EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 11
CA163/19

Lord Malcolm
Lord Doherty
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion

by

ROBERT GORDON KIDD

Pursuer and Reclaimer

against

LIME ROCK MANAGEMENT LLP AND OTHERS

Defenders and Respondents

Pursuer and reclaimer: Smith KC, Anderson and Reid; Harper Macleod LLP
First to fifth defenders and respondents: McBrearty KC, McKenzie KC and Roxburgh; Gilson Gray LLP
Sixth to eighth defenders and respondents: Dean of Faculty and Paterson KC; CMS Cameron McKenna, Nabarro and Olswang LLP

24 April 2025

Introduction and background

[1] This action concerns an alleged unlawful means conspiracy by a private-equity house and solicitors to conclude an investment and share purchase agreement, which it is claimed resulted in an immediate loss of $150 million to the other party. The commercial judge held that there was no such conspiracy, and in any event nothing done by the alleged

conspirators caused any loss or damage. This court is now asked to reverse that decision. Each member of the court has contributed to this opinion.

[2] The pursuer, Robert Gordon Kidd, owned a company called ITS Tubular Services (Holdings) Limited. He held 100% of the shares. ITS bought, sold, and leased equipment in the oil and gas industry. Mr Kidd created the business in 1986 and incorporated ITS in 2003; by 2009 it was the holding company of a multinational group of enterprises with a combined annual turnover of over $100 million. The first defender, Lime Rock Management LLP, is a Scottish limited liability partnership. It provided investment advice to the second defender, Lime Rock Management LP, a limited partnership registered in Delaware, USA. In turn, the second defender provided investment advice to the third defender, Lime Rock Partners V LP, a Cayman-exempted limited partnership. We refer to the first, second and third defenders collectively as "Lime Rock". It is a private-equity house investing in the energy sector. Lawrence Ross, the fourth defender, was a partner of the first and second defenders, and was on the investment committee of the third defender. Jason Smith, the fifth defender, was employed by the first defender as an investment analyst.

[3] From 2007, Mr Kidd sought to realise the value of some or all of his shareholding in ITS. To that end he appointed a chief executive officer, Jeff Corray, with a view to improving ITS's management systems and finding a buyer or private-equity investor for the company, and also a director, Scott Milne, to oversee corporate development. In February 2008 Mr Kidd and ITS jointly instructed a firm of solicitors, namely Paull and Williamsons LLP ("P&W"), to represent their interests in any such transaction. By October 2008 discussions with three potential investors were underway. One was Lime Rock. It sent indicative proposals for its share purchase and investment in December 2008 - January 2009, which were, in broad terms, accepted by the ITS deal team.

[4] At this stage Lime Rock sought to instruct solicitors to advise it and to draft the relevant transaction documents. Its usual solicitors were P&W, but they were already instructed by Mr Kidd and ITS. They had a conflict of interest and thus could not advise Lime Rock. Instead Lime Rock instructed the sixth defenders, Ledingham Chalmers LLP ("LC"). The individual solicitors acting were the seventh defender, Malcolm Laing, and the eighth defender, Rod Hutchison, respectively a partner and employee of LC.

[5] Mr Kidd, ITS and Lime Rock executed the investment and share purchase agreement on 26 September 2009. It lies at the heart of this litigation. Mr Kidd's position is that the key terms of the agreement were never explained to him, whether by Mr Corray, Mr Milne or P&W, and that they were highly disadvantageous to him. He states that, if accurately presented to him, he would never have concluded the agreement. It is claimed that as a consequence his shareholding in ITS became worthless or next to worthless, and that he was deprived of various opportunities in the following years to dispose of his shareholding on substantially better terms.

[6] After the agreement was signed, ITS's performance deteriorated. On 19 April 2013, administrators were appointed; they immediately sold ITS to a competitor for $125 million, all of which was used to pay bank debt. Mr Kidd and Lime Rock ended up with nothing.

The events which have triggered this litigation

[7] When the agreement was negotiated in 2008/9, Kenneth Gordon, a P&W partner, retained an "advisory" role to LC throughout the transaction, notwithstanding P&W's duties to ITS and Mr Kidd. Mr Gordon was the partner responsible for P&W's client relationship with Lime Rock. He was familiar with Lime Rock's document styles and usual due diligence requirements. He proposed that he play a "facilitative" role in

explaining these to LC to save time and expense. As the commercial judge noted, the moment Mr Gordon did anything more than provide LC with Lime Rock's styles and an explanation of their standard due diligence requirements, he, and by extension P&W, were acting in a position of conflict of interest. In the event, Mr Gordon's actions extended to providing legal advice to Lime Rock and, on occasions, disclosing potentially sensitive information to LC. Mr Gordon acted contrary to his fiduciary duty to Mr Kidd as P&W's client. Eventually this led to his resignation from Burness Paull LLP (P&W's successor firm) and consideration of his conduct by the Scottish Solicitors' Discipline Tribunal.

[8] Mr Kidd avers that the defenders were aware of the conduct which amounted to a breach of Mr Gordon's fiduciary duty and professional obligations. It is said that by continuing to negotiate with Mr Kidd in such circumstances, the defenders conspired to create a false impression of an arm's-length private-equity transaction between counterparties with independent legal advice, whilst concealing from him that he was not being independently advised and that Lime Rock was receiving ITS's confidential information from Mr Gordon. This deprived Mr Kidd of the opportunity to discover that he could not trust P&W and that Lime Rock lacked integrity. Mr Kidd states that had he known of Mr Gordon's conduct, he would have sacked P&W and taken independent legal advice which would have revealed to him that the agreement diluted his control of ITS to an unacceptable degree and privileged Lime Rock's investment in the event of liquidation. Had he known of such terms, he would have made it clear that they were not acceptable. Had he known that Lime Rock had assented to Mr Gordon's "facilitative" role he would have pulled out of the deal, he being unwilling to transact with dishonest people. It is claimed that the object of the conspiracy was to complete the agreement on terms which were favourable to Lime Rock and prejudicial to Mr Kidd.

[9] Having concluded a deal with Lime Rock, Mr Kidd avers that he was precluded from seeking alternative means of realising the value of ITS, such as a trade sale or a private-equity transaction on better terms. He could not sell his shareholding without Lime Rock's permission. The effect of the agreement was to render his shares worthless (or at least very significantly less than they had been previously) because he no longer controlled the destiny of ITS and was now a co-shareholder with a dishonest party, a fact which would require to be disclosed to potential purchasers.

[10] For their part, the defenders deny being party to any such conspiracy. They maintain that they had no intention of deceiving, or knowingly assisting anyone to deceive Mr Kidd. They highlight that the disputed terms of the transaction were agreed by the parties' commercial negotiators and that very little, if any, modification of those terms arose from negotiations between the lawyers. Mr Kidd knew, or at least ought to have known of the terms of the transaction and of Mr Gordon's dual role. ITS's representatives, namely Mr Corray and Mr Milne, were so aware. The deal was on normal commercial terms for a private equity transaction in 2009. In any event ITS's financial position was such that Mr Kidd would have sought private-equity investment notwithstanding any misrepresentation by Mr Gordon and the defenders. Furthermore, if there was wrongdoing, it caused no loss because, even in its absence, the company would still have foundered in 2013.

[11] In 2015 Mr Kidd raised proceedings, initially based on alleged negligence, against P & W and Burness Paull seeking damages of $210 million ("the P & W action"). Investigations in 2016 resulted in Mr Kidd, for the first time, being informed of the extent of Mr Gordon's role. As a result a claim of breach of fiduciary duty, subsequently admitted, was added to the proceedings. Those were resolved by agreement between the parties on

the eve of the proof with Mr Kidd receiving £19 million and retaining an interim payment of £1 million. (A separate action against Mr Corray was settled at the same time.) Mr Kidd raised this action in 2019 against Lime Rock and LC for his remaining alleged losses. A proof was held over 6 weeks in late 2023. In due course the commercial judge issued an opinion ([2024] CSOH 28) holding that the claim was unfounded.

The investment and share purchase agreement

[12] The terms of the investment and share purchase agreement are of importance. Mr Kidd avers that they were materially disadvantageous to him. They crossed his "red lines", ie they required him to accept conditions which he would never have accepted. It is said that they differ markedly from how he understood the deal at the time. The disputed terms are set out below, together with what Mr Kidd says was his contemporaneous understanding in brackets:

i) Lime Rock would contribute $55 million, comprising $10 million "cash out" to Mr Kidd and subscription of $45 million for freshly-issued "A ordinary" shares comprising 34% of ITS's share capital. (Mr Kidd's evidence was that he believed that he was receiving $55 million in exchange for one-third of his existing shares, re-investing $45 million, and keeping $10 million.)

ii) The holders of "A ordinary" shares (ie Lime Rock) were entitled to a fixed 10% cumulative preferential dividend every year for the 5 years following the transaction. ITS had the option not to pay in which case the dividend would be rolled up and compounded at a rate of 10% per year. (Mr Kidd's evidence was that this meant that the investment was, effectively, preferential debt owed by ITS at a steep rate of interest. He was not aware of this at the time; when he

found out that he had, in his words, sold one-third of his company for only $10 million and more expensive debt, he was shocked.)

iii) A liquidation preference which, should ITS be liquidated, gave Lime Rock a preferential right to amongst other things, return of the $45 million from surplus assets before any other shareholder would receive anything. (Mr Kidd's evidence was that he believed that he, not Lime Rock, would be first to receive the $45 million in the event of liquidation or his exit from ITS.)

iv) A right to appoint two directors and, in certain specified circumstances, to take control of ITS's board. (Mr Kidd was aware that Lime Rock would appoint two directors, but he did not appreciate they might be able to control ITS's decision-making and would never have agreed to this.)

[13] Mr Kidd's evidence was that each and every one of these terms would never have been accepted by him.

