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Case No: CA-2025-001126

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Mr Justice Jacobs
[2025] EWHC 740 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2026

Before:

LORD JUSTICE NEWHEY
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

Between:

(1) G.I. GLOBINVESTMENT LIMITED
(2) MATTEO CORDERO DI MONTEZEMOLO
- and -
XY ERS UK LIMITED

Claimants/
Appellants

Defendant/
Respondent

Daniel Saoul KC and Benjamin Archer (instructed by **Mishcon de Reya LLP**) for the
Appellants

Adam Cloherty KC and James Fennemore (instructed by **Bird & Bird LLP**) for the
Respondent

Hearing dates: 21 and 22 July 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. What is at issue in this appeal from a decision of Jacobs J (“the Judge”) is whether the respondent, XY ERS UK Limited (“XY”), breached fiduciary duties which it owed to the appellants, G.I. Globinvestment Limited (“GIG”) and Mr Matteo Cordero di Montezemolo (“MDM”).

Basic facts

2. This section of this judgment is for the most part derived from the judgment which the Judge gave on 28 March 2025 (“the Judgment”).
3. GIG is used by the di Montezemolo family to make and hold certain investments. MDM and his father, Mr Luca Cordero di Montezemolo (“LDM”), who are Italian citizens, are both high net worth members of that family. LDM is a well-known industrial figure in Italy, principally as a result of having been chairman of Ferrari for more than 20 years. MDM has a degree in economics and has been a member of the board of a number of major companies, including two banks. He also co-founded with his father Charme Capital Partners SGR SpA (“Charme”) and has been chairman of its board, its chief executive officer and a member of its investment committee. Charme has established four private equity investment funds, known as Charme I, II, III and IV, which are classified as alternative investment funds (or “AIFs”) for the purposes of the EU Alternative Investment Fund Managers Directive. The basic idea of these funds, which have raised around US\$ 2 billion, is to identify undervalued companies with a view to unlocking their potential for the benefit of investors. MDM kept his personal wealth separate from that part of the wealth of the di Montezemolo family which was held by GIG, sometimes using Emmediemme Tre SRL (“SRL”).
4. XY is part of the XY Group, which provides data technology and strategy consultancy services to those managing high-end wealth. The XY Group is headed by XY SA, a Swiss company, and was founded, and is owned, by Mr Daniele Migani. Mr Migani is the chief executive officer of the XY Group and a director of XY.
5. Mr Marco Nuzzo, a director of GIG who is a longstanding trusted adviser to, and agent of, the di Montezemolo family in relation to their investments, was introduced to XY in the spring of 2016, first meeting Mr Migani in May of that year. Mr Nuzzo was looking for software which could help with the monitoring of the family wealth and costs, and the discussion both at that meeting and at subsequent ones in June and July of 2016 focused on technology. On 18 July 2016, GIG and XY entered into an agreement for the latter to provide “analysis of the financial assets of the Client outlining the strategic and operational guidelines to create added value”. At a meeting attended by MDM and Mr Nuzzo on 20 September 2016, Mr Migani gave a presentation which included information about “High Frequency Price Opportunity” (“HFPO”) products and XY also provided information about investing in “Market Insurance Notes” (“MINs”). On the next day, contracts were concluded between GIG and both XY and XY SA. The agreement with XY provided for the provision of consultancy services “intended to support the process of planning, implementing and controlling the Client’s investment strategy”. That with XY SA was for “requirements analysis, operational process set-up and day-to-day management of data for monitoring and reporting relating to the Client’s assets and economic flows”.

6. GIG and MDM/SRL came to invest in a large number of MIN products known as “stability” (or “gap”) notes. A stability note tracks the daily close position of a reference asset (generally an equity index) named in the note. The note guarantees the return of an investor’s capital together with a coupon (i.e. an interest payment) on the date of maturity if there has been no daily fall in the close position of the asset beyond the “trigger” or “barrier” level set out in the term sheet. By contrast, if a barrier event does occur within the life of the product, no coupon will generally be paid and the investor is exposed to a loss of capital, often increased by gearing. An investor takes the risk that the reference asset will fall by a given amount over the life of the product, the quid pro quo for undertaking the risk being the payment of the coupon.
7. Most of the HFPO products relevant to this case were structured products known as a “reverse barrier convertible” (“RBC”) and, more specifically, a type of RBC known as a “worst of note”. A “reverse convertible” bond is, in simple terms, a bond that can be converted by the issuer at maturity, so that the issuer delivers (for example) shares rather than cash. A “reverse barrier convertible” is a variation, because the bond incorporates a barrier. A “worst of note” indicates that there is more than one underlying asset on which the bond is based (for example, two equity indices), and the outcome of the bond is determined by the performance of the “worst of” those underlying indices. If an index falls below a “barrier” level, a “knock-in event” occurs exposing the investor to a loss of capital. If, on the other hand, there is no such event, on maturity the investor will recover the principal and also receive a coupon.
8. From early in 2017, MDM/SRL and, later, GIG and LDM invested in MIN and HFPO products pursuant to proposals from XY. Some 47 contracts were concluded in 2017 and there were 68 such investments in 2018. These investments were all profitable.
9. The appellants also came to acquire exposure to such products by investing in Skew Base Investments SCA RAIF (“the Skew Base Fund” or “the Fund”). The Skew Base Fund was incorporated as a partnership limited by shares under Luxembourg law on 9 February 2017. Such a partnership usually has one general partner, which is responsible for managing the fund.
10. The Skew Base Fund was set up by Twinkle Capital SA (“Twinkle”, formerly Ziusudra SA) with Mr Migani’s involvement. It is a type of AIF, a “Reserved Alternative Investment Fund” (or “RAIF”). The person or entity responsible for coming up with the concept for such a fund, and setting it up, is known as its “initiator”. Where the initiator does not come from Luxembourg, local third-party service providers are needed to perform certain functions, but the initiator will retain key roles in the operation of the fund and also receive a major part of the fees. If the initiator has a licence to perform the function of portfolio manager, then the portfolio management function will normally be delegated to the initiator. If not, then the initiator (or a company linked to it) will be an advisor to the party performing the portfolio management function. The initiator will normally have a role, too, on the governing body of the fund: for example, a representative on the board of directors of the general partner of the fund. The initiator also selects the service providers for the fund and negotiates their fees.
11. The service providers will or may include legal counsel, a portfolio manager, and an investment advisor to the portfolio manager. Where the fund is to invest in alternative investments, an alternative investment fund manager (or “AIFM”) is required. The

AIFM's role is defined in law, and it has two mandatory functions: portfolio management and risk management. It is allowed to delegate one of these functions, but it must perform the other one itself and it remains ultimately responsible for any delegated function. There further has to be a depositary bank, whose role is safekeeping of the fund's assets.

