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Case No: CL-2023-000277

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

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

Date: 1 May 2026

Before :

THE HONOURABLE MRS JUSTICE DIAS

Between :

VERANOVA BIDCO LP

Claimant

- and -

(1) JOHNSON MATTHEY PLC

Defendants

**(2) JOHNSON MATTHEY INVESTMENTS
LIMITED**

(3) JOHNSON MATTHEY INCORPORATED

Mr Simon Salzedo KC, Mr Michael Bolding and Mr Andris Rudzitis (instructed by
Linklaters LLP) for the **Claimant**
Mr Simon Rainey KC, Mr David Caplan and Ms Ruihan Liu (instructed by Herbert Smith
Freehills Kramer LLP) for the **Defendants**

Hearing dates: 17-20, 24-27 November, 1-4, 8-11, 17-18 December 2025

Approved Judgment

This judgment was handed down remotely at 9.30am on 1 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Dias :

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A: INTRODUCTION

1. This claim has its origins in the disclosure process preceding the sale by the Defendants to the Claimant of the Johnson Matthey Health Business (the “**Health Business**”). The Claimant alleges that the Defendants were in fraudulent breach of certain warranties contained within the Sale and Purchase Agreement (the “**SPA**”), which was signed on 16 December 2021. The transaction completed on 31 May 2022.
2. The Claimant is an affiliate of funds managed by Altaris LLC (“**Altaris**”) formerly known as Altaris Capital Partners LLC. Altaris is an investment first registered in Delaware, USA, headquartered in New York, USA, founded in 2003 with an exclusive focus on acquiring and building companies in the healthcare industry. The Claimant is a Delaware limited partnership that was formed on 13 December 2021 as a special purpose vehicle for the purpose of purchasing the Health Business. The Claimant was originally called Hermes Bidco LP and changed its name to Veranova Bidco LP (“**Veranova**”) on 26 April 2022.
3. The First Defendant, Johnson Matthey Plc is the ultimate holding company for the Johnson Matthey Group (the “**JM Group**”). The JM Group is a collection of businesses that are principally focused on the transport, energy and chemicals sectors. It is a large group, and the First Defendant was listed on the FTSE100 until 1 December 2021 (and on the FTSE 250 thereafter). In the financial year ending 31 March 2021 (i.e. the last full financial year before the sale of the Health Business), the JM Group generated revenues of £15.7bn and an underlying operating profit of £504m. The Second and Third Defendants, Johnson Matthey Investments Ltd and Johnson Matthey Incorporated, are wholly-owned indirect subsidiaries of the First Defendant. In the rest of this judgment references to the “**JM Group**” are to the Defendants collectively, save where it is necessary to distinguish between them.
4. The Health Business manufactured active pharmaceutical ingredients (“**API**”s) for use in both branded (“originator”) and “generic” drugs. Prior to the completion of the sale it was run by a management team based in the US (the “**Health Management Team**”) and operated across eight sites via three companies:
 - (a) Johnson Matthey Pharmaceutical Materials Incorporated (“**JMPMI**”), which owned assets in the US. Some of these assets were held by the Third Defendant and transferred to JMPMI as part of the sale process.
 - (b) Macfarlan Smith Limited (“**MSL**”), which owned assets in the UK, including a site in Cambridge and two sites in Scotland: Edinburgh and Annan.
 - (c) Johnson Matthey Pharmaceutical Services (Yantai) Co. Limited (“**JMPS**”), which owned assets in Yantai in China.
5. The Health Business was a non-core part of the overall JM Group. A financial due diligence report produced for the JM Group by KPMG LLP, dated 14 July 2021 (the “**KPMG Report**”), stated that in FY21, the Health Business generated a total revenue of £257.3m, of which £157.3m (61.1%) came from the generics division.
6. One of the major generic APIs manufactured by the Health Business was buprenorphine hydrochloride (“**BHCL**”), for which its largest customer by value was Alvogen Inc. (“**Alvogen**”). The contract pursuant to which the Health Business sold BHCL to Alvogen

(the “**Alvogen Supply Agreement**”) required Alvogen to purchase a minimum 75% of its BHCL requirements from the Health Business. It also contained what was referred to during the trial as a price match clause. This (in very broad terms) entitled Alvogen to initiate discussions with the Health Business no more than once a year in the event that it received a *bona fide* competing offer from a third party manufacturer which was at least 8% lower than the price charged under the Alvogen Supply Agreement. If the Health Business failed to match the offer or come to some other mutually acceptable arrangement, Alvogen would be entitled to source BHCL from an alternative supplier.

7. JM sold the Health Business to the Claimant via a suite of transaction documents central to which was the SPA. The SPA contained a number of warranties including the following:

“Business Warranty 1.4.2: Since the applicable Accounts Date ... the Businesses [i.e. the Health Business] have been carried on in the ordinary and usual course consistent with past practice and so as to maintain the Businesses as going concerns, without any ... material alteration to the nature, scope or manner of the Businesses.

Business Warranty 8.1.2: None of the Companies ... is currently renegotiating any material term of any Key Contract, which upon conclusion, would have an adverse or detrimental effect on the Businesses.”

8. Since their numbering changed during the course of the negotiations for the SPA, I shall refer to them in this judgment as the Ordinary and Usual Course Warranty and the Key Contracts Warranty respectively. It is the Claimant’s case that one or other or both of them was false as at 16 December 2021.

B: THE RIVAL CASES IN OUTLINE

9. The Claimant asserts that the Ordinary and Usual Course Warranty and Key Contracts Warranty were false as at 16 December 2021 because the Health Business was at that date in the process of renegotiating the price under the Alvogen Supply Agreement following the invocation by Alvogen of the price match clause. This was in consequence of an offer made to Alvogen on about 18 October 2021 by an alternative manufacturer (subsequently ascertained to be Chr. Olesen Synthesis A/S) to supply BHCL at around US\$8/g (albeit on a tiered basis dependent on volumes purchased). This will be referred to as the “**Olesen Offer**”. US\$8/g was much lower than the price then being charged to Alvogen of US\$16/g.
10. The Claimant accepts that it was informed by the Defendants during the sale process that the Health Business was renegotiating the price of BHCL charged to Alvogen, but says it was given the false impression by the Defendants that those negotiations related only to a proposed reduction in price from US\$16/g to around US\$12-13/g, rather than the actual reduction which occurred to around US\$8/g.
11. It is submitted by the Claimant that the negotiations which took place following the Olesen Offer would not only have an adverse or detrimental effect on the business, but also amounted to a material alteration to the nature, scope and manner of the business. It is common ground that the Alvogen Supply Agreement was a key contract and that the price was a material term for the purpose of the Key Contracts Warranty.
12. By virtue of certain contractual limitations in the SPA, the Claimant can only succeed in a claim for breach of warranty if it can prove that the claim arose from the fraud or wilful

misconduct of the Defendants. For this purpose, it relies on the state of mind of the following four senior individuals within the JM Group (the “**JM Executives**”):

- (a) Robert MacLeod, who was the JM Group CEO at the material time. Mr MacLeod is a chartered accountant who joined the JM Group in 2009 and became CEO in 2014. In November 2020, he informed the JM Group board that he intended to retire in early 2022. His retirement and replacement as from 1 March 2022 were announced on 11 November 2021.
 - (b) Stephen Oxley, who was the JM Group CFO at the material time. Mr Oxley is also a chartered accountant, and spent most of his career at KPMG. Mr Oxley joined the JM Group on 1 April 2021.
 - (c) Sarah Vawda, who was JM Group’s Corporate Development (“**CorpDev**”) Director between 2020 and 2022. She also is a chartered accountant. Ms Vawda was responsible for all M&A and similar transactions, and for reviewing the strategic direction of the various JM businesses. As such she had overall responsibility for the sale of the Health Business which was code-named internally “Project Hermes”.
 - (d) James Lyons, who was a Senior Corporate Development Manager at JM Group at the material time. He is a corporate finance professional with particular experience in M&A transactions. At JM, his key responsibilities included managing divestments, and he was the day-to-day project manager in relation to the sale of the Health Business, working under Ms Vawda.
13. Other individuals who featured prominently in the events giving rise to this claim are four members of the Health Business Management team at the material time: (i) Niek Stapel, the Sector CEO of the Health Business; (ii) Nick Shackley, the Vice President of Strategic Marketing, Generics Products and Solutions; (iii) Andrew Wesztergom, the Vice President of Finance; and (iv) Ross Oehler, the General Counsel. The documents also contain references to Kenneth Zrebiec, the Vice President for Manufacturing Operations, and Alex Zahiri, Vice President of Innovator Products and Solutions.
14. The claim was commenced on 22 May 2023. As well as asserting a cause of action for breach of warranty, it initially also pleaded a claim in deceit against the JM Executives as well as alleging fraudulent misrepresentation by Mr Stapel and Mr Lyons. However, the allegations of fraudulent misrepresentation were subsequently dropped on 17 March 2025 and the deceit claim was withdrawn on 23 October 2025, on the basis that the Claimant would pay the Defendants’ costs of that claim in any event, and on the indemnity basis in certain scenarios.
15. Accordingly, none of Health Management Team is now accused of behaving fraudulently.
16. The Defendants dispute that there has been any breach of warranty. They say that discussions with a purchaser on price pursuant to a contractual term are within the ordinary and usual course of business and that the Health Business had therefore been carried on in the “*ordinary and usual course consistent with past practice, without any material alteration to the nature, scope or manner of the business*”. Moreover, there was no breach of the Key Contracts Warranty because negotiations with Alvogen did not commence until after 16 December 2021.

17. In any event, the Defendants submit that the warranties were adequately qualified by disclosures and that there was no fraud because none of the JM Executives possessed the required knowledge and intention.

C: THE ISSUES

18. The allegations of fraudulent breach of warranties in this claim require careful examination of the elements that need to be proved and, in making their submissions, the Claimant advanced a primary case along with three alternative cases. At my request, the parties helpfully agreed the following List of Issues:

- (1) Leaving aside the question of disclosures, was the Business Warranty in paragraph 1.4.2 of Part 2 of Schedule 6 to the SPA (the Ordinary and Usual Course Warranty) false?
- (2) Leaving aside the question of disclosures, was the Business Warranty in paragraph 8.1.2 of Part 2 of Schedule 6 to the SPA (the Key Contracts Warranty) false?
- (3) If, in the absence of disclosures, either of those Business Warranties was false, were they adequately qualified by disclosures?
 - (a) Insofar as relevant, what was said to the Claimant prior to the conclusion of the SPA about price negotiations between the Health Business and Alvogen regarding BHCL?
 - (b) Are any of the parties entitled to rely on any such statements in order to determine or construe what was or was not Disclosed pursuant to the terms of the SPA and/or the Disclosure Letter?
- (4) What is required for a claim for breach of the relevant Business Warranties to arise or be increased “*directly as a result of the fraud of the Sellers*” and/or to be “*in respect of the fraud ... of any Seller*” for the purposes of clauses 6.7.2(B)(2) and/or 9.27 of the SPA? In particular, does it require:
 - (a) The Defendants to have given the warranties in the SPA; and for one or more of the JM Executives to have known the facts that rendered any warranty, as qualified by any relevant disclosure, false (or to have been reckless as to same, or to have lacked any honest belief to the contrary) (*the Claimant’s primary case*); or
 - (b) The Defendants to have given the warranties in the SPA; and for one or more of the JM Executives to have known that any warranty in the SPA, as qualified by such disclosure as s/he honestly believed to have been given, was false (or to have been reckless as to the same, or to have lacked any honest belief to the contrary) (*the Claimant’s first alternative case*);

For the avoidance of doubt, the Claimant’s first alternative case is intended to include, on the facts of the present case, a situation where a JM Executive:

- (i) knew of the Olesen Offer and/or the negotiations relating to it;
- (ii) knew that this information was required to be disclosed against warranties (without requiring knowledge of the particular terms of

particular warranties) or was reckless as to the same, or lacked any honest belief to the contrary; and

- (iii) knew that it had not been and would not be disclosed, or was reckless as to the same, or lacked any honest belief to the contrary; or
 - (c) For one or more JM Executives to have known: (i) the terms of the particular relevant warranty and relevant disclosures; (ii) the facts that made it false; and (iii) that such facts rendered such warranty false (or to have been reckless as to the same, or to have lacked any honest belief to the contrary) (*the Claimant's second alternative case*); or
 - (d) For one or more of the JM Executives: (i) to have known that or been reckless as to whether a particular warranty to which they had turned their minds was false; (ii) to have known that or been reckless as to whether that warranty had not been and would not be qualified in the relevant respect by a disclosure; and (iii) to have intended that the false and unqualified warranty would induce the Claimant to enter into the SPA on the terms that it did (*the Defendants' case and Claimant's third alternative case*)?
- (5) If one or other of the relevant Warranties was false and not adequately qualified by the disclosures, are the requirements of clauses 6.7.2(B)(2) and/or 9.27 of the SPA (as determined pursuant to issue (4) above) satisfied in relation to at least one of the JM Executives?
- (6) What loss has the Claimant sustained as a result of the alleged breaches of warranty?
- (a) What would a buyer without knowledge of the Olesen Offer have expected, as at 16 December 2021, about the prices that the Health Business would be able to charge its customers for BHCL in the future?

19. At the outset of the trial, the Claimant indicated that, unless agreement could be reached, it might in due course seek permission to amend its Particulars of Claim in response to a complaint by the Defendants that it was unclear as currently pleaded. Agreement could not be reached and a draft pleading was put before the court at the conclusion of the evidence. The putative application was unusual since both parties maintained that the amendment did not materially add to the existing pleading. The Claimant therefore put it forward on the basis that, in those circumstances, there was no particular reason to refuse it. The Defendants, however, submitted that, on one reading at least, the draft pleading contemplated that the warranties could be independently rendered false because one or more of the “*commercial implications*” of the Olesen Offer had not been disclosed. Mr Rainey argued with some force that this had never previously been suggested, and that it was unclear what specific commercial implications were being referred to. Moreover, this was not the case that the Defendants’ witnesses had come to court to meet and it would be unfair to allow such an amendment to be made after they had completed their evidence. He accordingly resisted it for that reason. Alternatively, he submitted that if this was not the purpose of the amendment then it changed nothing and was unnecessary.

20. Having heard submissions and scrutinised the pleading, the court expressed certain non-definitive views as a result of which the application was not pursued further. It is therefore not necessary to say anything further save that, particularly in a case involving allegations of dishonesty and fraud, it is particularly important that the Claimant is confined to its pleaded case.

D: FACTUAL SYNOPSIS

21. As I explained to the parties at the conclusion of the hearing, as a result of unfortunate scheduling, there would inevitably be a considerable delay before I was able to produce this judgment. I am indebted to them for their considerable assistance in producing a joint Factual Narrative. This was largely agreed and forms the basis of the Factual Synopsis set out in the attached Appendix. I do not therefore set out the course of events in any detail here and reference should be made to the Appendix as necessary which, where there was a dispute, represents the facts as I find them to be.

E: THE WITNESSES

22. On behalf of the Claimant, I heard oral evidence from Mr Fulco, Mr Stapel, Mr Shackley and Mr Chatzivasileidis, all of whom appeared in person. The written evidence of Mr David Payne and Mr Donald LaFerle was admitted without them being required to give oral evidence. The Defendants called oral evidence from Mr MacLeod, Mr Oxley, Mr Martin, Mr Lyons, Ms Vawda and Mr Oehler, all of whom appeared in person.

23. In assessing their testimony, I bear very much in mind the fact that the events in question took place some years ago and that the JM Executives, in particular, had other priorities which were occupying them to a greater or lesser extent so that they were not solely focused on this particular transaction. It is now generally accepted that all “memory” of distant events in fact depends on a process of reconstruction which is inevitably influenced, whether consciously or not, by a multitude of factors: see, for example, *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, [2013] EWHC 3560 (Comm) at [15]-[22], including the particular materials from which the witness may have been invited to refresh his or her memory as well as the fact that preparation for trial may result in the witness becoming increasingly reliant on the reconstructed memory rather than on his or her original experience of events. Indeed, many of the witnesses who gave evidence before me frankly recognised the limits of their actual recollection in this regard.

24. A further factor is the very natural human instinct for a witness, when their past behaviour is subjected to critical scrutiny, to reconstruct events in such a way as to put themselves in the most favourable light possible, especially when they have a stake in the outcome of the proceedings through a concern for their own reputation. This is a particularly pertinent consideration here, where the allegations are ones of fraud and where Mr Stapel and Mr Shackley must have found themselves in a very difficult position as retained employees of the Health Business after the sale to the Claimant.

25. For these reasons, the court will be particularly astute to test the witness evidence carefully by reference to the contemporaneous documentation: see the valuable guidance provided by Leggatt J (as he then was), in *Gestmin (supra)* at [20]:

“... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the

personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

26. Both parties also relied on expert pharmaceutical evidence to assess the expected pricing trajectory of BHCL. The Claimant’s expert was Mr Edric Engert, an independent consultant for Valere Capital Partners LLP, while the Defendants called Dr. Fintan Walton, Chief Executive of PharmaVentures Ltd.
27. Separate quantum experts were engaged to assess quantum in light of the projections made by the pharmaceutical experts but in the event they were not called to give oral evidence as the parties were able to agree the financial consequences which flowed from each side’s case on the pharmaceutical issues. I address the expert evidence in section H below.

