OUTER HOUSE, COURT OF SESSION

[2024] CSOH 28

CA163/19

OPINION OF LORD TYRE

In the cause

ROBERT GORDON KIDD

Pursuer

against

(FIRST) LIME ROCK MANAGEMENT LLP; (SECOND) LIME ROCK MANAGEMENT LP; (THIRD) LIME ROCK PARTNERS V, LP; (FOURTH) HAMISH HECTOR LAWRENCE ROSS; (FIFTH) JASON SMITH; (SIXTH) LEDINGHAM CHALMERS LLP; (SEVENTH) MALCOLM LAING; and (EIGHTH) RODNEY ALPHONSIOUS MAGILL HUTCHISON

Defenders

Pursuer: Smith KC, Anderson, Reid; Harper Macleod LLP
First to Fifth Defenders: McBrearty KC, McKenzie KC, Roxburgh; Gilson Gray LLP
Sixth to Eighth Defenders: Dean of Faculty (R Dunlop KC), Paterson KC, Boffey; CMS Cameron McKenna Nabarro Olswang LLP

8 March 2024

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Introduction

[1] On 26 September 2009, the pursuer ("Mr Kidd") and a company called ITS Tubular Services (Holdings) Ltd ("ITS") of which Mr Kidd was the sole shareholder entered into an investment and share purchase agreement with the third defenders (in this opinion I refer to the first to third defenders collectively as "Lime Rock"). Lime Rock are a US-based private equity house specialising in the energy sector. In terms of the agreement, Lime Rock

subscribed $45 million cash and received a 34% shareholding in ITS. A further cash payment of $10 million was made by Lime Rock to Mr Kidd. The sixth defenders ("LC") are a firm of solicitors in Aberdeen who acted on behalf of Lime Rock in the transaction.

[2] In this action Mr Kidd claims that the defenders engaged in a fraudulent conspiracy to induce him to enter into the agreement on the false basis that it was a fairly conducted arm's length transaction, when in fact the solicitors instructed to act on behalf of Mr Kidd and ITS were providing advice and information to Lime Rock. Mr Kidd states that as a consequence of this conspiracy he entered into a transaction, on terms unfavourable to him, which he would not have entered into at all had he known of the fraud. He seeks an award of damages of $150 million.

[3] Mr Kidd's assertions are founded upon the actings of Mr Ken Gordon, then a partner in the firm of Paull & Williamsons LLP ("P&W") who were instructed to act on behalf of ITS and Mr Kidd in the transaction. At the time when negotiations between ITS and Lime Rock began, both were existing clients of P&W. Mr Gordon was the partner responsible for Lime Rock's business and was familiar with their standard demands in relation to vendor due diligence. On his recommendation, Lime Rock instructed LC to act for them in the ITS transaction. The individual solicitors at LC responsible for carrying out Lime Rock's instructions were Mr Malcolm Laing, the seventh defender, and Mr Rodney (Rod) Hutchison, the eighth defender. However, with a view to saving time and expense, but with insufficient regard to conflict of interest, Mr Gordon retained an advisory role in explaining to Messrs Laing and Hutchison and to the Lime Rock personnel how the vendor due diligence documentation produced by Mr Allan on behalf of ITS differed from Lime Rock's usual demands. On occasions he gave advice to Lime Rock and also disclosed potentially sensitive information to them and to LC. None of this came to Mr Kidd's notice until many

years after the transaction completed. In the meantime, after completion of the share sale to and investment by Lime Rock, the operational performance of ITS deteriorated, and on 19 April 2013 the group went into administration.

[4] In 2014 Mr Kidd raised an action against P&W and its successor firm Burness Paull LLP ("BP") claiming damages of $210 million for fraudulent misrepresentation, breach of fiduciary duty and professional negligence. In the course of that action, emails describing the role played by Mr Gordon in terms which implied wrongdoing came to light. P&W/BP admitted breach of fiduciary duty. The action settled in February 2018 shortly before proof, on payment to Mr Kidd of the sum of £19 million.

[5] Mr Kidd subsequently raised the present action. The defenders took a number of preliminary points. They contended that the action was incompetent because the settlement with and subsequent payment by P&W/BP precluded it; that the averments of alleged wrongdoing were irrelevant; and that the pursuer's claim had prescribed. The commercial judge (Lord Clark) upheld the first of these contentions and dismissed the action. Mr Kidd successfully reclaimed and in its opinion dated 12 November 2021 ([2021] CSIH 62) the Second Division held that the pursuer's claim was not precluded, recalled the commercial judge's interlocutor and remitted the action for further procedure. On 8 November 2022 proof before answer was allowed and the present diet fixed. The defenders all reserve their plea of preclusion for argument should it be necessary in future to seek leave to appeal to the Supreme Court against the decision of the Second Division. The sixth to eighth defenders no longer insist in their plea of prescription. No point is taken by any of the corporate defenders regarding vicarious liability.

The Lime Rock transaction

Origins and development of ITS

[6] The business of ITS was created in 1986 by Mr Kidd. At all times until the Lime Rock transaction the business, which was incorporated in 2003, was in his sole ownership. Having begun as an inspection and repair operation in Aberdeen, it expanded during the 1990s into buying and selling oil field equipment. Mr Kidd exploited a lucrative market selling used North Sea oil field equipment to operators in the United States and the Middle East. In about the late 1990s the company moved into pipe and tool rental and longer term leasing, which became its principal activities.

[7] By the early 2000s Mr Kidd had expanded the business of ITS abroad. Operations were begun in Dubai, followed by China, Egypt, Venezuela, Pakistan, India and elsewhere. The business structure varied from country to country: in some locations ITS operated through a subsidiary company; in others it had a local partner or joint venture. Day to day management of subsidiaries was carried out by local general managers. A group structure was created with the various subsidiaries being wholly or partly owned by ITS, which was itself wholly owned by Mr Kidd. During its period of growth ITS obtained loan funding from the Bank of Scotland as and when borrowing was required.

[8] In 2007 the ITS group had turnover of $102 million and EBITDA (earnings before interest, tax, depreciation and amortisation) of $29 million. Mr Kidd, who was resident in Cyprus, began to think about realising some or all of the value of his interest. He was aware however that the rapid growth of the business had resulted in a need to improve its management systems. There was also a desire for better co-ordination among subsidiaries operating in different countries. By making such improvements, the value of the company could be further enhanced. Mr Kidd did not regard himself as the right person to make

these changes, and turned his attention to bringing in a CEO to address the management issues and allow him to step back from the day to day running of ITS, possibly with a view to selling up if an appropriate offer was received.

[9] Mr Kidd had from time to time received business and financial advice from Mr Jeffery (Jeff) Corray, a partner of KPMG in Aberdeen. Mr Corray was head of KPMG's M&A oil and gas services business, and was highly regarded in the oil industry. Mr Kidd persuaded Mr Corray to accept appointment as chief executive officer of ITS with effect from 1 October 2007. The purpose of Mr Corray's appointment was to grow the business and its value, partly but not exclusively with a view to a sale. Mr Scott Milne, who had been a director in Mr Corray's corporate finance team at KPMG, joined ITS at the same time, as a director with responsibility for corporate development.

Private equity investment

[10] Mr Corray shared Mr Kidd's view that the business had scope for further growth, and had not yet seen a full return on the capital invested. By this time however its bank debt was high: in early 2008 borrowing amounted to $175 million. The company also had significant capital expenditure ("capex") commitments in various territories. A further increase in borrowing was not prudent; in any event the financial crisis was under way and it was not certain that increased bank finance would be forthcoming. The alternative means of funding was to bring in an equity investor to contribute capital in exchange for a minority shareholding. Mr Corray had a friend who worked at the private equity investor 3i, and he opened preliminary discussions to see whether 3i would be interested in a quick deal. Discussions were initially positive. 3i proposed to invest $100 million in return for a 31.5% shareholding in ITS.

[11] In February 2008 Mr Corray, on behalf of ITS, contacted Scott Allan, the P&W partner in charge of the firm's relationship with ITS, to instruct him to provide legal support for ITS in relation to the prospective private equity investment, and in particular the indicative offer made by 3i. P&W were engaged to provide legal advice in relation to a sale of shares by Mr Kidd and an investment into ITS. Working with Mr Milne, Mr Allan began to prepare the legal due diligence documentation requested by 3i's solicitors. Subsequently, however, 3i made a revised, less favourable indicative offer which was not acceptable to Mr Kidd, and discussions with 3i terminated.

[12] P&W sent separate letters of engagement to Mr Kidd and to ITS. In the letter to Mr Kidd, P&W accepted instructions to act in connection with the proposed sale of part of his interest in ITS to a third party investor and the rollover of the balance of his shareholding into a new entity to be owned by him. In the letter to ITS, P&W accepted instructions to assist the company in relation to all UK legal aspects of its planned corporate restructuring including assistance in relation to any disclosure exercise being undertaken. Both letters stated that it was assumed that Mr Corray and Mr Milne had authority to give instructions to P&W on behalf of Mr Kidd or ITS, as the case may be.

[13] After the 3i deal had fallen through, Mr Corray and Mr Milne, acting on behalf of ITS, engaged Simmons & Co International Ltd ("Simmons"), a firm of investment bankers based in Aberdeen and specialising in provision of corporate finance advice in the oil and gas industry, to assist in identifying and commencing a dialogue with parties who might be interested in an equity investment in ITS. In September 2008 Simmons prepared a briefing document for what had become known as Project Indigo which was sent to potential interested parties. At around the same time KPMG prepared a vendor-initiated financial due diligence report on ITS and its subsidiaries.

[14] By the end of October 2008, a definite interest in investing had been expressed by three parties: Lime Rock, Lloyds Development Capital and TA Associates, all private equity houses. Each of these potential investors met the ITS management team; LDC and TA also met Mr Kidd. Simmons produced a detailed comparison of the terms of the three indicative offers received. Unfortunately at about this time the effects of the global financial crisis were beginning to be felt. Oil prices fell and the impact on ITS's customers and their level of activity in turn affected ITS's trading performance and prospects. Investors were afflicted by uncertainty as to how long and how deep the crisis would be. By the end of 2008 Simmons had received confirmation that neither LDC nor TA Associates wished to proceed with the investment at that time. LDC expressed concern regarding the structure and sustainability of ITS's banking facilities with HBOS. TA Associates were discouraged by a dip in ITS's performance data.

Negotiation and conclusion of deal with Lime Rock

[15] Lime Rock Management LLP (the first defender) is a Scottish limited liability partnership. It provides investment advice concerning Europe to Lime Rock Management LP (the second defender), a US entity which in turn provides investment advisory services to a series of investment funds including Lime Rock Partners V, LP (the third defender). Each of the investment funds has an investment committee whose members scrutinise investment deals proposed by a deal team comprising members of the committee. Any decision by the investment committee to proceed with an investment must be unanimous.

[16] At the time of Simmons' approach on behalf of ITS, Lawrence Ross (the fourth defender) was a member and employee of the first defender and head of its Aberdeen office. He was also a partner in the second defender and a member of the investment committee of

the third defender. Having joined Lime Rock in 2002, he was responsible for its European investment activity. He had previously been the director of 3i's oil and gas team. He knew Mr Corray and Mr Milne but had had no previous business dealings with Mr Kidd. He was enthusiastic about investing in ITS. Jason Smith (the fifth defender) was an investment analyst who joined Lime Rock in 2007 as an associate, working in Lime Rock's Aberdeen office as a junior member of the small team managed by Mr Ross. His role was to evaluate deal opportunities against Lime Rock's investment criteria.

[17] The indicative proposal submitted by Lime Rock in October 2008 was to pay $25 million to Mr Kidd and invest $100 million in ITS, for a 42% shareholding with a liquidation preference of 1x amount invested. Following a meeting on 13 November 2008, Mr Ross reported to his Lime Rock colleagues that:

> "…Next round proposals are expected in early December and based on those the company will grant exclusivity to one party. Completion is targeted for January – the haste being largely to do with the fact that Bob Kidd has no idea how these things work and doesn't like his management team being distracted from operations."

Mr Ross also reported:

> "P&W acts for ITS! Fortunately it is Scott Allan and even more fortunately Scott Milne at ITS has put together a package of documents so we would not have P&W checking P&W's work. I will speak to Ken [ie Mr Gordon] to see if he is happy for P&W to work on both sides of the transaction (there is precedent)…"

[18] On 22 December 2008, Mr Ross submitted Lime Rock's revised indicative proposal to Simmons. The key ingredients were a $10 million share purchase from Mr Kidd and a $50 million share subscription in ITS, for a 43% shareholding. The liquidation preference was maintained. P&W would be appointed to carry out legal due diligence; financial due diligence would be satisfied by the existing KPMG vendor due diligence report. Mr Kidd was not enthusiastic about the offer. On 24 December, Mr Corray emailed Mr Milne to

report: "Spoke to Bob. He said he is of the view to tell them to take a running jump! He was not for even entertaining a discussion with [Lime Rock]".

[19] On 7 January 2009, Lime Rock submitted a further revised indicative proposal. The offers of $10 million cash out to Mr Kidd and $50 million into the company remained the same, but the investment was now to represent 30% of the company. Lime Rock's shares would be convertible "A" ordinary shares attracting an annual "yield" of 10%, redeemable by either party after five years, and with a liquidation preference. The company would have an option to pay the yield in cash or in shares. After some discussions, Mr Ross reported to Lime Rock on 12 January 2009 that at last they had "some agreement" with ITS. A further indicative proposal was sent, addressed to Mr Corray, on 12 January. The offer was now to represent 27.5% of the equity in ITS, and there was a new "drag right" entitling Lime Rock as minority shareholder, in specified circumstances, to require the majority shareholder to join it in a sale of the company. The yield on the "A" shares remained the same but the option to pay in shares was removed and replaced by an option to roll up the cash payment at 10% compound interest. The liquidation preference was also maintained but there were now to be catch-up rights for the ordinary shareholder(s).

[20] The 12 January offer was favourably received by ITS. Mr Milne emailed a copy of Lime Rock's letter of intent to Mr Kidd, commenting "Any questions please give me a buzz". P&W were instructed to commence work on a vendor legal due diligence report. It was at this point that Mr Gordon's participation began, and I return to consider this in detail below.

[21] On 22 January 2009 Mr Allan sent a letter of engagement, addressed to Mr Kidd and ITS, setting out the scope of P&W's work as follows:

"A. **Legal Due Diligence**

We shall:

- carry out legal due diligence and produce an exceptions only report on the ITS group entities in the UK, such report being addressed to Lime Rock as requested by you (the 'UK Report'). The UK Report will not cover matters covered by the Contracts and Agency Report (as detailed below). The UK Report will contain certain assumptions and qualifications — please see Part 1 of the Schedule to this letter for more precise details on the scope of the UK Report;

- carry out legal due diligence and produce a report addressed to Lime Rock (as requested by you) on (a) material customer contracts of the group (against commonly understood and applied UK Continental Shelf standards); and (b) agency agreements entered into by the group (against commonly understood and applied standards for agency agreements) — in each case irrespective of governing law and jurisdiction. Note: we shall not be responsible for any aspect outwith the standards mentioned above, including any non-UK legal aspect; and

- instruct the carrying out of the limited scope legal due diligence on such of the foreign entities as are agreed between ITS and Lime Rock (with such scope as we are instructed to require).

B. Share Sale and Investment Documents

We shall:

- draft a share sale agreement and related ancillary documents;

- review and negotiate all documentation in relation to completion of the share sale; and

- review and negotiate the investment documentation."

[22] On the same date (22 January 2009), Mr Laing sent a letter of engagement on behalf of LC to Mr Ross. The letter stated:

"The work which you have instructed us to carry out is to act for Lime Rock Partners (V) LP in connection with its investment in ITS Tubular Services (Holdings) Limited ("ITS").

We will be representing the interests of Lime Rock Partners (V) LP and no other person and we will accept instructions during the course of our work from, and we will report to, you or Jason or such other persons as you or he may direct. Anyone

> else who may have an interest in the matter is recommended to obtain separate legal advice.
>
> Our remit will include the following:
>
> > - reviewing, advising on and adjusting the terms of an investment agreement, articles of association, share purchase agreement, disclosure letter, service contracts and ancillary documents such as minutes, resolutions, stock transfer forms and Companies House forms.
> >
> > - attending completion
>
> I understand that Paull & Williamsons have been instructed by you to carry out legal due diligence and prepare a legal due diligence report. We shall have no responsibility for any due diligence matters but will read the draft report and liaise with Paull & Williamsons for the purposes of and to the extent necessary to advise you properly on warranties and indemnities."

[23] During February 2009 work was carried out by P&W and LC on legal due diligence and the drafting and revision of the formal documents. Again I return to this in more detail below. Mr Ross was attempting to obtain approval of the deal by Lime Rock V's investment committee. This was not easy as some members of the committee had strong reservations about it. When Mr Ross did come back to Mr Corray on 26 March 2009, it was with a revised proposal in terms of which Lime Rock would invest $50 million into ITS and pay $10 million to Mr Kidd for 35% of equity, a warrant to acquire a further 5%, and two board seats. Mr Corray replied that they did not have a deal, and for the next month matters stalled.

[24] In early April 2009 there was further contact between Mr Mike Beveridge of Simmons and Mr Ross, and between Mr Corray and a representative of the Al Shoaibi Group who had expressed interest in investing alongside Lime Rock, with the consequence that on 20 April a revised summary returns analysis prepared by Simmons, showing projected EBITDA of $60 million for 2009, was provided to Lime Rock. Mr Ross presented a revised plan to the Lime Rock investment committee, in terms of which the sum invested

would be $50 million to ITS, with no cash out to Mr Kidd, for 32% of equity. After discussion, however, the offer made, through Mr Beveridge, at the beginning of May was of $40 million for 25.6% of equity, with no cash out. Mr Corray expressed his own and Mr Kidd's disappointment to Mr Beveridge, who reported this to Mr Ross, explaining that the "no money out" element was unacceptable in principle. Mr Ross expressed concern to John Reynolds, Lime Rock's co-founder and managing director, that the deal, about which Mr Ross remained enthusiastic, might have been lost. Mr Reynolds promised to obtain the investment committee's approval of an offer of $45 million with a further $5 million cash out to Mr Kidd. Such an offer was duly made by Mr Ross to Mr Corray on 1 June 2009. Mr Corray emailed it to Mr Kidd the following day. On 8 June, Mr Beveridge emailed a response to Mr Ross raising a number of points for discussion. At a meeting on 10 June, most of Mr Beveridge's points were accepted by Lime Rock, although the cash out to Mr Kidd remained $5 million. A revised indicative proposal was sent by Mr Ross to Mr Corray on 16 June.

[25] On 18 June 2009, TA Associates reappeared, unsolicited, with a new offer. The proposed investment was $60 million into ITS with $40 million cash out to Mr Kidd, in return for a 40% holding in convertible shares. The conditions included an annual coupon of $12.5 million which would roll up during the period of investment. Mr Corray regarded the offer as comparable with that of Lime Rock; Mr Kidd would receive more cash but would relinquish a larger shareholding. After some initial discussions the offer was amended to be for a 45% holding. The proposal was welcome in that ITS could use it to put some pressure on Lime Rock to improve their offer. In an email dated 4 July 2009 to Mr Corray and others, copied to Mr Kidd, Mr Beveridge expressed his view:

> "If the $40m cash out on offer plus the additional $15m equity injection is very important and very attractive I would invest more time with TA next week with a view to running with them and risk losing LR's offer.
>
> If the additional equity/cash is not very important and/or you need a lot of assurance that ITS can access new equity very soon I would shut down TA and concentrate on closing out LR because it removes execution risk and involves a known investor with strong reputation. As you say Jeff the total dilution with TA is much greater because of the additional capital involved and today's suppressed valuations. Therefore a smaller equity round will leave you all with a greater potential upside down the line."