12. The Skew Base Fund had a general partner, Skew Base SARL ("SB GP"), which was ultimately responsible for managing the Fund. SB GP was owned by Twinkle, which was itself owned by Mr Migani. SB GP was paid a global fee, comprising a management fee and a performance fee, out of the assets of the Skew Base Fund. As the Skew Base Fund is a RAIF, SB GP appointed VP Fund Solutions (Luxembourg) SA ("VP Lux"), part of the VP Bank group headquartered in Liechtenstein, as the AIFM. VP Lux was entitled to and did receive professional fees for its role as the AIFM, and these were paid by SB GP out of its own assets. VP Lux sub-delegated the portfolio management function to another company in the VP Bank group, VP Fund Solutions (Liechtenstein) AG ("VP Liechtenstein"), which was likewise entitled to receive fees for its services. VP Lux and VP Liechtenstein engaged Twinkle to provide a technological system and portfolio management support services, and it, too, was entitled to be paid, and was paid, for those services. The depositary bank was VP Bank (Luxembourg) SA.
13. The Skew Base Fund was set up as an umbrella fund with a number of compartments. These included HFPO, MIN (EUR), MIN (USD), Tangible Credit, Real Estate and Short-Term Arbitrage Compartments.
14. There was a separate Offering Memorandum for each compartment of the Skew Base Fund, but the bulk of the document was common to all the compartments. This identified SB GP as the Fund's general partner "in charge of the Fund's management" and went on:

"The General Partner shall have the broadest powers to act in any circumstances on behalf of the Partnership, subject to the powers expressly assigned by law to the general meetings of Shareholders.

The General Partner is responsible, while observing the principle of risk diversification, for laying down the investment policy of the Compartments and for monitoring the business activity of the Fund and its Compartments. It may carry out all acts of management and administration on behalf of the Fund and its Compartments and in particular purchase, sell, subscribe or exchange any securities and exercise all rights directly or indirectly attached to the Compartments."

VP Lux, as the AIFM, was explained to be "responsible for the portfolio and risk management of the Fund, subject to the overall supervision of the General Partner", and this was said as regards "Conflicts of Interest":

"The General Partner, the AIFM, the Investment Manager, the Investment Advisor, the Depositary, the Administrator and the other service providers of the Fund, and/or their respective

affiliates, members, employees or any person connected with them may be subject to various conflicts of interest in their relationships with the Fund.”

15. With respect to fees, the Offering Memorandum stated:

“9.2 General Partner Fee

The General Partner will be entitled to an annual fee and a performance fee as specified in the Appendix for each Compartment or Share Class, the fee will be paid out of the assets of the Fund and allocated to the relevant Compartments and Share Classes as described in section 8.2.5 (Allocation of assets and liabilities to Compartments and Share Classes) above.

9.3 Management Fee

The AIFM will be entitled to an annual fee for each Compartment or Share Class, and which will be paid by the General Partner out of its own fee. The AIFM will also be entitled to reimbursement by the General Partner of reasonable out-of-pocket expenses properly incurred in carrying out its duties.

9.4 Investment Manager and Investment Advisor Fee

The fees of the Investment Manager and the Investment Advisor, if applicable, will be borne by the General Partner out of its own assets.

9.5 Performance Fee

The AIFM may be entitled to receive a Performance Fee with respect to certain Compartments or Share Classes. It will be paid by the General Partner out of its own assets.”

16. The Offering Memorandum thus referred to the “fees of ... the Investment Advisor, if applicable,” being borne by SB GP out of its own assets. It did not name Twinkle as the “Investment Advisor”, but the omission was the result of a drafting error.
17. In May 2017, SRL invested €10 million in the Skew Base Fund’s HFPO Centaurus Compartment (later absorbed into the HFPO Compartment). In February of the following year, MDM invested €3 million in the Fund’s Tangible Credit Compartment.
18. At a meeting attended by, among others, Mr Nuzzo, MDM and Mr Migani on 9 March 2018, XY presented to GIG the option of investing in the Skew Base Fund. Further meetings attended by Mr Nuzzo, MDM and Mr Migani took place in April and June of 2018. Mr Migani also had meetings with Mr Nuzzo and MDM on 20 September 2018.

19. In October 2018, GIG invested €27 million in the Skew Base Fund's HFPO Compartment and another €27 million in its MIN (EUR) Compartment. In the next month, GIG invested €4,999,999.99 in the Fund's Tangible Credit Compartment, €10 million in the Real Estate Compartment and €3,999,999.99 in the Tangible Credit Compartment. More investments by GIG followed in December 2018: of €5 million in the HFPO Compartment, €5 million in the MIN (EUR) Compartment and €5 million in the Tangible Credit Compartment.
20. In 2019, GIG redeemed sums totalling €14.8 million from the HFPO and MIN (EUR) Compartments. MDM invested US\$1,499,990 in the MIN (USD) Compartment.
21. In February 2020, and particularly March 2020, financial markets were severely impacted by the Covid-19 pandemic. In March 2020, two market indices (the S&P 500 and the Euro Stoxx 50) suffered 1-day falls of greater than 10%. Equity markets were generally falling at around that time. A point was reached in or around mid-March 2020 when it was not viable for the Skew Base Fund's MIN Compartments to continue to operate, with the result that the MIN (EUR) and MIN (USD) Compartments were liquidated, with GIG and MDM losing 53% and 43% of their capital respectively. GIG and MDM also lost all capital invested in the HFPO Compartment as a result of the market volatility.
22. In contrast, GIG's investments in the Skew Base Fund's Real Estate Compartment were successful. GIG's and MDM's investments in the Tangible Credit Compartment did not suffer a loss, either.
23. The present proceedings were brought by GIG, MDM and LDM. The defendants included not only XY, but VP Lux, VP Liechtenstein, Twinkle, Mr Migani and Mr Federico Faleschini, who among other things was the company secretary of XY, the chief financial officer of the XY Group and a director of Twinkle.
24. The Judge summarised what was alleged in these terms in paragraph 5 of the Judgment:

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

25. The trial occupied the Judge for some 28 days in late 2024. Giving judgment on 28 March 2025, the Judge held that the claims all failed and that XY succeeded in a counterclaim for outstanding fees.
26. GIG and MDM now appeal against the Judge's decision in so far as it concerns the claim against XY for breach of fiduciary duty.
27. Permission to appeal was granted in respect of four grounds of appeal: grounds 1, 2, 4 and 5. By ground 1, it is contended that the conclusions of the Judge as to the scope of the fiduciary duty owed by XY were wrong and that he should have found that XY had a duty to disclose certain matters. Ground 2 is to the effect that the Judge was wrong to conclude that GIG and MDM gave informed consent to conduct of XY which would otherwise have involved breach of fiduciary duty. Grounds 4 and 5, which concern remedies, arise only if GIG and MDM are successful on ground 1 and/or ground 2.

