leave it there, my Lord.*
> *JUDGE LENON: But what model?*
> *A. The model of cash flow that we were expecting in term of future revenues.*
>
> [Day 8 page 122]

123. Mr Heath accepted that the actual sales were tiny compared to the projections [Day 8 page 123]. His explanation for this email was as follows:

Q. What I can't understand is why you're misleading your own team about this. Are you doing this to try and keep them engaged and not lose them?
A. No. I'm trying to point them towards the targets that we wanted to reach.
Q. But they knew that these -- what you're saying here was not true, wouldn't they? At least those people involved in the numbers, like Deby?
A. She would have -- yes.
Q. Yes. And, what, you were hoping she wasn't going to speak out?
A. No, not at all.
Q. But you're sending these to Piers as well, aren't you?
A. Yes, I am.
Q. And you're hoping that Piers is going to use some of this stuff for his presentations?
A. I mean, these are projections: "We have been relatively modest on projections." That's what it says at the beginning of the note.
Q. Yes, but you're not modest on projections. You're wildly optimistic.
A. Yes.
Q. Because the actuality is tiny compared to the projections?
A. It was over-optimistic, I agree.

[Day 8 page 123 – 124]

124. On 8 December 2016 Mr Hooper emailed Mr Bonança following a meeting with Mr Heath as follows:

"Hope you are well? I was with Martin and the team yesterday – we had a good update –
now we have some revised numbers and the funding plan we need to update the slide deck.
I need to think up a few new slides but in the meantime we can make some changes to the progression chart on slide 2:

The numbers should now read as follows:

	Year 1	Year 2	Year 3
Revenue	£6.4m	£21.7m	£ 40.7m
EBITDA	£4.3m	£18.2m	£36.3m
Operating margin	66.9%	84.1%	89.1%"

125. These revenue figures represented substantial increases on the previous financial forecast and the figures in the Investor Deck document which Mr Heath had sent to

Mr Hooper the previous month (£3m, £16m and £35m). When asked to explain the increases, Mr Heath said in cross-examination in that they were based on channel deals that they did not get but expected to get [Day 8 page 128].

126. Mr Heath accepted (Day 8 page 129) that he was involved in the preparation of the slides which Mr Hooper was working on. He suggested some changes to the slides in an email dated 15 December 2016 to Mr Hooper and others. He said he was "adding more clients" and referring to "13 clients we have", although in reality SML did not have 13 clients.

127. By January 2017 SML's financial forecasts, which Mr Heath was involved in preparing with Mr Higgon, were projecting revenue of £38,000 for January, £69,000 for February, £97,000 for March and £230,000 for April 2017. Mr Heath sought to explain the increases in projected sales on the basis that it was what he thought SML would do:

… once we were starting to scale, based on where the technology was, and since that moved forward by about three months, we thought that was the time that these things would happen. That's why it looks like that every three months.

[Day 8 page 132].

He claimed that he expected Embed to be finished within 3 months although he admitted that it was only a prototype at that stage. The actual income in January 2017 was approximately £4-5,000,

128. On 16 January 2017 there was a meeting between Mr Hooper, Mr Heath, Mr Higgon and Ms Fox to discuss fundraising. In an email on the evening of the same day, Mr Lane recorded that the objective of the fundraising was to raise £750,000, at a £7.5m to £30m valuation. Mr Hooper was to approach City Investors. Mr Lane was to approach angel investors; Ms Fox was to ensure that there was an accurate client pipeline to support investor due diligence (prompting the email referred to at paragraph 88 above).

129. On 22 January 2017 Mr Lane emailed Mr Higgon to say that he wanted to work with him "to get really focused on the core funding for Seed. I want this to be my priority next week – and I want to get to completed documents for everything we need. We then spend Feb meeting investors and March closing." Mr Lane proposed amongst other thing a one-page email to prospective investors, an eight page Teaser power point, he asked for the PPT version of the Teaser slides which he suggested amending in line with Mr Heath's comments.

130. On 24 January 2027 Mr Hooper emailed Mr Heath the latest version of the Teaser presentation. In the email he pointed out that he had made clear that the numbers were very exciting "cash positive this month/next" although according to Mr Heath's latest forecasts SML would not be cash positive for another three months. The presentation included the slides referred to above, as well as a slide headed "How does Seed work?" which stated that "Seed's core technology encourages, measures and attributes peer-to-peer interactions over all major platforms and networks". In fact, Ms Nolan's evidence, which I accept, was that the software could not track a customer who went from one network to another. Mr Heath admitted in cross-examination that he was remiss in not pulling up these particular points. [Day 8 page 168]

131. On 25 January 2017 Mr Heath emailed Mr Lane and others some draft notes which he said might be useful commentary when presenting the slides to investors. The notes included the following statement: "Seed already has 3 of the largest major ad agency as clients." This was untrue. SML did not have any major ad agency as a client. Mr Heath had added a slide which claimed amongst other things "Seed is profitable already". Mr Heath admitted in cross-examination that it was untrue. [Day 8 page 188]

132. On 29 January 2017 Mr Lane circulated by email what he referred to as the "key presentation material" consisting of an email template which was an introductory email which he had written, a one pager which was an updated version of the Angels Den Investor Summary amended by Mr Lane, a presentation comprising a series of slides called the Full Deck and a shorter version called the Summary. In a response

later the same day, Mr Heath circulated a message with what appears to be his narrative to be sent on to investors.

" Seed state of play:
Seed value for investors: cash flow positive, increasing sales, and traction, improving margin, and low incremental cost growth against sales"

133. The documents were finalised by Mr Lane on the following day and recirculated. The introductory email claimed that Seed Media had a "unique, proven, and scalable solution to the biggest challenge facing brands and marketing agencies", that early results were "already dramatic" Mr Heath accepted in cross-examination that he approved the email [Day 8 page 201]. There was in fact no proven, scalable solution and there had been no dramatic results.

Ms Groen's investment

134. In late 2016 Ms Groen was in touch with Mr Hooper, who was a business acquaintance who had done public relations work for a private equity firm Ms Groen founded. He mentioned the opportunity to invest in SML.

135. On 24 January 2017 Mr Hooper sent Ms Groen the latest version of the Teaser document, also referred to as the Equus document, consisting of 18 slides, ahead of a planned face to face meeting with Ms Groen to discuss SML. Mr Heath accepted in cross-examination that he was involved in the preparation of this document [Day 8 page 108].

136. On 31 January 2017 Mr Heath and Mr Lane met to run through the material to be presented to investors. Mr Heath went through the documents to make sure they were suitable in his eyes to be shown to investors. [Day 8 page 201]

137. The meeting with Ms Groen took place on 1 February 2017. Ms Groen, accompanied by Mr Hooper, met Mr Heath who gave a presentation using a version of the Teaser/Equus slides, and Mr Lane who arrived towards the end of the meeting. It was put to Ms Groen in cross-examination that it was Mr Lane who took Ms Groen

through the presentation but I accept Ms Groen's and Mr Lane's evidence that it was Mr Heath who did so, with Mr Lane arriving at the end and going through some aspects of it with her.

138. Mr Heath struck Ms Groen as engaging, energetic and enthusiastic. He talked her through the presentation. He highlighted how robust, proven and unique the Comhub platform was which was being used by clients of SML including Mattel. He described the product as "endlessly scalable". He mentioned that Coty was a signed client and that BigFM, FRE Plc and Lottoland were also signed clients and gave the impression that they were paying revenues. He mentioned BBC Worldwide and said that there were partnerships in place with Zanox, Publicis, Omnicom and Tata. Mr Heath's evidence in cross-examination was as follows:

Q. And you're happy that you told her the partnership with Publicis?
A. Yes, that we were -- yes, that that's what we were aiming to do at that point.
Q. No, that's very different, isn't it? You see, there we go again.
Q. You told her there was actually a partnership in place with Publicis.
A. I can't recall if I said there is an agreement in place, but I would have explained what we were trying to do with Publicis.
Q. No, the truth is if you'd have talked about Publicis, you would have presented it to her as there being an agreement in place, wouldn't you?
A. In principle, yes.

[Day 8 213-214]

139. Mr Cayless gave a demonstration of the product. When Ms Groen asked to what extent clients were able to use the product, Mr Heath said it was fully functional as demonstrated. Mr Heath accepted in cross-examination that, following the conversation with him, Ms Groen could reasonably have gone away thinking that the product was developed, working and scalable, that there were a number of actual clients including Coty, an actual agreement with Publicis, Omnicom and Tata and that the company was going to be cash flow positive by March 2017 [Day 8 pages 217/218]

140. On 2 February 2017 Mr Lane emailed Ms Groen attaching the Investor Deck that they had partially gone through on the previous day which included the following slides:

(1) A slide headed Summary Highlights which included the following statements

- Unique low cost but highly effective solution to the marketing needs of all brands seeking to interact with and sell to consumers (and businesses) – an alternative to advertising that collaborates with consumers, complies fully with EU data regulations,
- From a September 2016 launch, cash flow positive in March 2017 on current run rate and trending rapidly to 70%+ free cash flow margins – funding sought to accelerate UK, German and US Growth
- Proven demand for high value solution selling into Marketing Agencies, Brands, Publishers, eCommerce and (music, sports and TV) Celebrities - Marketing Agencies and Publishers act as sales channels selling to multiple brands. Affiliate networks act as sales channels to eCommerce customers. Sports, music and talent

(2) A slide under the heading "Traction" which included the following

- Run rate of £40k in January; £65k in February; £92k in March (75%+ being subscription revenue).
- Key clients: Rimmel (via Publicis), Gillette (via WPP & Publicis), SSE (via Omnicom), BigFM, British Triathlon
- Active with all major Marketing Agencies - channel deals signed with Publicis (global) and Omnicom (UK)
- Pipeline growth with eCommerce and Affiliate marketing customers building on Lottoland, Thomas Cook success.

(3) Another slide headed Traction which listed as "Signed clients Rimmel, British Triathlon, Lottoland, SSE, FRE, big FM; as Pending Gillette, Music and Sport,

H&N, Addias, Premier League, O2 and The Independent and as Partnerships, Publicis, Omnicom, Tata Communications.