Messrs Beveridge, Corray and Milne had a meeting in London with TA representatives. In the end, however, the TA offer came to nothing. Shortly after the meeting, TA's co-chair, Ajit Nedungadi, informed Mr Corray that TA would not be proceeding with their proposal as they were uncertain as to what the future held for ITS in light of the ongoing financial crisis.

[26] In the meantime, Mr Reynolds and Mr Corray had a forthright telephone discussion, in the course of which Mr Corray emphasised that any deal with Lime Rock had to release more cash out to Mr Kidd. Mr Corray was subsequently more specific: the cash out had to be increased to $10 million. In order to get the deal done, Mr Reynolds agreed. In an email on 22 July 2009, he reported to Mr Ross and Mr Smith: "Jeff just called. Good news back from him. He and Bob have agreed to move forward with us." A written offer to this effect was sent by Mr Ross to Mr Corray on 23 July. After some further negotiation of the terms of the warranties cap, a revised offer was signed as accepted on behalf of ITS by Mr Corray on 31 July 2009. Mr Corray informed Mr Allan that the deal with Lime Rock was on, and that they were aiming to close late August. The lawyers re-commenced work, which had been on hold since March, on the formal documentation.

[27] On 17 August 2009, Mr Allan sent a revised draft share purchase agreement to LC, reflecting the terms of the July agreement. There followed a period of negotiation of the

terms of the agreement, notably in relation to warranties and the terms of ITS's disclosure letter. Those negotiations were conducted partly by the lawyers in P&W (including Mr Gordon) and LC, and partly by Mr Corray and Mr Milne for ITS and Mr Ross and Kris Agarwal, Lime Rock's in-house counsel, for Lime Rock. Of particular concern was the scope of the warranties to be given by ITS in relation to US trade sanction compliance, especially as regards business carried on by ITS subsidiaries in Iran. The transaction could not be settled until the warranties had been agreed, and finalisation of the scope of the warranties was to some extent dependent upon the due diligence process, which was incomplete because reports from certain overseas subsidiaries were still awaited. There were also unresolved issues regarding Lime Rock's entitlement to a forced sale of Mr Kidd's shares. The terms of the transaction reached a final agreed form on 26 September 2009. Copies of the signing pages (only) were taken to Cyprus for Mr Kidd's signature by Stuart Ross (an employee of ITS who was Lawrence Ross's son). Mr Kidd signed *inter alia* the signing pages of the investment agreement, disclosure letter, share purchase agreement and articles of association on 26 September, the other relevant individuals signed, and the deal concluded. Mr Ross and Mr Saad Bargach, a member of Lime Rock V's investment committee with extensive oil industry experience, were appointed to the ITS board.

The actings of Ken Gordon

[28] By early 2009, Mr Gordon had been carrying out legal work for Lime Rock for about ten years. He was the "keeper" of the templates of Lime Rock styles for UK company investments and share purchases. He had acted on behalf of Lime Rock in many legal due diligence exercises. As already noted, Mr Ross wished to know whether P&W could act on both sides of the transaction. On 14 January 2009, Mr Ross emailed Mark Jenkins of the

Al Shoaibi Group to inform him that "we have instructed Paull & Williamsons (Ken Gordon) to start the drafting of legal documents and to co-ordinate legal due diligence". Mr Jenkins replied that he would very much welcome Mr Gordon acting on Al Shoaibi's behalf. Mr Ross forwarded Mr Jenkins' email to Mr Gordon who replied to Mr Ross in the following terms:

> "I omitted to remind you yesterday that my role here will be 'unofficial' counsel to Lime Rock and that for external consumption and to preserve my practising certificate I was going to ask Malcolm Laing to front the investment side. Scott [Allan] will produce the documents which will be in normal LRP style for the investment and an SPA in a P&W 'house' style which we will present to Malcolm. He will negotiate these on behalf of LRP (and Shoaibi) but I will direct him as to what is customarily acceptable to LRP and what is not and be responsible for keeping him on track. I am hoping that we did have that conversation and that I did not just imagine it. Can you just confirm we did and that is agreed so that I can brief Malcolm and respond to Mark Jenkins."

The references in this email to Mr Gordon being "unofficial counsel to Lime Rock" and to Mr Laing "fronting" the investment side are strongly founded on in the pursuer's case.

[29] On 15 January 2009, Mr Gordon emailed Mark Jenkins of the Al Shoaibi Group, setting out how he envisaged that matters were going to be arranged (references to "Indigo" are to ITS):

> "I don't know if Lawrence has told you that as well as acting as Lime Rock's UK counsel, we also act for Indigo. Whilst in some ways that is helpful, it does also present some challenges.
>
> One of my partners, Scott Allan, and his team have already carried out a good deal of preparatory work in assembling the legal due diligence information on behalf of ITS. We have been looking at how best to execute the transaction taking best advantage of resources, existing knowledge of client practices and preferences and work already carried out in order to attempt to mitigate transaction expenses and meet client expectation on timetable, but avoid conflicts of interest.
>
> What we have proposed to Indigo and Lime Rock, and which has been accepted by them, is that legal due diligence is effectively done as a vendor diligence report, prepared by this firm and addressed to Lime Rock, and assuming you are also comfortable with this approach, the Shoabi [sic] investor entity. Much of the diligence work will be carried out by Scott's team, as they are already familiar with

the Indigo set-up, but I will take on a supervisory/scrutineer role, reviewing their work, asking questions and issuing further requisitions etc.

The main transaction documents, i.e. sale and purchase agreement, tax deed, investment agreement, new articles of association will be prepared by Scott and 'vendor drafts' but the SPA will be based on a precedent form approved by me and the investment documents will follow the Lime Rock house styles.

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

[30] A meeting to discuss vendor due diligence and other matters was held at P&W's offices on 19 January 2009, attended by Mr Milne and Stuart Ross of ITS, Messrs Gordon and Allan of P&W, Ms Jenny Simpson of Simmons, Mr Laing of LC and Mr Smith of Lime Rock. A preamble to the meeting minute stated:

"Due to P&W conflicts, Malcolm Laing is to act for LRP in the negotiation of investment docs. Scott Allan will compile main vendor due diligence report for Malcolm's review. Ken Gordon will be involved throughout and standard LRP documentation will be used where possible to minimise process duration."

On 21 January, following a meeting with Lime Rock, Mr Gordon sent a note to Mr Allan on how Lime Rock wanted to handle the legal due diligence report on ITS's foreign subsidiaries. Mr Allan passed it to Mr Milne, who agreed to the proposed scope, and the work commenced. As regards the sale and investment documentation, Mr Allan emailed Mr Milne on 26 January, copied to Mr Gordon, stating:

"Regarding sale and investment docs I've agreed with Malcolm/Ken that the starting point 'Lime Rock house styles' should be used as our starting point (albeit with all customisation to be done by us for the deal and seller revisals introduced as we see fit). Malcolm/Ken are discussing to ensure the correct starting point. I hope to have that by mid-week to start properly considering that with you. Again, the intention here is to streamline the process where we can."

[31] On 2 February 2009 Mr Gordon emailed Mr Ross to draw his attention to a possible means of saving stamp duty (amounting to $50,000) on the share purchase by Lime Rock from Mr Kidd. Mr Ross replied rejecting the suggestion. In a further email exchange on 3 and 4 February, Mr Gordon queried whether Mr Ross had discussed P&W's fee for the due diligence exercise with Mr Corray, and also warned Mr Ross to "expect some ear-bashing" from Mr Corray and Mr Milne regarding the due diligence information being sought from ITS subsidiaries.

[32] On 17 February 2009, Mr Laing sought an update from Mr Gordon, observing that he had not heard from anyone for some time. Mr Gordon replied with an update on due diligence and an indication that Mr Allan was discussing the draft deal documentation with Messrs Corray and Milne. On 23 February Mr Allan advised Mr Gordon and Mr Laing that he expected to issue draft investment agreement, articles and share purchase agreement in a couple of days, and suggested arranging an all parties meeting on the documents. When Mr Allan duly produced the drafts, Mr Gordon emailed Lime Rock, copying in Mr Laing, to propose a series of meetings:

> "Tuesday, 3 March at 10.00am. Jason, Lynn, Malcolm and Ken.
>
> Thursday 5 March at 9am. Lawrence, Jason, Lynn, Malcolm and Ken - LRP side pre-meet going into all parties meeting at 10.00am.
>
> As a minimum, Tuesday's meeting should be a page turn to identify and list the bigger ticket items to create an 'agenda' for Thursday's meeting,"

"Lynn" is a reference to Lynn Calder, a member of Lime Rock's deal team in Aberdeen. Emphasis is placed by the pursuer on Mr Gordon's use of the label "LRP side".

[33] In advance of the all parties meeting, Mr Allan emailed Mr Corray, copied to Mr Milne, on 25 February noting:

> "Gents – we will have the meeting here. 10am start.

> I have issued the docs am meeting Malcolm and Ken tomorrow to talk them through the approach taken on the docs. They are then to meet Jason and Lynn on Tuesday next week to run through the docs with a view to making up a list of key issues for discussion…"

[34] The 3 March meeting took place and a list of points for discussion at the 5 March meeting was prepared. On the morning of 5 March, before the meeting, Mr Gordon emailed Mr Laing in the following terms:

> "Malcolm,
>
> Because of the P&W conflict, you will need to lead our side on all the docs so that I don't end up arguing against the P&W client (too often!). I will of course pitch in with what the 'usual Lime Rock position is' as and when required. See you at 9.
>
> Ken"

In an email to Mr Kidd on 5 March, Mr Milne described the meeting that day as "a productive work through the legal agreements".

[35] On 11 March 2009, Mr Hutchison sent an amended draft investment agreement and articles of association of ITS to Mr Gordon "…for your approval/comment prior to my releasing them to Scott" [ie Mr Allan], together with a list of proposed comments on his amendments. Mr Gordon replied on 17 March:

> "Rod,
>
> I attach pdf's of the pages with my manuscript changes. I think there are only a few points we will need to discuss and perhaps we could do this on the phone tomorrow morning and go through your draft email as well? We need to get the drafts back to Scott during tomorrow albeit I think that will be without having had the benefit of client instructions…"

"Client" in this context means Lime Rock. When Mr Hutchison inquired whether he could be sent a Word version of Mr Gordon's amendments, Mr Gordon replied:

> "No such luck! They only exist in manuscript. I thought to mark up your mark-ups electronically would get us in a mess and in any event I am 'unofficial' on this!"

Mr Hutchison incorporated Mr Gordon's suggested amendments into the drafts and sent the amended drafts to Mr Allan on 18 March, "subject to any comment that Lime Rock may have".

[36] On 23 March 2009 Mr Smith contacted Mr Gordon directly to obtain a schedule of ITS's indebtedness that had been passed to P&W by Mr Milne. Mr Gordon sent what he thought was the schedule but noted that he had been unable to check with Mr Allan's "lieutenants".

[37] By the end of March 2009 the lawyers were aware of the uncertainty as to whether the deal would proceed. In an email to Mr Ross on 27 March, Mr Gordon observed:

> "Scott [Allan] hasn't been told the deal is off but then he hasn't been kept fully informed of developments all along, he thinks, based on the false premise that JC will think that there will be inappropriate leakage from P&W to LRP (his 'bigger fish' paranoid theory)…"

In another email to Mr Ross on 9 April 2009, Mr Gordon said:

> "…There may be some encouragement in a comment which Scott Milne made to one of my colleagues on the foreign diligence. Whilst he was seeking reassurance that none of the foreign lawyers were continuing to clock up fees he did not call for a 'pens down' instruction and said that he would speak to me about the merit of getting the foreign diligence exercises completed whether that be for a Lime Rock deal or a deal with someone else. I took that as a sign that a Lime Rock deal had not been ruled out entirely. I doubt there is any real prospect of there being a 'someone else' out there at the moment."

[38] On 15 April 2009 Mr Ross reported to Mr Gordon that Mr Corray wanted to find a way to reopen the deal. On 4 May Mr Ross updated Mr Gordon on the approval by the Lime Rock investment committee of an offer of $40 million. On 5 May, Mr Gordon sent Lime Rock a note containing his comments on the latest drafts of the transaction documents. On 12 June Mr Ross forwarded an email chain to Mr Gordon in which Ms Simpson of Simmons reported Mr Corray's general agreement to the revised terms then being proposed. Mr Gordon emailed Messrs Laing and Hutchison on 17 June, stating:

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

The reference to "our side" is to Lime Rock. At this time there had been no drafting amendments by either side since March.

[39] On 29 July 2009 (in the course of the final negotiations of the warranties cap), Mr Ross emailed Mr Gordon requesting "a couple of minutes to talk about ITS and Jeff being difficult on warranties"; Mr Gordon promised to call shortly. Later that day Mr Gordon emailed Mr Ross, asking

> "Do you want me to hold off getting in touch with Scott Milne about resurrecting the due diligence (as I have been asked to do by Simmons - them having been prompted by Jason) so as not to appear too keen prior to your conversation with JC?"

No response to this query has been produced.

[40] Mr Gordon's next documented involvement is an email to Messrs Laing and Hutchison dated 8 September 2009, stating:

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

Mr Hutchison sent the requested drafts, and on 15 September Mr Gordon also requested the latest draft of the share purchase agreement. He continued to participate in the finalisation of diligence and disclosure, suggesting on 18 September to Messrs Ross and Smith an abbreviated procedure for reporting on the terms of ITS's customer and agency contracts.

[41] Finalisation of the terms of the warranties and disclosure letter continued until shortly before completion, because due diligence reports were still awaited from some of ITS's overseas subsidiaries. On 22 September 2009, Mr Gordon emailed Mr Hutchison, copying Mr Laing and Mr Allan:

> "I refer to our conversation today and attach some additional warranties that I consider are required to close the loop on the due diligence, particularly in relation to the overseas diligence reports. Having said that, the Egyptian report is outstanding, a note on the ITS operation in Iraq is awaited, the customer contracts review remains ongoing and whilst the two main LDDR's prepared by P&W have been updated, these are likely only to reach Lime Rock tomorrow. As a result I suspect Lime Rock will not want to close the door to further warranties at this stage.
>
> The second document includes as section 3 a list of post-completion actions. I suggest these be included as a schedule to the Investment Agreement. I would not propose these as conditions subsequent. They are more of an aide memoire and the obligation to action these should be of the good faith, reasonable endeavours type rather than one which failure to achieve renders the Managers and Company in breach."

These matters were then taken forward by Mr Hutchison and Mr Allan.

[42] On 25 September 2009 Mr Smith emailed Mr Gordon seeking advice in relation to avoiding payment of stamp duty by Lime Rock on the purchase of Mr Kidd's shares. Mr Gordon replied, advising that he was unaware of any relevant exemption and noting that "we have paid stamp duty in the past eg TWMA acquisition". He undertook to ask someone to look at it, and passed it to a colleague who confirmed that he agreed with Mr Gordon's view that stamp duty could not be avoided. Later the same day, Mr Gordon emailed Mr Smith again with detailed comments on ITS's draft disclosure letter. On certain matters Mr Gordon expressed the opinion that additional specification should be sought from ITS.

[43] No further documentation showing participation of Mr Gordon prior to completion has been produced.

[44] Two postscripts in relation to Mr Gordon's involvement may be noted here. The first concerns the circumstances in which many of the emails quoted above came to light. In the course of the action at Mr Kidd's instance against P&W/BP a number of attempts were made by the pursuer to recover documents from the defenders by commission and diligence procedure. Assurances were given on behalf of the defenders that no further documents were held. However, following an electronic search by the defenders in early October 2016 of *inter alia* Mr Gordon's email account, the emails quoted were discovered and lodged with the court in an inventory which, in accordance with usual practice, was labelled "Inventory Z". In the light of the information thus discovered, the admission of liability for breach of fiduciary duty was made on behalf of P&W/BP.

[45] The second postscript concerns a complaint lodged with the Scottish Solicitors' Discipline Tribunal against Mr Gordon by the Council of the Law Society of Scotland, alleging that he might have been guilty of professional misconduct. After hearing evidence and submissions, the Tribunal issued a decision dated 26 April 2021 containing the following finding (paragraph 14.69), in which Mr Gordon is referred to as the Respondent:

> "The role the Respondent accepted gave rise to a risk of his having a conflict of interest. The Respondent did not exercise sufficient caution to prevent that happening. A conflict of interest did arise. The Respondent provided advice to LRP when he ought not to have done in the letter of 5 May 2009 [paragraph 38 above], email of 29 July 2009 [paragraph 39 above] and the emails of 25 September 2009 [paragraph 42 above]."

Having regard to the established facts and the parties' submissions, the Tribunal concluded that Mr Gordon was not guilty of professional misconduct, but considered that he might be guilty of unsatisfactory professional conduct and remitted the complaint to the Council of the Law Society of Scotland in terms of section 53ZA of the Solicitors (Scotland) Act 1980.

Post-transaction events

[46] At the time of completion of the transaction with Lime Rock, ITS's EBITDA was already significantly behind forecasts. A review of ITS by Lime Rock in March 2010 attributed this to reduced trading activity across the group due to difficult market conditions. The review also noted that cash collection was a challenge and had got worse during 2009 as customers held back payments; of particular concern was a debt of over $8 million owed by a company in India called Reliance. The board strategy nevertheless remained focused on expansion by capex. In May 2010 pricing and cost control were acknowledged to be key issues. In June and December 2010 bank covenants were breached. At a board meeting on 1 March 2011, a need for equity investment was identified in order to get back within bank covenants and to fund capex. The covenants were re-set.

[47] In 2010 a possibility arose, promoted by Lime Rock, of a merger of ITS and a public company called Allis-Chalmers Energy Inc. Mr Kidd was not enthusiastic. The initial discussions ended in summer 2010 when Allis-Chalmers was sold to another company (Seawell Ltd) to form a new company called Archer. In 2011 merger discussions recommenced more seriously, this time with Seawell/Archer. A letter of intent was signed on 11 March 2011, in terms of which Archer would purchase ITS and Mr Kidd would be bought out entirely. This time Mr Kidd was content with what was proposed. However at the end of March 2011 Archer withdrew. Mr Kidd was unhappy that the deal had not proceeded and blamed Mr Corray and other ITS board members for handling it badly. One consequence of the Archer negotiations was that Mr Bargach, who was a member of the

Archer board, resigned from the ITS board to avoid a conflict of interest. He was replaced by Mr Michael Press as an independent non-executive director. From this time on there was bad feeling between Mr Kidd and the other ITS board members.

[48] One of the issues that troubled potential buyers of ITS was the group's trading activities in Iran. An ITS subsidiary, ITS FZE, which was incorporated in Dubai, in turn owned ITS Kish, a company incorporated in Iran. In 2011, one or other of ITS FZE or ITS Kish was a party to 14 contracts relating to the supply of equipment and services in connection with offshore drilling operations in Iran. EU and US sanctions were by then in force which prohibited certain business operations including supply of oil and gas drilling equipment to any Iranian entity for use in Iran. Senior counsel's advice was that the entities carrying on sanctions country trading should be detached from the group. In early 2012 indicative offers to purchase the whole share capital of ITS were made by two private equity funds, Blue Water Energy and First Reserve. Both offers were conditional upon Iranian business being carved out of the group prior to purchase. Part of the consideration for Mr Kidd's equity interest was to be the sanctions country business, for the sale or disposal of which he would assume responsibility. Nothing came of either of these offers, but they served to focus the attention of the ITS board on the need to address sanctions compliance and to withdraw from Iran. The loss of unrecovered debts on eventual withdrawal from Iran was a contributing factor to ITS's collapse.