The Judgment

28. The Judge addressed the allegations of deceit in Sections G and H of the Judgment, which ran from paragraph 969 to paragraph 1253. Section H dealt with the "Independence Representations" for which the claimants contended. These could be summarised as that (i) XY was an independent financial advisor and (ii) XY was in a position to and would provide unbiased advice in relation to investments. The Judge found that it had been represented that "the services which XY provided were not influenced by financial connections to external parties such as banks" (paragraph 1150 of the Judgment). He considered the "central factual issue" to be whether there was disclosure to the claimants (paragraph 1157) and concluded that "it is more likely than not that Mr Migani did disclose to MDM and Mr Nuzzo that he was the entrepreneur who was behind the Fund and had set it up, and that he was the owner of the general partner" (paragraph 1173). The Judge explained that, in the light of that conclusion, the "independence misrepresentations" case "must fail" (paragraph 1229). "[S]ince the Claimants were aware of Mr Migani's significant connection to the Skew Base Fund – in that he was the entrepreneur behind it and he was the owner of the general partner", the Judge said in paragraph 1229, "it cannot be said that the Claimants relied upon the relevant representations when concluding contracts with XY, or making investments (whether into the Skew Base Fund or otherwise)". The Judge added:

"1230. Before leaving this part of the case, however, I should note that I am far from persuaded that the Claimants ever attached as much significance, as they now seek to do, to the importance of XY being independent, conflict-free and unbiased. In my view, what the Claimants, and certainly MDM, were really interested in was making investments which they considered to be sound and in accordance with the overall objectives as discussed with XY in the meetings. As I have said, they were not averse to investing in 'in-house' funds. Their initial introduction to XY had been as a result of a personal recommendation. It was not because the

Claimants were concerned about banks having a conflict of interest.

1231. As discussed in Section G, the Skew Base Fund was attractive to both MDM and Mr Nuzzo for a variety of reasons, including MDM's tax position and the ease of making substantial investments via a fund. When cross-examined ... as to what mattered to him at the time that he first subscribed to the Skew Base Fund, MDM referred to his investment objectives, his non-dom status and his tax position. I think that this fairly reflected what mattered to MDM. Furthermore, MDM had not visited the website, and had not attended any meetings where representations had been made as to independence and being unbiased and conflict-free. The brief report by Mr Nuzzo, of his first meeting with Mr Migani in May 2016, would not have been a relevant factor in MDM's decision to move forward with Mr Migani.

1232. Against this background, there is no reason to think that any of the Claimants' witnesses would have reacted adversely to being told the information, as to Mr Migani's connection to the Skew Base Fund, that (in my judgment) was communicated to MDM and Mr Nuzzo. The evidence is that they liked the man, and they liked the strategy.

...

1235. I consider that if XY's website had said nothing about being independent or unbiased or being conflict-free, or if nothing had been said on that topic at the May 2016 meeting, events would still have proceeded in the same way that they did, and that the Claimants would have suffered all the losses that they did eventually suffer as a result of the adverse market movements in March 2020. In my view, the relationship with XY would have started in the way that it did, not least because of the technology that XY could provide to assist Mr Nuzzo. It would then have developed as it did, because the Claimants were impressed by Mr Migani and XY, and were attracted to the investment strategy that was proposed, including investment in HFPO and MIN products. Accordingly, the claim based on the independence misrepresentations also fails on causation grounds."

29. The Judge turned to the allegations of breach of fiduciary duty and dishonest assistance in Section I of the Judgment. After noting in paragraph 1237 that there was "a substantial overlap between the issues on independence, which I have addressed in

Section H above, and the arguments here”, he said in paragraph 1238 that he considered that his conclusions in Section H “effectively dispose of the case based on breach of fiduciary duty and dishonest assistance”.

30. The Judge held there to have been a fiduciary relationship between XY and the claimants (paragraph 1245 of the Judgment). He noted that there was no real dispute as to whether XY had as a result owed GIG and MDM duties not to place itself in a position of conflict or to profit from its position, but that the claimants further contended that XY’s “duty of undivided loyalty” included “a duty to disclose to GIG and MDM all information relevant to their affairs”. As to that, the Judge said in paragraph 1248:

“XY submitted that any fiduciary duty did not include a positive obligation to disclose to GIG and MDM ‘all information relevant to their affairs’. I agree. *Snell’s Equity*, 35th edition, states (at 7-014):

‘Fiduciary duties are fundamentally proscriptive in nature, rather than prescriptive: fiduciary doctrine “tells the fiduciary what he must not do. It does not tell him what he ought to do’.”

31. The Judge further considered that “there was informed consent in the present case, and ... therefore there was no breach of fiduciary duty” (paragraph 1256 of the Judgment). In that connection, the Judge said this:

“1253. On the basis of my findings in Section H above, the Claimants were told that Mr Migani was the entrepreneur behind the Skew Base Fund, and that he owned its general partner. The question of informed consent must be applied, as *Snell* indicates, by looking at substance not form, and treating it in a functional rather than formalistic way. I must also take into account, as indicated in the cases cited in footnote 144 of *Snell*, the sophistication of the person to whom the disclosure is made.

1254. In Section H above in the context of the independence representations claim, I addressed the Claimants’ argument that the other XY clients were not given the full picture; because they were only told of Mr Migani’s involvement as the person behind the Fund, and his ownership of the general partner. I concluded, in that context, this was not a persuasive point. I accepted [counsel for XY’s] argument, in that context, that all the Claimants needed to know was that Mr Migani was the person behind the fund and that he was behind the general partner, and that was enough. It was not relevant to enquire in enormous detail as to what then happened to the fees. I accepted that investors in the fund therefore knew: what they were paying, that

they were paying it to the general partner; and that the general partner will pay other people out of its fee, including the investment advisor if there is one. It was irrelevant what the general partner then did with its surplus assets afterwards.

1255. I have considered whether, in the context of the claim for breach of fiduciary duty – bearing in mind that the onus is on the fiduciary to establish informed consent – the answer should be any different. I have concluded that it should not. I am concerned here with a case of professional investors with considerable experience of financial matters, where MDM ran his own Luxembourg fund, and Mr Nuzzo acknowledged that he understood the important role that a general partner plays. The disclosure that was made would have made it obvious that Mr Migani, as the entrepreneur behind the fund, had a significant financial interest in its success. The Offering Memorandum set out the fees that were to be paid to the general partner, and so investors knew that substantial sums were flowing out from the Fund into a company which Mr Migani owned. In the context of a disclosure which revealed Mr Migani’s significant interest and involvement in the Fund, I do not consider that the absence of disclosure of other matters – for example exactly how much money was being paid to each actual or potential service provider identified in the Offering Memorandum, or how any profits made by the general partner were to be distributed – means that there was not a sufficient disclosure of material facts to the Claimants.”