A summary of the commercial judge's decision

Overview

[14] The judge held that there was no unlawful means conspiracy against Mr Kidd. Neither Mr Gordon nor the individual defenders in this action acted with the intention of causing injury or loss to Mr Kidd. Even if he had been advised by a properly independent firm of solicitors, the evidence established that Mr Kidd would have completed the same deal at the same time. Its terms reflected a typical private equity transaction entered into in September 2009, a time when ITS's management was actively seeking equity investment to grow the company, the business had reached the limit of its borrowing ability, and it was in danger of breaching bank covenants.

[15] Even had Mr Kidd not done the same deal at the same time, nevertheless by the latter part of the first decade of the new millennium the business was over-extended and over-leveraged, had below-forecast EBITDA (earnings before interest, tax, depreciation, and amortisation), a plethora of unprofitable international operations, and was under commercial pressure caused by American and European sanctions against Iran. The deal with Lime Rock did not contribute significantly to its failure compared to these factors. Finally, and even assuming that there was an immediate loss to Mr Kidd on completion of the agreement, having considered the expert valuation evidence, the judge concluded that any loss sustained by Mr Kidd was less than the value of the settlement already recovered from P&W/Burness Paull.

Common intention to injure Mr Kidd

[16] The judge first considered the requirements for the tort of unlawful means conspiracy in English law, neither party having submitted that the law of Scotland differed meaningfully from that of England on this point. Following *OBG* v *Allan* [2008] 1 AC 1, Lord Nicholls at paragraph 166, a common intention to cause harm is an essential element. As pled, Mr Kidd's case is that the parties to the conspiracy are Mr Gordon, together with the individual defenders in this action.

[17] The evidence showed that Mr Gordon did not act with the intention of harming Mr Kidd, and similarly in respect of the defenders. The judge's reasoning is summarised later in this opinion, see paragraphs 70-72. In short, it was held that Mr Kidd had failed to prove an express or tacit agreement involving any of the defenders to cause him injury.

Fraudulent concealment

[18] The judge then considered the unlawful means which Mr Kidd avers were employed by the defenders in order to injure him, namely the deliberate concealment of the fact that Mr Gordon was acting in a conflict of interest or, put short, fraud. After adopting the definition of that term provided by Lord President Carloway in *Marine & Offshore (Scotland) Ltd* v *Hill* 2018 SLT 239, after Erskine's *Institutes*, as a false pretence combined with a practical result, he further noted that an essential ingredient of fraud is dishonesty. This he defined with reference to the formula set out by Lord Hughes in *Ivey* v *Genting Casinos (UK) Ltd* [2018] AC 391 at paragraph 74.

[19] As pled, the parties to the alleged unlawful means conspiracy were Mr Gordon and the individual named defenders in this action. The difficulty for Mr Kidd was that the evidence did not support a pattern of concealment by any of them. On the contrary, Mr Gordon was straightforward with those involved in the transaction about his dual role. This openness extended to those not said to have been parties to the conspiracy against Mr Kidd, including those, such as Mr Corray and Mr Milne, who were advising him. An alternative case against the LC defenders, on the basis that they turned a blind eye to a fraud perpetrated by Mr Gordon and Mr Ross, failed for the same reason.

Causation

[20] Despite finding that Mr Kidd had failed to establish liability, the judge nevertheless considered the issues of causation and loss; this on the hypothesis that Mr Kidd was indeed deceived by a fraudulent conspiracy to conclude the investment and share purchase agreement with Lime Rock.

[21] Mr Kidd avers that if he had known that Lime Rock was receiving advice from his solicitors, he would have terminated negotiations with them. The "counterfactual" advanced by Mr Kidd took as its starting point the disclosure by P&W of Mr Gordon's improper conduct at some stage prior to the completion of the transaction. The defenders submitted that this was the wrong analysis, the correct approach being to consider what would have happened had there been no breach of duty by Mr Gordon. Under reference to *Primeo Fund* v *Bank of Bermuda (Cayman) Ltd* [2024] AC 727, the judge agreed. As submitted by LC, on the hypothesis of fact in Mr Kidd's pleadings Mr Gordon was a joint wrongdoer not sued. The correct question was - what would have happened had Mr Gordon refrained from acting in a conflict of interest? The answer was that ITS and Mr Kidd would still have sought private equity investment in 2008-2009. Mr Kidd and the company's management wished to continue a growth strategy, but funding was becoming tighter. In particular in 2009 ITS's financial controller was warning of the potential of bank covenants being breached. By this stage Lime Rock was the only remaining interested investor. At the time Mr Corray and Mr Milne were of the view that the deal was a good one. It had been a hard negotiation. The conclusion was that had Mr Gordon withdrawn and not participated, the probability was that the transaction would have proceeded as it did.

Loss

[22] Considerable expert evidence was led regarding Mr Kidd's claimed losses. Mr Kidd invited the court to assess his loss as at immediately post-transaction, with no consideration of subsequent events. The defenders submitted that the court should consider the subsequent performance and administration of Lime Rock. In any event, even if one did focus on matters as they stood on or immediately after the date of the transaction, Mr Kidd

had failed to demonstrate that he had sustained any loss as a consequence of transacting with Lime Rock. The parties also disputed whether, and to what extent, the alleged fraud should be taken into account in valuing Mr Kidd's shares. The defenders submitted that if any loss did arise, this was "reflective loss" - a loss which damaged the entire share value of ITS and which was thus not separately recoverable by Mr Kidd. This argument was rejected, and no cross-appeal has been taken by the defenders.

[23] Turning first to the question of whether, and to what extent, he should take post-transaction events into account, the judge applied the "*Bwllfa* principle" as set out in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd* v *Pontypridd Waterworks Co* [1903] AC 426 and approved by the House of Lords in *The Golden Victory* [2007] 2 AC 353. It states that when assessing damages, eyes need not be shut to the known facts. As Lord Bingham put it in *The Golden Victory*: "you need not gaze into the crystal ball when you can read the book." This principle was applied by a Scottish court in *Haberstich* v *McCormick & Nicholson* 1975 SC 1.

[24] In these circumstances, the appropriate question was - what would have happened had no transaction with Lime Rock taken place in September 2009? In the light of evidence from executive and director-level staff, including contemporaneous board minutes and financial information pre-dating and post-dating the transaction, it was plain that ITS would still have faced financial difficulties. Capital expenditure would have required to be substantially reduced. In the event, Lime Rock's investment was considerably depleted as a result of financing loss-making overseas operations. The business spread itself too thinly. Sanctions by the United States and European Union caused serious difficulties for the Iran operation.

[25] The board of ITS, including the Lime Rock investors, responded by attempting to boost the group's cash flow and reduce its capital expenditure and indebtedness. Everything that could have been done to retrieve the company's situation was attempted. The judge found that the relationship with Lime Rock did not prevent Mr Kidd from trying to do what he said he would have done had the deal not proceeded. Although Mr Kidd averred and gave evidence to the effect that he would have achieved a trade sale of ITS had Lime Rock not been involved, no evidence was led from potential trade buyers, and sales to American trade buyers were attempted but did not complete. The judge was not satisfied that such a sale would have been achieved. It followed that, even if there had been a fraudulent conspiracy to induce Mr Kidd to enter into the transaction, and even if that conspiracy did indeed so induce Mr Kidd, it caused no loss which he would not otherwise have sustained.

[26] Finally the judge turned to the assessment of any loss on the hypotheses that, contrary to his earlier findings, (a) the pursuer had succeeded on the merits, (b) the appropriate counterfactual was that he had discovered Mr Gordon's true position before completion and he had withdrawn from the transaction, and (c) his loss was to be assessed as at the date of completion of the transaction. The judge rejected the defenders' arguments that the post-transaction value of Mr Kidd's shareholding should be determined without taking into account the alleged fraud, again on the basis of *Primeo*. In order to determine the effect of the alleged fraud, he had to value the shares absent fraud. In this he was assisted by valuation experts Michael Thornton (instructed by Mr Kidd) and Richard Indge (instructed by the LC defenders). Both experts agreed to a considerable extent. In particular they were at one that simply valuing ITS by a cost approach (ie the aggregate value of ITS's assets minus its liabilities) was of little assistance except as a floor value. Mr Indge applied

a 20% discount to the value of Mr Kidd's pre-transaction shareholding on the basis that it was in a private company (and thus less readily marketable), as opposed to the public companies both experts had used as comparators in their valuation exercises. On the basis of the expert literature cited by Mr Indge, the judge adopted this approach.

[27] Blending both experts' conclusions, the judge adopted Mr Thornton's market approach valuation but applied Mr Indge's 20% discount for lack of marketability. This produced an enterprise value of $270 - 290 million. Subtraction of the company's $168 million debt returned an equity value of $102 - 122 million. Applying a further discount to account for the interests of minority shareholders in ITS subsidiaries, the pre-transaction value of Mr Kidd's shareholding was assessed at $101 million.

[28] In arriving at a post-transaction value of Mr Kidd's 66% shareholding, it was necessary to determine the allocation of value between Mr Kidd's ordinary shares and Lime Rock's A ordinary shares; the discount for Mr Kidd's loss of 100% control; and the value of Lime Rock's investment. With respect to the allocation of value issue, the judge split the difference between the experts' figures and arrived at 60.5% of the company's post-transaction value being held by Mr Kidd. Turning to the discount for loss of control, Mr Thornton saw Mr Kidd as a *de facto* "influential minority" post-deal, while Mr Indge considered he still retained a controlling influence, albeit he could no longer pass a special resolution. Mr Thornton discounted the value of Mr Kidd's shareholding by 30 - 40%; Mr Indge by 10%. On his analysis of the terms of the deal, the judge preferred Mr Indge's approach and discounted the value of Mr Kidd's shareholding by 10% to reflect the diminution of his influence from his previous 100% shareholding. As to the value of Lime Rock's investment, both experts admitted in cross-examination that they had made a mistake, namely that ITS's pre-transaction EBITDA forecasts assumed that the Lime Rock

investment would complete; in fact the opposite was the case. The result was that both experts had either under-valued ITS post-transaction or over-valued it pre-transaction.