(1) The Claimant’s witnesses

28. Nicholas Fulco: Mr Fulco’s evidence was high-level. He was assertive and at times overly confident in the strength of his recollection from which he frequently had subsequently to retreat. In particular, he was obliged to resile from the “*strong recollection*” of a call with Mr Lyons which he described in his witness statement when this was undermined by contemporaneous emails. He admitted that he had confused the sequence of events and conflated a series of communications. While I had no reason to doubt his honesty, he was not always able to support his assertions and I found his recollection to be generally unreliable. This is not surprising. He was a busy investment professional, and it was noticeable that he had a much more detailed recollection regarding the various financial updates, which perhaps gives some indication of where his primary focus was directed. He was surprisingly reluctant to state clearly in response to cross-examination whether he did or did not consider Mr Oehler to be honest.
29. Nicolaas Stapel: As Chief Executive Officer of the Health Business, one could expect Mr Stapel to possess the best knowledge of what was happening on the ground and to take responsibility accordingly. Yet Mr Stapel was a very defensive witness who demonstrated a marked tendency to minimise his role in the sale of the Health Business and an equally marked tendency to deflect criticism on to others. He was inconsistent in his responses and wholly unreliable in his recollection of dates and timings which gave the lie to his claims to have a “*vivid recollection*”. Much of his evidence amounted to a reconstruction of what he thought he must have done or said or thought, which was frequently exposed as being simply wrong. This very much suggests a witness who is trying with hindsight to justify their conduct and it was difficult to avoid the conclusion that his evidence had been influenced by the charges of fraudulent misrepresentation which had been levelled against him (albeit subsequently withdrawn). Indeed, he accepted that this was preying on his mind when he prepared his first witness statement.
30. Four aspects of Mr Stapel’s evidence gave particular cause for concern. First, it became clear during cross-examination that his witness statements were misleading as regards the onus on the Health Management Team to review the relevant disclosures for accuracy. Having said in his written evidence that he and Mr Oehler had agreed it was not their role to report the Olesen Offer to Herbert Smith Freehills Kramer LLP (as it then was) (“**HSF**”) since it was the responsibility of CorpDev to manage and approve the warranties, he was

forced to accept that the accuracy and truthfulness of the warranties was in fact a matter for him and the other members of the Health Management Team and not CorpDev. Moreover, there were examples in the documents of him correcting information on other occasions where he felt it necessary to do so. I was left with the impression that large parts of his written evidence were simply untrue and had been put forward in an attempt to pass all responsibility on to CorpDev. Secondly, Mr Stapel struggled to answer and contradicted himself when asked to confirm whether his own response in approving the disclosures had been truthful and honest. Thirdly, his recollection of the December Health Business Review (“HBR”) meeting changed over the course of proceedings, particularly regarding the attendees. And finally, his recollection of when Mr Lyons had been told about the Olesen Offer, while forceful at the outset, was exposed as being imprecise and wholly inconsistent with the documents. While some of his testimony was plausible enough, I regret to say that I cannot unreservedly accept him as a witness of truth and I am unable to place any reliance on his evidence save where it is supported by contemporaneous documentation or accords with my view of the inherent probabilities.

31. Nicholas Shackley: Mr Shackley was an immensely cautious witness who took great time and care over his answers. Even so, it became apparent as his cross-examination progressed that his witness statement was incorrect in many respects and he too was often forced to change or retract what was there stated. For example, like Mr Stapel, Mr Shackley had to accept in cross-examination that the Health Management Team’s role in relation to approval of the Disclosures was less passive than he had described in his witness statement, and that each of them had a specific and personal responsibility to review the draft disclosures for their accuracy against the warranties which was understood at the time.
32. More troubling was his insistence that he had “*a very clear recollection of participating in the HBR and presenting the Olesen material*” on 13 December 2021 when the documentary evidence points overwhelmingly towards him not being in attendance. Thus, contemporaneous emails show that he was directed not to join the call and when forwarding some slides after the meeting, he himself noted that “*The HBR was curtailed so I did not participate*”. He had in fact declined the meeting and there is no record of his attendance at any stage. In his third witness statement, he said that he must have been asked to join from Mr Wesztergom’s office and that he recalled “*standing at his standing desk to speak to the Olesen Offer Slide, rather than joining the meeting from my own desk*”. However, he could provide no convincing explanation for why he would have attended from Mr Wesztergom’s office despite his superior, Mr Stapel, directing him not to attend and, if he did attend, it is not obvious why he messaged Mr LaFerle during the meeting to say that he had been “*booted out*” and that the meeting was now taking place only with Mr Stapel and Mr Wesztergom. On any view, he accepted that he would have joined after Ms Vawda and Mr Lyons had already left.
33. His evidence on this and many other points was substantially undermined by the documentary record, to the point of being at times unbelievable, and I treated it with the utmost caution. He admitted that some of his evidence was incorrect and could be interpreted as misleading.
34. In fairness to both Mr Stapel and Mr Shackley, I recognise the difficult position in which they both found themselves as retained employees of the Health Business following the sale, particularly when allegations of fraud were made against the JM Executives and Mr Stapel himself. Nonetheless, it is striking that the Claimant made submissions in closing undermining their evidence, which were subsequently criticised by the Defendants as an

impermissible attempt to impugn the honesty of its own witnesses. I agree that even if it was not asserted in so many words that they had given dishonest evidence, it was certainly insinuated.

35. As to this, there is undoubtedly a general principle that a party may not invite the court to treat the evidence of its own witness as dishonest and untrue. However, the ambit of this rule is less certain and it does not in any event appear to be absolute. Like the Court of Appeal in *The Filiatra Legacy*, [1991] 2 Lloyd's Rep. 337 at 361, I tend to think that the question of what evidence can and cannot be accepted is one for the trial judge. In the event, I have not found it necessary to determine whether their evidence on this point was honest, dishonest or simply inaccurate, self-serving reconstruction.
36. Antonios Chatzivasileiadis: Mr Chatzivasileiadis was a helpful, albeit very nervous witness. His involvement in the case was confined to his attendance as a note taker for Linklaters during the due diligence calls on 2 and 9 November. The sale transaction was only one part of Mr Chatzivasileiadis' work as a then-trainee at Linklaters and he had only moved to the corporate desk in September 2021. He frankly accepted that he was not aware of the details of all of the issues being discussed and had only a high-level understanding of the transaction. Each meeting was fast-moving with long agendas and it is unsurprising that, four years on, he had no independent recollection of what was said and that his memories were entirely based on his notes and any recollections triggered by these notes. Consequently, while I do not doubt Mr Chatzivasileiadis' integrity as a witness, it was difficult to place any great weight on anything he said that was not captured in the contemporaneous documents.

(2) The Defendants' witnesses

37. Robert MacLeod: Mr MacLeod was Chief Executive Officer of JM from 2014 until 1 March 2022. I found him to be a straightforward and co-operative witness who gave clear, concise and fair evidence and was careful to distinguish between recollection and reconstruction. I accept him as a witness of truth, although it is fair to say that his actual recollection was somewhat hazy. This is understandable, since I accept his evidence that his primary focus at the relevant time was on JM Group's strategic exit from its Battery Materials business. This was a much more important matter for the Group, both strategically and reputationally, as compared to the sale of the Health Business which was a very minor and non-core part of the overall business. He would not, therefore, have been involved in the day-to-day running of the transaction or of the disclosure process. I did not agree with the Claimant's view that this was an attempt to distance himself from the terms of the SPA and Disclosure Letter. The current intense focus of the forensic spotlight on BHCL and Alvogen should not be allowed to obscure the past reality of running a multi-billion-pound conglomerate.
38. However, Mr MacLeod did make a series of very significant concessions, including that in his view it was obvious that the Olesen Offer needed to be disclosed. He also accepted that the Disclosure Letter did not adequately disclose the Olesen Offer. The significance of these concessions is discussed further below: see paragraph 179 below.
39. Stephen Oxley: Mr Oxley was a measured witness. He had become Chief Financial Officer only on 1 April 2021 and gave evidence that, as a relatively new senior executive, his attention, like that of Mr MacLeod, was principally focused on the exit from the Battery Materials business. I reject the Claimant's argument that Mr Oxley was lying when he said

he could not recall some of the details of the events in question. He was persistently accused of being evasive but since many of his answers which attracted this criticism were in response to hypothetical questions about what he would have thought or done if he had known “x”, I found his evidence that he could not answer them even hypothetically without also knowing “y” and “z” to be entirely understandable and fair. On the contrary, I assessed him as a convincing and coherent witness who maintained both his composure and his testimony under very persistent and sometimes unnecessarily hostile questioning. Moreover, many of the matters on which the Claimant relied as demonstrating that his evidence was unreliable were peripheral to the main issues in the case and do not cast any doubt on my conclusion that he was a witness of truth.

40. David Martin: Mr Martin struck me as a fair and frank witness who again was subjected to some fairly hostile questioning. I was satisfied that I could accept his evidence without reservation. The parties agree that neither Mr Martin nor anyone else at HSF was told about the Olesen Offer at any stage during the Project Hermes sale.
41. James Lyons: Mr Lyons could not recall much, if anything, about the disclosure process or the various calls, meetings and discussions in which he participated. Nor could he clearly remember whether or not he in fact attended some of the calls or meetings which featured in his calendar or, if so, for how long. It is fair to note that, as with many of the Johnson Matthey employees, they had busy diaries with frequently overlapping appointments, so I do not find this surprising. He was a hesitant witness but I did not get the impression that this was due to any evasiveness on his part. Rather he was being careful to ensure that he fully understood the questions being put to him.
42. On the critical point as to when he first learned of the Olesen Offer, his evidence was that when Mr Fulco raised the question on 22 May 2022 of a *bona fide* offer which the Health Business was obliged to match, he could clearly recall his reaction which was that this was the first he had heard of it. This had a ring of truth about it and while he fairly accepted on the basis of Ms Vawda’s notes that they must have been told by the Health Management Team on 3 December 2022 that there was a structural issue with Buprenorphine and that Scotland was no longer economic due to the decline in Buprenorphine revenues, I am satisfied that he was telling the truth when he said that he was not aware of any offer from a specific supplier to a specific customer and that he did not “join the dots” between this information and either the renegotiated deal with Alvogen which was signed in February 2022, or the Olesen Offer to which Mr Fulco was referring in May 2022. At most he accepted that the offer might have been discussed during a call with Mr Wesztergom in February 2022 but he did not recall discussing it specifically and the evidence does not satisfy me that the Olesen Offer as such was discussed. I reject the assertion that he was deliberately seeking to mislead the court in his evidence.
43. Sarah Vawda: Ms Vawda was cross-examined hard for more than two days, which she withstood with great stamina and composure. It was evident that she was a person of decided and independent views which she was not afraid to express, and that these were sometimes at odds with those of her colleagues, although this did not appear to have been an issue in relation to the sale of the Health Business. She was an articulate and confident witness who gave her answers clearly and concisely and without evasion. Although she could not remember particular emails or meetings, her recollection where it existed was generally confirmed by other material. She readily agreed with most of the propositions put to her, for example relating to the materiality of the Olesen Offer, but was adamant that she was never told about it. I accept her as a witness of truth and reject the wide-ranging

allegations that were put to her of duplicitous and dishonest conduct. As she aptly commented at one point, *“The assumption that every time I reply to something I had something else in mind ... is, with respect, quite preposterous.”* Having heard Ms Vawda give evidence, I can only agree.

44. Ross Oehler: Mr Oehler was one of the few witnesses in the case who was not accused by the Claimant of dishonesty. I found him to be an articulate and collected witness. He was precise in his answers and while he did not pretend to have a current recollection of very much, he said what he recalled and stuck to it. I had no cause to doubt his honesty.

(3) Unpleaded allegations of dishonesty

45. During the course of the trial, the Claimant cross-examined Ms Vawda and Mr Oxley on the basis that some of their conduct in relation to the transaction had been dishonest. In due course, it made extensive closing submissions in reliance on this cross-examination to suggest that the evidence of these witnesses could not be accepted and that they were fundamentally dishonest.
46. In particular, as part of a broader attack based on what the Claimant framed as her propensity to withhold important materials, it was put to Ms Vawda that she had acted dishonestly in signing off on the release of the Hermes Q1 Update materials which contained text suggesting that the Health Management Team had a *“high degree of confidence”* in the original FY22 forecast. In fact, Mr Stapel had been asked expressly to review the draft update and had explicitly confirmed that the text was *“ok”*. He did not suggest that he had been under any pressure to do so. It was nonetheless put to Ms Vawda that she could not honestly have believed this since Mr Stapel had previously said that the original forecast was untenable. However, as she said, unless and until any revised forecast had been formally approved, these were the figures provided by the Health Management Team and the figures on which they had signed off. She could only ask them what they believed and what they were willing to provide and it was not for her to override or change the figures she received back from them. In any event, since the Claimant was given the actual trading figures, it could assess the likelihood of meeting the forecast for itself.
47. For his part, Mr Oxley was accused of having misled the market and JM’s auditors in relation to certain matters relating to the Health Business’ trading figures.
48. The Defendants, unsurprisingly, submitted that none of these allegations had been pleaded and that no disclosure had been given about them. They pointed to authority that facts intended to advance a case of dishonesty should as a matter of fairness be pleaded: see *Three Rivers District Council v Bank of England (No 3)*, [2003] 2 AC 1 at [186]:

“[a]t trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.”

See also Henshaw J in *Alta Trading UK Ltd v Bosworth*, [2025] EWHC 91 (Comm) at Annex [66]:

“the Claimants are not entitled to cross-examine the Defendants or their witnesses on the basis of unpleaded allegations of dishonesty or other intentional wrongdoing (including

such allegations for which there is no subsisting plea pursuant to my rulings 1-5 above), save to the extent that the court may in its discretion permit such cross-examination on matters going purely to credit and not to any of the issues in the case. Even in that context, I note the statement of Carr J in Baturina v. Chistyakov [2017] EWHC 1049 (Comm) at [126]-[127], cited in Grant and Mumford on Civil Fraud (1st edn.) § 34-056, that where a claimant intends to advance specific allegations of dishonesty based on particular facts in cross-examination, such matters should, as a matter of fairness, be pleaded even where the allegations are not part of the claim being made, in order to ensure that the defendant has a proper opportunity to consider the allegations and decide how he may wish to defend himself.”

49. There is considerable force in this criticism and to the extent that such cross-examination was intended to form the basis for an inference of dishonesty, it was in my view impermissible and unfair. When challenged, however, Mr Salzedo eschewed any such intention and insisted that the questioning went solely to matters of credit. As he accepted, he was therefore bound by the answers he received and could not go behind them, although the Claimant’s closing submissions at times came perilously close to straying beyond simply matters of credit into general dishonesty in relation to the transaction.
50. In the event, I was not persuaded that there was in fact any recognisable pattern in Ms Vawda’s behaviour beyond strategic business conduct. In particular, I do not accept that she can be criticised for wanting to control the release of information to the Claimant so that the communication of the admitted deterioration in the Health Business could be managed in the most advantageous way possible. That was, after all, her job. As far as Mr Oxley is concerned, I accept his denial that he attempted to mislead the market or the auditors and his answers are in any event final.
51. Accordingly, while it would perhaps have been better if these allegations had not been made in the way they were, they did not ultimately affect my decision.
52. I should nonetheless remark that, on re-reading the transcript, there were a number of features which troubled me. These principally consisted of the Defendants’ witnesses being questioned on the basis that they had accepted a proposition when they had not in fact done so – or at least not fully or unambiguously. Sometimes the witnesses picked this up for themselves. More often they did not. Some of these passages were then relied on in the Claimant’s closing submissions even though they were not necessarily a fair reflection of the witness’ evidence taken as whole. Questioning of this nature should on the whole be avoided. It is unattractive and unfair to the witness who cannot always be expected to be exercising the laser-like precision of a lawyer in their choice of words, still less to be aware of where any particular question is leading or which particular aspects of their answer might subsequently be regarded as critical.
53. One example will suffice. Ms Vawda consistently denied knowing about the Olesen Offer. In the Claimant’s closing submissions, however, it was said that she had agreed she knew there had been an offer from a competing supplier to supply at a price substantially lower than hitherto, and that this was a significant fact which needed to be disclosed. However, on any fair reading of her evidence, all that she agreed she knew was what was reflected in her notes of the meeting of 3 December and her email to Mr MacLeod of 6 December, namely that Scotland would not be economic as Buprenorphine had significantly declined, due to “*a new entrant producing at a much reduced cost*” and that this was a structural problem. With respect, there is nothing in either of these documents about any specific

competing offer to any customer of the Health Business and Ms Vawda's acceptance of what was said to be a significant fact has to be read in light of her note and email, rather than an offer she steadfastly maintained she did not know about.

54. A raft of other similar complaints were made by the Defendants following exchange of written closings to the effect that the Claimant's closing submissions misstated the effect of the evidence which had been given. It is unnecessary for me to rehearse these here. Suffice it to say that I have re-read the transcripts for myself in full and satisfied myself as to the effect of the evidence given and the extent to which it supports one side's case or other.
55. For completeness, I should say that I did not find attempts to get one witness to opine on the honesty or dishonesty of another witness helpful, particularly when the questions were put on the basis that the other witness had particular knowledge which may or may not have been the case. Ultimately, the assessment of the witnesses and the question of honesty are matters for the court. Other people's views on a hypothetical basis are of little value.

(4) Adverse inferences

56. Both Mr Oehler and Mr Wesztergom remained with the Health Business after the sale, although they have now moved on. They were intimately involved in the events leading up to the sale as part of the Health Management Team and it might have been expected that the Claimant would call them both to give evidence in support of its case. When it became apparent that it was not intending to do so, the Defendants themselves took steps to depose Mr Oehler and, as appears above, he in fact came and gave evidence on their behalf.
57. There has been no explanation from the Claimant as to why Mr Wesztergom was not called, notwithstanding its confirmation that he was under a contractual obligation to give evidence for it if called upon to do so. The Defendants accordingly invited me to infer from his absence that his evidence would not have supported the Claimant's case any more than Mr Oehler's did.
58. In such cases, the court takes a common-sense approach as explained by Lord Leggatt in *Royal Mail Group Ltd v Efofi*, [2021] UKSC 33; [2021] 1 WLR 3863 at [41]:

“Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

59. In this case, there was no evidence that Mr Wesztergom was unavailable to give evidence. On the contrary, he was under a positive contractual obligation to make himself available. He was a party to nearly all of the key meetings, discussions and correspondence and although he was not the only witness who could speak to these matters, his evidence would have been highly relevant given that the question of what was said or known, by whom and when, was hotly disputed.

60. In these circumstances, I conclude that this is a case where it is appropriate to infer that his evidence would not have supported the Claimant's allegations that at least some of the JM Executives had the relevant knowledge, and I do so infer. The fact that the Defendants might have been able to call Mr Wesztergom for themselves as they did with Mr Oehler is neither here nor there. It is the Claimant who brings this claim and who bears the burden of proof.

F: THE STANDARD OF PROOF

61. In cases of fraud, the standard of proof remains the balance of probabilities. However, the courts have consistently recognised that in practice more convincing evidence will often be required to establish fraud than other types of allegation. This is on the basis that fraud is usually less likely than negligence and that the more serious the allegation, all other things being equal, the less likely it is to have occurred: *Kazakhstan Kagazy Plc v Zhunus*, [2017] EWHC 3374 (Comm) at [155]-[156].

62. Despite (or maybe because of) this, there is an enhanced need to test the witness evidence carefully against the documentary evidence where it exists: *Armagas Ltd v Mundogas SA (The Ocean Frost)*, [1985] 1 Lloyd's Rep 1 at 57.

