OUTER HOUSE, COURT OF SESSION

[2024] CSOH 9

CA4/22
[CA99/22]

OPINION OF LORD BRAID

In the cause

LEANDER CB CONSULTANTS LIMITED T/A LEANDER ADVISORS

Pursuer

against

(FIRST) BOGSIDE INVESTMENTS LIMITED AND (SECOND) ALAN CARSON McLEISH

Defenders

Pursuer: Lord Keen of Elie KC, Ower KC, Boffey; DAC Beachcroft Scotland LLP
Defenders: Dean of Faculty KC, Paterson KC; TLT LLP

2 February 2024

Introduction

[1] The story begins with Covid-19, which led to an unprecedented world-wide demand for PPE. In the prevailing febrile climate of 2020/21, it was, perhaps, believable that the sum of US$2 billion might have been earned in commission from a PPE contract involving the US government and was to be sent to a New York law firm, but that a considerable amount of effort and money was required to have that sum moved overseas to the persons entitled to it; certainly, Alan McLeish believed it in January 2021 when he was fed just such a tale by

Graeme Paterson, Jonathan Stewart and Ryan Underwood, who claimed to be three such persons. If Mr McLeish invested $7.5 million to unlock the commission, he would receive an entitlement to 15%, not only of the $2 billion already there, but to profits from future transactions in the pipeline (including one with a consortium said to involve three former presidents of the United States). Such were the profits that would be generated, all those involved would require financial advice, which would be given by a highly qualified financial adviser brought in to advise the team, Christopher Shute.

[2] Mr McLeish did "invest" $7.5 million, through a company owned by him, Bogside Investments Ltd. That sum was loaned to Mr Underwood pending incorporation of a new company, Obree Global, in which Mr McLeish, Mr Paterson, Mr Underwood and Mr Stewart were to be shareholders, and was to be held in an escrow account until then. Mr McLeish also entered into a Letter of Engagement with a "vehicle" used by Mr Shute, Leander CB Consultants Ltd, whereby Mr Shute would provide investment advice for an initial period of six months for a fee of £50,000 per month, payable in advance by two tranches of £150,000. Sadly for Mr McLeish, the tale he had been fed was a lie from start to finish; a sophisticated advance fee fraud. There was no PPE commission; no $2 billion with any New York law firm; no deals in the pipeline with former US presidents or otherwise; no pot of gold in Dubai on which investment advice was needed; no mint of money to be made. Although a small amount was returned to him, the bulk of his "investment" was lost.

The proof

The two litigations

[3] Subject to the qualification in para [5], this opinion covers two litigations which have emerged from the ashes of the foregoing debacle and in which I heard a combined proof. In

the one action, Leander is suing Bogside and Mr McLeish for payment of the second tranche of £150,000 due under the Letter of Engagement (the first tranche having been paid out of the escrow account); and Bogside and Mr McLeish are counterclaiming for reduction of the Letter of Engagement (in other words, that it should be quashed) and for payment of £175,000, being repayment of the first tranche together with expenses paid to Mr Shute of £25,000. Proof in that action was allowed on all issues other than (a) what work Leander did and (b) unjust enrichment (which may arise if the Letter of Engagement is reduced), so that the principal issues for determination are those arising from the counterclaim. Those are the same issues as arise in the other action, in which Bogside is suing Mr Shute and Mr Paterson for £4,856,421.30, being the agreed amount of its loss. The McLeish/Bogside position across the two litigations is that Mr Shute fraudulently, failing which negligently, failing which innocently, misrepresented (a) that the $2 billion was in the hands of a New York law firm which I will refer to as M&G[1], and that this sum would be released to Obree, which was untrue; and (b) that Obree would be involved in other lucrative deals, some of which were close to completion, which was also untrue; and that these misrepresentations caused Mr McLeish both to advance the $7.5 million through Bogside, and shortly thereafter, to enter into the Letter of Engagement. The Shute/Leander position is that Mr Shute was himself duped by Mr Paterson and that in any event, Mr McLeish did not rely on anything that Mr Shute said in deciding to advance the money and sign the Letter of Engagement; further, that the Letter of Engagement had nothing to do with the PPE commission or the sums allegedly held by M&G but was entered into because Mr McLeish wished to "off-shore" his personal assets, in an attempt to circumvent payment of tax to HMRC, and in

[1] There is no suggestion that the law firm was in any way, shape or form implicated in the fraud, and it follows that there is no public interest in their being named.

anticipation of a divorce settlement of between £15 million and £20 million (which, in turn is denied by Mr McLeish). Mr Paterson does not have a position, since he has not defended the Bogside action, and it is agreed that in due course, decree in absence will fall to be granted against him.

[4] For the avoidance of doubt, it is not contended, nor on the evidence could it be, that the PPE transaction was anything other than entirely fictitious, that any funds ever were held by M&G or that any other deals were in the pipeline. Mr Paterson must have been party to the fraud all along, which is worth bearing in mind when we come to consider the communications sent by him. The critical issues are:

(i) What, if any, misrepresentations were made by Mr Shute, and when?

(ii) Were any such misrepresentations fraudulent, negligent or merely innocent?

(iii) If fraudulent, was Mr Shute party to the wider fraud committed by Paterson?

(iv) What induced Mr McLeish to part with his money; in other words did any fraud, or negligent misrepresentation, cause Bogside to suffer loss?

(v) If there was merely a negligent misrepresentation, was there contributory negligence on the part of Mr McLeish?

(vi) What caused Mr McLeish to enter into the Letter of Engagement?

(vii) What remedies (if any) are Mr McLeish and Bogside entitled to in respect of the Letter of Engagement?

Death of Mr Shute

[5] At this stage, I need to introduce the sad news that Mr Shute died shortly after the conclusion of the proof. Consequently, no formal procedure can take place in the Bogside action until his executors have entered the process, and no interlocutor can be issued in that

action until then. Mr Shute's untimely death has no impact on the Leander action, in which he was not a party, nor on my assessment (and, indeed, criticism) of his evidence. The two actions are so inter-linked that it would be artificial to issue an opinion only in the Leander action making no reference to the Bogside one. At a by order hearing shortly after Mr Shute's death, parties agreed that my opinion should deal with both actions but that, for now, it should be treated as a draft in the Bogside action, and I issue it on that basis.

Witnesses

[6] The witnesses at the proof were: Mr McLeish; Mr Shute; Graeme Bryson, Chartered Accountant, who provided general financial and advice to Mr McLeish; Derek Hamill, a partner in Gilson Gray, Mr McLeish's solicitor; Kenneth Barlow and Kenneth Binnie, financial advisers instructed by Mr McLeish; Mohammed Al Dahbashi, a UAE qualified lawyer, of ADG Legal, a Dubai law firm which, among other things, held the escrow account; Dan Morrison, a solicitor in, and founding partner of, the English firm Grosvenor Law, who was initially instructed by Mr Paterson to carry out due diligence to verify the existence of the PPE transaction work and was later instructed by Mr McLeish in a personal capacity; Stuart McIvor, an Obree employee; Timothy Connell, director and majority shareholder of a Delaware corporation, Hart Dairy Creamery Corporation (Hart), who spoke to certain dealings he has had with Mr Shute, and whose entire evidence was the subject of a Note of Objection which I therefore heard under reservation of its relevancy and competency, my decision on that note being at paras [82] to [88]; Robin Rathmell, an American lawyer who was then a partner in the firm Kobre and Kim, who had some dealings with Mr Shute and Mr Paterson but was never formally instructed to act for them; and Timothy Blair, the sole director and shareholder of Leander. They all gave witness

statements (and, in some cases, supplementary statements) which formed the bulk, or all, of their evidence-in-chief. The statements of Messrs Barlow, Binnie, Al Dahbashi, Morrison, McIvor, Rathmell and Blair were agreed by joint minute to represent their evidence, and none of them gave oral evidence.

Joint Minute

[7] In the joint minute already referred to, it was also agreed that all emails and letters are what they bear to be, were prepared on or about the date that they bear, and were sent to, and received by, the addressee(s) on or about the date they bear; and that all WhatsApp, Facebook Messenger and Telegram electronic communications which bear to be sent or received by Mr McLeish, or which bear to be circulated in a Telegram[2] group named "Victorious Secrets" of which Mr McLeish was a member (and which also included Mr Shute, Mr Paterson, Mr Stewart and Mr Underwood), are what they bear to be and were prepared and sent on or about the date they bear. There was a separate, less imaginatively named, Telegram group which did not include Mr McLeish, "Gee Ryan Jonny Chris", the members of which were (as the name of the group suggests) Mr Paterson, Mr Underwood, Mr Stewart and Mr Shute. The messages sent among the members of that group were not admitted, but the material ones were spoken to in evidence. The correspondence, emails and Telegram messages provide a reliable contemporaneous guide to what happened, and set a useful benchmark against which the credibility and reliability of the witnesses can be tested.

[2] Telegram is a secure messaging service, similar to the more familiar WhatsApp.

Credibility and reliability

[8] I accept the evidence of Mr Bryson and Mr Hamill as credible and reliable, as I do the evidence of the witnesses whose statements were agreed. This is of most significance where their evidence contradicts that of Mr Shute, particularly in relation to things which he said, or did not say. Thus, I accept, for example, Mr Rathmell's evidence that Kobre and Kim, held discussions with Mr Shute and Mr Paterson with a view to being engaged to act, but were never in fact engaged; consequently, Mr Rathmell never spoke to M&G, nor is it conceivable that Mr Shute had believed that he would be speaking to them. I also accept Mr Al Dahbashi's evidence that he was not instructed to and did not recollect dealing with M&G; as such, he did not know why Mr Shute would have said (as he did in a message of 2 February 2021) that he was.

[9] The principal witnesses were Mr McLeish and Mr Shute and the bulk of the time at the proof was taken up with their cross-examination, their respective credibility and reliability lying at the heart of the case.