[29] Leaving that matter aside, and without assuming fraud, this left a post-transaction value of ITS of $78.75 million. This produced a loss to Mr Kidd of $12.25 million (accounting for his $10 million cash out). The judge could not reconcile that figure with the evidence of Mr Kidd's advisers that he had received a good deal, nor with contemporaneous financial modelling by Simmons. Noting the experts' consensus that their methodology undervalued the cash injection, he arrived "on the balance of probabilities" at a post-transaction value, not accounting for fraud, of $91 million for Mr Kidd's shareholding, being the value of his pre-transaction holding less the $10 million cash out.

[30] Turning then to the assessment taking account of fraud, the judge rejected Mr Kidd's contention that Lime Rock's alleged fraud rendered his shares worthless as entirely unsupported by evidence. However, he accepted that some discount required to be made. Mr Thornton used the equivalent figures for HMRC tax valuations (70 - 80%) of small minority holdings in private companies on the basis that this was a similar situation; Mr Kidd held a shareholding in a private company which would be unlikely to sell. Mr Indge did not supply a figure but commented that there was always a market for problematic assets at the right price.

[31] It was held that the impact of fraud on the value of Mr Kidd's shares would have been speculative. Mr Thornton's approach, based on a distinct and different hypothetical scenario, was unhelpful. It produced a value for ITS's share capital below Mr Thornton's own floor value for ITS calculated on a costs approach ($97.9 million). That could not be right. All that could be said with confidence is that a hypothetical purchaser would have bought Mr Kidd's shares for something between $91 million (the value of Mr Kidd's

shareholding assuming no fraud) and $64.6 million (the pro rata value of Mr Kidd's shareholding in ITS on Mr Thornton's costs approach). The judge split the difference, arriving at a figure for Mr Kidd's post-transaction shareholding in ITS, taking into account Lime Rock's alleged fraud, of $77.8 million, this being $23.2 million less than his pre-transaction shareholding. Deducting Mr Kidd's $10 million cash out, this left a loss of $13.2 million. On that basis, Mr Kidd had achieved a full recovery when the P & W action was settled by agreement for £19 million plus the interim payment of £1 million and thus, even on the hypotheses mentioned earlier, there was no residual loss due from the defenders.

Other matters

[32] Although his decision did not turn upon Mr Kidd's credibility and reliability, the judge found him to be an unreliable witness. He was apparently unable to recall events which he would be expected to remember. He was inclined to be dismissive of questioning rather than, as the judge put it, "engage with a court process in which his perception of the Lime Rock transaction and the subsequent failure of ITS was subjected to rigorous challenge". The judge did not accept Mr Kidd's evidence that the disputed terms were never explained to him by Mr Corray, Mr Milne, or Mr Beveridge (the latter a banker and director of Simmons & Co International). On the contrary, they were explained to him. The judge did not understand how a businessman of Mr Kidd's experience could have misunderstood the transaction in the manner now averred. Whilst it was accepted that Mr Kidd's (present-day) belief that he did not understand the transaction was genuinely held, it was not necessary to assess whether that belief was in fact correct.

[33] With regard to Mr Gordon, he still lacked insight into the manner in which his facilitative role breached his professional obligations, and he was reluctant to accept that he had crossed the line into wrongdoing. Nevertheless the judge accepted his evidence as generally credible and reliable. The evidence of the remaining factual witnesses, including the fourth, fifth, seventh and eighth defenders, was regarded as being both credible and reliable.

A summary of Mr Kidd's grounds of appeal

[34] Mr Kidd now reclaims (appeals) the decision to this court on the following grounds:

i) The judge erred in law in repelling an objection that evidence as to the objective fairness (or otherwise) of the transaction was irrelevant. This error materially influenced his consideration of the facts and led to the unfavourable factual findings set out above.

ii) He erred in his consideration of the alleged unlawful means conspiracy; he reached conclusions which were plainly wrong on the evidence led before him.

iii) He was plainly wrong in concluding that Mr Kidd had failed to establish that there was fraudulent concealment of the wrongdoing.

iv) He erred by misapplying the common law of fraud.

v) He wrongly held that the fifth to eighth defenders could not incur accessory liability.

vi) He wrongly held that the appropriate counterfactual in assessing the cause and extent of Mr Kidd's losses was a transaction which proceeded with Mr Gordon playing no role. He ought instead to have held that the appropriate

counterfactual was one in which Mr Gordon's conflict of interest was disclosed to Mr Kidd prior to completion of the transaction.

vii) He erred by considering what happened after the date of the transaction with Lime Rock when assessing the value of ITS. He ought to have valued Mr Kidd's loss as at the date of the transaction, namely 26 September 2009.

viii) His approach to the valuation of Mr Kidd's shares was incorrect.

A summary of the parties' submissions

Ground of appeal 1

[35] At a pre-proof hearing on 27 October 2023 counsel for Mr Kidd lodged a note of objection to a line of evidence developed by the defenders that the transaction with Lime Rock was a fair one, or at least typical of a private equity transaction entered into in September 2009. The objection was renewed at the proof. The judge did not rule on the note of objections, but as he had regard to, and accepted, the expert and lay evidence that the transaction was a typical one, it is evident that he was not persuaded by it. Counsel submitted that this was an error of law which led the judge to consider irrelevant and inadmissible matters. This coloured his findings in fact in a manner which infected his consideration of the remaining evidence.

[36] Counsel for Mr Kidd submitted that in a case for breach of fiduciary duty the court will not entertain evidence in relation to the fairness of the transaction. Reference was made to *Commonwealth Oil & Gas Co Ltd* v *Baxter* 2010 SC 156 where Lord Nimmo-Smith quoted with approval the authority of *Aberdeen Railway* v *Blaikie Bros* (1854) 1 Macq 461 that:

> "…It is a rule of universal application, that no one, having (fiduciary) duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of

> those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

[37] Lord Nimmo-Smith relied upon this, and other, authorities in rejecting a line of argument advanced by a director that his fiduciary obligation to his company in relation to dealings with third parties extended only so far as refraining from using the company's property or confidential information for his own benefit. It was contended that the same rule applies in the present context and that similar considerations arise when there is an allegation of fraud; *BP Exploration Operating Company Ltd* v *Chevron Transport (Scotland)* 2002 SC (HL) 19 per Lord Millet at paragraphs 103-105.

[38] In answer, the defenders highlighted Mr Kidd's averments that the transaction was highly disadvantageous to Mr Kidd; he was not advised of this by P&W; and if he had known he would not have entered into to it. Mr Kidd put the fairness of the transaction at issue. He led evidence as to the effect of its terms; it was only when the expert solicitor witness instructed by him conceded that the transaction was a typical one that he adopted his position that objective fairness could not be considered by the court. It would be perverse if the terms of the transaction were relevant only if they were disadvantageous to Mr Kidd. Furthermore, the terms of the transaction were relevant to the likelihood of Mr Kidd's primary contention of unlawful means conspiracy. As the judge noted, it would be an odd conspiracy where the object of the conspirators was to induce a person to enter into an agreement on normal commercial terms negotiated by experienced advisers not said to be part of the conspiracy. Counsel submitted that Mr Kidd's approach was artificial, and drew a distinction between the principle articulated in the decisions cited and the facts of the present action.

Ground of appeal 2

[39] Mr Kidd's counsel did not dispute the law in relation to unlawful means conspiracy as summarised by the judge. He identified three further principles. First, the necessary combination may be proved by inference where the evidence is that the defender knew what was going on and failed to stop the unlawful activity; it is not necessary to prove an agreement, formal or informal, with the principal purpose of injuring the pursuer, *Kuwait Oil Tanker Co SAK* v *Al Bader* [2000] 2 All ER (Comm) 271, Nourse LJ at paragraphs 111 and 120-122. Secondly, where a party has a suspicion that certain facts exist and takes a deliberate decision not to confirm them, this may constitute blind eye knowledge, *Group Seven Ltd* v *Notable Services LLP & Ors* [2019] EWCA Civ 614 at paragraph 60. Thirdly, conduct which if carried out by a single person would incur criminal or civil liability will constitute an unlawful act founding a claim for conspiracy if multiple parties combine or agree to such conduct as a means of injuring a pursuer, per Lord Hope of Craighead in *Revenue & Customs Commissioners* v *Total Network SL* [2008] 1 AC 1174 at paragraph 46.

[40] On the evidence the judge was plainly wrong to conclude that there was no conspiracy to injure Mr Kidd. Counsel criticised the following conclusions. First, having noted correctly that an "intention to harm" may be inferred from an intention to profit from the unlawful means (see *Kuwait Oil Tankers* at paragraph 121), the judge failed to consider the evidence of the alleged conspirators' intention to profit. The terms of the deal were that ITS would pay all of the transaction costs, including the legal fees of both ITS and Lime Rock. In so far as Mr Gordon felt he was saving everyone money, this was in error since Lime Rock were never paying. At a meeting on 20 January 2009, which Mr Allan did not attend but Mr Gordon did, it was noted that Lime Rock would be seeking "toothy

warranties". This was reflective of Mr Gordon's actions going beyond a mere explanatory role.

[41] Lime Rock intended to profit from the unlawful means, indeed that was the point of the investment. They used Mr Gordon as their instrument to complete the agreement on their standard terms. Both LC and P&W charged significant fees: P&W earned £165,000 for drafting and a further £175,000 for due diligence, including a £55,000 success fee. LC invoiced the sum of £42,737.20. Lime Rock benefitted by all of these fees being paid by ITS. Mr Gordon's actions were characterised as "reprehensible", which was relevant to the assessment of intention, see Lord Scott in *Total Network SL* at paragraph 56. Why, asked counsel, should Mr Gordon's reprehensible actions not be attributable to Lime Rock when they were aware of his actions, and why should LC not be liable in circumstances where, having been instructed because of P&W's admitted conflict, they were well aware of his blurring (at best) his professional lines from at least 20 January 2009?