[49] In June 2012 Mr Corray resigned as CEO and left the board. Mr Kidd was appointed CEO on an interim basis pending recruitment of a replacement for Mr Corray. The company's performance continued to deteriorate and it once again breached its bank covenants. Lime Rock did not wish to risk further investment. At the banks' instigation, a

Chief Restructuring Officer was appointed in November 2012. There was no progress on the appointment of a new CEO. Relations between Mr Kidd and Lime Rock broke down.

[50] On 10 January 2013 Mr Kidd purported to pass board resolutions appointing several new directors and suspending Mr Milne and Ms Suzanne Park, the group's legal counsel, from their duties. Lime Rock sought and obtained an order from this court suspending the resolution and prohibiting Mr Kidd from attempting to make further appointments without Lime Rock's consent as required by the investment agreement. At a meeting on 16 January 2013 the board resolved to reinstate Mr Milne and Ms Park in their roles. Mr Kidd intimated his resignation from the positions of CEO and Executive Chairman. As a consequence of the covenant breaches, the banks asserted control of the company. Administrators were appointed on 19 April 2013 and the business and assets of ITS were sold as a going concern to a competitor, Parker Drilling, for $125 million. The whole of the consideration was applied towards satisfaction of bank debt, and Mr Kidd and Lime Rock as equity holders received no return.

The pursuer's contention

[51] Mr Kidd's case on record is that Lime Rock executed a conspiracy to defraud him by instructing (and continuing to instruct) LC to engage with P&W when Lime Rock knew that those engagements were corrupted by Mr Gordon's actings in breach of fiduciary duty, and knew that the corruption was being concealed from Mr Kidd. It is averred that LC knowingly and dishonestly assisted Mr Gordon by accepting instructions to represent Lime Rock, knowing that Mr Gordon was acting in breach of his obligations owed to Mr Kidd. But for LC's assistance, the breaches by Mr Gordon would not have been capable of being

committed and/or continued, and the defenders' conspiracy to commit fraud in order to facilitate completion of the transaction would not have come to fruition.

[52] It is further averred that from around November 2008 until completion of the transaction, each and all of the defenders conspired to present a knowingly false impression to Mr Kidd that the proposed transaction was being conducted fairly and at arm's length, with each party represented independently and according to proper professional standards incumbent on solicitors. They conspired to induce Mr Kidd to enter into the transaction on a false basis while concealing from him that he was not being independently advised and that his transactional counterparty was receiving an unfair advantage by way of confidential information and guidance from Mr Gordon/P&W. Had Mr Kidd been represented by solicitors who acted in a professionally appropriate manner, it is likely that he would have been advised that the transaction was highly disadvantageous to him and that his rights as a shareholder were seriously compromised. Had he been so advised, he would not have concluded the contract with Lime Rock.

[53] As presented in submissions at the close of the proof, Mr Kidd's case is that he has suffered loss and damage as a consequence of the defenders' fraud. Lime Rock, through individuals for whom they were legally responsible (including Mr Gordon), and LC, through individuals for whom they were responsible, combined to construct the pretence of a transaction being negotiated by lawyers acting independently of each other and at arms' length. They contrived to conceal the reality and to maintain the situation of conflict and breach of fiduciary duty that the involvement of LC was supposed to have prevented. The harm which the defenders intended was to secure Lime Rock's advantage and the lawyers' advantage (in the form of professional fees). The individuals concerned maintained the pretence that they were acting not only honestly, but in a way which would save expense for

ITS and Mr Kidd. An apparently free flow of information and inside knowledge at each stage of the negotiations gave Lime Rock an edge in relation to the technical way in which the commercial terms of the deal were implemented and the minority protection terms written into the deal documentation.

[54] Had Mr Kidd known the truth, he would not have transacted with Lime Rock. It was irrelevant that the deal might have been an objectively commercially acceptable deal. Although the Pursuer considered that the deal was not good for him, that was not the issue for determination. His complaint was that he signed up to a deal where the counterparty was dishonestly using his lawyers behind his back. Had he known this, he would not have entered into business with dishonest people. He was entitled to reparation or equitable compensation.

[55] The amount of Mr Kidd's loss was quantified as $144,510,959, being the difference between (i) the pre-deal equity value, according to expert evidence, of his shares in ITS ($161.85 million), less a net amount recovered from P&W/BP of $17,339,041, and (ii) a nil value of his shares post-deal.

[56] In summary, the essence of Mr Kidd's case is that he suffered loss and damage as a consequence of an unlawful means conspiracy to which all of the defenders were party. The conspiracy was to bring to conclusion a transaction which all concerned knew was not being conducted at arm's length. The unlawful means was the fraudulent representation to Mr Kidd that it was being conducted at arm's length with independent professional advice on each side, when the defenders all knew that as a consequence of Mr Gordon's breach of fiduciary duty and resultant breach of contract, it was not being so conducted. Intention to injure Mr Kidd is to be inferred from a common intention to enrich Lime Rock at Mr Kidd's

expense. LC were knowing participants but in any event incurred accessory liability for, or for dishonest assistance with, the deception of Mr Kidd.

Summary of the relevant law

Unlawful means conspiracy

[57] There is much recent English authority on the requirements for establishing unlawful means conspiracy as a ground of action, but very little in Scotland. It was not suggested by any of the parties that the English authorities could not be applied to the circumstances of the present action. It is appropriate therefore to adopt *mutatis mutandis* the following English definition provided by *Clerk & Lindsell on Torts* (24th ed, 2023) at paragraph 23-108:

> "This form of the tort is committed where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a claimant who does incur the intended damage. It is not necessary for the injured party to prove that causing him damage was the main or predominant purpose of the combination but that purpose must be part of the combiners' intentions."

The authors then observe:

> "The main issues raised by this form of the tort are: first, the degree of intention required, secondly what forms of behaviour will count as unlawful means, thirdly whether the unlawful means were 'indeed the means' by which damage was caused, and fourthly whether the defendants must know that their means are unlawful."

[58] In relation to those issues, the following propositions may be derived from the authorities.

(i) Intention to cause harm, although not necessarily as a main or predominant purpose, is an essential ingredient; lesser states of mind do not suffice. Awareness that harm may or will be caused by unlawful conduct is not sufficient (*OBG* v *Allan* [2008] 1 AC 1, Lord Nicholls at paragraph 166), although intention to cause harm may be inferred from a finding that a conspirator intended to profit from use of the unlawful means at the expense of the person injured (*Kuwait Oil Tanker Co SAK* v *Al Bader* [2000] 2 All ER (Comm) 271 (CA) at paragraph 121; *Revenue and Customs Commissioners* v *Total Network SL* [2008] 1 AC 1174, Lord Neuberger at paragraph 221).

(ii) The conspiracy or "combination" need not be contained in a formal agreement. It is sufficient if two or more persons combine with a common intention, ie that they deliberately combine, albeit tacitly, to achieve a common end (*Kuwait Oil Tanker Co*, above at paragraph 111).

(iii) "Unlawful means" in this context include common law and statutory criminal offences, and civil wrongs such as breach of contract and breach of fiduciary duty (*Total Network* above, Lord Walker at paragraphs 89-91).

(iv) The unlawful means must have directly caused loss to the person injured, rather than merely being the occasion of such loss being sustained *(Total Network* above, Lord Walker at paragraphs 93-96; Lord Mance at paragraph 119, citing the example of a pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights). As Lord Walker observed at paragraph 96:

> "…What is important, to my mind, is that in the phrase 'unlawful means' each word has an important part to play. It is not enough that there is an element of unlawfulness somewhere in the story."

(v) The alleged conspirator must have knowledge of the facts which render the means unlawful, but need not have knowledge that the means are unlawful (*Racing Partnership Ltd* v *Done Bros Ltd* [2021] Ch 233 (CA) at paragraphs 139 and 171). The requirement of knowledge is satisfied by "blind eye" knowledge (ibid paragraph 159) but only if there is a suspicion that the relevant facts exist and a deliberate decision to avoid confirming that they do exist (*Manifest Shipping Co Limited* v *Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469, Lord Scott at paragraph 116).

Fraud

[59] As Lord President Carloway observed in *Marine & Offshore (Scotland) Ltd* v *Hill* 2018 SLT 239 at paragraph 16:

> "Fraud is a 'machination or contrivance to deceive' (Erskine, *Institute*, III.1.16). There requires to be a false pretence and, in the civil context, resultant loss (a practical result)."

Fraud may be perpetrated by false representations, concealment of material circumstances or other means which induce the victim to act to his disadvantage (Reid, *The Law of Delict in Scotland* (2022), paragraph 21.63). Fraud is distinguished from negligence by the ingredient of dishonesty: the misrepresentation or concealment must be intentional and not merely careless.

[60] The means of assessing whether a person has acted dishonestly was stated in *Ivey* v *Genting Casinos (UK) Ltd* [2018] AC 391 as follows (Lord Hughes at paragraph 74):

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying 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."

Accessory liability/dishonest assistance

[61] In *Libyan Investment Authority* v *King* [2023] EWHC 265 (Ch) at paragraph 606, Miles J summarised the material principles in relation to dishonest assistance as follows:

(i) There must be a trust or fiduciary obligation owed by the fiduciary to the claimant.

(ii) There must be a breach of trust/fiduciary duty by the fiduciary, which need not be dishonest.

(iii) The defendant must have assisted in or procured the breach.

(iv) The defendant must have acted dishonestly in providing the assistance.

(v) For this purpose, deliberately turning a blind eye counts as knowledge.

In *Fish & Fish Ltd* v *Sea Shepherd UK* [2015] AC 1229, it was emphasised (paragraphs 21 and 58) that there must be a common design between the defendant and the primary tortfeasor that the act be carried out.

[62] Scots law recognises a remedy for dishonest assistance in the commission of a breach of a fiduciary duty: see eg *Ted Jacob Engineering Group Inc* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579, Lord Drummond Young at paragraph 100. Mere knowledge of a breach of fiduciary duty is not however sufficient to render liable a person who is not himself subject to a fiduciary duty (cf *Watson* v *Fletcher* [2023] CSOH 87 and authorities cited there). In *Frank Houlgate Investment Co Ltd* v *Biggart Baillie LLP* 2015 SC 187, a solicitor whose client confessed to him that he was a fraudster but who did nothing to alert the other party to the transaction was held to have incurred accessory liability for loss sustained by the other party as a consequence of having made a further loan to the fraudster. The court was not unanimous on the basis of the solicitor's liability. Lords Menzies and McEwan held that by accepting and acting on the fraudster's instruction not to tell the other party of the fraud, the solicitor became accessory to the fraud. Lord Malcolm rejected accession to the fraud as a ground of recovery, holding instead that once he became aware of the truth, the solicitor required to take reasonable care to prevent further foreseeable losses flowing from the

fraudulent transaction which he had unwittingly facilitated, but had failed to do so.

Lord Menzies observed (paragraph 36):

> "…(A) solicitor acting for the recipient in a transaction which involves the transfer of money from one party to another secured by a security over heritable subjects gives a continuing implied representation to the solicitor for the transferor that he is not aware of any fundamental dishonesty or fraud which might make the security transaction worthless."

Assessment of witnesses

Factual evidence

[63] Factual evidence took the form of witness statements largely adopted as evidence in chief, followed by cross-examination. Some statements were agreed by joint minute to be the evidence of the witness in question. No witness statement was provided by Mr Gordon until a few days before the proof began, when he provided a statement to the sixth to eighth defenders. An affidavit dated 14 December 2016 sworn by Mr Gordon in the course of the P&W/BP action was also produced. The descriptions below are of the witnesses' occupations at the material time (2008-2009) and not their current positions.

[64] Evidence was led on behalf of the pursuer from the following witnesses:

- Ken Gordon;
- Robert Kidd;
- Jamie Ritchie, director of corporate banking, Clydesdale Bank plc;
- Ian Mackie, ITS group financial controller;
- Jack Ogston, head of corporate and structured finance for Scotland, Clydesdale Bank plc;
- Patrick Reilly, head of commercial banking for north of Scotland, Bank of Scotland plc;

- Scott Milne;
- Stephen Morrison, head of credit risk, Bank of Scotland plc;
- Tom Milne, ITS general manager for the Far East (written statement only).

[65] Evidence was led on behalf of Lime Rock from the following witnesses:

- Jeff Corray
- Saad Bargach
- John Reynolds;
- Jason Smith;
- Lawrence Ross;
- Mike Beveridge;
- Stuart Ross;
- Kris Agarwal;
- Neil Hartley, managing director, First Reserve (written statement only);
- Ajit Nedungadi (written statement only);
- Mark McCall, Lime Rock chief financial officer and general counsel (written statement only);
- Michael Press (written statement only).

[66] Evidence was led on behalf of LC from the following witnesses:

- Scott Allan;
- Malcolm Laing;
- Rod Hutchison.

[67] Subject to the following comments, I accept the evidence of the factual witnesses as credible and reliable.

[68] *Ken Gordon.* Mr Gordon was a reluctant witness, called to give evidence about events that had a highly detrimental effect upon his professional career, having resigned as a member of BP shortly after the documents produced in Inventory Z came to light. I am not sure that, despite the litigations and disciplinary procedure that have arisen from it, he yet considers that there was anything untoward in the "facilitative" role that he undertook. He denied having being influenced by concern that if he had declined to assist he might have lost an important client. His position then and now is that he did what he did to save time and expense for all concerned, recognising his special familiarity with Lime Rock's documentation and standard corporate practices. Despite his reluctance to accept that there was wrongdoing when he "breached boundaries", I am satisfied that he did his best to tell the truth and to assist the court. I am unable to accept all of his evidence as to his motivation for acting as he did, but in other respects I found his evidence to be generally credible and reliable.

[69] *Robert Kidd.* Mr Kidd retains a strong and entirely understandable grievance that a business which he personally built up from scratch to an international group with a value of many millions of dollars foundered with no return to him other than the $10 million he received from Lime Rock (and the damages subsequently recovered from P&W/BP). It was not at all surprising that his sense of grievance coloured his evidence, and I am mindful of the need to make allowances for that. I acknowledge also that Mr Kidd's expertise lies in conducting face to face deals with oil industry personnel, and not in the financial transactions with which this action is concerned. Nevertheless I did not find him to be an impressive witness. Throughout his evidence he professed himself unable to remember matters which I would have expected him to remember, and denied the occurrence of events which were clearly vouched by contemporaneous documents. I do not go so far as to find

that he was intentionally untruthful; I would characterise his attitude rather as a disinclination properly to 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. On many occasions he evaded answering questions by, for example, asserting without any careful consideration that he had never seen a document; that he had not received an email; that information was withheld from him; that contemporaneous financial analyses were wrong; that he did not know if he was on the ITS board at a particular time; and other responses which were disproved or which in the light of other reliable evidence seemed unlikely to be correct. My decision in this case does not turn on Mr Kidd's credibility or reliability. It suffices to say that I did not find him to be a reliable witness and I have exercised caution in accepting his evidence where it is not corroborated by evidence that I do accept.

[70] *Lawrence Ross*. I found Mr Ross to be a credible and reliable witness. I have no reason to reject, as the pursuer invited me to do, his evidence that he saw the lawyers' role as being no more than "papering up" the transaction. I see nothing extraordinary in his assertion that he was not really interested in Mr Gordon's unofficial counsel role; he clearly regarded any issue of conflict of interest as something for the lawyers to sort out among themselves. It was submitted that his probity was called into question by an email exchange that he had on 16 July 2009 with Mr Smith, in which Mr Ross suggested they "add a bit of external pressure" by disclosing to ITS's bankers that Lime Rock had given ITS an ultimatum that the offer on the table was only open for acceptance until 23 July. In response, Mr Smith warned that this might be counterproductive, but offered to make the call. Mr Ross replied:

> "If you have a line into someone at HBOS then make the call just to find out how their process is going and ask how they view the equity. Don't tell them about our position unless you are questioned in which case your reply is legitimate."

I accept that Mr Ross's initial suggestion was an unethical one. In the end, however, he decided not to pursue it because he did not consider that it would be proper, and instructed Mr Smith to approach the matter differently. I do not regard this exchange as casting doubt upon Mr Ross's credibility as a witness.

Expert evidence

[71] The two principal areas of expert evidence were in relation to (i) the conduct and usual practice of solicitors and (ii) company and share valuation. The parties' experts in relation to these matters gave their evidence concurrently, having previously submitted written reports, held meetings and produced very helpful summaries of areas of agreement and disagreement. In addition the first to fifth defenders led expert evidence, under objection, from two witnesses regarding the impact on ITS of sanctions against Iran introduced between 2009 and 2013 in the United States and the European Union respectively. Subject to the observations below, I found all of the expert witnesses to be well qualified to provide reports and give oral evidence on the matters which they addressed.

[72] Evidence was led on behalf of the pursuer from the following witnesses:

- Mr Keith Anderson, Solicitor, senior partner, Vialex WS, Edinburgh;
- Mr Michael Thornton, partner, Grant Thornton UK LLP.

[73] Mr Anderson's instructions included reviewing the terms of the transaction with a view to expressing an opinion as to whether they were unusual and/or unusually disadvantageous to either party. In advance of the proof the first to fifth defenders lodged a note of objections to the admissibility of Mr Anderson's evidence under reference to the

decision of the Supreme Court in *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 at paragraph 44. It was submitted firstly that Mr Anderson offered views on factual matters, including the dishonesty of the LC solicitors and the knowledge and motives of Lime Rock, which were not within his expertise, and secondly that his presentation and assessment of the evidence was not impartial. The objection was renewed in submissions at the close of the proof.

[74] In cross-examination, the objection was pursued with particular reference to three passages in Mr Anderson's initial written opinion. The first was a view that the only reasonable conclusion was that Mr Kidd was not made aware by P&W of the nature of the terms and the effect of the deal. The second was a conclusion that the common objective on the part of P&W, LC and Lime Rock was to complete the transaction on the best possible terms for Lime Rock: a conclusion that imputes dishonesty to all three parties. The third was an opinion that Lime Rock would have recognised that what the solicitors were doing was unusual and wrong, and serving a purpose in driving the transaction forward on terms which were much more favourable to Lime Rock than they were to Mr Kidd. It was submitted on behalf of the pursuer that where the experts had been asked for their opinion measured against the standard of an ordinarily competent (and honest) solicitor, it was appropriate for Mr Anderson to proffer these views.

[75] I accept the first to fifth defenders' submission that Mr Anderson's evidence strayed beyond the area of his expertise into matters which are for determination by the court. It is a matter of particular concern that Mr Anderson felt able, on the basis of material supplied to him, to express the view that there was dishonesty on the part of the P&W, LC and Lime Rock personnel. It was no part of his function as an expert witness to do so. I have considered very carefully whether I must hold the whole of his evidence to be inadmissible.