Mr Shute

[10] In assessing Mr Shute's credibility and reliability, the starting point is that already made, namely that on several material issues his evidence conflicted either with evidence from other witnesses which I accept, or with the contemporaneous messages, such that Mr Shute's evidence could not be correct. Further, he had acted dishonestly in at least three ways during the course of the events which are the subject of the litigation. First, he dishonestly told Mr McLeish in his email of 28 January 2021 that the loan agreement and escrow agreement did not contain any terms which had not been agreed, which was untrue (see paras [36] and [37]). Second, he sent the message of 3 February 2021, referred to above,

in which he said that Mr Al Dahbashi was dealing with M&G, which was untrue. Third, he was dishonest in relation to his address. In the Shareholder Agreement among the various shareholders in Obree (of which he was one) drawn up by Mr Al Dahbashi on Mr Shute's instructions, he was designed as residing at an address in Elvaston Mews, South Kensington, London. However, as he was constrained to concede under cross-examination, he had not resided at that address since 2016 and he no longer had any connection with it. That was significant should it have been necessary for legal proceedings to be served on him (as indeed it turned out to be). Mr Shute's attempts to explain this were unconvincing. He said that the London address was a correspondence address that he had "kept" for his bank, Natwest, although in what sense it was a correspondence address was unclear, since he could not receive correspondence at it and in any event, he said all correspondence with Natwest was being done electronically. On being pressed further, he then said that Natwest required him to have a UK address so that he could continue banking with them; which was another way of saying that he had used the London address so as to deceive Natwest into believing he was resident in the UK when he was not (which, since he retained his bank account with them, apparently it did). Mr Shute's attempt to explain why Mr Al Dahbashi had used his London address was no more convincing: he said he must have used that address because ADG had his banking details, although since Mr Shute must have known that those details contained an address that was at least four years out of date, that is no explanation at all. He then said that he was travelling in North America when the Shareholders Agreement was being drafted, and that he believed that Mr Al Dahbashi was aware of "the situation", although why or how that would have been the case, or what prevented him from correcting the error in his address before he signed the Shareholders Agreement, remained unclear.

[11] Further still, Mr Shute also had to concede in cross-examination that one important element of his case which was advanced in his pleadings, and perpetuated in his witness statement - namely that there had been a meeting with Mr McLeish and his advisers on 2 February 2021 when certain things were said - was false (see paras [60] to [62]). Finally, one passage of his evidence, in relation to what he claimed (for the first time, during his cross-examination) to have said to Mr McLeish on 4 February 2021 was simply incredible (see para [63]).

[12] The foregoing merely contains a selection of criticisms which can be made of Mr Shute's evidence: I identify others in the narrative which follows. Apart from all of those objectively verifiable reasons for rejecting much of Mr Shute's evidence, I also found his demeanour in giving it to be unsatisfactory. He was often long-winded in his responses; at times he signally failed to give a direct answer to straightforward questions; and at other times, he appeared to struggle in thinking of an answer. Even making due allowance for the fact that it was, as his senior counsel put it, a highly charged situation in which he was being accused of fraud, he was the very antithesis of an impressive witness.

[13] I therefore reject Mr Shute's evidence where it conflicted with that of any other witness on any material matter.

Mr McLeish

[14] The foregoing should not be taken as meaning that I unreservedly accept all of Mr McLeish's evidence. Although at times, perhaps understandably, he was keen to downplay the extent of his naivety in falling for the scam, I did find him to be mostly credible and reliable when speaking about factual events - what happened, and what was said - and I accept his evidence in preference to Mr Shute's where the two conflict.

However, his evidence about what was in his mind at particular times, and what he would have done had the misrepresentations of 4 February 2021 not been made, was not always supported by the contemporaneous messages, and I do not accept that in its entirety; particularly in relation to whether or not he intended to advance the full $7.5 million before the end of January 2021, which I discuss in more detail at paras [45] to [54], and where it is possible that some element of post-event reconstruction has gone on in Mr McLeish's mind.

The law

Fraud

[15] There is no significant dispute as to the law. The salient principles can be stated as follows.

[16] In a broad sense, fraud is a machination or contrivance to deceive: McBryde, *The Law of Contract in Scotland* 3rd Ed, 14-02; *Grant Estates Limited (in liquidation) and others* v *The Royal Bank of Scotland Plc and others* [2012] CSOH 133 Lord Hodge at [86]. More narrowly, fraud is proved when it is shown that a false representation has been made (a) knowingly and (b) without belief in its truth, or (c) recklessly careless whether it is true or false: *Derry* v *Peek* (1889) 14 App Cas 337. It follows that there cannot be liability for fraudulent misrepresentation if the representor believes the statement to be true.

[17] The recent case of *Shill Properties Limited* v *Bunch* [2023] EWHC 2135 (Ch) usefully summarises (at para [109]) further uncontroversial propositions derived from the case law. The statement founded upon as a misrepresentation must be false. If a statement was ambiguous the representee must prove that they understood the statement in a way which was in fact false. A statement of intention may be a misrepresentation of existing fact if, at the time it was made, the maker did not in fact intend to do what they said, or knew that

they did not have the ability to put the intention into effect. The representor must intend the representation to be acted upon.

[18] For a fraudulent misrepresentation to sound in damages, it must have operated on the mind of the representee: it must have induced them to enter the contract. However, it need not be the sole cause. It is sufficient to prove that the representation was *an* inducing cause: *BP Exploration Operating Company Limited* v *Chevron Transport (Scotland)* 2002 SC (HL) 19, Lord Millett at [104], where he said with reference to the representee:

> "Whether, if a full disclosure of the truth had been made, he would or would not have acted differently is a question to which English law does not require an answer; it is sufficient that he *might* have done so" [emphasis added].

[19] As *Shill Properties* also discusses, although the legal burden of establishing reliance is on the representee, there is, in fraudulent misrepresentation cases, an evidential presumption of reliance which is very difficult to rebut. As senior counsel for Mr Shute was at pains to stress, the presumption is one of fact, not law. However it is not necessary for the representee to believe that the misrepresentation was true; he need merely show that it was a factor which induced him to act as he did. This issue was discussed extensively by Lord Clarke of Stone-cum-Ebony in the Supreme Court case *Zurich Insurance Co Plc* v *Hayward* [2017] AC 142 at paras [17] to [40]. The facts in that case were that the defendant, who had been injured in an accident at work, misrepresented the severity of his injuries to his employer's insurers. Although the insurers suspected that the defendant had exaggerated the extent of his injuries, they settled his claim. Having received proof that the defendant had fully recovered from his injuries a year before the settlement had been reached, the insurers were subsequently found entitled to reduce the settlement agreement, the Supreme Court holding that it was not necessary as a matter of law to prove that the representations had been believed to be true; it was sufficient for the defrauded representee

to establish that the fact of the misrepresentation had been a material cause of its entering into the settlement. As it was put in one of the authorities mentioned with approval by Lord Clarke[3], all that was required was that the fraud be "actively in the mind" of the recipient when the contract came to be made.

[20] Finally, where fraud is established, contributory negligence is not available as a partial defence: *Standard Chartered Bank* v *Pakistan National Shipping Corpn and Others* [2003] 1 AC 959.

Negligent misrepresentation

[21] Where a representor does not take reasonable care in making a statement, liability for negligent misrepresentation might attach. It will do so where the representor has assumed responsibility for the statement, such that a duty of care was owed to the representee. To establish that, the representee will require to show both that it was reasonable for him to have relied upon the representation, and that the representor should reasonably have foreseen that he would do so: *NRAM Ltd* v *Steel* 2018 SC (UKSC) 141, para [23]. The misrepresentation must have caused or materially contributed to the ensuing loss. Only where a statement is wrong or inaccurate, and a reasonable person exercising ordinary care would have realised the inaccuracy, will liability attach. Finally, in contrast to a fraudulent misrepresentation, contributory negligence is available as a partial defence.

[3] *Ross River* v *Cambridge City Football Club* [2008] 1 All ER 1004, per Briggs J at para 241

Innocent misrepresentation: reduction

[22] Even an innocent misrepresentation may give rise to the remedy of reduction, although not to damages: *Royal Bank of Scotland Plc* v *O'Donnell* 2015 SC 258; McBryde, paragraph 15-66. The requirements for reduction are that: (a) there must have been a misrepresentation; (b) the representation must be material: it must have been at least a factor which induced the contract; (c) the representation must have been made by the defender or someone for whom he is responsible; and (d) r*estitutio in integrum* must be possible.

Chronology of material events

[23] The following narrative is based both on the witness evidence and on the agreed documentation. It is largely uncontroversial until the events of late January and early February 2021. I will highlight and discuss any conflicts in the evidence where appropriate.

Events until 26 January 2021

[24] Mr McLeish was first introduced to the possible "investment" by Jonathan (Jonny) Stewart in July 2020. Mr Stewart was someone he knew from Ayrshire, whom Mr McLeish said he had met only four or five times. It was put to Mr McLeish in cross-examination that he must have known Mr Stewart a great deal better than that. On this matter, I conclude that Mr McLeish was downplaying how well he knew Mr Stewart, since on any view he knew him well enough not to be surprised that he was being provided with a significant investment opportunity. Mr Stewart told Mr McLeish that he was getting

£100 million from a PPE deal in America and, initially, asked Mr McLeish for advice as to how he should invest it.

[25] In January 2021 Mr Stewart introduced Mr McLeish to Graeme Paterson and Ryan Underwood, who in turn introduced him to Mr Shute, who was presented as a top financial advisor and investor with an admittedly impressive CV. (That said, there was a dark side to Mr Shute, which his CV (unsurprisingly) did not disclose: he had a tendency to threaten those who crossed him. He accepted that in 2010 he had emailed a Mr Hocart threatening to "send someone round to see you"; in 2022, he sent a text to Stuart McIvor, including a picture of a large knife with the caption "im going to carve you up for threatening my girlfriend" (which Mr McIvor denied having done); and around the same time sent a threatening and abusive message to a Mr Arthur Romanet. Mr Shute admitted that he was the author of all of these messages, which he did not seek to justify, other than by saying that Mr Hocart had given him bad advice some years previously.)

[26] On 15 January 2021 Mr Stewart set up the "Victorious Secrets" Telegram chat group. Although Mr McLeish did not join that group until 19 January 2021, an initial Zoom meeting took place on or about 16 January 2021 among himself, Mr Stewart, Mr Shute, Mr Paterson, and Mr Underwood. By that time the separate "Gee Ryan Jonny Chris" Telegram group had also been set up by Mr Stewart.

[27] On 18 January 2021, Mr Paterson messaged Mr McLeish offering two options: US$5 million for 10%, or US$7.5 million for 15%, both structured as a loan to acquire shares after 36 months. That message was copied to the "Gee Ryan Jonny Chris" group at 9.15pm on that date, prompting this exchange:

Mr Underwood: "Perfecto"

Mr Paterson: "Done

Thanks guys fingers crossed" (at 9.16pm).

Mr Shute (at 9.25pm, referring to Mr McLeish):	"He's online now reading it".