[42] It was submitted that the judge further erred in his consideration of knowledge and intention. The evidence of the seventh and eighth defenders fell squarely into the category of knowledge considered in *Group Seven*. Counsel relied upon the following chapter of questioning from Mr Laing's evidence:

> "Q. And I'm suggesting to you, Mr Laing, that not only is it obvious now there was a conflict, it was obvious back then. But you say -- well what do you say? 'Yes it would have been but I thought it was consented to.' Is that what you are saying?
>
> A. I think that probably is my position.
>
> Q. I'm suggesting to you that, as you certainly know now, it cannot be consented to. But why is it you didn't check with Scott Allan whether Mr Kidd had consented to it?
>
> A. I didn't think it was my problem. The extent to which there was a conflict of interest, it seemed to me it was a Paull & Williamsons problem. And my clients weren't -- I didn't think my clients were prejudiced by it, and therefore why rock the

> boat? The facilitative role I maintain was known by Scott Allan and Scott Milne, I believe Jeff Corray as well. So -- and plus the fact it was the very early stages of the deal and frankly the documentation, as we've heard, went backwards and forwards umpteen times in the next stage of the transaction. So that even if Ken Gordon had given more advice than he should have given, Scott Allan had ample opportunity prior to completion to throw things back at us."

[43] Counsel maintained this was a conscious decision, of the kind deplored in *Group Seven*, to refrain from confirming a suspicion that unlawful means were being employed. To exonerate Mr Laing, or any solicitor, in such circumstances was contrary to public policy. Likewise, Mr Hutchison's evidence was that "in hindsight" Mr Gordon had breached boundaries, but he had simply accepted that more senior lawyers saw nothing wrong at the relevant time.

[44] The judge was also incorrect to accept the "plausible and credible" explanations provided by the individual defenders as to why they did not consider Mr Gordon's actions amounted to wrongdoing. It is not a requirement of the tort of unlawful means conspiracy that the conspirators appreciate that their conduct is unlawful (*Racing Partnership Ltd* v *Sports Information Services* [2021] Ch 233 (CA)). Subjective understanding that one's actions are dishonest is not a necessary ingredient of dishonesty (*Ivey*). It was relevant that Mr Ross, Mr Smith, Mr Laing and Mr Hutchison were professional people (two accountants, two solicitors). It was not explained why their conscious involvement in a position of conflict of interest did not give rise to the necessary inference of dishonesty, awareness of the use of unlawful means, and intention to harm.

[45] In answer, counsel for the defenders submitted that this ground of appeal was founded upon a selective reading of the evidence. It was a classic instance of inviting an appeal court to decide on the basis of a "telescopic" view of the evidence. It was emphasised that the judge heard every witness. Rather than reading the documentary

evidence relied upon by Mr Kidd as a single, damning testament, he had correctly viewed it in its temporal context; each participant in the transaction would have seen only those parts of the inventory copied to them at the time they were sent. The question for the judge was whether the defenders had evinced a deliberate intention to achieve a common end of harming Mr Kidd. On the evidence, he was not prepared to so infer. Counsel for the sixth to eighth defenders highlighted that Mr Laing's use of the words "why rock the boat" was in the context of his understanding that any conflict on P&W's part had been consented to by their clients. Counsel prayed in aid the *dicta* of Lewison LJ in *Volpi* v *Volpi* [2022] 4 WLR 48 at paragraph 2(vi) that:

> "reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Grounds of appeal 3 and 4

[46] No issue was taken with the judge's assessment that fraud requires dishonesty, or with his identification of the *Ivey* test as the correct approach to assessing dishonesty. However dishonesty, and false representations, can be constituted not simply by a downright lie or half-truth, but by intentional suppression or non-disclosure of information which a party was under a positive duty to disclose, resulting in a false impression, see *Brownlie* v *Miller* (1880) 7 R (HL) 66 and *Cullen's Trustees* v *Thomson's Trustees* (1865) 3 M 935. Where an implied representation is a continuing one, as pled by Mr Kidd, there is a continuing responsibility that the representation is correct.

[47] Mr Gordon breached his fiduciary duty. The judge considered this "entirely wrong" and "reprehensible". Nonetheless he held that Mr Gordon did not act dishonestly or deceptively and that he had "fully disclosed" his activities to Mr Kidd's advisers. These

findings were contrary to the evidence. Mr Kidd's unchallenged evidence was that he was unaware of Mr Gordon's role. Mr Gordon agreed in evidence that his role was not "explained fully". Mr Corray and Mr Milne both gave evidence that they were not aware of any wider role for Mr Gordon. Mr Allan's unchallenged evidence was that he would have withdrawn from acting for ITS had the extent of Mr Gordon's role become known to him. In any event, a client cannot consent to an actual conflict of interest. The judge had erroneously conflated ITS executives' knowledge of Mr Gordon's role in carrying out vendor due diligence for ITS with knowledge of his retained advisory role.

[48] In answer, counsel for the defenders again highlighted that the judge's conclusions were based upon his assessment of the credibility and reliability of the witnesses. The individuals involved had been confused as to the extent of Mr Gordon's role. The confusion was caused by Mr Gordon's failure to define the scope of his involvement or stick within that scope (however ill-defined) as the transaction progressed. That was distinct from the necessary ingredients of dishonesty and intention to harm. The suggestion that the judge did not distinguish between Mr Gordon's agreed involvement in vendor due diligence and his wider and inappropriate role was confounded by paragraph 108 of his opinion where that role was specifically identified. More fundamentally, the findings in this regard were not "plainly wrong" and thus were immune to interference by an appellate court.

[49] In so far as the judge was said to have erred in law, this was ill-conceived. The defenders did not blind themselves to something "unconscionable", as in *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* 2015 SC 187. The judge concluded that any misrepresentation, if there was one, was not made with the intention that Mr Kidd would act upon it to his detriment. Mr Kidd had failed to prove that there were clear words or conduct implying any misrepresentation, *Property Alliance Group* v *RBS plc* [2018] 1

WLR 3529. The judge correctly identified the improbability that the defenders would participate in a fraud to induce Mr Kidd to enter a transaction on normal commercial terms.

Ground of appeal 5

[50] Mr Kidd relied upon the extensive professional obligations placed upon solicitors. The judge paid insufficient regard to this point. At first instance in *Frank Houlgate* the actions of the solicitor defender were described as "wilful unthinking". The same applied here. The judge's reasons for rejecting an argument of dishonest assistance to a fraud were limited and inadequate, being addressed in a single paragraph.

[51] In answer, the sixth to eighth defenders (this ground not being directed at Lime Rock) pointed out that the submission Mr Kidd made at proof was that the LC defenders were liable as accessories to Mr Gordon's fraud on the basis that they had dishonestly assisted, or at least turned a blind eye to it. Having made the finding in fact that there was no fraud on Mr Gordon's part and that the LC defenders did not act dishonestly, it was hardly surprising that the judge's treatment of this issue was in brief terms.

Ground of appeal 6

[52] The judge was wrong to hold that any breach of duty did not cause Mr Kidd loss on the basis that the correct counterfactual was that the negotiation and ultimate transaction proceeded with no wrongdoing. Mr Kidd's evidence, said to be unchallenged, and his pled case, was that he would not have proceeded with Lime Rock had he known the truth. The judge's conclusion failed to take into account the rule that where there is a fraud, the pursuer is not required to reconstruct that which he would have agreed had there been no deception, *Smith New Court Securities* v *Citibank NA* [1997] AC 254. There was a misapplication of the

decision in *Primeo*, the correct counterfactual being that no transaction took place at all. Counsel acknowledged that if the judge applied the correct counterfactual, Mr Kidd's case must fail. However, the judge's analysis of causation was wrong in fact and law.

[53] For the defenders, counsel maintained that Mr Kidd bore the burden not only of demonstrating that a fraudulent misrepresentation was made, but also of showing that it influenced (to whatever extent) his decision to enter into the transaction, *Zurich Insurance Co plc* v *Hayward* [2017] AC 142. That was consistent with common sense. If, in the absence of a misrepresentation, a party would still have entered into a transaction, their claim must fail, *Versloot Dreddging BV* v *HDI Gerling Industrie Versicherung AG* [2017] AC 1; *Raiffeisen Zentralbank Osterreich AG* v *RBS plc* [2011] 1 Lloyd's Rep 123. Where there is deliberate wrongdoing, issues of remoteness might have less salience than in claims for mere negligence or breach of contract, but that is distinct from Mr Kidd's submission. If Mr Kidd were correct, the wrongdoer would effectively become an insurer and liable for all of his misfortunes regardless of whether there was a causal connection between his losses and the wrongdoing. The proposition that where it is proven that a pursuer would have done nothing differently even in the absence of wrongdoing, he is nevertheless entitled to recover damages, was unprincipled, unfair, and not vouched by authority.

Ground of appeal 7

[54] The *Bwllfa* and *The Golden Victory* line of authority had no application to the exercise which the judge required to carry out. They involved circumstances where there was a known event. The counterfactual that required to be considered by the judge was that there was no transaction at all and the business of ITS continued under the 100% shareholding of Mr Kidd rather than encumbered (as he would put it) by Lime Rock's control rights. To

inquire as to whether the business would still have collapsed had a different set of facts prevailed was the kind of crystal ball speculation discouraged by Lord Bingham in *The Golden Victory*.

[55] The judge erred by assuming that ITS would have conducted its business in the same way had the Lime Rock investment not taken place. There was no dispute that after the transaction Lime Rock would have a significant influence on ITS's business. Mr Kidd did not have to prove precisely what form that influence would have taken or its effect on the business. It was contrary to the authorities, particularly *Smith New Court Securities*, to force a victim of fraud to carry the risk of failing in that regard.

[56] The defenders submitted that Mr Kidd had misapplied *Smith New Court Securities*. Read as a whole, that case is a disapproval of a strict and inflexible rule that damages must be assessed at the date of the alleged wrong. The fundamental task in a claim for damages is to ascertain loss caused to the pursuer by entering into the transaction (*Downs* v *Chappell* [1997] 1 WLR 426; *Haberstich*). Where a person is induced to part with a flawed asset, the value of the asset must be assessed with reference to those flaws. The judge's conclusions that ITS would have failed in any event and that the deal with Lime Rock did not prevent Mr Kidd from attempting the measures he said he would have tried had the deal not been entered into, flowed from his consideration of the evidence and were not plainly wrong.