(4) Notes to a slide 8: 'SEED SOLUTION: Rapidly deployed SaaS platform with no technology integration required to clients. Seed Media tracks content engagement and multi-level sharing across and between social networks to outcomes, eg installs, signups, and/or transactions (ecommerce and/or retail store) – enabling attribution of outcomes to people and behaviour.

141. These slides gave a misleading impression of SML's client base and the state of development of its product. For example, whatever the precise position with "pipeline" clients, there was no basis for the assertion that SML was active with all major marketing agencies and there were no partnerships with Publicis, Omnicom or Tata Communications. The software was not able to do what it was represented as doing. Mr Heath's evidence in his witness statement was that the presentation was Mr Lane's business plan, based on information from sales people and engineers. Mr Heath cannot plausibly distance himself from the presentation in this way. Whilst Mr Lane put the deck together, it was largely based on materials he had received from Mr Heath and was approved by Mr Heath.

142. On 8 February 2017 there was a follow- up meeting between Ms Groen and Mr Heath at which Ms Groen was presented with SML's accounts by Mr Heath. To Ms Groen, the figures sounded ambitious but credible, given the robust nature of the product, the fact that it was Software as a Service or "SaaS", the clients it already had, including Coty and Rimmel, plus the other clients onboarded, new prospects in the process of onboarding and pipeline prospects.

143. On the following day, 9 February 2017, Mr Heath wrote in an email to Ms Groen:

"I wrote a longer note, about the value of seeds technology etc, securing your investment , based on the fact that Coty, our client, who wants us to boost ecommerce with our tech has just paid $600mio for a "Tupperware site" with no tech, that I

mentioned on the call yesterday with Coty's SVP of ecommerce as an integration target" …

This email indicates that Mr Heath was well aware of the importance of the Coty deal to Ms Groen's decision to invest since, if the trial was a success, Coty might use SML's tech for their other brands.

144. On 15 February 2017 Ms Groen was sent a due diligence pack, which she had requested, including three years' audited accounts and monthly management accounts to 31 July 2016. She had a further meeting with Mr Heath on that day when they had a further discussion about SML's product and business at which Mr Heath described SML's product and clients in similar terms to the way they were described in the Investor Deck.

145. On 19 February 2017 Mr Heath emailed Deby Green in response to cash flow data sent to him by Ms Green, pointing out that SML's revenue bore little relation to the numbers that were being quoted to investors. On the following day, 20 February 2017, Deby Green emailed Mr Heath commenting on the sales projections and pointing out that, with effect from 1 March 2017, SML needed £100,000 per month as a mixture of sales and investment because that was the amount that SML was burning through each month as Mr Heath accepted in cross-examination [Day 9 page 24].

146. On 28 February 2017 Mr Heath emailed William Liani, a potential US agent for SML. Whilst not directly relevant to the issues in this case, it is a further example of Mr Heath misstating facts with the aim of attracting investors. The letter claimed that "at present we are selling Influencer plus [i.e. Comhub] at £10,000 per month", which had no basis in fact. He also referred to an agreement with Publicis which he claimed allowed SML to charge Publicis's clients. The contract with Zenith (referred to later in this judgment) was signed by Mr Heath four days previously and contained no entitlement to such a charge. In cross-examination, Mr Heath sought to explain this untrue statement as a target:

A Yes. It was more of a target than anything else.
Q Why didn't you express it like that? Why

didn't you tell him, "This is what we're wanting to do"?
A Yes.
Q Why didn't you do that?
A Because that was our target, really.
Q But why aren't you up front and straight with him? He's going to be representing you.
A Yes.
Q You accept you should have been, shouldn't you?
A Yes.

[Day 9 page 29]

147. On 2 March 2017 Mr Heath and Mr Pulido put together version 14 of the financial forecast. This forecast assumed that in January 2017 SML would have a single agency client producing revenue of £21,875, in the following month two agents each producing £31,874, and in March three of them. In fact, the contract with Coty generated a £20,000 build fee and thereafter only £3,000 per month. There was no basis for the forecast increases as Mr Heath accepted [Day 9 page 48]. The total revenue forecast for March 2017 was £87,740 and for April £230,625. In fact, in the whole financial year to February 2017 SML's total turnover was £26,726 and in the following financial year £70,700. There was no proper factual basis for the total revenue figures as Mr Heath accepted in cross-examination [Day 9 pages 50/51].

148. On the following day Mr Hooper emailed that forecast together with various other attachments to Ms Groen and others. The same forecast was emailed to Mr Woods on 24 March 2017. Mr Heath accepted in cross-examination that Ms Groen and Mr Woods were entitled to assume that there was a proper factual basis for the forecast, (which there was not) [Day 9 page 53].

149. The email from Mr Hooper of 3 March 2017 had a concluding paragraph written by Mr Heath himself including the following:

> "In short, the truly unique opportunity that lies ahead - we have a cash flow positive & vastly scalable tech company, with sustainable high margins(70%+) and negligible marketing costs."

150. Mr Heath accepted in cross-examination that the cashflow positive statement was untrue:

Q. It certainly wasn't cash flow positive at this time, was it?
A. No.
Q. And you knew that?
A. Yes.

[Day 9 page 39]

He also accepted that SML was not yet scalable:

Q. Yes, but in March you're not at the state where the company is in fact vastly scalable at this point with sustainable high margins are you?
A. No, it's an aim.
Q. Yes, thank you. So I go back to my original point, you knew at the time that this statement was untrue?
A. Yes.
Q. Thank you.
A. It was a plan rather than anything else.

[Day 9 page 40]

151. On 8 March 2017 Mr Heath sent an email to Deby Green candidly acknowledging the problems with the company:

"My view having seen the feeble sales is I am no good and neither is the sales process any good.
So I am thinking of letting Suzy, Chris Alistair and Viraj go and keeping the rest.
We have built a product. It could be sold. It's valuable but as you say the sales aren't coming and it still isn't being marketed and run correctly.
Suzy doesn't know this area and neither does Alistair.
There is no one in Seed other than Lucy who has any digital marketing and sales experience.
So lose everyone else.
In relation to your comments about what to do and how to do it.
I am trying to run the company in the best way I can.
It's a technology business with few experienced people at the front end.
No matter how often I try to organise and even sell when I have to it doesn't seem to work.
So I want to stop what I am doing as it doesn't work."

152. Between 11 and 13 March 2017 Christian Pulido produced the first of four investor communiques which were overseen and approved by Mr Heath, as Mr Heath accepted

in cross-examination [Day 9 page 60]. On 13 March 2017 Mr Hooper emailed the communique to Ms Groen and to Mr Woods. The email included the following:

"As promised herewith an update with various important pieces of information to validate your diligence.

The first of those, to reassure you against the Q1 Numbers and individually against January, February, and March, we can now say the revenue capture from clients is living up to the promise. Furthermore, average contract length at the moment is

Mean: 5 mo Median: of 6 mo Range: 1.5 – 12 mo

Many of those started in December of last year, and January of this year, so the flow through in terms of the length and sequence of contracts allows us absolute confidence that we are going to hit Q2 numbers."

153. Mr Heath accepted in cross-examination that the statement about revenue living up to promise was untrue as the revenue for the first three months of 2017 was nothing like the revenue in the latest financial forecast. He also accepted that the assertion about contract lengths and confidence of reaching Q2 numbers were also untrue and that he would have known they were untrue. [Day 9 pages 63 – 64]

154. On 18 March 2017 Mr Hooper sent the draft of a second communique to investors to Mr Heath for his approval which Mr Heath gave on the same day. The communique was sent to Ms Groen on 20 March 2017. The communique asserted as follows:

"In the meantime new clients are on-boarding at a great rate while existing client campaigns are demonstrably proving the ROI we expected and generating discussions for repeat business, as expected and as built in to our 3FF outlook."

155. The assertion that clients were on-boarding at a great rate and that client campaigns were proving the expected return on investment were untrue.

156. By 25 March 2017, the Coty trial was running into difficulties, as set out later in this judgment. Mr Heath had a meeting with Ms Groen on 30 March 2017 but made no mention of the difficulties with the trial. She asked Mr Heath whether the information she was receiving from Mr Hooper was correct. Mr Heath confirmed that it was.

157. A third communique was sent to Ms Groen and Mr Woods on 13 April 2017 which had been prepared by Mr Hooper and approved by Mr Heath. The email listed various potential US investors (none of whom ever in fact invested) but said nothing about the Coty issue.

158. On 27 April 2017, the settlement agreement with Mr Evans was signed off by Mr Heath, under which Mr Evans was to be paid £300,000. In an email to his solicitor Mr Heath said as follows:

"We have 90 days to pay Paul, which allows us to get money in investment over this period, (which we are in the process of doing), which will replace the mortgage of £250k, Deby organised with Barclays and I had to take out to keep Seed running. This will be then be used to pay back Paul, whose equity (15%?) can be used for Seed equity and staff.

Its not easy as you know getting investment for a young company but the deal is great for us, once we have investment, as we are seeking funds to close our seed round valuing Seed £6mio, (£300k,) and £1.5 mio at £7.5-30 mio.

So in effect for £300k we have bought back Equity worth £900k at £6 mio or £4.5mio at £30mio."

159. Mr Heath did not tell any of the potential investors (including Ms Groen and Mr Woods) that he intended to use any part of monies they were investing to repay Mr Evans. He accepted in cross-examination that Ms Groen and Mr Woods should have been informed that 20% of the funds raised would be used to pay off Mr Evans [Day 9 page 108]. After Ms Groen invested, on 19 July 2017 Deby Green wrote to Mr Heath recording that Mr Heath had explicitly prevented her from correcting the position to Ms Groen:

"In my opinion you need to be honest with Marleen… I was not permitted to convey that the £6mio raise of £300k (that Marlene and Henry participated in) was left open to pull in the 300K for Paul Evans repayment and then helped to solidify the £1.5 mio raise via the CEN. The fact that this liability remains o/s needs to be acknowledged… that I have no authority from you to answer Marleen's questions as I would normally respond to being asked a straight question; so if you want some time to reflect on those questions, I suggest that I do not join the call and that you make a note of them".

160. On 18 May 2017 Mr Hooper sent Communique no 4 to Ms Groen and Mr Woods referring to "onboarding" of two clients with four following although none of them actually signed up as clients as Mr Heath accepted [Day 4 page 111].