[28] The following messages passed between Mr McLeish and Mr Stewart at around this time:

Mr McLeish:	"So your thoughts young man just between you and I on the share option"
Mr Stewart:	"There's 10% up for grabs…don't mention I said there is 10%".

These messages, which Mr McLeish evidently intended to be a private discussion between himself and Mr Stewart, were promptly sent by Mr Stewart to the "Gee Ryan Jonny Chris" group, eliciting from Mr Paterson the response "Good Jonny" – the first indication that Mr McLeish was being "played". Mr Stewart also forwarded the following message from Mr McLeish:

> "Ok so here is a thought 15 percent still a minority which would be 5% each off of you guys leaving you guys 85%...and depending what the tax experts say could the money be called a loan".

[29] On 19 January 2021, Mr Stewart told the Victorious Secrets group that Mr McLeish had opted for the 15% partnership option. At around that time Mr Paterson messaged the group giving Mr McLeish details of other contracts and opportunities that were available. On that date, too, Mr Stewart messaged the "Gee Ryan Jonny Chris" group attaching messages between himself and Mr McLeish in which he (Mr Stewart) had said:

> "I know we have been offered 5% for the full capitals so to jump another 10% won't be cards (*sic*). But let me speak to them?"

to which Mr McLeish had replied:

> "Ok I am open to a counter offer".

That led to this exchange:

Mr Paterson:	"Great work Jonny"
Mr Stewart:	"Chris Shute @Mr Ripley are we sending across a counter offer tonight guys. Let's strike when the irons hot".
Mr Underwood:	"I agree, gents did we get a chance to discuss a counter offer yet?"
Mr Shute:	"Let's all relax – we will be back at the hotel in 20".

(Mr Shute professed in evidence not to understand the Mr Ripley reference, Mr Ripley being a reasonably well known fictional and murderous conman; nor, however, did he query it at the time. If nothing else, the reference demonstrates a degree of familiarity between Mr Stewart and Mr Shute beyond that admitted to by Mr Shute, since one would not normally make such a reference to one's financial adviser, even in jest; for that matter the exhortation "let's all relax" demonstrated a certain unity of purpose.)

[30] On 19/20 January 2021 in the "Gee Ryan Jonny Chris" group, Mr Shute posted:

> "Impressive – the environment to raise short-term capital is f'g impossible right now. So to deliver that is seriously great work".

Mr Stewart:	"Great teamwork we all played a massive part in getting that closed. I started conversation on Thursday with Alan so for us to close in less than a week is great"

[31] On 20 January Mr McLeish sent the "Victorious Secrets" group a message asking to set up a Zoom meeting with his advisors, stating:

> "The deal is going ahead but would like them [his advisors] to understand a bit more".

Around that time he messaged Mr Stewart saying (referring to his advisors):

> "I look after them and I am loyal to them but if I want to do something I do it but I will allow them to think they are looking after my interests."

Mr Stewart sent a screenshot of that message to the "Gee Ryan Jonny Chris" group saying:

> "Alan 100% in" (laughing crying emoji)

prompting the following exchange:

Mr Paterson:	"Perfect"
Mr Stewart:	He said just let him know when we want him out and he'll be there"
Mr Paterson:	"He is a great acquisition"
Mr Stewart:	"First or second week of Feb suits him. He agreed they might have felt threatened but said it's his call and they will have to go with it."

[32] On 22 January 2021 Mr Paterson emailed Mr McLeish a more detailed list of supposed current and future opportunities supposedly available to Obree, all related to health care in some shape or form.

[33] Also on 22 January a Zoom meeting took place attended by Messrs McLeish, Paterson, Barlow, Binnie, Bryson, Stewart, Shute, Underwood and Paterson, the purpose of which was to introduce the syndicate members to Mr McLeish's advisors but nothing of any significance was discussed.

[34] On 23 January on the "Victorious Secrets" group this exchange took place:

Mr McLeish:	"Yip my guys are typically wary and I get that but they just need told at times plus when the monies come back they will be going…wow."

Mr Paterson:	"That is there (*sic*) game mate. Went really well from there"
Mr Underwood:	"Yes of course Alan"
Mr Paterson:	"You done great protecting us (wink emoji, thumbs up emoji)"
	"Teamwork"

[35] Around that time the following messages were sent among the members of the "Gee Ryan Jonny Chris" group.

Mr Paterson:	"We 100% made the right choice out of everyone. LOL"
Mr Underwood:	"Love that! (Thumbs up emoji. Laughing crying emoji, laughing crying emoji). Yes out of all the candidates I feel he is definitely the most suitable (laughing crying emoji)".
Mr Stewart:	"Definitely haha Although Jimmy [another potential 'investor'] said in the future the door is open".
Mr Paterson:	"LOL, you can send him that"
Mr Stewart:	"Just about managing relationships. You do it with Brent.[4] I do it with Alan. Trust is everything"

[36] Mr Shute instructed Mr Al Dahbashi to draft a loan agreement and an escrow agreement. Mr Shute forwarded drafts of the agreements to Mr McLeish on 28 January 2021. In his forwarding email he stated that "all documents represent in good faith all terms and conditions that have been discussed and agreed to in principal (*sic*)". The escrow agreement provided for ADG to hold the "escrow amount" (being any funds made available by Bogside) subject to the terms of the agreement; clause 5.3 provided for the payment of an

[4] A reference to Brent Fernandez, who was heavily involved in the fraud but who had no direct dealings with Mr McLeish

unspecified fee to "the advisor", who, in the draft, was left undefined. The loan agreement provided for Bogside to provide a loan of $7.5 million to Mr Underwood, to be paid to the Escrow Agent (ADG) on or before 27 January 2021. Repayment was to be effected by converting the principal loan to a 15% shareholding in Obree. The agreement did not specifically refer to the funds held by M&G, but did include a provision whereby "funds that have been generated from a large transaction occurred in 2020" (*sic*) (clearly an oblique reference to the $2 billion) were to be transferred to Obree; it also referred to three transactions in progress (presumably the so-called pipeline transactions) which were to be allocated to Obree. In terms of the agreements, the "initial tranche" of 25% of the loan, was to be transferred by ADG to Mr Underwood within 3 business days of the loan date, with the remaining amount to be transferred within 5 days of the incorporation of Obree's bank account. Clause 3 of the loan agreement provided that Mr Underwood was to use the Loan Amount (defined as the entire $7.5 million) for "working capital purposes, general corporate purposes, business expansion and to fund certain fees and expenses related to the execution of transactions of [Obree]" and of any other company in which Mr Underwood directly and/or indirectly had an interest. This last aspect had not been discussed with, nor did it have the prior agreement of, Mr McLeish.

[37] On 29 January, the final escrow and loan agreement were sent to Mr McLeish by Mr Al Dahbashi, already signed by Mr Underwood, with a request that Mr McLeish countersign them. Clause 5.3 of the final escrow agreement now provided for a fee of $400,000 to be made to Mr Shute, as the advisor. Although Mr Shute protested at the proof that he had not given instructions for that to be inserted, the escrow agreement was prepared on his instructions, as the email correspondence and Mr Al Dahbashi's evidence make clear, and it is not credible that Mr Al Dahbashi would simply have conjured up the

clause, or the figure to be inserted into it, of his own accord. Further, it is fanciful to suppose that Mr Shute would not have read the final version. At no stage was it brought to Mr McLeish's attention that the escrow agreement contained provision for Mr Shute to be paid $400.000. Indeed, since Mr Shute's position was that he had not given such an instruction, he did not contend otherwise. Mr Shute said that he had never been paid the $400,000, which did appear to be true, but for present purposes, that is beside the point: what is significant is that the statement in Mr Shute's email of 28 January 2021 was untrue: the agreements *did* contain material terms which had not been discussed or agreed in advance, namely that Mr Shute would be entitled to a sizeable fee, and that the funds in the escrow account could be utilised for any company in which Mr Underwood had an interest. The agreements were signed by Mr McLeish in his capacity as CEO of Bogside, on 1 February 2021.

[38] Meanwhile, on 25 January 2021 Mr Bryson emailed Mr McLeish, copied to Mr Binnie and Mr Barlow, asking for a number of points to be clarified. In particular, he sought details of the structure of the deal and what had secured the significant sums of money locked into the United States; he asked why the input, advice and guidance of asset recovery specialists was required; and he also asked what were the deals that had generated the right to further significant commissions (said to be $19 million, $25 million, $680 million and $1.2 billion) within the following 2 to 6 weeks as had been suggested; all very pertinent questions.

[39] A further brief Zoom call took place on 25 January 2021, but the main Zoom meeting was on 26 January, attended by Rathmell, Paterson, McLeish, Bryson, Hamill, Shute, Stewart as well as Craig Darling and Ryan McCreadie of Gilson Gray.

[40] Before that meeting Mr McLeish posted this message to the "Victorious Secrets" group:

> "Just a heads up…my lawyers are a very bullish bunch especially Derek Hamill but don't get upset with any of their questions…they all think I am crazy so just answer every question put you guys with as much clarity as you can"

[41] The evidence varied as to what was said at the meeting of 26 January 2021. According to Mr McLeish, Mr Shute took the lead and, among other things, referred to a genuine body of work in the Obree transaction pipeline, emphasising how Mr McLeish would benefit from that. Mr Hamill's recollection of the meeting was also that Mr Shute took an active role, and that he gave the impression of knowing that the funds were with M&G; he had no recollection of Mr Shute saying that he had not personally verified whether the funds were there; if he had, Mr Hamill would have expected that to be included in his firm's file note (which it was not). He, too, remembered Mr Shute referring to the genuine body of work in the Obree transaction pipeline and that it was important for Mr McLeish not to lose sight of the benefit deriving from that if he invested in Obree. Mr Hamill had the overall impression that Mr Shute was attempting to persuade Mr McLeish of the legitimacy of the transactions so that he would proceed with the investment despite Mr Hamill's advice about concerns which he had.

[42] Mr Shute's evidence about the meeting was different. He denied having taken an active role, saying that its purpose was to discuss "legal and transactional process". He made no reference to the "pipeline" transactions having been discussed, although he did state that at the meeting on 25 January, representations about the purported transactional pipeline in the PPE sector were made solely by Paterson, Stewart and Underwood.

