



Neutral Citation Number: [2022] EWHC 935 (Comm)

Case No: LM-2020-000172

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 29/04/2022

Before:

HHJ Russen QC

(Sitting as a Judge of the High Court)

Between :

(1) PAUL RICHARDS
(2) KEITH PURVES

Claimants

- and -

(1) SPEECHLY BIRCHAM LLP
(2) CHARLES RUSSELL SPEECHLYS LLP

Defendants

Richard Leiper QC (instructed by **Cardium Law Limited**) for the **Claimants**
Nigel Tozzi QC and **Alexander Wright QC** (instructed by **Norton Rose Fullbright LLP**) for
the **Defendants**

Hearing dates: 8th-10th and 14th-16th March 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HH JUDGE RUSSEN QC

HHJ Russen QC :

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A. INTRODUCTION

2. This is my judgment following a trial of a professional negligence claim which was heard over 6 days in March 2022.
3. The Claimants (respectively **Mr Richards** and **Mr Purves**) sue the Defendants (**the Firm**, following the merger on 1 November 2014, during the course of the Claimants' retainer, of the First Defendant with another firm so as to form the Second Defendant) in respect of losses said to have been suffered by them on the sale of their respective 42.95% equity stakes in a cloud-based communications technology company, IP Solutions UK Limited ("**IPS UK**") in December 2014 ("**the Transaction**").
4. The Firm acted for the Claimants on the Transaction. The Claimants allege that the Firm was negligent in failing to advise them in relation to their financial exposure in the event of them subsequently leaving the employment of IP Solutions Group Limited ("**the Company**"), the newly incorporated company which acquired their shareholdings in IPS UK and in which they each acquired a 30% holding of C Class Shares and became the Company's CEO and Sales Director respectively.
5. Their principal complaint is that the Firm failed to warn them that the terms of the Transaction were such that even if they were subsequently wrongfully dismissed from their employment by the Company, so that they would be classed as "Good Leavers" for the purposes of the resulting sale of their shareholdings in the Company, they would receive no or only nominal value for their shareholding. That is because of the impact of something called the Redemption Premium Provision ("**the RPP**") on the determination of the "Market Value" of their shareholdings, upon them leaving the Company, in accordance with the Company's Articles. Their pleaded case is that, had they been made aware of this risk, they would have sought to have negotiated a carve-out of the RPP from the determination of Market Value. The true construction of the relevant article was key to the decision of the High Court in the litigation between the Claimants and the Company, mentioned next, and it is now central to the present proceedings between the Claimants and the Firm. The Claimants say that, had they been warned that the RPP would or could have had that impact, then they would either (1) have negotiated a carve-out in the Articles, such that the RPP did not apply to the determination of Market Value ("**Scenario 1**"); or (2) concluded an agreement with an alternative investor ("**Scenario 2**"). Either way, they say that they have each suffered a loss of between £1.7 and £1.9 million.
6. In addition, they seek to recover the costs of what has been described as "**the Leaver Litigation**" in the sum of £895,141.63. The Leaver Litigation arose out of the dismissal of Mr Richards and Mr Purves from their employment by the Company in July 2015. They were categorised by their employer as "Bad Leavers" for the purposes of the resulting sale of their shareholdings, which, if a correct categorisation, meant that under the Articles each shareholding was only worth £1. They challenged that categorisation in the Leaver Litigation brought against the Company. Following a trial earlier that month, by her judgment dated 22 July 2016, Mrs Justice May DBE, determined that they had been wrongfully dismissed ("**the Liability Judgment**": [2016] EWHC 1835 (QB)). The result meant that the Claimants ought to have been categorised as Good Leavers. On that basis they claimed to be entitled to receive "Market Value" for their shares.