161. On 26 May 2017 Mr Heath sent an email to Mr Lane pointing out that a new set of figures was needed to present to investors in the following week. Mr Heath accepted in cross-examination by this stage that the projections previously sent to Ms Groen and Mr Woods could no longer be met. In Communique no 5 sent on 30 May 2017 by Mr Hooper to Ms Groen and Mr Woods, nothing was said about these problems. Instead, there was more relentlessly positive messaging:

> "An exciting couple of weeks with very significant progress, particularly on the funding front. We are now circling
> the wagons within an expression of proper interest total of £3.3m at this point and building."

162. In early June 2017, Ms Groen formally confirmed her interest in investing £150,000 in the prior investment round and £50,000 in the next investment round equity round. The £50,000 was invested pursuant to an Advanced Equity Subscription Note under which the funds were to be applied towards SML's general working capital and automatically into conversion shares at the next investment round. By clauses 5.2(c) and (d) of the Advanced Equity Subscription Note she confirmed that she had received sufficient information from SML in respect of all matters material to her decisions to invest and had sufficient knowledge and expertise to evaluate the risks and merits of her investment. When asked about these clauses in cross-examination, Ms Groen's response was that it turned out that the information she was provided with was a lie.

Mr Woods' investment

163. Mr Hooper approached Mr Woods at a time when he had just sold a property and had cash to invest. The first contact was by two emails on 8 March 2017 and was backed up by a meeting at the Royal Thames Yacht Club. Mr Hooper intimated that

he would be investing in SML himself if he had any spare cash following a sale of his property in Barbados although in the event the property was not sold and Mr Hooper did not invest.

164. The first email of 8 March 2017 was based on the introductory email drafted by Mr Lane. It described an investment in SML as a terrific opportunity:

> "Concept proven, cash positive, founder backed plus one investor to date, small round of £750,000 to fund internationalisation /proliferation of revenues, massive addressable market, zero competition, very high tech barriers.
>
> - Seed Media (www.seed.media) has a unique, proven, and scalable solution to the biggest challenge facing brands and marketing agencies: consumers are ignoring and increasingly blocking digital advertising and turning to family, friends and influencers for purchase recommendations.
> - Seed Media tracks content engagement and sharing across social networks (including dark social – 80%+ of sharing) to ecommerce and retail store outcomes – enabling attribution of outcomes to people and behaviour.
> - Seed Media finds and values micro influencers and provides the tools to reward and incentives these micro influencers to market on a brands behalf to their personal networks – finding new customers, upselling and cross selling, raising awareness, interest, consideration and purchase.
> - Seed Media enables brands and agencies to optimise their digital spend across programmatic, celebrity influencers, email and owned media posts – whilst greatly amplifying the effectiveness of earned media.
>
> No other solution provides this end-to-end tracking with attribution of outcomes to people and behaviour.
>
> Early results are already dramatic with our agency and brand customers gaining transparency into the effectiveness of spend across digital channels, attribution of outcomes within and between channels, and the ability to optimise content, incentives, and rewards to magnify desired outcomes – whilst building a growing, unique, and fully permissioned data asset on their user community."

165. There was a link to an introductory video and attachments consisting of the one-page investor introduction and the Summary Deck.

166. Mr Woods subsequently received the same communiques as were sent to Ms Groen. Mr Heath accepted in cross-examination that Mr Woods was entitled to understand from these communications that the software was working, that it was proven and

scalable at a high margin, that the business was cash flow positive, and that there was a reasonable basis for the financial projections. [Day 9 page 39]

167. At his meeting with Mr Hooper, Mr Woods was told that he needed to think in terms of an investment of over £50,000 in order to be included in an exclusive "friends and family". The £50,000 lower limit and the "friends and family" idea were based on what Mr Hooper had been told by Mr Heath.

168. In reliance on the information received from Mr Hooper, Mr Woods decided to invest a total of £70,000 between April and June 2017. Of this, £35,000 was invested by way of Advance Equity Subscription Agreements dated 15 May 2017 and 19 June 2017 on the same terms as Ms Groen's.

The Coty trial

169. Publicis is a leading media agency. The cosmetics company Coty is one of its clients. Coty owns many brands including Rimmel. On 31 January 2017, shortly after she joined SML, Ms Nolan was copied in on an email from Chris Cayless as follows:

> "Lot's happening here with John A and the Seed/Publicis partnership. We rolled out last week with our Coty influencers campaign, starting with Rimmel and another 3 Coty brands coming down the tracks with their P&G brands they acquired."

170. Ms Nolan discovered shortly after joining SML that any partnership between SML and Coty was contingent on the success of the trial campaign for Coty/Rimmel. No other brands were involved.

171. On 26 January 2017 Alison Keith, Vice President, Global Media at Coty, emailed SML raising concerns about unresolved data and asking for more information about SML's technology. Ms Nolan's evidence, which I accept, was that these questions were not properly answered and that, as the trial progressed, problems emerged about

the performance of the SML software. On 23 March 2017 Andrea Brown, a Publicis executive, forwarded an email she had received from a colleague at Publicis, Glenda Goveia:

> "Hi Andrea
> Sorry for another moan, but have to get a few things on your radar. We are handling all of this and client is not aware of a couple of things, but just wanted you to know the full picture.
>
> - we are a month on from the complaint from Coty regarding the loading time of the Hub at c15seconds being too long. Senior team still testing and updating but action is slow.
>
> - reporting is poor, for a team that boasted amazing dashboards and live data etc, the reports are slow, require chasing and our client has even had to make their own template and asked team to fill it in as they are fed up.
>
> - numbers reported are inaccurate. We now have c50k difference in impressions from Yahoo, and although both tech teams have been trying to resolve this, Yahoo are also fed up of their traffic drivers not being captured and thus 50k visits to our Hub our missing. Over a month of discussions and not solved.. However it makes our paid for work look poor in comparison to other teams amplification
>
> - summary - lack of resource over there, lack of experience, and sadly tech that might not really be able to do what it says as there are glitches with the links they generate and supply for content.
>
> 3 more months to go and I will fire fight daily but Coty for sure will not use them again and this is direct from Global.
>
> Despite a lovely team, I would not jeopardise future client relationships with H&M and Pandora until they fix things on their side.
>
> Thanks
>
> Glen"

172. Ms Nolan's evidence, which I accept, was that the main problems with the software were (i) inaccuracies in the data shown on the client's dashboard making it necessary to compile manual reports and (ii) excessive load time. The load time was important because this was a social media campaign aimed at teenagers:

And I think the whole campaign was firefighting, because they were trying to adapt a prototype to work for this campaign, and it wasn't working. So there was many issues. So on the front end for the user, it's not loading. The client is expecting all of this data and reporting. And we couldn't fulfil any of those features that had been sold

[Day 5 page 97]

173. On 9 April 2017 Mr Lane emailed Christian Pulido as follows:

"Are you up to speed with the Coty account? Suzy has stepped into the key relationship with Andrea Brown due to issues on the account - mostly around mobile load times (ie 80% bounce rates on mobile traffic, 15+ second load times) and reporting (.. but Suzy has the detail and status)."

174. On the same day Mr Lane emailed the tech team warning of the risk of being sued:

"

- the current ComHub-I does not support mobile and 60-70% of Rimmel's spend on marketing was resolving in bounced visits to the ComHub-I website - this creates commercial exposure, not just an unhappy client (s)

- patching ComHub-I, eg Facebook API changes, resulted in a major development and testing effort (involving Dev & Commercial), but broke other functionality (eg 'share to reveal' and Twitter) requiring further cycles of patching - and so the cycle continues

- meanwhile limited progress is made on Embed, which is what all our futures need to see launched and scaled"

175. On 24 February 2017 SML had signed a "Product Order" with Zenith Optimedia Limited in relation to Coty under which SML was to build a marketing campaign for a total sum of £20,000. However, on 30 May 2017 Glenda Govia of Zenith emailed Lucy Nolan, notifying her that Coty/Rimmel wished to pull the campaign as they were unhappy with the service they had received and wanted compensation.

"Hope you.re all good. I need to catch up with you asap regarding Rimmel. They have been in contact with us and would like to end the partnership with Seed with immediate effect. We will no longer be driving traffic to the Hub for Brighton or London.

Sorry to be the bearer of bad news, but after many meeting with them over the months, they are still unhappy with the service and would like to terminate this

partnership.

I would like to have a chat with you ideally as they are also requiring compensation, and so I would like to talk through things with you properly, as I can understand that this will be difficult, but I have to explore this for the client on behalf of the agency.

Please can you give me a call on the number below as I'm at my desk.

Thanks

Glen"

176. Attempts to salvage the relationship with Coty/Publicis came to nothing. On 2 June 2017 Andrea Brown emailed Mr Heath in response to his approach to mend fences

"It's a flat no… All in all this simply needs to be buried."

177. On 5 June 2017 Ms Govia emailed Mr Lane as follows:

"Thanks for this David.

Let's leave all communication there with regards to Coty and future business with the group.

Many thanks and good luck in the future.

Glenda"

178. Nothing was said about the failure of the Coty trial to Ms Groen or Mr Woods. Mr Heath's explanation in cross-examination was that he hoped to find other clients in the US though they never in fact materialised. In relation to Ms Groen, Mr Heath accepted in cross-examination that he

Q But you know then-- Even on your own case, you know that she's labouring under a misapprehension?
A Yes.
Q Yes?
A Yes.
Q You're aware of that?
A Yes.

Q And yet you still let her invest on that basis?
A Yes.
Q When you know that the misapprehension she's under is false, yes?
A At that point, yes.
Q Yes, and you knew it was false.
A Yes.

[Day 9 page 125]

179. Ms Nolan produced a report on the campaign with the object of heading off being sued for compensation. She identified a number of aspects of the campaign that had gone wrong, including lack of understanding from all sides, including the client, as to what the client's requirements were, a failure of account management and a failure on the client's part to provide vouchers for use in the trial. When it was put to her in cross-examination that the report did not say or imply that the product was not fit for purpose, (which was what her evidence in her witness statement amounted to), her explanation, which I accept, was that at the time she wrote the report she had only been with the company a short time and still believed that the essential features of the product worked. When it was put to her in cross-examination that there were always glitches with new technology her response was as follows:

Absolutely. You know, I have worked with many new products, and you do have glitches. However, in this case, this wasn't supposed to be new technology; this was a product that was already in market and had already been used for other clients, and had case studies. And so we hadn't sold it as a pilot or a beta product. We'd gone to a big, major agency with -- and a major campaign that they were spending a huge amount of budget on, with our prototype, and we hadn't shared that with them.