[43] The contemporaneous Gilson Gray file note supports the evidence of Mr McLeish and Mr Hamill, and gives the lie to Mr Shute's evidence. It records that Mr Hamill expressed scepticism about the transaction. Mr Rathmell said that M&G had the leading

interface with the banks to get through the regulatory process, and that they would give a letter of comfort/advice. He explained, as did Graeme Paterson, that the reason M&G were involved was because they were advising the current trading entity whereas Mr Rathmell had been engaged by the beneficial owners to advise on the new structure once the money had cleared. Crucially, the file note records what Mr Shute said about imminent future deals and that Mr McLeish would be paying to benefit from those. Mr Hamill said that *he* would need to chat with M&G but it was agreed that Mr Rathmell would liaise with them and with Mr Shute, and arrange to get a letter of comfort/satisfaction to allay concerns.

[44] I therefore find that in the call of 26 January 2021, Mr Shute represented to Mr McLeish, and his advisers, that in addition to the existing PPE commission, further deals were in the pipeline, three of which were close to completion; that these would generate further significant sums; and that this was intended to induce Mr McLeish to invest.

Payment of the first £400,000

[45] Notwithstanding the legitimate (and ultimately well-founded) concerns of his advisers, there is no doubt that following the meeting of 26 January 2021, Mr McLeish was very keen to do the deal. He said in his witness statement that he was under daily pressure from Mr Shute in particular, who was pressurising him daily to release the loan funds, including by telling him that another investor was interested. I accept that was happening; equally, as Mr McLeish also accepted, he did not want to lose out on the opportunity to make vast sums of money. In his evidence - both in his witness statement and in cross-examination - Mr McLeish maintained that he only ever intended to release £400,000 as the first tranche, on the basis that he knew he would have a window of several days to recall it, should it transpire that M&G did not have the funds; and that he always intended not to

send the balance of the loan until he had confirmation that M&G did have the funds. He said he was keeping the others onside to stop them from going to the other investor. He insisted that he was always aware that he did not have instant access to the £5 million or so which was required, and that references to the money being sent on Thursday were not to Thursday 28 January, but to the following Thursday. He acknowledged that he had signed the loan agreement (requiring the loan to be advanced by 27 January 2021) (albeit, notwithstanding the dates on the face of the agreement, it appears not to have been signed until 1 February 2021) but said that was subject to the correct paperwork being provided.

[46] The best way to test that evidence is to compare it to the contemporaneous messages. On Tuesday 26 January 2021 Mr McLeish messaged Victorious Secrets stating that he was organising the funds which would hopefully be received in the account at some point on Thursday. On the same day, he messaged Mr Barlow telling him that he was looking to transfer $7.5 million on Thursday, this message being copied to Graeme Paterson, who posted it on to the "Gee Ryan Jonny Chris" group on Wednesday 27 January. Further messaging in that group that day included:

Mr Paterson:	"M&G will be connecting with Robin tomorrow with an update to satisfy the Alan's team (*sic*)"
Mr Underwood:	"Perfect (ok hand emoji)"
Mr Paterson:	"Se email guys, Alan is committed. that is a great news. Getting things moving now I think. Fingers crossed."
Mr Underwood:	"Great news mate!! That £400k will be a great start! Good work! (clap hands emoji)"
Mr Paterson:	"Yeah"
Mr Stewart:	"Great news He is frustrated they can't move it quicker"
Mr Underwood:	"Yeah means he's plugging in the same direction as we are already..."

[47] Also on 27 January 2021, Mr McLeish messaged the Victorious Secrets group again, following up his message of the previous day, but now stating:

> "Guys I am really sorry the funds won't be across till early next week due to lots of issues with Banking and The Wealth Management people. I am not impressed but I have been (*sic*) they are working as fast as they can."

[48] Also on 27 January Mr Barlow emailed Graeme Paterson stating:

> "I'm actually sitting with Alan just now to give him an update on the cash transfer. Due to the size of the transfer and the associated regulations the full funds will not be able to be transferred until early February. Alan was not pleased with this delay but we have to work within the guidelines. We can arrange for up to £400,000 to be transferred within the next few days, with the remaining sum to follow by mid next week. Please let me know how you wish us to proceed."

Mr Paterson replied:

> "Thanks for the email. I'm sitting with Chris and been on with the boys.
>
> We fully understand, looking at our current situation. We also are fully committed to working with Alan and know he is the right guy for the team, which for us is the most important thing in a partner.
>
> If you could get £400,000 out this week it would be really beneficial for us all with the remainder to follow early next week. As you know we are pushing to position ourselves to receive additional funds from future contracts and this will go a long way to help get a MVP in place asap.
>
> We wish to proceed with Alan and the 2 payments."

That was followed up by a further email from Mr Paterson a few hours later asking when the £400,000 would be sent.

[49] These messages from Mr McLeish and Mr Barlow reflected the fact, as Mr McLeish explained, that the entire sterling equivalent of $7.5 million could not be accessed immediately from his investments, whereas he had £400,000 readily available in his current

account. However, as Mr Barlow confirmed, the instruction to St James' Place to transfer £5 million from Mr McLeish's investment portfolio to his bank account was issued on 27 January 2021.

[50] It is also clear that the fellow "investors" were anxiously awaiting payment. This exchange of messages took place on Victorious Secrets around that time (the date is unclear from what has been lodged, but probably 29 January 2021):

Mr Stewart	"Graeme Bryson just off the phone to me. He's waiting on one extra piece of information from Mohammed before the money goes over.
	Do we know what document Mohammed is sending"
Mr Paterson	"We were not copied in on anything. On with Mohammad the now"
	"Mohammed has clarified everything we believe, so all good."
	"Think it was just a check on the accounts and loan agreement"
Mr McLeish	"Yeah they are looking for the loan agreement before the bank with (*sic*) release the funds"
Mr Paterson	"That has been provided".

[51] Behind the scenes on "Gee Ryan Jonny Chris", things were not so sanguine, as these messages of 29 January show:

Mr Stewart	"Sounds like it (*sic*) waiting on Alan messaging back"
Mr Paterson	"He emailed separately 2 mins ago"
	"Total fucking delay tactic!"
	"Waits till 2mins before the cut off time."
Mr Underwood	"FFS"

Mr Paterson	"His advisors are Ky-boshing the transfer."
Mr Shute	"Spoken to Mohammed"
	"He has responded on all points"
	"Email has been returned now"
	"They emailed Mohammed only 25 mins ago"
Mr Paterson	"We just need to stay calm. There was a good chance they were always going to do this!"

Then, later that day:

(messages forwarded by Mr Stewart, clearly messages forward to him by Mr McLeish)	"Jonny has your side signed all the paperwork? Plus a heads up I just got a text from Ken Barlow as apparently my lawyers have a serious issue with anti money laundering... they have said anything to me will catch with them tomorrow (*sic*)– Alan"
	"No problem, I know you were busy. Funds should be with them tomorrow first thing. Gilson Gray phoned later to say they have major concerns with anti money laundering rules so we'll have to get a call with them early next week before next traunche (*sic*) is transferred – Ken Barlow to Alan"
Mr Underwood	"Of course they do... I wouldn't expect anything else."
	"Maybe we should've got our paperwork in order earlier from our side."
	"Oh well, not to worry, we'll get everything competed today and then there should be no excuses from their end...surely. (shrug emoji)"

The next group of messages on "Gee Ryan Jonny Chris" came on 30 January 2021:

Mr Paterson	"Do we know what he means by that?"
Mr Stewart	"Not really pal"

	"Concerned that we haven't heard anything about the transfer yet team 2pm UK time"
Mr Shute	"Everyone just calm down pls"

(Graham Paterson then posted an exchange between himself and Mr McLeish regarding transfer of the money, including Mr McLeish's assertion "it's a goer"). The conversation carried on:

Mr Paterson	"Just ine (*sic*)"
	"I reached out"
Mr Stewart	"Thanks for update"
	"All calm but after yesterday I just want to make sure guys"
Mr Paterson	"Thanks brother"
Mr Underwood	"Haha you're welcome sir (folded hands emoji; thumbs up emoji)"
Mr Stewart (forwarding a message received from Mr McLeish)	"Yeah all good. But my bank need Robin to give a detailed answers (*sic*) to all Gilson Grays questions can you push that on young man - Alan"
Mr Stewart	"All good was Alan's travel plans"
	"I've asked if the first transfer is confirmed and asked again for the remittance"
Mr Shute	"Robin is working on responses to Gilson Grays questions"
	"I was on the phone with Robin for an hour last night"
Mr Stewart (forwarding a message received from Mr McLeish)	"It did go ahead but I haven't got the remittance I will speak to David Bias from Adam and Co on Monday but they won't release anything else until they have detailed answers from Robin...so push it on - Alan"

Mr Shute	"Gilson Gray sent a very long and repetitive email to Robin yesterday."
	"Tell Alan that I am working on this"

[52] The payment of £400,000 was sent on 29 January 2021 and received by ADG on 8 February 2021.

[53] The telegram messages do not support Mr McLeish's evidence on this issue. The reference to "Thursday" was, in context, and contrary to what Mr McLeish claimed, clearly a reference to Thursday 28 January, rather than to the following Thursday, otherwise the reference on Wednesday 27 January to the funds being delayed until early next week would make no sense. While it is possible that Mr McLeish was being economical with the truth with the group, to keep them warm, that interpretation is not supported by Mr Barlow's statement that Mr McLeish was not pleased with the delay; had Mr Barlow been in on "keeping the group warm", one might have expected him to have remembered that and to have volunteered it in evidence, but he did not. Equally, I did not find Mr McLeish's evidence about his signature of the documentation being subject to the paperwork being provided, to be particularly convincing. There was no mention of that at the time.

[54] I therefore find that had Mr McLeish been in a position to transfer the full $7.5 million on 28 January 2021, he is, despite his protestations to the contrary, likely to have done so, notwithstanding the absence, at that time, of any letter of comfort from M&G. However, the fact is that, for whatever reason, he did not do so. The Telegram messages also show that the others were not only keen for the balance of the loan to be made, they were worried that Mr McLeish's advisers might "kybosh" the deal. It would have been

apparent to them that further effort was required on their part for Mr McLeish to part with the remainder of the loan; and such further effort there was.

Events from 29 January 2021 to 4 February 2021

[55] The worries of the syndicate about Gilson Gray were justified. While it is overstating it to say that they were trying to "kybosh" the deal, they clearly had ongoing concerns, as is already obvious. On 29 January 2021 Craig Darling of that firm emailed Robin Rathmell setting out those concerns (this presumably being the email referred to by Mr Shute, somewhat dismissively, as "long and repetitive": repetitive, no doubt, because the legitimate queries were not being answered). The email ended with the perceptive observation that if the "roadblock" was the bank requiring to go through its own internal transactional and compliance protocols and checks, it was hard to understand why the costs to unlock were so significant.