Ground 1

32. In a much-cited passage, Millett LJ said in *Bristol and West Building Society v Mothew* [1998] Ch 1 (“*Mothew*”), at 18:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.”

33. That dictum has recently been quoted with approval by the Supreme Court in *Recovery Partners GP Ltd v Rukhadze* [2025] UKSC 10, [2026] AC 209 (“*Rukhadze*”), at paragraph 17, *Hopcraft v Close Brothers Ltd* [2025] UKSC 33, [2026] AC 877 (“*Hopcraft*”), at paragraph 89, and *Mitchell v Al Jaber* [2025] UKSC 43, [2026] AC 758, at paragraph 38. In *Hopcraft*, the Supreme Court explained at paragraph 90:

“The key principle is therefore that a fiduciary acts for and only for another. He owes a duty of single-minded loyalty to his principal, meaning that he cannot exercise any power in relation to matters covered by his fiduciary duty so as to benefit himself. Accordingly, if a person is a fiduciary then he must not put himself into a position where his interest and that of the beneficiary might conflict (the no conflict rule), subject to the principal’s informed consent. In addition, or perhaps in consequence, he must not receive a personal benefit from his fiduciary position (the no profit rule), subject again to the principal’s informed consent.”

34. The “precise scope” of these duties may be “moulded according to the nature of the relationship” (to use words of Lord Wilberforce in *New Zealand Netherlands Society ‘Oranje’ Inc v Kuys* [1973] 1 WLR 1126, at 1130). Where there is a contractual relationship between a fiduciary and the principal, the fiduciary relationship “must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them” and “cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction” (*Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 C.L.R. 41, at 97, per Mason J, applied by the Privy Council in *Kelly v Cooper* [1993] AC 205, at 214-215, and also endorsed in *Hopcraft*, at paragraph 103). In *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Browne-Wilkinson explained at 206 that “[t]he existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise”.
35. Mr Daniel Saoul KC, who appeared for the appellants with Mr Benjamin Archer, addressed the possibility that the Judge considered XY’s fiduciary duties to have been “moulded”, and so curtailed, in the present case. He submitted that the Judge ought *first* to have decided what a “full” fiduciary duty would have required and then, *second*, whether there was any basis for “moulding” or “narrowing” the scope of that duty on the facts. However, the Judge said when deciding whether to grant permission to appeal that the fiduciary duties identified in paragraphs 1247-1249 of the Judgment were “orthodox” and “not ‘moulded’ or ‘narrowed’ by consideration of (e.g.) whether there was informed consent”, adding that “the key issue in the present case is whether there was informed consent”. Those comments seem to me to accord with the Judgment, the reasoning in which does not appear to me to depend in any way on XY’s fiduciary duties having been “moulded”. Nor, so far as I can see, is there any good reason to suppose that the contractual relationships between the appellants and XY served to curtail its fiduciary duties in a material way.

36. The real question raised by ground 1 is, I think, not whether XY's fiduciary duties were "moulded", but whether XY had a positive duty of disclosure. In other words, was it the case that XY was not merely subject to the "no profit" and "no conflict" rules as described in *Hopcraft* but, as a discrete matter, required to disclose to the appellants all information relevant to their affairs?
37. Arguing that such an obligation existed, Mr Saoul contended that, as a consequence of his obligation of loyalty, a fiduciary contemplating an arrangement which has the potential to compromise that loyalty must make disclosure of all facts and matters relevant to their affairs. Both disclosure by the fiduciary *and* informed consent are needed where there is a potential conflict of interest. Absent compliance with the duty of disclosure, Mr Saoul argued, the question of informed consent does not arise. That, Mr Saoul said, makes sense since the approach avoids doubt as to the parties' positions and the relevant information will be within the knowledge of the fiduciary. Mr Saoul identified rescission and an account of profits as remedies in respect of a breach of the duty of disclosure; the availability of equitable compensation, Mr Saoul said, would depend on additional requirements.
38. One of the authorities on which Mr Saoul relied in this context was *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 ("*Daly*"), a decision of the High Court of Australia in which a firm of stockbrokers was held to have been in breach of duty in not disclosing its parlous financial position to an investor who lent money to it. Gibbs CJ said at 377:

"It was right to say that Patrick Partners owed a fiduciary duty to Dr. Daly and acted in breach of that duty. The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr. Daly, and Dr. Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr. Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction"

Another member of the Court, Brennan J, said at 385-386:

"The duty of an investment adviser who is approached by a client for advice and undertakes to give it, and who proposes to offer the client an investment in which the adviser has a financial interest, is a heavy one. His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision including the identity of the buyer or seller of the investment when that identity is relevant, to give the best advice which the adviser could give if he did not have but a third party did have a financial interest in the investment to be offered, to reveal fully the adviser's financial interest, and to obtain for the client the

best terms which the client would obtain from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction

Patrick Partners were therefore under a duty, before borrowing from Dr. Daly without security the money on the investment of which their advice had been sought, to tell him fully and truthfully what they knew about their financial position and to warn him, as they could and should have warned him if a third party in their financial position has sought a loan from Dr. Daly, that it was unwise to lend the money.”

39. Mr Saoul stressed the references in these judgments to the firm having “a duty to disclose” and a “duty to furnish ... with ... knowledge”. However, decisions of the High Court of Australia subsequent to *Daly* lend no support to the existence of the duty of disclosure for which Mr Saoul contends:

- i) In *Breen v Williams* [1996] HCA 57, (1996) 186 CLR 71, Gaudron and McHugh JJ said:

“40. ... the Canadian law on fiduciary duties is very different from the law of this country with respect to that subject. ... The Canadian cases ... reveal a tendency to view fiduciary obligations as both proscriptive and prescriptive. However, Australian courts only recognise proscriptive fiduciary duties. This is not the place to explore the differences between the law of Canada and the law of Australia on this topic

41. In this country, fiduciary obligations arise because a person has come under an obligation to act in another’s interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed”

Prescriptive fiduciary duties (such as that suggested by Mr Saoul) were accordingly said not to be recognised in Australia; and

- ii) In *Maguire v Makaronis* [1997] HCA 23, (1997) 188 CLR 449, clients of solicitors had executed a mortgage in favour of the solicitors to secure bridging finance for a purchase. The High Court of Australia held that the mortgage was liable to be set aside at the suit of the clients because they had not given informed consent to the solicitors’ interest in the transaction. Brennan CJ and Gaudron, McHugh and Gummow JJ said in their judgment:

“if the appellants were to escape the stigma of an adverse finding of breach of fiduciary duty, with consequent remedies,

it was for them to show, by way of defence, informed consent by the respondents to the appellants' acting, in relation to the Mortgage, with a divided loyalty. What is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given. ... On no footing could it be maintained that the appellants had taken the necessary steps of this nature to answer the charge of breach of fiduciary duty. However, it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty."

