THE SOLICITORS (SCOTLAND) ACT 1980
THE SCOTTISH SOLICITORS' DISCIPLINE TRIBUNAL
(PROCEDURE RULES 2008)

F I N D I N G S

in Complaint

by

THE COUNCIL OF THE LAW SOCIETY of SCOTLAND, Atria One, 144 Morrison Street, Edinburgh

Complainers

against

KENNETH STEWART GORDON, 30 Seafield Drive, East, Aberdeen

Respondent

1. A Complaint dated 11 February 2020 was lodged with the Scottish Solicitors' Discipline Tribunal by the Council of the Law Society of Scotland (hereinafter referred to as "the Complainers") averring that Kenneth Stewart Gordon, 30 Seafield Drive East, Aberdeen (hereinafter referred to as "the Respondent") was a practitioner who may have been guilty of professional misconduct.

2. There were two Secondary Complainers, Mrs Lindsay Wallace and Mr Robert Gordon Kidd.

3. The Tribunal caused a copy of the Complaint as lodged to be served upon the Respondent.

4. On 2 April 2020, the Tribunal, *ex proprio motu*, sisted the proceedings due to the coronavirus pandemic. On 22 May 2020, the Tribunal, *ex proprio motu,* recalled the sist and set down a procedural hearing for 15 July 2020, to take place remotely.

5. Answers were lodged for the Respondent.

6. At the procedural hearing on 15 July 2020 the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and was represented by

Alastair Duncan, QC, instructed by Anne Kentish, Solicitor, Edinburgh. On the unopposed motion of the Respondent, the Tribunal continued the matter to a further procedural hearing on 17 August 2020, to proceed remotely, to allow the parties to continue their discussions, in particular in relation to the original transaction files.

7. At the procedural hearing on 17 August 2020, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and was represented by Alastair Duncan, QC, instructed by Anne Kentish, Solicitor, Edinburgh. On the unopposed motion of the Respondent, the Tribunal fixed a preliminary hearing for 6 October 2020, to proceed remotely, and the Respondent was directed to lodge and intimate a written note of the preliminary pleas to be argued.

8. On joint motion, the Tribunal converted the preliminary hearing set down for 6 October 2020 to a procedural hearing, administratively in terms of Rule 56 of the Scottish Solicitors Discipline Tribunal Procedure Rules 2008 ("the Tribunal Rules").

9. At the procedural hearing on 6 October 2020, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and was represented by Alastair Duncan, QC, instructed by Anne Kentish, Solicitor, Edinburgh. On the unopposed motion of the Complainers, the Tribunal fixed a further procedural hearing for 24 November 2020, to proceed remotely, to allow parties to discuss the terms of a possible Joint Minute and for the Complainers to lodge an amended Complaint.

10. At the procedural hearing on 24 November 2020, the Complainers were represented by their Fiscal, Elaine Crawford, Solicitor, Edinburgh. The Respondent was present and was represented by Alastair Duncan, QC, instructed by Anne Kentish, Solicitor, Edinburgh. There being no objection, the Tribunal allowed an amended Complaint and Answers to be received. On joint motion, the Tribunal fixed a full hearing to proceed over two days, with a procedural hearing to take place in advance of the full hearing, all on dates to be afterwards fixed and to proceed remotely. A Record was to be produced by 15 December 2020.

11. Suitable dates were thereafter identified. The procedural hearing was set down for 9 February 2021 and the hearing for 8 and 9 March 2021.

12. At the procedural hearing on 9 February 2021, the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and represented by Alastair Duncan, QC, instructed by Anne Kentish, Solicitor, Edinburgh. It was noted that a Record was not yet completed and the Joint Minute was still being discussed. The Respondent indicated an intention to lodge a written statement for the Respondent which would be used as supplementary to his oral evidence. The Complaint was continued to the full hearing previously fixed.

13. On both 8 and 9 March the Complainers were represented by their Fiscal, Grant Knight, Solicitor, Edinburgh. The Respondent was present and was represented by Alastair Duncan QC, instructed by Anne Kentish, Solicitor, Edinburgh. The Tribunal heard evidence and submissions over both days. Deliberations not being completed on 9 March 2021, the case was continued to 22 March 2021 for them to continue.

14. On 22 March 2021, the Tribunal met to continue its deliberations. Having given careful consideration to the oral evidence, Joint Minute, productions and submissions, the Tribunal found the following facts established:-

14.1 The Respondent is Kenneth Stewart Gordon who was born on 24 August 1959. He was enrolled as a solicitor on 8 January 1982. The Respondent was a Partner with the firm Paull & Williamsons from 1998 until 2009 and then Paull & Williamsons LLP ('P&W') in Aberdeen until 2012. When the firm merged with Burness LLP in December 2012 to become Burness Paull LLP the Respondent became a Director of that firm and remained so until 28 October 2016. He specialises in corporate and commercial work, particularly in relation to the oil and gas sector. The Respondent holds a current practising certificate but is not currently practising as a solicitor.

14.2 In January 2009, the secondary complainer Robert Kidd ('RK') was the owner of the whole share capital of a company incorporated in Scotland called ITS Tubular Services (Holdings) Limited ("ITS"). The business of ITS consisted in the provision of downhole tools and drilling equipment to the oil industry and ancillary services at locations worldwide.

14.3 On about 26 January 2009, RK and ITS engaged P&W to act for them in connection with the sale of part of RK's shareholding. The name given to the transaction within P&W was Project Indigo. The principal solicitor instructed within P&W was Scott Allan.

14.4 During the transaction, instructions to P&W on behalf of ITS and RK came from two officers of ITS: Jeff Corray and Scott Milne. They had actual authority to provide those instructions. Mr Corray was formerly a partner with KPMG. He was appointed as CEO of ITS on 1 October 2007. On the same date, Mr Milne (also formerly of KPMG) was appointed as a director of ITS. Simmons & Co are investment bankers. They acted as agents for ITS during the transaction. The person with day-to-day responsibility within Simmons & Co was Jennifer Simpson. Simmons's role was to look for suitable investors on behalf of RK/ITS.

14.5 The purchaser of RK's shareholding was Lime Rock Partners ("LRP"). LRP is an American private equity firm which invests in the oil and gas sector. The fund itself is based in the Caymans, while the investors were North American based. During the transaction, LRP's principal representative was Lawrence Ross ("LR"). He eventually became Managing Director of LRP. LR was assisted on the transaction by Jason Smith of LRP.

LRP was an existing client of P&W and continued to be so when it put forward its proposal to ITS. The Respondent was the partner in the firm with primary responsibility for LRP's business.

14.6 LRP was represented in the transaction by Ledingham Chalmers ("LC"). The principal solicitor instructed was Malcolm Laing.

14.7 During 2008 and 2009, the oil and gas sector was under severe financial stress. ITS were no exception to this. It was understood by P&W that, by 2008/2009, ITS was at risk of bank covenant breach in relation to its borrowing levels.

14.8 P&W were originally appointed by RK and ITS to act in relation to a possible sale of RK's shareholding in around February 2008. Instructions were to be taken from Mr Corray and Mr Milne. During 2008, ITS and RK pursued a possible sale to 3i. That transaction eventually fell through in mid-2008.

14.9 Mr Corray instructed Simmons & Co to market the minority shareholding to private equity firms. Simmons & Co negotiated with those firms identified by that process. P&W were not involved in providing any advice during this period. By December 2008, the only remaining prospective investor was LRP.

14.10 LRP submitted an amended proposal through Simmons & Co on 12 January 2009. Negotiations between ITS/RK and LRP then stalled for several months. LRP issued a renewed proposal on 18 June 2009. This was issued direct; it did not go to P&W. The renewed offer increased (from $5 million to $10 million) as regards the cash proceeds from the deal that RK would personally receive.

14.11 The transaction completed on 26 September 2009. RK received the foregoing payment. In addition, LRP paid $45 million for new shares in ITS. It was the understanding of P&W at the time that LRP continued to be the only prospective investor; and that, had the transaction with LRP not completed at that time, ITS would have breached its banking covenants.

14.12 It was the understanding of P&W that, from the beginning of LRP's emergence as the only serious bidder, ITS/RK were anxious to conclude a deal; to do so as quickly as possible; and to do so with the minimum spend on legal fees

14.13 The LRP investment was conditional upon LRP being satisfied upon a series of due diligence reports on ITS, including a legal due diligence report, and upon the legal documentation. The principal legal documentation comprised the sale and purchase agreement, the investment agreement and the articles of association.

14.14 Scott Allan considered that he could not undertake all of the foregoing work on his own. There was also a concern that, if the transaction was going to be completed in accordance with the foregoing aspirations of ITS/RK, it would be necessary to ensure that transaction documents aligned with the approach that LRP would wish to take.

14.15 The Respondent had a long-standing relationship with LRP and with LR in particular. He was LRP's go-to solicitor in the UK and had acted for them since around 1999.

14.16 Initially, Mr Allan and the Respondent considered whether P&W could act for RK/ITS and LRP. They dismissed this. LRP were advised to seek alternative representation and were directed to LC.

14.17 Mr Allan determined that the Respondent be given responsibility for overseeing the preparation of the vendor due diligence report. In addition, he determined that the Respondent should have a facilitative role: to ensure that the transaction had access to previously used LRP protocols, procedures and styles.

14.18 In proceeding in accordance with the foregoing arrangement, the Respondent acted for RK/ITS.

14.19 Through their agents, Mr Corray and Mr Milne, P&W's clients were aware of these arrangements. Simmons & Co were similarly aware. This is apparent from the following correspondence:

(a) 16.1.09: email from Scott Allan to Jennifer Simpson of Simmons & Co;

(b) 26.1.09: letter of engagement and email from Scott Allan to Mr Milne regarding the discussions the Respondent was to have with LC about LRP styles as the "correct starting point";

(c) 25.2.09: emails involving Scott Allan, Mr Corray and Mr Milne demonstrating the Respondent's role in discussing matters with LRP in advance of the all parties meeting;

(d) 13.8.09: emails between Mr Allan and the Respondent regarding questionnaires and warranty drafting from/on behalf of LRP to ITS/RK;

(e) 30.9.09: emails between Scott Allan and Scott Milne that discuss and acknowledge the value in the role taken by the Respondent and the fees relative to that.

(f) 10.10.09: email from Mr Milne to Mr Allan in which he recognises the benefit from the Respondent's input, specifically "[his] experience and pragmatic approach coupled with the LRP relationship".

14.20 The Respondent's time on the transaction was properly recorded and fee'd.

14.21 An inevitable consequence of the role given to the Respondent was that he would require to speak with LRP and their solicitors. Mr Corray and Mr Milne were aware he was doing so.

14.22 Initially, during the period from late 2008 to just before the issuing of the letter of engagement on 26 January 2009, the precise way in which the transaction was going to be handled within P&W had not been settled.

14.23 As set out in paragraphs 14.24 to 14.26 below, the Respondent communicated with LRP representatives in relation to certain aspects of the ongoing discussions about the proposed transaction. In none of that correspondence referred to, did the Respondent say or discuss anything that was confidential to ITS/RK or otherwise inappropriate.

14.24 On 25 November 2008 LR sent an email to the Respondent stating:-

"Ref conversation a week or so ago. I am not in tomorrow but any chance you can give me a call on Thursday or Friday to discuss? Although the other side has again slipped behind on timing, I would like to keep up as best as I can with delivering the bits that I said that I would address."

The Respondent replied that he would do so.

14.25 On 13 January 2009 the Respondent sent an email to LR with the heading "*Indigo*" stating:-

"I don't remember Scott Allan saying that the 3i info I imparted was embargoed – he has been pretty good at delineating what may and what may not be passed on – but there is likely to be a sensitivity on the ITS side that to P & W, LRP is the bigger fish and will be favoured, so we should be aware of that and keeping this info to ourselves would probably assist with keeping the paranoia in check."

14.26 *On the same date the Respondent was in correspondence with Mr Jason Smith, another member of staff at LRP in relation to the 3i information referred to above. Mr Smith advised that he had spoken to Scott Milne at ITS about it.*

The Respondent replied as follows:-

"Good. Thanks for that. As I said to Lawrence I didn't pick up from Scott A that this was a secret and was surprised you didn't know about this.

Have just been talking to Scott A about getting the diligence going. He is going to have a call with Scott M about this and make sure he is comfortable with the approach we discussed this morning."

The Respondent carried on in the email to tender advice to Mr Smith regarding the next steps for LRP to take to allow them to form a view on the level of diligence that needed to be done.

14.27 On 13 January 2009 LR sent an email to Mr Mark Jenkins of IR Partners who intended to be co-investors with LRP in the transaction with ITS.

LR advised Mr Jenkins that:-

"We have instructed Paull & Williamsons (Ken Gordon) to start the drafting of legal documents and to co-ordinate legal due diligence. Ken is aware that you are likely to

be a co-investor. Can you advise the nationality of the investing vehicle – will he need to engage another lawyer in a different jurisdiction to deal with your affairs?"

Mr Jenkins replied to LR and indicated that he would welcome the Respondent acting on behalf of his company and asked LR to put the Respondent in touch with him.

LR forwarded the email chain to the Respondent who replied on 14 January 2009 as follows:-

"I omitted to remind you yesterday that my role here will be 'unofficial' counsel to Lime Rock and that for external consumption and to preserve my practising certificate I was going to ask Malcolm Laing to front the investment side."

Against the background of LR's desire that the Respondent would act for LRP, the Respondent attempted to explain that that would not be the case and that he would be performing the facilitative role referred to above. He incorrectly described himself as "unofficial counsel" for LRP. He did so to soften the blow to a long-standing client. He did not act as counsel for LRP in the transaction. That role was performed by LC.

14.28 On 26 January 2009 a letter of engagement was sent by P&W to RK and ITS. The subject heading was "*Project Indigo*". The letter referred to a recent meeting between Scott Milne, Jeff Corray, Scott Allan and the Respondent. The scope of the work to be carried out by them was detailed in the letter and included the carrying out of legal due diligence and the production of a report on ITS and its subsidiary group companies incorporated in Scotland, such report at their request to be addressed to LRP.

Enclosed with this letter was the firm's Terms of Business which stated under the heading Conflicts of Interest:-

"Subject to certain exceptions, the practice rules of the Law Society of Scotland prevent us from acting for two or more clients whose interests conflict or potentially conflict. If we believe we may be prevented from advising you or any Other

Beneficiaries in connection with any matter as a result of such a conflict we shall advise you or any Other Beneficiaries of this as soon as the potential conflict is identified. In those circumstances, we may require you or any Other Beneficiaries to seek independent legal advice elsewhere and may require to decline to undertake further work on your or any Other Beneficiaries behalf."

14.29 On 26 January 2009, the Respondent emailed Maples & Calder to seek their assistance in relation to the vendor due diligence work to be done in respect of an ITS entity in the Cayman Islands. Maples & Calder had acted for LRP in the past.

An exchange of emails followed between the Respondent and a Ms Spottiswoode who was based in the firm's Jersey office and who indicated that she would require to perform the firm's standard conflicts checking procedure.

Ms Spottiswoode responded asking if the Respondent would object to her firm discussing the general nature of the potential instruction with LRP given her firm's existing close relationship with LRP. The Respondent advised that he would not object but asked why. He stated, "*I am Lime Rock's UK counsel.*"

Caroline Spottiswoode elected not to accept the instruction. She was concerned that undertaking vendor due diligence had the potential to give rise to a conflict where it disclosed something that ITS would not wish to disclose to LRP but which LRP might consider to be of interest. The Respondent discussed this issue with her in his email of 5 February 2009. The form of potential conflict of interest to which Ms Spottiswoode referred did not arise during the transaction.

14.30 On 2 February 2009 the Respondent sent an email to LR under the heading "*Indigo – Stamp Duty*" and queried whether the stamp duty payable by LRP had been factored into the deal. He provided LR with details of a stamp duty savings scheme. He stated that he did not like the scheme but asked for LR's thoughts on it.

14.31 On 3 February 2009 the Respondent exchanged emails with LR under the heading "*Indigo – Overseas diligence*" as follows:-

Respondent: *"I see I am threatened with a 'catch-up' meeting with Scott Milne tomorrow on diligence – did you manage to speak to Jeff on this. I also have to talk with SM on the OFAC questionnaire – "blind leading the blind I'd say……"*

LR: *"Yes, he didn't react much. I gave him the $200k figure and said we would do our best to get it below that. C'est la vie"*

Respondent: *"OK – I will release the hounds"*.

The reference to releasing the hounds was a reference to the commencement of foreign due diligence work.

The above quoted pieces of correspondence are examples of the Respondent undertaking his intended facilitative and due diligence roles.

14.32 The following day the Respondent sent an email to LR enclosing an email which he had received from Messrs Simmons & Co the investment bankers instructed by Mr Milne and Mr Corray on behalf of ITS. The Respondent narrated a conversation which he had had with Scott Milne regarding the completion of questionnaires for the Office of Foreign Assets Control in America. He stated to LR *"I think I got the point across that it was not within your gift simply to waive this and also we had already made some concessions but expect some ear-bashing."*

14.33 An all parties meeting took place on 5 March 2009. In advance of the meeting, Mr Allan emailed the Respondent and Mr Laing on 23 February. He suggested dates for the meeting and asked the Respondent and Mr Laing if that suited "LR and ML". The Respondent forwarded this to LR on the same date and copied in Jason Smith, Lynn Calder and ML. In that email he stated:-

"In order to make that a productive meeting we will have to invest considerable time in reviewing the docs and meeting ahead of that."