[56] On 31 January 2021, Graeme Paterson sent Mr McLeish a video of a computer screen with an online statement for a bank account showing a frozen balance of $250 million, which he understood to show funds connected with a small transaction, also held by M&G. That was a further lie: it showed no such thing.

[57] On 2 February 2021, Mr Paterson posted the following to Victorious Secrets:

> "Hi Alan, this morning I received confirmation that the funds were now with M&G.
> Can you and Chris jump on with me to discuss?"

[58] Although their evidence conflicted as to what was said at it, both Mr McLeish and Mr Shute said that one Zoom call did take place that day. Mr McLeish's evidence was that Mr Shute said that it was not now a case of finding out if M&G had the funds, it was now

proved that they did have funds; whereas Mr Shute claimed to have made it clear that he personally had no direct communication with M&G and was not expecting to be given direct access, all parties being reliant on what Mr Paterson had said.

[59] That same day, Mr Shute sent these direct messages to Mr McLeish, using Telegram:

> "Mohammed and I will be coordinating with M&G throughout the day today (along with Robin Rathmell) to deliver the remaining documents to you so we can proceed with the additional transfer/transaction tomorrow subject to you having everything that you need."
>
> "We have been working through this overnight as I reflected to you yesterday"

These messages are significant in various respects. First, they are consistent with Mr McLeish's evidence that Mr Shute had earlier told him that it was now proved that M&G had the funds, since it represented that all that remained was to deliver documents. Second, they represented to Mr McLeish that Mr Shute and Mr Al Dahbashi would be "co-ordinating" with M&G that day, which Mr Shute cannot have honestly believed would happen, standing Mr Al Dahbashi's evidence. Third, they represented that they (in context, Shute and Al Dahbashi) had been working through the night to deliver the remaining documents, also untrue. Mr Al Dahbashi's evidence was that he had never dealt with M&G nor was he ever instructed to do so; plainly, he had not been working through the night with Mr Shute. It was also untrue that Mr Rathmell was involved (or had been working overnight). Although at the meeting of 26 January 2021, Mr Rathmell had said he would contact M&G, and Mr Darling emailed him on 29 January asking if he had managed to have "his" conversation with M&G yet, when Mr Darling sent a chasing reminder on 3 February 2021 asking if any progress had been made, the response, copied to Mr Shute, was that "I understand from Chris that he is in discussions with M&G. I've copied him here and he can

update you". Thus, as at 3 February 2021, it was not Mr Rathmell's position that he was speaking to, or trying to speak to, M&G. Rather, it appeared that Mr Shute had told Mr Rathmell that he, Mr Shute, was in discussions with M&G. If Mr Rathmell had misunderstood what Mr Shute had said, Mr Shute had the opportunity to correct that misunderstanding. However, he did not do so.

[60] Mr Shute's evidence about these messages was, at best, difficult to follow, and at times evasive. First, he did not volunteer any information whatsoever about them in his witness statements, crucial though they clearly were. Second, in cross-examination, he attempted to stand by his assertion that he had made clear that he had no direct access to M&G. His attempts to explain why he had worded the direct message to Mr McLeish as he had were unconvincing to say the least. He insisted that the reference to working overnight was to working with Mr Paterson; and that Mr Paterson had told him he would be responsible for coordinating legal counsel and communicating with M&G under his instruction; Mr Shute's role, in other words, being to coordinate timings and schedules of legal counsel to make themselves available to speak to US attorneys. He then said that he had no communication with Mr Al Dahbashi through the evening but he may have had communication with Mr Rathmell. Ultimately his explanation as to what he meant by saying that "we'd" been working through the night was that he had been referring to a conversation with Mr Rathmell and was also working through a checklist of things he thought would be required from M&G. Mr Shute was equally unconvincing when asked about the email from Mr Rathmell of 3 February 2021. He said that he had indicated to Mr Rathmell his expectation that "we" would be able to speak to M&G and that Mr Rathmell must have interpreted this as meaning that only Mr Shute would be in discussion with them. He agreed that he had not corrected Mr Rathmell's email, nor asked

him what he meant, but did not offer any satisfactory explanation, other than that he was waiting to be given access to M&G when he received that email.

[61] Prior to the commencement of the proof, one highly contentious matter was whether or not there had been a Zoom call on 2 February 2021 between Mr McLeish, his advisors, Mr Shute and Mr Paterson. In paragraph 49 of his witness statement, Mr Shute said that there had been such a call. He said that any representations were made by Mr Paterson and that all on that call knew that he did not have personal access to M&G. In paragraph 50, he professed to have a recollection of what was said, stating that it was discussed that Mr McLeish was to release the second tranche of funds to Gilson Gray initially, to be held by them subject to appropriate documentation being provided whereupon they would then release the funds to ADG for the benefit of the soon-to-be formed entity, Obree; but that ultimately Mr McLeish decided to ignore this step. This evidence was foreshadowed in answer 8 of the defences, where the defender averred in terms that a call took place on 2 February 2021 with Mr McLeish and his advisors, who were named as including Mr Bryson, Mr Barlow, Mr Binnie, Mr McReady, Mr Darling and Mr Hamill of Gilson Gray, and that Mr McLeish agreed to release $7.5 million to Gilson Gray on the foregoing basis. Such a conversation, if it had taken place, would have been significant, since it would have tended to negate the suggestion that Mr Shute had induced Mr McLeish to part with any money prior to written confirmation from M&G that they were in funds. In his witness statement, Mr McLeish said that he knew, having checked his calendar, that no such meeting took place on 2 February 2021. Senior counsel for Mr Shute put to Mr McLeish that there had been a meeting but he maintained his position that there had not. Mr Bryson, too, said in his witness statement that he had checked his calendar and notes, and he had no record of any such meeting having taken place that day. Mr Binnie was more emphatic: he

confirmed that he did not attend any such meeting and was not asked to attend a meeting on 2 February 2021. Although it was not covered in his witness statement, Mr Hamill was asked in evidence about a meeting on 2 February 2021, and replied that he had no recollection of attending any such meeting. He had checked his time recording for that day, and the only entry was for a board meeting lasting seven and a half hours.

[62] Given all of the foregoing, including that the averments in answer 8, and the cross-examination of Mr McLeish would have been made on Mr Shute's instructions, it therefore came as a surprise when Mr Shute began his oral testimony by withdrawing paragraph 49 of his witness statement (and subsequently paragraph 50, although that withdrawal came only in cross-examination). When his senior counsel put to him that neither Mr McLeish nor Mr Hamill could recall the Zoom call, his reply as I have it noted was:

> "On multiple overviews there was an exchange between me and Alan McLeish which indicated a call would take place. I was of the understanding that it did, I now agree that the second call did not take place, the first call did take place".

[63] Mr Shute's adoption of his witness statement was therefore subject to the deletion of paragraph 49. His senior counsel subsequently sought to found upon this as an example of Mr Shute's candour, but an alternative interpretation, which I prefer, is that he had been found out in a lie from which he knew there was no escape. While it is easy to understand how, two years after the event, it might be difficult to remember whether a particular meeting took place or not, that goes no way towards explaining why Mr Shute professed to remember not only who had attended a non-existent meeting, but what had been said at it. There was no suggestion that the meeting took place on some other day: it simply did not take place at all. Before leaving this topic, the answer given by Mr Shute, quoted above, was typical of his evidence as a whole, full of phrases which appeared to have been rehearsed, but which, when examined closely, were meaningless (such as his reference to "multiple

overviews"); nor did his answer truly explain why he was "of the understanding" that a meeting had taken place. Perhaps more significantly, the inclusion of a blatant untruth in his witness statement demonstrates that Mr Shute was willing to lie if it advanced his case.

[64] Moving on to 4 February 2021, Mr McLeish and Mr Shute agreed in their respective evidence that they had spoken that day, but they differed as to what was said.

Mr McLeish's position was that he spoke twice with Mr Shute, by telephone. Mr Shute told him that M&G were in funds, and Mr McLeish communicated that (as requested by Mr Shute) to Mr Hamill and Mr Darling. This news reassured Mr McLeish, who took it that M&G had the funds and were getting the necessary paperwork. Mr Hamill confirmed that there had been a video conference between himself, Mr Darling, Mr Bryson and Mr McLeish at 4pm that day, at which Mr Hamill (as his file note of the call confirms) expressed his continuing reservations about the transaction. Mr McLeish had said that matters had moved on and that the cash had now been released to M&G's client account. This appears to have assuaged Mr Hamill at least to the extent of not dissuading Mr McLeish from making the transfer. Mr Hamill was unable to say to whom Mr McLeish had attributed this information, but since there is no suggestion that Mr McLeish spoke to anyone other than Mr Shute that day, it can only have been him. Mr McLeish was cross-examined closely on this telephone conversation by counsel for Mr Shute. It was put to him that Mr Shute had told him to send the money to Gilson Gray, to be held until there was proof of funds, at which point it would be forwarded by Gilson Gray to ADG, but Mr McLeish adhered to his evidence that Mr Shute had told him to send the money directly to ADG who would "smooth the bumps out". Turning to Mr Shute's evidence, in his witness statement, somewhat surprisingly given their obvious significance to the central issue in the case, there was no mention of the calls on 4 February 2021 at all. In his oral evidence he accepted there

had been at least one phone call; he not only denied that he had told Mr McLeish that M&G had the funds, but he maintained that he had told him specifically that the only conversation that had taken place with M&G was with Mr Paterson. His attempts to explain why neither his pleadings nor his witness statement nor his supplementary statement made any reference to this conversation were unconvincing (including, as they did, an attempt to blame his lawyers for the omission). I find that this part of his evidence was also a lie, and I prefer Mr McLeish's evidence about what was said, in particular that Mr Shute told him to send the money directly to ADG.

[65] Mr Shute then sent the following messages to Mr McLeish:

> "I'm speaking to the NY guys in the next few hours but not before 4pm your time...your funds have just hit the UAE from the first transfer FYI – and will clear over the weekend"
>
> "Just tried to call again."
>
> "We are now – as you know in the process of receiving funds rather than establishing proof of funds/process of release so as soon as we have what you need - I will ensure that you have it immediately."