63. Further, although motive is not a necessary ingredient of fraud, the presence or absence of motive may be an important factor in assessing whether a person's conduct has been dishonest. If authority is required for what might be thought to be a self-evident proposition, see *Mortgage Agency Services Number One Ltd v Cripps Harries LLP*, [2016] EWHC 2483 (Ch) at [88]:

"Of particular relevance to a case of fraud such as the present is the question of motive. By and large dishonest people are dishonest for a reason. They tend not be dishonest wilfully or just for fun. Establishing a motive for deceit, or conspiracy, is not a legal requirement, but if a motive cannot be detected or plausibly suggested then wrongful intention (to tell a deliberate lie in order to deceive) is less likely. The less likely the motive, the less likely the intention to deceive, or to conspire unlawfully."
and *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS*, [2009] EWHC 1276 (Ch) at 858:

"motivation in relation to dishonest conduct necessarily requires an assessment not merely of the incentives, but also of the disincentives to embarking upon the course of conduct alleged. The supposed incentives need to be balanced against the disincentives, which in the case of participating in a fraud include not merely a disinclination to do that which is immoral, but also the risk of incurring long-term damage to the commercial reputation of a business enterprise, and the personal risks to the careers and even liberty of the individuals concerned, if found out and brought to justice."

64. On the other hand, it is also necessary to bear in mind that fraud is not generally signposted explicitly and that it can very often only be established by inference based on the cumulative effect of individual pieces of circumstantial evidence. As Bryan J said in *Lakatamia Shipping Co. Ltd v Su*, [2021] EWHC 1907 (Comm) at [64]-[65] after citing comments of Rix LJ in *JSC BTA Bank v Ablyazov*, [2012] EWCA Civ. 1141:

"... it is the essence of a successful circumstantial case that the whole is stronger than the individual parts, and that circumstantial evidence works cumulatively... In this regard

and consistently with Rix LJ's observations, in evaluating the evidence it is best to avoid compartmentalising particular points relied upon, or treating points in "silos", or adopting a piecemeal approach to evidence relied upon; rather it is appropriate to take account of "previous findings in considering the likelihood of the later facts having occurred" or, in other words, to "stand ... back and consider... the effects of the implications of the facts... found in the round".

65. I bear all these considerations very much in mind when evaluating the evidence.

G: DISCUSSION AND ANALYSIS

(1) The applicable warranty and disclosure framework

66. The Claimant's case was initially advanced on the basis that fraudulent misrepresentations were made, by Mr Oehler amongst others, during the due diligence calls and in the Disclosure Letter and/or equivalent passages in a draft Disclosure Letter. Those allegations were subsequently withdrawn, and the claim now rests solely on breach of warranty "*in respect of the fraud or wilful misconduct*" of one or more of the JM Executives when they signed off on the SPA.

67. It was not controversial that parties are free to agree whether and to what extent the warranties given in a sale contract may be qualified. Commonly this is done by means of a disclosure letter. A useful summary of the principles relating to contractual disclosure clauses was given by O'Farrell J in *Triumph Controls - UK Ltd v Primus International Holding Company*, [2019] EWHC 565 (TCC) at 335 as follows:

- "i) The commercial purpose of such disclosure clauses is to exonerate the seller from its breach of warranty by fairly disclosing the matters giving rise to the breach.*
- ii) The disclosure requirements of the contract in question must be construed applying the usual rules of contractual interpretation, by reference to the express words used, the relevant factual matrix and the above commercial purpose.*
- iii) The adequacy of disclosure must be considered by careful analysis of the contents of the disclosure letter, including any references in the disclosure letter to other sources of information, against the contractual requirements.*
- iv) A disclosure letter which purports to disclose specific matters merely by referring to other documents as a source of information will generally not be adequate to fairly disclose with sufficient detail the nature and scope of those matters. For that reason, disclosure by omission will rarely be adequate.*
- v) However, it is open to the parties to agree the form and extent of any disclosure that will be deemed to be adequate against the warranty. That could include an agreement that disclosure may be given by reference to documents other than the disclosure letter, such as by list or in a data room.*
- vi) Where disclosure is by reference to documents other than the disclosure letter, only matters that can be ascertained directly from such documents will be treated as disclosed."*

68. In this case, the relevant provisions of the SPA concerning warranties and disclosures are as follows:

“6. COMPLETION

...

6.7 *Notwithstanding any provision to the contrary in this Agreement:*

...

6.7.2 *in the event that the Purchaser enters into a W&I Insurance Policy prior to Completion:*

...

(B) *the Purchaser agrees with the Sellers that it will not be entitled to make, will not make, and waives any right it may have to make, any Business Warranty Claim..., except if and to the extent that any of the following applies:*

...

(2) *the Business Warranty Claim... arises or is increased directly as a result of the fraud of the Sellers and then only if and to the extent that such Business Warranty Claim... relates to the Sellers' fraud...*

7. SELLER WARRANTIES

Seller Warranties

7.1 *... the Sellers jointly and severally warrant to the Purchaser in the terms of the Seller Warranties.*

...

9.SELLER LIMITATIONS ON LIABILITY

Disclosure

9.1 *The Sellers shall not be liable in respect of a Business Warranty Claim ...: (i) relating to Business Warranties... made as at the date of this Agreement;...to the extent that the facts and circumstances giving rise to the Business Warranty Claim... are:*

9.1.1 *in the case of the Business Warranties ... made as at the date of this Agreement Disclosed in the Disclosure Letter or are treated as Disclosed pursuant to the terms of the Disclosure Letter*

...

9.1.3 *disclosed in the Data Room;*

9.1.4 *disclosed in the Q&A report; or*

9.1.5 *disclosed in [a variety of specified reports].*

...

9.27 *The limitations on the liability of the Sellers set out in this Clause [9] shall not apply in relation to a Seller to the extent that any claim under this Agreement is in respect of the fraud or wilful misconduct of any Seller.*

...

16. ENTIRE AGREEMENT

...

16.2 Each Party agrees on behalf of itself and its group undertakings that this Agreement is made on the basis that, no Party has been induced to enter into this Agreement by, nor has relied on, any statement, representation, warranty, assurance, covenant, indemnity, undertaking or commitment which is not expressly set out in this Agreement or an agreed form document.

...

SCHEDULE 19

DEFINITIONS AND INTERPRETATION

...

“Disclosed” means fairly disclosed with sufficient detail to allow a reasonable buyer to make an informed assessment of the nature and scope of the matter concerned;

...

“Disclosure Letter” means the letter dated the same date as this Agreement from the Seller to the Purchaser in relation to the Seller Warranties given as at the date of this Agreement.

...”

69. For ease of reference, I set out again here the Business Warranties in issue in this case:

“Business Warranty 1.4.2: Since the applicable Accounts Date ... the Businesses [i.e. the Health Business] have been carried on in the ordinary and usual course consistent with past practice and so as to maintain the Businesses as going concerns, without any ... material alteration to the nature, scope or manner of the Businesses.

Business Warranty 8.1.2: None of the Companies ... is currently renegotiating any material term of any Key Contract, which upon conclusion, would have an adverse or detrimental effect on the Businesses.”

70. These clearly have to be considered alongside the accompanying disclosures. In this regard, JM provided a Disclosure Letter (running to some 303 pages) which contained the following general provisions and specific disclosures in relation to these particular warranties:

“DISCLOSURE LETTER

A. INTRODUCTION

...

4. This letter, together with all information contained or referred to in it or deemed to be disclosed by it (including in any Appendix to it) constitutes the Disclosure Letter referred to in the Agreement.

5. The Business Warranties and the Tax Warranties contained in the Agreement are qualified by the disclosures contained in this letter provided that, in each case, the disclosures are Disclosed, and the Sellers will not be in breach of any such Business Warranties or Tax Warranties in respect of the matters Disclosed under this letter. The

disclosure of any matter hereby shall not imply any representation, warranty, undertaking, assurance, covenant, indemnity, guarantee or other commitment of any nature whatsoever not expressly given in the Agreement and none of the Business Warranties nor the Tax Warranties shall be extended in scope by any of the disclosures.

6. For the sake of convenience, each matter disclosed is listed against the paragraph number of the Business Warranties or Tax Warranties to which the disclosure is considered most likely to relate, but any disclosure, whether made generally or specifically, directly, or by reference to any document or other source, will apply to all of the Business Warranties and the Tax Warranties to which it is or may be relevant and any disclosure will not be limited in any way to the specific Business Warranty or Tax Warranty to which it refers or against which it is listed.

B GENERAL DISCLOSURES

...

7. Where brief particulars of a matter are set out or referred to in this letter or a document is referred to but not attached or a reference is made to a particular part only of such document, full particulars of the matter and full contents of the document are deemed to be disclosed as if set out in full in this letter.

C. SPECIFIC DISCLOSURES

Without limiting the generality of the disclosures referred to above, we make the following specific disclosures in relation to the Business Warranties.

...

1.4.2 Since the applicable Accounts Date, increased competition in the market for the Businesses' buprenorphine products has adversely impacted, and continues to adversely impact, the Businesses' market share in that market and the prices that the Businesses are able to charge their customers for these products. Pricing discussions in relation to this issue are ongoing with Alvogen. The projected financial impact of this issue cannot be quantified as at the date of this letter but the impact of this issue on the financial performance of the Businesses during the relevant periods is reflected in the Q1 Accounts and the September 2021 Accounts.

...

8.1.2 Since the applicable Accounts Date, increased competition in the market for the Businesses' buprenorphine products has adversely impacted, and continues to adversely impact, the Businesses' market share in that market and the prices that the Businesses are able to charge their customers for these products. Pricing discussions in relation to this issue are ongoing with Alvogen. The projected financial impact of this issue cannot be quantified as at the date of this letter but the impact of this issue on the financial performance of the Businesses during the relevant periods is reflected in the Q1 Accounts and the September 2021 Accounts.

...”

71. The upshot of these provisions is that in order for the Claimant to make good its claim, it must show that:

(a) There was a breach of warranty as at 16 December 2021;

- (b) The facts and circumstances giving rise to the claim for breach of warranty were not Disclosed or treated as Disclosed within the meaning of clause 9.1 of the SPA;
- (c) At least one of the JM Executives was guilty of fraud or wilful misconduct.

(2) Breach of warranty

(a) Ordinary and Usual Course Warranty

72. It was the Claimant's case that the price negotiations undertaken after notification of the Olesen Offer meant that the Health Business was not being carried on "*in the ordinary and usual course consistent with past practice and so as to maintain it as a going concern, without any ... material alteration to its nature, scope or manner*".
73. Valiantly as Mr Salzedo attempted to sustain this submission, I am unable to accept it. The warranty in terms looks at a particular period in the past, namely from the Accounts Date to the date of the SPA. It is not concerned with what the future might bring. As at the date of the SPA nothing had occurred which was out of the ordinary course. To the contrary, negotiations about pricing are entirely to be expected in the course of a long-term supply relationship. For a business like the Health Business, where price erosion is a feature of the commercial landscape, such negotiations were very much in the ordinary and usual course, and, moreover, consistent with past practice given that Alvogen had triggered the price match clause at least once before.
74. Nor can it sensibly be said that the price negotiations resulted in a change to the nature, scope or manner of the business. Note that it is the nature, scope and manner of the business which is the focus of this part of the warranty, not the nature, scope or manner of particular contracts. In my judgment, as a matter of construction, the clause is therefore directed at the actual manufacturing or other activities being carried out by the business. Thus a change from manufacturing pharmaceutical products to chartering out yachts would undoubtedly be a change in the nature of the business, while a change from selling own-manufactured products to supplying as a distributor or through a franchise operation would be a change in the manner of the business. Altering the geographical reach of the business would amount to a change in its scope.
75. I can see that an alteration to the contractual arrangements under which the business was operated might, in some circumstances, indicate a change to the manner in which the business was carried out. However, this could only be the case where any negotiations leading to the alteration had concluded and the change had actually occurred in the relevant period. In this case that had not happened. More importantly, this warranty is inapt to cover price negotiations which are contemplated by existing contractual arrangements and where such negotiations have taken place on a previous occasion.
76. In short, I am entirely satisfied that there was no breach of the Ordinary and Usual Course Warranty.

(b) Key Contracts Warranty

77. To set the scene, it is common ground that:
- (a) The Alvogen Supply Agreement was a "key contract" and the price under that contract was a material term.

- (b) The following was expressly disclosed to the Claimant prior to 16 December 2021:
- (i) There was increased market competition for Buprenorphine products which had adversely impacted and was continuing to adversely impact the Health Business' market share and pricing;
 - (ii) There was a price match clause in the Alvogen Supply Agreement which could be triggered annually by Alvogen and had been triggered over a year previously;
 - (iii) Pricing discussions with Alvogen were ongoing;
 - (iv) The projected financial impact of the issue could not yet be quantified although the impact to date was reflected in the Q1 and September 2021 accounts;
 - (v) Price erosion to around US\$12-US\$13/g had been built into the Health Business model.
- (c) The following was not expressly disclosed prior to signature of the SPA:
- (i) The Olesen Offer or any recent offer triggering the price match clause;
 - (ii) The fact that Alvogen had asked the Health Business to match the price in the Olesen Offer;
 - (iii) The tiering levels in the Olesen Offer;
 - (iv) The fact that the Olesen Offer had been verified as *bona fide* by 12 December 2021;
 - (v) The fact that the Health Business intended to retain Alvogen's business and match the Olesen Offer.

78. In the context of this case, breach of the Key Contracts Warranty requires the Claimant to show: first, that there were renegotiations as to a material term of a key contract and, secondly, that upon conclusion, those renegotiations would have an adverse or detrimental effect on the Health Business. I take each in turn.

Renegotiations

79. The Defendants argued that mere notification of a *bona fide* third party offer under the Alvogen Supply Agreement does not necessarily give rise to a renegotiation of anything. It simply triggers the price match clause which does not positively require any renegotiation, whether as to price or any other term. Moreover, as a matter of fact, there were no renegotiations with Alvogen until 20 December 2021, after the SPA had been signed.

80. Whilst admiring the elegance and apparent plausibility with which this argument was advanced, I regard it as pure sophistry. First and foremost, it is contradicted by the Defendants' express disclosure to the Claimant that the Health Business was in negotiations with Alvogen about the price of BHCL. The distinction which the Defendants tried to draw between (i) negotiations following Alvogen's first invocation of the price match clause in 2020 which (it was said) were still continuing and had not yet reached a conclusion and (ii)

anticipated separate negotiations following the Olesen Offer which were still in future strikes me as unreal.

81. Moreover, it founders on the rock of Mr Oehler's evidence. He was clear that he had referred to ongoing negotiations with Alvogen in the due diligence calls but explained that the previous attempt to invoke the price match clause by Alvogen in 2020 had effectively petered out before being brought to a grinding halt by notification of the Olesen Offer. Accordingly, any ongoing negotiations could only have related to the Olesen Offer.
82. Secondly, Alvogen had asked the Health Business to match the Olesen Offer and although the Health Business did not put forward any counteroffer until after verification, Alvogen had fired the opening shot and negotiations were thus inevitable. Even if the 2020 negotiations were still limping on, the request to match was – at the very least – essential context to those continuing negotiations.
83. Thirdly, the Health Business and Alvogen were admittedly in negotiation about the conditions for verification of the Olesen Offer which was an essential pre-requisite for any discussions about price. Moreover, in the light of the communications which took place between them in late October regarding a possible linkage between BHCL and Lisdex, and Mr Patel's email to Mr Oehler suggesting that they "*proposed start and pricing structure dates and just kick it off*", I struggle to see how the parties were not engaged in a renegotiation process.
84. Mr Rainey invited me to test the matter by asking what would have happened if the Health Business had done nothing at all in response to Alvogen's request to match the Olesen Offer. He submitted that Alvogen might well have walked away and gone to another supplier, in which case there would have been no negotiations or renegotiations at all. In my judgment, this submission loses touch with reality since it is fanciful to suppose that the Health Business would have simply put up the shutters in the face of a threat from its major customer for its flagship product to take its business elsewhere.
85. For these reasons, I am therefore satisfied that the invocation by Alvogen of the price match clause on 18 October 2021 in respect of the Olesen Offer marked the initiation of renegotiations within the meaning of the Key Contracts Warranty. Applying the usual canons of construction, I have no doubt that an ordinary person armed with all the background knowledge reasonably available to the parties at the date of the SPA would also understand the word "*renegotiation*" to cover this situation.

Adverse or detrimental effect

86. Alvogen was admittedly the Health Business's most significant customer for Buprenorphine and there were no readily available alternative markets.
87. The benchmark set by the warranty is that the renegotiations would have an adverse or detrimental effect on the business, not that they might do so. In principle, a reduction in the price charged to Alvogen would not necessarily have such an effect since there might be mitigations which could be introduced, such as costs savings or greater efficiencies. That said, I accept that a drop of nearly 50% from the price currently being charged to US\$8/g would have an adverse or detrimental effect unless offset by mitigating action. The evidence showed that at US\$8/g the Health Business would barely cover the production

costs of BHCL and that it would threaten the entire viability of the Annan site unless other production could be switched there to offset the loss of profit.

88. There was some debate after service of closing submissions as to whether the Claimant was attempting to advance a case that the Key Contracts Warranty was false on the basis of negotiations with Alvogen following a competing offer at a substantially lower - but unspecific - price. Ultimately, it was unclear to me whether Mr Salzedo was in fact putting his case in this way but, to the extent that he was, I agree with the Defendants that the Claimant had hitherto advanced its case squarely on the basis of the Olesen Offer and that this iteration of the argument was unpleaded and should not be permitted at this late stage.
89. Any adverse or detrimental effect therefore falls to be assessed by reference to the Olesen Offer. This requires consideration of whether it was sufficiently clear by 16 December 2021 that:
- (a) The negotiations with Alvogen would conclude at a level of around US\$8/g;
 - (b) The resultant price drop could not be offset by cost savings elsewhere or restructuring of the business, or other commercial steps such as tying the reduction into an improved deal for Lisdex.
90. I bear in mind that the Health Business and the Claimant were effectively antagonists. Commerce is notoriously red in tooth and claw and any self-respecting buyer would naturally want to secure the best possible deal and leap on any opportunity to drive the price down. The Claimant had already reduced its offer several times on the basis of the Health Business' continuing poor trading results in 2021 and there was nothing dishonest or unfair to my mind in the Defendants taking the view that they were not prepared to give it any further excuse to do so unless and until the position was clear. Clarification, however, required a two-stage investigation and consideration.
91. The first, essential, step was to confirm the Olesen Offer as genuine and *bona fide*. The price match clause was only triggered by a *bona fide* offer and until an offer had been verified as *bona fide*, it could not be said that the clause had actually been triggered. Mr Oehler's verification visit to Alvogen took place on 10 December 2021, but it was not until 13 December 2021 that it was formally confirmed within the Health Business that the offer was indeed *bona fide*. In my view, there was no obligation on the Defendants to disclose the existence of the Olesen Offer before then. Until then, the Olesen Offer consisted only of the untested assertion of one customer. Indeed, the initial response of the Health Management Team to the offer was one of scepticism and incredulity and it was only gradually that they began to appreciate that it might in fact be genuine. Accordingly, there was nothing to disclose until after verification had taken place and there can therefore be no criticism of the Defendants' failure to mention it in any of the due diligence calls.
92. The second stage was to try to assess the impact of the Olesen Offer. By 22 November 2021, the Health Business had tried unsuccessfully to negotiate a price higher than US\$8/g by offering a profit share on Lisdex. However, quantification of the ultimate impact would depend on the availability of cost-cutting measures. It was not in dispute that the Health Business could not cover its costs at Annan unless it retained the Alvogen business and it could just cover those costs at a price of US\$8/g. The Claimant accordingly submitted that the only realistic cost-cutting measure that could have been taken would have been to close

Annan, although even that required consideration of the further possibilities that BHCL could be manufactured elsewhere, or that other production could be shifted to Annan.