In so doing I bear in mind that the Supreme Court in *Kennedy* v *Cordia* emphasised (at paragraph 51) that the requirement of independence and impartiality is one of admissibility rather than merely the weight of the evidence. Having heard Mr Anderson's explanations of why he felt it appropriate to include those passages in his report, I have concluded that they do not indicate a lack of independence or impartiality on his part, but rather an erroneous assessment by him of how best to assist the court, on the basis of the information provided to him when he was instructed to prepare an expert report. I do not therefore find it necessary to exclude the whole of his evidence, which I would have been reluctant to do as he has many years of expertise in transactions of the kind with which this case is concerned. I attach no weight, however, to his views on factual inferences to be drawn from the primary evidence.

[76] Evidence was led on behalf of the first to fifth defenders from the following witnesses:

- Mr Iain Young, Solicitor, Partner, Corporate Division, Morton Fraser LLP;
- Ms Michelle Linderman, Solicitor, Head of UK Trade group, Van Bael & Bellis, London;
- Mr David Wolff, Partner, Crowell & Moring LLP, Washington DC, United States.

[77] In advance of the proof the pursuer lodged a note of objection to the evidence of Ms Linderman and Mr Wolff. It was submitted that Ms Linderman's evidence regarding the EU sanctions regime was a matter of Scots domestic law and that her evidence usurped the function of the court and was inadmissible. I repel this objection. In so far as Ms Linderman narrated EU law in her written opinion she did so to provide context for her opinion regarding the practical effect of sanctions on the business of ITS and its subsidiaries, which in my judgment was a matter of professional expertise and not law. It was submitted that

Mr Wolff's evidence was irrelevant because, on the hypothesis that Mr Kidd would not have transacted with Lime Rock, the US sanctions regime would not have been engaged. I repel this objection too. It was clear from the evidence that the US sanctions regime would have affected the business of ITS and the realisation of Mr Kidd's interest in that business regardless of whether the deal with Lime Rock had proceeded or not.

[78] An expert report was also lodged on behalf of the first to fifth defenders by Mr David Mitchell, Managing Director in the Valuations Team at Interpath Advisory, on company and share valuation. However, his evidence was not led at the proof. Senior counsel explained that until 2022 Mr Mitchell had been head of the UK valuations team at BDO UK, another of whose members, Mr Gervase MacGregor, had produced a report on behalf of Mr Kidd in the litigation against P&W/BP. The existence of this report had come to the notice of the first to fifth defenders' advisers when Mr Thornton's supplementary report, referring to it as "the BDO Report", was lodged on 1 September 2023. (Mr Thornton's first report had in fact included "Expert report by Gervase MacGregor", without mention of BDO, in a list of documents relied on). When asked by the first to fifth defenders' advisers about the BDO report, Mr Mitchell had no recollection of it or of any involvement in its preparation. However, on the morning when the evidence of the valuation experts, including Mr Mitchell, was due to be led in the present proof, senior counsel for the pursuer disclosed that the pursuer's advisers were in possession of documents demonstrating that Mr Mitchell had reviewed and concurred in Mr MacGregor's report, despite having no recollection of this. In these circumstances senior counsel for the first to fifth defenders decided that in view of Mr Mitchell's conflict he was unable to lead his evidence.

[79] Senior counsel for the pursuer informed the court that the pursuer's solicitors had been aware of Mr Mitchell's conflict for some months (the court was subsequently informed

that this had been the case since July 2023) and that he himself had known for about a month. A decision had been taken not to bring the matter to the defenders' attention until the morning when Mr Mitchell was due to give evidence in court. Senior counsel for the pursuer described this as a "tactical decision"; senior counsel for the first to fifth defenders described it as an ambush. For my part I regard the latter description as appropriate. The commercial court operates on the basis of full and frank disclosure between parties of their respective positions, including any fundamental objections to admissibility of evidence. The relevant rules of court and practice notes provide for issues to be raised and determined at as early a stage as possible. Provisions for meetings of experts and of parties are intended to allow opportunities for fundamental issues to be raised and discussed. The court is not assisted by being deprived of the evidence of one party's expert, in circumstances where earlier disclosure of the problem might have permitted the instruction of a substitute. This is especially so when the experts have been put to the trouble and expense of holding a joint meeting and producing a detailed note of areas of agreement and disagreement. It is highly regrettable that Mr Mitchell himself did not recall the circumstances giving rise to the conflict, although this is at least partly explicable by the fact that he did not have access to the files of his former firm. Nevertheless the decision taken by the pursuer's advisers to say nothing with a view to excluding the evidence of another party's expert from the court's consideration was, to say the least, discourteous to the court and to the other parties, and contrary to the ethos of commercial court practice.

[80] Evidence was led on behalf of the sixth to eighth defenders from the following witnesses:

- Mr David Rennie, Solicitor, Consultant, Stronachs LLP, Aberdeen;
- Mr Richard Indge, Senior Managing Director, Ankura Consulting (Europe) Ltd.

Objection was taken by the pursuer prior to the proof to the admissibility of parts of Mr Rennie's reports on the ground that they amounted to submissions in law rather than expert opinion. As with Ms Linderman, I regard Mr Rennie's references to case law as doing no more than setting out his understanding of the legal context of his expert opinion on the actions of the sixth to eighth defenders, and I repel the objection.

Application of legal analysis to the circumstances of the case

[81] Applying the law, as summarised above, to the circumstances of the present case, it is incumbent upon the pursuer to prove, in relation to each of Lime Rock and LC or persons for whose actings they are in law respectively responsible, the following:

- There was an express or tacit agreement or conspiracy between or among the defenders one of whose purposes was to cause injury to Mr Kidd;
- The unlawful means employed by the defenders to implement the conspiracy was fraudulent concealment from Mr Kidd of the corruption of the arm's length nature of the transaction by Mr Gordon's breach of fiduciary duty;
- In the case of the LC defenders, they either participated in the conspiracy or dishonestly assisted with it.
- Mr Kidd suffered loss and damage;
- The unlawful means, ie the fraudulent concealment, was the direct cause of the loss and damage suffered by Mr Kidd.

I find it convenient to examine the evidence and reach conclusions on the first three of these points before moving on to address issues of loss and causation.

[82] I should note that at paragraph 39 of the pursuer's written submissions it appears to be submitted that the unlawful means consisted of a breach of contract, a breach of

confidence and a breach of fiduciary duty giving rise to civil liability in the P&W/BP action and to regulatory sanction, rather than consisting, as asserted elsewhere in the argument, of fraudulent concealment of a breach of fiduciary duty. It was argued on behalf of the sixth to eighth defenders that it was not open to the pursuer on his pleadings to present such a submission. I agree, but in any event I am unable to see how it could be contended that actings of Mr Gordon – who is not of course a defender in this action – could be said to be an unlawful means employed by any of the persons who are alleged to have conspired. I proceed rather on the basis that the pursuer's case is as summarised at paragraph 56 above.

Unlawful means conspiracy: summary of evidence

(i) Conspiracy to injure

(a) Lime Rock witnesses

[83] Lawrence Ross. Mr Ross denied participation in conspiracy to defraud Mr Kidd. He was aware from the outset that P&W acted for ITS and believed that it might be possible for them to act for both parties in a transaction between Mr Kidd/ITS and Lime Rock. He was not familiar with solicitors' rules regarding conflict of interest and relied on P&W to decide whether it was possible to work around any conflict. He characterised the role of the lawyers as being to "paper" the transaction, ie to put into legal words what had already been agreed between the principals. According to his understanding, Lime Rock were Mr Gordon's client for the purposes of legal due diligence. Mr Gordon's role was to provide assistance to LC regarding Lime Rock's standard position. There were no particular limits to Mr Gordon's role, subject to him not crossing a Chinese wall which Mr Ross assumed would be put in place within P&W. It did not occur to Mr Ross that Mr Gordon was acting improperly. There was no attempt to conceal his role, whose purpose was to speed up the

process and save cost. It had been agreed at a meeting at which all parties had been represented. ITS's executives had been aware that Lime Rock were engaging Mr Gordon.

[84] Mr Ross denied that his memo of 13 November 2008 indicated a desire to hurry the deal through in order to take advantage of Mr Kidd's ignorance. He denied that his intention was to have Mr Gordon working for both sides; rather he envisaged that P&W would work on both sides through Mr Gordon and Mr Allan respectively. He did not see that as a problem; it had happened before. He would not expect the lawyers to breach confidences. He denied that the terms of Mr Gordon's "unofficial counsel" email of 14 January 2009 were a clear indication that Mr Gordon was doing something that was professionally improper. He did not know what Mr Gordon had meant by asking Mr Laing to "front the investment side". Lime Rock had no need to seek advice from Mr Gordon with regard to negotiation of the deal.

[85] Jason Smith. Mr Smith denied having conspired to defraud Mr Kidd. His role in the transaction was to support Mr Ross by assisting with financial analysis and preparation of internal documents, coordination of due diligence, feeding into the legal documents, and coordination of the transaction through to completion. He was not familiar with solicitors' conflict rules. He understood Mr Gordon's role to be to produce vendor due diligence reports that would be addressed to Lime Rock. According to his understanding, Mr Gordon's client was ITS, albeit he was producing reports that would ultimately be for the benefit of Lime Rock. He understood Mr Gordon to have a liaison role but did not know the scope of that role and had no part in setting the scope. He regarded it as a matter for P&W to address. Mr Corray and Mr Milne were aware of Mr Gordon's role. It never occurred to Mr Smith to question whether Mr Gordon was acting improperly. With hindsight he could see that Mr Gordon's actings had gone beyond a liaison role and created

a conflict. When he sought Mr Gordon's advice about stamp duty in September 2009, he saw this as asking Lime Rock's usual go-to lawyer for advice on a neutral point.

[86] John Reynolds. Mr Reynolds was one of the co-founders of Lime Rock, having come to it from an oil service industry background. He was the most senior of the Lime Rock personnel who gave evidence. His enthusiasm for the ITS deal waxed and waned in the course of the protracted negotiations, but he was eventually persuaded by Mr Ross to support it. Having received Mr Ross's memo of 13 November 2008 drawing attention to the potential conflict arising out of P&W's existing relationship with both parties, he assumed that any such conflict would be managed to the satisfaction of the parties. He probably did not give the matter a second thought.

(b) LC witnesses

[87] Malcolm Laing. Mr Laing denied that he or the firm of LC had acted as a "front" for Mr Gordon in the transaction between Mr Kidd and Lime Rock. He first became aware that Mr Gordon had used the word "front" in 2017 in connection with a complaint by Mr Kidd to the Scottish Legal Complaints Commission. He denied being a member of a conspiracy to defraud Mr Kidd by concealing from him that P&W were acting in conflict of interest to defeat Mr Kidd's interests in the deal with Lime Rock. He was aware at the time of a potential conflict in Mr Gordon's roles, but regarded Mr Gordon's facilitative role at the outset of the transaction, ie familiarising LC with Lime Rock's usual position and red lines, as sensible and expedient, to avoid P&W wasting time trying to negotiate something that Lime Rock would never agree to. His understanding, like that of Mr Ross, was that when carrying out legal due diligence, Mr Gordon was acting on behalf of Lime Rock, as stated in LC's letter of engagement which excluded due diligence from the scope of LC's instructions.

This was presented to him as having been agreed with Mr Allan and Mr Corray. At the time he had understood that it was acceptable in terms of the Law Society of Scotland's conflict rules because it had the consent of both parties. He was now aware that he had been wrong, and that where there was actual conflict it could not be cleared by client consent. He had had no suspicion of dishonesty on anyone's part and did not accept that there had been any dishonesty. He now considered that Mr Gordon had gone beyond the role that he (Mr Laing) had understood he was to play by carrying out a detailed review of the initial drafts of the transaction documents. In his view the terms of the transaction documents were robustly negotiated by Mr Allan on behalf of Mr Kidd and himself and Mr Hutchison on behalf of Lime Rock, with each party being properly and independently represented.

[88] Rod Hutchison. At the time of the transaction, Mr Hutchison was an associate in LC's corporate team, working principally for Mr Laing and reliant upon him for advice and assistance. He denied having acted dishonestly or having participated in a conspiracy against Mr Kidd. He was aware that the instruction was coming to LC because of a conflict. He understood that Mr Gordon would only be involved in the early stages of the transaction for the sake of efficiency and to the mutual benefit of ITS and Lime Rock, including briefing LC on Lime Rock's usual requirements. He did as he was directed to do by Mr Laing; he did not take instructions from Mr Gordon. When he used phrases such as "for your approval/ comment" in correspondence, Mr Hutchison was being courteous to a more senior commercial lawyer. With hindsight he saw that the nature of Mr Gordon's involvement by February 2009 might have been greater than LC had envisaged when instructed, but he did not consider that Mr Gordon was providing legal advice to Lime Rock or conducting negotiations on their behalf. His role was a junior one and he did not give much thought to the role being played by Mr Gordon because everyone else seemed happy

with it and he understood that ITS had agreed to it. Most of the amendments made to the draft investment agreement were Mr Hutchison's and were not suggested to him by Mr Gordon.

(c) Other factual witnesses

[89] Jeff Corray. At the time when Mr Corray, on behalf of ITS, instructed P&W to act for them in the transaction with Lime Rock, he made it clear to Mr Allan that P&W could not also act for Lime Rock. Mr Allan assured him that they would not. Mr Corray was aware that Mr Gordon had done work for Lime Rock in the past. It did not cause him any concern that Mr Gordon was one of the P&W team for the transaction and that he would be leading or conducting the due diligence process. If Mr Gordon was speaking to Mr Ross, it was as ITS's lawyer. Mr Corray was aware that P&W, on behalf of ITS, were going to produce the first draft of the share purchase agreement using a Lime Rock house style, which would then be negotiated by both sides' lawyers. This did not cause him any concern. At no point did he have any suspicion that Mr Gordon or any other P&W solicitor was acting in a conflicted position. If he had suspected that, he would have spoken to Mr Kidd and Mr Milne, and the outcome would have been that P&W would no longer have been instructed by ITS. The terms of the email sent to him in advance of the all parties' documents meeting on 5 March 2009 would not have caused him any concern.

[90] Scott Milne. Mr Milne viewed his role in ITS as akin to an adviser and not a decision maker. When a decision required to be made he would go to Mr Corray who would go in turn to Mr Kidd for the decision. His role in connection with the Lime Rock transaction was to help with the organisation of the due diligence process. He knew that Mr Gordon usually acted for Lime Rock. He regarded it as a favourable opportunity to have someone involved

who had experience of advising Lime Rock. He knew that Mr Gordon was discussing Lime Rock standard styles with Mr Laing and Mr Smith before handing them over to Mr Allan who was advising ITS. Contemporaneous emails describing Mr Gordon's work as consisting of work done in relation to UK due diligence reports, work done on overseas reports, and document and consultancy support to LC accorded with his understanding of Mr Gordon's role, the last being a reference to Mr Gordon assisting with "streamlining" the process by sharing style documents with LC. An arrangement whereby Mr Gordon dealt with vendor due diligence and Mr Allan dealt with the formalisation of the terms of the deal caused him no concern. He had not been aware of Mr Gordon having a defined facilitative role; his day to day dealing with Mr Gordon was in relation to legal due diligence.
Mr Gordon would complete a questionnaire telling Mr Milne what he wanted, they would have a debate as to whether or not it was reasonable, and Mr Milne would then action it, sometimes by employing foreign lawyers.

[91] Scott Allan. Mr Allan was unaware of any conspiracy against Mr Kidd and did not participate in one. The lawyers did not negotiate the commercial terms of the deal between ITS and Lime Rock. He was not involved in the decision by ITS and Mr Kidd in January 2009 to agree heads of terms with Lime Rock. When he heard of the decision he told Mr Gordon that Lime Rock would have to be informed that P&W could not act for them in the transaction, as they were already acting for ITS. Mr Gordon accepted that and agreed to point Lime Rock in the direction of another firm of solicitors. At that time P&W were engaged under the 2008 letter of engagement as advisers to ITS and Mr Kidd and to negotiate transaction documents once heads of terms had been agreed. However it was quickly agreed that P&W would also carry out legal due diligence as a vendor due diligence exercise because they had assembled so much information on ITS in connection with the

aborted 3i deal, and had relationships with the foreign lawyers who would have to provide reports. Mr Gordon informed him that the parties had agreed among themselves that vendor due diligence would be expeditious; Mr Allan spoke to Mr Milne who confirmed this to be the case. Mr Gordon obtained a draft scope of the due diligence from Lime Rock and passed it to Mr Allan who in turn passed it to Mr Milne for approval. As matters progressed, Mr Gordon played an increasing role because of the extent of overseas diligence required, while Mr Allan focused on the transaction documentation. As regards Mr Gordon's "handover" role, the purpose was to use his knowledge to progress the transaction expeditiously. The process agreed with Messrs Corray and Milne was that after P&W had produced the first draft of the investment agreement and articles, Mr Gordon would confirm to LC whether certain revisions had or had not conventionally been accepted by Lime Rock in past transactions. Mr Gordon would then step out and LC, with this knowledge in mind, would negotiate to a conclusion on behalf of Lime Rock. The convention adopted throughout was that Messrs Corray and Milne acted with Mr Kidd's authority and that they would seek his instructions or report back to him as necessary. Unfortunately Mr Gordon's actions had gone beyond the envisaged role by giving certain small pieces of advice, and had created a conflict of interest. Mr Allan did not see the "unofficial counsel" email of 14 January 2009 at the time; he considered this language to be inappropriate and not in accordance with what was agreed. He did not however consider that Mr Gordon's role resulted in terms being agreed that were more favourable to Lime Rock; negotiations took place in the normal manner. At the all parties meeting on 3 March 2009, it was LC, with contributions from Mr Ross, and not Mr Gordon who went through the points that were not acceptable to or required further consideration by Lime Rock. When it later appeared that there were due diligence gaps that could not be resolved, Mr Gordon suggested filling these with warranties. Mr Allan's understanding was that Mr Gordon would seek Mr Milne's approval of these and then suggest them to LC for Lime Rock's consideration. If as the emails indicated Mr Gordon went first to Lime Rock, that was not the order in which it ought to have happened. In the end however the suggestions were broadly acceptable to all parties.

[92] Ken Gordon. Mr Gordon did not accept that he had acted in breach of fiduciary duty (notwithstanding the admission made in the P&W/BP action), but did accept that he had made admissions to the Scottish Solicitors' Discipline Tribunal in relation to two occasions where he felt he had acted in conflict of interest. He had not appreciated at the time that he was acting in conflict. His recollection was that the idea of his "facilitative role" came from Messrs Corray and Milne, who knew that he was attending meetings with Lime Rock and LC. He was not aware of it having been put directly to Mr Kidd for his approval, but his understanding was that all correspondence with Mr Kidd had to go through Messrs Corray and Milne. There was nothing in writing defining his role because there was pressure to get the deal done. The "unofficial counsel" email of 14 January 2009 was poorly drafted. It was an attempt to break the news gently to Mr Ross that P&W would not be acting for Lime Rock as they would have expected. It did not imply a covert role. The reference to Mr Laing "fronting" the investment side was sloppy language and not an indication of intention to deceive. LC performed their role as one would expect a firm of solicitors to perform. He denied being aware of conflict in his role and attempting to conceal it. His participation in September 2009 was with a view to finding a way through the gaps in due diligence in order to get the deal completed. He denied that conflicts had occurred because he was essentially representing the interests of Lime Rock. He denied procuring the assistance of LC to act as a front to pretend that the transaction was conducted at arm's length and in a proper

professional and commercial manner. He denied concealing this from Mr Allan by not copying him into emails. He accepted that because there were muddied boundaries as to what properly could or could not be done and who was doing what, there was a "guddle".