[Day 5 page 86]

SML subsequently

180. In June 2017 Ms Nolan worked on a campaign with Music plus Sport. This was the first campaign with data that allowed the team to develop the SML software. Ms Nolan's evidence was that there continued to be major difficulties with reporting. In an email to Sam Prin on 20 June 2017 she wrote as follows:

"Hi Sam
I've seen we still haven't had an update on the data and whether Linden can get the report to the client this morning.
Please refer to my other email and also teamwork
This is causing a lot of stress every week and it is looking a lot like Rimmel where we have absolutely no idea and cannot provide simple reporting.
We have to make excuses up to the client every week as to why we cannot give them a report."

181. Subsequently a trial with Carphone Warehouse went ahead but was cancelled when SML went into liquidation.

182. According to SML's Statement of Affairs, staffing levels were reduced during 2018, to three. Mr Heath and his wife continued to inject funding but on 22 November 2018 SML entered liquidation with an estimated deficiency of £2.75 million.

Mr Lane's claim

183. Mr Lane's pleaded case (paragraphs 63 to 82 of the Particulars of Claim and Schedule 3) is that Mr Heath made a number of fraudulent misrepresentations which induced him to advance £100,003 to SML and to pay a fee of £6,000 to Angel's Den.

184. It was submitted on behalf of Mr Heath that the pleading was defective in a number of respects. As set out earlier in this judgment, I accept that the pleading was unsatisfactory but I consider that Mr Lane is entitled to rely on Schedule 3 as providing the necessary details to substantiate the case pleaded in the main body of the Particulars of Claim.

185. What appear to me to be the salient representations are set out below.

(1) Representation as to the Case Studies

186. The pleaded case is that, at their initial meeting on 24 October 2016, Mr Heath expressly represented to Mr Lane that the Case Studies were case studies of customers of SML who had used SML's software (paragraph 69.2 of the Particulars of Claim

and paragraphs 4.2 and 4.3 of Schedule 3) whereas in fact the case studies were carried out by Digital Animal using Digital Animal's software.

187. In his Defence (paragraph 84) Mr Heath does not deny making any representation about the Case Studies and admits that the Case Studies were carried out by Digital Animal. In his witness statement, Mr Heath does deny providing Mr Lane with any Case Studies (paragraph 117). He goes on to say that Mr Lane could have discovered that the clients in the case studies were not clients of SML (paragraph 124).

The representation

188. I am satisfied that, as set out in Mr Lane's witness statement, Mr Heath made the representation alleged by repeating and endorsing the contents of the Case Studies. As set out earlier in this judgment, the Case Studies were branded "Seed Media" and contained statements such as "Our technology is in market" "Our technology ……has delivered exceptional results" ; "Read our case studies from satisfied clients...";"Seed Campaigns have been extended"; In relation to Tesco "We are now launching multiple campaigns".

189. In cross-examination Mr Heath's evidence was that he did not remember showing the Case Studies to Mr Lane [Day 7 page 193]. The fact that he did show the Case Studies to Mr Lane would, however, have been consistent with his use of the Case Studies as a means of attracting investors as when he sent them to William Liani.

Falsity

190. It is common ground that the representations that the Case Studies were SML's own case studies were false. The Case Studies were Digital Animal's using their clients, their technology and their coding. The true position was that the campaigns with BT, TalkTalk, Tesco, EMG Ticketing and Jamie Oliver had been undertaken by Digital Animal, using Digital Animal's proprietary software. Mr Heath's evidence was as follows:

A. At the early stage of the company, we wanted to produce a document that -- you know, that had case studies on it and so we did. We produced this document.
Q. Yes, which you knew made false statements. It does make false statements, doesn't it?

A. To the extent that it was Digital Animal's technology, yes, but the intention here was to say: this is how the technology worked and this is how it was actually delivered.

[Day 7 page 53]

Deceit

191. Mr Heath knew the true position concerning the provenance of the Case Studies and that any representation that the Case Studies were based on SML's clients and SML's software was false. His evidence in cross-examination was as follows;

Q, ...I think you'll also accept that what we have referred to as the case studies, you know the document we're referring to?
A. Yes.
Q. That any representation by those case studies that SML had been retained by one or other of the companies involved, that would have been false?
A. Yes.
Q. You would have known that to be false?
A. Yes.
Q. Any representations that SML had carried out the case studies was false, and you would have known that to be false?
A. Yes.
Q. Likewise, any representations that the case studies had been carried out using SML's technology would also have been false, and you would have known that to be false?
A. No, not necessarily, because we were using the Digital Animal technology in the first articulation of the company.
Q. So any representation, though, that it was SML's technology that you were using, that would have been false?
A. Yes.
Q. You would have known it to be false?
A. Yes.
Q. Thank you.

[Day 7 page 24]

192. Mr Heath also admitted that, if the Court was to find that he showed the Case Studies document to the Claimants, he would have carried out a fraud on them:

Q. If you did show these case studies to my clients, then you would accept, would you not, that they were misled as to case studies carried out by SML?
A. If I'd shown them, yes.
Q. Yes, and if you had shown them, you would also accept that you knew that they were false, yes?
A. Yes.

Q. You also -- you didn't believe that they were true. That's a double question.
A. But I didn't show them these documents.
Q. But you accept that if you had?
A. Yes.
Q. Yes?
A. Yes.
Q. If you had shown them --
A. Yes.
Q. -- you would have known that effectively you were falsely misleading them and knowingly so?
A. If I'd done that, yes.
Q. Yes. Therefore, although it was put by my learned friend to my witnesses, you never, ever told them that the case studies were Digital Animal case studies?
A. Well, there was no reason to, because they didn't actually become relevant.
Q. Thank you. Would you accept this: had you told them that these were not Digital Animal case studies, you would be admitting that SML produces documents, the contents of which are false?
A. If I'd given them these documents, then yes.

[Day 7 page 75]

Reliance

193. I am satisfied that Mr Lane relied on the misrepresentation that the Case Studies were SML's case studies when deciding to invest in SML. Mr Heath admitted the importance and materiality of case studies to potential investors:

Q. Case studies are important to an investor?
A. Of course.
Q. In fact they're one of the main selling points to an investor, aren't they?
A. Not necessarily. It depends on the investor.
Q. That's a fair comment. But for many investors, they are an important part of the -- their assessment --
A. Yes.
Q. -- in determining whether to invest?
A. Yes.

[Day 7 pages 32/33]

194. Mr Lane's evidence was that he would not have invested if he had known that the case studies were falsely represented.

195. The assertion in Mr Heath's witness statement that Mr Lane could have discovered from his due diligence that that Case Studies were not SML's does not assist Mr Heath; see the legal principle referred to at paragraphs 34-35 above.

(2) Representation that SML's software was scalable and SaaS

196. The pleaded case is that Mr Heath represented to Mr Lane that the SML software was a developed product which was ready to scale as a software as a service (SaaS) product, (paragraph 69.1 of the Particulars of Claim). In Schedule 3 it is alleged at paragraph 4.2 that Mr Heath represented that the software was highly configurable via customer self-service capabilities with robust multi-tenant/SaaS capabilities meaning that customers could be onboarded at minimal effort and cost.

197. Mr Heath's case was that he did not tell Mr Lane that the software was scalable or SaaS but that, had he done so, the description was not fraudulent, that the question of whether software was SaaS was not a binary issue, that the software had a number of characteristics that might be regarded as SaaS characteristics and that Mr Lane himself described the software as such in documents which he authored.

The representation

198. I am satisfied that Mr Heath expressly represented to Mr Lane at the meeting on 24 October 2016 that the SML software was scalable and SaaS. Mr Lane's evidence in his witness statement was that Mr Heath repeatedly claimed that the product was proven, and able to scale with minimal support as it was a SaaS platform, 'configurable' and 'self-service'.

199. This was consistent with what was said in documents produced by SML in October 2016 and of which Mr Heath must have been aware, including the Overview Document which was presented to Mr Lane at the Angels Den meeting attended by Mr Heath. "Tech is built, scalable with proven application and results across multiple sectors Tech can be deployed quickly with minimal client integration".

Falsity

200. I am satisfied that the representation as to scalability was false. The true position was that the software was not scalable. SML had to build a microsite for each customer which took man hours and incurred considerable costs. This was common ground. Mr Heath's evidence in his witness statement was to the effect that even on his own case the technology was not scalable until 2018: "in fact towards the end with Carphone Warehouse …. and we had developed the technology to the point that we could scale it".

201. As to whether the software was SaaS, the position is less clear. Mr Heath accepted in his Defence that the software was not SaaS although Mr Lane accepted that it had certain SaaS characteristics. Mr Lane accepted that the Software could have multiple customers on one platform, that it was accessible via a web browser, that it was "multi-tenanted" and that it had a UI builder that allowed clients to build their own campaigns and had a dashboard delivering data in respect of those campaigns and that this was a further SaaS characteristic. Mr Lane appeared to admit that describing the Comhub software as SaaS would have been a reasonable description although it was not clear whether Mr Lane was referring to the product as it actually was or as it was represented. Mr Lane subsequently co-authored with Ren Reynold (one of the lead software engineers) the Seed Solutions Document in which Comhub was described repeatedly as SaaS software although Mr Lane explained this inconsistency on the basis that when the document was authored in early 2017 he was not yet acquainted with the product architecture and still believed that the product was SaaS.

Deceit

202. Mr Heath knew that the SML software was not scalable. Embed was being built to make it scalable but it never got beyond a prototype; see paragraphs 89 - 95 above.

Reliance

203. In addition to the presumption of inducement, I accept Mr Lane's evidence that he relied upon the same, stating he would not have invested if he had known "the product was not SaaS and/or could not scale".

(3) Representation as to SML's customers

204. The pleaded case is that Mr Heath represented to Mr Lane, amongst other things, that SML had numerous satisfied customers who had used or were using SML's software and that contracts had been entered into with customers and with the trial prospects named in the documentation provided to Mr Lane (Particulars of Claim paragraph 70.1, Schedule 3 paragraphs 4, 3, 7 and 8).