93. All this was, of course, part of the Plan B assessment which was presented to senior management on 13 December 2021. In the event, Plan B modelled two scenarios which had been devised by the Health Management Team. The first modelled the retention of Annan with the addition of other products, while the second modelled closure. They were obviously not the only two possibilities but they clearly reflected the Health Management Team's immediate reaction to the Olesen Offer. For the purposes of the present discussion, the important point is that both scenarios assumed a substantial drop in income from Buprenorphine.
94. Furthermore, by 16 December 2021, the precise tiering of the Olesen Offer had been disclosed to Mr LaFerle on 15 December 2021 and to Mr Stapel and Mr Shackley on 16 December 2021. As made clear by Slide 29 in the slides prepared for the HBR on 13 December 2021, the Health Management Team knew that the Health Business would have to match the Olesen Offer (or at least come close) if it wanted to retain Alvogen's business. This they intended to do, since there was no realistic alternative in the absence of other readily available customers, as had been recognised by Mr MacLeod in his email to Mr Stapel of 3 December 2021.
95. In these circumstances, it cannot realistically be denied that, as at 16 December 2021, the conclusion of negotiations with Alvogen would have an adverse and detrimental effect on the Health Business, irrespective of whether or not it could be finally quantified. I am therefore satisfied that there was a prima facie breach of the Key Contracts Warranty unless it was adequately qualified by disclosure.

(3) Clause 9.1: were the facts and circumstances giving rise to the claim Disclosed or to be treated as Disclosed?

(a) Disclosed/treated as Disclosed: in principle

96. The test laid down by the definition of Disclosure in the SPA is whether a matter has been fairly disclosed with sufficient detail to allow a reasonable buyer to make an informed assessment of the nature and scope of the matter concerned.
97. In this context, there was a debate before me concerning the relationship between clause 9.1 and paragraph B7 of the Disclosure Letter set out in paragraph 70 above. As a matter of textual construction, I tend to agree with Mr Rainey that the first step is to start with the Disclosure Letter and identify what matters are deemed to have been set out in full, before applying clause 9.1. However, it also seems to me that the court must avoid the danger of over-analysis. The critical question must always be whether the disclosure is fair and, as the authorities show, it may not be sufficiently fair simply to refer to a source of information: see *Kitcatt v MMS UK Holdings Ltd*, [2017] EWHC 675 (Comm); [2017] EWHC 786 (Comm) at [25].
98. The parties were also in dispute as to the relevance of extraneous statements, in this case what was said during the due diligence calls or in prior correspondence. The Claimant relied on *BIP Chemical Holdings Ltd v Blundell*, [2021] EWHC 2590 (CH.) in support of its submission that such statements could be relied upon in assessing the fairness of any disclosure. The Defendants argued forcefully that they were irrelevant and should be left

out of account on the basis that to do otherwise would not only be contrary to authority but was also at odds with the express non-reliance provisions contained in the SPA. Mr Rainey submitted that the purpose of the warranty and disclosure scheme was to confine the ambit of disclosure to defined sources. Accordingly, just as the Defendants could not assert that a matter was disclosed by other means, equally the Claimant could not rely on extraneous material to read down or qualify what had been disclosed.

99. In support of this submission, Mr Rainey relied on *Atten Bidco Ltd v Assassa*, [2025] EWHC 2347 (Comm) which contained contractual provisions very similar to those in the present case. Thus “*Disclosed*” was defined as “*fairly disclosed with sufficient detail to enable a reasonable buyer to identify the nature and scope of the matter disclosed in or under the Disclosure Letter or the Data Room (and Disclosure will be construed accordingly)*”. The contract also contained warranties that:

“Since the Accounts Date: ...the Company has conducted its business in the ordinary course and as a going concern”; and that

“In the 12 months ending with the Completion Date the business of the Company has not been nor, so far as the Sellers are aware, is likely to be materially affected in an adverse manner as a result of any one or more of the following things happening to it: 13.7.1 the loss of any of its significant customers or suppliers; or 13.7.2 a material change in the terms on which it trades with or is supplied by any of its significant customers or significant suppliers.”

100. HHJ Worster held that the definition of “*Disclosure*” focused on what had been disclosed in the Disclosure Letter/Data Room, not on what had not been disclosed. Thus, the relevant enquiry was whether there was sufficient detail within the four corners of what was in the Disclosure Letter/Data Room to enable a reasonable buyer to identify its nature and scope. The defendants in that case accordingly could not rely on previous discussions to amplify what was in the Disclosure Letter/Data Room. In *obiter* comments, he further opined that the defendants could not even rely on the discussions as context for what was disclosed in the Disclosure Letter/Data Room, although in fact it made no difference since nothing had been said which changed the position and the disclosure was still insufficient and unfair. In the course of his judgment, he made the telling point that if something which had been discussed previously was material to a proper understanding of what had been disclosed, there was nothing to stop the seller adding it expressly to the Disclosure Letter/Data Room.
101. I respectfully agree with HHJ Worster that it is not open to a party to rely on extraneous material to go beyond the terms of any contractual agreement (in this case the Disclosure Letter) in order to identify the material that has been Disclosed. By the same token, it is not open to either party to rely on what has been said or discussed previously in order to assess whether that material amounts to “fair” disclosure of the relevant facts and circumstances.
102. It might, of course, be said that if the touchstone is fairness, the court would be donning self-imposed blinkers if it simply ignored what the Claimant had previously been told about the expectation that negotiations with Alvogen would conclude at around US\$12-US\$13/g. The argument is that this would be the very antithesis of fairness. I could see considerable force in this submission if the definition of Disclosure had referred to “*the buyer*” (as in *BIP v Blundell*), i.e., specifically to Veranova. However, it does not. It refers instead to “*a reasonable buyer*”, thereby clearly imposing an objective test. That, it seems to me, indicates an intention to exclude reliance by either party on anything outside the ambit of

the Disclosure Letter in order to construe or qualify what is there said. Such an approach is entirely consistent with and supported by the non-reliance provisions on which the Defendants relied. Given the different definition in *BIP v Blundell* and the sheer extent of the non-disclosure in that case, I do not regard it as compelling authority to the contrary.

103. I see no injustice in this. If the Disclosure as so constrained is not fair for the reasonable buyer, then there is no need for the actual buyer to have resort to any extraneous material. On the other hand, if it is fair for the reasonable buyer, it is difficult to see why or on what basis the actual buyer should be entitled to complain given the contractual scheme to which it agreed. Conversely, if the seller is concerned that something said previously is necessary in order properly to interpret the Disclosure, then it should disclose it explicitly. It may not be under any formal obligation to provide additional material, but if failure to do so makes the actual disclosure unfair, then I do not see why the seller should be permitted to shelter behind the lack of any positive obligation in this regard.

104. In fact, the point is not live in this case since, for the reasons given below, I have concluded that there was not in any event fair disclosure of what I have held needed to be disclosed.

(b) Disclosed/treated as Disclosed: fair disclosure in fact

105. In order to forestall a claim for breach of warranty for the purposes of clause 9.1 of the SPA it is the facts and circumstances giving rise to the claim which must be disclosed. In the context of the Key Contracts Warranty, the relevant “claim” is the assertion that the Health Business was “*currently renegotiating [a] material term of [the Alvogen Supply Agreement] which, upon conclusion, would have an adverse or detrimental effect on the business*”. The facts and circumstances giving rise to that claim plainly extend beyond the renegotiations themselves and include the context giving rise to those negotiations.

106. As already stated, it is accepted by the Defendants that there was no specific reference during the due diligence calls to the Olesen Offer specifically or to a price of US\$8/g. This was a deliberate decision by the Health Management Team as they did not yet know whether the offer was genuine and *bona fide*. There was, however, a dispute between the parties as to whether the Claimant was positively told that the last attempt to trigger the price match clause had been made over a year previously or whether reference was made during any of the calls to a second, more recent, trigger by Alvogen.

107. The contemporaneous notes are somewhat ambiguous as to precisely what was said in this regard:

(a) Mr Oehler spoke to the matter during the 2 November due diligence call. However, none of the notes of the call say any more than that the price match clause had been triggered, no agreement had been reached and the Health Business and Alvogen were still negotiating.

(b) In relation to the 5 November due diligence call, I am satisfied that Mr Shackley spoke to his notes (which are reflected in Mr Fulco’s notes of the call). I thus find that he referred only to a wide range of pricing and the fact that the Health Business had modelled a price of US\$15/g with subsequent general price erosion which it was anticipated would be accelerated with a matching *bona fide* offer concluding at around US\$12-US\$13/g for 1200 kg. He also said that Alvogen had a contractual right to

trigger the price match clause annually and that there was therefore potential for dialogue in the second half of 2021. But there was no reference to a second trigger.

- (c) Of the six contemporaneous documents evidencing what was said by Mr Oehler on the 9 November due diligence call, only one expressly states that the Claimant was told that the price match clause had been “*last triggered*” over a year previously. The others merely refer to a *bona fide* offer having been put forward at that time.

108. Having listened to the evidence, I am satisfied on a balance of probabilities that Mr Oehler did not say expressly that the price match clause was “*last triggered*” over a year ago. He denied having said any such thing in his witness statement and it would have been untrue if he had. Rather, he said only that the price match clause had been triggered over a year ago, that there had been no resolution and that negotiations were ongoing. The gist of Mr Oehler’s evidence has already been set out in paragraph 81 above. He said that he would not have been talking about two-year old negotiations which were dead and that the only reason to mention the first trigger at all was to set the scene for the second trigger. He did not recall saying anything about pricing.
109. On the other hand, while Mr Oehler may subjectively have had in mind that what he said about negotiations referred to separate negotiations in relation to a second offer, I am equally satisfied that he did not refer expressly to a second trigger. There is no reason why he would have done, and every reason why he would not prior to the Olesen Offer being verified. Until then, the price match clause had not technically been triggered and what he said was therefore not inaccurate. However, it is entirely understandable that the Claimant and the other attendees on the call understood that there had only been one invocation of the price match clause to date.
110. Mr Rainey nonetheless argues that express disclosure of ongoing pricing negotiations following a trigger of the price match clause (whenever it may have occurred) was sufficient to cover the developing situation with Alvogen and the further invocation of the price match clause.
111. I disagree. I accept the point made by Mr Martin that knowledge of the Olesen Offer specifically would not have been the only way in which the Claimant could have made an informed decision about the transaction. However, it is one thing to refer to negotiations in the context of increased market competition and downward pressure on pricing in general and quite another to refer to negotiations around a price which represented a sudden 50% reduction with a direct impact on revenues and material consequences for the operation of the manufacturing sites. To say that the Defendants could not quantify the precise financial impact of the Olesen Offer until negotiations with Alvogen had concluded misses the point. If the Health Business matched the Olesen Offer, there would be an adverse and detrimental impact which was qualitatively different from both general price erosion due to increased competition and the impact of a reduction to US\$12-US\$13 about which the Claimant was aware.
112. Thus, even if the disclosure was arguably sufficient to allow the Claimant to make an informed assessment of “*the nature of the matter concerned*” within the meaning of the definition of “Disclosure”, it was not in my judgment sufficient for it to make an informed assessment of the “*scope of the matter concerned*”.

113. I do not ignore the fact that where information is received which requires clarification before its impact can be properly understood, the Defendants would have had a legitimate commercial concern about divulging information which might prove not to be correct, particularly where the information in question is an unverified assertion by a single customer. That would permit a prospective purchaser to have a free shot at reducing the price on grounds which might turn out to be wholly unfounded. Moreover, to keep changing position looks chaotic and unprofessional. As Mr MacLeod said in his oral evidence: they would not keep giving updates. They would disclose once, and it was for CorpDev to decide when.
114. All that said, I am satisfied that the position had become sufficiently clear by 16 December 2021 that fair disclosure in accordance with the contractual provisions required Disclosure of the following facts and circumstances:
- (a) Alvogen had invoked the price match clause on the basis of a third party offer at around US\$8/g which had been verified as *bona fide*; and
 - (b) The Health Business would need to match the offer at around that price in order to retain Alvogen's business.
115. As to (a), it is irrelevant that the Health Management Team did not know the exact tiering of the Olesen Offer until after signature of the SPA. The offer had been presented as an offer at a price point of around US\$8/g, and Mr Oehler had confirmed that it was *bona fide*. That was therefore the benchmark price against which negotiations would take place. As to (b), the *subjective* intention of the Health Management Team to match the Olesen Offer was relevant only to the Health Management Team's forward-looking assessment of the impact on the Health Business and, as such, it did not need to be disclosed in itself. By contrast, the relevant circumstance for disclosure was the *objective* fact that retention of Alvogen's business depended on matching the offer or at least coming close.
116. Nothing in the Disclosure Letter or Data Room amounted to fair disclosure of either of these matters. Nor do I accept that full particulars of the discussions with Alvogen were deemed to have been disclosed in the Disclosure Letter by virtue of paragraph B7. First, such a submission is inconsistent with the Defendants' case that negotiations with Alvogen about the Olesen Offer did not commence until 20 December 2021. Secondly, no reasonably buyer in the position of the Claimant would have understood that these discussions related to a potential immediate drop in price of around 50%. Thirdly, a general and unspecific reference to price negotiations cannot be regarded as brief particulars of Alvogen's operation of the price match clause on the basis of a specific offer at a specific price. Finally, there is considerable force in Mr Salzedo's submission that the deeming provisions of paragraph B7 cannot apply to particulars of which the buyer had no reason to suspect even existed and to which it had no access. Indeed, it would be extraordinary if paragraph B7 amounted to a contractual agreement that full particulars were nevertheless treated as being incorporated into the Disclosure Letter in this situation and very clear wording would be required to achieve this result. In my judgment the appropriate test should be whether the brief particulars provided enable a purchaser to say "*I want to see more about X*" where X is the matter which needs to be disclosed. If the purchaser is not even alerted to the possibility that there might even be an "X", then the deeming provisions cannot apply.

117. I do not criticise the Defendants' failure to provide any quantification of the financial impact of the Olesen Offer. I accept that the precise consequences could not be calculated and, in any event, if fair disclosure was given as I have outlined above it was for the Claimant itself to assess the impact that the offer might have on revenues and what, if any, knock-on effects there might be on the viability of Annan or any other site. Obviously something would need to be done, but exactly what would be a matter for the Claimant if the sale proceeded or for the JM Group if it did not.
118. Subject to the all-important question of fraud/wilful misconduct, the Claimant has therefore established that there was a breach of the Key Contracts Warranty. If I am wrong about the exclusion of extraneous material and it is permissible to take account of the fact that the Claimant was told during the due diligence calls that the Health Business anticipated negotiations with Alvogen to conclude at around US\$12-US\$13/g then the position is *a fortiori*.

(4) Fraud

119. This was the major battleground between the parties. There was no dispute that the Defendants had given the warranties in question by virtue of the JM Executives having signed and approved the SPA. I have now found that the Key Contracts Warranty was false and was not adequately qualified by disclosure. The question is therefore whether this arose from the fraud or wilful misconduct of one or more of the JM Executives.

(a) Test for fraud

120. There was no real dispute that the test for fraud or wilful misconduct in the context of a claim for breach of warranty in an SPA was substantially the same as the claim for deceit and therefore required that the defendant knew that the warranties breached were false; or gave the warranties without belief in their truth; or was reckless as to whether they were true or false: see *Arani v Cordic Group Ltd*, [2023] EWHC 95 (Comm) where this was common ground.
121. However, knowledge that a warranty is false requires some unpacking, particularly in a corporate context. Guidance on the point is provided in *Raffeyisen Zentralbank Österreich AG v The Royal Bank of Scotland*, [2010] EWHC 1392 (Comm) at [338]-[340] where it was held by Christopher Clarke J (as he then was) that in the context of a fraudulent misrepresentation, it is necessary to prove that the defendant:
- (a) knew he was making the statement which he was found to have made, in other words, knew that this was what he was saying and had not understood it in some other sense;
 - (b) had conscious knowledge of the facts alleged to render the statement false, in other words, knew that he was not telling the truth.
122. It is in this sense that the reference in some of the cases to "*wickedness and dishonesty*" is to be understood: see *Armstrong v Strain*, [1951] 1 TLR 856 at 871 *per* Devlin J. To that extent, the concession in *Arani* may have gone too far in so far as it suggests that there is an additional requirement to show that the defendant was dishonest by the standards of ordinary reasonable people with the same knowledge. Nonetheless, I agree with Mr Salzedo that if conscious knowledge in the *Raffeyisen* sense is established then it would, almost inevitably, be dishonest by the standards of ordinary reasonable people.

123. The Claimant advanced a number of alternative cases as to how the test fell to be applied in the corporate context of this case. I deal with each in turn.

Claimant's primary case

124. The Claimant's primary case was that, once it is established that the warranties were false, the only further question is whether the Defendants knew the facts that made them false and this will be the case if any of the JM Executives knew such facts.

125. I have no hesitation in rejecting this submission. The analysis in paragraph 121 above necessarily means that the defendant must not only know the facts, but must also know or be reckless as to (i) the terms of the warranties and (ii) their falsity. If not, then there cannot be said to be conscious dishonesty.

126. The Claimant has only pleaded a case of fraud, not wilful misconduct. However, the reference to wilful misconduct in clause 9.27 is instructive since "wilful misconduct" refers to conduct by a person who knows that he is committing and intends to commit a breach of duty or is reckless as to the same: see *National Semiconductors (UK) Ltd v UPS Ltd*, [1996] 2 Lloyd's Rep. 212 at 214 *per* Longmore J (as he then was) and *De Beers UK Ltd v Atos Origin IT Services UK Ltd*, [2010] EWHC 3276 (TCC) at [206] *per* Edwards-Stuart J. This necessarily implies that the conduct and the culpable state of mind must co-exist in the same person, since a person cannot intend to commit a breach of duty or be reckless as to the breach unless he is the person carrying out the relevant acts and omissions (or, I would add, is aware that another person is carrying out the acts and omissions and adopts or endorses them).