Ground of appeal 8

[57] Mr Kidd took no issue with the pre-transaction valuation of $101 million for his shareholding. However, the $77.8 million post-transaction valuation, assuming fraud, was plainly wrong. The judge should have assessed post-transaction value at nil, or at most

$17.5 million. In characterising Mr Kidd's claim that his shareholding was worthless as an "assertion", the judge ignored his evidence, as well as Mr Thornton's conclusion in his report that a third-party purchaser would have no interest in Mr Kidd's shares. Even Lime Rock's principal, John Reynolds, gave evidence that a suggestion of dishonesty would give him pause before engaging in a transaction. It was not clear that the judge had regard to any of this evidence.

[58] If this was wrong and Mr Kidd's shares did have some value, the judge's assessment of that value was plainly wrong. There was no proper basis for rejecting both experts' methodology, nor for the judge's own valuation of $91 million which was arrived at by a method not considered by either expert and not put to them in cross-examination. The use of $64.6 million as a floor value was to take a figure which assumed no fraud. Fraud could reduce the value of assets; both experts concurred on that. This undermined the entire basis of the judge's valuation. As a matter of fairness, any alternative methodology should have been put to the experts, *Griffiths* v *TUI UK Ltd* [2023] 3 WLR 1204, Lord Hodge at paragraph 70. As Mr Indge did not offer a figure beyond observing that fraud would reduce the value of assets, the judge was left with, and should have applied, Mr Thornton's suggestion of an 80% discount.

[59] The defenders submitted that this ground of appeal proceeded on a misunderstanding of the expert evidence and the judge's approach thereto. The consensus of the experts was that account had to be taken of Lime Rock's $45 million subscription in any valuation of ITS. Both made the same error (as set out above). Their valuations either over-valued ITS pre-transaction or under-valued it post-transaction. Faced with a gap in the evidence, the judge was entitled to take a broad axe approach, see *Grier* v *Lord Advocate* 2023 SC 116 at paragraph 114. The approach he took was entirely reasonable. He was correct

that in the absence of expert evidence about the extent to which the alleged fraud would be relevant to a hypothetical purchaser, it was a matter for him to resolve. The submission that the shares post-transaction had a nil value was contrary to the common view of the experts. Both considered that even tainted assets had a value. The judge was also entitled to consider both the cash value of ITS's assets and the fact that Lime Rock was a potential buyer for Mr Kidd's shareholding and would hardly be dissuaded by its own fraud.

General

[60] The defenders' submissions addressed the caution required of an appellate court when asked to interfere with the factual findings made by a judge who heard the evidence and reached decisions based on the credibility and reliability of the witnesses. The authorities cited included *Thomas* v *Thomas* 1947 SC (HL) 45, Lord Thankerton at page 54; the trilogy of recent decisions of the UK Supreme Court ending with *Royal Bank of Scotland plc* v *Carlyle* 2015 SC (UKSC) 93; and *Grier* v *Lord Advocate*. Mr Kidd described the relevant findings as "plainly wrong". In any event they involved inferences from facts, not primary factual findings, or the application of the law to the facts, and thus were more amenable to challenge.

[61] The defenders drew attention to the "massive recovery" sought by Mr Kidd, namely over $500 million if compound interest at the judicial rate is added to the principal sum of $150 million. Mr Kidd was the only party to come away from the demise of ITS with anything, being the $10 million cash payment and the £20 million from the settlement of the P & W action. In contrast, Lime Rock lost its entire investment. It was suggested that there would be something wrong with the law if Mr Kidd was to gain a further "windfall" from these defenders, let alone the "unconscionable" sum sought.

Analysis and decisions on the grounds of appeal

The alleged conspiracy - grounds of appeal 2, 3 and 4

[62] Mr Kidd had to prove that two or more persons combined to take unlawful action intending to and successfully causing him damage. The alleged unlawful action was fraudulent concealment of Mr Gordon's breach of fiduciary duty. (It would be enough if one of the defenders so conspired with Mr Gordon, an alleged joint wrongdoer who is not convened in this action.) All of the named defenders denied any such wrongdoing.

[63] The judge's account of the evidence from some of the key witnesses can be summarised as follows. Mr Ross thought that P&W could act for both parties; it had happened previously. The lawyers were just putting the commercial agreement into a legal document. He thought that everyone knew that Mr Gordon was acting for Lime Rock regarding due diligence. It did not occur to him that Mr Gordon was behaving improperly. Mr Ross negotiated the deal with Mr Corray who was checking with Mr Kidd at each step.

[64] Mr Smith said that his role was to support Mr Ross. He was not familiar with solicitors' conflict rules. He thought that Mr Gordon was acting for P&W and had a liaison role. The ITS directors negotiating the deal knew about this. It did not occur to him that it was improper. There was no intention to use Mr Gordon or P&W to gain a tactical advantage. No lawyer was involved in the agreement as to the commercial terms of the deal.

[65] Mr Laing denied that LC were a "front" for Mr Gordon. He was unaware of that term having been used by Mr Gordon until many years later. He knew there was a potential conflict, but it was sensible and expedient for Mr Gordon to familiarise LC with Lime Rock's usual position and "red lines". Mr Laing thought this acceptable since he was told both

parties agreed to it. If there was a problem, it was for P&W to resolve. He denied dishonesty and any concealment of wrongdoing from Mr Kidd.

[66] Mr Hutchison observed that he took directions from Mr Laing, not Mr Gordon. He understood that both sides were happy that it would be expedient for Mr Gordon to be involved in the early stages, for example to provide briefing as to Lime Rock's usual requirements. He never thought that there was any collusion or attempt to facilitate wrongdoing.

[67] Mr Gordon said that he did not appreciate that he was in a position of conflict. Mr Corray and Mr Milne agreed to his facilitative role. The "unofficial email" was poorly drafted; it did not imply a covert role. Saying that LC "fronted" the negotiation was sloppy language. LC performed its role as would be expected. Mr Gordon wanted to find a way through gaps in the due diligence to get the deal done. He was not representing the interests of Lime Rock. There was no recruitment of LC so that it could be pretended that it was an arm's length transaction. There was a "guddle" as to boundaries and who was doing what.

[68] Mr Kidd said that he would have been concerned had he known that Mr Gordon strayed beyond due diligence and gave advice to Lime Rock. His practice was to approve the key points of a deal, usually the price, and leave implementation to managers and advisers. No one went over the contract terms with him. At the time of completion he was presented with only the signing pages. He was shocked when he learned that the £45 million was preferential debt owed to Lime Rock. He did not discover the actions of Lime Rock, LC and P&W till receipt of what became known as Inventory Z in October 2016. If this had been revealed at the time he would have sacked P&W and called off the deal.

[69] In submissions at the proof and before this court, counsel for Mr Kidd focussed on the documentation recovered in the course of the earlier litigation that has come to be referred to as Inventory Z and some of the questioning of witnesses pertaining to it. That material was taken into account by the judge, see paragraphs 28-45, 103-105 and 113-115 of his opinion. He noted that he required to address what Mr Gordon did, not just the wording of emails. And of course he had to take account of all the evidence led relevant to the allegation of an unlawful means conspiracy.

[70] The judge concluded that Mr Gordon's continuing input after providing the initial information as to Lime Rock's due diligence requirements put him in a position of a conflict of interest between the two parties. He wrongly gave confidential information to Mr Ross and he offered to delay contacting Mr Corray so as not to harm Lime Rock's negotiating position. He assisted with the drafting of warranties to cover due diligence gaps. He gave Lime Rock advice on US warranty law and again as to stamp duty. However, while this was a breach of fiduciary duty, the judge was satisfied that it was not done to give Lime Rock an unfair advantage in the negotiation of the deal nor to harm the interests of ITS and Mr Kidd. Mr Gordon wanted to keep both ITS and Lime Rock happy. He saw his role as being to the shared benefit of both parties, notwithstanding the colourful and inappropriate way in which he expressed himself in emails, and that it brought him into conflict with his professional obligations. Mr Gordon wanted to be of use to his most important client and reduce the risk of losing their business, thus he closed his mind to what he wrongly saw as only a potential conflict of interest. His conduct was reprehensible, but not dishonest. He did not conceal his role, nor deceive anyone.

[71] The judge observed that his finding that Mr Gordon did not act with an intention to cause harm to Mr Kidd made it less likely that the defenders did so. Their denials of such

and of involvement in concealing wrongdoing were accepted. It was held that each named defender gave a credible explanation as to why, from their own perspective, they did not consider that Mr Gordon's actions were improper. There was confusion as to his facilitative role caused by a failure to define it and then stay within it, but this raised no inference as to an unlawful means conspiracy involving any of the defenders.

[72] The judge found support for this conclusion in that neither P&W nor LC were involved in the negotiation of the commercial terms of the deal. Lime Rock made an indicative offer to ITS on 12 January 2009. It included the terms of the deal of which Mr Kidd now claims he was unaware and would never have accepted. That offer was made to Mr Corray and Mr Milne who obtained authorisation and approval to proceed from Mr Kidd at each stage of the process. It predated the instruction of LC. There was no evidence that anything said or done by Mr Gordon influenced the outcome, nor that the Lime Rock defenders made improper use of his input to secure a better deal. In addition, as both the solicitor experts agreed, the terms of the agreement were as would be expected in a private equity transaction of this nature in September 2009. Nothing was said on behalf of Mr Kidd as to any term which should have been negotiated away in his interests. Mr Milne, Mr Corray and Mr Beveridge thought it a fair deal for Mr Kidd and ITS. The judge asked, why would the defenders conspire to achieve an outcome negotiated by others on terms satisfactory to both parties?