14.34 The Respondent emailed LR on 24 February 2009 and stated:-

"To accommodate the different diaries I think the document review should go like this:-
Thursday 26 Feb – Scott Allan briefs me and malcolm on the changes he has made to the LRP style IA and Arts and the approach he has taken in SPA

Tuesday 3 March – I meet with Malcolm, Jason and Lynn to walk through the IA and Arts in detail and SPA at high level.

Thursday 5 March – all parties meeting to go through the IA and Arts. We will need you for this otherwise we will get "Lawrence agreed to this" or a heap of points will be parked because when we start pushing back on the changes they have made, they will want to "talk to Lawrence about that". (I have been in enough meetings with JC to write his script).

Agree? What time is best for you on Thursday 5th? Afternoon?"

14.35 The firm Paull & Williamsons Solicitors Aberdeen became Paull & Williamsons LLP on 24 February 2009.

14.36 In accordance with this approach, Mr Allan forwarded documents to the Respondent and Mr Laing on 24 February. The Respondent forwarded these to LR and his LRP colleagues. He proposed that they do a page turn and identify bigger ticket items to form an agenda. The purpose of this exercise was to identify those areas where Mr Allan's drafting differed from the usual LRP approach. This was as per the arrangement regarding the Respondent's role that had been agreed.

14.37 A meeting took place on 4 March among LRP, LC and the Respondent, who was representing ITS/RK. As evidenced by an email of that date, a list of items was identified for discussion at the all parties meeting. Later on this day (at 16.09), the

Respondent advised LC that he would be briefing Mr Allan about this. He did so at 16.31.

14.38 On the morning of the all parties meeting the Respondent sent an email to Mr Laing stating that:-

"Because of the P & W conflict, you will need to lead our side on all the docs so that I don't end up arguing against the P & W client (too often!). I will of course pitch in with what the 'usual Lime Rock position is' as and when required."

14.39 On 3 March 2009, the Respondent received an email from Mr Agarwal of LRP. He was LRP general counsel. He had raised an issue about compliance with US bribery, corruption and sanctions laws that went beyond the transaction. The Respondent considered this to be a non-issue and provided no advice.

14.40 Following on from the meeting on 3 March 2009 the Respondent sent an email on 4 March 2009 to those who had attended. In it he stated:-

"I attach a list of the points I had noted on the investment agreement and articles. There are a lot but I think it is better to list all these out since we don't know which are the big points for them.

Apparently Jeff's mother has been taken ill and he is presently en route for Malaysia. ITS are still of the view that the meeting should take place tomorrow and I think there is merit in doing so albeit there are likely to be "Jeff" issues that will not be capable of being resolved."

14.41 On 4 March 2009 Mr Hutchison of LC emailed the Respondent. In that email he stated:-

"Please find attached our proposed list of discussion points on the SPA for your approval/comment.

I have limited the points to material issues and have not dealt with the appropriateness of awareness (in relation to certain Warranties), gone into the detail of the specific additional warranties that we might require nor highlighted general drafting points as it is probably better to address those matters when we return the draft to Scott."

The Respondent replied on the same date stating:-

"I have made a couple of tweaks. I will explain to Scott that we did not get into the detail of the SPA in the same way as we did with the other docs hence the difference approach between the lists.

For everyone's information, Mike Beveridge and Jenny Simpson will be joining the meeting."

14.42 On 4 March 2009 the Respondent emailed LR, Jason Smith, Lynn Calder, ML and Rod Hutchison. In that email he stated:-

"I had a discussion with Scott Allan on the IA & Arts list and we agreed some of the points could simply appear in the next drafts rather than be the subject of discussion tomorrow. They are not necessarily conceded. I attach marked up and clean versions plus the clean version of the SPA list."

14.43 The Respondent sent an email to LR and Mr Smith at LRP on 4 March 2009 with the heading "*Indigo – Catch-up rights*" and advised them that this seemed to be a big issue. He asked them to have a chat about it in advance of the all parties meeting the following day and advised that they could discuss it with him before the meeting.

14.44 On 7 March, the Respondent emailed LC. The Respondent was concerned that there was wording missing from the covenants. LC sent amended versions of the documents on 11 March, and the Respondent replied with further changes on 17 March. The Respondent's changes provided the appropriate LRP style. He was acting in accordance with the role that had been agreed for him.

14.45 The Respondent had sent his amendments to the document by pdf and on 17/3/2009 Mr Hutchison asked if the Respondent could send them in word version to save time on retyping them. The Respondent replied:-

"No such luck! They only exist in manuscript. I thought to mark up your mark-ups electronically would get us in a mess and in any event I am "unofficial" on this! Would 11.15 work for you? I have something at 10."

Amendments made by the Respondent were included in the draft documents produced by LC on behalf of LRP. These were sent by Mr Hutchison to Scott Allan on 18 March 2009.

14.46 On 23 March 2009, LRP emailed the Respondent and said that Mr Milne had informed them of a schedule of ITS indebtedness which they had not seen. LRP requested a copy. The Respondent provided it. The schedule was part of the due diligence report. LRP was entitled to see it, and it had been provided to P&W for that express purpose by ITS/RK.

14.47 On 27 March the Respondent emailed LR and discussed a communication between Scott Allan and Mr Corray. In the email the Respondent made a passing comment as regards the progress of the deal at this point. The Respondent made a similar comment in an email of 9 April. These discussions arose in the context of the Respondent's due diligence work in which discussion with LRP was inevitable. Notwithstanding that and notwithstanding the fact that no confidential information was disclosed, the Respondent acknowledges that he ought not to have made the comments he did.

14.48 On 9 April 2009 Scott Allan sent an email to the Respondent asking to discuss with him what share of the Indigo Project fees LRP were going to pay.

The Respondent forwarded this email to LR stating: "*This doesn't look too encouraging!*"

14.49 The Respondent sent a further email to LR on 9 April 2009 stating:-

"Saw the MB note – where there's life there's hope. Maybe Scott's take on it that Jeff wanted his holiday had a ring of truth to it. There may be some encouragement in a comment which Scott Mile made to one of my colleagues on the foreign diligence. Whilst he was seeking reassurance that none of the foreign lawyers were continuing to clock up fees he did not call for a "pens down" instruction and said that he would speak to me about the merit of getting the foreign diligence exercises completed whether that be for a Lime Rock deal or a deal with someone else. I took that as a sign that a Lime Rock deal had not been ruled out entirely. I doubt there is any real prospect of there being a "someone else" out there at the moment.

When I think about it, the enquiry re fee split is probably driven by the fact that invoices / chasers are arriving in from the foreign lawyers.

Remind me to have an IDM rant next time we speak."

14.50 On 15 April 2009 the Respondent was forwarded a chain of emails by LR from potential investors in ITS stating *"For your eyes only."* The Respondent replied *"Thanks. Have deleted it."*

14.51 On 4 May 2009 LR forwarded an email to the Respondent which LR had sent to the investment bankers and LRP personnel which confirmed that his team was continuing to work through the diligence items on the basis that they were proceeding to a deal completion.

The Respondent replied stating "*ITS need to get its finger out on this.*"

14.52 On 5 May (and resent on 25 May), the Respondent sent LR his comments upon certain of the transaction documents. He referred to the need to draft certain compliance covenants and warranties. The matters to which these warranties and covenants related concerned issues of US bribery, corruption and sanctions law. LC

had no one who could advise on these matters. At paragraph 8(b) of the letter, the Respondent provided advice to LRP. While the matter was inconsequential to ITS and RK, the Respondent acknowledges that he ought not to have done this. The correspondence was otherwise in keeping with the role that he had been given in the transaction.

He went on to say in the letter that "*I (with some help) need to turn my mind to drafting OFAC/FCPA compliance covenants and get ITS to buy into this.*" Also "*I need to draft warranties on the overseas subsidiaries to fit with the (limited) diligence scope.*"

The Respondent stated that "*it would make more sense to await the next turn from the ITS side before summarising the outstanding issues.*"

He advised that he had not heard anything from the ITS side that day.

14.53 On 17 June 2009 the Respondent sent an email to Mr Hutchison and Mr Laing at LC stating:

"Looks like this may be back on. Lime Rock are hoping to have a new term sheet signed by the end of the week. Scott Allan is on holiday this week and next. Although it is not our side's turn to turn the drafts, given Scott's absence I think this is what we will be asked to do. I should hear late tomorrow / Friday if we have a green light on this and will give you a call when I do."

14.54 On 29 July 2009 LR sent an email to the Respondent asking to speak to the Respondent "*about ITS and Jeff being difficult on warranties*". The Respondent replied that he would call LR shortly.

14.55 On 29 July 2009, the Respondent emailed LR and asked him whether he wished him to hold off getting in touch with Mr Milne about resurrecting the due diligence "so as not to appear too keen". The Respondent accepts that although no confidential

information was provided and although the comment was inconsequential, it ought not to have been made.

14.56 On 13 August, the Respondent forwarded LRP pro forma questionnaires to Scott Allan for sending on to Mr Kidd, Mr Corray, Mr Milne and Mr Burlison of ITS. Mr Allan did so. He said expressly that these had been provided by the Respondent.

Mr Allan also commented on the Respondent's drafting of an ethical practices warranty. This concerned US bribery, corruption and sanctions law. It was no secret that the Respondent was responsible for that drafting as an adjunct to his due diligence role. Mr Allan, in the email timed at 11:51, gave advice to the Respondent on how to approach this exercise.

14.57 On 8 September 2009 the Respondent sent an email to Mr Laing and Mr Hutchison stating:-

"I was out of the office yesterday. I picked up your voicemail this morning on disclosure. I haven't been very focussed on ITS in recent times so need to get myself back into this since we (at last) seem to have a deal. I realise that I will need to perform some sort of link role on diligence/warranties/disclosure so am starting to focus on how we close off the diligence and what additional bespoke warranties we will need to reflect the agreed diligence scope. I think that will probably require us to sit down with Lime Rock to agree an approach on all of this but I am not ready to do that yet.

I am expecting to go up to Lime Rock on another matter shortly and to be there for the first part of the afternoon but you should get me later today if you want to discuss.

Please could you send me the latest drafts of the Investment Agreement and Articles."

14.58 Mr Hutchison replied stating:-

"Many thanks for the prompt response.

Please find attached the latest drafts of the IA and Articles which were returned to Scott a couple of weeks ago. We are still discussing the extent of the OFAC and US trade sanction warranties in the IA (and SPA) with ITS at the moment. There will be further adjustments to those warranties (as well as any others that may be required pursuant to the dd findings) as well as the addition of a covenant against trade with prohibited countries (without consent).

On the Articles, there are ongoing discussions with Bob/Jeff as to the acceptability of an LR preference on a return of capital (other than liquidation)/sale or listing. This is the remaining big issue that requires further discussion on that document.

By way of information, Lawrence suggested in an email earlier today that the 18th of this month would be a potential date for completion. Whilst the main deal docs aren't really too far from being in agreed form, it would be helpful if you would have a chat with him today on how realistic you consider this proposed date to be taking account of what still requires to be done on the dd close out and disclosure process.

I am out of office this afternoon. However, Malcolm will be around if you feel that a telephone catch up later today would be useful."

14.59 On 15 September 2009 the Respondent advised Mr Hutchison that he was about to carry out his review of the warranties against the various diligence reports and asked for the latest draft of the share purchase agreement.

14.60 Ultimately, in order to ensure that the deal completed within the timescale that each side wished, it fell to the Respondent to check on behalf of ITS/RK that the warranties within the Share Purchase Agreement ("SPA") and the contents of the disclosure letter lined up with the due diligence reports. That the Respondent had had no hand in drafting the SPA is evident from the email of 15 September timed at 09:41.

14.61 On 18 September at 16:19, LR emailed Mr Corray and referred to the fact that he had spoken with the Respondent. He referred to the work being done on due diligence. Mr Corray acknowledged this at 16:33 on the same day. He stated:-

"Ok, thanks Lawrence. As discussed and agreed, we should close this deal on or before next Friday (25th) as we are both away to Dubai on the 27th. With the documents in good shape (only major outstanding being your response to the liquidity preference proposal Scott sent you last night), the customer referencing now largely completed to your satisfaction, and with the disclosure letter available early next week, I cannot see what should get in the way of meeting this timeline. In any case, we both now want this phase behind us, so let's make sure it happens."

14.62 On 21 September 2009 the Respondent sent an email, headed "*Indigo Due Diligence Status Report*", to Mr Smith at LRP, copying in LR. He advised that work was continuing on updating the various reports from P&W. He explained that he had received a list of new contracts from ITS which still required to be reviewed and him to decide on how to deal with them.

The Respondent stated that he had a role to play in relation to the share purchase agreement and the investment agreement in lining these up to the due diligence. He advised that he had taken the LRP list of actions/issues arising out of their review of the legal due diligence reports and ITS' responses and categorised them. He advised that he would draft the required warranties and try to get them agreed with Scott Allan and Scott Milne before passing them to LC.

14.63 The following day the Respondent sent an email to Rod Hutchison, copied to ML and SA, stating:-

"I refer to our conversation today and attach some additional warranties that I consider are required to close the loop on the due diligence, particularly in relation to the overseas diligence reports. Having said that, the Egyptian report is outstanding, a note on the ITS operation in Iraq is awaited, the customer contracts review remains ongoing and whilst the two main LDDR's prepared by P&W have

been updated, these are likely only to reach Lime Rock tomorrow. As a result I suspect Lime Rock will not want to close the door to further warranties at this stage.

The second document includes as section 3 a list of post-completion actions. I suggest these be included as a schedule to the Investment Agreement. I would not propose these as conditions subsequent. They are more of an aide memoire and the obligation to action these should be of the good faith, reasonable endeavours type rather than one which failure to achieve renders the Managers and Company in breach.

I will be out of the office for the rest of the week. I should be able to pick up emails however so if you need to speak let me know."

The Respondent forwarded this email to Jason Smith saying *"FYI."*

14.64 On 25 September 2009, LRP sought advice from the Respondent regarding stamp duty exemption. The Respondent replied to the request and proffered advice. Had LRP gone to LC, there would have been no one to give that advice and they too would have gone to the Respondent. The matter was entirely inconsequential from the point of view of ITS/RK. But the Respondent acknowledges that he ought not to have provided advice.

14.65 The Respondent sent a further email to Mr Smith the same day stating: "*After I sent the email to you Scott Allan emailed me to say they wanted the DL agreed today so I have had a preliminary look at this and these are my comments so far.*" The Respondent listed various comments and advised that, "*I can't do much more on this today so I agree you should reserve your position on this.*"

14.66 On 26 September 2009, the parties having reached various agreements, three main documents were executed:

i. a share purchase agreement between the secondary complainer RK and LRP for the sale of 6,612 A ordinary shares in ITS for the sum of $10 million;

ii. an investment agreement among ITS, RK, LRP, Jeff Corray and Scott Milne and another director (which, amongst other things, prohibited the appointment of other directors without LRP's consent, such consent not to unreasonably withheld);

iii. amendment of the articles of association of ITS.

14.67 The Respondent recognised that there was a conflict of interest and that his firm could not act on behalf of LRP and ITS and accordingly he referred LRP to LC solicitors for independent legal representation. He drafted documents. During the course of the transaction the Respondent continued to represent LRP in relation to other business.

14.68 RK sued P&W and Burness Paull for damages said to have arisen as a result of their conduct of the transaction. The action was settled extra-judicially. In said proceedings P&W accepted having breached their fiduciary duty to their client, RK.

14.69 The role the Respondent accepted gave rise to a risk of his having a conflict of interest. The Respondent did not exercise sufficient caution to prevent that happening. A conflict of interest did arise. The Respondent provided advice to LRP when he ought not to have done in the letter of 5 May 2009 (para 14.52 above), email of 29 July 2009 (para 14.55 above) and the emails of 29 September 2009 (para 14.64 above).

14.70 The transaction file has not been made available to the principal complainer or to the Respondent. The prosecution proceeded on the basis of isolated extracts from the file. RK's present advisers indicated an unwillingness to disclose the whole transaction file and that their client did not intend to seek compensation.

15. Having regard to the established facts and the submissions previously made by both parties, the Tribunal concluded that the Respondent was not guilty of Professional Misconduct but considered that he may be guilty of unsatisfactory professional conduct in which case the Tribunal required to remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980.

16. The Tribunal continued the hearing to 26 April 2021 for both parties to be present to hear the decision of the Tribunal and to make any further submissions.

17. On 26 April 2021, the Tribunal intimated its decision to both parties and invited submissions in relation to expenses and publicity. The Complainers sought an award of expenses in their favour and made submissions in support of that motion. The Respondent sought an award of expenses in his favour and made submissions in support of that motion. Neither party had any comment to make with regard to publicity.

18. The Tribunal pronounced an Interlocutor in the following terms:-

> By Video Conference, 26 April 2021. The Tribunal having considered the Complaint dated 11 February 2020 at the instance of the Council of the Law Society of Scotland against Kenneth Stewart Gordon, 30 Seafield Drive East, Aberdeen; Find the Respondent not guilty of professional misconduct; Remit the Complaint to the Council of the Law Society of Scotland in terms of Section 53ZA of the Solicitors (Scotland) Act 1980; Find the Respondent liable in the expenses of the Complainers and of the Tribunal including expenses of the Clerk, chargeable on a time and line basis as the same may be taxed by the Auditor of the Court of Session on an agent and client, client paying basis in terms of Chapter Three of the last published Law Society's Table of Fees for general business with a unit rate of £14.00; and Direct that publicity will be given to this decision and that this publicity should include the name of the Respondent but need not, subject to article 14A of Schedule 4 to the Solicitors (Scotland) Act 1980, identify any other person.
>
> **(signed)**
> **Colin Bell**
> **Vice Chair**

19. A copy of the foregoing together with a copy of the Findings certified by the Clerk to the Tribunal as correct were duly sent to the Respondent by recorded delivery service on 16 JUNE 2021

IN THE NAME OF THE TRIBUNAL

Colin Bell

Vice Chair

NOTE

Prior to the Hearing on 8 March 2021, an up-to-date Record, a Joint Minute, a Joint Bundle of Productions and a Statement for the Respondent had been lodged with the Tribunal office. A Supplementary Joint Bundle of Productions was lodged on the morning of the hearing. On joint motion, the Tribunal allowed the Record, Joint Minute and two Joint Bundles of Productions to be received. On the unopposed motion of the Respondent, the Tribunal allowed the statement for the Respondent to be received.