127. Accordingly, I fail to see how deliberate conduct by one employee can be coupled with the state of mind of someone who is not themselves doing anything. Such a situation cannot in my judgment sensibly be regarded as wilful misconduct, even if the conduct and the state of mind can be separately and independently attributed to a corporate employer as a matter of corporate attribution. That being the case, it seems to me that this gives colour and meaning to the concept of "fraud" in the SPA.

128. On the basis that conscious dishonesty is therefore required, the next question is how this is to be established in a corporate context. It was common ground that the state of mind of each of the JM Executives was attributable to the Defendants on ordinary principles of corporate attribution. However, the contentious issue was the extent to which it is permissible in a corporate context to aggregate knowledge of facts and knowledge of falsity in the corporate entity where such knowledge is held by different individuals.

129. Mr Rainey relied on *Armstrong v Strain (supra)* in support of the proposition that it is not possible to add an innocent state of mind to an innocent state of mind to obtain a dishonest state of mind. Thus, he submits, dishonesty is not established where one person knows the relevant facts but does not know that those facts render the warranty untrue and another person knows the terms of the warranty but not the facts that render it false.

130. This is a principle of long standing which has been applied repeatedly. It is sufficient in this context to refer to two cases. The first is *Greenridge Luton One Ltd v Kempton Investments Ltd*, [2016] EWHC 91 (Ch) at [77]-[78] where Newey J (as he then was) said the following with reference to *Armstrong v Strain*:

“[T]he law does not recognise any conception of ‘composite fraud’, i.e. an action in fraud will not lie where a statement is made by an agent who honestly believes it to be true, merely because the principal, or another agent, knew the statement to be false” (Chitty on Contracts, 32nd ed., at paragraph 7-053).”

131. The second is *Stanford International Bank Ltd v HSBC Bank plc*, [2021] EWCA Civ. 535 at [47] *per* Sir Geoffrey Vos MR giving the unanimous judgment of the Court of Appeal:

“As the cases show, if dishonesty and blind-eye knowledge is to be alleged against corporations, large or small, it has to be evidenced by the dishonesty of one or more natural persons. The rules that have been laid down as to what amounts to dishonesty for the purposes of dishonest assistance cannot be circumvented. Of course, the court must look at all the facts and all the actual and constructive knowledge of those involved in representing HSBC, but one cannot avoid the subjective dishonesty stage of the test in order to proceed directly to the objectively dishonest stage as Mr Fenwick seeks to do. The subjective dishonesty that needs to be established, after consideration of all the facts, must either be the dishonesty of a person within the corporation or the blind-eye knowledge of such a person. The latter requires, as I have said and the judge held, that person to have a targeted suspicion (here that there was a Ponzi fraud) and then to decide not to ask questions that might lead to its discovery. The use of the epithet ‘recklessly dishonest’ does not help, because the substantive allegation is simply that HSBC’s management allowed HSBC to be run in such a way that ‘nobody ever got to the point of realising that SIB was a massive Ponzi scheme’. That is negligence not dishonesty.”

132. The Defendants submitted that the Claimant’s primary case was completely at odds with this principle since it ignored the need to find at least one person with a dishonest state of mind. In response, Mr Salzedo relied heavily on the decision of Moore-Bick J (as he then was) in *MAN Nutzfahrzeuge AG v Freightliner Ltd*, [2005] EWHC 2347 (Comm). In that case, the judge identified three distinct sets of rules: (i) those relating to the imposition of vicarious liability; (ii) those governing the attribution of an agent’s knowledge to a principal; and (iii) those governing the attribution of knowledge to a company. It is common ground that vicarious liability is not in issue in this case as it is not alleged that any of the JM Executives gave the warranties in a personal capacity. Nor is this a case of agency. We are therefore only concerned with the rules of corporate attribution and, as Moore-Bick J pointed out, this is not so much a question of attribution as one of identifying the natural person whose knowledge is to be treated as that of the company.

133. However, I do not understand anything in *MAN v Freightliner* to absolve the Claimant from the need to prove conscious dishonesty by at least one natural person whose state of mind is attributable to JM and the following passages from the judgment at [156]-[158] make this clear:

*“It is obvious that, because it is a fictitious person, a company can only act through one or more natural persons and therefore, as the decisions in *El Ajou v Dollar Land Holdings Plc* and the *Meridian* case show, in order to determine whether the company is liable in respect of any particular act or omission it is necessary to identify the natural person who represented the company for that particular purpose and who can therefore be regarded as embodying for that purpose what is sometimes called its controlling mind and will. When seeking to identify the person who is to count as the company for the*

purposes of a substantive rule of law it is necessary to consider the nature and policy of that rule. The essence of fraudulent misrepresentation, so far as is relevant for this case, is making a statement that is known to be untrue intending that the person to whom it is made will rely on it. Liability therefore depends on the conjunction of a false statement and a dishonest state of mind. In a case where it is said that a company has made a fraudulent misrepresentation the first step must be to see whether a false statement has been made by someone who is authorised to speak on the company's behalf. Once that has been established the starting point in deciding whether the company acted dishonestly must be to enquire into the state of mind of the person who made the statement. However, if that person was unaware that the statement was false, it may be necessary to enquire into the state of mind of other persons who directed him to make it or who allowed it to be made.

...

Entering into an entire contract of the kind represented by the Share Purchase Agreement in this case represents a single indivisible act of will, despite the fact that the contract itself may contain many different provisions. Therefore, although the agreement in this case contains many different representations, they were all made at the same time by the same legal person at the direction of the same natural person or persons. In these circumstances although several persons may together be regarded as representing the company's controlling mind and will for the purpose of entering into the contract (for example, the various members of the board of directors), it is not possible, in my view, for different persons to represent its controlling mind and will in respect of different parts of that contract. The fact that the state of knowledge of those who represent the company for the purpose of a complex transaction of this kind may be different does not present any difficulties, however, since the knowledge of all those who can be regarded as representing the company will be attributed to it in relation to each part of the contract. In the present case I am prepared to assume that Mr. Peabody, Mr. Stewart Smith, Mr. Burke and Mr. Bryant as directors of the company all counted as Western Star for the purposes of the Share Purchase Agreement and that the knowledge of each of them is to be regarded as the knowledge of Western Star for the purposes of each of the representations made in it. However, that does not help MN since it was accepted that none of them was aware of what Mr. Ellis had been doing."

134. The entire judgment was thus premised on the need to find a dishonest state of mind in some particular individual. On the facts, there was no conscious dishonesty by anyone whose state of mind was attributable to the company. The question of aggregating the states of mind of different individuals to arrive at an overall dishonest corporate state of mind accordingly did not arise. Nonetheless, the terms of the judgment indicate quite clearly that there is no relevant distinction to be drawn between a corporate and a non-corporate context. It is still necessary to find a dishonest state of mind in an individual whose state of mind is either attributable to the defendant on agency principles, or is treated as being that of the defendant by virtue of corporate attribution. If it were otherwise, I agree with Mr Rainey that it would significantly erode the very real distinction between fraud, negligence and innocence.

135. I note the following comment in the judgment of Singleton LJ in *Armstrong v Strain* (*supra*) which was referred to in *Greenridge* (*supra*):

“Difficulties may arise in a claim against a company which can only speak or act through its agents or officers, but if an officer of a company writes and represents that which is untrue when many other officers of the company know the true facts, it may well be found that he made the representation without belief in its truth, or that he made it recklessly, careless whether it was true or false. That must depend on the evidence.”

136. This does not seem to me to alter the position. Singleton LJ was not there saying that the court can find deceit when the maker of the statement does not know the true facts but another person does. Rather he was saying that the evidence in the case may in those circumstances still support a finding of recklessness or absence of belief on the part of the maker. Either way, it is the state of mind of the maker of the statement which is important.

137. The Claimant further relied on *Marme Inversiones 2007 SL v Natwest Markets Plc*, [2019] EWHC 366 (Comm) at [259]-[260] where Picken J commented *obiter* that:

“Whilst I acknowledge that, as a general proposition, it is necessary for there to be both knowledge and intention in one person, and that it certainly ought never to be possible to aggregate as between two innocent agents to arrive at a finding that there has been fraud, it nonetheless does seem to me to be appropriate that, if one agent (or employee) knows that a representation is being made, or should be treated as knowing that a representation is being made even if the agent does not actually know this to be the case, and knows that that representation is false but does nothing to make that known, then the principal (or employer) is liable in fraud.”

138. Again, however, this passage in fact affirms the principle that it is not possible to aggregate as between two innocent agents to arrive at a finding of fraud but merely contemplates that a situation may arise where the person with the dishonest state of mind effectively adopts or authorises the statement made by another so as to arrive at a coincidence between the making of the statement and the culpable mindset. I regard that as an entirely orthodox approach and the matter is put beyond doubt by Picken J’s reference to the judgment of Males J (as he then was) in *UBS AG v Kommunale Wasserwerke Leipzig GmbH*, [2014] EWHC 3615. In that case, Males J accepted that there would be no corporate fraudulent state of mind where one representative made a statement believing it to be true even though another representative *“not responsible for the representation and not being aware of its being made knows facts making it untrue.”* (Emphasis added.)

139. Finally, the Claimant relied on the very recent decision of HHJ Pelling in *Synthos Spolka Akcyjna v Ineos Industries Holdings Ltd*, [2026] EWHC 83 (Comm). That was a case of an SPA which contained very similar provisions to those in issue here excluding claims for breach of warranty save in the case of fraud. Critically, however, it also contained an express clause (clause 9.5) which contractually deemed the actual knowledge of certain individuals to be that of the company. The judge held as a matter of construction that this clause permitted the knowledge of those individuals to be aggregated and treated compendiously as the knowledge of the company.

140. The judge in fact held in favour of the claimant on the basis of a warranty which he held to constitute an unqualified contractual obligation breach of which did not depend on knowledge. However, he went on to consider, *obiter*, the position in relation to a different warranty which is the relevant provision for present purposes. This was (in essence) a warranty that the target company was not involved in any proceedings and that *“so far as the Seller is aware”* there were no circumstances likely to give rise to any such proceedings.

141. As to this, HHJ Pelling expressed the view that the only issue to be determined was whether the company did or did not have knowledge of the relevant circumstances and the likelihood that those circumstances would give rise to proceedings. He further held that by virtue of clause 9.5 the state of mind of different individuals could be aggregated as to both facts and likelihood as a matter of contractual agreement. Having therefore held as a matter of construction that it was not necessary to identify any single individual who had knowledge of the facts and likelihood, he dismissed an argument based on *Armstrong v Strain (supra)* on the grounds that it was irrelevant to the only question which he had to determine, which was the attribution of knowledge pursuant to clause 9.5. By the same token, however, his judgment has nothing to say about aggregation where (as here) there is no clause equivalent to clause 9.5.
142. In any event, a crucial distinction between the present case and *Synthos* is that the latter concerned a warranty that the seller did *not* possess certain knowledge. The judge held that if in fact it *did* have that knowledge, then it must necessarily have been fraudulent (or at the very least reckless) and there was no need to show any further dishonesty. In other words, there was no distinction to be drawn between falsity of the warranty and dishonesty because the one determined the other. Clause 9.5 therefore had the practical effect of permitting aggregation in relation to both knowledge of the facts and dishonesty.
143. I do not express any opinion on whether the judge was correct to elide so completely the conceptually distinct concepts of knowledge of facts and dishonesty, and I note that he did not refer to *Armstrong v Strain* in this context. I can see arguments both ways. However, the important point is that the warranty with which this case is concerned is not a warranty as to the Defendants' knowledge (as was the case in *Synthos*), nor did the SPA contain a provision equivalent to clause 9.5. In my judgment, the decision of HHJ Pelling (which was in any event *obiter*) does not dissuade me from the view that the principles in *Armstrong v Strain* remain good law and that, in so far as it departs from these principles, the Claimant's primary case is wrong in law.
144. I therefore reject the argument that it is unnecessary to prove that any of the JM Executives was actually aware of the content of the warranty breached or knew that it was false.

Claimant's first alternative case

145. The first of the Claimant's alternative cases was that it was sufficient to prove that at least one of the JM Executives knew or was reckless about the falsity of the warranty, although it was not necessary to prove that s/he was consciously aware of the exact text of the warranty or of the Disclosure Letter.
146. I am prepared to go a substantial way with the Claimant along this path. In my judgment, in order to succeed, the Claimant must show the following.
147. First, it must establish that one or more of the JM Executives knew the facts which made the warranty (as qualified by any disclosure) false. This is a binary question: a person knows something or they do not. It is difficult conceptually to see how you can be reckless as to knowledge other, perhaps, than in the sense of blind eye knowledge which is not alleged in this case.

148. Secondly, that JM Executive must have sufficient knowledge of the terms of the warranty in question. I agree with the Claimant that knowledge of the precise terms is not required in every case. Indeed, I do not understand this to be disputed by the Defendants. They agree that there is no bright line and that the question is context-specific. To my mind, the best formulation is that the individual must know the nature and terms of the warranty in sufficient detail to be able reasonably to appreciate that the knowledge which s/he has is relevant to the warranty. Alternatively, s/he must be reckless as to the terms of the warranty in the sense of not caring what warranties are given.
149. This follows from what was said in *Raffeisen (supra)* about the necessity for showing that the defendant knew or was at least completely reckless as to whether he was making the statement alleged to be false. For example, if the defendant simply did not care what warranties were being offered or whether they were true or false (what was referred to in *Stanford (supra)* at [45] as “*institutional dishonesty*”), then it would be open to the court to find recklessness as to both the existence of the warranty and its falsity. I believe that this is what Picken J had in mind when making the comments set out above in *Marme (supra)*.
150. This is a high hurdle since it is inherently unlikely that the senior executives of a company would be reckless in this sense. On the contrary, it is much more likely that they would be concerned that the warranties given should be correct (and/or appropriately qualified) and would have put in place a proper process to ensure that this was the case. If so, then their fault, if fault there be, is more likely to be one of negligence than recklessness. However, absent complete recklessness of this nature, I consider that there must be sufficient knowledge of the terms of the warranty for the defendant reasonably to appreciate the significance of his or her own knowledge of the facts and circumstances to that warranty. I can see nothing in the contractual structure which, as a matter of construction, leads to any different conclusion.
151. Thirdly, the Claimant must show that the Executive in question knew or was reckless as to whether the warranty was falsified by that knowledge.
152. With these qualifications, I accept the Claimant’s first alternative formulation as the appropriate test.

Claimant’s second alternative case

153. The second alternative put forward by the Claimants was that the JM Executives must have had actual knowledge of the text of the warranties and the facts which made them false and also known or been reckless as to whether the warranties were false.
154. If made out on the facts, I accept that this would be sufficient (as indeed did Mr Rainey, subject to the Claimant’s third alternative case below). Since, however, I have accepted the Claimant’s first alternative case, the second alternative no longer arises.

Claimant’s third alternative case

155. The third alternative case arose out of a debate between the parties as to whether it was necessary for the Claimant additionally to show that the Defendants intended it to be induced by the false warranty to enter into the SPA. The Claimant denied that there was any separate requirement as to reliance/inducement or intention, maintaining that it was

irrelevant in the context of a claim for breach of warranty. For their part, the Defendants recognised that it might not add much if all other ingredients of deceit were established, but nonetheless submitted that, as a matter of principle, the concept of dishonesty or trickery required an intention to induce reliance.

156. I am not myself persuaded that there is any such additional requirement for much the same reasons as given by Picken J (*obiter*) in *Marme (supra)* at [254]. But it is unnecessary for me to decide the point since (i) as I find below, the claim fails in any event; and (ii) there is considerable force in the Claimant's submission that the enquiry would be artificial since the warranties were included in the SPA and were obviously therefore intended to be relied upon such that I could fairly infer an intention to induce reliance if fraud were to be established.

157. Had it been necessary to do so, I would accordingly have found that the Claimant did rely on the warranty and that the Defendants intended it to do so.

(b) Application to the facts

158. It is common ground that Mr Oxley signed the SPA and that the other JM Executives were present at the signing and so must be treated as having adopted the warranties on behalf of the Defendants.

159. On the basis of my conclusions so far, a successful claim further requires the Claimant to establish the following:

(a) One or more of the JM Executives knew of matters which in fact made the Key Contracts Warranty (as qualified by any disclosure) false, namely that:

(i) Alvogen had invoked the price match clause on the basis of a third party offer at around US\$8/g which had been verified as *bona fide*;

(ii) The Health Business would need to match the offer at around that price in order to retain Alvogen's business;

(b) Such JM Executive either (i) knew the nature and terms of the Key Contracts Warranty in sufficient detail reasonably to appreciate that his or her knowledge was relevant, or (ii) was reckless as to what warranties were given;

(c) Such JM Executive also knew that, or was reckless as to whether, the Key Contracts Warranty was falsified by his or her knowledge.

160. I start this investigation with the following prefatory comments.

161. JM was a multi-national, multi-billion pound conglomerate. The sale of the Health Business was a complex matter requiring the corporate reorganisation of three separate entities and careful structuring. It involved thousands of pages of due diligence materials and nearly 100 separate transaction documents. Unsurprisingly, the process could not be handled by a single individual, or even a single team, and involved multiple professional advisors to guide and oversee different parts of the process, in addition to the JM Group's own CorpDev and legal departments. These included Citi (financial), HSF (legal), BCG (commercial VDD) and KPMG (financial VDD).