The representations

205. The representations concerning SML's clients included the following:

> (i) *Seed.Media works with advertising agencies and brands, managing customised peer-to-peer campaigns (i.e. where social influence is important), and engages with existing and new influencers to grow audiences and drive revenues.…*
>
> *(ii) Current active channel partners are in large agency groups (Publicis; WPP; Dentsu Aegis), media groups (Bauer; Mediaquest) and ecommerce clients (Sainsburys; Singapore Airlines).*
>
> *(iii) Sales traction is in fashion brands (Rimmel; H&M); gambling (Lottoland); financial services (FRE plc; Trinity Insurance); radio (BigFM); football talent (Adidas/Dele Ali); content platforms (Storyful; Daily Telegraph); events (Jockey Club Live; Mama Group)*
>
> *(iv) Seed has an impressive initial client base across multiple sectors … Zalando, … BBC … Mattel.. Brit Awards … Bundesliga*
>
> *(v) OTT Streaming in partnership with TATA communication*

206. Representations in (i) (ii) and (iii) were made in the Investor Summary produced for the Angels Den presentation and handed out at the Angels Den meeting attended by Mr Heath. Representations (iv) and (v) were contained in slides shown at the Angels Den meeting. Applying the legal principle addressed at paragraphs 26 to 31 above, I am satisfied that Mr Heath made these representations in that he approved and adopted them by being closely involved in the preparation and approval of the document and slides and by being present at the Angels Den meeting.

207. It was submitted on behalf of Mr Lane in closing that the same or representations as to the named clients and brands were made on a number of other occasions including the Sunday lunch on 6 November 2016, the Music Deck Presentation sent on 8 November 2016, the Taylor Swift presentation sent on 8 November 2016 and Seed Group Seed Innovations set on 9 November 2016 but these are, in so far as material, were essentially repetitions of the earlier representations, are not referred to in any detail in Mr Lane's statement and it is not necessary for me to consider them separately.

Falsity

208. The representation that SML had numerous satisfied clients, including the businesses named above, was untrue and misleading Mr Heath's Defence asserts (at paragraph 89(1)) that at the time Mr Lane was considering whether to invest, Mattel, Sofa Sounds, SSE and Lottoland had entered into agreements with SML and would properly have been referred to in marketing material and presentations to prospective investors. Of these four companies, a trial had been run for eight weeks for Mattel in early 2016 and a contract had been entered into with Lottoland but SSE and Sofa Sounds were not and had not been clients.

209. Mr Heath accepted in cross-examination that the impression given by the Investor Document that there were active agreements with the various agencies referred to (WPP, Publicis, Dentsu, Omnicom and Interpublic) was untrue:

Q. So channel partners is the same as agencies?
A. Yes.
Q. And so ordinarily in our speak that would be WPP, Publicis, Dentsu, Omnicom, and Interpublic is the other one, I think, isn't it?
A. Yes.
Q. Thank you. What I'm saying to you is you knew that this was false. You knew you were conveying false information to the people in that room?
A. Well, as I said, I didn't see this until I actually got there.
Q. Yes. But you didn't stand up in the room and correct it either, did you?
A. No.
Q. So you were quite happy for the people in the room to understand, wrongly, that you had active agreements with the agencies?
A. Yes.
...

Q. You didn't have an agreement with Trinity Insurance. You didn't have an agreement with Adidas or Storyful or Daily Telegraph. I can go through the whole list, but you didn't have agreements with those, did you?
A. No, they were demo clients at the time.
Q. Yes. So you would have known that the investor in the room -- the investor in the room was going to have a false understanding of what the true position was with SML clients, didn't you?
A. Yes, except obviously I believed this at the time. ...

...

Q And then if we go to the next page, 724, it's said: "Seed has an impressive initial client base across multiple sectors ..."
A. Yes.
Q. Well, a lot of this is untrue, isn't it? Zalando?
A. Yes.
Q. You don't claim them to have been a client in this case.
They were never a client, were they?
A. No. We had a series of meetings and we developed a prototype for them.
Q. Yes. You had meetings and developed a prototype and made a pitch. But they were never a client?
A. No.
Q. DJ Maxwell, never a client -- Axwell, sorry. I was thinking of Maxwell House.
A. Actually, he was a client, yes, and we did work on his project, to promote his project.
Q. BBC World?
A. No.
Q. You only ever pitched to them, didn't you?
A. Yes.
Q. Thinkers Live?
A. Yes, we did develop that.
Q. But never a client?
A. It was a client, yes. It went live.
Q. Everbrite (sic)?
A. No, again, that was pitched.
Q. The Brits were never a client?
A. It says "UGC streaming for 2016 campaigns".
Q. Yes.
A. That's correct.
Q. You did user generated content streaming for the campaigns.
A. Yes.
Q. Yes, but you're doing it under the badge of the Brit Awards?
A. Yes.
Q. Brit Awards were never a client?
A. Directly they weren't, no.
Q. No. Thank you. And Bundesliga?
A. Yes.

Q. You say they were not a client, paragraph --
A. It actually says: "Two players agreed to use seed to monetise fan base."
Q. But you say in your witness statement they were not a client. Paragraph 193.
A. No.
Q. They were not a client?
A. No.
Q. They were a client or not -- sorry.
A. No, they weren't.
Q. No, they weren't. Thank you. Okay

[Day 7 pages 180 – 182; Day 8 pages 42 – 44]

210. There was no evidence of any relationship with Singapore Airlines or Sainsbury's. There was no commercial partnership with TATA.

Deceit

211. I am satisfied that, with the limited qualification referred to below, Mr Heath must have known that the representations referred to above were untrue. The notion that Mr Heath believed that the representations were true, based on information supplied by other people working within the company, is fanciful given Mr Heath's close involvement with and knowledge of SML's activities. Mr Mistry's email of 1 November 2016 referred to above, with its reference to clients with whom it was hoped to contract and to potential high value clients, does not support the contention that Mr Heath believed that the representations as to actual clients were true.

212. By way of qualification, I accept that Mr Heath may have believed, based on information supplied by Mr Evans which was in turn based on a conversation with a friend, John Antoniades, on 16 November 2016 , that Publicis and SML were about to do a deal. It is unclear whether this information related to a global deal or to a smaller deal involving Coty Rimmel but Mr Heath may have interpreted it as referring to the former.

Reliance

213. I am satisfied that Mr Lane relied upon these representations when deciding to invest in SML. Mr Lane's evidence is clear that "I would not have invested if I had known ….. that most claimed past and/or current customer, active trial and

prospects were false.". Mr Heath admitted that actual clients were important to investors:

Q. Of course, investors are going to want to know whether the company has any existing clients --
A. Yes.
Q. -- aren't they? That's important to them to know that there's already an income stream coming through?
A. Yes.

[Day 7 page 34]

(4) Representation as to Mr Evans' investment

214. Mr Lane's pleaded case was that Mr Heath orally represented to Mr Lane at the Angels Den meeting that, in the investment round in which Mr Lane was being encouraged to invest, Mr Evans, as the "lead investor", had invested £100,000 valuing the company at £6 million (Particulars of Claim, paragraph 66, Schedule 3 para 46.3). If an investor who had known SML for some time was willing to invest in a round at £6 million, this would have been a clear vote of confidence from someone close to the company.

215. In his Defence, Mr Heath denied that he had ever told Mr Lane that Mr Evans had invested on the basis of a valuation of SML of £6 million but in his witness statement and his oral evidence he accepted that he did so.

Q. And you may actually accept, because I think this is your pleaded case, you accept that you represented to Mr Lane that Mr Evans had invested in the round at 6 million?
A. Yes.
[Day 8 page 53]

The representation

216. I am satisfied that Mr Heath's admission was correctly made and that he did make the representation as alleged. It is consistent with the email from Mr Heath dated 22

November 2016 in which he referred to Mr Evans having invested in the round at £6 million.

Falsity

217. The representation was false. The true position was that, as set out at paragraph 69 above, by 22 July 2016, it had been agreed between Mr Heath and Mr Evans that Mr Evans would invest a further £100k (total £300k) at a much reduced valuation of £2 million.

Deceit

218. Mr Heath must have known the true position from his dealings with Mr Evans and he admitted as much:

> *Q. Mr Heath, it's common ground, and I think you will agree, that Paul Evans never invested any money at 6 million?*
> *A. Yes. He didn't invest at 6 million.*
> *Q. Therefore any representation that he did was false. You have to say yes or no for the tape?*
> *A. Yes.*
> *Q. You would have known that any representation he invested at 6 million was false?*
> *A. Yes*

[Day 7 pages 23-24]

219. Moreover, as set out at paragraph 70 above, Mr Heath had actually sought legal advice as to whether he was bound by the agreement he had reached with Mr Evans at a £2m valuation.

Reliance

220. I am satisfied that Mr Lane relied upon the representation. In addition to the presumption of inducement in deceit, Mr Lane's evidence was that he would not have invested if he had known that Mr Evans was not the lead investor in a £6m valuation round. Mr Lane understood this to be a clear vote of confidence from someone close to the company.

(5) Representation as to Mr Heath's status as an investor

221. The pleaded case was that Mr Heath orally represented to Mr Lane that the Heath Family had invested £900k in return for equity (i.e. that they had not merely lent that sum but invested it) (Particulars of Claim paragraph 68; Schedule 3 paragraph 4.1).

222. Mr Lane's case was that, unless told otherwise, an investor would expect a founder to have funded by way of equity. Mr Heath must have been aware of this not least because Mr Evans had given him a clear warning in an email on 5 August 2016 that the fact that he had loaned, rather than invested, funds to SML would be highly material to investors and would need to be made clear.

The representation

223. At the meeting between Mr Lane and Mr Heath on 24 October 2016 Mr Heath referred to his £900k personal investment in the business. Mr Heath accepted that after the Angels Den presentation he met with Mr Lane and referred to himself as an investor in SML and that he had "put in £900,000" [Day 8 page 52]. [Day 7 page 188]. He says much the same thing in his witness statement: "I just said oh I put in £900,000" (paragraph 244). Mr Heath accepted that in theory a reasonable investor could have understood him to be saying he had put in £900k in return for shares as equity [Day8 page 52].

Falsity

224. The representation was false in that, other than £1,000 for an initial 1,000 shares, Mr Heath had not invested in SML by way of share purchases. All the other financial assistance he gave was in the form of loans at 12% interest.