The Court thus considered that informed consent would have "gone to negate what otherwise was a breach of duty", not that there was a "duty ... to obtain" such consent.

40. *Daly, Breen v Williams* and *Maguire v Makaronis* were amongst the cases discussed by Austin J, sitting in the New South Wales Supreme Court, in *Aequitas v AEFC* [2001] NSWSC 14, (2001) 19 ACLC 1006. After quoting from the judgment of Brennan J in *Daly*, Austin J observed that "judicial thinking about the content of fiduciary duties has changed significantly over the last decade, especially in cases where the fiduciary and the principal are in a contractual relationship, or where the fiduciary owes the principal a duty of care"; that "[i]n Australia, after acknowledging the co-existence of contractual and fiduciary rights in *Hospital Products Ltd v US Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41, the High Court has decided to confine the fiduciary component of the overall relationship to a number of specific duties"; and that the "logic" of the analysis of five of the six members of the High Court who decided *Breen v Williams* is that "most of the observations of Brennan J [in *Daly*] do not relate to the fiduciary character of the adviser's position": see paragraphs 283 and 286. In paragraph 287, Austin J said:

"In my opinion, in light of the reasoning in *Breen v Williams*, Brennan J's dictum should be taken to refer, for the most part, to the contractual aspects of the adviser-client relationship. The duty to provide 'best advice' and to disclose knowledge and information arise out of the adviser's 'undertaking', and are therefore implied terms of the contractual retainer. And disclosure may also relieve the adviser from the fundamental fiduciary duty not to 'assume a position where his self-interest might conflict with the honest and impartial giving of advice'."

41. In the same vein, Austin J said in paragraph 285, quoting *Breen v Williams*, that "[i]n fiduciary law, 'informed consent' is 'an answer to circumstances which otherwise indicate disloyalty, not a mainspring of equitable liability'". "Australian law," Austin J noted, "is to be contrasted with the law of the United States, where 'informed consent' represents some assumed synthesis between the tort of negligence and principles of fiduciary duty giving rise to a 'free-standing' action in damages".

42. In all the circumstances, it seems to me that, far from supporting Mr Saoul's submissions, the Australian authorities are inconsistent with them.
43. Mr Saoul relied, too, on *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2004] BCC 994 ("*Item Software*"). In that case, the Court of Appeal concluded that a company director had breached his duties by failing to disclose his own misconduct. I noted in *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369, at paragraph 193, that the decision is somewhat controversial. What matters for present purposes, however, is that Arden LJ, who gave the main judgment, did not arrive at her conclusion on the basis that there was a freestanding obligation of disclosure. Arden LJ expressly stated in paragraph 41 that she did "not consider that it is correct to infer from the cases to which I have referred that a fiduciary owes a separate and independent duty to disclose his own misconduct to his principal or more generally information of relevance and concern to it". "So to hold," she said, "would lead to a proliferation of duties and arguments about their breadth". Arden LJ "prefer[red]" to base [her] conclusion ... on the fundamental duty to which a director is subject, that is the duty to act in what he in good faith considers to be the best interests of his company". On the facts, as Arden LJ explained in paragraph 44, she considered there to be "no basis on which Mr Fassihi could reasonably have come to the conclusion that it was not in the interests of Item to know of his breach of duty" and so "he could not fulfil his duty of loyalty ... except by telling Item about his setting up of RAMS, and his plan to acquire the Isograph contract for himself". Arden LJ had noted in paragraph 40 that "it is often said that a fiduciary must disclose a conflict of interest and duty because that is a shorthand way of stating the mechanism by which he can avoid any liability to account for secret profits".
44. That last comment has a resonance in relation to other authorities to which Mr Saoul referred us in which Courts have used the word "duty" in connection with disclosure by a fiduciary. Thus, in *Moody v Cox* [1917] 2 Ch 71, where a solicitor acted for the purchaser of land which he was selling as a trustee, Lord Cozens-Hardy MR said at 81 that, if a solicitor chooses to put himself in a position where he has "a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other", the resulting "dilemma" is "his own fault": "He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full *duties of disclosure* or say - which would be much better - 'I cannot accept this business'" (emphasis added). In *Rhodes v Macalister* (1924) 29 Com Cas 19, Scrutton LJ said at 27 that "an agent must not take remuneration from the other side without *both disclosure and consent* from his principal" (emphasis added). In *Hilton v Barker Booth and Eastwood* [2005] UKHL 8, [2005] 1 All ER 651, Lord Walker said in paragraph 42 when discussing *Moody v Cox* that "the content of the contractual *duty of disclosure*" was "rooted in the fiduciary relationship between solicitor and client" and that "Lord Cozens-Hardy MR expressly stated that the solicitor's *duty of disclosure* does not depend on undue influence" (emphases added). In *Rukhadze*, Lord Briggs spoke at paragraph 40 of the law asking "whether the fiduciary would have made the profit if he had done his *duty* and asked his principal for consent" (emphasis added).
45. In my view, however, these cases take matters no further. They do not establish a positive fiduciary duty of disclosure. The references to "duty" can be explained as

illustrations of the “shorthand way of stating the mechanism by which [a fiduciary] can avoid any liability to account for secret profits” which Arden LJ identified.