162. Mr MacLeod and Mr Oxley were extremely senior executives who were in charge of running the entire JM Group. It is unrealistic to suppose that either of them was involved in the day-to-day running of the Health Business, which was the smallest part of the JM portfolio and not strategically important to the Group. Its annual revenues were described by Mr Rainey as a “*rounding error*” in the context of overall Group revenues and, even allowing for forensic hyperbole, this was not altogether an inaccurate description. Day-to-day handling of the business was the province of the Health Management Team, who would have known most about what was going on. It is true that Mr MacLeod had regular catch-up meetings with Mr Stapel and that Mr Oxley had regular meetings with the CFOs for each business sector (i.e., Mr Wesztergom for the Health Business). However, such meetings were relatively high-level. Mr MacLeod’s role as CEO was only to offer strategic guidance and he would only have needed to know sufficient details for that purpose and no more. Likewise, the HBR meetings were necessarily at a fairly high level.
163. Neither Mr MacLeod nor Mr Oxley was involved in the details of the sale, let alone the handling of the negotiations or the procedure for the transaction. Both had many other projects on their plate at the time, not least of which was managing the Group’s *volte face* on the Battery Materials business which carried huge reputational risks. Mr Oxley’s evidence was that this was his primary focus at the time and I am satisfied that the sale of the Health Business would not have been at the top of either man’s list of priorities.
164. Ms Vawda and Mr Lyons were obviously in a different position as they were specifically charged with leading the sale process. However, they also (in particular Ms Vawda) had multiple other important projects in progress at the same time and the sale to the Claimant was not their sole focus any more than it was that of Mr MacLeod or Mr Oxley. In any event, while CorpDev may have been leading the project for the Group, the nature and complexity of the process necessarily meant that different teams were handling different aspects. The role of Ms Vawda and Mr Lyons was therefore primarily one of reviewing and co-ordinating the output from each team and providing strategic oversight. They would not have had the time and cannot have been expected to get into the granular detail of what each team was doing.
165. Accepting the proposition that the JM Executives did not know any more than the Health Management Team about the facts which needed to be disclosed, I regard it as wholly unrealistic to expect any of them to have done more than give reasonably diligent consideration, in the light of such knowledge as each of them had, to material which was put in front of them or which was raised for their attention from time to time. If they should reasonably have appreciated that that material was contrary to something they had previously been told, they can legitimately have been expected to query it. Otherwise, in my judgment they were entitled to rely on the proper operation of the process which had been put in place and could not reasonably have been expected to go behind it. It follows that if a particular query was raised and an answer received from the appropriate sources best-placed to provide that answer, they were entitled to rely on it unless they should reasonably have suspected that it was untrue.
166. The warranty and disclosure process was run by HSF with the involvement of JM’s internal lawyers. JM waived privilege for the purposes of this case over all relevant communications with its in-house counsel and HSF regarding that process, which included specific and targeted requests to the Health Management Team to provide information and to comment on the disclosures being made. There was no suggestion that the process itself was flawed or inadequate in any way and it is to be noted that no suggestion of fraud is

advanced against any of the internal or external lawyers involved or (now) against any members of the Health Management Team. The JM Executives knew that this process was in place and could see from the correspondence to which each of them was variously copied that HSF were seeking information directly from the people best-placed to provide it.

167. It is also worth pointing out that the Defendants made no attempt to suppress the disclosure of negative information altogether. As will be clear from the Factual Synopsis, the Health Business sustained dismal trading results throughout the entirety of 2021 and the decline in Buprenorphine sales was disclosed at regular intervals along with negative information about other areas of the business. The Disclosure Letter alone extended to 22 pages of single-spaced type with a further 281-page schedule.
168. A further pertinent point is that none of the JM Executives had any motive to act fraudulently and the Claimant was unable to identify quite what any of them stood to gain from the sale proceeding rather than falling through. Mr MacLeod had already announced his retirement and I reject the suggestion put to both him and Mr Oxley that they were motivated by the impact on their respective bonuses if the sale did not proceed. This was explored in cross-examination but the evidence was that it would only have affected the discretionary element of any bonus payment and that the sale price had fallen so far below initial expectations already that it was unclear whether a failure to complete the transaction would have made any difference anyway. While it might have been embarrassing for the JM Group if the sale had fallen through, this was hardly a significant factor when set against the Battery Materials disposal which was far more reputationally damaging.
169. Moreover, none of the JM Executives was particularly enthusiastic about the sale. Mr MacLeod vacillated about selling but ultimately thought on balance that it would be better to proceed. Mr Oxley was uncomfortable with the price (which he described as “*terrible*”) but ultimately concluded in favour of sale because the Health Business was non-core and not a good strategic fit within the Group and he thought it might do better with different owners. Ms Vawda thought that the Health Business was worth much more than the Claimant was offering and that it would be better to retain it, albeit that it would need restructuring. She advised against sale, but it was not her decision. Mr Lyons’ view was also finely balanced, but he also eventually concluded that it was a deal that they could live with in the circumstances.
170. Given the insignificant proportion of the overall Group revenues represented by the Health Business, the suggestion that the JM Executives were desperate to avoid the continuing losses that would be incurred by retaining and restructuring it does not, to my mind, carry great weight as an incentive to fraud. The JM Executives may well all have wanted to bring an end to what had already become a protracted sale process, but not at the expense of their personal and corporate reputations.
171. If anything, the disincentives to fraud would have been far more powerful than the incentives, such as they were. Thus, if fraud there was, it would have been a peculiarly obtuse type of fraud where:
- (a) The matters to be disclosed relating to the Olesen Offer could not have been suppressed without suborning the entire Health Management Team, since the Health Management Team were collectively and individually in direct communication with HSF and in a position to divulge the full picture. However, this is not suggested and, indeed, it is no part of the Claimant’s case that the members of the Health Management Team were

given instructions to say that they had nothing further to add to the Buprenorphine disclosure. Rather the suggestion seems to be that they were somehow given the impression with a nod and a wink that they should keep quiet. This is an extremely flimsy basis for fraud.

- (b) More importantly, the Claimant would inevitably have discovered the true position as soon as it took over the business since the Health Management Team transferred along with the business and Alvogen remained a customer. The JM Executives have been accused of being wilfully dishonest and giving untrue evidence but they have not been charged with rank stupidity. Yet this was an alleged fraud which was bound to have come to light and to have had serious repercussions for the personal reputations and careers of some very senior people with a hitherto unblemished record.

172. With these preliminary remarks, I turn to consider the position of each JM Executive.

Mr MacLeod

Knowledge of the facts

173. It was not controversial that Mr MacLeod knew the relevant facts. He knew about the Olesen Offer, the fact that it had been verified as *bona fide* and the potential consequences of the offer, namely that the Health Business needed to match the offer or come close in order to retain Alvogen's business.

Knowledge of the warranty

174. As already stated, Mr MacLeod was not personally involved in the warranty and disclosure process. He knew that the SPA would contain warranties of some description but, as CEO of the entire Group, he could not have been expected to study them in detail and would not have done so. There was, however, a dispute as to whether Mr MacLeod and Mr Oxley were taken through the transaction documents at the signing meeting – in particular the disclosures and warranties – and, if so, which and in what level of detail.

175. As to this, the evidence was inconclusive.

- (a) Mr MacLeod could not remember what, if any, documents were gone through. He recalled the meeting taking no more than 15 minutes so that they certainly could not have looked at all the documents in detail. His assumption was that they were taken through the key parts of the SPA and the key warranties and he confirmed that he would have looked at whatever he was shown. He remembered looking at some warranties, but not the Ordinary and Usual Course Warranty or the Key Contracts Warranty and he did not recall going through the Disclosure Letter. He said that they would normally get a report from the people who had done the negotiating who would identify any points to focus on.
- (b) Mr Oxley likewise could not recall being taken through any specific detail or receiving any briefing on the warranties.
- (c) Ms Vawda could not remember whether she and Mr Martin went through the warranties with Mr MacLeod and Mr Oxley but thought that, if they did, the discussion would have been led by Mr Martin as the lawyer present. She said that any briefing would have been high-level and focused on the risks but she agreed that if they highlighted

any specific warranties at all, they would have included the Ordinary and Usual Course Warranty and the Key Contracts Warranty as these affected the business as a whole and not just a particular part of it.

(d) Mr Martin thought it more likely that any discussion was about the transaction as a whole, in the sense of the structure of the deal and the areas of risk. He regarded it as unlikely that they would have covered any individual warranties or disclosures.

(e) Mr Lyons had no recollection of taking Mr MacLeod through the key warranties.

176. Given this state of the evidence, I am not persuaded on a balance of probabilities that Mr MacLeod and Mr Oxley were given any specific briefing or report on the warranties in issue in this case. While, therefore, Mr MacLeod accepted that he would have appreciated that the Key Contracts Warranty was falsified by the Olesen Offer unless there was disclosure, in the absence of being referred to it, I am not satisfied on a balance of probabilities that he had sufficient knowledge of its terms to appreciate that the Olesen Offer was relevant.

Falsity

177. The question here is whether Mr MacLeod knew or was reckless as to whether the Key Contracts Warranty was false at the time the SPA was signed. Hindsight is a wonderful thing. With the luxury of being able to focus specifically on the Olesen Offer, it is comparatively easy for Mr MacLeod to say now that it should have been disclosed and that he anticipated it would be disclosed. However, as far as he was concerned at the time, he was aware that the Health Management Team was alive to the issue – they being the ones who had raised it with him in the first place. He also knew that there was a proper disclosure process in place headed up by a highly-respected firm of external lawyers and CorpDev. He was not directly involved in that process and trusted his team to do their job and follow that process properly and correctly. In my view, he was entitled to assume that this would be the case.

178. After all, it was only the Health Management Team who had direct, first-hand knowledge of the Olesen Offer and the discussions with Alvogen. Anything Mr MacLeod knew was only second-hand via the Health Management Team. Obviously, therefore, the latter was best-placed to consider what disclosure was appropriate. I accept that Mr MacLeod relied on CorpDev to make him aware of any material points relating to the sale. However, CorpDev, likewise, could only operate on the basis of what they actually knew. They would not have had first-hand knowledge any more than Mr MacLeod did and could only take reasonable and proper steps to secure input from those who did.

179. I accept Mr MacLeod's evidence that he did not check the disclosures himself but I do not regard him as having been under any absolute personal duty to do so or to ensure that the contents of the transaction documents were appropriate, as was put to him in cross-examination. He very fairly accepted that this was something that with hindsight he regretted: "... I can only tell you what I actually did and what I do recall and I don't think I -- well, I don't recall particularly asking the question: did you disclose? Maybe I should have done in retrospect, but I don't recall doing that." On that basis, it might be possible to say that he was negligent. But this claim is being advanced on the basis of fraud, not negligence and, as I have held above, it is necessary to show that Mr MacLeod had conscious knowledge at the date of the SPA. A negligent failure to check is not the same

as conscious awareness that a warranty is false and that disclosure is inadequate: see *The Kriti Palm*, [2006] EWCA Civ. 1601 at [257] *per Rix LJ*:

“As for the element of dishonesty, the leading cases are replete with statements of its vital importance and of warnings against watering down this ingredient into something akin to negligence, however gross. The standard direction is still that of Lord Herschell in Derry v Peek (1889) 14 App Cas 337 at 374, [1886–90] All ER Rep 1 at 22:

‘First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.’

In effect, recklessness is a species of dishonest knowledge, for in both cases there is an absence of belief in truth. It is for that reason that there is ‘proof of fraud’ in the cases of both knowledge and recklessness. This was stressed by Bowen LJ in Angus v Clifford [1891] 2 Ch 449 at 471 where he said:

‘Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity of which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind is to be drawn—evidence which consists in a great many cases of gross want of caution—with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence.’ ...“

180. Nor, in my judgment, is it reckless to rely on a proper process. Mr MacLeod denied any dishonest intent and I am wholly unable to find that he was indifferent to the truth or to the risk of non-disclosure in the required sense. I accordingly hold that he did not have conscious knowledge that the Key Contracts Warranty as qualified after operation of the disclosure process was false. Accordingly, even if he had sufficient knowledge of the warranty as well as the facts, it follows that he was not guilty of fraud or wilful misconduct.

Mr Oxley

181. Mr Oxley’s main concern was with the exit from the Battery Materials business. He was not involved in the detail of the Health Business and had no direct involvement in the disclosure process or the due diligence meetings. His only participation in the transaction at all was at some of the Plan B meetings, in the telephone conversation with HSF on 13 December 2021 prior to the HBR meeting, at the HBR itself and in signing the SPA.

Knowledge of the facts

182. Having considered the documents and the written and oral evidence with care, I am satisfied that Mr Oxley did not know about the Olesen Offer and did not therefore know the facts which I have held ought to have been disclosed. This is for the following reasons.

183. He was not a party to the telephone conversation between Mr MacLeod and Mr Stapel on 3 December 2021. The Claimant makes the bald assertion that if Mr MacLeod knew all about it, then so must Mr Oxley who sat next to him in the office. However, that is pure speculation. Mr Oxley and Mr MacLeod may have had adjacent offices, but he was the CFO. There is no reason why Mr MacLeod would have been discussing the affairs of a

very minor part of the overall business with him and neither could recall any such conversation. The suggestion that Mr MacLeod would have told him about it at a General Management Committee dinner that night was based on the most exiguous evidence consisting entirely of the inability of either witness to recall enough to deny it.

184. It was then put to Mr Oxley that he was told about the Olesen Offer by Ms Vawda at a meeting on 3 December 2021. However, he could not remember any such conversation and there is no positive evidence that it occurred. Since I am also satisfied (as appears below) that Ms Vawda did not know about the Olesen Offer, the most that could have been discussed was what I find Ms Vawda to have known. The Claimant's written closing submissions suggest somewhat faintly that he may have been told by Mr Wesztergom with whom he was in frequent contact. The Claimant has not called Mr Wesztergom to support this assertion and as I have already held, I consider it appropriate to infer from his absence that he would not have done so.
185. The Claimant moreover considerably overstates the effect of Mr Oxley's evidence about the Plan B meeting which took place on 9 December 2021 when Mr Lyons' Plan B discounted cash flow slides were discussed: see paragraphs 151 ff. of the Factual Synopsis. This is because Mr Oxley was questioned on the premise that both Mr MacLeod and Ms Vawda were anticipating a steep drop in Buprenorphine revenues *because of the Olesen Offer*. It was in that context that he accepted that the closure of Annan was triggered by the Olesen Offer and that he was possibly made aware of this by the end of the meeting. However, his only actual recollection was that the Health Business was slipping and that it would need substantial capital investment and restructuring if it was to be retained. It is not obvious to me why, as CFO, he would have needed to know more than that. I am therefore unable to find on a balance of probabilities that any mention of the Olesen Offer was made at the meeting or that this was anything other than a high-level discussion.
186. In relation to the HBR meeting on 13 December, Mr Oxley's unchallenged evidence was that he only attended the first hour. He accepted that slides were shown which demonstrated significant price pressure on Buprenorphine due to faster than expected genericisation, which put the future of Annan in jeopardy. He also accepted that he would have wanted to understand where the business was headed. He did not recall having seen or discussed Slide 29 at the time and I am not satisfied on a balance of probabilities that he was party to any discussion of that slide. Mr MacLeod's evidence was that he thought it would have been presented but had no actual positive recollection that it was. He himself had a vague recollection of seeing it but could not say when. I have already rejected Mr Stapel's evidence that he referred to the Olesen Offer three times: during the Plan B part of the discussion, and again at the start of the HBR proper and as part of the presentation of Slide 29. I have also rejected Mr Shackley's evidence that he was present at the meeting and spoke to the slide. There is no other evidence to suggest that it was mentioned.
187. I am therefore satisfied that Mr Oxley did not know about any specific offer, let alone one that the Health Business would have to match in order to retain its major customer for BHCL. As CFO, he needed to understand the direction of travel of the Health Business and understood that this was downwards due to price erosion as a result of increased competition. It was repeatedly put to him in cross-examination that he would have needed to know precisely why that was and he just as repeatedly denied that he was involved at that level of detail. I accept that it was no part of his role to interrogate the assumptions underlying the scenarios put forward by the Health Management Team, and all his answers in cross-examination were consistent with the fact that he only needed to know the big

picture rather than the detail. It may well have been that the scenarios were in fact modelling the Olesen Offer, but Mr Oxley neither needed to nor did know this.

188. For these reasons, I find that Mr Oxley did not have any knowledge which impacted the warranties. That in itself is sufficient to acquit him of fraud or wilful misconduct, but for completeness I nonetheless consider the other ingredients of the cause of action.

Knowledge of the warranty

189. Mr Oxley accepted that the Ordinary and Usual Course Warranty and the Key Contracts Warranty looked like standard warranties and that he would expect there to be something similar in the SPA. As already stated, however, he had no recollection of going through the warranties or disclosures or being briefed on them and I have held in paragraph 176 above that he was not. He was not involved in the warranty and disclosure process itself and accordingly I find that he would not have had sufficient knowledge of the warranties in any event to give rise to a finding of fraud or wilful misconduct. I acquit him of having been completely reckless as to what the warranties were. There was likewise no evidence that he reviewed the contents of the Disclosure Letter but, even if he had, he had no reason to think that it was not adequate.

Falsity

190. Mr Oxley was even further removed than Mr MacLeod from the running of the Health Business and the details of its customer relationships. Like the other JM Executives, he had confidence in the professional teams around him (which included senior lawyers) and was comfortable that the disclosure process would be conducted with appropriate rigour. Accordingly, the same comments apply to him as are set out in paragraphs 179 (first sentence) and 180 above in relation to Mr MacLeod. He did not regard it as his responsibility to understand every line of every transaction document and I agree.

191. Even if it is assumed that Mr Oxley was aware that the SPA was likely to contain warranties such as the Ordinary and Usual Course Warranty and Key Contracts Warranty, he had no knowledge of the matters which I have held made the Key Contracts Warranty false. He knew only that there were pricing pressures due to faster than expected commoditisation and that the Health Business had sustained and was continuing to sustain a series of poor results which had meant that the offer price was being constantly chipped. He believed he knew that Alvogen was an important customer, although he did not know how important it was. As far as he was concerned, it was simply one of a number of customers in one part of the JM divisions.

192. For all these reasons, I find that there was no conscious dishonesty or recklessness on the part of Mr Oxley. He was told that it was in order for him to sign the SPA by the team which had finalised the negotiations and drafted the documents and he did so. I do not accept that his responsibilities extended any further than that, absent specific knowledge which would reasonably have alerted him to a problem.

Ms Vawda

Knowledge of the facts

193. One glance at Ms Vawda's calendar for the relevant period is sufficient to show that she was an extraordinarily busy woman who was juggling very many balls at the same time.

Her diary was packed with meetings on different projects, sometimes back-to-back for a whole day. The suggestion that she could be expected to get into matters of detail is utterly fanciful. That was not her role. She was responsible for managing the sale process, not carrying it out herself. She was therefore necessarily reliant on others performing their roles conscientiously, competently and honestly.