[73] The case therefore fell at the first hurdle, namely the need to prove an express or tacit agreement to cause Mr Kidd injury involving one or more of the named defenders. Nonetheless the judge separately addressed whether the alleged unlawful means, namely fraudulent concealment of Mr Gordon's conduct, had been established. The contemporaneous material suggested that Mr Gordon was open with everyone as to his

intentions. There was no evidence that Mr Kidd was being deceived by anyone, either by a misrepresentation or concealment. The finding that there was no fraudulent conspiracy was supported by the inherent improbability that the LC and Lime Rock representatives would participate in such to induce Mr Kidd to enter into the transaction.

[74] As to the alternative plea that LC provided dishonest assistance to a fraud perpetrated by Gordon and Ross, the judge noted that there was no fraud to assist or turn a blind eye to; no dishonesty on the part of Laing and Hutchison; and no common design to injure Mr Kidd.

[75] Notwithstanding the terms of his note of argument, and perhaps appreciating the difficulties inherent in seeking to persuade this court to interfere with what are findings of primary fact by the judge who heard the proof, counsel for Mr Kidd informed us that the main proposition was as follows: It is enough if the defenders knew what it was that Mr Gordon was doing; they did not need to appreciate that it was a breach of duty or otherwise wrongful. Counsel indicated that the judge's finding that they did not consider it improper conduct was not challenged. These grounds of appeal could and should succeed even standing the acceptance of the defenders' explanations and denials of a cover-up.

[76] This proposition is foreshadowed in a passage in counsel's note of argument, but at the hearing it dominated his submissions on this aspect of the case. The judge's "fundamental error" was to misapply the two-stage test for dishonesty set down in *Genting Casinos* v *Ivey*. All one needed to know was the material contained in Inventory Z, for example the "unofficial counsel" email of 13 November 2018 which was "pivotal to the case." Exception was taken to almost nothing in the judge's opinion regarding the law and the facts; the problem was that he asked himself the wrong question.

[77] Reference was made to the first stage of the test for dishonesty, namely to "ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts", *Ivey*, Lord Hughes at paragraph 74. As to the second stage:

> "When, once his actual state of mind as to knowledge or belief of facts is established, the question whether his conduct was honest or dishonest is to be determined by the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

On this approach Mr Ivey's belief that his conduct was permissible would not render his conduct honest. Thus the argument ran that the judge erred by taking the defenders' subjective beliefs as to the propriety of Gordon's conduct into account when acquitting them of dishonest, or fraudulent, conduct (and likewise regarding Mr Gordon's views as to his own actions.) They only needed to know of the conduct which, objectively, amounted to a breach of fiduciary duty on Gordon's part, and which the judge described as "reprehensible". Any right thinking person would have seen that something was wrong. Good motives or ignorance of the rules were irrelevant in respect of a conflict of interest.

[78] In our view there is no merit in these criticisms of the judge's analysis. At paragraphs 105-106 he considers whether Mr Gordon was dishonest. The finding was that he did not act with a view to damaging the interests of ITS and Mr Kidd by enabling Lime Rock to gain an advantage. To avoid upset to an important client he closed his mind to what he wrongly saw as no more than a potential conflict. While his failure to adhere to the standards expected of a solicitor was reprehensible, "it would be wrong to draw the inference that he acted dishonestly." Mr Gordon considered that he was acting for the shared benefit of both parties. He had no intention of unlawfully causing damage to Mr Kidd. Counsel for Mr Kidd's approach would exclude from the assessment such

subjective beliefs; it would be enough for dishonesty if (a) Mr Gordon knew what it was that he was doing, and (b) that, on an objective assessment, it was wrong.

[79] The factual context of Mr Ivey's case and that of the present are different. The former concerned conduct by a professional gambler which most people would consider dishonest cheating. However, while there may be circumstances where it is obvious that acting while under a conflict of interest involves dishonesty, this will not always, or perhaps even usually be the case. Unlike cheating while gambling, it does not carry, as it was put in *Ivey*, "its own stamp of wrongfulness". A position of conflict of interest is a state of fact, not mind. It can arise in a wide variety of circumstances. If it occurs in a professional context, the code of the particular profession may render it improper behaviour. As here, it might amount to the civil wrong of breach of fiduciary duty. However it does not necessarily involve moral turpitude or an intention to cause harm. For a solicitor, even if it has no impact on events and causes no harm it will still be improper and unethical behaviour. This is because it creates a risk of professional embarrassment and/or prejudice to someone whose interests the solicitor should be protecting. It impinges on the duty of undivided loyalty and confidence towards a client. There are many examples of circumstances where reasonable people can and do differ as to whether an improper conflict has been created. Professional bodies' views can diverge as to whether and when a client's consent makes a difference. In short, it cannot simply be assumed that, even if carried out as envisaged by counsel for Mr Kidd, the assessment would lead to a finding of dishonesty on the part of Mr Gordon and those aware of his role in the matter.

[80] There is, however, a more fundamental error in the submission. *Ivey* does not mandate that the second stage of the test leaves out of account the individual's beliefs and state of mind. The discussion of the foreigner who does not appreciate that public transport

has to be paid for illustrates the point. If they genuinely believe it is free, there is nothing dishonest in their conduct. "What is objectively judged is the standard of behaviour given any known actual state of mind of the actor as to the facts" (paragraph 60). Lord Hughes quotes Lord Hoffman in *Barlow Clowes* v *Eurotrust* [2006] 1 WLR 1476: "If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards." The correct approach was discussed in detail by Lord Nicholls in *Royal Brunei* at pages 389-391. He noted that carelessness is not dishonesty; for the most part dishonesty is equated with conscious impropriety. Reference can also be made to Lewison and Longmore LJJ in *Clydesdale Bank* at respectively paragraphs 51-52 and 57-58.

[81] The key point in *Ivey* was the affirmation that someone's honesty or dishonesty does not depend on their own opinion as to their behaviour. They do not have to appreciate that they are acting in a dishonest manner. However, when the ordinary right thinking person's standards are invoked, the exercise includes everything relevant to whether the individual acted dishonestly, including the reasons for his conduct. It follows that the judge's analysis on this issue was consistent with the approach discussed in *Ivey*. He did not err in taking into account Mr Gordon's motives and lack of intention to cause harm to Mr Kidd or favour Lime Rock when deciding whether his reprehensible conduct was also dishonest. Likewise, there was no flaw in his assessment of the defenders.

[82] Counsel for Mr Kidd prayed in aid the majority view in *Racing Partnership* that for an unlawful means conspiracy, proof that it was known that the means were unlawful is not necessary (though establishing a belief of legality would be a defence). On this issue we find the dissenting opinion of Lewison LJ wholly convincing, see paragraphs 213ff. At paragraph 248 he says: "It would, I think, not generally be regarded as dishonest to act in

accordance with a mistaken view as to one's own legal rights." He explains that this is not affected by the reformulation of the test in *Ivey*. He concludes:

> "I would hold...that where the unlawful means consists of a violation of some private right, knowledge of unlawfulness is an ingredient of the tort of intention to injure by unlawful means; and of conspiracy to commit that tort" (paragraph 265).

[83] As to the need to establish an intention to injure Mr Kidd on the part of the alleged conspirators, standing the findings of the judge it is not entirely clear how Mr Kidd proposes that this can be established. It is worth remembering that the pleaded case was that the harm to Mr Kidd was him being locked into a bad deal on disadvantageous terms. That proposition having failed at proof, the submission now is that it was intended to be a profitable bargain for Lime Rock (in the result a disappointed expectation) and that ITS paid the legal fees.

[84] It is said that where there is a benefit there is a consequential loss; "the other side of the coin". No doubt Lime Rock were aiming for a profitable deal for them, but it hardly follows that Mr Gordon was being used to harm the economic interests of Mr Kidd and ITS. This was not a zero-sum game. The desire was that everyone would gain, not that Lime Rock would benefit at the expense of their business partners. A contrast can be drawn with cases where a competitor captures a rival's business by the use of unlawful means. It can be noted that the courts have often warned of the danger of expanding the scope of economic torts in a manner harmful to free trade and legitimate competition.

[85] Once again the finding that the transactions were in terms to be expected and fair to both sides militates against the notion that the defenders were engaged in a conspiracy designed to harm Mr Kidd. The proposition that it is established by the payment of fees does not bear examination. There is a suggestion that the necessary intention to injure is

demonstrated by the concealment of Mr Gordon's conduct, sometimes characterised as an implied misrepresentation that all was well. Leaving aside the findings that there was no such concealment, this returns us to the judge's main conclusion that there was no unlawful means conspiracy. Mention was made of the Outer and Inner House decisions in *Frank Houlgate,* but the circumstances of that case are so markedly different from the present, we gain no assistance from it. (The other necessary element of the delict, namely that the conspiracy did in fact cause loss, is addressed below.)

[86] As already mentioned, the submission of a fundamental error sidesteps the difficult task of persuading us to overturn the judge's findings of fact by reference to the contents of Inventory Z and selected passages from the transcript of evidence. That said, often there were more than hints that this was being attempted. However, unless they are undermined by a material error of approach, in our view none of the judge's key findings in fact and law can be categorised as plainly wrong in the sense described by Lord Reed in *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at paragraph 62. We have not identified any flaw in the judge's reasoning, and we consider that there is no proper basis for a reappraisal of the evidence relating to an alleged fraudulent conspiracy.

The fifth ground of appeal - dishonest assistance by LC

[87] We agree with the submissions for the defenders on this ground of appeal. As already mentioned, the circumstances in *Frank Houlgate* were materially different from those in the present case. Given his earlier findings, the judge cannot be criticised for dealing with the issue of dishonest assistance in the brief terms of paragraph 118 of his opinion. We reject this ground of appeal.

The first ground of appeal - the note of objection to evidence as to the fairness of the transaction

[88] This ground of appeal has no merit, largely for the reasons given by the defenders. Mr Kidd introduced the issue of the alleged unfairness and prejudicial nature of the transaction; indeed it was a main plank of the case of an unlawful means conspiracy as pled and initially presented prior to the expert led for Mr Kidd disowning it. Mr Kidd cannot object to evidence in contradiction, nor to the implications of a finding that the transaction was in fact a fair one.