46. The true position, as it seems to me, is that disclosure can facilitate informed consent where the “no conflict” and/or “no profit” rules might otherwise bite but that there is no discrete fiduciary duty of disclosure. That understanding is borne out by paragraph 225 of the Supreme Court’s judgment in *Hopcraft*, where it was observed that “[t]he purpose of requiring disclosure, as a condition for excluding the law’s remedial response, is ... to negative what would otherwise be a breach of fiduciary duty”. It accords, too, with the passage from *Mothew* quoted in paragraph 32 above. Millett LJ explained there that the “core liability” of a fiduciary means that “[a] fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal”. There was no suggestion that a fiduciary had an independent obligation of disclosure.
47. That is not to say that all fiduciary duties are invariably proscriptive rather than prescriptive. I do not understand the Courts of this jurisdiction to have so decided and it is not necessary to address the question in this case. All that has to be determined in the present context is whether a fiduciary has as such a positive obligation to disclose, and I do not consider that he does. Neither *Daly* nor *Item Software* nor the cases mentioned in paragraph 44 above appear to me to provide any significant support for the existence of such a duty.
48. As I have mentioned, in *Hopcraft* the Supreme Court said that a fiduciary “must not put himself into a position where his interest and that of the beneficiary might conflict (the no conflict rule), subject to the principal’s informed consent” and “must not receive a personal benefit from his fiduciary position (the no profit rule), subject again to the principal’s informed consent”. “Informed consent” may hence preclude liability under both the “no conflict” and “no profit” rules, and disclosure will play a crucial role in this context. While, however, disclosure may avert liability by facilitating informed consent, it does not follow that a principal can make a freestanding claim for non-disclosure by a fiduciary, and I do not think he can. In *Expert Tooling and Automation Ltd v Engie Power Ltd* [2025] EWCA Civ 292, [2026] 1 All ER 825, Zacaroli LJ said at paragraph 42 that “the duty not to make a profit and not to place oneself in a position where duty and interest conflict” are “not outright prohibitions, ... but merely proscribe conflicts and profiting that have not been consented to by the principal”. That, it seems to me, indicates where disclosure has a role: it may be the basis of informed consent.
49. To my mind, the views I have been expressing accord with policy as well as authority. Were Mr Saoul correct in his submissions, it would appear that a fiduciary with a conflicting interest or duty could incur liability even though the principal had chosen to proceed with full knowledge of all material facts. On Mr Saoul’s case, the principal could still make a claim if the fiduciary had not himself disclosed a fact which a Court later held to be material. It would make no difference that the fiduciary had striven to make full disclosure, that the fiduciary had believed the fact in question to be immaterial or that the principal had known the fact anyway. I would not regard such an outcome as equitable.

50. In all the circumstances, I do not accept ground 1. I agree with the Judge that XY did not have a positive duty of disclosure.

Ground 2

The parties' positions

51. Mr Saoul argued that, to satisfy the requirement for informed consent, XY had to disclose, but did not, the following:
- i) The amount and/or proportion of fees that companies owned and/or controlled by Mr Migani would receive in respect of investments in the Skew Base Fund, and the circumstances in which they would be received;
 - ii) The role of Twinkle, “an unregulated and undisclosed entity which was receiving substantial fees for (to put it at its lowest) advising the formally appointed portfolio manager ([VP Liechtenstein]) in relation to investment decision making within the [Skew Base] Fund” (to quote from the appellants’ skeleton argument);
 - iii) The fact that Twinkle was owned and controlled by Mr Migani.
52. In contrast, Mr Cloherty submitted that there is no proper basis for interfering with the Judge’s conclusion that there had been informed consent and that the Judge was in any event correct.

Informed consent: legal principles

53. In *Hopcraft*, the Supreme Court explained at paragraph 211:
- “It is well established that the consent which is required in order to avoid the equitable liabilities which flow from a breach of the no conflict and no profit rules must be fully informed. The burden is on the payer of the commission or its recipient, as the case may be, to prove that full disclosure was made, which means all material facts, and it is not enough to place the principal on inquiry.”
54. The Supreme Court went on to observe in paragraph 226 that “what amount to material facts will depend on the circumstances of the particular case”. As the Court noted, the point is illustrated by *Liquidators of the Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189 (“*Imperial Mercantile*”) and *Anangel Atlas Cia Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd* [1990] 1 Lloyd’s Rep 167 (“*Anangel*”).
55. The Supreme Court said this about *Imperial Mercantile* in paragraph 213 of *Hopcraft*:
- “One of the authorities relied on by the Master of the Rolls [in *Dunne v English* (1874) LR 18 Eq 524] was the decision of the House of Lords in *Liquidators of Imperial Mercantile Credit Association v Coleman* ... , a case concerned with the payment of a commission to a director of a company in connection with

the placing of debentures with it. His fellow directors knew that he was a stockbroker, and he told them that he was receiving a commission, but not the amount, which was much larger than the usual stockbroker's commission. The company sought the disgorgement of the commission. Lord Chelmsford noted that the magnitude and nature of the transaction lay beyond the ordinary business of stockbrokers, and beyond the scope of the usual stockbroker's commission, with the consequence that the disclosure which had been made 'afforded very scanty information' as to the nature of the director's interest (p 202). As the decision illustrates, what amounts to the disclosure of all material facts can depend on the circumstances. It seems that the disclosure made in that case might have sufficed if the commission received had been the usual stockbroker's commission, as the information which had been disclosed would then have been sufficient to enable the directors to form an accurate idea of their fellow director's interest in the transaction. As it was, however, the information which was disclosed did not enable them to do so."

56. *Imperial Mercantile* can be contrasted with *Anangel*. The Supreme Court said this about *Anangel* in paragraphs 215 and 216 of *Hopcraft*:

"215. ... The case concerned a naval architect who was engaged by shipowners to negotiate on their behalf the purchase of ships which they knew he had designed, from the shipbuilders who had constructed the ships. The architect received royalties from the shipbuilders for the licensing of his designs, and payments for the promotion of the sale of the ships. The shipowners then sought to recover the amount of those payments from the shipbuilders, on the basis that the architect had been acting as their agent in relation to the purchases, and they had not known about the payments. The claim failed, on the basis that the shipowners had known all the material facts about the payments and consented to them.

216. In the course of his judgment, Leggatt J cited authorities establishing the need for fully informed consent, and recorded that it was 'not disputed that knowledge of and consent to the fact of payment is sufficient to legitimate it, without it being necessary to prove that the principal knew the exact amounts paid, provided that they were reasonable' (p 171). He went on to find that although the shipowners never knew the amount of the payments, they knew that the shipbuilders were making payments to the architect for design and promotion on a per ship basis. The amounts paid were unexceptional, and did not affect the price paid by the shipbuilders. In those circumstances, Leggatt J concluded that the information which had not been disclosed, as to the precise amount of the payments, was 'not material, so far as the plaintiffs were

concerned’ (p 176). The decision is a modern illustration of a point which could be inferred from the earlier authorities, notably *Imperial Mercantile*, namely that what amounts to disclosure of all material facts depends on the circumstances of the particular case: not every fact which could be disclosed is necessarily material in a particular context. The significance of the payments being ‘reasonable’ was that the disclosure of their existence gave the shipowners, in the circumstances of that case, all the information they required in order to understand the nature and extent of the architect’s interest.”