Deceit

225. Mr Heath obviously knew the true position:

> *Q, Why didn't you ever tell any of my clients that you'd put your money in and -- by way of a loan?*
> *A. Because I never expected to claim any of it back. It was never in my head that, you know, that that loan would ever be redeemed.*
> *Q. But you know -- you had been told it's an issue for investors?*
> *A. Yes.*

Q. So why are you not telling potential investors that in fact you haven't put in your money in as equity

A. As I say, it really wasn't in my head that I would ever ask for that money to be reclaimed as loans, and of course I didn't.

[Day 7 page 133]

Reliance

226. It was put to Mr Lane that he in fact found out the true position from a financial forecast that he was shown. Mr Lane admitted that he could have done if he had he seen and registered it, but that as a matter of fact he did not spot the point because he and Shane Higgon had focussed on the P&L.

227. The fact that Mr Lane did not look carefully at SML's accounts would suggest that he was not interested in how SML had been funded and that what he was really interested in was SML's potential. I am, however, satisfied on the basis of Mr Lane's evidence that he relied upon the representation. "I would not have invested if I had known ….. that MH's 'invested' money was neither all personal nor as equity."

.

(6) Representation as to positive cash flow

228. The pleaded case is that Mr Heath presented financial forecasts to Mr Lane and impliedly represented that there were reasonable grounds for those forecasts and, in particular that there were reasonable grounds for the forecast that SML would be cash flow positive by Christmas 2016/January 2017 (POC 71.5; Schedule 3 paragraphs 9, 21 and 40.6). There are a number of specific financial forecasts referred to in Schedule 3 which are not mentioned anywhere in Mr Lane's witness statements and there is no evidence that Mr Lane focused or relied on them. The representation that SML would be cash positive by Christmas/January2017 is, however, referred to in his witness statements.

Representation

229. I accept that the representation as to SML being cash flow positive was made by Mr Heath at the lunch on 6 November 2016 and in the Teaser slides sent to Mr Lane by Mr Heath on 22 November 2016 which included a graph stating that SML would be cash positive in December 2016. In an email forwarded with the slides, Mr Heath

stated "*Piers prepared his numbers based on mine and Shane's p&l which he wants to present to investors."* Mr Heath thereby represented that he had been through and approved the cash flow positive representation.

Falsity

230. Mr Heath did not have reasonable grounds for forecasting that SML would be cash flow positive by or in January 2017. The only paying client for SML's software had been Mattel. That trial had stopped in March 2016. The financial projections on which this forecast was based was unrealistic. SML's financial forecasts in October 2016 showed SML as cash flow positive in January 2017 after sales of £48,098 in September 2016, £43,455 in October 2016, £51,598 in November 2016 and £51,598 in December. In fact, SML had made sales of only £2,320 in September 2016 and £1,160 in October 2016. The projection that SML would be cash flow positive by January 2107 was completely unrealistic.

229. In cross-examination, Mr Heath admitted that there were no reasonably prospects of being cash flow positive by Christmas:

Q. You met with Mr Lane for Sunday lunch at your home; do you recall that, on 6 November?
A. Yes.
Q. And did you tell him then, or might you have told him that the company would be cash flow positive by Christmas?
A. I mean, I don't recall saying that in that meeting.
Q. But you might have done?
A. Potentially I might have done, yes. I don't recall actually saying it.
Q. But by the beginning of November you accept that the prospects of the company being cash flow positive by Christmas were non-existent?
A. Yes, that was going to be unlikely, yes.
Q. Very unlikely?
A. Yes.

[Day 8 pages 77/78]

230. Indeed, Mr Heath's evidence in his witness statement was that: "Saying Seed Media was going to be cashflow positive by Christmas would be foolhardy given that this was November and Christmas was only eight weeks away from that point".

Deceit

231. I am satisfied that Mr Heath must have realised that he had no reasonable grounds for estimating that SML would be cash flow positive in January 2017 alternatively that he was reckless in making the representation, given SML's actual sales to date.

Reliance

232. As well as being entitled to rely on the presumption of inducement, I am satisfied that Mr Lane relied on the representation about SML being cashflow positive. His witness statement refers to the fact that he was impressed by the cashflow projections he was shown by Mr Higgon.

Claim for £6,000

233. Mr Lane is claiming the sum of £6,000 being the amount of a fee paid to Angels Den in relation to his investment in SML which he contends should have been paid by SML but which Mr Heath refused to sanction. Mr Lane's case is that he paid the fee in order to safeguard his relationship with Angels Den. The sum is claimed on the basis that it was paid as a consequence of Mr Heath's fraudulent misrepresentations.

234. The only evidence of the payment is a bank statement of Profitable Publishing Ltd showing the payment of £6,000 to Angels Den on 30 December 2016. Profitable Publishing Ltd has been dissolved. Mr Lane's evidence was that it was treated as a drawing but there is no evidence of the payment being debited to or paid by Mr Lane.

235. In these circumstances, I am not satisfied that Mr Lane has established any right to be compensated for the £6,000 fee.

Quantum

236. Mr Evans paid £100,003.60 for shares in reliance on the misrepresentations set out above which he is entitled to recover from Mr Heath as damages.

Ms Groen's claim

237. The pleaded case for Ms Groen (paragraphs 83 to 104 of the Particulars of Claim and Schedule 4) is that Mr Heath made a series of fraudulent misrepresentations to her which induced her to invest £200,000 in SML. As with Mr Lane's claim, I consider that Ms Groen is entitled to rely on the accompanying Schedule (Schedule 4) by way of substantiation of the case pleaded in the main body of the Particulars of Claim. The salient misrepresentations are as follows.

(1) Representation as to the Case Studies

238. Ms Groen's case is similar to Mr Lane's. She claims that Mr Heath represented to her that the Case Studies were case studies of customers of SML who had used SML software (Particulars of Claim paragraph 1.3, Schedule 4 paragraph 10) whereas in fact they were case studies of Digital Animal's clients using Digital Animal's software.

239. In his Defence Mr Heath does not deny that Ms Groen was shown the case studies or that the case studies had been carried out using Digital Animal software but he contends that the identity of the company which carried the case studies was immaterial (paragraph 112 of the Defence),

The representation

240. I am satisfied that it was expressly represented to Ms Groen by Mr Heath that the Case Studies were case studies of SML using SML software as alleged. Ms Groen was clear about what she was told. She does not claim that she was shown the case studies in her first meeting on 1 February 2017. On that occasion Mr Heath simply spoke about them. However, Ms Groen was clear about what happened in the second meeting, Her evidence in her witness statement, which I accept, was as follows:

> "**Case Studies**. MH does not deny introducing and talking about the case studies on 1 February (e.g. [237]-[242]). But he does deny taking me through the case studies on 8 February [252], and he is wrong. He is also completely wrong at [52] in saying I knew the case studies were not customers of SML. He is also

> completely wrong at [55] in saying that I knew BT, Talk Talk, Tesco and Bundes League were not customers of SML from my due diligence. During all my communications with MH prior to my investment the case studies on which I relied were always branded SML and claimed to be SML's. Had MH corrected and informed me that they were not case studies carried out by SML or using the SML software or SML was using another company's software, I would not have invested. SML should have had its own case studies had it developed the product as represented. SML not having case studies of its own would have made me and I believe other investors seriously doubt the product was as represented. If it was as fantastic as represented, there should have been case studies."

241. The fact that Ms Groen was shown the case studies at the meeting on 8 February 2017 was not challenged in cross-examination. It was put to Ms Groen in cross examination that she was told that the case studies related to Digital Animal. This was not Mr Heath's pleaded case. and there is an element of unreality about Mr Heath having told Ms Groen that the Case Studies were another company's since their whole purpose was to show that SML's software was developed, working, and had been proven with a range of clients in a range of different sectors. The absence of SML case studies would have cast doubt on the maturity, scalability and commerciality of SML's product.

Falsity

242. The representation was false in that the Case Studies were done using Digital Animal software and Digital Animal customers.

Deceit

243. Mr Heath accepted that if the Court found he had shown Ms Groen the Case Studies document he would have been making a false representation, and would have been doing so knowingly [Day 9 pages 4-15].

Reliance

244. In addition to being entitled to rely on the presumption of inducement, it is clear from that Ms Groen's evidence that she relied upon the Case Studies.

(2) Representation that SML's software was scalable

245. The pleaded case is that it was represented to Ms Groen that the SML software was ready to scale without significant scaling costs (Particulars of Claim, paragraph 91.4, Schedule 4 paragraph 10, 16.3).

The representation

246. Mr Heath admitted telling Ms Groen that the product was scalable at the meeting on 1 February 2017. In addition, the email dated 3 March 2017 from Mr Hooper which he approved said "we have a cash flow positive & vastly scalable tech company".

Falsity

247. The representation was false see paragraphs 90 – 93 and 193 above. The product was not scalable as Mr Heath accepted. He also accepted that SML was not a vastly scalable company [Day 9 page 40]:

> *Q. Yes, but in March you're not at the state where the company is in fact vastly scalable at this point with sustainable high margins are you?*
> *A. No, it's an aim.*

Deceit

248. Mr Heath knew that the SML software was not scalable. Embed was being built to make it scalable but it never got beyond a prototype; see paragraphs 89- 95 above.

Reliance

249. In addition to the presumption of inducement, I am satisfied that Ms Groen relied on the representation as to scalability. In her witness statement she describes learning that the product was barely a prototype and was not working and had never been proven to work. She describes it as a fragile, unproven prototype that was unable to support even a single client even with huge manual workarounds and to feeling she had been hugely and deliberately misled.

(3) Representation as to SML's customers including Coty

250. The pleaded case is that it was represented to Ms Groen by Mr Heath that SML had numerous satisfied customers who had used or were using SML's software including Coty, with further potential business through Publicis who were Coty's media agency and Coty's other brands including Rimmel (Particulars of Claim paragraph 92.1, Schedule 4 paragraphs 4, 8, 11, 14, 17.4 and 18.2).

251. Mr Heath's pleaded response is that the alleged representations were made and that they were substantially true. He asserts that by the time Ms Groen came to invest seven paying customers had entered into contracts with SML to use the SML software and that, with regard to Coty, the position was that Coty had concluded a contract with SML to use the SML software, that this was initially very successful; however problems with download speeds emerged in May 2017 during the course of this contract. At the time Mr Lane advised, and it was believed by Mr Heath, that it would take just four weeks for the software development team to resolve this issue but ultimately it took four months.