(d) Expert evidence

[93] Keith Anderson. In Mr Anderson's opinion, an ordinarily competent solicitor asked to become involved in conducting a transaction in the way proposed to LC and pursued by Mr Gordon and P&W would have declined to act in the way proposed. An ordinarily competent solicitor would have taken nothing to do with Mr Gordon acting as "unofficial" counsel to Lime Rock. Even if LC had been told by Mr Corray or Mr Milne that Mr Kidd was content for Mr Gordon to act in the manner he did, it would have been essential for them to request P&W to confirm in clear terms that Mr Gordon/P&W were acting with the full knowledge and express consent of Mr Kidd. They should have recognised that what they were doing did not comply with professional standards and the terms of the solicitors' practice rules. An ordinarily competent solicitor would not have regarded this as simply an issue for Mr Gordon/P&W.

[94] Iain Young. Mr Young did not profess to be an expert in conflict of interest. His report did not address the conduct of any of the defenders in this regard.

[95] David Rennie. In Mr Rennie's view the actions of Mr Laing and Mr Hutchison were the implementation of their instructions from Lime Rock; that what they saw Mr Gordon doing was consistent with their belief that he was implementing the instructions he had from Lime Rock; and that what they saw Mr Allan doing was consistent with him representing the interests of Mr Kidd/ITS. There was nothing in the actions of Mr Allan or Mr Gordon which should have resulted in Mr Laing or Mr Hutchinson suspecting that

either was acting dishonestly. In relation to Lime Rock, the terms of the transaction were not materially more disadvantageous to Mr Kidd than would ordinarily be expected in a private equity transaction of similar type and size, and there was no reason why Mr Laing or Mr Hutchinson should have suspected that Lime Rock were acting dishonestly.

(ii) Fraudulent concealment from Mr Kidd

(a) The pursuer

[96] Mr Kidd readily acknowledged that he relied on lawyers and accountants to deal with documentation in detail. He would approve the key points in a deal (usually the price) and then leave it to his managers and advisers to implement it. He preferred to leave it to his senior executives to deal with professional advisers. He very seldom used his computer at home and only occasionally read emails. He knew that Mr Corray had instructed P&W to act for ITS and for himself in the Lime Rock transaction and regarded it as normal for them to be so instructed as they were ITS's lawyers. Messrs Corray and Milne were not authorised to agree the terms on which he would sell his shares or to make major decisions affecting him or ITS. He did not speak to anyone at P&W about their terms of engagement; he did not believe that he had received their 2008 letter of engagement and was sure that he did not receive their 2009 letter of engagement. It would not have bothered him to discover at the time of the transaction that Mr Gordon had told Lime Rock how much stamp duty they would have to pay on the shares they were acquiring. It would however have concerned him if he had been told that Mr Gordon had strayed beyond due diligence and given advice to Lime Rock. When after some months of discussion, Lime Rock agreed to pay him cash out of $10 million, his understanding of the deal was as follows: he would receive $55 million for around one third of his ITS shares; he would keep $10 million and

reinvest the remaining $45 million in ITS to increase growth. He would retain control of ITS, and after three to five years of strong growth and reinvested profit, ITS would be sold and he would have a full exit with *inter alia* a return of the $45 million. He was willing to accept those terms and authorised Mr Corray to proceed with the deal. No-one went over the contract details with him. Mr Corray did not explain the deal as it ended up to him. When it came to signing the agreements, he was in Cyprus and was presented only with the signing pages. It had since been explained to him that the $45 million was preferential debt owed to Lime Rock, entitling them to 10% interest per annum which would be compounded if not paid out, and with a preference on liquidation entitling them to $45 million before any sum fell due to be paid to him. He was shocked when he discovered the true position. Had it been explained to him he would not have done the deal. He denied having had a meeting with Messrs Corray, Milne and Beveridge at which he agreed to the 10% yield. He denied having previously seen an email to him from Mr Corray on 16 July 2009 forwarding a chain of email correspondence with Mr Reynolds in which reference was made to $45 million going directly from Lime Rock into ITS. He did not remember seeing a term sheet for the deal; in any event he would not have had enough time to look at it. He did not find out about the actions of Lime Rock, LC and P&W until after P&W provided Inventory Z in October 2016. If he had found out before the Lime Rock deal had been concluded he would have called it off and sacked P&W.

(b) Lime Rock witnesses

[97] Lawrence Ross. Initially Mr Ross had no direct contact with Mr Kidd, although they met on one occasion along with Mr Corray to confirm that their respective exit objectives were in alignment. Negotiations on the terms of the deal were conducted between himself

and Mr Corray. He was aware however that Mr Corray was checking with Mr Kidd at every step, even when Mr Corray was empowered to make a decision without discussing it first.

[98] Jason Smith. Mr Smith operated on the basis that Mr Gordon knew his role and trusted him to discharge his obligations and keep to his role. At no point was there an intention to use Mr Gordon or P&W to gain a tactical advantage over ITS or Mr Kidd. The deal agreed between Lime Rock and ITS, as reflected in the various indicative proposals, was agreed by the parties. On the Lime Rock side this was Lawrence Ross with John Reynolds having some input at the end. On the ITS and Bob Kidd side it was as negotiated by Jeff Corray and Scott Milne. No solicitor was involved in agreement of any of the commercial terms.

(c) LC witnesses

[99] Malcolm Laing. It was put to Mr Laing that he knew at the material time that Mr Gordon was acting in conflict of interest and that by failing to ensure, through Mr Allan or otherwise, that Mr Kidd knew of that conflict, he was dishonest about it and actively concealing something that Mr Kidd had a right to know. Mr Laing denied that. He considered that to the extent that there was a conflict of interest, that was a P&W problem. He did not believe that there had been any concealment at all.

[100] Rod Hutchison. Mr Hutchison's understanding was that Mr Gordon's role had been consented to by all parties. At no time did he think that there was any collusion or attempt to facilitate wrongdoing.

(d) Other factual witnesses

[101] Jeff Corray. Mr Kidd was not directly involved in negotiating the terms of the Lime Rock deal, but every proposal received from Lime Rock or any other interested party was sent to and discussed with him. He was copied into emails and Mr Corray spoke to him daily or almost daily by phone, by email or in person. Mr Corray sought his instructions on the deal as a whole and on the key commercial terms in particular. If terms were not agreeable to Mr Kidd, he said so. It was always in Mr Corray's mind that it was not his company to sell. He refused to sign documents on behalf of Mr Kidd. He thought that Mr Kidd had understood what was explained to him. Before the Lime Rock deal was signed, Mr Milne and Simmons prepared a model and they and Mr Corray went through it with Mr Kidd at a meeting in London. Liquidation preference (the "waterfall" of entitlements) and cumulative dividends were explained directly to him. He did not tell Mr Kidd that he would receive $55 million and lend $45 million back to ITS. After completion of the transaction Mr Kidd did not raise any issue about having only received $10 million. Mr Corray did not consider that he was negotiating a deal that required Mr Kidd to do anything out of the norm for private equity.

[102] Scott Milne. Mr Milne did not know Mr Kidd well enough to have separate conversations with him. The protocol was that communication was between Mr Kidd and Mr Corray. As the Lime Rock proposal evolved, Mr Milne considered that it was as good as ITS was going to get, and that they were driving a hard bargain with Lime Rock. He recalled the meeting in London when they met Mr Kidd to discuss the details. He believed at the time of the deal that Mr Kidd understood the basic structure. He never had the impression that Mr Kidd understood the deal to be that he would receive $55 million and then lend $45 million back to ITS. He had no cause to think that Mr Kidd did not

understand the deal. He regarded Mr Corray as an excellent communicator and he could not think of anything else that they could have done to explain it. The only unusual feature of the deal was the length of time it took to reach a conclusion, during which there were significant changes in market conditions.

Decision on conspiracy, fraudulent concealment and dishonest assistance

Conspiracy

[103] The first matter that the pursuer must prove is that there was an express or tacit agreement or conspiracy between or among the defenders, one of whose purposes was to cause injury to Mr Kidd. I begin by noting that the only parties to the alleged agreement are Messrs Gordon, Ross, Smith, Laing and Hutchison. It is not suggested that the parties to the agreement included any of Mr Allan, Mr Corray, Mr Milne or Mr Beveridge. Nor is it submitted that there was an express agreement. The pursuer submits that an inference of conspiracy to injure Mr Kidd is to be inferred from the terms of Mr Gordon's email correspondence set out above; the agreement of all concerned that Mr Gordon be involved throughout the transaction and not merely in relation to due diligence; Mr Gordon's promotion of Lime Rock's interest in drafting and communication of confidential information; a falsely asserted premise for Mr Gordon's role when other Lime Rock personnel could have provided LC with styles and instructions; Mr Gordon's continued communications with Mr Ross; and LC's deference to Mr Gordon in drafting the deal documents.

[104] It is necessary to look behind the words used by Mr Gordon in his emails and to focus on what he actually did that has been subjected to criticism:

- The role that he initially undertook, with the consent and encouragement of, at least, Mr Milne, and the awareness of Lime Rock, LC and P&W, created a conflict of interest as soon as he did anything more than initial provision to Mr Allan of Lime Rock documentation and information regarding Lime Rock's standard requirements in relation to due diligence. From that point forward, responsibility for considering and responding to Mr Allan's draft documentation rested upon LC, on the basis of instructions and information provided by Lime Rock personnel such as Mr Ross and Mr Agarwal. Mr Gordon's continuing input created an actual conflict between the interests of the two negotiating parties. (Whether that conflict resulted in injury to ITS or Mr Kidd is a different matter to which I return below.) His assumption of responsibility for legal due diligence created a further source of confusion: as I have noted, some of those involved (Mr Smith and Mr Allan) thought he was carrying out vendor due diligence on behalf of ITS, whereas others (Mr Ross and Mr Laing) understood him to be acting on behalf of Lime Rock.
- From time to time Mr Gordon communicated with Mr Ross in terms which were inappropriate for a solicitor whose firm was engaged by the other party to a transaction. In particular, his email of 9 April 2009 quoted at paragraph 37 above could be read as providing Lime Rock with confidential information that ITS had not ruled out a deal with them and that there was no competing potential purchaser. On 29 July 2009 he offered to delay contacting Mr Corray about resurrecting due diligence, seemingly to avoid prejudicing Mr Ross's negotiating stance as the parties approached agreement. Those remarks ought not to have been made.
- As the deal whose commercial terms had been agreed on 29 July 2009 neared completion, Mr Gordon re-emerged to assist with the drafting of warranties by ITS to

cover gaps in due diligence in order to bring the transaction to completion. No matter how well-intentioned this may have been, it was clearly a conflict of interest for Mr Gordon to have any input at this late stage into any position to be taken by Lime Rock in relation to the nature or adequacy of warranties offered by ITS.

- On two specific occasions, Mr Gordon provided advice to Lime Rock: once on 5 May 2009 when he provided advice about the need for certain warranties and covenants in relation to US law, and once on 25 September 2009 when he provided advice regarding the (non)availability of stamp duty exemption.

[105] Although I am satisfied that the concession made by P&W/BP in the previous action and by the defenders in this action that Mr Gordon acted in breach of his fiduciary duty to ITS and to Mr Kidd was correctly made, I am equally satisfied that he did not do so with a view to damaging the interests of either of them by enabling Lime Rock to gain an unfair commercial advantage in the negotiation of the deal. By 2009 he was accustomed to receiving instructions from Lime Rock in share purchase/investment transactions. He held their style documents and knew more about their commercial practices than any other Scottish solicitor. When confronted with an unwelcome situation in which his firm had accepted instructions to act for the other party to a transaction with Lime Rock, his reaction was to attempt to find a way to be useful to his most important client, as a means of sugaring the pill and (despite his denial that this was a concern) reducing the risk that they would take future business elsewhere. As he acknowledged in cross-examination, he expected to get a hard time from Lime Rock, and in attempting to find a solution that would keep them happy, he closed his mind to what he saw as merely a potential issue of conflict. He was of course entirely wrong so to view it, and his failure to adhere to the standards reasonably to be expected of a solicitor was reprehensible. But it would be wrong to draw

an inference that he acted dishonestly. Having regard to the contemporaneous documentation and to his oral evidence, I find that he saw his role as acting for the shared benefit of both parties, by using his familiarity with Lime Rock's documents and preferences to save them both time and money, without any conscious thought of favouring Lime Rock over ITS in that process. As a partner in the firm instructed by one of the parties, it was not open to him to take on such a role, but it is important to observe that he did so without any concealment or deception. His intentions were set out in his email of 15 January 2009 to Mark Jenkins of the Al Shoaibi Group, reiterated in the 19 January meeting note, and reflected, at least in relation to due diligence, in the letters of engagement of P&W and LC respectively.

[106] Mr Gordon is not a defender in this action, but his intentions are relevant because he is one of the alleged co-conspirators. If as I have found Mr Gordon did not act with the intention of unlawfully causing damage to Mr Kidd, it becomes much less likely that any of the other alleged conspirators did so. Each in his evidence to the court denied that they did so, and I am entirely satisfied that I should accept the evidence of each of them that they did not. I find the following support for this conclusion.

[107] Firstly, neither P&W (including Mr Gordon) nor LC were directly participant in the negotiation of the principal terms of the deal between Lime Rock and Mr Kidd. The first indicative offer that found favour with ITS and (I infer from the fact that it was emailed to and discussed with him) Mr Kidd, dated 12 January 2009, pre-dated the instruction of P&W or LC in connection with Lime Rock. Thereafter, the negotiation was conducted by Mr Ross, with the assistance of Mr Smith, and Mr Reynolds on behalf of Lime Rock and by Messrs Corray, Milne and Beveridge on behalf of Mr Kidd and ITS. It is worth emphasising that the terms so negotiated included the features of the deal which Mr Kidd, in his evidence

to the court in this case and in his pleadings in the P&W/BP action claimed not to have knowingly agreed to: the fact that the $45 million was an investment by Lime Rock with preferential rights and not a loan by himself, the annual 10% compoundable interest on the Lime Rock investment, the liquidation preference, and the entitlement of Lime Rock to appoint two board members. On each side the individuals responsible for negotiation required to and did obtain authorisation to conclude the deal: on the Lime Rock side Mr Ross required the approval of the investment committee of the Lime Rock V fund, and on the ITS side Messrs Corray, Milne and Beveridge required the approval of Mr Kidd. There is ample evidence in the contemporaneous documentation and in these witnesses' oral testimony of such approvals having been sought and obtained at every stage of the protracted negotiation process, including the deal finally agreed in July 2009. As is apparent from the chronology narrated above, those discussions were carried out without substantive involvement of any of the solicitors, who were simply kept informed of progress from time to time. So far as Mr Ross and Mr Smith are concerned, there was no evidence that at any stage of the process either of them made improper use of any input provided by Mr Gordon in order to secure a better deal for Lime Rock than could otherwise have been obtained. There is in particular no evidence that any of the inappropriate remarks made by Mr Gordon to Mr Ross, or any advice provided by Mr Gordon to Lime Rock in relation to warranties or stamp duty, had any effect or influence on the terms agreed between the parties.

[108] Secondly, each of the named individual defenders gave a plausible and, in my view credible, explanation from his own perspective of why he had not considered that Mr Gordon's actings amounted to wrongdoing. With the benefit of hindsight it can be seen that each of them was wrong about that, but for differing reasons. Mr Ross understood that

Mr Gordon was acting for Lime Rock in relation to legal due diligence and that any issues of potential conflict had been sorted out between the lawyers. Mr Smith understood that Mr Gordon was acting for ITS in carrying out vendor due diligence. Mr Laing understood that Mr Gordon was carrying out due diligence on behalf of Lime Rock and erroneously considered that the conflict could be managed by agreement with the clients' consent which had been given. Mr Hutchison took his lead from Mr Laing and understood that Mr Gordon's role had been agreed by the clients. As regards due diligence, the view of Messrs Ross and Laing that Mr Gordon was acting for Lime Rock was supported by the terms of the letters of engagement issued to Lime Rock by P&W and LC respectively. As regards Mr Gordon's "facilitative" role beyond the carrying out of vendor due diligence, the confusion among the various individual defenders was the consequence of Mr Gordon's failure to define the scope of his involvement or to remain within the initially intended scope as the transaction proceeded. It amounts to a complete answer to the concerns expressed by Mr Anderson, and raises no inference of unlawful means conspiracy on the part of any of those individuals.

[109] Thirdly, when one turns to consider the detailed terms of the investment agreement and sale and purchase agreement negotiated by the solicitors, I am not persuaded that the terms negotiated between P&W on behalf of ITS and Mr Kidd, and LC on behalf of Lime Rock departed in any material respect from those which might reasonably be expected to have been negotiated in a private equity transaction of this nature taking place in or around September 2009. This was a matter on which, at least initially, there was disagreement within the expert evidence given by Mr Anderson and Mr Young. In his principal report, Mr Anderson identified lists of provisions of the articles of association and the investment agreement that were disadvantageous to the pursuer. He acknowledged that he was not

suggesting that Mr Kidd would, if properly represented, have achieved a re-negotiated version of all of these. Some of them, such as the liquidation preference and Mr Kidd's inability to influence whether the preference dividend was paid, were features of the heads of terms negotiated by the principals, and I find no reason to conclude that any solicitor would have been likely to succeed in re-opening these hard-fought conditions. One particular provision of the articles (10.1.3), concerning the requirement for Mr Kidd to subscribe for a proportionate share of any new issue if he wished to take up that offer, was discussed in detail in cross-examination. My conclusion from that discussion was that reading the articles as a whole, Mr Kidd retained control of any decision to allot new shares, albeit that his hand could be forced if the company's financial need was urgent, and that there was nothing untoward in the provision itself. In his second supplementary report, Mr Anderson conceded that the documentation entered into reflected a typical private equity investment structure. That was the view of Mr Young, with whom Mr Rennie concurred. I see no reason to reject that view. In the end Mr Anderson's concern appeared to relate less to the terms of the documentation than to whether they were explained to and understood by Mr Kidd.

[110] In his submissions at the close of the proof, senior counsel for Mr Kidd did not found on any particular provision of the investment agreement, sale and purchase agreement or articles negotiated between P&W and LC which was said to have been prejudicial to Mr Kidd's or to ITS's interests and which would have been successfully negotiated away by a solicitor acting properly to protect those interests. Senior counsel's position, as I understood it, was rather that it did not matter whether or not the deal was on standard commercial terms; what mattered was the tainted manner in which it was arrived at. It would be a somewhat unusual unlawful means conspiracy where the common intention of

the conspirators was to induce a person to enter into an agreement on commercial terms negotiated on his behalf by highly experienced financial advisers who were not part of the conspiracy. That however appears to be what remains if no weight is attached in the argument to the terms of any of the documentation in whose drafting Mr Gordon participated to any extent. Messrs Milne, Corray and Beveridge were all of the view that the deal was a fair one for both Mr Kidd and ITS. I regard this as a further indication that there was no such conspiracy.

[111] For these reasons, the pursuer's case falls at the first hurdle. When examined in context, the evidence founded upon by the pursuer does not begin to support an inference of express or tacit agreement to cause injury to Mr Kidd to which any of the named defenders was a party. The first requirement of unlawful means conspiracy has not been proved.

Fraudulent concealment

[112] The second essential element of unlawful means conspiracy is the use of unlawful means. As already noted the unlawful means alleged by Mr Kidd is fraud: specifically, the intentional concealment from him of Mr Gordon's actings in conflict of interest.