The Fiscal confirmed that the Joint Minute was supplemental to the averments within the Record and that he would be relying upon both, together with the documentary productions that had been lodged. He confirmed that he was not calling any witnesses.

Mr Duncan indicated that it was his intention to call the Respondent. He asked if the Tribunal had had an opportunity to read the Joint Minute. The Tribunal confirmed that it had but considered that it might be helpful if Mr Duncan took the Tribunal through it. In the course of that exercise, the Tribunal asked Mr Duncan to set out his understanding of the role of "facilitator" described within the Joint Minute. He explained that the Respondent was to have two roles in the transaction. The first was to have oversight of the vendor due diligence process which, although it was carried out by the solicitors acting for the seller, was for the benefit of the purchaser. The Respondent's role was to have oversight over a team of 20 solicitors, with input from ITS and LR to ensure that it was completed satisfactorily. The second role was that of the facilitative role explained within the Respondent's statement. The time for completion of this transaction was exceptionally truncated. P&W were formally instructed on 26 January 2009 and ITS wanted the transaction to complete by mid-March. LC had not acted for LRP previously. LRP was an American entity and the majority of due diligence involved operations in territories which had implications for a US entity. The Respondent was familiar with the style documents used by LRP. It was agreed that the Respondent would provide the precedent language used by LRP to Scott Allan. Mr Allan would consider this together with his client and make proposed adjustments. These would then be put to the Respondent who would highlight the differences and then step away, allowing the actual negotiations to take place between Scott Allan and Malcolm Laing of LC.

In response to a question from the Tribunal, Mr Duncan emphasised that it was agreed within the Joint Minute that the Respondent did not act as Counsel for LRP in this transaction.

EVIDENCE FOR THE RESPONDENT
KENNETH STEWART GORDON

The Respondent adopted the statement that had been lodged as his evidence in the proceedings. The written statement read as follows:-

"Section 1 -Qualifications and Career History

1. I was born in Aberdeen in 1959 and started studying at Aberdeen University in September 1976 for an ordinary LLB. I graduated in 1979 and began a two year apprenticeship at Craigens, Glennie & Whyte, a three-partner Aberdeen firm, where I mostly dealt with residential property conveyancing transactions. In 1982, during my post-qualifying year, I joined Clark & Wallace, an eight-partner Aberdeen firm. During the first few years there most of my work was residential estate agency work and conveyancing. In 1985 I was assumed as an equity partner and I remained a partner there until 1998. Whilst I never stopped doing residential property work, I broadened my scope by undertaking commercial property work and corporate work. There was only one partner in the firm whose practice included this kind of work and my initial exposure to this came through having to cover his work when he was on holiday. Over time, despite being largely self-taught, I became more proficient in corporate work and became the main point of contact for 3i (formerly Investors in Industry), a venture capital firm owned by the Bank of England and the UK clearing banks. At the time, there were only two Scottish firms which were on 3i's panel and I started doing a fair bit of work with them. Lawrence Ross worked in 3i's Aberdeen office at the time. In 1994, the banks sold off their stakes in 3i and the company was floated on the London Stock Exchange. After the float, 3i changed from being a minority investor in companies to mostly taking majority positions (i.e. buy-outs). One of the consequences of that change was that they decided a law firm with only a single lawyer capable of doing their work was no longer a good fit for them and they stopped instructing Clark & Wallace.

2. The 3i defection turned out to be a portent of changing times. With the number, value and complexity of corporate transactions increasing, principally driven by the offshore oil and gas industry, it became clear that corporate clients were looking for law firms that could field a team of lawyers to discharge transactional work and that I was unlikely to be able to retain, let alone grow, a corporate finance practice if I remained at Clark & Wallace. During 1998 I was approached for the second time by Paull & Williamsons about joining them and agreed to do so. Paull & Williamsons had at that time the largest team of corporate lawyers in Aberdeen and was the "go to" firm for high value corporate transactions, particularly

those related to the oil and gas service sector.

3. In my early years at Paull & Williamsons I mostly worked on transactions alongside the senior corporate partner and it was he who passed on Lime Rock as a client to me. Lime Rock was a newly set up US private equity fund specialising in oil and gas investments. I acted for them in their first non-US investment in 1999 and acted for them in all UK investments and a number of European investments from then until 2016. Whilst Lime Rock was a key client, I carried out many transactions for other clients, predominantly oil and gas service companies and other private equity investors.

Section 2 - Project Indigo Transaction Summary

The transaction which was named Project Indigo comprised the sale by Robert Kidd, up until then the sole shareholder of ITS, of approximately 6% of the share capital of ITS to Lime Rock for US$10m and an investment by Lime Rock of US$45m for new shares which gave them an aggregate shareholding of approximately 34% of the enlarged share capital, with Mr Kidd continuing to own approximately 66% of ITS.

Section 3 - Project Indigo Dramatis Personae

Robert Kidd	Founder and 100% shareholder of ITS
ITS	A company which principally sold, rented, serviced and repaired oilfield equipment globally
Simmons & Co	The Aberdeen office of a Houston investment bank specialising in oil and gas service sector transactions
Mike Beveridge	A Managing Director at Simmons & Co and tasked with sourcing growth capital for ITS
Jennifer Simpson	Associate at Simmons & Co working for Mike Beveridge
Jeff Corray	Ex KPMG partner specialising in oil and gas service sector transactions and main competitor to Simmons & Co until he joined ITS as CEO in

	succession to Robert Kidd
Scott Milne	Worked for Jeff Corray at KPMG and moved with him to ITS initially as Corporate Development Director and later became CFO
Neil Burlison	CFO of ITS at the time of Project Indigo
Scott Allan	Partner at Paull & Williamsons who principally acted for ITS
Gary Chapman	Solicitor at Paull & Williamsons principally working for Scott Allan
Arlene Edwards	Solicitor at Paull & Williamsons principally working for Scott Allan
Lawrence Ross	A Managing Director at Lime Rock and in charge of its Aberdeen Office
Lynn Calder	Investment Executive at Lime Rock
Jason Smith	Investment Executive at Lime Rock
Kris Agarwal	General Counsel of Lime Rock based in USA
Ledingham Chalmers	Law firm in Aberdeen
Malcolm Laing	Partner at Ledingham Chalmers
Rod Hutchison	Solicitor at Ledingham Chalmers

Section 4 – Project Indigo Legal Workscope and Documents Part

A – Due Diligence

Purpose of due diligence

1. The primary purpose of a due diligence review is to obtain sufficient information about the target company's business to enable the buyer/investor (hereinafter "buyer") to decide whether the proposed transaction represents a sound commercial investment. Due diligence is effectively an audit of the target's affairs - legal, business and financial.

2. The buyer will inevitably seek contractual protection from the seller/target company (hereinafter "seller")

inthe form of warranties but, in practice, the protection offered may be limited by disclosure and other contractual provisions. Damages for breach may be difficult to quantify and to secure. The buyer may have an action in misrepresentation for any false or misleading pre-contractual statements about the target business, but such actions are often excluded by the contract.

3. While due diligence is not a substitute for contractual protection, it is an aid for the buyer to work out whatcontractual protection it requires from the seller and what risks it is not prepared to take. On a share purchase, the buyer inherits all the historical liabilities of the target and may even have responsibility for land no longer owned by the target. So ultimately, the results of the due diligence investigation might either cast doubt on whether the buyer can get what it wants from the acquisition/investment or make it clear that it will be too risky whatever the commercial terms.

4. A legal due diligence enquiry should establish the following key information about the target company's business:

- does the seller have good title to the shares in the target;
- are there any unstated or understated liabilities;
- detailed information on the target's business so that the buyer is in a better position to make a final decision on whether to proceed with the acquisition/investment;
- determine any consents that may be required for the transaction. For example, the consent of industry regulators, tax authorities, competition authorities, shareholders or important customers of the target. Where one of the main assets of the target is customer contracts, it will be imperative for the buyer to find out through due diligence whether there are any contractual prohibitions on transfer;
- whether the target's contractual arrangements are on acceptable commercial and legal terms.

Scope of the due diligence review

5. The scope of a due diligence investigation will depend on the purpose of the transaction. For example, where two companies are looking for a trade advantage or element of synergy through a merger, the investigation will focus on matters such as economies of scale, marketing advantages and competition issues.

6. The extent of the investigation is also likely to be governed by practical realities, such as available time,

expense and the overriding need to get the transaction done. Even if the investigation is well-focused, there will need to be a limit on the type of information to be supplied. To use an extreme illustration, a requisition in a legal due diligence questionnaire might be to disclose all current contracts to which the target is a party. Such an enquiry is likely to turn up a large number of small contracts entered into in the ordinary course of business, such as an office plant care contract. Contracts such as these, which are made in the normal course of business, will have little bearing on the price or risks of the transaction. One solution would be for the parties to agree criteria by which contracts would be assessed and they would either be included or excluded from the review based on those criteria.

7. Although contractual protection is no substitute for a thorough due diligence exercise, it may offer some comfort where, for example, time is short and due diligence is limited. In these circumstances, the buyer should at least seek to investigate key issues and take other steps to protect itself, for example:

- ensure that warranties and indemnities are appropriately wide;
- consider negotiating a retention of the purchase price to cover potential warranty claims;
- propose a price adjustment; and
- provide for particular sorts of problems to be solved as pre-conditions to completion or post-completion undertakings.

Vendor Due Diligence

8. Vendor Due Diligence reports are prepared by the seller's advisers based on information given by, and interviews with, the Target's management. They are initially given to potential buyers on a non-reliance basis. This is on the understanding that the report will be addressed to the successful buyer who is to rely on it, in the same way as it would rely on a report produced by its own advisers. A well-prepared set of VDD reports enables the buyer and its advisers to develop a better understanding of the Target within a much shorter timeframe than if it was relying on a data room and its own advisers' work. VDD requires considerable input from the Target's management at the start of the process but once it does begin it should lead to management spending less time answering questions from potential buyers and allowing them to spend more time on other parts of the process.

Industry risk

9. Those carrying out the due diligence review need to identify the main areas of risk and liability inherent in

the industry in which the target operates. This will set the emphasis of the due diligence exercise and assist in seeking appropriate contractual protections from the seller.

The following need to be considered:

- what are the "normal" risks in the industry?
- what is the known reputation of the target company and how has it been run?
- what is the assessment of the people who are selling it and, if different, who have been running it?

Project Indigo Due Diligence

10. Scott Allan decided to use a VDD report for the legal due diligence on Project Indigo in an attempt to meet ITS expectations on time and cost. By January 2009 when the legal due diligence commenced, there was only one potential buyer left in the process so it was always the case that the VDD Report would be addressed to Lime Rock as it was the only party placing reliance on it. The P&W letter of engagement set this out clearly.

11. From memory, the main risks on ITS were considered to be:

- uncapped liabilities under customer contracts; and
- use of overseas sales agents.

12. The greatest compliance risk to oil and gas companies is the use of sales agents, particularly in countries which rank poorly in the Transparency International Corruption Perceptions Index. ITS used a large number of agents and operated in a number of countries which ranked poorly in the CPI. This was a real concern to Lime Rock, which was subject to the US Foreign and Corrupt Practices Act, borne out by ITS deciding to self-report in relation to bribery and corruption in Kazakhstan in 2012 and being fined £172,000. Further, although the Lime Rock investment fund was registered in the Cayman Islands, in terms of US trade sanctions legislation it was deemed to be a "US Person" and thus subject to such legislation. Lime Rock was extremely sensitive to compliance with US trade sanctions, particularly in relation to Iran, where ITS were operating. Trying to gain reassurance in respect of such legal compliance matters through carrying out proper due diligence and obtaining contractual representations was of fundamental importance to Lime Rock and a key part of the legal work on Project Indigo. If Lime Rock had not been satisfied on these matters it would not have completed the transaction. The reputational risks were too

great. ITS was reluctant to engage in this aspect of the due diligence (see paragraphs 17 and 31 in Section 6.

Part B

Project Indigo Transaction Documents

1. Project Indigo involved the sale by Robert Kidd of approximately 6% of the existing share capital of ITS to Lime Rock for US$10m and an investment by Lime Rock of US$45m for new shares in ITS. The sale of the shares was governed by a Sale and Purchase Agreement ("SPA"). The investment for the new shares was governed by an Investment Agreement and new Articles of Association of ITS. The other key legal documents were the legal due diligence reports and the disclosure letter. These were relevant to the warranties in both the SPA and the Investment Agreement.

Sale and Purchase Agreement

2. The "front-end" of most SPAs is constructed in a similar way. There will be provisions dealing with what shares are being sold, the price, any mechanics for adjusting the price e.g. net asset adjustment, net debtor net cash adjustment, normalised working capital adjustment, any conditions precedent to completion, the completion mechanics, warranties by the seller, limitations on warranty claims, post-completion restrictions on the seller and the usual legal boilerplate clauses. An SPA will invariably have a number of schedules attached to it containing information on the target, its subsidiaries, its leased and owned properties, the completion deliverables, the warranties, the warranty limitations and a tax covenant/indemnity.

3. Buying or investing in a company is not like buying or investing in a property. Generally speaking, the value of a property is unlikely to change between the date of concluding missives and the date of entry. The same is not true for a company, particularly one such as ITS which had many subsidiaries operating in challenging locations in an industry which is high risk in a number of respects. The value of any company has the potential to change by the day/hour. Pre-completion the buyer will seek to validate the price it has offered through due diligence and contractually it will seek to protect the value it has paid through the warranties. The seller's protection comes through the limitations on warranty claims and the disclosure letter i.e. a warranty claim cannot be made in respect of facts or circumstances the buyer knewabout prior to paying over the price. It is therefore important for the seller to carry out a full disclosure exercise. In Project Indigo the legal due diligence reports formed part of the documents disclosed through the

disclosure letter and their terms provided protection for Mr Kidd and ITS against warranty claims. There were no warranty claims under the SPA (or the Investment Agreement).

Investment Agreement

4. The front-end of a private equity investment agreement will customarily contain provisions setting out any conditions precedent to completion of the investment; matters which must take place and documents that must be delivered at completion, warranties and warranty limitations, investor rights e.g. rights to appoint directors and board observers, rights to information, positive and negative controls (covenants) on how the target must run the business post-completion and what actions will require the consent of the investor, restrictive covenants on the managers whom the investor is backing to run the business successfully,what will happen on an exit plus the usual legal boilerplate.

Articles of Association

5. It is important that rights given to an investor in terms of the investment agreement are underpinned by the target's articles of association otherwise the investor's consent rights could be undermined. Accordingly, it will invariably be the case that a private equity investor will require the target to adopt new articles as a condition of completing its investment. An investor will require the articles to address voting rights, dividend rights, rights on return of capital, board appointment rights, board proceedings, rights on share issues, share class rights and consents, share transfers including permitted transfers and compulsory transfers, good leaver/bad leaver, provisions on exit e.g. drag along, tag along, change of control and how the exit proceeds are distributed.

Section 5 – My Role in Project Indigo

1. There were two parts to my role in Project Indigo.

2. Firstly, I was asked by Scott Allan to use my knowledge of Lime Rock drawn from previous transactions to shape the legal due diligence scope and to guide the due diligence process so that the final product would be in a form and content acceptable to Lime Rock. The Scott Allan/ITS view was that I would know what required to be looked at and what did not and thus what is always a lengthy, time consuming, cumbersome and costly process would be, as far as possible, streamlined, leading to savings in time, effort and expense. Also, the fact that I had fairly extensive experience of carrying out transactional work in overseas jurisdictions made me well-placed to organise and control the due diligence exercise generally

given ITS operated in a large number of overseas locations. Part of my work was engaging overseas law firms to carry out due diligence on the ITS subsidiary operating in their jurisdiction. In some locations the existing ITS lawyers were used. A scope of work, fee and letter of engagement had to be agreed with each law firm. I then had to ensure they were passed the information and documents they needed to carry out their diligence work and then review their reports.

3. Due to the nature of its business (i.e. sale, rental, servicing and repair of a wide range of oilfield equipment) ITS had a huge number of customer contracts and it would have been impracticable to review and report all of these within reasonable time and cost parameters. I therefore had to agree criteria with ITS and Lime Rock as to what would be a reasonable selection of contracts to review.

4. I then ended up as editor in chief of the three P&W due diligence reports. There were over 20 P&W lawyers of varying levels of experience and different disciplines inputting into these. I had to spend a lot of time converting their work into something that ITS and Lime Rock could understand.

5. The second part of my role was what has been referred to as the "facilitator role". I was to provide access to Lime Rock style documents, to advise on Lime Rock's usual position on issues that might arise between the parties, to advise on Lime Rock internal policies, protocols and procedures and generally to use my experience as the only UK lawyer to have acted for Lime Rock to ensure that the transaction timetable was met and that Ledingham Chalmers were neither allowed nor required to "reinvent the wheel" thus avoiding unnecessary delays or expense to be incurred.