The representation

252. As noted above, it is not disputed by Mr Heath that he made the representations alleged. At the meeting on 1 February 2017 Mr Heath took Ms Groen through the presentation. As set out above, he mentioned that Coty was a signed client and that BigFM, FRE Plc and Lottoland were also signed clients and gave the impression that they were paying revenues. He mentioned BBC Worldwide and said that there were partnerships in place with Zanox, Publicis, Omnicom and Tata.

253. Mr Heath admitted playing up the alleged fact that Coty was a client.

Q And she also says that you mentioned that Coty was a signed client for its Rimmel brand --
A. Yes.
Q. -- which would have been right; yes?
A. Yes.
Q. And indeed she says you played it up?
A. Yes.
Q. It was a big deal, wasn't it --
A. Yes.

Q. -- to be perfectly blunt?
A. Yes.
Q. You regarded this as a feather in the cap?
A. Yes.
Q. And you told her that it had proved the success of the product?
A. I wouldn't say proved the success, but it showed that there was traction amongst the ad agencies, yes.
Q. And it provided potential for other Coty brands?
A. Yes.
Q. And also it provided potential to go through Coty for other Publicis clients?
A. Yes.

[Day 8 pages 211- 212]

254. Mr Heath accepted that he would have discussed the deal with Coty at the meeting with Ms Groen on 8 February 2017. He also accepted that the Coty deal would have been represented to Ms Groen as a significant opportunity for SML's business as the way to increase getting bigger revenue in terms of more sales [Day 9 pages16-17]. Mr Heath accepted that "the investment opportunity had been premised on Coty and the opportunities it provided leading to the revenues and the success you were expecting" [Day 9 page 122].

255. The representation that Coty was a satisfied client was a continuing representation and was not corrected prior to Ms Groen's investing. There was no requirement as a matter of pleading to assert that it was a continuing representation.

Falsity

256. As noted above, the facts concerning SML's clients are unclear; see paragraphs 80 - 88. SML appears to have had very few paying clients at any stage. Music + Sport, Coty/Rimmel, SSE, BigFM and Fre PLC were all trial campaigns rather than clients who had signed up and were paying monthly recurring revenues. Fre Plc never went live and SSE does not appear to have gone live before Ms Groen invested. What is clear is that Coty/Rimmel had been lost as a client before Ms Groen invested as set out at paragraphs 169 - 179 above.

Deceit

257. Mr Heath accepted that he knew Ms Groen was therefore labouring under a misapprehension concerning the Coty deal that he knew was false but let her invest anyway:

Q Given though that you had pitched, particularly to Ms Groen, yes, the whole investment that you've got this Coty deal----
A Mm-hmm.
Q -- why didn't you go back to her and say, "Look, I should let you know that all this Coty deal has fallen away and so has the pipeline"? That would have a material effect on her investment, wouldn't it?
A Yes, I imagine it would have done.
Q Yes. It would have a material effect on her thinking?
A Yes.
Q Thank you. You knew it had fallen away. Why didn't you go back and correct it?
A At the time-- Well, I wasn't hopeful we could resurrect it, but at the time, as I said, I hoped that we could replace it with US clients. That's what it seemed like. So, I hoped it wouldn't have any material effect on the business.
Q But you know then-- Even on your own case, you know that she's labouring under a misapprehension?
A Yes.
Q Yes?
A Yes.
Q You're aware of that?
A Yes.
Q And yet you still let her invest on that basis?
A Yes.
Q When you know that the misapprehension she's under is false, yes?
A At that point, yes.
Q Yes, and you knew it was false.

[Day 9 pages 124-125].

Reliance

258. Ms Groen relied upon the representation concerning Coty's status as a client. In her witness statement she complains and that the Coty trial had ceased even before she had signed and invested leaving her feeling she had been hugely and deliberately mislead. Her evidence, which I accept, was as follows:

"Coty was very material to my investment decision. Coty was represented to me as being major client and one likely leading to more business. Yet prior to my investment, Coty had terminated its product trial approx. halfway through. I should have been informed that the facts had changed.

As to [72] and [284], it cannot be true that MH reasonably thought the situation could be salvaged, particularly as the trial was not completed and in light of RR's email of 5 May, 2017 to a.o. MH stating the product was "a prototype, there will be bugs, thats [sic] the whole idea". MH now says at [72] that he did not think the loss of Coty was material, but Coty had been emphasised in presentations from my very first introduction to SML. MH says at [267] that the loss of Coty caused SML to reschedule all clients. Also, the importance of the loss was for me to decide. Indeed, Coty was still cited by MH as a client in later presentations made well after the Coty's trial had been terminated prematurely. I did not find out about the Coty trial termination until well after my investment. I would not have invested if I had known the facts about the Coty status and the issues they had with the software. In the various investor decks and in my meetings with MH, he also claimed (as he does now at [241]) that a global channel deal was in place with Publicis but I believe that this was never the case."

(4) Representation as to positive cash flow

259. The pleaded case is that it was falsely represented to Ms Groen that SML was within 2 to 3 months of being cash flow positive. (Particulars of Claim paragraph 94.2, Schedule 4).

260. Mr Heath's pleaded response is that he was not responsible for the financial forecasts provided to Ms Groen which were prepared by Mr Lane on the basis of information from the sales team, software development team and Shane Higgon.

The representation

261. I am satisfied that the representation was made by Mr Heath as alleged. As set out above, at the meeting on 1 February 2017 between Mr Heath and Ms Groen Mr Heath went through the Teaser/Equus presentation. One of the slides stated that SML would be cash flow positive in March 2017. Mr Heath agreed that Ms Groen was entitled to rely on this representation [Day 9 page 10]. Moreover , as already noted the email to Ms Groen from Mr Hooper on 3 March 2017 included text authored by Mr Heath

himself stating that "we have a cash flow positive and vastly scalable tech company, with sustainable high margins (70%+) and negligible marketing costs". Mr Heath accepted that he had written this text [Day 9 page 35] and that an investor reading it would be entitled to understand the company was cash flow positive at this stage [Day 9 page 38.

262. There is no substance to the contention that Mr Heath was not responsible for the forecast. Mr Heath accepted he was responsible for giving Ms Groen the financial forecasts [Day 9 pages 17, 20, 21 and 34]. Moreover in an email dated 21 February 2017 to Deby Green, Mr Heath acknowledged "… there is a reason I wrote the P&L – its because I understand how the tech works and each sector… Neither David nor Suzy know anything about these sectors". Mr Heath accepted he had produced version 14 of the forecast on 02.03.17 with Mr Pulido as is clear from the email dated 19 May 2017 to Mr Lane from Mr Heath attaching a three year forecast and stating that he and Mr Pulido had "worked on [it] pre trip".

Falsity

263. Mr Heath must have known that there was no reasonable basis for the representation as to SML being cashflow positive in March 2017. He accepted that the purported actual figures for January and February 2017 were untrue **[**Day 9 pages 43/53]. By taking SML's known revenues for months/periods in that year (£24,480), the maximum actual revenue for January 2017 cannot have been more than £2,249.

Deceit

264. Mr Heath accepted in cross-examination that he did not have a proper factual basis for his projections in March 2017. He did not deny that his projections were pure hope and fantasy [Day 9 page 53].

Reliance

265. In addition to the presumption of inducement, Ms Groen plainly relied upon the same. In her first witness statement she describes learning that forecasts turned out to be "*an absolute sham*" and to feeling she had been hugely and deliberately misled.

(5) Representation as to absence of disputes

266. It is alleged in the Particulars of Claim that Mr Heath had represented to Ms Groen that SML had no disputes (Particulars of Claim paragraph 94.5), in answer to a specific request from her as to whether there were any disputes. This allegation is not particularised in Schedule 4 although it is addressed in Ms Groen's witness statement (paragraph 21) according to which Mr Heath represented that there were no legal cases against SML or threats thereof nor had there been any in the past. The representation is said to have been made by Mr Heath in certain undated meetings.

267. Mr Heath's pleaded defence is that he believed that Ms Groen was independently aware there was an issue with Mr Evans from SML's accounts.

Representation

268. I am satisfied on the basis of Ms Groen's evidence that Mr Heath represented that SML had no current disputes. Mr Heath accepted that when Ms Groen asked him about legal disputes, he told her there weren't any [Day7 page 157].

Falsity

269. SML was in dispute with Mr Evans. On 4 March 2017 Ms Green emailed Mr Heath noting "we are in dispute with Paul [PE]".

Deceit

270. Mr Heath knew that SML was in dispute with Mr Evans. Even if he thought that the dispute was "manageable" as he claimed in his cross-examination, that does not alter the fact that there was, to his knowledge, a dispute.

Reliance

271. I am satisfied that Ms Groen relied on the representation. In her second witness statement she says as follows:

> "MH does not deny that I asked about disputes prior to my investment. He states he does not recall my asking: [40]. Instead, MH says at [38] he believes I was aware there was an issue with PE prior to investing because it was listed as a debt in the accounts. I confirm I was not at all aware. … the very material continuing representation of no past/to be expected disputes was not true at the time of my investment and should have been disclosed to me, and I would not have invested."

272. Mr Heath accepted in cross-examination that whether or not there were any disputes would have been material information for investors as well as whether their money was to be used to pay off a previous investor [Day7 page 37].

273. In addition to the presumption of inducement, I am satisfied that Ms Groen relied upon what Mr Heath said as to the absence of disputes. In her witness statement she describes learning about the long running dispute with Mr Evans. She makes the point that as a result there "was a distinct possibly that that Mr Evans could all his money in shortly after I invested and the business would have folded", and she states "Had I known this I would never have invested". She says "As an investment professional, I am quite mad about the lie and the concealment".

274. Mr Heath's defence appears to be that he believed that MG was independently aware there was an issue with Paul from SML's accounts and/or from what she was told by Deby Green. Given his representation, this cannot have been what he believed. In any event, the accounts do not show the dispute with Mr Evans as a dispute and there is no basis for any belief that Deby Green told Ms Groen about the dispute.