[113] The obvious difficulty with this contention is that far from demonstrating concealment, the contemporaneous evidence suggests that Mr Gordon was entirely open with everyone concerned in the transaction about what he intended to do. It was submitted on behalf of the pursuer that this very openness was demonstrative of the willingness of the co-conspirators, such as Mr Ross to whom the "unofficial counsel" email was sent, to play along in maintaining the deception. That submission would carry greater force were it not for the fact that Mr Gordon was equally open about his intentions with others, including Mr Milne and Mr Allan, who were not parties to the alleged deception. In his evidence to

the court Mr Gordon went so far as to suggest that his role had been proposed by Messrs Corray and Milne. That suggestion was not put to either Mr Corray or Mr Milne and I make no finding to that effect, but I am satisfied that Mr Milne at least knew and approved of what Mr Gordon was doing, both in relation to due diligence and in relation to the "handover" of Lime Rock style documentation for use by Mr Allan in negotiations with LC. I have already mentioned, *inter alia*:

- The preamble to the note of the meeting on 19 January 2009 attended by, among others, Mr Milne, Mr Allan and Ms Simpson, referring to Mr Gordon being "involved throughout";
- Mr Gordon's email of 21 January to Mr Allan, attaching a note of a meeting with Lime Rock on how they wished to handle foreign legal due diligence, which was forwarded by Mr Allan to Mr Milne for agreement;
- Mr Allan's email of 26 January to Mr Milne referring to having "agreed with Malcolm/Ken" about use of Lime Rock house styles as a starting point for the sale and investment documents, in order to "streamline the process";
- Mr Allan's email of 23 February to Mr Gordon and Mr Laing, advising them that he expected to issue draft documents in a couple of days and suggesting an all parties meeting;

[114] It is readily apparent from these documents that far from being concealed from Mr Kidd, Mr Gordon's activities were fully disclosed to Mr Kidd's advisers Mr Milne and Mr Allan and, indeed, met with their approval. As regards Mr Corray, although he has no recollection now of the role adopted by Mr Gordon, he too was a recipient of emails, such as Mr Allan's email of 25 February, which made reference to it and which he accepts would have caused him no concern. Mr Kidd himself had very little direct contact with Mr Ross

and none with either Mr Smith or LC. His meeting with Mr Ross was a high level one which had nothing to do with the role being undertaken by Mr Gordon. Having regard to Mr Ross's subjective understanding of Mr Gordon's role, I find that there is no evidence of deception of Mr Kidd by him, whether by representation or concealment. Nor is there any evidence of deception by Mr Smith, a junior member of Mr Ross's team whose communications with Mr Milne were at a technical level. The due diligence exercise and the drafting of the transaction documentation were matters with which Mr Kidd did not concern himself, relying instead on his executives and lawyers to get on with them unless something arose that required his instructions. The Lime Rock and LC personnel were entitled to proceed on the basis that whatever was known by Mr Milne, Mr Corray and/or Mr Allan would, so far as they saw fit, be brought to the attention of Mr Kidd.

[115] Having regard to all of these circumstances I find that there was no intentional – that is, fraudulent – concealment from Mr Kidd by any of the defenders of those actings of Mr Gordon which constituted breach of fiduciary duty. Put shortly, there was no fraud and therefore no use of unlawful means. For that reason too the pursuer's case fails.

[116] I reach these conclusions without having to make any finding as to Mr Kidd's contemporaneous understanding of the deal with Lime Rock. His case, as ultimately presented, did not depend upon him having been misinformed about the terms which he subsequently claimed not to have understood; his case depended solely upon fraudulent concealment of Mr Gordon's activities. For the sake of completeness, however, I am satisfied that the core terms of the deal, including the fact that the $45 million was a capital investment by Lime Rock and not a loan by Mr Kidd, the 10% compoundable interest on the "A" shares, the minority participation of Lime Rock nominees on the ITS board, and the "waterfall" entitlements of Lime Rock and Mr Kidd in the event of a liquidation, were

explained to Mr Kidd on more than one occasion by Messrs Corray, Milne and Beveridge. I share the evident perplexity of those witnesses that Mr Kidd, a very experienced businessman, could have misunderstood the deal in the ways that he now says he did. I accept that Mr Kidd genuinely believes that he did not understand the deal at the time, but it is unnecessary to my decision for me to make any finding as to whether or not that belief is correct.

[117] I also reach my conclusions without needing to have regard to the inherent improbability, for differing reasons, that either Lime Rock and their representatives or the partners of LC would participate in a fraud to induce Mr Kidd to enter into a deal, but my conclusions are thereby reinforced. The consequence of the deal for Lime Rock was to enter into a close business relationship with Mr Kidd and the executives of ITS with a view to maximisation of future profit. Such a relationship required a high degree of mutual trust and co-operation, and it is extremely unlikely that an experienced private equity executive such as Mr Ross would regard it as appropriate to lead his fund into a deal founded upon fraudulent concealment. It is equally unlikely that respected solicitors in a reputable firm would put their careers and their firm's reputation at risk for the purpose of earning a professional fee. As Ungoed-Thomas J observed in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451 at 455 (quoted by Lord Nicholls of Birkenhead in *In re H and Others (Minors)* [1996] AC 563 at 586): "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it." The allegation in the present case is a very serious one. The evidence does not, in my opinion, come close to raising the inferences necessary to overcome the unlikelihood of what has been alleged.

Dishonest assistance

[118] Mr Kidd contends that LC were knowing participants in a fraud. I have rejected that contention. He submits in the alternative that they incurred accessory liability by providing dishonest assistance with a fraud perpetrated by Messrs Gordon and Ross. Reference was made to "blind eye" knowledge that a fiduciary is acting in breach of his duties being sufficient. It follows from my rejection of Mr Kidd's primary argument that the alternative argument based on dishonest assistance must also be rejected. For the reasons already given, there was no fraud to assist or turn a blind eye to, no dishonesty on the part of the LC defenders, and no common design to injure Mr Kidd.

Loss and causation

Introduction

[119] The remainder of this opinion proceeds upon the basis that I am wrong in my conclusions that there was no conspiracy, no use of unlawful means, and no dishonest assistance. In other words it proceeds upon the hypothesis that Mr Kidd was induced by fraudulent conspiracy to enter into the transaction with Lime Rock. On loss and causation, Mr Kidd's submission was that if he had known that Lime Rock were dishonestly using ITS's lawyers behind his back, he would not have entered into the deal. The measure of damages was the loss flowing directly from his reliance on the concealment of the true position, so as to put him in the same position as if he had not been defrauded. That required a comparison between the value of his shareholding immediately prior to completion of the transaction and its value immediately after. In valuing his shareholding immediately after the transaction it was appropriate to take into account that he would have had to disclose to any prospective purchaser that the other significant shareholder in the

business was dishonest. For that reason his shareholding had been rendered worthless or at least fell to be valued at a very substantial discount.

[120] The defenders take issue with this analysis on a number of grounds, which may be summarised as follows:

- The pursuer's approach to causation is flawed because it assumes the wrong counterfactual: the correct approach is to assume not discovery of wrongdoing but absence of wrongdoing. On that basis, no loss has occurred.
- *Esto* the pursuer's approach to causation is correct, his approach to quantification of loss is incorrect because the loss should be assessed with the benefit of hindsight and not at the date of the breach. On that basis, there is no causal link between any loss ultimately sustained by the pursuer and the defenders' alleged wrongdoing.
- *Esto* the loss falls to be assessed at the date of the breach, the pursuer has failed, on the basis of the facts and the expert evidence, to demonstrate that he sustained any loss as a consequence of entering into the transaction with Lime Rock;
- *Esto* the loss falls to be assessed at the date of the breach, and the defenders' fraudulent concealment falls to be taken into account in assessing the post-transaction value of the pursuer's shares, any loss is speculative and would, in any event, be reflective loss which would be recoverable only by ITS and not by Mr Kidd *qua* shareholder;

I address each of these arguments in turn.

Causation: the counterfactual

[121] In his action against P&W/BP, Mr Kidd stated his case on causation in a similar way to the present case, averring that if P&W had disclosed to him its improper actings on behalf

of Lime Rock, he would not have proceeded with the transaction and would have terminated negotiations because he would have considered Lime Rock to be persons with whom he did not wish to be in business. I held (2018 SC 193 at paragraph 47-48), under reference to various authorities including *Target Holdings* v *Redferns* [1996] AC 421, that the analysis was flawed and that the relevant question for determination was what would have occurred if P&W had avoided committing a breach of fiduciary duty by timeous disclosure of the conflict.

[122] In the present case it was submitted on behalf of the pursuer that the recent decision of the Judicial Committee of the Privy Council in *Primeo Fund* v *Bank of Bermuda (Cayman) Ltd* [2023] 3 WLR 1007 demonstrated that my decision on this point in the P&W/BP case had been wrong. In *Primeo*, the claimant sued for losses sustained in a multi-billion dollar Ponzi scheme operated by a company ("BLMIS") controlled by the fraudulent financier Bernie Madoff. One of the issues for determination by the Board was whether Primeo had suffered any recoverable loss. The defendants contended in one branch of their argument that even if BLMIS had fulfilled its duty and had held Primeo's cash in safe keeping, BLMIS would still have run up the same losses operating its fraudulent Ponzi scheme using other customers' cash; Primeo would still only have had an unsecured right to its cash; and so would have suffered the same loss on the collapse of the Ponzi scheme as it did in fact suffer. Therefore, it was maintained, the breach of duty caused Primeo no loss. The Board rejected that argument, stating (paragraph 63):

> "In the Board's view, this submission cannot be sustained. For the reasons given above, *the relevant counterfactual 'but for' analysis involves asking what would have been the position if BLMIS did not carry on the Ponzi scheme at all…* BLMIS's duty of safekeeping of Primeo's cash included not misappropriating it for the Ponzi scheme and not exposing it to loss through including it in the assets at risk from the conduct of the Ponzi scheme. Therefore, to comply with its duty of safekeeping, BLMIS

> should itself immediately upon receiving cash from Primeo have returned it to Primeo (or, what comes to the same thing, put it in trust for Primeo)…."
>
> (Emphasis added.)

[123] It was submitted on behalf of the defenders that my decision in the P&W/BP case was consistent with the Board's analysis, although their analyses of its application to the present case were slightly different. On behalf of Lime Rock, senior counsel submitted that the counterfactual assumed that Mr Gordon had made the proposal that he did make, but that Lime Rock had declined to accede to it or to the instruction of LC on the basis proposed. Even if this had caused Mr Kidd to distrust P&W and seek alternative representation, it would have given him no cause to distrust Lime Rock, and the transaction would have proceeded with or without the instruction of P&W and/or LC. On behalf of LC, the Dean of Faculty submitted that the position of Mr Gordon could be equated with that of BLMIS in *Primeo*: a joint wrongdoer not sued. The counterfactual assumed that the transaction proceeded with no wrongdoing: ie Mr Gordon played no role at all, and the transaction proceeded with Mr Allan representing Mr Kidd and ITS, and LC or someone else representing Lime Rock.

[124] It appears to me that my reasoning in the P&W/BP case accords with the Judicial Committee's analysis, which affirmed that the correct counterfactual "but for" analysis requires one to ask what would have happened if the wrongdoing had not taken place. Of the two analyses proffered for application to the present case, I consider that the Dean of Faculty's analysis adheres more closely to what was said in *Primeo.* The difference is, however, of no importance, because both analyses lead to the same submission: that no recoverable loss was sustained by Mr Kidd because on the relevant "but for" analysis the transaction would have proceeded exactly as it did. If so, the alleged wrongdoing cannot be

said to have been a material cause of any loss ultimately sustained by Mr Kidd (cf *Zurich Insurance Co plc* v *Hayward* [2017] AC 142). The question is whether that conclusion is justified by the evidence.

[125] In my opinion there is ample reason to conclude that in the absence of any wrongdoing by any of the defenders, the outcome as regards the parties concluding a deal, the terms of the deal, and all subsequent events would have been the same in all material respects as in fact occurred. The context of the Lime Rock transaction was that in 2008-2009 the individuals in charge of ITS, Mr Kidd and Mr Corray, were keen to attract equity investment in order to grow earnings and to enhance the value of the company with a view to Mr Kidd's eventual exit. They wished to continue to expand the company's international operations but were reaching the limit for funding by bank borrowing. Private equity finance was seen as the most practicable source of growth funding. By the end of 2008, Lime Rock were the only interested investor, and that remained the case until the deal was concluded, except for a short-lived revival of interest by TA Associates, whose new indicative offer was not more favourable than that of Lime Rock. During the first half of 2009 Mr Corray, under instructions throughout from Mr Kidd, negotiated hard for a deal that gave Mr Kidd the cash out that he wanted while retaining control of ITS. As already noted, the lawyers played no part on either side in those negotiations. By the summer of 2009, ITS was beginning to fail to meet its EBITDA forecasts. In an email dated 25 August 2009 (entitled "Indebtedness – musings from Dr Doom") to Mr Corray, copied to Mr Kidd, Mr Milne warned that unless ITS received either funding from Lime Rock or payment of the Reliance debt by September, bank covenants were likely to be breached. According to Mr Corray, there was an urgent need for cash. It was not suggested that without the Lime Rock investment the banks would not have continued to support ITS (and it was the view of

Mr Mackie, ITS's financial controller, that Mr Milne's warning was unduly pessimistic), but in the prevailing economic climate the banks were adopting a more rigorous attitude to acceptable levels of indebtedness. There was pressure on the lawyers to get the due diligence/warranties process wrapped up so that the Lime Rock deal could complete. The final terms of the investment agreement, share purchase agreement and articles accorded with what would reasonably be expected for a private equity investment. Mr Kidd's advisers were strongly of the view that it was favourable to ITS to enter into the Lime Rock transaction. Mr Kidd himself expressed no reservations about the deal at the time; those came later after his relationship with Lime Rock had soured. In all of these circumstances I find no reason to find that matters would have proceeded differently if Mr Gordon's proposal to "facilitate" the transaction had either been rejected by Lime Rock or had never been made at all. The transaction would have proceeded as it did without his participation. The pursuer's case on causation accordingly fails on the facts.

Assessment of loss

[126] I turn next to consider the assessment of loss on the hypotheses (i) that unlawful means conspiracy has been established and (ii) that, contrary to the foregoing analysis, the pursuer is correct that the appropriate counterfactual is discovery of the fraudulent concealment of Mr Gordon's activities. On that basis the pursuer contends that the measure of Mr Kidd's loss is the difference between the value of his shareholding immediately prior to completion and the value immediately after. It was submitted that this approach was supported by the decision of the House of Lords in *Smith New Court Securities Ltd* v *Citibank NA* [1997] AC 254, in which Lord Browne-Wilkinson observed (page 266):

> "…In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, freed from any continuing adverse impact of the defendant's wrongful act…"

Lord Browne-Wilkinson noted that one advantage of the "transaction date" rule is that it avoids difficult questions of causation which arise if the asset is valued at a later date. However, he continued:

> "…But in cases where property has been acquired in reliance on a fraudulent misrepresentation there are likely to be many cases where the general rule has to be departed from in order to give adequate compensation for the wrong done to the plaintiff, in particular where the fraud continues to influence the conduct of the plaintiff after the transaction is complete or where the result of the transaction induced by fraud is to lock the plaintiff into continuing to hold the asset acquired."

In that case it was held that the correct measure of damages was the difference between the fraudulently induced purchase price and the actual price obtained on re-sale, even though the latter was adversely affected by the effect of a second and separate fraud which, unknown to any of the parties, had been perpetrated prior to the purchase. Read as a whole, it seems to me that the decision amounts to disapproval of what was said to be a "strict and inflexible rule" that damages fall to be assessed as at the date when the wrong was committed.

[127] On behalf of the defenders it was emphasised that the purpose of an award of damages is to put the pursuer in the position he would have been in if the wrong had not occurred (*Livingstone* v *Rawyards Coal Co* (1880) 5 App Cas 25, Lord Blackburn at 39; *Smith New Court Securities Ltd* v *Citibank NA* above, Lord Steyn at 282): in the present case, to compensate Mr Kidd for loss suffered as a result of entering into the transaction with Lime Rock. I was invited to adopt the same approach as in *Crimond Estates Ltd* v *Mile End*

Developments Ltd [2021] CSOH 26, and apply what is sometimes referred to as the *Bwllfa* principle derived from the case of *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd* v *Pontypridd Waterworks Co* [1903] AC 426, and enunciated by Lord Bingham (dissenting) in *Golden Strait Corpn* v *Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 as being that:

> "…(W)here the court making an assessment of damages has knowledge of what actually happened it need not speculate about what might have happened but should base itself on the known facts. In non-judicial discourse the point has been made that you need not gaze into the crystal ball when you can read the book."

Delivering one of the majority judgments in *The Golden Victory*, Lord Brown of Eaton-under-Heywood observed at paragraph 78:

> "Must the judge really shut his eyes to the known facts and speculate how matters might have looked at some earlier date? Again, not without compelling reason and none appears to me. Lord Bingham, at para 12, and Lord Carswell, at para 65, have already explained the '*Bwllfa* principle'… There is no need to repeat it. Suffice it to say that I see no good reason to depart from it here."

[128] None of these cases concerned a claim for damages for loss caused by fraudulent conduct. *Bwlffa* was concerned with statutory compensation for not working a coal mine; *The Golden Victory* and *Crimond Estates* were concerned with damages for breach of contract. That does not, in my view, distinguish them from the present case. All are concerned with application of the compensation principle which applies with equal force to damages for fraudulent concealment, the only difference being that the latter is not restricted by foreseeability. The principle is of general application. Another example is provided by *Haberstich* v *McCormick & Nicholson* 1975 SC 1, which concerned loss on the resale of a house with a defective title. Although the defect could have been cured at less expense during the period of the pursuers' ownership, the court held that the actual loss sustained on resale was the correct measure of damages. Lord Cameron observed (page 13):

> "…If …a claim of damages for breach of contract by solicitors, the breach being found as a failure to secure a valid and marketable title as contracted for, has to be assessed, it appears to me that the best proof of actual loss—if any—may well be found in evidence of what occurred when the subjects so acquired were in fact sold. Let the matter be put the other way: if it could be shown that in point of fact the particular subjects were sold for a full price, the defect in title being acknowledged but ignored, could it be said that in such circumstances the original purchaser could complain of actual loss when in fact he had sustained none? This would be in such an event a clear case of *injuria sine damno*…"

The same point was made in a more general way by Nourse LJ in *Kennedy* v *Van Emden* [1996] PNLR 409, where the *Bwlffa* principle was applied in an action for damages for professional negligence, at page 414:

> "…(D)amages are to be assessed in the real world. Compensation is a reward for real, not hypothetical, loss. It is not to be made an occasion for recovery in respect of a loss which might have been, but has not been, suffered."

These observations have obvious resonance in the present case where the alleged wrongdoing did not come to light until after the company had gone into administration and had been sold without any awareness of or reference to it.

[129] It follows, in my opinion, that in carrying out the exercise of assessing the loss sustained by Mr Kidd as a consequence of having entered into the transaction with Lime Rock, it is necessary to consider what actually happened during the period after the transaction took place, and not to attempt to quantify an unrealised and notional loss on the date of the transaction. The counterfactual on this set of hypotheses is not that Mr Kidd disposed of his shares in ITS immediately after the transaction with Lime Rock; it is rather that no deal with Lime Rock took place, no funds were invested by Lime Rock, Mr Kidd remained the sole ITS shareholder, no Lime Rock nominees were appointed to the ITS board, and ITS continued to trade.