6. I was active in this facilitator role in the early days of the transaction in March and April 2009 when there was a real push to get the transaction completed and it was important to get Ledingham Chalmers up to speed quickly. That part of the role soon fell away, as it was always intended it would. When the parties finally reached agreement on a new deal in late July/early August 2009, Ledingham Chalmers dealt exclusively with Scott Allan on the transaction documents until the issue caused by the unavailability of the due diligence reports required some further action from me in my facilitator role to bridge the gap between the due diligence exercise and the transaction documents to prevent completion of the transaction stalling and Mr Kidd and ITS not receiving the Lime Rock money.

Section 6 – Detailed Statement/Response to Complaint

1. I provide this statement in connection with the complaint against me to the Scottish Solicitors' Discipline

Tribunal in relation to the transaction known as Project Indigo which took place during the period from January 2009 to September 2009. In making this statement I have not had access to the Project Indigo transaction files nor my own email folders covering the period. I have been provided with copies of certain emails relating to Project Indigo but I do not know the basis of selection adopted. Nor does the primary complainer who has not had access to the transaction files either. Both secondary complainers have refused to assist with producing the transaction files. I understand that when all correspondence was printed out, Scott Allan's main transaction file filled six lever-arch files (more than 3,000 pages) and the legal due diligence files extended to approximately 1,500 pages, in both cases excluding documents and time recording print outs. Recalling events from that period generally, and onetransaction in particular in which I only carried out a peripheral role, out of the multitude of transactions I have been involved in during a career spanning the last 40 plus years, is not easy.

2. I have never met or spoken to Robert Kidd. Prior to Project Indigo I had never carried out any work on behalf of Mr Kidd or ITS. The principal ITS contact at Paull & Williamsons ("P&W") was Scott Allan. I did not become aware of the abortive transaction with 3i until January 2009.

3. From a P&W perspective, Mr Kidd was almost completely absent from the Project Indigo transaction. My understanding is that Scott Allan was not allowed to contact Mr Kidd directly. Mr Kidd was resident in Cyprus. He used Jeff Corray as his "gatekeeper". I do not think Mr Kidd was even copied on emails from Mr Allan. It was made clear to us that P&W should deal with Jeff Corray and Scott Milne and Mr Corray would seek instructions from Mr Kidd as and when he saw fit.

4. I started acting for Lime Rock Partners in 1999. Lime Rock was a US-based private equity firm specialising in investing in the oil and gas sector. Lime Rock only raised its first fund during 1999 so I was in with the bricks. The first UK investment Lime Rock did was a co- investment with 3i. Lawrence Ross was at that time in charge of oil and gas investments at 3i.In 2002 Mr Ross left 3i and joined Lime Rock to head up their UK operations.

5. Paragraph 3.7 of the complaint states that I was "in correspondence with Mr Lawrence Ross the Managing Director of Lime Rock, in relation to the negotiations and transaction with ITS from about November 2008 onwards". I do not believe that is an accurate characterisation of such limited contact as there was. The correspondence in relation to the possible transaction was between Lime Rock and Simmons & Co who had been instructed to run a process to find potential investors in ITS. Solicitors are not involved in these

processes. There are no binding legal commitments or documents at this stage other than a confidentiality agreement and I was not asked to review a confidentiality agreement for Lime Rock. As far as I can tell from my diary for 2008, I may have had a maximum of two calls with Mr Ross during November 2008 relating to the discussions he was having with Simmons on ITS, the first (15 November) relating to the US Foreign and Corrupt Practices Act and the second (27 November) on warranty limitations. These could only have been high-level, generic, non-critical conversations. ITS did not sign a (non-binding) term sheet with Lime Rock until 12 January 2009. The discussion between Mr Ross and Mr Corray on warranty limitations continued until September 2009. Further, it was not unreasonable for Mr Ross to believe, that having acted for Lime Rock since 1999, I would be acting for them if his negotiations had a successful outcome.

6. Lehman Brothers filed for bankruptcy on 15 September 2008, the UK government bailed out The Royal Bank of Scotland on 8 October 2008 and HBOS plc was rescued by Lloyds TSB on 19 January 2009. The price of oil collapsed from US$147 per barrel in July 2008 to US$33 in February 2009. The ITS business was heavily reliant on bank funding and wholly dependent on the oil and gas market. P&W's own business was heavily dependent on the oil and gas industry.

7. Lime Rock Partners closed its fifth investment fund on 8 May 2008 having received commitments from investors of US$1.4 billion. Thus, when the global credit crisis hit and the price of oil plunged, Lime Rock was one of the few institutions with cash to invest. As a consequence, I was very busy in the second half of 2008 and in the run up to the festive period. In November and December I was working on a number of significant transactions and working six and seven day weeks in order to cope. In addition, there were the usual seasonal business development engagements plus family commitments. I neither had the time nor the inclination to get involved in whatever discussions were taking place between Lime Rock and Simmons/ITS. In any event, at that stage, there was no role for a lawyer to play.

8. I usually take the Christmas and New Year period as a holiday, but I can see from my diaries that I was working up until 24 December, worked on 30 and 31 December and resumed on 5 January 2009. Most of the transactions I had been working on before Christmas were still going and in addition, I started work on two new transactions first week back. I do not believe I had any real engagement on Project Indigo until after the term sheet was signed on 12 January 2009. My diary indicates that I attended a couple of meetings regarding Project Indigo on 13 January 2009 but I cannot remember who attended these or what was discussed.

9. I cannot recall when the discussion between Scott Allan and me on which client P&W was going to act for

took place, but I do not think this happened before 12 January 2009. Certainly, Mr Ross's expectation that P&W would be acting for Lime Rock existed until some point on 12/13/14 January. I suspect there had been conversations between ITS and Lime Rock about P&W acting for both and there would have been conversations on this and fees between Mr Allan and Mr Corray and Scott Milne of ITS. I can only recall Mr Allan saying that an ethical wall arrangement would not work. Without doubt the decision that P&W would act for ITS and not Lime Rock came down to money and time. ITS would be responsible for all the transaction fees including Lime Rock's legal costs and therefore they were keen to minimise the legal fees. It is the norm for a private equity investor's fees to be paid by the investee company. This is confirmed by clause 10 (Fees and Expenses) of the Investment Agreement which states that ITS would be liable to pay the following fees and expenses: (i) all the legal fees and disbursements (including any VAT) of Lime Rock in connection with the negotiation, preparation, completion and implementation of the Investment Agreement, the new Articles of Association, the Sale and Purchase Agreement (and related documents) and all related matters; (ii) the fees and expenses (including any VAT) in relation to the preparation of the Financial Due Diligence Report and the Legal Due Diligence Reports; and (iii) Lime Rock's out of pocket expenses in relation to the investment. In addition, P&W had significant unbilled WIP that had built up on the abortive 3i transaction. If my recollection is correct, this was in the region of £80,000 to £90,000 which would have been outstanding/unbilled for approximately six months. A second area of concern on the ITS side was speed of transaction delivery. When the term sheet was signed on 12 January 2009 the price of Brent crude was around US$43 per barrel, down from US$147 in July 2008. ITS had started its process with three potential investors and was down to one. There was a real risk that if the transaction did not happen quickly and there was a further fall in the oil price, either it would not happen at all, or that Lime Rock would revisit the terms of its offer.

10. Pulling all those strands together, in order to minimise cost and time, what was agreed between Scott Allan and ITS was that (i) P&W would act for Mr Kidd and ITS; (ii) a vendor legal due diligence report would be produced by P&W thus utilising some of the work that had been done by P&W on the abortive 3i transaction; (iii) P&W would draft the sale and purchase agreement for the sale of shares by Mr Kidd; (iv) P&W would draft the investment documents (principally an investment agreement and new articles of association) using the usual Lime Rock forms of these as a starting point; (v) a separate firm of solicitors (Ledingham Chalmers) would be instructed by Lime Rock to advise them on the terms of the drafts produced by P&W; and (vi) to facilitate speedy transaction delivery I would carry out the following roles: (a) provide Scott Allan with the Lime Rock forms of investment documents from which he would produce first drafts for review by Ledingham Chalmers ("LC"); (b) agree the scope of the due diligence report with Lime Rock and ITS and then oversee the vendor due diligence report as I was deemed best placed to

manage the international content of the report; and (c) be available as a resource and/or facilitator i.e. to provide access to other Lime Rock style documents, to advise on Lime Rock's usual position on issues that might arise between the parties; to advise on Lime Rock internal policies, protocols and procedures and generally to use my experience as the only UK lawyer to have acted for Lime Rock to ensure that the transaction timetable was met and that LC were neither allowed nor required to "reinvent the wheel" thus avoiding unnecessary delays or expense to be incurred.

11. On 13 January 2009 my diary records that I attended what presumably was a kick-off meeting for Project Indigo, worked on a transaction which involved the sale of a Toronto Stock Exchange listed oil and gas E&P company and had a kick-off meeting for the acquisition of companies in Qatar and UAE. On 14 January I continued to work on the Canadian transaction, produced heads of terms for the Qatar/UAE acquisition and drafted investment documents for a new private equity investment.

I have no recollection of sending the email and can offer no better explanation of the "unofficial counsel" expression other than it was sent to a close business associate whom I had known and worked alongside for many years, who was the immediate contact for my most important client and a strategic client of the firm, who I was in the habit of corresponding with using unconventional solicitor-client language (which was reciprocated), who at best was going to be disappointed at the message I was sending, at a time when I was distracted by other transactions for which I bore primary responsibility to discharge, and as a result I poorly articulated the role I had been assigned in the Project Indigo transaction. At paragraph 3.9, the complaint quotes from an email sent on 13 January 2009 by Mr Ross to Mark Jenkins who represented a potential co-investor (Al Shoaibi Group) with Lime Rock in ITS. The complaint does not contain my response (date unknown) to Mr Jenkins which states:

"Mark

Apologies for being slow in coming back to you on this, there were a couple of people Ineeded to speak to about how we were going to arrange matters here.
I don't know if Lawrence has told you that as well as acting as Lime Rock's UK counsel, we also act for Indigo. Whilst in some ways that is helpful, it does also present some challenges.
One of my partners, Scott Allan, and his team have already carried out a good deal of preparatory work in assembling the legal due diligence information on behalf of ITS. We have been looking at how best to execute the transaction taking best advantage of resources, existing knowledge of client practices and

preferences and work already carried out in order to attempt to mitigate transaction expenses and meet client expectation on timetable, but avoid conflicts of interest.

What we have proposed to Indigo and Lime Rock, and which has been accepted by them, is that legal due diligence is effectively done as a vendor due diligence report, prepared by the firm and addressed to Lime Rock, and assuming you are also comfortable with this approach, the Shoabi investor entity. Much of the diligence work will be carried out by Scott's team, as they are already familiar with the Indigo set-up, but I will take on a supervisory / scrutineer role, reviewing their work, asking questions and issuing further requisitions etc.

The main transaction documents, i.e. sale and purchase agreement, tax deed, investment agreement, new articles of association will be prepared by Scott as "vendor drafts" but the

SPA will be based on a precedent form approved by me and the investment documents willfollow the Lime Rock house styles.

The purchaser / investor side negotiation and revision of these drafts will be carried out by another firm of Aberdeen lawyers so that they are subject to independent scrutiny and checks. I have arranged this role to be taken on by Malcolm Laing, Head of Corporate at Ledingham Chalmers, another Aberdeen firm. Malcolm is an experienced and well respectedlawyer. I would play a supporting role in advising Malcolm on usual Lime Rock practice on these documents to avoid any time and expense being wasted on re-invention of the wheel."

I believe the email from Mr Ross to Mr Jenkins supports my recollection that as there was no deal between Lime Rock and ITS until Mr Corray signed the outline terms sheet on 12 January, there had been no discussion, or at least focused discussion, as to who was goingto be acting for who. This was not unusual for corporate finance transactions. Corporate finance professionals such as Simmons & Co and Messrs Corray and Milne tend to regardthe "legals" as a necessary (and expensive) evil, adding little or no value to a transaction, and to delay bringing the lawyers in until the last possible moment before setting an unrealistic timetable for completion. I have no clear recollection of the events of 12, 13 and 14 Januaryor their sequencing, but there may be some significance in the first sentence of my email to Mark Jenkins where I apologise for the delay in responding and refer to speaking to a couple of people (presumably Scott Allan and Malcolm Laing of LC) about how legal representation for Project Indigo would be organised and then provide a better explanation of this than in my email to Mr Ross.

12. The emails sent to Mr Ross and Jason Smith of Lime Rock on 13 January (referred to at paragraphs 3.8 and 3.9 of the complaint), to my mind, are consistent with me being more focused on the new transactions

where I was lead partner than I was on Project Indigo. I thinkI was probably behind the curve in terms of the discussions which had taken place between Scott Allan and Scott Milne (who had principal responsibility for the due diligence on the ITS side) and those between Scott Milne and Jason Smith (who had principal responsibility for the due diligence for Lime Rock). The decision to produce a vendor due diligence legal report was not mine. With hindsight, it would be easy to say this was ill-conceived, but in fairness, it was not reasonably foreseeable that nine months after the kick-off due diligence meeting the due diligence would not be completed and that ITS would produce 31 material contracts (the "Late Contracts") for review eight days before the transaction finally completed. The financial due diligence report was prepared as a vendor due diligence report. There is nothing wrong with the concept and it can have benefits for the sale-side. But here it was principally used to save on fees and time. Had a more conventional route been followed then LC would have prepared the report. In practice, ITS would have sent the due diligence information to P&W who would have created a data room which LC would have been given access to and they would have been engaged by Lime Rock directly to produce the legal due diligence report. That exercise would have ensured that both firms had good knowledge of ITS' affairs which would have flowed through into the disclosure process. What was supposed to happen on Indigo was that P&W would be engaged by ITS to produce the legal due diligence report but this would also be addressed to Lime Rock (who would therefore be entitled to rely on the report), Lime Rock and LC would be given the report to read and with the knowledge of what was in the report, Lime Rock and LC would be able to properly review and adjust the disclosure letter against the warranties in the sale and purchase agreement and investment agreement. However, the perception (probably correct) was that such a process would be more costly than P&W producing a vendor due diligence report.

13. In the end, the legal due diligence report comprised a number of different reports. P&W produced a report entitled "UK/Group Report" and an update of that, an international contractsand agency report and a "red flag" report on the Late Contracts. Like many oil and gas service companies, ITS had a large number of overseas subsidiaries and approximately a dozen overseas law firms were engaged to provide separate reports on those subsidiaries which were deemed material. My role was not to carry out the due diligence itself, but (i) to agree the scope of the due diligence report with ITS and Lime Rock; (ii) engage and instruct the overseas lawyers; and (iii) review, revise and present the reports to Lime Rock. In addition to the overseas lawyers, more than 20 P&W lawyers, including eight partners, plus a number of trainees, were involved in producing these reports. It needs to be understood, that Lime Rock,as a purchaser of shares in ITS and an investor for new shares in ITS, was the only party whowas going to place any reliance on the legal due diligence report, so it was fundamental that they agreed the scope of the report, otherwise it

would have been a flawed exercise.

14. Just to finish on the emails referred to in paragraph 3.10 of the complaint, I accept that the reference to me keeping Malcolm Laing "on track" may be open to different interpretations. ITS had imposed a very aggressive transaction timetable. One of the reasons I had managed to build and maintain a strong relationship with Lime Rock was the fact that I was very responsive to their requirements. LC was P&W's pick. If they did not perform then it was Mr Allan (from ITS) and me (from Lime Rock) who would be first in the firing line. Whilst I had a lot of respect for Mr Laing, I had two concerns. Firstly, and understandably, he was likely to be less responsive to Lime Rock than I was. LC were after all only hired hands for this one transaction. Secondly, Mr Laing had a tendency to delegate work to junior colleagues, whereas I was more hands-on. I was therefore trying to get over the point that part of my role would be to ensure that LC were not a cause of delay to the timetable.

15. Vendor due diligence reports do not *per se* breach conflict of interest rules. The exchange with Ms Spottiswoode referred to at paragraph 3.12 of the complaint simply (i) sets out the arrangements Mr Allan had agreed with ITS and (ii) exposes the inherent risk that exists within all vendor/sale-side due diligence reports i.e. that the due diligence investigations might uncover some previously unknown liability. If the liability came within the level of materiality being applied to the report, the reporting firm would be obliged to disclose it in the report or risk being sued by a party placing reliance on the report. Any tension that such an event could create is something that should be addressed through the solicitors' terms of engagement. The ITS Cayman Islands entity was non-trading, so the report being asked for was restricted to a review of the entity's corporate registers only, which was unlikely to reveal anything untoward. My impression at the time was that Miss Spottiswoode was looking for a reason to turn down the assignment. Due diligence is not exciting work. She was being asked to do a very limited scope of work, so the fee would have been modest, but the potential risk/indemnity on due diligence is always regarded as being high. I felt she was hiding behind the existing relationship with Lime Rock and making a value judgment rather than one based on conflict rules. I believe I used Boyar Miller in Houston, USA and Hugh Fraser International in the UAE to carry out the due diligence in those jurisdictions, both of whom worked on other Lime Rock transactions, and saw no difficulty in accepting their Project Indigo assignments. The decision to undertake a vendor due diligence report was not mine. More than 20 P&W lawyers including eight partners were involved in the preparation of the due diligence reports. All of those partners were aware that the firm had acted for Lime Rock in previous transactions.