194. I am quite satisfied on the evidence that she did not know of the Olesen Offer at any time prior to the signing of the SPA. It was admitted by the Claimant that the Health Management Team took a conscious decision not to tell CorpDev about the offer when it was first made, since they took the view that it would be premature pending verification. Apart from Slide 29 (as to which, see further below), there was no document either created by her or sent to her which mentioned the Olesen Offer. Indeed, the only evidence that she was informed of the Olesen Offer came from Mr Stapel, who said that he told her about it at the Plan B meeting on 3 December 2021 and that it was also discussed during the discussion about the Plan B spreadsheet on 7 December 2021.
195. The meeting on 3 December 2021 was held remotely between Ms Vawda and Mr Lyons on behalf of CorpDev and Mr Stapel and Mr Wertzergom on behalf of the Health Management Team. Plan B had, of course, been in preparation before the Olesen Offer was received as a result of Citi's advice to prepare scenarios in the event that the sale did not proceed. Restructuring the Health Business and closing both Scottish sites had therefore been an option for consideration even before the offer.
196. The only documentary evidence of what happened at the meeting is contained in Ms Vawda's notes which state: "*Structural issue on Bupe. Bupe has gone. Scotland is not economic due to Bupe has significantly declined.*" It is noteworthy that there is no mention of the Olesen Offer or any third party offer at all. I have no doubt that in the minds of the Health Management Team, the Olesen Offer was the reason for their pessimism about the future of Buprenorphine, but this is not patent on the face of the documents. I have found Mr Stapel to be a thoroughly unreliable witness whereas I have found Ms Vawda to be an honest and credible witness. Mr Wertzergom was not called and I infer (for the reasons already given) that he would not have supported Mr Stapel's version of events. I therefore have no hesitation in rejecting Mr Stapel's evidence that he spoke about the Olesen Offer at this meeting.
197. The substance of Ms Vawda's notes is accurately reflected in her email to Mr MacLeod on 6 December 2021, namely that Scotland might not be economic as low Buprenorphine prices were there to stay due to a new entrant at lower cost. She noted that this was a structural issue rather than a question of challenged pricing and said that she had been asked by the Health Management Team to consider closure of Scotland as part of Plan B. I find as a fact that this is the extent of what Ms Vawda was told by the Health Management Team on 3 December 2021.
198. This is not at all the same as a "*competing offer notified by Alvogen for the supply of BHCL at a price substantially lower than that being charged by the Health Business at the time*". To suggest, as the Claimant did in its written closing submissions, that this is what Ms Vawda accepted having been told is a mischaracterisation of her evidence. What she was told does not refer to a specific offer to a specific customer, let alone an offer to supply at US\$8/g. If Ms Vawda had been told about the Olesen Offer, it is extraordinary that there was nothing in her notes about Alvogen or the price match clause. She would have had no motive not to note it – if anything, it would have provided support for her view that JM

would do better to retain the Health Business for the time being and not to proceed with a sale at the price then on offer.

199. I also reject the Claimant's further submission that Mr MacLeod must have told her about the Olesen Offer. He accepted that he did not do so on 3 December 2021 and he could not positively remember having done so thereafter. The Claimant relies on his evidence that he "*may well have had*" a conversation with Ms Vawda on 6 December 2021 when they agreed that it was not necessary to tell the Claimant about the Olesen Offer immediately as they did not as yet know all the facts. Ms Vawda denied any such agreement and in any event "*may well have*" is not a positive recollection or sufficient on its own to satisfy the burden of proof. Nor do the inherent probabilities suggest that Mr MacLeod must have mentioned the Olesen Offer. From looking at their respective diaries, this could only have been a short call sandwiched between other meetings and the important thing for both of them would have been what to do about this latest bombshell from the Health Management Team ("*yet another*" as both Mr MacLeod and Mr Oxley described) rather than how the situation had arisen, i.e., whether due to general pricing pressure or the Olesen Offer specifically. It is also quite possible that Mr MacLeod may have assumed that Mr Stapel had given Ms Vawda the same information as given to him. He accepted that her email of 6 December 2021 implied that she already knew sufficient details about the Olesen Offer, so it is not immediately obvious why he would have felt the need to mention it in what was on any view a brief call.

200. Ms Vawda's subsequent contemporaneous communications are likewise consistent with her not knowing anything more than is reflected in her notes and email to Mr MacLeod. Thus:

- (a) After her conversation with Mr MacLeod, Ms Vawda noted "*? Bupre??*" on her copy of the warranty rider. She then spoke to HSF, who drafted a disclosure in relation to Buprenorphine on the basis of that conversation. This made no mention of any offer but simply referred to increased competition. It is inherently unlikely that, having decided to tell HSF anything at all, she would then only have told part of the story. Mr Martin's evidence regarding this call was that while it was possible that price negotiations with Alvogen were mentioned, he was sure there was no mention of the Olesen Offer;
- (b) Ms Vawda's resistance to providing further information in response to the Claimant's bring-down question (as articulated in her email to Mr Morton on 8 December 2021) was based on the fact that the Health Business was and continued to be challenged. Again there is no necessary implication that she knew about the Olesen Offer;
- (c) Her approval of the draft disclosures circulated by HSF on 8 December 2021 referred to increased competition of which the Claimant was aware. Since the Claimant was admittedly aware of pressure on pricing, this response is entirely consistent with that being the extent of her own knowledge and, inferentially, also supports the Defendants' case that neither she nor Mr Lyons was aware of any specific offer at US\$8/g. For reasons already given (see paragraph 117 above), no criticism can be made of her reluctance to give any judgment on future impact: that was a matter for the Claimant to assess for itself;
- (d) The same can be said in relation to Ms Vawda's response to Mr Tosh on 13 December 2021 that the Claimant was already aware of the pricing issues and that it was

impossible to be more explicit. Since this was in response to a question from Linklaters (who obviously did not know about the Olesen Offer), it could only have been referring to general pricing pressure and I reject the Claimant's suggestion that this was a deliberate diversionary tactic.

201. I can see no basis on which Ms Vawda could or should have inferred the existence of the Olesen Offer from any of the Plan B meetings or Plan B slides. The Plan B scenarios had been put together by the Health Management Team in short order in response to a request to create some short-term forecasts which CorpDev could extrapolate over 10 years to obtain a DCF valuation of the Health Business. They were not fully worked up and the choice of scenarios was that of the Health Management Team. They had not been told what scenarios to present and there were obviously many more that they might have chosen. In the event, they prepared figures on the premise that there would be a loss of revenue on several products, not just Buprenorphine. The first scenario assumed the retention of Annan, while the second modelled potential cost-cutting measures, including the closure of Annan. Even if both scenarios were specifically modelling potential consequences of the Olesen Offer, it was clear that Annan did not necessarily have to close. Moreover, Ms Vawda already knew that the viability of Annan was in doubt because that is something which she had been told on 3 December 2021. However, there is no reason why she should have known about the Olesen Offer specifically in order to understand the models presented. In other words, she needed to know the 'what' but not necessarily the 'why'.
202. There was some debate before me as to whether these were worst case scenarios or simply a reflection of reality. I am not sure why this particularly matters. Ms Vawda had been told only about increased competition. She did not and could not know the impact of this on the business, let alone the impact of the Olesen Offer about which she had not been told. Since there were ways in which increased competition could have been mitigated, at least in theory, I am inclined to accept her evidence that she regarded these as worst case scenarios. But on any view, they were consistent with what she had been told on 3 December 2021 about the need to consider options where the viability of Annan was in doubt and there was no reason for her to delve deeper into the reasons for the assumptions made. As noted already, divestment of the Scottish sites had been on the cards even before the Olesen Offer was made.
203. So far as relevant, I also find that the Plan B spreadsheet prepared by Mr Wesztergom was not discussed with CorpDev as initially claimed by Mr Stapel. It was simply sent to Mr Lyons on 7 December 2021 so that he could prepare his DCF calculations.
204. I turn next to Slide 29 which was contained in the 49-page slide deck sent to Ms Vawda on the evening before the HBR meeting on 13 December 2021. I accept Ms Vawda's evidence that she did not read this slide. Her evidence was that she did not routinely have the time to study slide decks when they came in, but would rely on what was actually presented at a meeting. Given the state of her diary, this does not surprise me at all and in fact she had wall-to-wall meetings for virtually the entire day on 13 December, starting at 8.30 am and finishing after 8 pm. Many of these meetings were on other matters and, on top of that, she and Mr Lyons were also putting together a paper for the JM Board regarding the sale. Given everything else that she had to prepare for during the evening on 12 December 2021, it is unrealistic to suppose that she had time at her disposal to study the slide deck in any detail, particularly since she and Mr Lyons would not be staying for the HBR part of the meeting anyway. Ms Vawda accepted that she probably flicked through

the deck to extract some headline figures that were needed for the Board paper but I am satisfied that she did not focus on Slide 29.

205. I have already found (see paragraph 185 above) that there was no reference to the Olesen Offer during the Plan B part of the meeting on 13 December 2021. Ms Vawda and Mr Lyons left after about 20 minutes and most of that time would have been taken up with Mr Lyons presenting his DCF valuation slides. There was nothing else in any of the other Plan B slides which referred to the Olesen Offer.

206. Finally, the Claimant advanced the rather Machiavellian suggestion that Ms Vawda's email to Mr Tosh on 13 December 2021 (paragraph 176 of the Factual Synopsis and paragraph 200(d) above) was somehow conveyed to the Health Management Team by HSF via Mr Martin and Mr Oehler and interpreted by them as an instruction to suppress information. This does not immediately spring to mind as the most foolproof method of ensuring that sensitive information is not disclosed and would, moreover, have required the complicity or at least the co-operation of both HSF and Mr Oehler, against whom no allegations of wrongdoing have ever been made.

207. I likewise reject the Claimant's suggestion that this email was an attempt by Ms Vawda to instruct HSF as to what disclosure should be made before anyone else had a chance to express their views. Her answer to this was entirely convincing: this was an independent process which no single person could override. The role of HSF was to collect views from everybody and to hold everyone accountable, not to pass on her views to others. In any event, the suggestion is inconsistent with HSF's subsequent requests to the Health Management Team for input and comments which Mr Lyons actively chased and Ms Vawda took no steps to prevent or interfere with. Even if (which I do not necessarily accept), the Health Management Team were influenced by their perception of Ms Vawda's views, there is no reason why she would have known this.

208. In summary, Ms Vawda consistently and firmly denied knowing anything about a specific offer, or a particular price level. She denied knowledge of the price match clause in the Alvogen Supply Agreement, to which she did not have access and which she had never reviewed. It was not suggested that she was wrong about this. All her contemporaneous communications are consistent with her knowledge being limited to pricing pressure on Buprenorphine due to increased competition with unquantifiable future consequences. Testing the oral evidence against the documents (as both parties urged me to do), I am satisfied that the documents fairly reflect Ms Vawda's state of knowledge. Accordingly, the Claimant has failed to show that she was ever informed that the issue was more than one of challenged pricing due to a new market entrant at a substantially lower price which potentially put the future of Annan in doubt.

Knowledge of the warranty

209. It is not in dispute that Ms Vawda was aware of the terms of both the warranties and the disclosures.

Falsity

210. Ms Vawda accepted that the disclosure in fact made against the warranties was insufficient in the light of the Olesen Offer, but that was on the basis of what she knew now. Since I have found that she was unaware of the Olesen Offer at the time, the question

of whether she knew or was reckless as to the falsity of the warranties on the basis alleged by the Claimant does not strictly arise.

211. In any event, I reject the submission that she did not care whether the warranties were true or not. If anything, the documents show that she was concerned to give disclosure rather than to conceal. For example, on receipt of the information from Mr Stapel on 3 December 2021 about a new entrant causing structural problems with pricing, she explicitly flagged the issue for Mr MacLeod and also raised the question of what to say about it to the Claimant. Mr MacLeod in turn asked the Health Management Team to consider cost-cutting options. Ms Vawda also noted the question of disclosure in relation to Buprenorphine on her copy of the warranty rider sent to her by Mr Tosh on 6 December 2021 and it is common ground that whatever she was told on 3 December 2021 was raised by her in her ensuing call with Mr Tosh. While she could not know what impact it would have on the Health Business, making an appropriate disclosure was clearly on her mind and she ensured that it was put straight into the disclosure process so that HSF could take it up with the Health Management Team.
212. It is wholly inexplicable why she would have done any of this if she was aware of the Olesen Offer but wanted to conceal the information. If that was her intention, it is improbable that she would have raised the issue at all since once she had raised it with HSF, the investigation of what disclosure should be given was out of her hands. As it is, it is difficult to see that her role was to do any more than she in fact did. She was copied into many emails between HSF and the Health Management Team but it was not her job to deal with them personally. Rather, it was the task of Mr Martin and HSF to make sure that the appropriate people looked at the appropriate warranties and Ms Vawda was entitled to assume that they would do their job properly, as they clearly did. Thus, Mr Martin explicitly queried with Mr Tosh on 9 December 2021 whether any specific disclosure was needed on Buprenorphine and Mr Tosh then asked each of the Health Management Team individually, including Mr Oehler as the in-house lawyer, to provide further details for that particular disclosure.
213. Ms Vawda could accordingly see that the Health Management Team (who knew more than anyone else about the Health Business) were being asked for their input and could take comfort from the fact that any further details which were available would be provided by them. There is no indication that she sought to interfere with that process or to prevent or hinder any input from them. On the contrary, Mr Lyons assisted – to her knowledge because she was copied in on his email – in chasing up responses.
214. The fact that HSF were anxious to give further details if possible does not to my mind indicate any concern on their part that the disclosure as given was inadequate; simply that they were understandably anxious to minimise any possibility of a complaint from the Claimant and Linklaters. Mr Martin made the valid comment in this context that disclosure can only be regarded as inadequate if there is more to give. HSF did not know whether this was the case or not and were simply trying to find out.
215. The unanimous response from the Health Management Team to HSF's queries was that they could not quantify the impact of the price competition and had no further comments to add to the disclosure as drafted. Whatever they may say now, they were therefore confirming, as the people best-placed to know – that the disclosure was accurate and that there was nothing more which could usefully be added. Even Mr Oehler, who alone knew the exact pricing of the Olesen Offer, took the view that it was not technically possible to

quantify the impact as he was still under an obligation of confidence to Alvogen. He indicated on 11 December 2021 that he would raise the matter with Mr Martin and Mr Tosh, but there is no evidence that he took it up with Ms Vawda or Mr Lyons. Thus, the Health Management Team knew perfectly well that they were being asked, personally and individually, to provide comment on the disclosures directly to HSF and that it was their duty as employees to answer honestly and truthfully. Ms Vawda knew this and was entitled to rely on them fulfilling that duty conscientiously. In all the circumstances, I do not consider that she was obliged to do more than she did.

216. Mr Salzedo nonetheless suggested that she was seeking to hide behind the responses from the Health Management Team. I do not accept this. If anything, it is Mr Stapel and Mr Shackley who rather unattractively sought to shelter behind CorpDev and put all responsibility for the disclosure on Ms Vawda and Mr Lyons. However, it was not for Ms Vawda to gainsay what they said. Indeed, she could justifiably have been criticised if she had attempted to override them. Mr Stapel and Mr Shackley both insisted that their answers to HSF were honest and truthful. Even if they were not, that is not something that Ms Vawda could have been expected to know or suspect if, as I have found, she did not know of the Olesen Offer. In any event, whatever she may have been told at the beginning of December, the matter had been further investigated through the disclosure process and it was not for her to challenge the outcome of that investigation. Mr MacLeod's rather self-serving evidence that more fulsome disclosure should have been given based on what Ms Vawda knew in early December completely ignores the fact that things had moved on by the time the SPA was signed and I discount it.
217. I therefore entirely reject the allegation that Ms Vawda was dishonestly concealing the Olesen Offer from HSF and the Claimant, or that she knew that there was anything further to be said. It was repeatedly put to her in cross-examination that her requests to see all information divulged to the Claimant before it was sent out were in order that she could suppress anything inconvenient or unhelpful. However, as Mr Fulco accepted, it was entirely reasonable for CorpDev to want to know what information was being given to potential purchasers. They would clearly want to take care with the 'spin' they put on their messaging; that was their job.
218. Nor can I see anything to support the Claimant's submission that Ms Vawda was trying to curtail any legitimate right of Linklaters or the Claimant to ask questions. It is a fair comment that any buyer will try to wrinkle out as much information as possible, including forward-looking assessments, while the seller will quite reasonably want to avoid giving any hostages to fortune. Thus, a seller may quite reasonably take the view that as long as proper disclosure is given as to the past and present, it is for the buyer to make its own judgments as to the future. Moreover, where, as here, the process is becoming protracted, it is understandable that the seller may be concerned that the buyer is spinning things out in the hope of getting more and more information and feels the need to draw matters to a conclusion. I regard Ms Vawda's conduct throughout the sale process as entirely consistent with such legitimate concerns.
219. Finally, there is no reason why Ms Vawda would have concealed the Olesen Offer if she had been aware of it. As already noted, it would have been grist to her mill that sale at this price was not the best option for the JM Group. And it is not as if she was concerned to withhold all bad news. The Health Business's dire trading results were provided notwithstanding that they were anticipated to lead to reductions in the Claimant's bids – as they indeed did. In any event, it would have been a wholly inept way to conceal the

information since any number of people within the Health Management Team could have revealed the position. I accept her evidence that she would not have used any desire to minimise a further price reduction as an excuse to withhold information that ought properly to have been disclosed.

220. On the contrary, she ensured that Mr MacLeod and HSF were aware of the issue to which she had been alerted on 3 December 2021. She could see that a proper disclosure process was being followed and that steps were being positively taken to obtain input from the people most intimately concerned and was entitled to assume that their responses represented the result of further consideration and discussion since the issue first surfaced. The responses to the warranty rider had been looked at by Mr Oehler, the Health Business's in-house lawyer, and it was not for her to question or reject them. Those responses were entirely consistent with what she knew. There is considerable force in Mr Rainey's submission that she cannot have known that the warranties as qualified were false when each member of the Health Management Team had separately confirmed on 14 December 2021 that they were adequate. In all the circumstances, I find that she was not reckless as to the truth of the warranties either. Certainly, there is not a trace of the conscious dishonesty which would be required for a successful claim.

Mr Lyons

Knowledge of the facts

221. As already noted, Mr Lyons could not really recall very much. He accepted that he would have understood that Buprenorphine was the biggest generator of profit for the Health Business in Scotland. He would also have understood from the Claimant's analysis of the information given to them that they had priced in a 20% reduction in the price of BHCL.

222. Having listened to the evidence, I am satisfied that Mr Lyons had never heard of the Olesen Offer as such before it was raised by Mr Fulco during the telephone call on 24 May 2022. Mr Fulco accepted in cross-examination that Mr Lyons had been unable to respond to his questions about the Offer and had needed to go away and investigate before reverting. Even after that investigation, Mr Lyons gave evidence that he came away with the impression that nothing had been clear and that the disclosure was correct at the time.

223. Mr Lyons worked closely with Ms Vawda, who was his superior and I am satisfied that he knew no more than she did at any stage of the transaction. All of the occasions on which the Claimant alleges that he was made aware of the Olesen Offer have been covered above and it is unnecessary to rehearse them again. I accept that his focus on Mr Wesztergom's Plan B spreadsheet was simply for the purpose of extrapolating the figures necessary for preparation of the DCF valuations that he subsequently circulated on 13 December 2021 prior to the HBR meeting. This only required a high-level consideration of the spreadsheet and he said that he concentrated on the summary pages and did not go through the detail with Mr Wesztergom or interrogate the underlying assumptions, which he regarded as a matter for the Health Management Team. He also said that he would not have assumed that closing Annan necessarily meant ceasing Buprenorphine production altogether and this was clearly correct on the facts.