(6) Representation that SML's software was GDPR Compliant

275. The pleaded case is that Mr Heath represented to Ms Groen at a meeting at SML's offices during the due diligence process that the SML software was GDPR compliant (Particulars of Claim paragraph 91.2).

276. Mr Heath's pleaded response is that the representation was true.

Representation

277. The SML Investor Deck sent to Ms Groen on 2 February 20176 stated that SML's product "complies fully with EU data regulations" and was "fully EU GDPR compliant". Ms Groen's evidence was that at the meeting with Mr Heath on 8 February 2017 Mr Heath confirmed that the product would be fully GDPR compliant as this was needed to keep trading. This was consistent with an email from Mr Heath

to Ms Groen on 8 June 2017 in which he stated that "Seed provides the business, legal, and technical platform for financial product marketers to comply not only with FCA and ASA regulation, but also EU GDPR" (emphasis added).

Falsity

278. There was no evidence that SML had checked whether the product they were selling was or would be GDPR compliant. In November 2017, Mr Heath effectively admitted to Ms Groen (in response to her question "currently the Comhub based campaigns such as CPW's [Carphone Warehouse]are not GDPR compliant, correct?" that the SML software was not GDPR compliant: "Yes that's right Marleen, which is the plan and the road map".

279. By May 2018, the month in which GDPR came into force, Ms Nolan was repeatedly warning Mr Heath that they could not continue to sell to clients because the product was not GDPR compliant. On 1 May 2018 she emailed Mr Heath: "I believe we need to urgently look at making our existing clients GDPR compliant… without a compliant product, we don't have a product to sell", On May 2018 Ms Nolan emailed Mr Heath again "I really believe we need to address CPW urgently as I have still not had any response on the urgent issues of GDPR compliance … The team have fed back to you that they dont think we should be running CPW or sell any campaigns at the moment" On 23 May 2018 Ms Nolan emailed MH to state: "I've had zero input from you or John regarding GDPR which I am sure you appreciate is serious as we have made repeated promises as a business to clients and taken no action".

Deceit

280. There is no evidence that Mr Heath had any reasonable basis for believing that the product was GDPR compliant. In these circumstances, I consider that Mr Heath was reckless in representing that the software was GDPR compliant.

Reliance

281. Given that Ms Groen specifically asked about GDPR compliance, I am satisfied that she relied on the representation.

Topper

282. Ms Groen was cross-examined on the basis that she invested purely because of an expression of interest from 'Topper'. I accept Ms Groen's evidence that Topper's decision had no bearing on her investment decision.

Q Piers Cooper told you that at that meeting, Topper had said that he intended to invest in the company. That was on the 5th of June, the meeting, and I think it was the 6th of June he contacted you and updated you. I think, sorry, it was the 8th of June he told you that. And that is what prompted you to invest in the company, wasn't it?
A: Is that it? Seriously? My Lord, as a professional investor, if somebody just goes, oh, I'll do a much higher valuation and I'll get lots of money overnight, I advise the company, as I did, to check out his credentials. Did he ever invest anything in any company, which is somewhere in my statement, to go check him out, because this doesn't make sense. And indeed, he never invested. He disappeared as quickly as he came. Totally not credible. And I would never, in my many, many decades of finance experience, investment experience, make an investment just based on somebody, somebody, somebody say so. That would be mad."

[Day 4 page 81]

Quantum

283. In reliance on the misrepresentations referred to above, Ms Groen invested a total of £200,000 in SML, £150,000 in the prior investment round and £50,000 in the following investment round pursuant to the Advance Equity Subscription Note, which she is entitled to recover as damages from Mr Heath.

Mr Woods' claim

284. Mr Woods' claim is introduced in the Particulars of Claim as follows:

"87. HW was introduced to SML by PH via email on 8 March 2017. All of HW's communication was with PH and HW received all of his information from him. Almost all communication was by email save for one text and informal meetings with PH in early April 2017 at the Royal Thames Yacht Club where there was limited discussion about SML

88. Over the course of the following four months PH provided HW with a series of email updates and presentations as set out in Schedule 5, containing

information for the purpose of inducing HW to invest in SML with a view to splitting the investment across the same two investment securities as MG as indeed happened in fact. The documents sent to HW were generally provided as attachments or as direct links to documents on SML's electronic drives.

89. In the circumstances, the information provided to MG and HW and/or to which they were given access was prepared and provided with the knowledge and with the express, alternatively with the implied, authority and approval of MH who, given his role in management and/or his interest in SML, directed, consented to or permitted the provision of the documents with the intention and for the purpose of them being relied upon by investors (including, specifically, MG and HW).

90. Through the provision of the meetings, presentations and correspondence detailed in Schedules 4 and 5, MH made the following express or implied representations to MG and/or HW (together the "**MG and HW Representations**"). Each Representation was made in the context of and for the purpose of inducing them to pay over funds to SML. In such circumstances, it is to be inferred that this was with the intention by MH that the MG and MW Representations be relied upon by each of them."

285. There follows a list of alleged representations grouped by subject matter. Schedule 5 refers in some detail to two emails dated 8 March 2017 sent by Mr Hooper and to various other emails sent by Mr Hooper and to the fact that material developments (the redundancies of the commercial team and the failure of the Coty trial) were not disclosed to Mr Woods.

286. Mr Wood's witness statement deals with the alleged representations as follows:

"What MH [i.e. Mr Heath] told me, via PH [i.e.Mr Hooper] , about SML

17 During much of May, June, and July in the period leading up to, and during making my investment, I was overseas and relied exclusively on PH's email communiques and informal club conversations to understand the status of SML:

18 PH's communications were relentlessly upbeat and grew more compelling over time, painting a picture of a highly successful startup with market traction, market momentum, and investor momentum.

19 What I understood from PH's communications was that I was not being asked to invest in an early stage and risky concept, but rather a company that had developed a complete product, that was tested and validated by multiple customers, that was growing fast. The company was cash flow positive and a queue of prospects set to grow revenue further. So, it looked like my 'risk' was limited to poor execution of international expansion and failure to grow the value."

287. Mr Heath's pleaded response to Mr Woods' claim is, in summary, as follows:

(1) The documents, information and investor presentations provided to Mr Woods were written and prepared by Mr Lane, not Mr Heath, on the basis of information provided to Mr Lane by the sales team, software team and Shane Higgon;

(2) Mr Heath acted at all times in his capacity as a director and agent of SML rather than in a personal capacity;

(3) It is denied that the alleged representations were untruthful;

(4) Insofar as Mr Heath provided documents and/or investor presentations to Mr Woods, Mr Heath believed the contents to be accurate and truthful;

(5) The alleged representations are inadequately pleaded.

288. I do not propose to consider individually all the representations pleaded in Schedule 5. Based on Mr Woods' witness statement or his oral evidence, my impression is that these representations were not "actively present" to Mr Woods when he invested; see the legal principle referred to at paragraphs 36 and 37 above. However, I find that he did rely on the cumulative effect of those representations and in particular the representation that SML had a complete, tested and validated product and was cash flow positive.

Adequacy of pleading

289. I consider that the representations are adequately pleaded. The representation as to cash flow is pleaded at paragraphs 92.8 and 94.2 and particularised at paragraph 2 of Schedule 5 by reference to Mr Hooper's emails of 8 March 2017. The representation as to the state of SML's product is set out at paragraph 2 of Schedule 5 by reference to Mr Hooper's emails. Mr Heath's role is adequately pleaded at paragraph 89 as quoted above.

Representations

290. I am satisfied that the representations were made by Mr Heath either on the basis that (i) the representations were made by Mr Heath to Mr Hooper with the intention that they would be passed on to Mr Woods and they were in fact passed on to him; alternatively (ii) on the basis that Mr Heath adopted and approved the representations; see paragraphs 25 to 31 above.

291. First, it was Mr Heath who penned the conclusion to the email sent on 8 March 2017 by Mr Hooper stating that "we have a cash flow positive & vastly scalable tech company" with the intent that it be passed on to investors such as Mr Woods which is what happened. Second, Mr Heath was directly involved in the preparation of the information provided by Mr Hooper to Mr Woods, as he accepted in cross examination [Day 3 page 104]. At the meeting on 31 January 2017, Mr Heath approved the documents that were to be sent out to investors by Mr Hooper. Having approved and adopted the representations made by Mr Hooper, he is liable in respect of them.

292. I note that Mr Woods was aware that the representations were made by Mr Heath. His evidence was as follows:

> *Well, I made a point of speaking to Mr. Hooper and finding out where he got the information from, because I only knew him very vaguely at the time, so why should I take it from him? I said, where 1 are you getting the information from? He said, it's from the founder, it's from the horse's mouth, and everything that I'm giving you is coming from Martin Heath.*
>
> [Day 5 pages 11-12]

Moreover, the 8 March 2017 email instructed the reader to direct further questions of the materials to Mr Hooper or Mr Heath.

293. The fact that, as admitted by Mr Hooper, Mr Hooper did not check whether the projections in January 2017 had been updated, does not assist Mr Heath. Had Mr Hooper checked, he would have been provided with further misleading information. Mr Heath's role in the making of the representations to Mr Woods is unaffected.

Falsity

294. SML was not cash flow positive on any date that Mr Woods invested. This was accepted by Mr Heath in cross-examination [Day 9 page 39]. SML did not have a complete, tested and validated product. Fundamentally, its product did not work; see paragraphs 89 to 95 and 169 to 179 above.

Deceit

295. Mr Heath accepted in cross-examination that the representation as to cash flow was false:

> *Q. The very simple point is, the statement that cash flow was positive, you knew to be false. You can't possibly have believed otherwise.*
> *A. Yes.*

[Day 9 page 94].

296. Mr Heath knew from, amongst other things, the experience of the Coty trial that SML did not have a complete, tested and validated product. He must have realised that to represent SML's product as such was thoroughly misleading.

Quantum

297. In reliance on the misrepresentations referred to above, between 5 April 2017 and 2 June 2017 Mr Woods invested a total of £70,000 over two investment rounds, £35,000 in the prior investment round and £35,000 in the following investment round pursuant to the Advance Equity Subscription Note. Mr Woods is accordingly entitled to damages in this amount.

Conclusion

298. Mr Lane is entitled to damages of £100,003. Ms Groen is entitled to damages of £200,012. Mr Woods is entitled to damages of £69,992.