16. Stamp Duty on the transfer of shares had always been a sensitive issue with Lime Rock as there is no equivalent tax in the USA. It was unusual for Lime Rock to purchase shares. They usually only subscribed for new shares on which no Stamp Duty is payable. The Stamp Duty on the US$10,000,000 payable to Mr Kidd would amount to the sterling equivalent of US$50,000. Lime Rock funded their investments by calling funds down from their investors. That could be upwards of 200 entities and individuals. If they failed to call down sufficient funds for an investment it was administratively awkward for them to make a call for a further, relatively small amount. I think what happened is that Scott Allan forwarded an email to me from KPMG, Mr Kidd's tax advisers, and asked me to send it on to Lime Rock to get their view on this.

17. The exchange of emails with Mr Ross referred to at paragraphs 3.13 and 3.14 of the complaint was the inevitable consequence of the due diligence being carried out as a VDD. These emails entirely relate to the scope, costs and progress of the legal due diligence exercise and demonstrates that we tended to correspond in informal terms. The reference to releasing the hounds was to me instructing the overseas lawyers to start on their respective due diligence exercises which were estimated to cost US$200,000 in aggregate. Whilst P&W was engaged by ITS to produce the legal due diligence report, ITS itself had no interest in the report other than its production and acceptance by Lime Rock was a condition precedent to Lime Rock completing its investment in ITS. OFAC is the acronym for the US Office of Foreign Assets Control and is responsible for enforcing the US sanctions programmes. Checking that ITS had been compliant with US sanctions was a part of the legal due diligence scope that Lime Rock required. I had provided ITS with the usual Lime Rock questionnaire on this to complete and they were resisting doing so.

18. The email from Simmons & Co referred to at paragraph 3.15 of the complaint was sent by the junior employee in charge of maintaining the transaction timetable document. It contained no sensitive information. My email simply expresses frustration at ITS seeking rapid progress with the due diligence whilst failing to respond to requests made of them. The OFAC/FCPA part of the diligence was a specific Lime Rock requirement. It was unusual as it related to US legislation which the US Government sought to enforce "extra-territorially". I was simply reporting back to Lime Rock that I had hit an impasse with this aspect of the due diligence and that they would have to resolve this directly with ITS. LC were not involved in this aspect of the transaction. Their remit was simply to review the completed due diligence reports in order to negotiate and agree the warranties and disclosures. This was part of my role which was known to and acknowledged by ITS.

19. I understood a key aspect of my facilitating role was to prevent slippage resulting from LC's lack of

knowledge of Lime Rock style documents and procedures. I was to be available to them to explain how the draft documents deviated from what I would usually provide for if I had been drafting these on behalf of Lime Rock. Having done so, it would then be for LC to take instructions from Lime Rock and negotiate these to final form documents with Mr Allan. That role was known to and acknowledged by ITS. For the reason set out at paragraph 14 above, I was also intent on holding LC's "feet to the fire". The transaction timetable was very aggressive. ITS wanted to complete on 13 March when the first drafts of the documents were only being issued on 24 February. That only allowed 13 working days. It was our client that was setting the timetable and we had to do our best to ensure this was complied with. It was therefore imperative that LC and Lime Rock were made aware that they would have to move early on this and invest significant time, including Mr Ross as the Lime Rock decision maker. My email to Lime Rock and LC was intended to ensure that this happened for the benefit of Mr Kidd/ITS. What is set out in the emails referred to at paragraphs 3.16, 3.17, 3.19, 3.21, 3.22 and 3.25 is what was expected of me by Mr Allan and ITS.

20. Kris Agarwal was the Lime Rock general counsel operating from their US headquarters in Connecticut, USA. I am not sure that at the time he sent the email referred to at paragraph 3.20 of the complaint he was aware that I was not acting for Lime Rock in the Project Indigo transaction. When I was acting for Lime Rock my instructions came from the Aberdeen office, not Mr Agarwal. I did not generally report to him. The point he raised had a wider context than just the ITS investment so it was important that I knew about it. It concerned US regulatory matters and was of no commercial significance. I think I decided it did not require to be reflected in the new ITS articles of association and took no further action. It does however underline how seriously Lime Rock took sanctions related issues.

21. I had been given the task by Scott Allan of ensuring that LC and Lime Rock were prepared and up to speed for the all parties' meeting to be held on 5 March. A lot of ground would need to covered at the meeting given the proposed completion date was only eight days after that. I can only assume that "catch-up rights" being a big issue for ITS came to me from Mr Allan and as the message was not accompanied by any explanation of what this referred to, he did not know what this meant. I did not know what "catch-up rights" meant. If I did not know, then I doubted Malcolm Laing would either. I did not fancy being in a room full of clients and advisers not knowing what was being discussed and I reckoned that would be the same for Malcolm. If the Lime Rock guys knew what it meant then I wanted them to tell us. I was going to be at the meeting to advise, if necessary, what Lime Rock's usual position on particular matters was. I could not do that on "catch-up rights" if I did not know what was being referred to.

22. By the email referred to at paragraph 3.26 of the complaint I wanted to ensure that Mr Laing "stepped up to the plate". Whilst in my facilitator role I had set up meetings and given LC guidance, I wanted Mr Laing to be clear that he was representing Lime Rock and getting paid for doing so. I saw my role at the meeting as being available to answer any questions on what the normal Lime Rock position on a particular issue might be, but otherwise to leave any negotiation between lawyers to Mr Allan and Mr Laing. To the best of my recollection that is what happened at the meeting. I was also concerned that up to that point, Mr Laing had takena bit of a back seat and had left most of the work to his less experienced assistant, Mr Hutchison. I was trying to get the message over that it was he personally who had been recommended to Lime Rock by P&W, rather than LC as a firm, and that he should be leading at the meeting and not his assistant. I tried to do so in a light-hearted manner to avoid causing offence or embarrassment. In retrospect, I should have been more direct.

23. As set out at paragraph 10, the first part of my role was to provide Scott Allan with the Lime Rock forms of investment agreement and articles of association. I did not maintain actual precedent forms. On each occasion there was a new Lime Rock investment I would look at the documents from the most recent transactions and from these create first drafts for the new transaction. That is what I did for this transaction, although at the point I passed these over to Mr Allan these were not fully formed drafts. I sent what I had prepared to Mr Allan on 28 January. The initial transaction drafts were not issued by Mr Allan until 24 February and were significantly different from these, so he and ITS must have spent a lot of time discussing and amending what I had provided. My email referred to at paragraph 3.27 refers to "missing words". When preparing the outline drafts for Mr Allan I had omitted to update the restrictive covenant provisions of the investment agreement to reflect the (then) current Lime Rock requirements. I sent LC the correct version of the clause. I do not know if LC did include this wording when they revised the drafts. The restrictive covenants in the investment agreement were always likely to be the subject of intense scrutiny and negotiation by the parties, which I think must have been the case because the form of these in the executed version of the investment agreement is markedly different from the usual Lime Rock form which I had provided.

24. In relation to my actions referred to at paragraphs 3.28 and 3.29, this was the first adjustment by LC of the initial transaction drafts following the all-parties meeting held on 5 March. The initial transaction drafts produced by Mr Allan following what I imagine were extensive discussions with ITS were materially changed from normal Lime Rock forms and introduced a number of novel concepts. An investment

agreement and articles of association are documents which have to work together. In this transaction, as Mr Kidd wanted to realise part of his capital in ITS, part of the Lime Rock investment involved the purchase of shares through a sale and purchase agreement. There was some interaction between the terms of the sale and purchase agreement and the investment agreement and the due diligence reports were relevant to both the investment agreement and the sale and purchase agreement in relation to the warranties in both and disclosure against these. I do not have all of the email correspondence and transaction drafts available to me in order to analyse the progress of any comments or amendments I would have offered up to LC and whether any of these appear in or influenced the terms of the final documents. At that stage there was still pressure to get the transaction completed during March and I saw my actions as part of my role to advise LC on normal Lime Rock practice to help them keep to the transactiontimetable.

25. Notwithstanding I considered that my actions referred to in paragraphs 3.28, 3.29 and 3.30 were consistent with my facilitator role, I think I was by that time wishing to be done with it. I was working on a number of my own transactions (i.e. where I was the principal partner) which were challenging and time-consuming and wanted to be free to concentrate on them. Again, I wanted LC to step up to the plate and take the transaction forward without any further involvement from me and had become agitated by the fact it was only Mr Laing's assistant who was visible. That frustration and agitation showed through in the email I sent to Mr Hutchison referred to at 3.30 of the complaint. I felt he was being lazy. I had sent him a manuscript mark-up of the language he was looking for as I had taken this from an executed Lime Rock document. I felt I had fulfilled my role by providing the precedent language. It was up to him to use it if he wanted to, or to decide not to do so. I was not there to draft his documents. He was acting for Lime Rock and getting paid for it.

26. Paragraph 8.5 of Part 4 (The Warranties) of the executed Investment Agreement states: "The Disclosure Letter contains details of the borrowings of the Group (other than borrowings between members of the Group).". The SPA contained the same warranty. The schedule of indebtedness referred to in paragraph 3.31 of the complaint was the "details of the borrowings of the Group" which was to be disclosed to Lime Rock in the Disclosure Letter. This was information which ITS was required to give to Lime Rock and there was nothing improper in me giving it to Mr Smith.

27. The email referred to at paragraph 3.32 was inappropriate and should not have been sent. This was idle chat between two people who knew each other very well about a third whom both knew very well about a

transaction in which both had an interest. The transaction had been timetabled to complete on 13 March. I do not recall the email or the background to it, but presumably, for whatever reason, the transaction was stalling. By that time a huge amount of fees would have built-up. P&W had over 20 lawyers working on the due diligence and a number of overseas law firms had been instructed to produce diligence reports and would be chasing for payment. Everyone involved was a bit jumpy about abort costs due to the difficult economic situation caused by the global banking crisis and the oil price collapse. The email referred to at paragraph 3.33 also relates to fees for abortive due diligence costs. Neither email imparts any information which would not already have been known to Mr Ross as throughout the transaction he was in direct contact with Mr Corray, nor does it contain any advice to Lime Rock.

28. The email referred to at paragraph 3.34 again was idle chat and in parts inappropriate but again was probably prompted by an uneasiness over the prospect of abort fees. Whilst it should either not have been sent at all, or limited to a direct response, it is unlikely to have informed Mr Ross of anything that he was not already aware of and contains no advice to Lime Rock.

29. The email chain referred to at paragraph 3.35 was sent to me on an unsolicited basis by Mr Ross. I have no recollection of either receiving the email or reading it at the time. I went on holiday a day later so would have been more focused on what I needed to do before I left rather than an email about a deal where nothing had happened for three or four weeks. The fact that I replied to him saying that I deleted the email, but apparently did not, makes me think it just slipped from sight unread. Even if I had read the email chain at the time, it simply relates that the transaction as originally proposed was no longer proceeding as the Lime RockInvestment Committee had rejected it, that an amended proposal from Lime Rock had been rejected by ITS, but that there may be still be some appetite within ITS to do a deal. The emails do not contain any details of any proposals, I do not comment on the email chain, I do not provide any advice to Lime Rock and it does not contain any information that would not already have been known to ITS.

30. Again, Mr Ross forwarded the email referred to at paragraph 3.35 on an unsolicited basis.This is simply advising Simmons & Co that the Lime Rock Investment Committee hadapproved an amended proposal and that his team was re-starting the diligence process. Simmons & Co were acting for ITS. This was just a heads up to me as the person charged with delivering the legal due diligence reports which had been paused for around four weeks that the process would need to be re-started. Given more than 20 lawyers within P&W were involved in this as well as a dozen or so overseas firms, re-mobilising was going to require a significant effort. All through the due diligence process we had difficulty in getting ITS to produce

the documentation to enable the legal due diligence exercises to be carried out and unless there was a considerably greater degree of buy-in to this from ITS than there had been earlier in the transaction, making progress would be hard. I would re-iterate that the due diligence reports were being produced for Lime Rock's benefit only. LC were not instructed in relation to the due diligence so there was no solicitor on "the other side" to communicate through. I had to deal directly with Lime Rock on the due diligence and they had to deal directly with me and/or Scott Milne. Both P&W and ITS were aware of that.

31. The Lime Rock proposal referred to in paragraph 30 above, was approved by the Lime Rock Investment Committee meeting held on 4 May, but the proposed transaction fell into abeyance during May 2009 as (unbeknown to me) ITS sought (but failed) to find an alternative investor. The local Lime Rock office had clearly been having difficulty in getting their Investment Committee to back the amended proposal and in advance of that had asked me, to provide them with a summary of the main outstanding issues on the transaction documents as adjusted between Scott Allan and LC at that time and how the documents differed from the usual position they would accept. LC could have provided the summary but not the comparison. The note does that but also contains some commentary from me on how the outstanding points might be resolved. This was sent to Lime Rock on 5 May and re- forwarded to Mr Ross on 25 May. There was no second/separate letter or note on 25 May.

With hindsight I should have told Lime Rock to have LC to prepare and send the note, but nothing in the note influenced the final form of the documents and I do not believe that providing this commentary was wholly inconsistent with my facilitator role.

The OFAC/FCPA compliance due diligence was to be dealt with by way of a questionnaire which ITS was asked to complete. LC were not involved in the due diligence and in any event would have had little or no knowledge of these matters, as would Scott Allan. Lime Rock required ITS to provide warranties that they had not breached any relevant FCPA provisions or US trade sanctions in the past but also required ITS to provide undertakings (i.e. covenants) in the Investment Agreement to comply with this legislation going forward. Drafting these covenants was entirely consistent with my facilitator role. Once drafted these would be passed to Scott Allan and ITS to review and amend/negotiate with LC and Lime Rock. By that time it was clear there were going to be gaps in the overseas due diligence as a result of ITS's failure to make available the necessary information. I could have just done nothing, but we are supposed to be problem solvers, and the fix was to cover the gaps with warranties, which Mr Kidd and ITS could either give, safe in the knowledge they were true or, where necessary they could disclose against these and avoid

any claim for breach of warranty. The final quote in paragraph 3.37 relates to the SPA only and as far as I can see I did not produceany note on this then or later.

32. LC needed to be advised that the transaction was re-awakening and Mr Allan was on holiday, hence the email referred to in paragraph 3.38. I accept the some of the language is not helpful but from that point on my contribution was limited to trying to complete the due diligence exercise and matters flowing from that.

33. I think I do recall the telephone conversation with Mr Ross regarding warranties referred to at paragraph 3.39. I remember Mr Ross started the call by saying something like "I know you are not acting for Lime Rock on this but". The point was on warranty caps and the question and my answer were the same or similar to those referred to in paragraph 5 above. That conversation was followed by an email exchange between Mr Ross and Mr Corray as follows:

Email Lawrence Ross to Jeff Corray dated 30 July at 15.09 and JC's response at 15.49 on 30July
"The draft docs have $100k disregard and $1m threshold which my adviser Mr Laing tells me is quite generous. In the spirit of trying to get something done I can bring myself to be super generous (and risk the wrath of Mr Laing) by going to $150k and $1.5m. Can we now close this off at that and get everybody working towards completion asap."

JC responds: *"OK done Lawrence."*

It appears that he asked me a general question that only I would know the answer to (i.e. what level of cap did Lime Rock usually apply to warranty claims) and then sought advice from Mr Laing on the specific issue.

This exchange perhaps demonstrates that this transaction was populated by clients and advisers who knew each other very well and had been involved in previous transactions with each other, sometimes on the same side and sometimes on opposite sides. This is reflected occasionally in the lines of communication. Here we have the principals negotiating a fairly significant point direct without reference to legal advisers, and in Mr Ross's case, choosing to ignore the advice given to him by Mr Laing. It is more widely reflected in the casual form of language used in many communications during the transaction (not just by me).

34. The email referred to at paragraph 3.40 of the complaint may be interpreted by others differently, but for

me it was simply a matter of courtesy. Despite a brief renaissance at the beginning of June 2009, it looks as if there was a further pause in Project Indigo until the end of July. If negotiations were at a delicate stage, I wanted to leave the field clear to the principals to sort matters out and not somehow put my foot in it.

35. I regard the email exchange referred to in paragraph 3.42 as being entirely consistent with my allotted role in Project Indigo. "Ethical practices" refers to bribery and corruption. The UK Bribery Act was not in force then and the warranties were therefore based on the US Foreign and Corrupt Practices Act and flowed from Lime Rock's due diligence requirements. I had passed to Mr Allan the standard warranties that Lime Rock required on bribery and corruption. These were not included in the outline drafts I had given him as these warranties were not always required. This was part of my facilitator role to provide Lime Rock precedentsand ITS were fully aware that I had provided these warranties. My suggestion that a milder form of these might be acceptable was entirely to the benefit of ITS. I do not believe I played any further part in the adjustment of these warranties. That was done between Mr Allan and LC (see next paragraph). On the same day, I was asked by Scott Allan to furnish him with Lime Rock pro forma Manager's Questionnaires for Messrs Kidd, Corray, Milne and Burlison to complete. The extent of any drafting I did on these was only to insert each individual's name into the form. Scott Allan forwarded these to ITS making it clear these had come from me.

36. Paragraphs 3.43 to 3.48, 3.50 and 3.51 of the complaint. I think it important to understand the ebb and flow of my involvement in Project Indigo as recorded through my time entries. The transaction started mid-January and was supposed to complete mid-March. There was a huge amount of activity during that period. Then it all came to a halt and little happened until towards the end of April when there was a bit of activity until the end of the first week of May. It then came to a halt again and there was some activity on 8 and 9 June before going quiet again until 14 August when there was activity from then through until completion near the end of September. I do not know what was going on, if anything, during the periods when I wasnot recording time on the files, but presumably at some point during August Scott Allan picked up on the transaction documents with LC.