[66] We now come to the critical email of 4 February 2021 written by Mr Shute, addressed to Mr McLeish, Derek (Hamill) and Craig (Darling) of Gilson Gray and to Mr Bryson. It is too long to repeat *verbatim* but the following extracts are significant:

> "Just to confirm what Alan has told you – M&G has informed us that funds have been received from the US-based financial institutions that were previously holding funds that were subject to regular way AML review procedure. We anticipate that we will receive documentation in support of these funds being received shortly and just as importantly we expect those funds to be remitted out to the UAE to be received initially by Aldahbashi Gray and then ultimately transferred into the new corporate entity (Obree Global)...
>
> ...we will also engage one of our two legal advisory partners in the US to further support the legal attestation process – most likely either at Kobre and Kim (**M&G have shown a reluctance to speak with him directly as they have some concerns regarding circumvention**) or our Tax Advisory Attorney... (seen as a more 'neutral party')"[emphasis added].

[67] Mr Shute's contention was that he was merely repeating what he had been told by Mr Paterson, which he maintained was clear from the terms of the email and the prior conversation with Mr McLeish, and that the email could not be read as containing a representation that he personally had spoken to M&G. I agree that the email should be read in the context of the prior conversation, but, as I have found, that was to the effect that Mr Shute himself had spoken to M&G. That reading of the email is lent support by the further reference to M&G having concerns about circumvention, and details of the attorney they were prepared to engage with, which suggests a degree of personal knowledge on Mr Shute's part about M&G's attitude and the reason for it.

[68] For completeness, the email did go on to say that Mr Shute understood that Mr McLeish would be releasing funds to Gilson Gray in the next 24 hours following which, subject to receipt of acceptable documentation and proof of funds, the investment would be released into the Escrow Account. However, as I have found, this was contrary to what Mr Shute had previously told Mr McLeish to do. The whole tenor of the contemporaneous documentation, including the "Gee Ryan Jonny Chris" chat, was that the syndicate was desperate for the money to arrive and so it is unlikely that Mr Shute would have told Mr McLeish to send the money to Gilson Gray to await documentation, particularly when he knew that he had not spoken to M&G and that no documentation would be forthcoming. The proof of this particular pudding is that as soon as the money did arrive, Mr Shute began spending it, as we shall see in the next section: had his position honestly been that he did not wish Mr McLeish to forward the money until documentation had been produced, he would not have done that, but is more likely immediately to have contacted Mr McLeish to query why his advice had been ignored.

Events after 4 February 2021

The immediate aftermath

[69] Mr McLeish flew out to Dubai on 6/7 February 2021 to meet the syndicate, including Mr Shute. Mr Shute and Mr Paterson were always together when they met. Mr Shute told Mr McLeish that given the size of the proceeds it might take a little longer than anticipated for the funds to be transferred to Dubai; and he repeated that he was to be the only person to deal with M&G. On 8 February 2021, Mr McLeish instructed Adam & Co to pay the second instalment of £5,074,039. On that same date, Mr Al Dahbashi acknowledged receipt of the initial sum and said that he would proceed with remitting it to the targeted advisors based on individual instructions from Mr Shute. The SWIFT receipt was sent by Adam & Co to Mr McLeish and forwarded by him to Mr Shute that day. Although Mr Shute had initially claimed in his witness statement that he did not become aware of the fact that the second instalment had been sent to ADG until some time later, he admitted in cross-examination that he had in fact been aware of it on 8 February 2021. The money was received on 16 February 2021 by ADG as escrow agent, and they notified Mr Shute that day.

[70] On 4 February 2021 Mr Underwood had signed an "Authorisation to Allocate Funds", whereby he purported to "confirm" that the funds received by ADG on behalf of Obree were "fully accessible and under the direction of" Mr Shute. On 12 March 2021, Mr Al Dahbashi sent to Mr Shute an escrow amendment agreement prepared on his instructions. This was sent to Mr McLeish by Mr Morrison. The main change was said to be to allow the Advisor (Mr Shute) to make payments out of the escrow account before the Obree bank account was set up. In fact, what the amendment provided for was for the escrow agent (ADG) to transfer the Initial Tranche to any bank account designated by

Mr Shute, and, upon receipt of evidence that Obree had been established, transfer the remaining funds that were not part of the Initial Tranche to "the benefit of" Obree or to any bank account or party designated by Mr Shute for the purposes of the loan agreement. The effect of the letter of authorisation and the escrow amendment was that Mr Shute was able to intromit with the funds, and he began doing so immediately the escrow amendment had been signed. On or about 15 March 2021, Mr Al Dahbashi sent an email to, among others, Mr McLeish stating that ADG's role as escrow agent had been completed, the funds having been disbursed in accordance with the escrow amendment. All of the money advanced by Mr McLeish thus became available for Mr Shute to spend, and spend it he did, as we shall see.

The Letter of Engagement

[71] The Letter of Engagement was signed by Mr McLeish on 8 March 2021. It bears to outline the nature of the relationship between Leander and Alan McLeish and Bogside Investments (referred to as the "Principals"). It states, somewhat opaquely, that:

> "Leander Advisors is structured as a Principal Investment and Advisory Vehicle. The primary investment verticals expand across Multiple Asset Classes and Multiple Industry Verticals which manage the Principals' Capital and also manages third party funds from other Family Office Vehicles".

It goes on to provide that Mr McLeish and Bogside will be advised by Leander Advisors via Christopher Shute - described as Executive Chairman/Managing Partner of Leander Advisors (although in fact he was neither, another deception), and states that Leander undertakes to provide the following services:

> "(1) Initial Structuring and Establishment of Family Office Vehicle/s
>
> (2) Establishment of Off-Shore Asset Protection Trust Structures

(3) Establishment of Off-Shore Banking Accounts and Infrastructure

(4) Selection of Trustees for Supervision/Fiduciary Oversight of Family Office Vehicle/s

(5) Management of Family Office Vehicle

(6) Ongoing Management of Internal Capital and Oversight of Capital Allocated to Third-Party Managers"

[72] There was a sharp dispute between Mr McLeish and Mr Shute as to whether the Letter of Engagement was connected to the investment in Obree, which was Mr McLeish's position or was, as Mr Shute contended, for Mr McLeish to "offshore" assets to avoid paying tax and to defeat financial claims by his wife. In support of his position, Mr Shute founded on screenshots of messages he had sent to Mr Morrison. On or about 10 March 2021, he said:

> "We can probably release funds from Obree Global to cover Alan's costs on the Financial and Legal side if need be rather than have him double dip on that front – his offshoring of his personal stuff is linked to his participation in the Obree structure so I suspect the other guys will be supportive of that"

And on 27 February 2021 in an earlier message to Mr Morrison he had said:

> "Spoke to Alan McLeish – we are going to have him engage you immediately on his personal affairs in relation to his divorce proceedings and the re-domiciling of his assets"

Mr McLeish's comment on the latter was that there had been a very brief conversation when he had said "let's see how Obree works out"; and he said he had not seen the 10 March 2021 message before the proof. He remained insistent that he had not instructed Leander to "offshore" existing assets and that the only advice that was to be provided was in relation to profits realised by him from Obree.

[73] The independent evidence supports Mr McLeish's position. First, it is significant that Mr Shute, through Leander, had entered into virtually identical letters of engagement with the other individuals to be involved with Obree, the ostensible purpose of those being to

give advice in relation to the money flowing from the PPE transactions ("ostensible", because of course there never was to be any money flowing from the PPE transactions). Mr Shute attempted to explain this by saying that the nature of his engagement with Mr McLeish was different because he had already pledged capital but it is hard to see why that should make any difference.

[74] Second, Mr Morrison in his witness statement disavowed the notion that the Letter of Engagement related to anything other than the proceeds from the PPE transaction. He said that the Leander Letter of Engagement was one of a series of agreements entered into by Mr McLeish in the context of due diligence work being carried out in respect of the PPE transactions, and that the purpose of the Letter of Engagement was for Leander to provide investment and asset structuring advice to Mr McLeish in respect of his share of the proceeds from the PPE transaction. In relation to the specific point whether he had heard that the purpose of the Letter of Engagement was to facilitate tax evasion or avoid liabilities to Mr McLeish's estranged wife, he said not. While I accept that he might not have known the full picture, his unchallenged evidence tends to support Mr McLeish's evidence and to contradict that of Mr Shute.

[75] Again, I therefore prefer Mr McLeish's evidence to Mr Shute's. The purpose of the Letter of Engagement was not to enable Mr Shute to advise Mr McLeish about off-shoring existing assets; it was inextricably linked to the PPE transaction and the profits to be generated by Obree. Mr McLeish would not have entered into it had it not been for those blandishments.

Disbursement of the money

[76] One of the first payments authorised by Mr Shute was a payment to himself of £175,000 for services rendered to Mr McLeish through Leander, purportedly due under the Letter of Engagement, being the monthly fee of £50,000 for the months of March, April and May, plus additional expenses of £25,000. The other payments made included two payments to himself of £200,000 each for "Advisory Service provided to Graeme Paterson", and sums of £35,000 and £72,000 to Mr Paterson for "operational expenses" and "working capital". The ADG ledger lodged in process showed that these payments had all been made from 25 April 2021; Mr Shute maintained that many of them had been made before that; but the point is (and the more so if Mr Shute's evidence on that matter is correct), very soon after Mr McLeish's money arrived in Dubai, a substantial proportion of it found its way to Mr Shute and to Mr Paterson. This action is not concerned with whether Mr Shute was guilty of misappropriation of or misfeasance in relation to the funds remitted by Mr McLeish, but it is hard to see that Mr Shute believed that all of the payments which were made were in fact authorised by the terms of the loan agreement, escrow agreement and the letter of authority by Mr Underwood. For example, taking Mr Shute's view that the purpose of the Letter of Engagement was to enable Mr McLeish to "offshore" assets to avoid tax and to defeat claims by his wife, on what basis could the fees due by Mr McLeish under the Letter of Engagement be an expense which should be debited to Obree? And yet, without telling Mr McLeish that he was doing so, Mr Shute paid himself £175,000 out of the funds advanced by Bogside for the benefit of Obree. Mr Shute continually underplayed (as it turned out) the amount of the funds in the escrow account which had been spent, and said that Mr Morrison was conducting an audit of the payments, which also turned out to be untrue.