[130] I have already set out (at paragraphs 46-50 above) a brief summary of the events which in fact took place after the transaction, culminating in the sale of ITS at a price which

produced no return for shareholders. The question is whether, viewed with hindsight, Mr Kidd sustained a loss, as a consequence of having been induced to enter into the transaction with Lime Rock, that he would not have sustained if there had been no such transaction.

[131] Mr Kidd's evidence was that if the Lime Rock deal had been called off due to discovery of fraudulent concealment, he would first have taken whatever steps were necessary to ensure that ITS's financial position was sound. Without the additional investment, the level of capex would have been reduced by cancellation or postponement of commitments. He would have focused on cost-cutting, cash management and sale of surplus assets to realise cash. If ITS had breached its banking covenants he would have worked something out with Mr Mackie that would have satisfied the banks, with whom he had always had a good relationship. He would probably have considered a trade sale of ITS rather than private equity investment. The market was picking up during 2010 and 2011. There were a number of potential buyers in the industry. The business could have been sold in parts without any discount to a sale of the whole.

[132] Mr Mackie considered that if the Lime Rock deal had not proceeded, it would have been business as usual managing the group's income and expenditure, but the level of capex would have had to be substantially reduced, and surplus equipment sold. Payments would have been deferred and orders cancelled. A new three year credit facility had been negotiated with HBOS and Clydesdale Bank in August 2009, and if covenants were breached this would have been managed by renegotiation of the covenants. Mr Milne expressed a similar view. Mr Corray's view was that if ITS had not obtained equity investment it would have run into financial difficulty.

[133] There was a consensus among the witnesses that the demise of ITS was not attributable to one single factor. In a witness statement provided for the P&W/BP action, Mr Mackie identified a number of bad decisions made "throughout the years". These included remedial action not being taken quickly enough; a poor investment in Colombia; poor execution of a merger in the Far East which made losses every month; investment in research and development of whipstocks (an item of equipment which allowed drilling out of an existing well in a non-vertical direction) which did not produce revenue; low asset utilisation; and failure to move assets around freely. In the course of cross-examination Mr Mackie accepted that these difficulties all had their origins before the Lime Rock transaction completed. Mr Mackie also identified as major contributing factors the impact of Iranian sanctions, which led to the writing off of $18 million of trapped debtors and assets, and a build-up of trade debtors, including Reliance, in the Middle East. Mr Milne's view was that there were changes within the industry and ITS's performance declined. This put pressure on cash flow and the business was unable to deliver adequate returns for its level of debt. With hindsight, the company was attempting to operate in too many places. By late 2011, the business unit in the Middle East and India had contracted, new business ventures were proving slow, and existing businesses were producing 50% less revenue than in previous years. Sanctions became more and more of an issue, especially after EU sanctions were imposed. The Iranian supply chain stopped paying on time and then stopped paying at all (SWIFT banking codes were removed by the EU sanctions). Various ideas were discussed but eventually there was no alternative but to withdraw.

[134] As to whether the Lime Rock transaction contributed to ITS's demise, Mr Mackie noted that much of the Lime Rock investment was spent on new ventures many of which underperformed and took the business backwards. Mr Milne acknowledged that the

dynamic of having two parties making decisions created an additional complication, but considered that Lime Rock's involvement was not part of ITS's performance shift. He did not believe that the transaction contributed to the demise of ITS.

[135] Mr Michael Press joined the ITS board as an independent non-executive director in March 2012. He found a company with high debt levels that was living hand to mouth with respect to cash. New growth capital was needed but neither of the existing shareholders wished to invest further. The bank syndicate were not going to put any more money into ITS. The strategy was to reduce debt and then continue to grow the business. There was a need to withdraw from Iran but this was taking longer than expected. A proposal encouraged by Mr Press to raise funds by sale of selected business lines, assets and surplus equipment was rejected by Mr Kidd. By the end of 2012 it was apparent to the banks that Mr Kidd was not working together with the rest of the board. In Mr Press's opinion, the entry into administration might have been avoided if the shareholders had stayed aligned and maintained the confidence of the bank syndicate until the company had weathered the storm and redeployed the Iranian equipment elsewhere. Most of the problems during this period, in his view, were down to Mr Kidd.

[136] As regards the Iranian sanctions, it was submitted on behalf of the pursuer that the evidence of Ms Linderman and Mr Wolff should be disregarded; opinion evidence as to what might have happened in the past was of no relevance when there was evidence of what actually did happen. Mr Press's evidence was that ITS "did not put a foot wrong" on sanctions. Properly interpreted, the EU Council Regulation was not applicable to the business carried on by ITS Kish. US sanctions were problematic because of the involvement of the second defender; the shareholder in ITS was the third defender which was a Cayman LP. The Iranian arm was only one part of ITS FZE's wider business in the Middle East. I do

not require to address these submissions in detail because my assessment does not depend upon accepting the experts' analysis of the actual or potential effect of sanctions on the business of the ITS group. It is entirely clear from the evidence of, among others, Mr Milne, Mr Corray and Mr Press that the sanctions, especially those imposed by the EU – including, of course, the UK, were seriously damaging to the group's business, as well as to the shareholders' efforts to achieve an exit. I find no evidence to support the submission that those problems were created or significantly exacerbated by Lime Rock's US connections; that was not the view of those who were managing the financial affairs of the group at the time.

[137] Drawing all of the above together, I find 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. The minutes of ITS board meetings amply demonstrate that all concerned were alive to the need to control capex, improve operational cash flow and reduce indebtedness. Pricing issues and pursuit of debtors were constant themes. There is, in short, nothing that Mr Kidd says he would have done if the Lime Rock deal had been terminated that was not in fact attempted. Despite this, EBITDA continued to fall below forecasts. I accept the analysis of those witnesses who described the business as having become too widely spread, with too many unprofitable operations and insufficient co-ordination in utilisation of assets. The effect of sanctions on the group's Iranian business was especially damaging.

[138] Nor am I persuaded that the difficulties would have been likely to be avoided by a trade sale of ITS prior to their occurrence. No evidence was led from any potential trade buyer. On the contrary, there was evidence that trade sales to Allis-Chalmers and Seawell/Archer were attempted but did not reach fruition. Although the failure of the latter

deal appears to have been one of the catalysts of the breakdown in co-operative relations between Mr Kidd and Lime Rock, there was nothing to indicate that any fault for the failure lay at the door of Lime Rock. In so far as that breakdown may be said to have accelerated the end of ITS because of its adverse effect on the confidence of the banks, I am satisfied on the evidence that any such consequence occurred only at a very late stage when the equity value had been lost.

[139] For these reasons I find that Mr Kidd sustained no loss as a consequence of having been induced to enter into the transaction with Lime Rock that he would not have sustained if there had been no transaction.

Loss at the date of the wrongdoing

Introduction

[140] I turn now to consider the assessment of loss on the hypotheses (i) that unlawful means conspiracy has been proved, (ii) that the appropriate counterfactual is discovery of the fraudulent concealment of Mr Gordon's activities, and (iii) that, contrary to the foregoing analysis, the pursuer is correct that the measure of Mr Kidd's loss is the difference between the value of his shareholding immediately prior to completion and the value immediately after. That requires me to make findings on four matters: (1) whether the fraudulent concealment ought to be taken into account when valuing the shares immediately after the transaction; (2) the value of Mr Kidd's shares in ITS pre-and post-transaction leaving aside any effect of the fraud; (3) if the fraud does require to be taken into account, what effect this had on the post-transaction value of the shares; and (4) whether Mr Kidd is precluded from making such a claim by the doctrine of reflective loss.

(i) Whether fraud requires to be taken into account

[141] The pursuer's contention is that the fraud affected the post-transaction value of his shares because in the event of a sale of the shares he would be obliged to disclose to the prospective purchaser that he was selling an interest in what was effectively a joint venture with a fraudster. His primary position is that there would be no market at all for such shares, which were accordingly worthless. Alternatively he contends, with support from Mr Thornton's expert report, that the value of the shares would be heavily discounted. If the calculation was carried out without taking account of the fraud, this would have the effect of giving credit to the defenders for their fraudulent concealment, rather than compensating the pursuer for the effects of that concealment. It would rely on a hypothetical valuation which disregarded the central feature of the action. Reference was made to *Primeo* (above) at paragraph 87.

[142] In my view the reasoning of the Judicial Committee in *Primeo* supports the pursuer's contention on this point. One of the defendant's arguments in *Primeo* was that loss did not occur at the date of investment because Primeo might have been able to withdraw its investment from BLMIS in full at some date prior to the collapse of the Ponzi scheme. This argument was rejected under reference to Lord Nicholls' analysis in *Nykredit Mortgage Bank plc* v *Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (at 1632), the Board observing at paragraph 87:

> "…(W)hen [Lord Nicholls] spoke about valuing the borrower's covenant…, he was referring to its true value at the relevant time, not such value as might be ascribed to it by the market by reason of a fraudulent concealment of the true state of affairs. He observed that the borrower might be a company with no other assets, so that its covenant was in fact valueless. This involves looking at the true position, not the market perception based on fraudulent statements about the borrower's financial position…"

Applying that approach to the present case, it is necessary to value Mr Kidd's shares post-transaction on what (on this set of hypotheses) is the true state of affairs, ie that Lime Rock was a fraudster, regardless of the fact that this was not known to Mr Kidd at the time because of concealment by Lime Rock and LC. As the Board put it in *Primeo*,

> "…This is in line with Lord Nicholls' discussion of the simple case of a purchase where a valuer has given negligent advice, in relation to which he made it clear that the existence of loss is to be assessed according to the true state of affairs at the time of the completion of the purchase although the purchaser does not appreciate this and the fact of the loss only comes to light later…"

[143] On behalf of the defenders it was submitted that no account should be taken of the alleged fraud when valuing Mr Kidd's shares post-transaction. Firstly, it was said that the loss was speculative and that Mr Thornton's approach to discounting had no sound basis. I deal in part (3) of this chapter below with these arguments, including my concerns regarding Mr Thornton's methodology. They do not, however, constitute a reason in principle for leaving fraud out of account. In *Primeo* at paragraph 90, again under reference to Lord Nicholls' approach in *Nykredit*, the Board observed that "relevant loss may be identified even though it cannot be precisely quantified on the evidence which is available", and quoted Lord Nicholls' observation that "such difficulties as there may be are evidential and practical difficulties, not difficulties in principle". Secondly, it was said that the pursuer's approach required the court to close its eyes to the fact that ITS entered administration for unconnected reasons before the fraud was discovered, and that no loss in fact crystallised before then. I have already addressed this argument, which seems to me to relate rather to the question whether the loss should be assessed at the transaction date. Finally it was submitted by the sixth to eighth defenders that if it was correct to take fraud into account, the pursuer's claim was precluded because it was reflective loss. I address that argument separately in part (4) below.

[144] For these reasons, I am satisfied that it is appropriate in principle when valuing Mr Kidd's shares post-transaction to take account of the fraud which, on the hypothesis under consideration, was perpetrated by the defenders. Before that can be done I must, in order to fix a starting point, make findings as to the pre-and post-transaction value of Mr Kidd's shares *without* taking any account of the effect, if any, of fraud on the post-transaction value. That exercise requires an assessment of the evidence of the share valuation experts.

(2) Share values without fraud

<u>Pre-transaction value</u>

[145] There was much agreement between Mr Thornton and Mr Indge as to the approaches that ought to be considered in arriving at a pre-transaction value for Mr Kidd's 100% shareholding in ITS. Both concluded that in the circumstances of the present case the primary indicator was the market approach, using figures from recent sales of shares in the most closely comparable listed public companies. Both had regard also to the terms of the most recent offer by TA Associates. Both used the income approach, based on discounted cash flow, as a cross-check. It was agreed that use of a cost approach, based on the value of the assets of the business, was not appropriate other than to provide a floor value. Mr Indge had regard to the price paid by Lime Rock; Mr Thornton was instructed to disregard this.

[146] As regards the application of the market approach, there was also agreement between Mr Thornton and Mr Indge that the two most appropriate guideline public companies (GPCs) to use were Total Energy Services Inc and Natural Gas Services Inc. Mr Thornton considered that ITS was likely to have a value closer to Natural Gas Services'

EBITDA and adjusted his range of values accordingly; Mr Indge's view was that there was insufficient support for Mr Thornton's view. In the end this was of limited significance because Mr Thornton selected values for ITS which were at the lower end of his adjusted range. Both experts considered it appropriate to apply a control premium of 38.1% to the share prices of the GPCs. There was a minor disagreement as to the quantification of ITS's net debt which fell to be deducted from the company's enterprise value in order to give its equity value; the difference was about $5 million and the experts were content for me to split the difference. There was also some disagreement regarding the periods used for comparison of EBITDA, but this did not materially affect the outcome.

[147] The values produced on a market approach by Mr Thornton and Mr Indge for the pre-transaction value of ITS were as follows (figures in $ million):

	MT		RI	
	Low	High	Low	High
Enterprise Value	320.0	340.0	270.0	290.0
Net debt	168.0	168.0	168.0	168.0
Equity Value	152.0	172.0	102.0	122.0

The difference between these values is attributable to the major issue of disagreement between Mr Thornton and Mr Indge, namely whether it was appropriate to apply a private company discount (also called a discount for lack of marketability, or DLOM) to the enterprise value.

[148] Mr Indge's opinion was that it was appropriate to apply a discount to reflect the fact that the shares in ITS were held in a private company, which was not bound by the same regulations as, and generally had more difficulty accessing shareholder and lender financing than, listed companies from which the valuation multiples were derived. In support of his view, Mr Indge referred to published studies, recognising that many of these were based on minority interests. Whilst a controlling interest in a private company might suffer from a

lack of marketability, the discount would probably not be as high as that for a minority interest, as there were fewer restrictions to a sale for a controlling shareholder. The discount effectively related to the additional time required to sell a private controlling shareholding versus the same in a public company, and the inequality between private and public companies in respect of regulatory requirements and sources of financing. Published data suggested that the discount from listed companies applicable to sales of minority holdings of private company shares was of the order of 20-30%; acknowledging that the present case was concerned with a 100% holding, Mr Indge applied a discount at the bottom of the range, ie 20%.

[149] Mr Thornton did not consider it appropriate to apply a discount. In his supplementary report, the reason he gave was that the basis of value assumed that there already existed a willing buyer and willing seller for the subject company as a result of a proper marketing process having been completed. That would not differ as between a public and a private company. In the course of giving evidence, Mr Thornton also made the point that there was no readily available market for a 100% shareholding in a public company, and again therefore no difference in marketability between the two. In the case of a 100% holding of private company shares it was not appropriate to apply a "rule of thumb"; each case had to be considered individually.

[150] On this issue I find Mr Indge's arguments persuasive, and supported by the literature to which he referred. The point, as I understand it, is that it is unnecessary and inappropriate to attempt to compare a sale of a 100% holding in ITS with a hypothetical sale of a 100% holding in a public company. The comparison that has been done to produce enterprise and equity values for the listed companies is based on sales of readily marketable small parcels of shares; it is that comparison which requires a discount in valuing a less

marketable shareholding of whatever size. I have difficulty with Mr Thornton's reasoning based on the marketing process having been completed, because the discount reflects the hypothetical purchaser's awareness that that process will have to be gone through when he comes to sell on, as well as recognising the greater uncertainties regarding marketability of shares in a private company.

[151] The published material to which Mr Indge referred recognised that different considerations applied to discounting controlling interests for lack of marketability. According to one source (Shannon P Pratt, *The Market Approach to Valuing Businesses* (2005), page 163) there are no directly observable market data to quantify such discounts. However the author observes that preparing the company for sale and accomplishing the sale involves substantial time and costs, and there is a risk that once these costs are incurred, the company might not be able to realise the amount indicated by historically observed transactions. In determining a discount one should attempt to quantify these costs and risks. The approach taken by Mr Indge accorded with this guidance and did not merely apply a rule of thumb. To the same effect, a study by Micah S. Officer, "The price of corporate liquidity: Acquisition discounts for unlisted targets" (2007) 83 Journal of Financial Economics 571 concluded, in a passage with obvious relevance to controlling as well as minority interests:

> "Selling a part, or the whole, of a firm is an important source of liquidity for the trapped owners of equity in nontraded assets — but a source that comes with a price that appears to at least equal that of alternate sources of liquidity (public and private debt and equity markets). However, the results in this paper imply that selling part of an unlisted firm is a last-resort source of liquidity for owners that need sources of cash when borrowing additional funds is unappealing. As such, the price paid to access liquidity by selling unlisted assets is reflected in the discounted sale price…"

I am therefore satisfied that Mr Indge's approach is soundly based in experience and published guidance. I find no evidential basis to warrant departing from his choice of a discount of 20%.

[152] Turning to the income approach using discounted cash flow, there was one significant area of disagreement between Mr Thornton and Mr Indge. Both noted that ITS's forecasts for EBITDA had not been met, and agreed that some account had to be taken of this when applying a discount rate to ITS's forecast future income. Mr Thornton produced two DCF valuations using ITS management's forecasts with weighted average cost of capital incorporating additional risk premiums of 2% and 3% respectively. Mr Indge went further and adjusted the pre-deal forecasts to reflect actual results to September 2009, and then also applied 2% and 3% additional risk premiums to forecast future income. Mr Thornton regarded it as inappropriate to do both. The consequence of this and certain other minor differences was that Mr Thornton's calculation produced an enterprise value for ITS in the range $340 - 360 million (adjusted in his supplementary report to include actual performance for the nine month period to September 2009 to a range of $332 - 356 million), whereas Mr Indge's enterprise value range was $284 - 306 million, with a caveat that the additional risk premium of 2% to 3% might not sufficiently capture the risk of ITS performing below forecast and the uncertainty in the market at that time.

[153] The experts were agreed that the difficult prevailing market conditions created uncertainty as to the reliability of forecasts of future income. For that reason they placed less weight on this approach to valuation than on the market approach, and I shall do likewise. So far as it is necessary to choose between their differing applications of the income approach to the valuation of ITS at the transaction date, I am persuaded that Mr Indge's methodology is preferable. It does not appear to me to amount to a double allowance for the same risk: the adjustment to pre-deal forecasts is intended to produce forecasts likely to have been made if the actual performance to valuation date had been known, and the risk premium is to reflect the risk that the adjusted forecasts might not be achieved either.

Having regard to what would have been known in 2009 about ITS's actual performance against forecast, that appears to me to be an appropriate methodology to adopt. The enterprise value range thus produced is comparable with, albeit slightly higher than, Mr Indge's range of $270 - 290 million using the market approach.

[154] In order to make a finding on pre-transaction value, I have carried out a re-calculation of Mr Thornton's market approach valuation, using the methodology at paragraphs 8.20 to 8.24 of his report but with the inclusion of a private company discount of 20%. According to my calculation this would produce implied multiples for the two GPCs of 4.4 and 6.9 respectively, giving an enterprise value range for ITS of $203.7 to $319.5 million. The midpoint is $261.6 million. Continuing with Mr Thornton's approach by identifying a narrower range within the lower bound of the range between the midpoint and the upper (Natural Gas Services) figure, one arrives at a range of value between $270 - 290 million: the same as Mr Indge's market approach valuation. I regard this as a sound footing upon which to make a finding that the enterprise value of ITS immediately before the transaction was in the range of $270 - 290 million. I do not find that the results produced by either the income approach or reference to the most recent offer by TA Associates (which was of course based on earlier and more favourable EBITDA forecasts) cast doubt on this conclusion. I note that Mr Indge calculated the pre-money enterprise value of ITS based on the price paid by Lime Rock to be $287.5 million.