With the benefit of hindsight there were two problems with what had been arranged for the legal due diligence. Firstly, whilst ITS acknowledged the positive benefit of my existing relationship with Lime Rock and wanted to leverage on that, the existence of that relationship coupled with the requirement to speak directly to Lime Rock personnel in connection with the due diligence created the opportunity for exchanges of views to take place which should not have happened. I should have been clearer with Lime Rock about where lines had to be drawn and been more rigorous in enforcing these. Secondly, it was not

reasonably foreseeable in January, that in a transaction which was scheduled to complete in March, the due diligence would still not have been completed six months after that. Due diligence reports are supposed to be completed and available at a relatively early stage of a transaction. The idea had been that once the due diligence reports had been completed, these would beissued to Lime Rock and LC who would be able to review these then (i) form a view on whether the warranties in the SPA and Investment Agreement as then drafted required to be added to or amended in order to reflect issues disclosed in the reports and (ii) be in a positionto review the disclosure letter from Mr Kidd and ITS against the warranties.

The email of 8 September from Mr Hutchison to me referred to in paragraph 3.34 states:

"Please find attached the latest drafts of the IA and Articles which were returned to Scott a couple of weeks ago. We are still discussing the extent of the OFAC and trade sanctions warranties in the IA (and SPA) with ITS at the moment. There will be further adjustments tothose warranties (as well as any others that may be required pursuant to the dd findings) aswell as the addition of a covenant against trade with prohibited countries (without consent).
On the Articles, there are ongoing discussions with Bob/Jeff as to the acceptability of an LRpreference on a return of capital (other than liquidation/sale or listing. This is the remaining big issue that requires further discussion on that document. [i.e. "catch-up rights"]
By way of information, Lawrence suggested in an email earlier today that the 18th of this month would be a potential date for completion. Whilst the main deal docs aren't really too far
from being in agreed form, it would be helpful if you would have a chat to him today on how realistic you consider this proposed date to be taking account of what still requires to be doneon the dd close out and disclosure process."

LC's understandable concern that with completion scheduled for little more than a week ahead they had not seen the due diligence reports to enable them to carry out the work referred to above. In particular, they were in no position to advise Lime Rock on the terms of the disclosures against the warranties.
There is an email from Mr Ross to Mr Corray on 18 September 2009 in the following terms:

"Spoken to Ken. As the work for the updating of the UK report is having to be done anyway inpart for the disclosure and in part covering stuff that you are now issuing (contracts etc) the report might as well be updated. Regarding the difficulty of getting reports from Venezuela and Egypt, I have said they should not hold up completion."

Mr Corray responded: *"OK, thanks Lawrence. As discussed and agreed, we should close this deal on or before next Friday (25th) as we are both away to Dubai on the 27th. With the documents being in good shape (only major outstanding being your response to the liquidity preference proposal Scott sent you last night), the customer referencing now largely completed to your satisfaction, and with the disclosure letter available early next week, I cannot see what should get In the way of meeting this timeline. In any case, we both now want this phase behind us, so let's make sure it happens."*

Below is text taken from an email I sent to Jason Smith of Lime Rock (copied to Mr Ross) on 22nd September 2009 at 11:27 headed "Indigo Due Diligence Status Report" and which is referenced at paragraph 3.47 of the complaint.

"This is likely to be the first of many emails from me on ITS diligence/disclosure over the next couple of days. I am assuming you are the correct person to receive these. If that is not correct let me know. I will copy in Lawrence unless he tells me otherwise. If you want to widenthe distribution list let me know.
Firstly a brief status report.
P&W "UK" LDDR
We are currently working on updating the P&W "UK Report". That work should be completed tomorrow. There are not a lot of changes.
P&W Customer Contracts and Agency Agreements Report (CCAAR)
We are also working on updating the CCAAR. You will have seen that we received a raft of "new" contracts from ITS on Friday. The list that accompanied the disc noted that there were 25 contracts included which we had not previously reviewed. Hence my decision to deal with these on a "red flag" reporting basis. However, on comparing the list with what is already in
the report it may be that we have in fact already reviewed a number of those contracts which the ITS list says we have not. We are currently going through an exercise of comparing what we printed off the new disc on Friday with the hard copies of those already reviewed. That exercise itself will take some time, so I intend to stick with the red flag reporting format notwithstanding the actual number of new contracts to review may be less than originally thought. The red flag report will be a separate report rather than an update of the existing report. We were also provided with 10 agency agreements which we had not previously seen. These have been reported on in the same format as before and will appear in the next versionof the CCAAR that I send you.

Overseas LDDR's

I agreed with Lawrence last week that we would not ask the overseas diligence providers to finalise and formalise their reports. Again as agreed with Lawrence (and now Scott Milne) we are going to abandon the Venezuelan report on the basis that even if the lawyers there do getthe information to improve on the very basic draft they have produced so far (I will forward thisseparately) it will arrive too late in the process to be of any real value. Instead I will recommend that post-completion some work is done to make sure everything is in order as regards the Venezuelan sub so far as corporate registration and licences are concerned.

Nothing has come from the Egyptian lawyers and their office is closed until tomorrow for theEID El Fitr holiday. I will wait to see if they can give us anything tomorrow but it may be thatwe should abandon that exercise too otherwise we are incurring cost for no real benefit.

Disclosure Letter and documents

Scott Milne has been busy sending through disclosure documents. I do not think the first draft of the disclosure letter will reach you until Wednesday. I am getting copied on some if not all the emails sending through disclosure docs and those which you might wish to see I will forward on to you now rather than leave you to get a huge dump of information later in the week (of course that may still happen).

Due Diligence and Warranties

I have a role to play in relation to the SPA and IA in linking these up to the due diligence. I have taken the Lime Rock list of actions/issues arising out of your review of the LDDR's andthe ITS responses and placed these in one of 4 categories i.e. (1) no action needed (2) pre-completion action required (3) warranty required (4) post-completion action required.

Items have been placed in (1) either because they have been adequately answered /disposed of or because they are already covered by a warranty.

Items I have categorised as falling within (2) have already been flagged to Scott Allan / Scott Milne for action. There are not many of these and I do not regard these as dealbreakers or

deal delayers but categorising them as pre-completion items might actually produce someresponse!

I will draft the warranties required for (3) and try and get them agreed with Scott & Scottbefore passing these on to Leds."

This is the text of an email I sent to Mr Hutchison of LC copied to Mr Laing and Mr Allan on 22September 2009 at 19:19 headed "Indigo – additional warranties and post-completion actions":

"I refer to our conversation today and attach some additional warranties that I consider are required to close the loop on the due diligence, particularly in relation to the overseas diligence reports. Having said that, the Egyptian report is outstanding, a note on the ITS operation in Iraq is awaited, the customer contracts review remains ongoing and whilst the two main LDDR's prepared by P&W have been updated, these are likely only to reach LimeRock tomorrow. As a result I suspect Lime Rock will not want to close the door to further warranties at this stage.

The second document includes as section 3 a list of proposed post-completion actions. I suggest these be included as a schedule to the Investment Agreement. I would not proposethese as conditions subsequent. They are more of an aide memoire and the obligation to action these should be of the good faith, reasonable endeavours type rather than one whichfailure to achieve renders the Managers and Company in breach."

This is Tuesday 22nd September, the transaction is completing on Friday 25th September, the due diligence is not completed and will not be, a first draft of the disclosure letter was not going to be issued until Wednesday, 23 September. I can recall LC making the point following Mr Hutchison's email of 8th September that they would not be able to review the due diligence reports and disclosure letter within the timescale.

37. It is clear from the exchange between Mr Corray and Mr Ross that ITS wanted completion no later than 25th September. Had I not used the knowledge I had of the legal due diligence to close the gap between the due diligence and the transaction documents as set out in my email to Mr Smith quoted from above, then I do not know how completion could have taken place on 25th September. The alternative would have been a delay of at least a week and probably longer given the principals were travelling. My understanding was that ITS was desperate for the investment monies in March and its financial position was unlikely to have improved in the intervening six months. There was no advantage to, or requirement on, Lime Rock to complete before they were ready to do so. My work around the disclosures and the warranties was all done for the benefit of Mr Kidd/ITS. Lime Rock was increasing its risk by completing without the due diligence having been completed and rushing the disclosure process. Any drafting produced by me as part of this exercise was passed to Mr Allan and LC and negotiated between them. This part of the complaint (as it does generally) focuses solely on communications between me and Lime Rock. Whilst plainly those communications took place, there is no wider context to these provided or able to be provided. There are likely to have been many call and emails between me and ITS during the same period about the need to complete the due diligence, the consequences of not doing so and how to navigate an alternative route to completion. I have not had access to my email folders covering the period

since 2009. As a result of the actions of the secondary complainers I have not had access to the full files and neither has the primary complainer. After more than ten years, my recollection of the final days of what was just one of many similar transactions I worked on during my career is sketchy at best. At the time, everything was done for the purpose of closing the transaction on time, which P&W understood to be of critical importance to Mr Kidd/ITS. There were no warranty (or other) claims made by Lime Rock under either the Sale and Purchase Agreement or the Investment Agreement.

38. Lime Rock was to be responsible for paying the stamp duty on the shares being purchased from Mr Kidd for US$10,000,000. The question in the email referred to at paragraph 3.49/3.50of the complaint was "Are you aware of any exemption that Lime Rock has used in the past when acquiring shares.". Clearly this was a question about historic transactions, not Project Indigo, which no one else would have been able to answer. It was completely irrelevant to the interests of Mr Kidd/ITS.

39. The Investment Agreement is 134 pages long. The Articles of Association are 63 pages long. I am not sure why the complaint at paragraph 3.53 chooses to make mention of these two specific provisions unless it is being suggested that these were somehow unusual or unfavourable to Mr Kidd/ITS or favourable to Lime Rock and this is down to me? The standard Lime Rock investment agreement provision on appointment of additional directors is that these may not be appointed without Lime Rocks' consent i.e. with no qualification that the consent is not to be unreasonably withheld, an absolute veto right. So this was a departure from normal practice that favoured Mr Kidd/ITS. The articles of ITS were not amended but a complete new set adopted. The statement in the complaint that Lime Rock could take control of ITS and force its sale in specified circumstances is not an accurate description. Article 17 provides that at any time following a Liquidity Trigger Lime Rock could make a Liquidity Request. Liquidity Trigger is defined as the seventh anniversary of completion or a number ofdifferent material breach or insolvency related events or circumstances. If a Liquidity Request was made then ITS was required to use its best efforts to achieve a sale of its share capital within 180 days. If no sale was consummated, then the Lime Rock directors became entitled to a majority of votes at board meetings. It was fairly empty remedy since no sale was ever going to be achieved without Mr Kidd's agreement as majority shareholder. The drag along right required an 80% vote and Mr Kidd held in excess of 50%. Lime Rock may have had the right in those extreme circumstances to achieve control at board level, but it could never achieve a sale of the Company and get its money back unless Mr Kidd agreed to sell his shares too. This was standard Lime Rock provision and both provisions highlighted are fairly standard private equity controls.

40. There was no conflict in me acting for Lime Rock in other transactions at the same time as Project Indigo.

41. That ITS breached its bank covenants is a fact. Lime Rock did serve a Liquidity Notice. ITS did go into administration in April 2013. The reasons it went into administration were unconnected with Project Indigo. Project Indigo resulted in Mr Kidd receiving US$10,000,000 personally. He was not subject to any claims under the Sale and Purchase Agreement so he kept all of that. ITS received an investment of US$45,000,000 and was not subject to any claims under the Investment Agreement. Mr Kidd and Lime Rock both invested further sums in ITS. Mr Kidd's attempt to appoint additional directors was in breach of the terms of the investment documents he had signed up to.

42. There was no secret about the work I was carrying out on Project Indigo. All the work I did was recorded through the P&W time recording system. I did not negotiate the terms of any of the transaction documents on behalf of Lime Rock, I provided some drafting as part of my facilitative role for Scott Allan and LC to negotiate. From memory, LC received a fee of at least £30,000 for their role in the transaction. At the end of the transaction in a discussion on fees, there was full disclosure to ITS of the work I had done, both on the due diligence reportsand the facilitative role, and Scott Milne of ITS commented in an email to Scott Allan on 10 October 2009: "Finally as I also said to you, I am also very clear that Ken's experience and pragmatic approach coupled with his LRP relationship did help us on the plus side".

Conclusion

A private equity investment is not a wholly adversarial transaction. Once the investment process is completed, the shareholders have to work together as co-owners of the business and they have to ensure that the executive managers are incentivised to grow the business in order to achieve a successful exit (i.e. a sale or flotation) within a three to five year timescale. The private equity investor has to have trust and confidence in the executive managers and will therefore seek to build and maintain a positive relationship with them before, during and after the transaction process. Prior to Project Indigo there was already a relationship between Lime Rock and Messrs Corray and Milne from their time at KPMG. It must have been the case that there was a great deal of communication directly between LRP and the ITS managers during the transaction which would not have been captured on the P&W files (even if these had been made available by the secondary complainers)and which might have assisted in setting the context of Project Indigo, which the complaint lacks.

Hindsight has shown that the structure for discharging the Project Indigo work ran the risk that lines would be blurred resulting in these being crossed on occasion. Ultimately, the lawyers, both collectively and individually, have to accept responsibility for the structure regardless of pressure from the client. I was not the architect of the

structure, but I accept that at the time I did not apply the correct degree of foresight as to what might happen in practice. I was prepared to go along with what the firm and the client wanted. Whilst that was done for good commercial reasons given the macro economic forces ITS was up against at the time, I accept that it was the wrong decision.

I was remote from the decision making on Project Indigo and my role was secondary. As I have said I have never communicated with Mr Kidd and had little direct contact with Mr Corray during the transaction. At all times during the period from January to September 2009, my understanding was that ITS was under severe financial pressure due to the global financial crisis and collapse in the oil price and that it desperately needed the Lime Rock investment. Everything I did on Project Indigo wasconsistent with delivering completion of the transaction in line with client expectations so that Mr Kidd received his US$10m personally and ITS the US$45m of growth capital. Neither Mr Kidd nor ITS had to repay any part of the Lime Rock money through any claims arising under the Project Indigo documents. The fact that the relationship between the shareholders turned sour over time and the business failed in 2013 was not as a result of anything in the legal documents.

My principal responsibility was the legal due diligence reports which were accepted by Lime Rock allowing the transaction to complete. Any input I had to the SPA, investment agreement or articles of association was always a suggestion, rather than a requisition, which was then subject to review and adjustment by Messrs Allan, Corray and Milne, on the Kidd/ ITS side and Messrs Ross, Smith and Laing on the Lime Rock side, all extremely intelligent and experienced corporate finance professionals.

I am disappointed with some of the language I used in emails and that on occasion (and uncharacteristically) I indulged in "idle chat" on the status of the transaction, but at no time did I disclose sensitive information to Lime Rock or create any commercial advantage for them. Whilst well-intentioned in that its purpose was to help give a transaction which had stalled some forwardmovement, I accept that sending Lime Rock the note of 5th May 2009 pushed the boundaries of my facilitator role too far. Having lived with this matter for a long time, I am absolutely clear in my mind that nothing I wrote in the note of 5th May or in any of the "idle chat" emails had any adverse impact whatsoever on either Mr Kidd or ITS."

Mr Duncan took the Respondent through his statement and the emails mentioned therein.

The Respondent explained that this transaction was one of a type of transaction of which he had done many. He did not compile the files, they were not his and he did not have custody of them. He was not sure he had ever seen the completed files.

The financial due diligence was carried out by Price Waterhouse.

The potential difficulties raised by undertaking vendor due diligence were covered by the letter of engagement and terms of business sent to ITS.

With reference to the email sent by him to LR on 29 July 2009 (paragraph 14.56) he accepted that the language should not have been used and was an example of the "idle chat" he referred to in his statement.

He did not believe there was a conflict of interest in the undertaking of vendor due diligence per se. He had undertaken both roles (overseer of the due diligence and facilitator) for ITS. Nor did he see a conflict of interest in his facilitative role. That role was well understood and it was known about by the clients.

He was disappointed in himself for describing his role as "unofficial" Counsel in the email of 14 January 2009 (paragraph 14.27). He had described his role much better in the email referred to in his statement. He accepted that there had been a risk that he would engage in "idle chat" because of the existing relationship with LR. He accepted that he had used inappropriate language in a number of emails. He accepted that he had given advice to LRP on two occasions, relating to stamp duty and voting rights, which had caused him to cross the line from being a facilitator to giving advice to LRP. However, this had not had any adverse impact on either RK or ITS.

CROSS-EXAMINATION OF THE RESPONDENT

The Respondent stated that he could not remember how his role as facilitator had originated. The term "facilitator" was not actually used in describing his role. He could not recall if he had attended the early meetings with members of ITS. He believed that his role probably evolved through discussions between Scott Allan, Jeff Corray and Scott Milne. Both Corray and Milne were aware that he acted for LRP. The Respondent understood that it was their view that his knowledge of LRP requirements could make the whole exercise happen more quickly and cost effectively. He confirmed that, in hindsight, he regretted taking on the role of facilitator.

On being asked when he considered the conflict of interest had crystallised, he stated he believed that it was when he sent the letter of 5 May 2009 (paragraph 14.53) and had given his first piece of advice to LRP.

Problems had only arisen because the due diligence had not been completed in time. Comparing the differences between draft documents and LRP's normal approach was part of his facilitative role.