Other subsequent events

[77] Other subsequent events can be taken relatively quickly. Mr Morrison became increasingly suspicious of the PPE transaction. He said that Mr Shute had instructed him to speak to M&G and he (Shute) apparently scheduled several calls with M&G during February and March 2021 but that these never took place, for reasons that were never explained. At no stage did Mr Shute report this to Mr McLeish. The extensive paperwork produced by Mr Paterson did not vouch that the commission existed. Proposed meetings with M&G were cancelled. By June 2021, it was established that the M&G funds did not exist and that M&G had no knowledge of the supposed transaction. However, Obree had been incorporated on 11 March 2021, a shareholders agreement had been entered into. At least initially, regular board meetings took place, ostensibly with a view to pursuing the transactions which had been said to be in the pipeline, and close to completion. Mr McLeish's initial attitude was that although the M&G funds did not exist, he might still recoup his "investment" through those other deals. However, in about June 2021, Mr McIvor, who by this time had been employed by Obree, told Mr McLeish that no progress had been made in closing any deals and that none were close to completion. Rather than pursuing PPE deals, Obree turned its attention to vaccine opportunities, which Mr McLeish was also content to go along with, in an attempt to get his money back. Initially Mr McLeish, at least outwardly, blamed Stewart, Paterson and Underwood for the situation, and an agreement terminating the first shareholders agreement and a fresh shareholders agreement (by which Mr McLeish was allocated 85% of the share capital of Obree) were entered into on 2 and 6 August 2021, by which Stewart and Paterson were removed.

[78] ADG prepared a report on the whole sorry affair which they issued on 9 September 2021. It did not attach any blame to Mr Shute; although it subsequently transpired that Mr Shute had written a section of the report himself.

[79] Throughout this period, Mr McLeish did not accuse Mr Shute of any wrongdoing but appeared to be working with him with a view to recouping such of his investment as was possible. That notwithstanding, Mr McLeish said he had no longer trusted Mr Shute, but had wanted to keep him onside until one or more deals "got over the line".

[80] It was put to Mr McLeish in cross-examination that even when the true position became apparent to him - that there were no deals or commission and that much of the money had been spent - his complaint had been with the way Mr Shute had spent the money, rather than that he had misrepresented the position himself. Mr McLeish's response was that it was only when his team had reviewed all the messages that the extent of Mr Shute's involvement had become clear.

[81] While it is difficult to find any objective support for Mr McLeish's evidence that he was merely keeping Mr Shute onside while at the same time harbouring a suspicion that Mr Shute had defrauded him, I do not consider that this is ultimately of any assistance in deciding whether, as a matter of fact, Mr Shute had been party to the fraud and if so, to what extent. Even if Mr McLeish did not, or was reluctant to, suspect Mr Shute of fraud, that may simply pay testament to Mr Shute's expertise in carrying off the deception; or it may be that Mr McLeish was loth to admit quite how long it took him to recognise Mr Shute's duplicity. There is nothing inherently surprising in Mr McLeish's position that it was only when the correspondence and messages were reviewed, by a more discerning and objective eye, that the fraud was appreciated. Whatever the reason, as a matter of general principle, Mr McLeish's actions after the event are of no relevance in deciding whether or not

Mr Shute committed a fraud (in contrast to Mr Shute's actions after the event, which may be of relevance as to his state of mind, as discussed below).

Decisions as to admissibility

Timothy Connell's evidence

[82] Broadly speaking, Mr Connell gave evidence about four matters. First, he said that Mr Shute had assisted Hart (which has nothing to do with the health care industry) to raise investment money in 2018, and Mr Connell was satisfied with the service provided by Mr Shute at that time. Second, he had loaned Mr Shute £15,000 in 2019/20 which had not been repaid. Third, in September 2019. Mr Shute had introduced a potential investor in Hart, Siraj Finance PJSC, who wished a $125,000 fee for due diligence. That sum was paid into an escrow account at Mr Shute's behest. The investment from Siraj never materialised and further inquiries revealed that the entire sum in the escrow account had been paid to an account in Mr Shute's name. Mr Shute had denied any wrongdoing. Finally, Mr Connell said that in March 2021 he was contacted by Mr Shute, offering Mr McLeish as an investor in Hart. A letter of intent was produced from Obree, which envisaged Obree paying $15 million for shares in Hart. Mr Shute told Mr Connell that he had been trusted with Mr McLeish's funds from the sale of his business. Mr Shute had mentioned Mr Paterson, whom he described as Mr McLeish's partner, who had sold the US company.

[83] All of the foregoing evidence was objected to as being inadmissible because it had no relevance to the issues in dispute, had no foundation in the pleadings, was collateral and invited exploration of an entirely different complaint against Mr Shute, with which these proceedings were not concerned.

[84] It was submitted for Mr McLeish that the evidence was admissible. Reference was made to *Moorov* v *HMA* 1930 JC 68 and the principle of mutual corroboration in criminal trials, although it was recognised that the cases of *A* v *B* (1895) 22 R 402 and *Inglis* v *The National Bank of Scotland Limited* 1909 SC 1038, which have not been overruled, are authority for the proposition that similar fact evidence is not admissible in civil actions. In *Inglis* (an action of damages for fraud), Lord McLaren said, of averments that the alleged fraudster had defrauded other people on different occasions:

> "[*A* v *B* is] good authority for the proposition that it is not evidence against a party of having committed a delict to shew that he has committed delicts of the like description against other persons on other occasions."

A v *B* was an action of damages for rape, where averments that the defender had attempted to ravish two other women on specified occasions were held to be irrelevant, the Lord President (Robertson) observing that if the defender admitted having attempted to ravish the two other women, the jury might legitimately hold that this made it more likely that he ravished the pursuer, but that it was:

> "better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great deal of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing on the matter in hand."

[85] Mr McLeish is in a still weaker position than the pursuers in those cases since his pleadings contain no averments at all about the matters on which Mr Connell gave evidence. Further, *Moorov* is of no real assistance, given that it was dealing with mutual corroboration in criminal trials and in any event requires there to be an underlying unifying course of criminal conduct, which is not suggested here.

[86] There is a hint in what the Lord President said in *Inglis*, above, that even if similar fact evidence might be indirectly relevant it should nonetheless be excluded because it is

collateral. The question of collateral evidence was more recently considered by a Full Bench in *Bark* v *Scott* 1954 SC 72 at 76, where Lord President Cooper said:

> "...the question is one of degree in each case, the determining factor being whether the matters averred are, in a reasonable sense, pertinent and relevant and whether they have a reasonably direct bearing on the subject matter under investigation, or whether on the other hand they fall to be rejected as being too indirect or too remote."

[87] The above and other authorities were considered in *Strathmore Group Ltd* v *Credit Lyonnais* 1994 SLT 1023, Lord Osborne making the additional points at 1031 H to K that some element of judicial discretion is involved, expediency having a part to play in deciding what is relevant; and that individual decisions are unlikely to be a reliable guide, cases being fact-specific.

[88] Applying the *Bark* v *Scott* approach to Mr Connell's evidence, the evidence about the 2018 investment is of no moment. The evidence about the loan has a loose bearing on the matters with which these litigation are concerned, but only insofar as it may tend to suggest that Mr Shute was short of funds at around the time of the events here, and I will have regard to it to that limited extent; otherwise it is of no relevance. The evidence about the Siraj investment has no foundation on record and irrespective of whether or not it might have been relevant had there been averments about it (although *A* v *B* and *Inglis* would suggest otherwise) no fair notice has been given of that line of inquiry. In any event, the fraud in the present case is said to consist of misrepresentations about the existence of funds rather than misapplication of the money in the escrow account, which seems to be Mr Connell's principal complaint, and there is insufficient information about the circumstances surrounding the Siraj investment, and whether it was genuine, to enable any meaningful conclusions to be drawn as to whether or not it has any bearing on the probability that Mr Shute committed a fraud against Mr McLeish. To have allowed inquiry

into the Siraj investment would truly have risked derailing the proof by an inquiry into collateral issues ultimately of limited assistance. I therefore exclude that evidence as inadmissible. However, insofar as Mr Connell gave evidence about Mr Shute having communicated with him about a possible investment by Obree and Mr McLeish, I consider that does have a sufficient connection with the facts in issue as to be relevant, and admissible, for what limited worth it has.

Evidence about Mr Shute's actings after 8 February 2021

[89] During the course of the proof, senior counsel for Mr Shute also objected to evidence being led about what Mr Shute did with the funds after they had been transferred, on the basis that the case on record was not one of *ex post facto* responsibility for the transfer of funds. Again, I allowed the evidence to be led under reservation of its admissibility and competency. Senior counsel for the pursuer submitted that the evidence was admissible on two bases: first, that a misrepresentation once made had enduring effect until corrected; and second, that in testing the veracity of Mr Shute's evidence it was highly relevant to have regard to what he did with the money once it had landed, so to speak.

[90] In determining the admissibility of this evidence it is sufficient to accept the second of these two arguments: that what Mr Shute did after 8 February 2021 is indeed relevant in assessing his evidence about events before that date; and I do have regard to the evidence for that purpose.

Decision

[91] In reaching my decision, I have had regard to the comprehensive written notes of argument, and to the oral submissions made by senior counsel for each party. It is

unnecessary to rehearse these. The material points made have all been addressed in the course of this opinion. I will now answer the questions identified in para [4].

What if any misrepresentations were made by Mr Shute, and when?

[92] The first material misrepresentation made by Mr Shute was the statement during the zoom call of 26 January 2021 that there were further deals in the pipeline, some of which were close to fruition. That was untrue. The next material misrepresentation came on 2 February 2021 when Mr Shute said that Mr Al Dahbashi would be coordinating with M&G throughout the day: untrue. There followed messages in which Mr Shute had said that he was speaking to M&G (the New York guys) and that he had been working on the matter through the night with Mr Al Dahbashi and/or Mr Rathmell: untrue. Next came the conversation with Mr McLeish on 4 February, when Mr Shute said that he had spoken to M&G and that they were in funds: both untrue. Finally, there is the email of 4 February, which clearly conveyed that Mr Shute himself had spoken to M&G and that they had confirmed they were in funds: both untrue. If there were otherwise any ambiguity about the terms of the email, and whether Mr Shute was representing that he personally had spoken to M&G or was simply passing on what he had been told by Mr Paterson, that would have been dispelled by the reference later in the email to the reason why M&G might be unwilling to speak to Mr Rathmell, which also carried with it the clear implication that Mr Shute was speaking from personal knowledge which he had acquired through speaking to M&G. (For completeness, that too was untrue: since M&G were not involved, the question of their having a reason for not speaking to Mr Rathmell simply did not arise.)

Were these misrepresentations fraudulent, negligent or merely innocent?