[155] In order to arrive at the equity value of Mr Kidd's 100% holding, ITS's net debt ($168 million) requires to be deducted from the enterprise value. This produces a range for the equity value of $102-122 million.

[156] There is, however, one further adjustment to make. Some of ITS's subsidiaries had minority shareholders, and the experts were agreed that account ought to be taken of these

when valuing Mr Kidd's shareholding in ITS. Unfortunately there was very little material upon which to carry out this exercise. In the absence of anything else, Mr Thornton adopted a figure of $3 million used for minority interests in the ITS balance sheets for the 2008 and 2009 financial years. Mr Indge's view was that there was insufficient information to be able to value the minority shareholdings. He considered that the figure shown in the balance sheet, based on book values which would be consistent with a cost approach to valuation, was not appropriate and would probably understate their value. He noted that according to the KPMG vendor due diligence report, the minority shareholders' share of EBITDA in financial year 2008 was just over 8%, but did not consider that there was sufficient information to confirm whether this was truly reflective of their economic interest. In his written report, Mr Mitchell also used the KPMG figures but considered that the most appropriate way of accounting for the minority shareholders' interest was to attribute a proportion of EBITDA on a forward-looking basis, which gave a figure of 11%.

[157] In circumstances where the experts agreed that some adjustment ought to be made, but that there was insufficient information to do this accurately, I consider that I must make an adjustment doing the best I can with such material as is available. In my view the use of the balance sheet figure, based on cost, is unlikely to allocate sufficient value to the minority shareholdings. On the other hand a valuation based on contribution to future EBITDA has significant uncertainties. I propose to make a very conservative allowance for the value of the minority shareholdings, beginning with the KPMG current EBITDA figure of 8% and reducing it by half to recognise the uncertainty of their future contribution. A deduction of 4% of the midpoint of the enterprise value range ($11.2 million) from the midpoint equity value of £112 million produces a figure of $100.8, or say **$101.0 million**. I find that this was the value of Mr Kidd's shareholding in ITS immediately before the transaction.

Post-transaction value

[158] In the valuation of Mr Kidd's 66% shareholding immediately after the Lime Rock transaction, three issues of disagreement arose between the experts: the allocation of value as between Mr Kidd's ordinary shares and Lime Rock's A ordinary shares; the discount to be applied to the value of a 100% holding; and the appropriate means of adjusting the value of the shares to take account of Lime Rock's capital investment. There is a further minor point in that Mr Thornton has used a figure of $43.6 million instead of $45 million for the Lime Rock capital injection to recognise deal costs; Mr Indge did not do so but acknowledged that the amount used in the calculation should be the sum actually received. In my calculations I shall use the figure of $43.6 million.

[159] The allocation of value as between the ordinary shares and A ordinary shares recognises the preference dividend entitlement attached to the A shares for up to five years. Although the experts used different methods they arrived at similar percentage values for Mr Kidd's interest: Mr Thornton's figure was 61.9%; Mr Indge's was 58.8 to 59.2%. Both methods are based on assumed five year returns on equity. Each witness preferred his own method but neither is demonstrably wrong; as it happens Mr Indge's result is more favourable to Mr Kidd's quantification than Mr Thornton's. In view of that, and the relatively small difference, I shall use an approximate midpoint of 60.5%.

[160] A more significant difference lies in the percentage discount adopted for loss of the control previously exercised by Mr Kidd as sole shareholder. Mr Thornton's view was that as a consequence of the terms of the investment agreement and the new articles, Mr Kidd's shareholding after the transaction should be considered to have the influence of a significant minority holding rather than a controlling interest. On that basis he applied a discount

of 30% to 40% to the value of Mr Kidd's shareholding. Mr Thornton based his view on the following features of the investment agreement:

- Clause 12.1.3 stated that if the lead investor (ie Lime Rock) voted in favour of any resolution or signed a written resolution, each other investor (if any) must also vote in favour of or sign the resolution. On Mr Thornton's interpretation this deprived Mr Kidd of the right to vote against the Lime Rock directors on resolutions.
- Mr Kidd was not permitted without Lime Rock's consent to effect any material change to the nature of the business, appoint directors or alter managers' service agreements, incur capex in excess of 10% of budget, dispose of the share capital of any subsidiary, make loans to other entities, raise additional funding, materially depart from the strategic plan, or liquidate the company.
- Mr Kidd could not sell his shares without Lime Rock consent to anyone other than a family member or Mr Corray.
- Lime Rock had certain rights on the occurrence of a "Trigger Event" including default and breach of covenant.

[161] Mr Indge noted that with only a 66% shareholding and no casting vote, Mr Kidd could not pass a special resolution. In practical terms this meant that he could no longer sell ITS and liquidate his shareholding without Lime Rock voting support, and could only sell his own shares if he could find a buyer. In terms of the investment agreement, he could not make changes to the business plan or appoint additional directors without Lime Rock consent. Mr Indge considered that a control premium was still appropriate but that a 10% discount should be applied to reflect the reduction in influence.

[162] In the course of cross-examination Mr Thornton's position in relation to voting on resolutions appeared to change. It was pointed out to him that for the purposes of

clause 12.1.3, Mr Kidd was not an "investor", and not therefore subject to the restriction in the clause. In response he explained that the clause was still relevant because it would apply to any acquirer of Mr Kidd's shares. He accepted that the provisions referred to were not major restrictions on Mr Kidd's ability to operate ITS's business, and that the guaranteed exit could not occur for seven years, which was quite a long time. He assented to the proposition that rather than an influential minority, Mr Kidd had moved to being a co-investor, to whom the minority discount would not apply, but observed that someone purchasing Mr Kidd's shares would have to see the matter differently. For his part, Mr Indge agreed with the description of the relationship as a joint venture, where the terms of the investment agreement reflected the parties' agreed business plan.

[163] The approaches of the two experts to this matter differ significantly, and I must choose one or other. On balance I am satisfied that Mr Indge's 10% discount is to be preferred. Despite Mr Thornton's explanation, it appears to me that his choice of discount was influenced by an erroneous interpretation of clause 12.1.3 regarding Mr Kidd's power to pass resolutions. I am not persuaded that the other factors mentioned by Mr Thornton justify characterising Mr Kidd's 66% holding as no more than an influential minority. They were concerned more with the parties' respective rights on exit, or in the event of the company falling into financial difficulty, than with the operation of the company's business. The descriptions of co-investors and joint venture seem to me to be much more apposite, and in my view those descriptions support the application of a 10% discount only.

[164] The final issue is more difficult to address because it arose at a very late stage of the proceedings. It concerns the appropriate treatment, in the post-transaction valuation of Mr Kidd's shares, of the cash injection by Lime Rock. In their written reports, Mr Thornton and Mr Indge adopted the same approach of simply adding $43.6 (Mr Thornton) or

$45 million (Mr Indge) to the equity value. In the course of cross-examination, senior counsel for the first to fifth defenders put to both witnesses that Mr Mitchell had taken a different and more accurate approach by taking into consideration the additional value that was attributable to the shares as a result of the business opportunities created by the injection of finance. Mr Mitchell used an expected returns methodology, which calculated the expected return to shareholders on exit, discounted to the valuation date. This method produced a much higher post-transaction value for Mr Kidd's shares. Having listened to the cross-examination, Mr Indge very properly volunteered that it had made him realise that he and Mr Thornton had accounted for the Lime Rock cash input on a mistaken basis that the pre-transaction EBITDA forecasts upon which all of the experts had based their calculation assumed that the investment would take place; hence they had regarded it as sufficient simply to add the cash input to the equity value. In fact the forecasts used had not assumed the investment. The consequence of this, Mr Indge explained, was that they had either overvalued the shares pre-transaction or undervalued them post-transaction. For his part, Mr Thornton also fairly acknowledged that he and Mr Indge might have missed the point in their calculation. Unfortunately this matter came to light at the very end of the proof. Mr Indge made clear that he had not been able to quantify the resultant increase in post-transaction value and would have to run the numbers. He agreed however that he would have carried out a calculation similar to Mr Mitchell's, had he taken that approach.

[165] Mr Mitchell's expected returns calculation produced a post-transaction value of Mr Kidd's 66% holding of $123 million. (This calculation incorporated an 11% reduction for minority shareholders' interest and a minority discount of 5%; if one were to substitute the percentages that I have used elsewhere – 4% and 10% respectively – the value increases to $125 million.) On behalf of the sixth to eighth defenders it was submitted, having regard to

Mr Indge's approval of Mr Mitchell's methodology, that I should adopt a conservative figure of $120 million as the post-transaction value. I am unable to accept that submission. Firstly, it is not supported by the terms of Mr Mitchell's report in which he stated (paragraph 9.6.4):

> "For the avoidance of doubt, I do not consider that the value of Mr Kidd's shareholding post-LRP Transaction was $123.0 million but is instead at least the same as it was post-LRP Transaction [*sic* – I assume this is an error and should be 'pre-LRP Transaction'], or potentially higher."

At paragraph 9.6.8 of his report Mr Mitchell offered an alternative post-transaction value of $86.2 million (which was still $15 million higher than Mr Mitchell's pre-transaction value of $73.1 million) if a higher discount rate was applied to reflect the higher risk to Mr Kidd's shares resulting from the waterfall distribution. Mr Mitchell did not of course give evidence, and the significance of these observations remains unexplained. Secondly, Mr Indge, although agreeing with the methodology, did not adopt the value of $123 million. I am satisfied on the ground of what appears to be a consensus among the experts that a method which simply adds $43.6 million without taking account of expected returns undervalues the shares post-transaction, but I am left with no clear evidential basis for assessing by how much.

[166] Disregarding for the moment such undervaluation, the arithmetic is as follows:

	$ million
Pre-transaction value of 100% holding (as calculated above)	101.0
Add net cash input	43.6
	144.6
Whereof 60.5%	87.5
Less 10% discount	8.75
Post-transaction value of 66% holding	78.75

To this falls to be added the $10 million received by Mr Kidd, giving a total of $88.75. When compared with the pre-transaction valuation, that would produce a loss on the transaction of $12.25 million.

[167] On the face of it, I would find this surprising. This part of the calculation does not assume fraud, and it will be recalled that Mr Kidd's financial advisers who are not implicated in the alleged fraud were of the view that he had got a good deal. In the course of the negotiations, Simmons had carried out numerous modelling exercises on behalf of Mr Kidd and ITS in order to assess the value of the company. Taking this into account, and having regard to the consensus of the experts that this methodology produces a post-transaction undervaluation, I find that, on balance of probabilities, it is likely that, still disregarding fraud, 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 received. On this basis he sustained no loss in the transaction.

[168] Even if the undervaluation is left out of account, Mr Kidd would have to demonstrate a loss which exceeds the sum recovered in the P&W/BP action. I have noted that that sum was £19 million. In their submissions the sixth to eighth defenders adopted a conversion rate (as at January 2019) of $1.29 to £1; - as no other rate was proposed I shall do likewise. £19 million equates to $24.5 million. Allowing for interest on $12.25 million at, say, 4% per annum from September 2009 until January 2019, the sum recovered by Mr Kidd in the P&W/BP action comfortably exceeds the loss calculated without taking account of the undervaluation. On this basis he would have sustained no residual loss recoverable from the present defenders.

(3) Post-transaction value taking fraud into account

[169] As I have noted, Mr Kidd's primary position was that the combination of dishonesty and Lime Rock protections rendered his shares worthless post-transaction. He would have had to disclose to any potential purchaser the fact that the other significant shareholder in the business, which held complex minority protection rights, was dishonest. Nobody would have purchased his shares in the light of such a disclosure. This submission did not rise above the level of assertion. It was unsupported by any evidence and conflicted with the common view of the expert witnesses that even tainted assets have a value. It ignores the very substantial cash value of the company's assets, and fails to acknowledge Lime Rock as a potential purchaser whose valuation would not be influenced by their own wrongdoing. I reject the submission.

[170] Alternatively, the pursuer founded upon Mr Thornton's opinion in his supplemental report, in response to his instruction to value Mr Kidd's residual shareholding on the hypothesis that the potential purchaser was aware of "a wrongdoing of a similar nature alleged by the pursuer". Mr Thornton applied the higher level of discounts applied in HMRC tax valuations, ie 70-80%. His rationale was that such a discount reflected the challenge in realising the value of a small minority holding in a private company, and was applicable to a situation where a deal for Mr Kidd's shares would be unlikely. This produced a post-transaction value range of $24.5 - 40.5 million. Mr Thornton accepted that the effect of fraud on the share value would be subject to a wide range of variables including the nature of the wrongdoing.

[171] Mr Indge did not comment directly on the 70-80% discount, but was of the view that there was always a market for problematic assets. He had experienced situations where

there were allegations of fraud but people were willing to buy at the right price. In this case there would have been a market for the right deal.

[172] I am not persuaded that Mr Thornton's comparison is of assistance. It is based on experience of the familiar situation of a sale of a minority private company shareholding and assumes what, in the very different circumstances of the present case, has to be demonstrated: namely, that dishonesty on the part of Lime Rock would have had a very significant impact on the marketability of Mr Kidd's residual shareholding. Secondly, as Mr Thornton accepted, the rationale of this argument was that the wrongdoing would impact on the value of all ITS shares and not just Mr Kidd's shares. On that basis Mr Thornton's comparison would value ITS's shares post-transaction at a range well below the figure of $97.9 million (including the Lime Rock cash injection) produced by his cost approach, which he regarded as a floor value. It seems to me that that cannot be right.

[173] The hypothetical purchaser of the shares must be presumed to have full and accurate information about the wrongdoing of Lime Rock. The purchaser must therefore be presumed not only to be aware that Lime Rock fraudulently concealed Mr Gordon's conduct from Mr Kidd but also what the conduct was that was concealed. In paragraph 104 above I listed the actings of Mr Gordon that were subjected to criticism. At paragraph 125, I concluded that the transaction would have proceeded as it did without Mr Gordon's participation. What the hypothetical purchaser would have made of this is, in my judgment, a matter of speculation and not one where expert valuation evidence can offer much assistance. It seems to me that all that one can say is that the hypothetical purchaser would have been willing to offer a price somewhere between (a) the post-transaction value with no allowance for fraud ($91 million), and (b) a *pro rata* share of the value of the company on the

cost approach ($64.6 million). In the absence of any reason to do otherwise, I adopt the figure half way between. The calculation is then as follows:

		$ million
Pre-transaction value		101.0
Less:		
Share of value on cost approach (66% of 97.9)	64.6	
Add 50% of (91.0 – 64.6 = 26.4)	13.2	
	77.8	
Add cash sum received	10.0	87.8
Loss on transaction		13.2

Again on this basis there has been full recovery, inclusive of interest, in the P&W/BP action, and there is no residual loss recoverable from the defenders in the present action.

[174] Finally, for the sake of completeness, if contrary to my decision the undervaluation of the shares post-transaction with no account taken for fraud were to be left out of account, the figure of 91.0 in the above calculation would become 78.75, and the figure of 77.8 would therefore become 71.7. After addition of the $10 million cash sum received, the loss produced would be $19.3 million. Interest thereon at, say, 4% per annum from September 2009 until January 2019 would amount to about $7.2 million, and Mr Kidd would have a recoverable residual loss of $2 million.

(4) Reflective loss

[175] On behalf of the sixth to eighth defenders it was submitted that on the hypothesis that the valuation post-transaction had to take into account the effect of fraud, the claim failed because it amounted to reflective loss. As already noted, Mr Thornton agreed that the impact of fraud would have affected the value of shares in ITS as a whole and not merely Mr Kidd's holding. On this hypothesis the wrongdoing would be actionable by ITS because the entire shareholding was devalued. Reference was made to *Sevilleja* v *Marex Financial*

Ltd [2021] AC 39, decided since I rejected a similar argument in the P&W/BP action. It was submitted that where the wrongdoing diminishes the value of the entire shareholding, a claim by a shareholder fails as reflective loss.

[176] Had it been necessary to address this argument, I would have rejected it. Far from supporting it, the *Sevilleja* decision emphasises that the circumstances of the present case do not fall within the restricted scope of the doctrine of reflective loss (in so far as it survives at all in the light of the Supreme Court's decision). The issue in *Sevilleja* was the proper scope of the decision of the Court of Appeal in *Prudential Assurance Co Ltd* v *Newman Industries Ltd (No 2)* [1982] Ch 204, as subsequently interpreted by the House of Lords in *Johnson* v *Gore Wood & Co* [2002] 2 AC 1. Delivering a judgment with which the majority agreed, Lord Reed observed (paragraph 39):

> "In summary, therefore, *Prudential* decided that a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable… The decision had no application to losses suffered by a shareholder which were distinct from the company's loss or to situations where the company had no cause of action."

At paragraph 41, Lord Reed quoted Lord Bingham's speech in *Johnson* at page 35, where he observed that the authorities including *Prudential* supported the following statement of principle:

> "Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company…"

Lord Reed noted (paragraph 42) that the first sentence quoted is a statement of the rule in *Foss* v *Harbottle* (1843) 2 Hare 461, and that the second sentence encapsulates the reasoning in *Prudential*, and explains why, in the circumstances described, a shareholder who is "suing in that capacity and no other" cannot bring a claim consistently with the rule in *Foss* v *Harbottle*.

[177] In the present case Mr Kidd is not suing in the capacity of shareholder and no other for a loss sustained because of an injury to ITS which has caused a diminution in value of his shareholding. His claim is to have suffered loss directly because of an unlawful means conspiracy perpetrated to cause harm to him, not to ITS. Had his case on the merits succeeded, the alleged diminution in his share value would not have been the consequence of a wrong against the company but rather of a wrong against himself by inducing him by fraudulent concealment to enter into a joint venture relationship with a fraudster. That is not a situation in which the law refuses to recognise the claim of a shareholder as separate and distinct from any claim that the company might have.

Expenses of action against P&W/BP

[178] In his quantification of loss, the pursuer seeks to reduce the £19 million recovered in the action against P&W/BP by the sum of £5,215,419, said to represent the expenses of that action beyond an interim award of £1 million. On this argument the US dollar equivalent, as at December 2023, of the sum recovered in the previous action is around $17.3, rather than the figure of $24.5 million that I have used in the above calculations. In my opinion this element of the pursuer's claim is irrelevant. The action against P&W/BP was a claim against different defenders based on different grounds, including breach of fiduciary duty on the part of P&W. That claim was settled on payment of a lump sum of £19 million. So far as expenses are concerned, the settlement agreement provided (clause 2.4):

> "No other sum of money, whether referable to damages, interest, expenses or otherwise, is payable as between the Parties. In particular, to the extent that they have not already been paid, any awards of expenses in favour of any party hereto are

> hereby waived irrevocably. For the avoidance of doubt no party shall be obliged to repay any sum already paid in respect of an award of expenses."

The sum now sought by the pursuer consists of some of the expenses incurred in recovering the loss sustained by him as a consequence of breach of duty by P&W. It does not relate to the alleged wrongdoing of any of the defenders in this action and is not, in my view, recoverable from them. I have therefore disregarded this element of the claim in my calculations.

Disposal

[179] I shall sustain the sixth plea-in-law for the first to fifth defenders and the fifth plea-in-law for the sixth to eighth defenders, repel the pursuer's pleas-in-law, and assoilzie all of the defenders from the conclusions of the summons. Expenses are in the meantime reserved.