When asked when he had realised he had acted in a conflict situation he responded that it was in the course of the Court of Session litigation that this had dawned on him.

When asked if it would have made any difference if he had said no to taking on the role of "facilitator", he responded that he did not think that it would have changed anything.

The Respondent accepted that he had sent some emails to LR/LRP and that he had not copied these in to his client, ITS. He explained that it was well understood that, in carrying out vendor due diligence, he would require to be in direct contact with LR/LRP in order to agree the scope of vendor due diligence. There was no necessity to copy these emails to LR/LRP and he believed they may have been irritated by him unnecessarily forwarding emails to them.

He accepted that in some emails he used casual, inappropriate or glib language. He explained that this required to be seen against the background of him corresponding with someone he knew very well and was the way they both communicated.

The email he had sent to LR on 14 January 2009 (paragraph 14.27) was the first intimation from him to LR that he was not going to being acting for LRP in the drafting of the documents and was sent "with a degree of trepidation" as to how it would be received.

The Respondent was asked why Ms Spottiswood had identified a conflict of interest when he had not done so. He responded that P&W had recognised the potential conflict of interest and had addressed that issue in the letter of engagement. He explained that the considerations for her firm were different to his. She was being asked to take on a relatively small piece of work where the risk to her relationship with her established client, LRP, was "out of kilter" with the value of the work to her firm. When asked why, in correspondence with Ms Spottiswood in describing his role, he had placed the word "independent" in inverted commas, he said he supposed it was because he was not wholly independent.

He explained that an email sent by him to Mr Laing on 5 March 2009 was to emphasise that Mr Laing required to take the lead at that meeting in negotiating the terms of the documents. The Respondent was to

be present simply to provide information on LRP's usual position in such matters, if necessary. LC had been instructed because "we have a conflict", although this would only have arisen if the Respondent had become involved in the actual negotiating of the documents, which he did not.

With regard to his email to LR on 29 July 2009 (paragraph 14.56) he explained that there had been a hiatus in the transaction. LR had contacted him to ask what LRP's normal position was in relation to warranties. He had a telephone conversation with LR where he provided information, not advice, with regard to LRP's normal position. His email to LR on 29 July 2009 did not amount to advice but was sent simply as a courtesy. In hindsight, he accepted that it would have been better not to have had any of that exchange at all.

The Respondent was referred to an email from him dated 18 September 2009 to LR and was asked why he was contacting LRP when he was not acting for them. He explained that this related to the due diligence reports which had not been completed. LRP would be the recipient of the due diligence reports and would be the only party relying upon them. The parties were happy to proceed by way of vendor due diligence. Whilst he was acting for ITS completing the ITS reports, the only party who would be relying on them was LRP. He did not copy LC into this email because they were not involved in the preparation of the due diligence reports.

The Respondent explained that he had no input to the Court of Session proceedings. By then he was only an onlooker and was not involved in the litigation. When asked whether he agreed that the action should have been settled, he indicated that he was not sure whether his opinion on that was relevant.

RE-EXAMINATION OF THE RESPONDENT

The Respondent explained that he had not considered the giving of advice regarding payment of stamp duty a conflict of interest at the time. It was really a post-completion matter and not something affecting RK or ITS.

The Respondent was referred to an email from him to LR dated 27 March 2009 where he stated "Scott hasn't been told the deal is off but then he hasn't been kept fully informed of developments all along, he thinks based on the false premise that JC will think that there will be inappropriate leakage from P&W to LRP (his) bigger fish paranoid theory." He explained that this was something that he had picked up from Scott Allan, that Mr Corray had a concern, that because LRP was the bigger client, P&W would somehow

pass information to LRP to give them an advantage. He was making clear in this email that leakage was inappropriate and that such a premise was clearly false. At the time he did not think he was saying anything inappropriate in the email. It did not tell LR any more than that Mr Corray had not turned up for a meeting. The Respondent was aware that confidentiality had to be maintained and he did not think that any of the emails passed on confidential information to LRP.

QUESTIONS FROM THE TRIBUNAL

The Respondent explained that LRP is an investment fund and as a legal entity it is registered as a limited liability partnership in the Cayman Islands. The Cayman Islands is a natural base for many investment funds. The LRP management was based in Massachusetts. The first investment that LRP was involved in the UK was investing money into a company that 3i had already invested in. LR referred LRP to P&W and later LRP was passed on to the Respondent within P&W. The Respondent was not involved in the work done in relation to the potential investment by 3i in ITS. That work was completed by Scott Allan. 3i was represented by another firm. He believed that Scott Allan had started to assemble a data room but he did not know how far that had gone. The Respondent himself had been associated with LR for some 10 years or so prior to the ITS transaction. Whilst the ITS transaction was ongoing there were other LRP transactions going on. LRP was a significant client for P&W. At no stage had he felt compromised. Each transaction related to a different company and there was no overlap. The use of the terms "we" and "our" was the way the Respondent tended to write emails. He would have used the same type of terminology in emails to ITS.

Part of his job in this transaction was to be a task master and hold LC's feet to the fire in what was a very aggressive timetable. He did not lose sight of the background to the transaction of the global financial crisis and the collapse of the oil price. Mr Corray did not want any macro economics to affect LRP's willingness to invest.

He was asked if it could be inferred from his description of Ms Spottiswood's decision not to act for ITS, that this was a big transaction for him and so it was worth taking on a risk of a conflict of interest as it was of more value to the Respondent than to Ms Spottiswood. The Respondent stated that this was not an entirely unfair comment. He explained that P&W were very close to ITS and understood the issue. He was asked if he was saying that he had considered it worth taking a risk and responded that this was not the case as there was no risk. The risk that existed for vendor due diligence was that something would be discovered that had to be disclosed to LRP that might result in them changing their minds. Mr Corray and the others

were seasoned corporate professionals who understood the nature of vendor due diligence. Their motivation was to get the transaction progressed as quickly as possible for the least possible costs. The risk was discussed with ITS and they accepted it.

He was asked if he thought that he had allowed his integrity to be compromised because his allegiance with LRP had blunted his thinking. He emphasised that his relationship with LR should not be overplayed. They were not social friends and their relationship was based on mutual respect and trust established over a large number of years.

The Respondent explained that the timescale for the transaction was dictated from the outset by Mr Corray. ITS was the Respondent's client so it was not open to him to argue with the timescales.

He was unable to provide much information about the decision not to use ethical walls partly because he was not involved in the original discussions and partly because he could not remember. He understood that it was Scott Allan who decided against attempting to use ethical walls and the Respondent did not argue with him.

He supposed that it might have been better in hindsight for him not to participate at all but that was not the decision the firm took at the time. He had not been the architect of the scheme.

He did not think that his prior knowledge of LRP could be a hindrance by reason of a possible conflict of interest. He explained that every piece of work was distinct with no overlap. The only standard throughout was the documentation and protocols that went into a transaction.

He understood that the arrangements were conceived primarily to save time and costs. He could not say whether they were factors which led to the conflict arising. This appeared to him to be a discussion in relation to a general conflict of interest whereas in the terms of the Joint Minute he had "put his hands up" to acting in a conflict on two occasions.

He was asked if he had felt there was any risk of a conflict of interest in taking on the role that he did. He explained that these events had occurred a long time ago but he believes that he was aware that this was a role that he had to perform with a great deal of care.

Definition of the word "facilitator" was put to him as "someone who is employed to make a process easier or to help people reach a solution or agreement without getting directly involved in the process itself". The Respondent agreed that that summed up his role in this case. He did not get involved in the actual negotiations of the commercial documents. On occasion, he had produced language that was put forward to others. Anything he put forward was subject to scrutiny and negotiation by others; Scott Allan and the team from ITS on one side and LRP on the other side.

Apart from the two pieces of advice he accepted giving, he took no active part on the part of LRP.

He was asked if he acted in the best interests of "all concerned". He explained that the driving factor was that ITS needed capital. It was in danger of breaching its banking covenants. Banks were not lending money to the oil industry. The relief was palpable when the bank extended its facility to ITS. ITS needed the money and that was what he focussed upon. Project Indigo was about getting money invested into ITS. The Respondent was out of the transaction by the end of March when the transaction broke down, apart from some isolated incidences. He only became involved later in the transaction in order to try to resolve the issues caused by the due diligence not being completed in time.

Mr Knight indicated that he had no questions arising from the additional evidence. Mr Duncan indicated a wish to clarify matters.

The Respondent clarified that the concern expressed by Ms Spottiswood was a concern that is inherent in vendor due diligence regardless of the identity of the purchaser. The danger is that something might be discovered that is inconvenient and might put the purchaser off.

The Respondent confirmed that he had had no hand at all in the negotiations of the commercial documents.

Scott Allan was in charge of the transaction. Everyone knew that the Respondent had an LRP connection.

The risks involved in vendor due diligence were covered in the terms of engagement. The role of "facilitator" was fully discussed with ITS.

He was asked whether when he had said he had done the right thing by "all concerned" that had been ITS and RK. He agreed that was how he saw it.

SUBMISSIONS FOR THE COMPLAINERS

The Fiscal emphasised that the Law Society are the primary complainers in this case. A narrative of emailed documents is presented within the Complaint and those emails were provided to the Law Society during the investigation process. It is agreed within the Joint Minute that the documents are what they bear to be. It is a matter for the Tribunal to consider the documents, interpret them and draw any inferences from them. The Tribunal must also take into account the parole evidence of the Respondent. He enlightened everyone to the context of the emails and the unusual and complex nature of this transaction.

The Joint Minute puts some narrative on to the transaction. There is no conflict between the statements of fact and the contents of the Joint Minute as the Law Society's case rests on a narrative of the emails.

The Complainers have pointed to terminology and language used within the emails such as "unofficial Counsel", "acting unofficially", and "all a bit of a fudge". The Respondent himself has recognised that some of his language was inappropriate. The Fiscal invited the Tribunal to view this use of language as a demonstration of a lack of awareness on the Respondent's part of the position he was placing himself in.

It was the Complainers' position that the Respondent had in fact acted in a conflict of interest. The Respondent has accepted that, although subject to the qualifications reflected within the Joint Minute. The Respondent has made no concession that his actions amounted to professional misconduct.

It was the Fiscal's position that the Tribunal did not need to look at the consequences of the conflict of interest that arose. The Respondent's conduct was one of a number of criticisms levelled at P&W in the civil litigation. He was placing no reliance on what may or may not have been the consequences to RK.

He asked the Tribunal to focus on the question of whether there was a conflict of interest and whether the Respondent acted in a conflict of interest. He submitted that there were no degrees of conflict, it either was or it was not. If there was a conflict then the rule was breached.

He submitted that it was obvious from the outset of this transaction that there was a potential for conflict of interest. The Respondent should have realised, from the stage that the ethical wall was ruled out, that this

middle ground of "facilitative" role that was chosen to be pursued would lead to a conflict of interest and in fact that is what transpired.

In his evidence, the Respondent accepted that there was a potential danger of a conflict of interest from the outset. As a consequence he has to accept that the role he agreed to take on of "facilitator" had an air of inevitability about it.

The Respondent accepts that some of the language and narrative in his emails was inappropriate and he accepts, as he put it, "he crossed the line" that he had drawn for himself and he had acted in a conflict of interest.

In his statement, the Respondent accepts the responsibility for that. He accepts that it was his choice to carry on in the role he was given.

The Respondent was asked, when giving evidence, whether the fees that the firm might earn from the transaction together with the value of the outstanding work in progress were a factor in the firm choosing to suggest the facilitative role. The Fiscal submitted that it was self-evident that was a factor in the decision. It was however allied to the clients making the request that the Respondent be involved in order to minimise their fee liability and help with the timescale.

The Fiscal submitted to the Tribunal that the relevant Practice Rules in this matter were the Solicitors (Scotland) (Standards of Conduct) Practice Rules 2008, in particular Rules 1 and 6.

He referred the Tribunal to the second edition of Paterson & Ritchie: Law, Practice and Conduct for Solicitors at paragraph 7.02. He submitted that almost all of the factors highlighted within that paragraph applied.

It is not for the client to determine whether or not a conflict of interest may or may not arise. It is a decision for the solicitor and it is not open to a client to override that decision. The Respondent could have refused to perform the "facilitative" role but made the wrong decision. Whilst we do not know how he was put in that position, and whether it was the decision of the firm, it is clear that the Respondent had the ability to chose not to take on the role. The culpability of the Respondent in this case stems from him agreeing to act when he should not have; lacking the foresight to see how that transaction might develop, as it did; then failing to

see and appreciate that he was being drawn into a conflict; and, finally, carrying on acting in the face of a conflict of interest and he now accepts that.

He invited the Tribunal to find the Respondent guilty of misconduct either *singly* or *in cumulo*. The averments of misconduct were made in five subheadings some or all of which can be held to be established. The Fiscal submitted that the Respondent's conduct in failing to recognise a conflict of interest, acting in a conflict of interest situation and continuing so to act was sufficient to reach the test of serious and reprehensible as set out in the Sharp case.

The firm, not the Respondent, admitted breaching its fiduciary duty to RK and ITS in the Court of Session action. It was his submission that the Respondent's conduct in acting in breach of the conflict of interest put him in breach of his fiduciary duty to his client.

One of the averments of misconduct was that he failed to act with integrity. For the avoidance of any doubt, there was no suggestion that the Respondent's conduct was in any way dishonest or deceitful. However, it was the Fiscal's submissions that the Respondent's failure to identify a potential conflict of interest, followed by acting in an actual conflict of interest and then continuing to act in that conflict of interest impacted upon the Respondent's integrity. The fact that everyone knew about the Respondent's role in the transaction does not absolve him of responsibility.

It was open to the Tribunal to accept any of the averments of misconduct or to delete some or most of them. He argued, however, that as a bare minimum the Tribunal should hold paragraph (a) as established. If the Tribunal were not with him, he invited it to remit the case back to the Law Society to consider unsatisfactory professional conduct.

SUBMISSIONS FOR THE RESPONDENT

Mr Duncan indicated that his submissions would be in two chapters. The first would relate to the question of conflict of interest and the second would be what the conflict of interest amounted to. Whilst it was accepted that the Respondent had acted in a conflict of interest, the extent of that conflict was not accepted. The Tribunal could only go on to consider the significance of the Respondent's conduct once it had determined what the extent of the conflict was.

Within the first subheading of his submissions, there were four subheads:

(i) The arrangements for undertaking vendor due diligence.
(ii) The facilitative role.
(iii) What was called "idle chat".
(iv) The advice the Respondent gave on two separate matters.

Vendor Due Diligence

Mr Duncan submitted that the only finding the Tribunal could make in this regard was that the Respondent did not act in a conflict of interest by taking part in the vendor due diligence. He had explained that the decision to proceed in this way was not his, although it is correct to say he could have said no.

The Respondent was just one of a team of 20 or so lawyers engaged in the exercise. Some of the lawyers were based overseas and some of those lawyers had connections to LRP. Price Waterhouse had undertaken the financial due diligence. None of these people face questions with regard to the suitability of the arrangement.

The Tribunal should accept that the vendor due diligence was an accepted way forward and that there were good reasons to proceed in this way. This exercise was not risk free, although the risk had nothing to do with the Respondent's connection to LRP. The risk was that the seller required to open its books which could result in inconvenient truths being revealed. P&W had catered for that in the terms of their letter of engagement.

It was important for the Tribunal to understand that the issue that had caused Ms Spottiswood concern was that very issue. At the end of the day, that risk did not eventuate and nothing of that nature had to be disclosed.

The only finding open to the Tribunal was that there was nothing wrong with this arrangement. It could be seen from the letter of engagement that the matter was dealt with by the waiving of confidentiality.

It was an inevitable part of vendor due diligence that the Respondent required to speak to LRP to make sure it was conducted within the required scope. There was evidence that Messrs Corray and Milne were aware of that.

There was no conflict in him acting as he did and insofar as there was a potential for risk that was catered for within the letter of engagement.

Facilitator

The definition of facilitator as put to the Respondent by the Tribunal was instructive. The Respondent explains what the facilitator role was in his statement. It was about providing precedent language, and providing and explaining LRP's usual approach. He was ensuring that the actual lawyers instructed stepped up to the plate.

There was no conflict in the Respondent providing a starting position for the negotiation of the terms of the documents. He always performed this role for ITS. The role was clearly explained to the clients.

Mr Duncan drew the Tribunal's attention to several of the email productions and submitted that it was clear from these that it was an agreed position with Scott Allan and ITS that the Respondent would provide starting language and assist Mr Laing with the starting point for negotiations. There was no evidence that the Respondent took any part in the negotiations themselves. Experienced corporate lawyers were involved who considered this to be an appropriate way to deal with the process. There was a clear delineation of the Respondent's involvement – that he would provide the starting language and LC would carry out the negotiations. It was an agreed position with the Law Society that there was no evidence that the Respondent was in any way involved in the negotiations themselves.

Mr Duncan referred the Tribunal to several of the emails produced and pointed to language used that referred to Mr Laing being the LRP "advisor".

In order to complete the due diligence process, Scott Allan had to ask for a share purchase agreement. Paragraph 42 of the Joint Minute is an agreement between the parties that the Respondent had no hand in the drafting of this agreement.

Paragraph 21 of the Joint Minute agrees that ITS was aware of the arrangements regarding vendor due diligence and facility, from the outset.

There was no room for the view that the Law Society had got anywhere near discharging the burden of proof in showing that there was a conflict of interest.

Idle Chat

It was certainly true that the Respondent's choice of language on occasion left something to be desired. The Respondent accepts that he used glib language.