[93] When the misrepresentations regarding M&G are considered together, they are incapable of an innocent explanation; or, for that matter, an explanation which merely imputes negligence to Mr Shute. Mr Shute did not just represent that M&G were in funds (which might simply have been negligent, or innocent, had he honestly been relying on what Mr Paterson had said) but represented that this information came from his personally having spoken to them, when he knew he had not. He cannot honestly have believed that this was true, nor can he have honestly believed the other untrue statements made between 2 and 4 February. I therefore find that all of these misrepresentations were fraudulently made. As regards the earlier statement that there were deals in the pipeline, this leads on to the next question.

Was Mr Shute party to the wider fraud committed by Paterson?

[94] A more difficult question is whether Mr Shute's involvement in the fraud extended beyond the misrepresentations surrounding M&G. Since it is accepted that Mr Paterson was instrumental in perpetrating the fraud, another way of putting that is perhaps to ask whether Mr Shute was party to that fraud or whether, having himself been duped by Mr Paterson as to the existence of PPE commissions, he had (coincidentally) embarked upon a separate fraud of his own to represent that those commissions were with M&G. A number of factors point to the former scenario as being the more likely. These are as follows.

[95] First, and significantly, Mr Shute's role in the deception (and his involvement in it with Mr Paterson) can be traced back at least to the zoom call on 26 January 2021, and the misrepresentation to Mr McLeish and his advisers about other deals. That too was pure fabrication. There were no deals in the pipeline, let alone any which were close to fruition.

Further, Mr Shute had presented those other deals as a reason for Mr McLeish making the desired investment, as clear an inducement to enter into the transaction as can be imagined. At no stage did Mr Shute, as I understood his evidence, claim that he had been duped by Mr Stewart as regards the existence of these deals.

[96] Second, there was the involvement of Mr Shute in the "Gee Ryan Jonny Chris" chat group, coupled with the nature of some of the messages, which included inappropriate emojis, some of them of a mocking nature: in effect, the group was laughing at Mr McLeish behind his back. Mr Shute sought to explain his membership of that group, and the nature of the messages, by saying that there was nothing sinister about the syndicate (and their financial adviser) passing comment about the person with whom they were hoping to transact, which I accept insofar as it goes. I accept, too, as was submitted for Mr Shute, that his involvement in the group chat was (in comparison with the others) relatively passive. Nonetheless, accepting as I do that the others were all in on the fraud, it is unlikely that they would have not only admitted Mr Shute to their private group had he not been party to the fraud, but then sent messages from which the fraud might have been deduced. Putting that another way, if Mr Shute had truly been a financial adviser giving arm's length advice to the syndicate and any prospective future members, and was himself being defrauded, one would not expect to have seen him in that particular telegram group which was conversing in that way. Viewed as a whole there is a cosy familiarity about the messages, signified even by the use of first names in the group title, which suggests a certain unity of purpose; and that is before we even get to the Mr Ripley reference, (see para [29].)

[97] The third factor is Mr Shute's obvious keenness that the money be sent to ADG, and his telling Mr McLeish (despite what was in the email of 4 February) to send the money directly to them: see paras [64] and [68].

[98] Fourth, and related to the foregoing point, is the fact that as soon as the money was received, Mr Shute first orchestrated changes to the documentation giving him complete control over the money in the account, and then began spending it, much of it for his own benefit and that of the other syndicated members; at least some of the payments, such as those in relation to the Letter of Engagement, were not even apparently authorised by the documentation: see para [76]. That an underlying fraud had been committed is underlined by the fact that Mr Shute did not tell Mr McLeish that he had taken the first tranche of fees out of the escrow account.

[99] Fifth are the other lies told by Mr Shute; in particular, that the documentation contained no terms which had not been agreed, when it did; and his use of a false residential address in the documentation.

[100] There are other pieces of circumstantial evidence pointing in the same direction, such as the fact that Mr Shute appears to have been short of money; the fact that later in 2021 he approached Mr Connell with a view to Obree investing in Hart (whose business was entirely unrelated to PPE or to healthcare); and the fact that Mr Shute himself wrote a significant part of the ADG report into the transaction which had the effect of concealing from Mr McLeish what had truly gone on.

[101] It may be that none of the foregoing factors (other than, perhaps, the misrepresentations in the zoom meeting of 26 January) is incriminatory in itself; but viewed together, they are sufficient to establish on a balance of probabilities that Mr Shute was complicit in the wider fraud.

Did the fraud cause Bogside's loss?

The wider fraud

[102] It is self-evident that the sole reason why Mr McLeish, through Bogside, advanced $7.5 million was because he had been induced to believe that substantial sums stood to be made from an existing pot of $2 billion and from future transactions, the representations to that effect being fraudulent from the outset. Since I have found that Mr Shute was complicit in that wider fraud, he is liable for the entire extent of Bogside's loss, £4,856,421.30.

The narrower fraud

[103] For completeness, I should deal briefly with what the position would have been had I found that Mr Shute's fraud extended only to the misrepresentations from 2 to 4 February 2021. There would then have been a real question as to the extent to which that induced Mr McLeish to advance money to Mr Underwood, particularly since £400,000 had already been advanced by then. I would have held that the misrepresentations of and immediately before 4 February 2021 were an inducing factor which contributed to Mr McLeish paying the second tranche of the $7.5 million. Although it is true that Mr McLeish would have paid the whole of that sum before 4 February had he been in a position to do so, the fact is that he did not pay it and there was still a worry on the part of the syndicate that Gilson Gray and the other advisers would, as Mr Paterson put it, kybosh the deal; and Mr McLeish, whatever his comments to the syndicate about his advisers doing as he told them, was still in fact taking advice from them; and they still had concerns about the deal. The whole purpose of Mr Shute's misrepresentation that M&G held the money was to persuade Mr McLeish not to back out of the deal; and to allay Gilson's Gray's concerns. That the very purpose of the email of 4 February was to help allay those concerns is shown by the words "Just to confirm

what Alan has told you": this was an email very much directed at Mr McLeish's advisers to prevent them from dissuading Mr McLeish to pay the money over. Mr McLeish believed the representation to be true and was in fact comforted by it. He is in a stronger position than the insurers in *Zurich Insurance* v *Hayward*, above, who entered into a settlement even though they suspected the representations to be untrue. Accordingly, while it is correct that he was desperate to do the deal, I accept that the misrepresentations were actively in his mind when he transferred the second tranche of money to ADG. Mr Shute, having achieved the end to which his misrepresentations had been directed, cannot now be heard to say that they had no causative effect; and he has not displaced the presumption of fact that the misrepresentations were one factor which induced Mr McLeish to make that payment. For completeness, and to deal with one argument advanced on Mr Shute's behalf, it is nothing to the point that in terms of the loan agreement, Mr McLeish was obliged to make the loan: the short point being that that, too, had been induced by the fraud.

[104] As regards the first £400,000, the position is different, because that was sent before the misrepresentations about M&G. Mr McLeish maintained that he would have requested the money back had Mr Shute not told him that the money was with M&G. However, based upon what Mr McLeish did after he found out that there were no funds with M&G (which was to continue his involvement with Obree in the hope of recouping his money) I am not persuaded that, if the fraudulent misrepresentations of 4 February 2021 had not been made, he would have requested the £400,000 back. That sum would still have been available for Mr Shute to have spent and would, in all probability, have been lost due to the wider fraud (for which, on this hypothesis, Mr Shute would not have been liable). Accordingly, on this alternative view of the case, I would have found Mr Shute liable for the agreed loss less £400,039, (the additional £39 being the relative bank charge) which is £4,456,382.30.

If not fraudulent, was there a negligent misrepresentation and if so, was there contributory negligence on the part of Mr McLeish?

[105] These questions do not require to be answered, given that I have found the misrepresentation to have been fraudulent. However, for completeness, if I had not found fraud, I would have found Mr Shute liable in negligence. As Mr Shute himself appeared to accept in evidence, his email of 4 February 2021 was carelessly worded: a reasonable person exercising ordinary care would have realised that it was inaccurate to represent that M&G were in funds. Even though (on this hypothesis) not fraudulent, its purpose remained to persuade Mr McLeish to part with his money. It was reasonable for Mr McLeish to rely on Mr Shute's representation that M&G were in funds, and, as I have found, he did so. It was also reasonably foreseeable that he would do so. The misrepresentation was at least a factor which materially contributed to Mr McLeish's decision to advance the second tranche of the loan. However, on this analysis, his own desire to do the deal was also a contributory factor; and to the extent that he decided to proceed before a letter of comfort had been seen, I would have found that he did fail to take reasonable care for his own interests. On this scenario, I would have found Mr McLeish contributorily negligent to the extent of one third.

What caused Mr McLeish to enter into the Letter of Engagement?

[106] This question has already been answered. The purpose of the Letter of Engagement was for Mr Shute to give financial advice to Mr McLeish in relation to the substantial funds promised from Obree. Had it not been for the wider fraud, there would have been no question of Mr McLeish entering into the Letter of Engagement for advice related to the offshoring of assets.

What remedies are Mr McLeish and Bogside entitled to?

[107] The requirements for reduction as set out in para [22] having been met - there was (a) a misrepresentation which (b) induced the contract and which (c) was made by Mr Shute, for whom Leander was responsible, and (d) *restitution in integrum* is possible – Mr McLeish is entitled to have the Letter of Engagement reduced. The position regarding repetition is more complicated, since payment of the first tranche was effected from the escrow account, in other words, from the funds which Bogside advanced as a consequence of the fraud. Counsel for Mr McLeish accepted that if damages for fraudulent (failing which negligent) misrepresentation are awarded (as, in due course, they will be), there is no further claim for repetition since those sums are already covered by the claim for damages (no point was taken that Leander, as opposed to Mr Shute, should be ordered to repay the £175,000; although there was no discussion of what the position would be should Mr Shute, or now, his estate, be unable to meet the award).

Disposal

Leander action

[108] For the reasons just given, I will meantime sustain the second plea in law in the counterclaim and grant decree of reduction in terms of the first conclusion, leaving all other conclusions and pleas in both the principal action and counterclaim extant for the time being. I will reserve all questions of expenses in relation to the proof, and put the case out by order to discuss whether any further pleas-in-law ought to be sustained or repelled at this stage, and to discuss further procedure albeit in practice that may have to await such time as Mr Shute's executors have been appointed.

Bogside action

[109] As discussed in para [5], no further procedure can occur in the Bogside action at the present time. This opinion being a draft insofar as that action is concerned, the appropriate procedure is probably now formally to sist that action pending appointment of Mr Shute's executors, but in the first instance I will also fix a by order to obtain an update as to progress in that regard, and to discuss the length of the sist. In due course, I will grant decree in absence against Mr Paterson for the agreed amount of the loss.