[89] As to the authorities relied on by Mr Kidd, it is true that it is well settled that if there is an action to set aside a contract made by a fiduciary on behalf of the principal, and from which the fiduciary benefits, it is no defence to show that it was a fair or reasonable bargain for both parties; but this principle of law has no relevance in the circumstances of the present case. Where the action is for damages based on an allegation that the defenders and Mr Gordon conspired to harm Mr Kidd by fraudulently causing him to sign up to a disadvantageous agreement with a third party, the relevance of the fairness of the transaction to the merits, to causation, and to loss, is obvious.

The sixth ground of appeal - factual causation

[90] Mr Kidd contends that, if it is accepted that there was an unlawful means conspiracy, it resulted in significant loss to him. Determination of whether there is a causal link between wrongdoing and claimed loss or damage can be resolved by the application of a "counterfactual" or "but for" test. Normally this will involve consideration of what would have happened had the alleged wrongdoing not occurred. The purpose of an award of damages is to put the individual in the position he would have been in if there had been

no wrongdoing, at least so far as monetary compensation can do so. If the answer is that the conduct complained of made no difference and any harm would have happened anyway, the general rule is that the wrongdoer is not responsible for the ultimate outcome and no damages are payable.

[91] A particular feature of the present case is that, if there was a conspiracy of the kind claimed, at the time Mr Kidd was unaware of it, and it did not influence his conduct; and furthermore, it has not been established that it had any impact on the nature and terms of the transaction entered into by Mr Kidd and ITS with Lime Rock. Thus the normal or traditional approach will not avail him. Therefore the dispute between the parties on this issue relates to the question which should be asked. For Mr Kidd it was contended that it should be - what would he have done had there been wrongdoing of the kind claimed but he discovered it or it was disclosed to him before the agreement was signed? In evidence he stated that in that event he would have pulled out of the proposed transaction with Lime Rock and so would have retained a company which he maintained was extremely valuable at that time.

[92] While it was suggested that this evidence was unchallenged, our attention was drawn to a passage in which it was put to Mr Kidd that he would have been unconcerned if he had discovered that Mr Gordon had given advice to Lime Rock on issues such as stamp duty. In any event, the contrary position was that the correct counterfactual is that the transaction proceeded but with no wrongdoing. Before the judge, two slightly different scenarios were advanced in relation to that. Lime Rock contended that the correct assumption was that Mr Gordon had made the proposal for his role and that of LC, but that Mr Kidd objected and so the transaction proceeded without either P&W or LC. LC contended that the correct approach was that the transaction proceeded without the

involvement of Mr Gordon, with either LC or another firm representing Lime Rock. In agreement with the judge, we do not consider that anything turns on which of these alternatives is adopted.

[93] In submissions to the judge all parties referred to the decision of the Judicial Committee of the Privy Council in *Primeo Fund*. Before this court counsel for Mr Kidd submitted that the decision was of little assistance. To the extent that it might be relevant, he suggested that the reference in that case (at paragraph 63) to what would have happened had the wrongdoer "given a true account of the actual position" supported the contention that the correct counterfactual question in this case was - what would have happened had the wrongdoing been disclosed? The evidence illustrated that the existence of the conflict was toxic and was itself a wrong. As the true situation had been misrepresented, it was that failure to disclose which provides the foundation for the counterfactual. Proceeding on the basis that there had been no such failure would favour the fraudster. In cases of fraud the court should not reconstruct what parties would have agreed had there been no deception (*Smith New Court Securities*).

[94] The defenders relied on a passage in paragraph 63 of *Primeo Fund.* The "but for" analysis requires asking what the position would have been if the relevant wrongdoing (the Ponzi scheme under scrutiny) had not been carried on at all. Here the complaint is that the defenders combined with Gordon in a scheme to damage Mr Kidd; the alternative is that there had been no such conspiracy.

[95] The judge relied on the same passage in *Primeo Fund*. We agree with his analysis on this matter. Mr Kidd's argument proceeds on the basis that there would have been wrongdoing and the conjecture that at some point prior to completion of the transaction it would have been disclosed to or discovered by Mr Kidd. That is not the correct approach.

The proper counterfactual is one that examines what would have happened if there had been no wrongdoing. In the present case that requires consideration of what would have occurred if Mr Gordon, who is an alleged, arguably the primary, conspirator, had absented himself from the transaction at the outset to avoid any situation of conflict. That seems to us to fit best with the decision in *Primeo Fund*. The judge held that on that analysis the transaction would have proceeded with Mr Allan of P&W representing Mr Kidd and ITS, and either LC or another firm representing Lime Rock.

[96] At paragraph 125 of his opinion the judge set out the basis for his conclusion that the deal between ITS and Lime Rock would have gone ahead in the absence of wrongdoing by the alleged conspirators. The relevant factors included:

(i) the clear desire by those running ITS for an equity investment in the company to enhance its value against a backdrop of the company, absent a deal, being at risk of breaching its covenants to the bank,

(ii) the lack of any other interested investor at a more favourable level of offer than Lime Rock,

(iii) the deal fulfilled Mr Kidd's aims, including retention of overall control of ITS,

(iv) the terms of the deal were consistent with reasonable expectations for a private equity investment, and

(v) the absence of any reservations about the deal expressed by Mr Kidd at the time it was completed.

[97] These factors support a conclusion that the transaction would have been entered into absent any wrongdoing. As Lord Sumption put it in *Versloot Dredging* at paragraph 54: "If [the claiming party] would have done the same thing even in the absence of the misrepresentation, a claim based on it will fail". The judge found that Mr Kidd would have

entered into the transaction absent any unlawful means conspiracy. On that basis the straightforward outcome is that he has failed to establish that the alleged wrongdoing caused the claimed loss. This is hardly surprising given that it cannot be said that anything done by any of the alleged wrongdoers influenced Mr Kidd's conduct or changed the terms of the transaction.

[98] For completeness it can be noted that counsel for Mr Kidd's reliance in this context on the decision in *Smith New Court Securities* is misplaced. That case addressed the separate question of the correct measure of damages after it was established that a bargain was fraudulently induced, and in particular that it need not be constrained by a date of transaction rule, nor the foreseeability of the claimed losses. It did not extend recovery to loss not caused by the wrongdoing. The sixth ground of appeal is rejected.

Ground of appeal 7

[99] At paragraphs 126 to 139 of his opinion the judge proceeded on the hypotheses that, contrary to his earlier findings, Mr Kidd had succeeded on the merits, and that the appropriate counterfactual was that he had discovered Mr Gordon's true position before the transaction was concluded and had not gone ahead with it. The judge found that, even making those assumptions, the pursuer had not suffered any loss that he would not have suffered in any case.

[100] In our opinion, in assessing whether Mr Kidd had suffered a loss the judge was not bound to confine himself to an examination of whether immediately after the transaction he was worse off financially than he was immediately before it. We agree with the judge (paragraph 126) that, properly read, *Smith New Court Securities Ltd* is not authority for the existence of a strict and inflexible rule that damages must be assessed as at the date of

commission of the wrong. We also agree with him (paragraph 128) that the compensation principle is one of general application. In terms of that principle, the fundamental question is whether Mr Kidd suffered a loss by entering into the transaction (*Livingstone* v *Rawyards Coal Co* (1880) 5 App Cas 25, Lord Blackburn at page 39; *Bwllfa and Merthyr Dare Steam Collieries*, Lord Macnaghten at page 431; *Smith New Court Securities,* Lord Steyn at page 382; *Downs* v *Chappell*, Hobhouse LJ at page 434; *The Golden Victory* Lord Bingham at paragraph 12, Lord Scott at paragraphs 32 and 38, Lord Carswell at paragraph 63, Lord Brown at paragraphs 78 and 80; *Crimond Estates Ltd* v *Mile End Developments Ltd* [2021] CSOH 26, Lord Tyre at paragraphs 53 - 56). Damages are intended to compensate real losses which have actually been sustained, not notional or hypothetical losses (*Haberstitch*, Lord Cameron at page 13; *Kennedy* v *Van Emden* [1996] PNLR 409, Nourse LJ at page 414).

[101] Given ITS's trading and financial position at the time of the sale and soon after it, culminating in its entry into administration three and a half years later with its shares becoming worthless, the judge was right (paragraphs 128 to 129) to be astute not to examine only a snapshot of the position as at the date of the sale. He was correct to be wary of compensating Mr Kidd for losses which he would have incurred even if there had been no wrongdoing. At the very least, it cannot be said that the judge was plainly wrong in taking the approach that he did.

[102] The judge carefully assessed the evidence about ITS's financial position from the time of the transaction until its entry into administration. He reviewed the evidence relating to ITS's difficulties at paragraphs 131 to 138. He found that many of the difficulties had their origins before completion of the transaction. He held that the circumstances which resulted in the decline of ITS's business were not caused or materially contributed to by its entering into the transaction with Lime Rock; and that it was unlikely that the difficulties would have

been avoided by a trade sale prior to their occurrence. He found (paragraph 139) that Mr Kidd sustained no loss which he would not have sustained if there had been no transaction. In our view the judge was entitled to make all of the findings which he made. He provided clear and adequate reasons for making them. It cannot be said that he was plainly wrong to make those findings.

[103] It follows that ground of appeal 7 has no merit.

Ground of appeal 8

Introduction

[104] At paragraphs 140 to 178 of his opinion the judge proceeded on the hypotheses that, contrary to his earlier findings, (a) Mr Kidd had succeeded on the merits; (b) that the appropriate counterfactual was that he had discovered Mr Gordon's true position before the transaction was concluded and had not proceeded with it; and (c) that his loss was to be assessed as at the date of completion of the transaction. The judge held that on that scenario (i) the fraudulent concealment ought to be taken into account when valuing the shares immediately after the transaction; (ii) Mr Kidd was not precluded by the doctrine of reflective loss from claiming any loss in the value of his shares which had occurred because of the fraud; (iii) the value of Mr Kidd's shares before the transaction was $101 million; (iv) the value of his residual shareholding immediately after the transaction was (a) at least $91 million if no account was taken of the fraud, and (b) $77.8 million if account was taken of the fraud; (v) as $23.2 million (the difference between $101 million and $77.8 million) was less than the aggregate of the $10 million cash payment made to Mr Kidd and the settlement sum of $24.5 million he received from the P & W action, he had suffered no loss. There was

no challenge to the judge's conclusions concerning (i), (ii) and (iii). The thrust of the attack was that he had erred when determining values (iv)(a) and (b).