An example of this was when the Respondent had had referred to himself as "unofficial" Counsel to LRP. This was simply the Respondent letting a client down gently. Mr Duncan drew the Tribunal's attention to emails demonstrating that this was clearly a misdescription. It was agreed between the parties that the Respondent did not act as Counsel for LRP in the transaction.

The Respondent also accepted using glib language to LC. The Respondent's explanation, that he was ensuring that LC stepped up to the plate, had a clear ring of truth.

There was nothing clandestine about the Respondent's role. His intention was to work for the client, ITS. He was doing the work for ITS and RK. They were also under that impression and on 12 October 2009 ITS expressed thanks for the Respondent's input.

With regard to his role in the preparation of the commercial documents, it was only ever about providing precedent language. There was a clear division of labour and it was not open to the Tribunal to hold that there was a conflict of interest in that area.

Whilst it might be said that this was an area where he had 'crossed a line', occasions when the Respondent and LR had engaged in "idle chat" required to be set against the background where P&W were appointed on 26 January 2009. LC were appointed around the same time. There was a sprint to get the work done by mid-March when there was a hiatus. By this stage, significant work and progress had accrued with the possibility of an aborted transaction. Those involved had to wait it out. Mr Duncan invited the Tribunal to consider the language used in emails of 27 March 2009, 9 April 2009, 4 May 2009, 17 June 2009 and 29 July 2009 and invited the Tribunal to consider that they were "kicking the tyres" discussions, albeit that they should not have taken place. The Law Society accept that no confidential information was exchanged in these emails. Although these conversations did not amount to anything, the Respondent accepted that they should not have taken place.

Mr Duncan referred to the exchange of 29 July 2009 and submitted that this was strong evidence that both LR and the Respondent clearly understood that the Respondent was not acting for LRP in the matter. He submitted that if the only issue had been that of what he referred to "idle chat" then this case would not be before the Tribunal. However, what was more significant was the next chapter.

Provision of Advice

The principal risk that the Respondent faced in taking on these two roles was that LRP might ask him to say something that amounted to advice. In fact, the Respondent had given advice on two occasions, 5 May in relation to voting rights and in September in relation to stamp duty. It is agreed by the Law Society that the issues on which the Respondent gave advice were entirely inconsequential. Neither RK or ITS had any interest in the issue of stamp duty. The same is true with regard to the voting rights issue. There is no connection between these matters and any concern that RK might have had. They were not part of the civil litigation.

It is however a fact that the Respondent gave advice on two isolated occasions and that placed him in a conflict of interest which he now acknowledges. Mr Duncan emphasised the use of the word isolated. He submitted that the clear limits placed on the Respondent's two roles, the first in the due diligence exercise and the second as facilitator, meant there was no question of there being a continuing conflict of interest.

It could be suggested that, as it is submitted that the advice given was of no relevance to ITS or RK, the conflict of interest is somewhat technical and the Tribunal might ask why then it is admitted. In that regard there are two issues to be considered, one factual and the other in relation to the rules of practice.

With regard to the factual analysis, the situation is clearer. The firm had declined to act on both sides of the transaction, even with an ethical wall. The Respondent accepted that was the correct approach. Therefore, if the Respondent finds himself on the other side of the transaction providing advice, then factually that is an end of the matter and he is placed in a conflict of interest.

He submitted that the rules of practice are somewhat less clear and referred the Tribunal to Paterson & Ritchie at paragraph 7.19.03 and asked the Tribunal to contrast that with the Law Society's approach in other areas of law such as conveyancing.

Whilst it could be suggested on a very narrow view that because the Respondent did not act contrary to the interests of his client, he did not act in a conflict. The broader view however is that if a solicitor is acting on one side of a transaction and gives advice to the other side then that factually is sufficient. Therefore, the Respondent was quite right to concede to the Tribunal that he had acted in a conflict of interest on two separate occasions.

The next phase of his submissions he indicated was directed to the question of professional misconduct. He invited the Tribunal to hold that professional misconduct had not been established.

He submitted to the Tribunal that it required to look at three elements. Firstly, the Tribunal required to look at the whole circumstances of the case. It was quite clear in this case that the Tribunal had not been given anything near the whole circumstances. Secondly, the Tribunal required to take into account the level of culpability of the Respondent and the seriousness of what had happened. The third element was the impact of the infraction upon the client.

He referred the Tribunal to Paterson & Ritchie at page 17 where they discuss the question of culpability as expressed in the Sharp test. This was clear authority for the view that the Tribunal required to consider the culpability and blameworthiness of the Respondent for his actions. He suggested that was probably why Paterson & Ritchie had set out in that paragraph a spectrum of outcomes for being found to act in a conflict of interest. The spectrum had included professional misconduct, unsatisfactory professional conduct and inadequate professional services.

Mr Duncan referred the Tribunal to the case of The Council of the Law Society of Scotland-v-J [1991] SLT 66. In the third last paragraph of the Opinion of the Court, it was stated that it was open to the Tribunal, considering that case, to give consideration to the fact that no prejudice was suffered by the client as a result of the conflict of interest and that it was relevant to the question of whether or not the conduct amounted to misconduct.

On no view has the Tribunal been given the whole view of this transaction. It has only been given isolated snapshots. A decision was taken to select items of correspondence, none of which was between the Respondent and ITS. The Tribunal has been invited to hold that the Respondent acted against the interests of RK and ITS but no challenge was taken of the Respondent when in his evidence he stated that he was acting in the interests of RK and ITS.

The Tribunal is invited to hold that a breach of fiduciary duty has been established as a matter of law. The Law Society has not produced any evidence of a breach of fiduciary duty. There has been no agreement as to what the breach of fiduciary duty was. No one from Burness Paul gave evidence. There is a suggestion within the Law Society's pleadings that Scott Allan was unaware of the Respondent's communications with LRP. The correspondence produced makes clear that Scott Allan was aware. If Burness Paul had given evidence to the Tribunal then they could have been asked if the Respondent was in fact "pushed under a bus" in order to protect Scott Allan who was in fact the person dealing with the transaction. It was important for the Tribunal to see the complete picture to assess the Respondent's role in any breach of fiduciary duty. The Law Society had not discharged its burden of proof.

In considering the impact of the infraction on the client, the Tribunal has heard nothing from RK. The Respondent has given a substantial, detailed and candid account. He had no hand in negotiating the transaction. The advice he gave was on matters that were immaterial to RK.

There is no mention in the civil pleadings against Burness Paul of the advice given by the Respondent and that would be because they formed no part of the loss sustained by RK.

The Tribunal was invited to hold that the Respondent had breached his duty of integrity. At no point had the Fiscal put to the Respondent that he had shown a lack of integrity.

Mr Duncan referred the Tribunal to the case of SRA-v-Wingate and another [2018] EWCA Civ 366 where the test for integrity is set out at paragraphs 100 and 101. He submitted that a lack of integrity required the same qualitative element to dishonesty. He submitted that, if the Law Society wanted the Respondent to be found guilty of a lack of integrity, this should have been put to him directly.

For all of these reasons, Mr Duncan argued that the Tribunal could not be satisfied that professional misconduct had been made out. He accepted that if the Tribunal agreed with him then it was open to the Tribunal to remit the case to the Law Society to consider the question of unsatisfactory professional conduct and, if that was what the Tribunal decided, he did not demur.

The Tribunal asked the Fiscal whether the wording of 5.1(a) in the averments of misconduct was consistent with the agreement between the parties expressed in articles 20 and 26 of the Joint Minute. The Fiscal

conceded that it was the Complainers' position that the Respondent had acted in a conflict of interest in advising LRP whilst representing ITS in the transaction. Mr Duncan stated that it was an agreed position between the parties that the Respondent did not represent LRP. The Fiscal accepted that the Joint Minute conflicted with the wording of paragraph 5.1(a) and moved to delete the words "acting on behalf of" and insert in place thereof "advising". Mr Duncan confirmed that he had no objection to that amendment. It was confirmed that a similar amendment required to be made to paragraph 5.1(b).

The Tribunal asked the Fiscal if there was any significance to the difference in wording of paragraph (d) where it was said the Respondent acted in "a conflict of interest" where in paragraphs (b) and (c) it stated that he acted in "said conflict of interest". The Fiscal indicated that, although the pleadings were not framed by him, he did not believe the difference in wording to be intentional and consequently was of no import based on his submissions.

The Tribunal asked the Fiscal if it was accepted that the Respondent did not pass any confidential information to LRP. The Fiscal indicated that this was accepted by the Complainers. He indicated that the difficulty in this case was that the Law Society only had snapshots of a file running to thousands of pages. There was nothing to contradict the suggestion that the Respondent did not pass on anything confidential.

DECISION

The first step for the Tribunal was identify which facts had been established. The standard of evidence required for these proceedings was that of beyond reasonable doubt and the burden of proof rested with the Complainers throughout.

In this case, the Tribunal's role in determining which facts had been established was significantly restricted by the terms of the Joint Minute between the parties. In determining what had been established, the Tribunal had regard to the Joint Minute, admissions made by the Respondent in the Record, the documentary productions and the evidence of the Respondent.

Given the agreement that the Respondent had not acted for or provided any confidential information to LRP, the inferences that the Tribunal could draw from the emails produced was restricted to assessing whether there were incidences of the Respondent providing advice to LRP. The Respondent had admitted giving advice on two separate occasions. The Tribunal considered that the email from the Respondent to LR

dated 29 July 2009 and referred to in paragraph 14.56 was tantamount to the Respondent giving advice regarding how best to progress the negotiations between the parties. Accordingly, the Tribunal determined that the Respondent had given advice to LRP on three occasions.

The next step for the Tribunal was to consider whether the established facts supported the averments of misconduct.

Given the amendment made to the first averment of misconduct made at 5.1(a), the issue was a relatively straightforward one. The amended averment stated:-

"The Respondent acted in a conflict of interest in 2009 by advising Lime Rock in relation to the transaction with Mr Kidd and ITS, whilst the Respondent and his firm were acting on behalf of Mr Kidd and ITS in said transaction."

Having determined that the Respondent had acted in a conflict of interest, the Tribunal required to consider whether the Respondent's actings amounted to professional misconduct. The test for professional misconduct is set out in the case of Sharp-v-Council of the Law Society of Scotland 1984 SLT 313:-

"There are certain standards of conduct to be expected of competent and reputable solicitors. A departure from these standards which would be regarded by competent and reputable solicitors as serious and reprehensible may properly be categorised as professional misconduct. Whether or not the conduct complained of is a breach of rules or some other actings or omissions, the same question falls to be asked and answered and in every case it will be essential to consider the whole circumstances and the degree of culpability which ought properly to be attached to the individual against whom the complaint is to be made."

Whilst what was established amounted to three isolated incidences of giving advice, this had to be seen against a background of the Respondent choosing to put himself in the position where there was a clear and obvious risk of a conflict of interest arising. Two of the pieces of advice had little or no consequence to the Respondent's client. The third, however, had a potential to adversely affect the client, although in actuality that potential did not materialise.

In all of the circumstances, the Tribunal considered that the Respondent's conduct amounted to a serious departure from the standard to be expected of a competent and reputable solicitor but it hesitated to hold that the conduct was reprehensible. Therefore, the Tribunal concluded that it was not satisfied that professional misconduct had been made out in terms of averment 5.1(a).

The second averment of misconduct stated that:

"The Respondent advised Lime Rock in 2009 in relation to the transaction with Mr Kidd and ITS, whilst the Respondent and his firm Paull & Williamsons were acting on behalf of Mr Kidd and ITS in said transaction thus causing Paul & Williamsons to act in a position of conflict and in breach of its fiduciary duty to Mr Kidd and ITS not to act in a position of conflict."

In his submissions, the Fiscal had invited the Tribunal to convict the Respondent in relation to averment 5.1(b) on the basis that his acting in a conflict of interest amounted to a breach of fiduciary duty to his client. However, that is not what is averred at paragraph 5.1(b). The Tribunal had been provided with little information about the detail of P&W's admitted breach of its fiduciary duty. In all of the circumstances, the Tribunal concluded that it had insufficient information before it and was therefore unable to hold that this averment was supported by the evidence before the Tribunal.

The third averment of misconduct stated that:

"The Respondent failed to act with integrity by acting in said conflict of interest."

The Tribunal was not satisfied that the three incidences of providing advice to LRP amounted to a lack of integrity, although the Tribunal was concerned by the email from the Respondent of 29 July 2009. Additionally, the Fiscal had not put this allegation in terms to the Respondent when he was giving evidence.

In all of the circumstances, the Tribunal concluded that averment 5.1(c) had not been made out.

The fourth averment of misconduct stated that:

"The Respondent failed to act in the best interests of the secondary complainer Robert Kidd and ITS by acting in a conflict of interest."

Given the Fiscal's submissions, the Tribunal read this averment as referring to the "said conflict" i.e. providing advice to LRP on three occasions. Whilst the Tribunal took the view that the Respondent's email of 29 July 2009 amounted to the Respondent not acting in the best interests of his client, it hesitated to hold that this was sufficient to reach the conjunctive test of serious and reprehensible conduct. Accordingly, the Tribunal determined that professional conduct was not made out in relation to averment 5.1(d).

The final averment of misconduct stated that:

"The Respondent's actings as averred at a) to d) above brought, or were likely to bring, the legal profession, as a whole, into disrepute."

Given that the Tribunal had not found that any of the other averments of misconduct had been established, the Tribunal concluded that this averment was not established.

The Tribunal was satisfied that the Respondent's conduct had represented a departure from the standards of conduct to be expected of competent and reputable solicitors. It considered that the case was very close to the boundary between unsatisfactory professional conduct and professional misconduct. Having taken this view, the Tribunal was bound to remit the case to the Law Society under Section 53ZA of the Solicitors (Scotland) Act 1980.

It should be emphasised that these findings reflect the content of the Joint Minute and the precise wording of the averments of misconduct. Members of the profession should note that the Tribunal had grave concerns about the Respondent's involvement in this transaction, acting for ITS, particularly with regard to what was called his role as "facilitator", when he had an ongoing, long term and close business relationship with LRP.

EXPENSES AND PUBLICITY

The Tribunal invited submissions from both parties with regard to expenses and publicity. The Fiscal suggested that it might be appropriate in the circumstances, for the Respondent to speak firsts.

SUBMISSIONS FOR THE RESPONDENT

Mr Duncan sought an award of expenses for the complaint process. He accepted that the Respondent had not achieved entire success but invited the Tribunal to consider the whole context.

He explained that there were three aspects to his motion for expenses. The first was that the original Complaint had included averments of dishonesty. These were deleted. Secondly, the Complaint was brought on the back of partial presentation of the transaction file. The Respondent had had to engage in a protracted process in trying to recover documents. Matters came to an impasse when it became clear that the documents were not going to be made available voluntarily. The Respondent's approach pivoted on an attack upon the relevancy of dishonesty pleadings, which were deleted. Thirdly, the surrounding background of the issue was exceptionally complex as were the facts. He submitted that the only way the Tribunal was able to understand the circumstances was as a result of the extent of the work done by the Respondent in preparing his statement and by him giving evidence. The fees incurred were substantial. He submitted that all of that was somewhat out of proportion considering the decision reached.

SUBMISSIONS FOR THE COMPLAINERS

Mr Knight confirmed he was seeking an award of expenses. He opposed the Respondent's award for expenses. Whilst the Respondent had achieved partial success, nevertheless, the case was being remitted back to the Law Society for consideration. If the Tribunal was inclined to award the Respondent expenses, he invited the Tribunal to restrict these in some fashion. He accepted that the Tribunal has a discretion in the matter.

In response to a question from the Tribunal regarding what he meant by restriction, the Fiscal suggested a restriction of 50% could be considered more in line with the partial success achieved.

Mr Duncan responded that the power to come to a view lay with the Tribunal. He clarified that even if the outcome had been different he would have resisted an award of expenses. If the Tribunal was considering restricting the Respondent's award of expenses, he suggested the figure awarded should be something " north of" 50%.

The Tribunal gave very careful consideration to the submissions of both parties and the whole circumstances of the proceedings. In considering this matter, the Tribunal noted the case of Baxendale-Walker-v-SDT [2011] EWHC 2254 (Admin), whilst recognising that this is an English authority with limited applicability in Tribunal proceedings. *Smith and Barton "Procedure and Decisions and the Scottish Solicitors' Discipline Tribunal"* paragraph 5.08 and the cases 754/89 and 755/89 referred to therein are also pertinent. The Tribunal considered that the Respondent in this case had knowingly placed himself in a position where a conflict of interest was highly likely to arise, if not inherent. He had put himself in a position where there was a high risk that his conduct would be placed in the spotlight. It was right and proper that the Law Society had brought this Complaint before the Tribunal and the Tribunal's decision was a very finely balanced one. The Tribunal recognised that averments of dishonesty had been deleted by the Complainers but noted that no preliminary hearing required to proceed. Whilst the finer detail of the commercial work undertaken by the Respondent maybe complex, the Tribunal considered that the broader question of conflict of interest in this case had been a straightforward one. In all of the circumstances, the Tribunal considered that the fair and appropriate order in this case was a full award of expenses in favour of the Complainers. The Tribunal confirmed with Mr Duncan that he was aware of the scale of expenses used by the Tribunal.

Neither party had any submissions with regard to publicity. In the circumstances, the Tribunal ordered that publicity in accordance with Paragraphs 14 and 14A of Schedule 4 to the Solicitors (Scotland) Act 1980 should be given to the decision and that publicity should include the name of the Respondent.

Colin Bell

Vice Chair