224. Nor am I persuaded that Mr Lyons would have focused on Slide 29 when he was sent Mr Wesztergom's final slide deck prior to the HBR meeting. At that time, he was concerned with producing the final version of his Plan B slides which he circulated the following

morning. I accept his evidence that, at most, he may have flicked through the slides but not to the extent of trying to understand each one – particularly as he would not have been attending the HBR part of the meeting.

225. I place no weight on Mr Stapel’s supposedly clear recollection that he asked Mr Lyons expressly whether the Olesen Offer would be disclosed and was told “*No. We’re done negotiating.*” While Mr Lyons fairly accepted that it was possible that such an exchange had taken place, he had no recollection of such a query. There was no documentary support for it and, moreover, it would have been for Ms Vawda, not Mr Lyons, to say whether negotiations were concluded. I note that this assertion was not put to Mr Oehler, to whom Mr Stapel said he vividly recalled passing on this response. Nor was there any supporting evidence from Mr Wesztergom who was also on the supposed call. I regard this as a clear instance of Mr Stapel reconstructing things after the event in order to exonerate himself from blame. In any event, even Mr Stapel did not claim that Mr Lyons told him positively to suppress the information so there would have been nothing to stop him disclosing it himself when asked to comment on the warranties.

Knowledge of the warranty

226. As with Ms Vawda, there is no dispute that Mr Lyons knew the terms of the warranties and disclosures.

Falsity

227. As regards knowledge or recklessness in relation to falsity, Mr Lyons was in much the same position as Ms Vawda. He also accepted that, in the light of what he knew now, the warranties were untrue without proper disclosure of the Olesen Offer. However, I accept without reservation that he had no conscious knowledge of their falsity at the time. He was not aware of the Olesen Offer itself. He did not know whether he had in mind the fact that pricing negotiations were ongoing with Alvogen, but in any event he said that he would not have known the details and would not necessarily have known that the price would fall. He read the due diligence questions put forward by Linklaters but it was not for him to provide the answers and he did not personally check the cross-references to the Data Room. He said he did not apply the Plan B scenarios (which were obviously only relevant if the sale fell through and the Health Business was restructured) to the warranties. It might be said that he should have made the connection, but, if so, that is a question of negligence, not fraud.

228. Mr Lyons likewise gave evidence that he would always have followed correct procedures and that he did not deliberately conceal anything. I have no reason to doubt him. He too relied on the Health Management Team as the people closest to the contracts and the customers for input on specific pricing/customer issues. He believed that they had added what they needed to add to the disclosures and he had no reason to doubt their answer that there was uncertainty about what the ultimate pricing might be. His function was to assist in obtaining input from the appropriate people and to respond to the warranties on the basis of what he personally knew and in the light of that knowledge he was comfortable with the disclosures given. He had no incentive whatsoever to lie or conceal anything and I can see nothing in his behaviour or conduct to support an allegation of conscious dishonesty in relation to the warranties.

(5) Conclusion on liability

229. The Claimant is undoubtedly entitled to feel aggrieved that there was no disclosure prior to sale of the Olesen Offer and the facts that I have held should have been disclosed. However, the terms of the SPA which it signed precluded any claim in negligence or for simple breach of contract. In pursuit of redress, it has accordingly brought a high-stakes claim in fraud, specifically targeting four very senior executives of a major global company. These individuals were always improbable targets for a fraud of the nature alleged, yet the claim has been pursued against them with relentless aggression despite the Claimant withdrawing: (i) an initial claim in fraud against Mr Stapel; (ii) claims against Mr Lyons for fraudulent misrepresentations during the due diligence calls; and (iii) a claim in deceit. In the event, I have found the sweeping and rather strident assertions that each of these individuals acted dishonestly and was giving untruthful evidence to the court to be implausible, improbable and wholly unsupported by the evidence.
230. I should also say that the number of allegations made and the force with which they were advanced did nothing to enhance their persuasiveness. If anything, the greater the number of instances of dishonesty alleged, the less plausible they became. Indeed, it is difficult to gainsay Mr Rainey's complaint, echoing Mann J in *Mortgage Agency Services Number One Ltd v Cripps Harries LLP (supra)*, that this was a case where "*the claimant [had] donned its fraud detection goggles, turned the sensitivity up to High and attributed a dishonest motive to every interesting feature in the landscape.*"
231. I have accordingly held that none of the JM Executives was guilty of fraud, wilful misconduct or conscious dishonesty and that the claim accordingly fails. If this leaves the Claimant without remedy, that is simply a consequence of the bargain that it struck. Meanwhile, the JM Executives have had these claims hanging over them for four years with all the reputational damage and anxiety that that must have entailed. I therefore wish to make it abundantly clear that, so far as this court is concerned, all four of them leave without a stain on their characters.

H: QUANTUM

(1) The pharmaceutical experts

232. In the light of my conclusion on liability above, it is only necessary to deal relatively briefly with quantum.
233. The parties agreed that, had the claim succeeded, the relevant comparison for the purposes of assessing the Claimant's loss was between the actual value of the shares and the value they would have had if the Key Contracts Warranty had been true, to be assessed as at the date of breach, i.e., 16 December 2021. The essential point of difference between them related to what a reasonable buyer's expectations would have been as to the future trajectory of Buprenorphine prices, both with and without knowledge of the Olesen Offer.
234. The Claimant's expert, Mr Engert was an engaging witness. He was clearly very knowledgeable and had considerable experience of the pharmaceutical industry and API markets, including Buprenorphine, with which he had worked directly. He gave his evidence carefully and thoughtfully and expressed his opinions in a fair and balanced manner. He was prepared to make concessions when he thought it proper and appropriate to do so.

235. By contrast, Dr Walton’s expertise lay in patent licensing and it was clear that he had less direct experience of API pricing and price forecasting than Mr Engert. In particular, he had not previously worked in the Buprenorphine market. He was altogether a less impressive witness whose evidence I had some difficulty at times in following. Moreover, his oral evidence did not support some of the key assertions in his reports.

236. Each side levelled a preliminary criticism at the instructions given to the opposing expert. The instructions given to Mr Engert were:

“(b) What would a well informed and reasonable market participant have expected as at signing (16 December 2021) and completion (31 May 2022) in respect of the prices that might be expected for BUP HCL going forward...”

whereas Dr Walton was asked:

“B. Would a knowledgeable and prudent buyer have known or expected that suppliers of BHCL generally were in the market offering to supply BHCL at a price of around \$8 per gram, or could be in the future?”

237. The Defendants criticised the instructions given to Mr Engert on the basis that the focus should have been on the expectations of a *buyer* rather than a market participant, since a market participant will not necessarily have carried out the due diligence that could be expected of a knowledgeable and prudent buyer. Mr Engert was cross-examined about this but, while I accept the theoretical difference between the two, it was ultimately not clear to me quite what information a knowledgeable and prudent buyer would have acquired as a result of such due diligence that Mr Engert had not already taken into account. I am therefore not persuaded that this distinction fundamentally undermined his approach.

238. For its part, the Claimant criticised Dr Walton’s instructions on the basis that they were leading. I can well see that trailing a price-point of US\$8/g could be said to be leading and, indeed, Dr Walton accepted expressly that he had been asked to look for evidence that might support a drop to US\$8/g. In the event, however, I found Mr Engert’s model to be the more meticulous and his assumptions the more well-founded of the two and where the experts differed, I preferred his evidence.

(2) Mr Engert

(a) Without knowledge of the Olesen Offer

239. Mr Engert applied three different, alternative, approaches to an assessment of the future movement of BHCL prices:

- (a) An aggregate industry-wide analysis across the entire portfolio of APIs, assuming an established book of business and no disruption due to new entrants;
- (b) The extent to which Alvogen’s gross profit margins may have given it an incentive to press for lower prices;
- (c) The likely impact on prices of three possible scenarios involving a new participant entering the market within 3 years.

Aggregate portfolio-wide approach

240. Mr Engert calculated that expected general API price erosion across the entire market would be within the range 0-15%, but only 2-5% for less competitive products. He assessed Buprenorphine/BHCL as a less competitive product but nonetheless adopted 5% as a conservative figure. The Claimant pointed out that this was higher than the anticipated average price erosion rate of 3.5% p.a. set out in the BCG report and also higher than the historic erosion rate for BHCL between 2016-2021 which averaged 1.2% p.a. It was also in line with the Claimant's own expectations, which Mr Salzedo submitted was good evidence of what a reasonable buyer would have expected. Mr Engert was not seriously challenged on this point and I accept that 5% is a reasonable figure to take for this part of his analysis.

Alvogen's gross profit margin

241. Mr Engert concluded that Alvogen consistently achieved gross profit margins of 80-90% and that it therefore had little incentive actively or aggressively to force lower pricing from its API suppliers.

The scenarios

242. Mr Engert considered each of the following scenarios over a period of 20 years:

- (a) Scenario 1: Alvogen did not positively require any price reduction and was not approached by the postulated new supplier with any lower offer. On this scenario, Mr Engert modelled nil price erosion over the first 10 years with general 5% erosion thereafter. He assigned a probability weighting of 50% to this scenario.
- (b) Scenario 2: A new supplier made a bid to sell BHCL to Alvogen at a 20-25% discount to existing prices but did not already have FDA approval to do so. Mr Engert concluded that in this situation, the seller was likely to offer Alvogen a 15% discount in year 3 in order to retain its business with a 5-year lock-in on price. He assigned a probability weighting of 25% to years 1-5 but did not consider the scenario separately thereafter because it effectively merged with Scenario 3.
- (c) Scenario 3: This was essentially the same as scenario 2, but where the new supplier was already approved. In this case, the seller would have to match the price immediately to retain Alvogen's business. Mr Engert therefore assumed a full 25% discount in year 3, again with a 5-year lock-in, resulting in nil further erosion in years 6-10. He ascribed a probability weighting of 25% for years 1-5 and 50% for years 6-10.

243. All scenarios modelled a general 5% price erosion from year 11 onwards and on this basis, Mr Engert calculated an overall cumulative average growth rate ("CAGR") of 2.4% for the first 10 years and 5% thereafter.

244. The conclusions that Mr Engert drew from his overall analysis were as follows:

- (a) There was no reason to think that prices would suffer a significant fall imminently. A single price drop of 50% was extremely rare and gradual long-term price erosion was far more usual;

- (b) The most likely projection, assuming a potential new competitor entering the market within 3 years, was average erosion of 2.4% p.a. for 10 years with 5% erosion thereafter;
 - (c) While Olesen and Chattem were both potential new entrants to the market, there was no indication that either of them intended to offer Buprenorphine at significantly lower prices;
 - (d) There was no significant price pressure from FDF manufacturers, as there is no automatic correlation between FDF prices and API prices. Albeit a decline could be expected following a loss of exclusivity, the sublingual film market in which Alvogen operated had lost exclusivity in 2019 and prices had flattened well before December 2021. There was not expected to be any future downward pressure on API prices.
245. By the time of closing submissions, the only criticism of Mr Engert's analysis which was maintained with any vigour was that Scenario 1 was unrealistic in modelling nil price erosion for 10 years notwithstanding that:
- (a) There had already been a significant drop in the weighted average price at which the Health Business sold BHCL;
 - (b) Alvogen was currently engaged in pricing negotiations with the Health Business and had successfully negotiated lower prices in the past;
 - (c) A greater number of competitors in the market could be expected to lead to reductions in price – with more competitors generating greater reductions. Two potential new competitors had filed DMFs which indicated serious intent to enter the US market. These included Olesen, which might have been able to start supplying BHCL in late 2022;
 - (d) If the Health Business could cover its costs at a price of around US\$8/g, then so could other competitors.
246. It was therefore put to Mr Engert that some erosion should have been modelled in years 1-10 and that a probability weighting of 50% was far too high. Mr Caplan, who conducted the cross-examination of Mr Engert, suggested that he should instead have adopted an erosion rate of 5% (consistently with his aggregate portfolio-wide approach) and a probability weighting of only 25%.
247. In response, Mr Engert pointed out that Scenario 1 was never intended to replicate his general portfolio approach. Each of his three approaches was alternative, acting as a sense check for each other, and they could not necessarily be transposed directly into each other. Scenario 1 was a reasonable alternative which assumed no downward pressure on prices from a new entrant. However, he very fairly accepted that it would not have been unreasonable to assume some erosion for the reasons suggested by Mr Caplan represented by "*a very small single digit*". He did not commit himself to a specific figure but said that 2%, 3% or 5% might be reasonable.
248. Notwithstanding that it is not possible simply to transpose the general portfolio approach into the scenario approach, I accept that the points made by Mr Caplan have force and that the concession was rightly made. Since damages fall to be assessed on the basis most

favourable to the Defendants, the appropriate figure to model for years 1-10 is in my judgment 5%. Having done that, however, I see no justifiable basis for also decreasing the probability weighting. If a more realistic figure for price erosion is adopted, then by definition the scenario becomes more probable. 50% accordingly remains an appropriate weighting for Scenario 1.

(b) With knowledge of the Olesen Offer

249. The Olesen Offer would obviously have had an immediate effect on the price charged by the Health Business to Alvogen. In Mr Engert's opinion, this was likely to have become known to the wider market within 1-2 years and would inevitably have led to a decrease in the price offered to other customers. Bearing in mind the time that it would take for those other customers to get FDA approval for an alternative supplier, he considered that where customers did not already have such approval (category 1), the Health Business would have been able to offer 60% of the price differential as a discount in year 1 with a further 40% spread over years 2-3. By contrast, where the alternative supplier was already authorised (category 2), the Health Business would have needed to match the reduction in full immediately. He assessed that 50% of the Health Business fell into each category.

250. No significant challenge was made to his assessment in this regard.

(3) Dr Walton

251. Dr Walton's views as expressed in his reports can be summarised as follows:

(a) A knowledgeable and prudent buyer would carry out its own due diligence and not simply rely on the BCG report for an assessment of future prices. The report was in any event open to a number of criticisms;

(b) A knowledgeable and prudent buyer would have expected the price for BHCL to drop to US\$8/g as early as 2022/2023 because, having done its due diligence, it would know that:

(i) Alvogen was the leading generics seller of sublingual film;

(ii) Generic FDF firms would have been putting pressure on their supply chains, including API suppliers, which would accordingly have had to compete heavily on price. Alvogen would therefore have been under significant competitive pressure and looking to pass that pressure on to its suppliers;

(iii) Two new manufacturing competitors (including Olesen) were taking steps to enter the US market and would have had an incentive to reduce their prices in order to win Alvogen's business;

(iv) A drop in price to US\$8/g was tolerable for the Health Business.

252. Very little of Dr Walton's evidence survived cross-examination intact. His criticisms of the BCG report largely evaporated when it was demonstrated that many of the factors which he had identified had in fact been taken into account and he was ultimately not able to provide any convincing reason for undermining BCG's views as to anticipated price erosion.

253. He also accepted that:

- (a) A knowledgeable and prudent buyer would regard the Health Business itself as an important source of information. The Health Business clearly had no expectation that prices could drop to anything like US\$8/g prior to receipt of the Olesen Offer, and were highly sceptical when it arrived, only starting to change their views when it became apparent that Alvogen was willing to permit verification. However, absent knowledge of the Olesen Offer, there would be no reason for the knowledgeable and prudent buyer to differ from the initial view of the Health Business that negotiations with Alvogen would conclude at around US\$12-US\$13/g.
- (b) The Claimant had done at least as much due diligence as would be expected of a knowledgeable and prudent buyer and had also engaged external consultants to help it model its own forecasts. This was a reasonable approach which had in fact produced more conservative estimates than those of the Health Business.

254. More critically, Dr Walton resiled in cross-examination from the confident assertion in his reports that a knowledgeable and prudent buyer *would* have regarded a drop in price to US\$8/g as more likely than not. Ultimately, he settled on the much more hesitant and qualified opinion that a knowledgeable and prudent buyer might have expected a range of prices, with US\$8/g being the bottom of the range on the basis that it was the lowest price at which the Health Business could cover its costs. However, he accepted that it would make no commercial sense for a supplier to make a price offer at rock bottom, and that while the knowledgeable and prudent buyer *could* have expected the price to drop that low by the end of 2023, it would not necessarily do so and the likelihood was much less than 50%.

255. There were other criticisms of Dr Walton's evidence but it is unnecessary to rehearse them here, since I am satisfied that Mr Engert's analysis was the more measured and well-founded of the two. He had evidently taken great care in constructing his approach and he was able to support his assumptions and methodology. By contrast, Dr Walton's reports made sweeping assertions from which he largely had to resile. I therefore had no hesitation in preferring the evidence of Mr Engert which I accept in full subject only to the qualification that Scenario 1 should have modelled an erosion rate of 5% for years 1-10. The parties were confident that, in conjunction with the experts, they could agree the financial consequences of this adjustment should it become necessary to do so and I gratefully take them at their word.

I: ANSWERS TO THE ISSUES

256. It follows that the answers to the List of Issues are as follows:

- (1) No. The Ordinary and Usual Course Warranty was not false.
- (2) Yes. The Key Contracts Warranty was false.
- (3) No. The Key Contracts Warranty was not adequately qualified by disclosures.
 - (a) No.

- (b) No. Neither of the parties is entitled to rely on any extraneous statements to determine or construe what was or was not Disclosed pursuant to the terms of the SPA and/or the Disclosure Letter.
- (4) In order for a claim for breach of the relevant Business Warranties to arise or be increased “*directly as a result of the fraud of the Sellers*” and/or to be “*in respect of the fraud... of any Seller*” for the purposes of clauses 6.7.2(B)(2) and/or 9.27 of the SPA it is required that a JM Executive:
- (a) Gave the warranty in question;
 - (b) Knew the facts which made the warranty, as qualified by such disclosure as s/he honestly believed to have been given, false;
 - (c) Had sufficient knowledge of the terms of the warranty in question to be able reasonably to appreciate that the knowledge which s/he had was relevant to that warranty; alternatively was reckless as to the terms of the warranty in the sense of not caring what warranties were given;
 - (d) Knew that the warranty, as qualified by such disclosure as s/he honestly believed to have been given, was false, alternatively was reckless as to the same, or lacked any honest belief to the contrary.
- (5) No.
- (6) Does not arise but if it did, the loss falls to be calculated in accordance with Mr Engert’s evidence subject to the qualification set out in paragraph 248 above.