57. As the High Court of Australia noted in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, at paragraph 107, “the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made”. In my view, that is plainly correct as a matter of the law of England and Wales, too. The “sophistication and intelligence” of the recipients of disclosures may affect what they understand from them. Something that may be obvious to someone with relevant experience may require far more explanation in the case of a person with no background knowledge. That is not to say that, with an addressee versed in the field, it suffices to impart information from which he could be *expected* to infer a matter. Such an approach would be inconsistent with the principle that it is not enough to place a principal on inquiry. If, however, an addressee’s sophistication means that he in *fact* draws an inference, and so is aware of something, that must fall to be taken into account.

The circumstances in which a finding of fact or evaluative assessment can be impugned

58. There are only limited circumstances in which an appellate Court should interfere with a finding of fact made by a trial judge. Thus, in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600 Lord Reed (with whom Lords Kerr, Sumption, Carnwath and Toulson agreed) said at paragraph 67:

“in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

A little earlier, in paragraph 62, Lord Reed had said:

“It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.”

59. In *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29, Lewison LJ identified in paragraph 114 a number of reasons for the approach which the Courts take. As he explained, they include the fact that “[i]n making his decisions the trial

judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping” and that “[t]he atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence)”. The position is comparable with evaluative assessments. An appellate Court will not interfere merely because it might have arrived at a different conclusion. It will do so only if it considers the decision under appeal to have been an unreasonable one or wrong as a result of some identifiable flaw in reasoning, “such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion” (see e.g. *R (R) v Chief Constable of Greater Manchester* [2018] UKSC 47, [2018] 1 WLR 4079, at paragraph 64, and also *In re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] 2 BCLC 617, at paragraphs 76 and 77).

Discussion

60. The Judge found on the evidence that GIG and MDM were told by Mr Migani that he was the entrepreneur behind the Skew Base Fund and that he owned its general partner: see in particular paragraph 1173 of the Judgment.
61. However, the information which GIG and MDM were given about Mr Migani and entities associated with him was subject to limitations. Twinkle was not identified as the Skew Base Fund’s “Investment Advisor”. Neither was it explained that Twinkle was owned and controlled by Mr Migani. Nor was the extent to which Twinkle was involved in selecting investments for the Fund spelled out. Again, the sums paid to Twinkle by VP Lux were not detailed.
62. With regard to Twinkle’s role in respect of investments, there was an “interface ... which enabled Twinkle to send investment proposals quickly, directly and in a uniform manner to the IT system used by VP Liechtenstein, known as Avaloq”, enabling “certain initial checks [to] be processed in the Avaloq system in a semi-automated way” (paragraph 878 of the Judgment). However, Mr Ralf Konrad, the head of investment management and chief executive officer of VP Liechtenstein and “an honest, extremely knowledgeable and impressive witness” (paragraph 849), explained that “the final decision as to whether or not to make any of the investments proposed remained (as it always does, even when an external advisor is involved) with the portfolio manager, VP Liechtenstein” (paragraph 878). Further, Mr Torsten Ries, head of private equity and real estate administration at VP Lux and “a patently honest witness” (paragraph 902), said that “it appeared to [him] and his colleagues that the technical system used by Twinkle to identify the investment proposals was not particularly relevant to the description of the relationship as it actually operated, which was like any other advisor/portfolio manager set up” (paragraph 841). The Judge rejected any suggestion that “Twinkle, rather than VP Liechtenstein (via delegation from VP Lux), was actually the portfolio manager”, instead concluding that “VP Liechtenstein was indeed the portfolio manager, and carried out its duties as such” (paragraph 1284 of the Judgment).
63. As for what Twinkle was paid by VP Lux, the Judge accepted evidence from Mr Ries to this effect:

“The fees which were paid to Twinkle were much greater than those paid to VP Liechtenstein, but there was nothing unusual

about that. It is very normal for the initiator, whatever role it has in relation to the fund, to expect to receive the major part of the fees.”

(See paragraphs 841 and 842 of the Judgment.)

64. More generally, the Judge found there to be nothing unusual about the structure of the arrangements relating to the Skew Base Fund (see e.g. paragraphs 803, 859 and 867 of the Judgment). The Judge explained that, in particular, “there was nothing unusual in VP Liechtenstein engaging the services of Twinkle as Investment Advisor”, nor “in Twinkle, as Investment Advisor, being connected to Mr Migani and one or more companies within the XY Group” (paragraph 804). As the Judge said in paragraph 903, “The broad shape of the arrangements was entirely orthodox: for example, the role of Ziusudra (Twinkle) as Investment Advisor, and the fact that the lion’s share of the monies paid by the Fund to the General Partner would ultimately benefit the initiator”. As the Judge recorded in paragraph 1282, Mr Ries explained:

“the structure of the Skew Base Fund in the present case was an ordinary structure which was commonly used in Luxembourg, in the context of a market where it was well known that a fund of this kind is the product of an initiator, such as in the present case Mr Migani. The involvement of the initiator in the subsequent operations of such a fund, as investment advisor, is also part of this ordinary structure.”

65. The Judge further made findings as to matters which Mr Nuzzo and MDM understood in relation to the structure and operation of the Skew Base Fund. In that connection, the Judge said the following:

- i) “over the years, Mr Nuzzo (who is a highly intelligent person generally and in relation to financial matters, as indeed were all of the Claimants’ witnesses) acquired considerable familiarity with different types of investments, including those which are at the heart of the case” (paragraph 102 of the Judgment);
- ii) “MDM was clearly financially astute and experienced, and I cannot accept that he would have been investing very substantial sums of money in the Skew Base Fund, or investments outside the Fund, with no real understanding of what the investments entailed or what the risks were. Similarly, I was not impressed with his answers, at the start of his cross-examination, to the effect that he had little understanding of AIFs, when in fact he ran (and was the CEO of the general partner of) a number of such funds” (paragraph 105);
- iii) “Mr Nuzzo regarded the Skew Base Fund as in effect synonymous with XY” (paragraph 751). As Mr Nuzzo saw it (paragraph 749):

“XY was concerned with the active management of the Fund itself, and in particular the investments that the Fund was making. In fact, this was a perception that was very close to the true position. In fact, it was not XY, but rather Twinkle, the sister company of XY (both of which were owned by Mr Migani) which was concerned in a broad sense with the active

management of the Fund, as indeed was SB GP (owned by Twinkle) which had ultimate supervisory responsibility for the Fund and was responsible for determining its strategy”;