Post-transaction value, no account of fraud

[105] At paragraphs 158 - 167 the judge discussed the post-transaction value of Mr Kidd's residual shareholding if no account was taken of fraud. There were only three areas of contention. The first issue was the allocation of value between his ordinary shares and Lime Rock's A ordinary shares. The judge attributed 60.5% of the value of the whole ITS shareholding to Mr Kidd's shares (paragraph 159). The second issue was the appropriate discount for the reduction in Mr Kidd's total control (as sole shareholder) to control as a majority (66%) shareholder. Mr Thornton had proposed a 30 - 40% discount, whereas Mr Indge considered that a 10% discount was appropriate. The judge was satisfied that Mr Indge's evidence on this issue should be accepted, for the reasons he set out at paragraph 163. Mr Kidd does not challenge the judge's decision on either of those issues. The third issue concerned the appropriate treatment of Lime Rock's cash injection. The judge discussed this at paragraphs 164 - 165. In their reports, both Mr Thornton and Mr Indge had simply added the cash injection to the equity value of the shares (in Mr Thornton's case he used a figure of $43.6 million rather than $45 million to take account of deal expenses). However, during their evidence both Mr Thornton and Mr Indge acknowledged that consideration ought also to have been given to the additional value attributable to the shares because of the business opportunities created by the finance injection. While they were not in a position at the proof to quantify the extent of the additional value, the judge was satisfied that a method which simply added the cash injection without taking account of expected returns undervalued the shares. If the

undervaluation was ignored, the post-transaction value of Mr Kidd's 66% holding was $78.75 million (paragraph 166). On that basis, once account was taken of the $10 million cash receipt, Mr Kidd would have suffered a loss of $12.5 million on the transaction. That suggested to the judge that the $78.75 million figure was too low. Mr Kidd's advisers had been of the view that he had got a good deal. In the course of negotiations they had carried out numerous modelling exercises for him and ITS in order to assess the value of the company. Having regard to that and to the consensus of the experts that there had been an undervaluation of the value of the cash injection, the judge found (paragraph 167) that the post-transaction value of Mr Kidd's 66% holding would have been at least $91 million, ie the pre-transaction value of his 100% holding less the $10 million cash he had received.

[106] Counsel for Mr Kidd submitted that the judge ought to have found that the post-transaction value of Mr Kidd's shares was $78.75 million. He maintains that it was plainly wrong for the judge to take the course which he did in paragraph 167. There was no proper evidential basis to support it.

[107] We reject those submissions. In this part of his opinion the judge required to assess the value of Mr Kidd's shares after the transaction leaving fault out of account. He had evidence indicating that they were worth at least $78.75 million, but that that figure was likely to be an undervaluation because the effect of the cash injection had been undervalued. In those circumstances, there was a good reason to cross-check the figure in light of the other evidence which he had heard. Mr Kidd was a shrewd businessman, and he was ably advised by professionals who had modelled what was proposed and who believed that he was getting a good deal. It was open to the judge to consider whether it was likely that Mr Kidd would have entered into the transaction if he expected to make a loss. In our view, in the whole circumstances the judge was entitled to conclude that the value of

Mr Kidd's shares immediately after the transaction was at least $91 million - the value of his whole shareholding immediately prior to the transaction ($101 million) minus the $10 million cash he received. It cannot be said that he was plainly wrong to reach that conclusion.

Post-transaction value, account taken of fraud

[108] At paragraphs 169 - 173 the judge discussed the post-transaction value of Mr Kidd's residual shareholding if account was taken of fraud.

[109] Mr Kidd's primary position was that the shares were worth nothing, the suggestion being that no-one would be prepared to pay anything for them once wrongdoing was disclosed. The judge rejected that contention. In his view it was not supported by the evidence, and indeed conflicted with the common view of the experts that even tainted assets have a value. It also ignored the very substantial cash value of the company's assets, and the existence of Lime Rock as a potential purchaser whose valuation would not be affected by their own wrongdoing. Our attention was directed to a passage at paragraph 6.26 of Mr Thornton's supplementary report where he had stated: "I do not consider that it is reasonable to conclude that a third-party purchaser would have any interest in acquiring Mr Kidd's shares". That was said to be supported by Mr Kidd's evidence that if he had known of the fraud he would have called off the deal, and by the evidence of Mr Reynolds that any suggestion of dishonesty would give him "pause" before engaging in a transaction.

[110] This selective highlighting of parts of the evidence does not persuade us that the judge was plainly wrong to reject the proposition that Mr Kidd's shares had a nil value. During their evidence Mr Thornton and Mr Indge both accepted that even tainted assets

have a value. The extent to which fraud might affect value was likely to depend upon the nature and consequences of the wrongdoing and how those matters would be viewed by a potential purchaser. Here, part of the relevant factual matrix would be that the hypothesised wrongdoing had no material effect on the terms of the transaction, which were entirely standard for private equity investments such as this one. Moreover, the value of the company's assets was very substantial. In addition, Lime Rock was a potential purchaser of Mr Kidd's shareholding and was unlikely to be deterred by a fraud in which it was said to have been a participant.

[111] Having rejected the nil value contention, the judge examined the evidence as to value (paragraphs 170 - 173). Mr Thornton suggested that an appropriate comparison was with the higher level discounts (70 - 80%) applied in HMRC tax valuations for the challenge of realising the value of a small minority shareholding in a private company. For his part, Mr Indge opined that there would have been a market for a deal at the right price notwithstanding the allegations of fraud. The judge did not find Mr Thornton's comparison of any assistance. It assumed that the wrongdoing here would have a very significant impact on the marketability of the pursuer's shares. The suggested reduction would value ITS's shares at a range well below their cost (floor) valuation. However, the hypothetical purchaser would be aware that the wrongdoing had no material effect upon the terms of the deal, and that the terms were fairly standard for a private equity transaction of this type. Doing the best he could on the material before him, the judge concluded that the price offered by the purchaser would be somewhere between the post-transaction value with no allowance for fraud ($91 million) and a *pro rata* share of the value of the company on the cost approach ($64.6 million). He adopted the mid-point of those figures, $77.8 million. When the cash receipt of $10 million was added, Mr Kidd's loss was $13.2 million

($101 million - $87.8 million), which was less than the sum already recovered in the P & W action.

[112] Before this court counsel for Mr Kidd submitted that the judge's approach was plainly wrong. It was not an approach which was available because it had not been put to Mr Thornton or Mr Indge. If it had been open to the judge to use upper and lower parameters, the upper parameter ought to have been $78.75 million, not $91 million. He had also erred in treating the $64.6 million cost basis value as a floor value because disclosure of the fraud might have reduced that value. He ought to have accepted Mr Thornton's evidence that an appropriate discount was 70 - 80%. If 80% had been applied, the value of Mr Kidd's shares would have been $17.5 million.

[113] We are not persuaded by these submissions. The judge required to estimate as best he could on the material before him the effect of the wrongdoing on the value of Mr Kidd's residual shareholding. Ultimately, it was very much a question for his determination. It was for him to decide which evidence to accept and which to reject, and the inferences which could reasonably be drawn from the evidence which he accepted. It was common ground that the effect on value which wrongdoing would have in any particular case would depend upon the nature and consequences of the wrongdoing. It was also common ground that the hypothetical purchaser would have full knowledge of the facts. He would be aware of the precise nature of the wrongdoing and its consequences. He would be aware that the wrongdoing had no material impact upon the terms of the deal, and that the terms were fairly standard for a private equity transaction of this type. It is clear that Mr Thornton treated the nature and gravity of the wrongdoing and its consequences as having a very dramatic effect on value - justifying a reduction of 70 - 80%. It is also clear that the judge did not accept that a reduction of anything like that order was appropriate. That was a

conclusion he was entitled to reach. It is a conclusion which we find wholly unsurprising given that any wrongdoing had no material influence on the terms of the deal, the terms of which were fairly standard for a private equity transaction of this type. The judge rejected Mr Thornton's analogy with a sale of a minority shareholding in a private company, which was the basis for his 70 - 80% reduction. He gave intelligible and persuasive reasons for doing so. Having rejected a reduction of that order as being excessive, he endeavoured to assess a more appropriate reduction. Two clear parameters of value were apparent to him. The upper one was the post-transaction value of Mr Kidd's shares leaving fraud out of account ($91 million). The lower one was the floor value of that shareholding on the cost approach ($64.6 million). He considered that a reasonable approach was to take the mid-point value, $77.8 million. Counsel for Mr Kidd contended once again that the upper parameter ought to have been $78.75 million rather than $91 million. We have already explained why we have rejected that contention. He further submitted that the judge erred in treating the cost basis as a floor value, because fraud could have reduced that too. The difficulty with that submission is that both experts spoke to the cost basis providing a floor value, and neither deponed that the floor value would be lowered by the wrongdoing said to have occurred here. It is far from clear to us that the value of the company's underlying assets would be affected by wrongdoing of that nature. While it may be inferred from Mr Thornton's suggested reduction of 70 - 80% that he considered that it would be, the judge rejected that evidence, for good reasons. There was no other evidence supporting a reduction below the floor value. In our opinion it was open to the judge to employ the floor value as his lower parameter, and to adopt the mid-point figure between it and the post-transaction value without fraud as the post-transaction value of the Mr Kidd's shares

taking account of the fraud. We are not convinced that these conclusions were plainly wrong.

[114] It follows that the judge was correct to determine (paragraph 173) that Mr Kidd's hypothesised loss on the transaction of $13.2 million has already been fully recovered by him in the P & W action. Ground of appeal 8 is not well founded and we reject it.

Disposal

[115] For these reasons the reclaiming motion is refused. We adhere to the judge's interlocutor of 8 March 2024.