- iv) “MDM’s evidence, when asked whether he knew that an alternative investment fund is managed by its general partner, said: ‘Yes, I do now’. I consider that he knew this at the time as well” (paragraph 1200);
 - v) “both MDM and Mr Nuzzo appreciated the important role that a general partner plays in the management of a fund such as the Skew Base Fund in which they decided to invest” (paragraph 1201);
 - vi) “It seems to me to be implausible that Mr Nuzzo and MDM would think that, if they invested in the Skew Base Fund, they would now be placing their wealth in the hands of a banking group with which they were entirely unfamiliar, whose key personnel they never sought to meet or ask any questions about, and would be doing so on the basis that it was important that Mr Migani and XY had no connection to the Fund. The Skew Base Fund had no track record in 2017 or 2018 at the time when XY proposed the Fund to the Claimants, and there is nothing in the evidence which suggests that there was any discussion about the qualities or experience of VP in the selection and management of investments in HFPO and MIN products. The Claimants sought to explain these matters by saying that MDM and Mr Nuzzo had complete trust in Mr Migani, as their advisor. I think that it is far more plausible that the decision was made because they knew of Mr Migani’s strong connections with the Skew Base Fund: his ownership of the General Partner, and the fact that he was the entrepreneur behind the Fund” (paragraph 1204); and
 - vii) “A reasonable reader of that Offering Memorandum, in particular recipients who were sophisticated and professional investors such as the Claimants, would understand that the general partner played a significant and important role in the structure and operation of the Fund. ... Mr Nuzzo accepted that he knew the importance of a general partner in the context of funds generally, and also that the Skew Base Fund was not a VP product” (paragraph 1283).
66. The Judge thus found that Mr Nuzzo and MDM (and, hence, GIG) knew the following:
- i) Mr Migani was the entrepreneur behind the Skew Base Fund (e.g. paragraph 1173 of the Judgment);
 - ii) The Fund was substantially and in a very real sense connected with Mr Migani (paragraph 1194);
 - iii) Mr Migani had a significant financial interest in the Fund and its success (paragraphs 1194 and 1255);
 - iv) Mr Migani owned the general partner, SB GP (e.g. paragraphs 1173 and 1255);

- v) The general partner played an important role in the management of the Fund, with significant responsibilities and powers in relation to its running (paragraphs 749, 1194, 1201, 1206, 1255 and 1283);
 - vi) What they were paying (paragraphs 1195 and 1254);
 - vii) The payments were being made to SB GP (paragraphs 1195, 1254 and 1255);
 - viii) The funds which SB GP received from the Fund were substantial (paragraph 1255); and
 - ix) SB GP would pay other people, including any investment advisor, out of what it received (paragraphs 1195 and 1254).
67. The Judge further considered that investors were “looking to Mr Migani, as the entrepreneur who had started this line of business, to make it work” (paragraph 1196 of the Judgment). Mr Migani had “impressed” Mr Nuzzo and MDM (paragraph 1203 of the Judgment). “[T]hey liked the man, and they liked the strategy” (paragraph 1232). Far from Mr Migani’s involvement with the Fund having been a mystery to Mr Nuzzo and MDM, it was an attraction.
68. Mr Nuzzo and MDM were not told a number of the things mentioned in paragraph 66 above in so many words. To the extent, however, that they were not, their background knowledge and intelligence led them so to conclude. In my view, it was plainly legitimate to take such conclusions into account when deciding whether there was informed consent. Someone less sophisticated than Mr Nuzzo and MDM might not have understood the significance of the information they were given in the way that they did, but that does not matter. As I have said in paragraph 57 above, where an addressee’s sophistication means that he is aware of something, it is right to have regard to it.
69. It also seems to me that there is no proper basis for impugning the Judge’s conclusion that there was informed consent. Whether, and to what extent, that conclusion is to be regarded as involving a finding of fact, on the one hand, or an evaluative assessment, on the other, is not important. Either way, there is no sufficient reason to interfere. The Judge’s conclusion was one that was rationally open to him, and it is not vitiated by matters such as were identified in *Henderson v Foxworth Investments Ltd* or *R (R) v Chief Constable of Greater Manchester* (as to which, see paragraphs 58 and 59 above). In fact, I consider that the Judge’s conclusion was not only one that he was entitled to reach, but correct.
70. The contrasting decisions in *Imperial Mercantile* and *Anangel* are relevant in this context. In the former, the information which had been disclosed was not “sufficient to enable the directors to form an accurate idea of their fellow director’s interest in the transaction” (see paragraph 56 above). In *Anangel*, on the other hand, disclosure of the *existence* of payments to the architect was good enough as that “gave the shipowners, in the circumstances of that case, all the information they required in order to understand the nature and extent of the architect’s interest” (see paragraph 56 above). It was not necessary for the shipowners to know the precise amount of the payments.

71. It seems to me that, similarly, GIG and MDM had adequate information for the purposes of informed consent in the present case. While Mr Nuzzo and MDM did not know the extent to which the sums paid to SB GP accrued for the benefit of Mr Migani or particular companies he owned or controlled, they were aware that Mr Migani had a significant financial interest in the Skew Base Fund, that he was the (ultimate) owner of SB GP and of the substantial sums which SB GP was being paid. Likewise, while Mr Nuzzo and MDM did not know of the part that Twinkle was playing in relation to investments, they were aware that SB GP had an important role in the management of the Fund and that the Fund was substantially connected with Mr Migani, who was the entrepreneur behind it. Mr Nuzzo believed XY rather than Twinkle to be concerned in the active management of the Fund and its investments, but the distinction was not a significant one: XY and Twinkle were sister companies owned by Mr Migani. Again, Mr Nuzzo and MDM were not aware that Twinkle was owned and controlled by Mr Migani, but that was not important. They knew that, through one or more vehicles, Mr Migani was closely connected with the Fund, involved with its management and deriving significant financial gains from it. The identity of the vehicles did not affect the nature or scale of the conflict of interest between GIG and MDM, on the one hand, and Mr Migani and entities associated with him, on the other. Further, it is to be remembered that there was nothing unusual about the structure of the arrangements relating to the Fund and that the interests of GIG, MDM and Mr Migani were aligned to a considerable extent. It was in the interests of all of them that the Fund was successful. After all, the fees payable to SB GP were calculated by reference to the value of the assets in the Compartments and their performance.
72. In all the circumstances, there was ample reason for the Judge to conclude that GIG and MDM had “all the information they required in order to understand the nature and extent of the ... interest [of Mr Migani and his companies]” (to adapt what the Supreme Court said about *Anangel*), and I in fact share the Judge’s view that there was informed consent. I am not, therefore, persuaded by ground 2.

Grounds 4 and 5

73. My conclusions on grounds 1 and 2 mean that grounds 4 and 5 do not arise.

Conclusion

74. I would dismiss the appeal.

Lady Justice Asplin:

75. I too would dismiss the appeal for all of the reasons given by Lord Justice Newey.

Lord Justice Popplewell:

76. I also agree.