7. However, by a further judgment dated 30 November 2016 (“**the Quantum Judgment**”: [2016] EWHC 2599 (QB)), following a hearing on 5 September 2016 and further written submissions thereafter, May J ruled that they were only entitled to receive a nominal sum for their shares. This was because of what the judge held to be the application of the RPP to their disposal. As a result, their shares were denuded of value just as if they had been Bad Leavers.
8. The Company sought to appeal the Liability Judgment but its paper application for permission was unsuccessful. The Claimants obtained permission to appeal the Quantum Judgment. However, their appeal and the Company’s renewed, oral application for permission to appeal the Liability Judgment were both compromised on 15 January 2018 and by consent both intended appeals were dismissed. The Claimants were each paid the sum of £87,500 under the compromise.
9. After the Claimants had completely severed their connection with it by that compromise, the Company was put into liquidation on 19 December 2018 and dissolved on 19 October 2019. It was insolvent and there was no distribution to its members.
10. The Firm defended the negligence claim by reference to liability, causation, and quantum. Part of its defence rests upon the contention that the Quantum Judgment was wrong as the RPP did not apply in a Good Leaver scenario. The Firm said that May J erred in reaching the conclusion she did and may have done so because of an incorrect concession made by the Claimants that a forced transfer constituted a “*Share Sale*” for the purposes of article 13.3.
11. The other main points relied upon in defence of the claim were as follows:
 - i) In relation to the Firm’s duty of care, that the risk against which it is alleged Firm should have warned was not a substantial one requiring such a warning. It is said to be a risk which eventuated only because of a most unlikely combination of factors: a situation in which (a) both the private equity house behind the December 2014 purchase (“**Livingbridge**”) and the independent Chairman, Mr Andrew Lockwood (“**Mr Lockwood**”) decided they should summarily dismiss the Claimants on what they considered to be justified grounds; (b) the Claimants were then held by May J to be Good Leavers; (c) the court construed the Company’s Articles incorrectly; and (d) the value of the Company (on the Claimants’ case) was such that it would have made a material difference to the price received by them. The Firm says that chain of events was not one that could have been foreseen during the negotiation of the Transaction.
 - ii) Further, and in any event, any such risk was the result of commercial negotiations between the Claimants and their corporate finance advisers Knight Corporate Finance Limited (“**Knight**”) and Livingbridge in September 2014. The Firm was not party to those discussions and was neither asked nor required to advise on the commercial desirability of the deal. It says that the commercial aspects were addressed by the Claimants with the assistance of Mr Paul Billingham (“**Mr Billingham**”) and Ms Laura Cockburn (“**Ms Cockburn**”) of Knight.
 - iii) In relation to causation and quantum, there was no real or substantial chance that Livingbridge would have agreed to carve out the RPP from a Good Leaver

scenario. The Claimants would most likely have done the same deal with Livingbridge as the one they actually did conclude.

- iv) Alternatively, if Livingbridge had been prepared to agree to the proposed carve out (Scenario 1), it would have made no difference, both because (a) the Market Value of the Claimants' shareholdings in the Company as at 29 July 2015 was zero, and (b) even if the Claimants had obtained a judgment against the Company, they would not have recovered more than they did under the compromise of the appeals in the Leaver Litigation because, by the conclusion of that litigation, the Company was effectively insolvent. On the scenario of the Claimants walking away from the Transaction had they been warned of the risk (Scenario 2) then (a) the chance of them concluding a deal with an alternative investor was low, and (b) the amount that they would have received would not have exceeded the cash consideration that they received from the Transaction, so that they suffered no loss.
 - v) The claim for the costs of the Leaver Litigation overlooks the point that the main issue in that litigation was whether or not the Claimants were Bad Leavers. That issue had nothing to do with the alleged breaches of duty by the Firm and/or was outside the scope of any such duty. Further, most of those costs were recovered from the Company, so even if the claim was otherwise good only a small fraction of the costs would therefore be recoverable.
 - vi) The Claimants have been contributorily negligent and failed to mitigate. The Firm says they caused or contributed to their own losses both as regards their conduct vis-à-vis the Company post-completion of the Transaction and by reason of the incorrect concession made as to the proper construction of the Articles before May J.
12. It will be noted that included within the Firm's defence is the proposition that a solicitor should not be held to have been negligent in failing to anticipate the risk that a judge may reach (what the Firm argued before me was) a plainly erroneous conclusion as to the meaning of legal documents which are the subject matter of the solicitor's retainer. The Firm says that the court's earlier misinterpretation of the Company's Articles in 2016 presented a risk which should not be regarded as a material or significant one when viewed from the perspective of the Firm performing its retainer in 2014.
13. I explain the parties' pleaded cases in a little more detail in Section F below.
14. Those cases were presented at the trial by Mr Richard Leiper QC on behalf of the Claimants and Mr Nigel Tozzi QC and Mr Alexander Wright (now QC) for the Firm. I am grateful to counsel and their instructing solicitors for the considerable effort that has gone into an orderly and skilful presentation of the numerous issues in this litigation and the voluminous evidence which relates to them.

B. THE BACKGROUND TO THE TRANSACTION

15. The business of IP Solutions was started by Mr Richards and Mr Purves in 2001. It sold a range of communication technologies such as mobile services, wired

communication services, broadband and conferencing services via a hosted cloud platform. The business was originally that of a “reseller”, taking a commission on sales but with no ongoing customer relationship.

16. In 2010, the business model changed from that of a reseller into a unified communications (“UC”) provider. This involved IP Solutions partnering with established sellers of technology to enable the business to deliver to its clients a managed service and providing them with a single point of contact. The cloud-based technology offered communication services and IT solutions on a business-to-business basis. The model focused on the SME market and operated entirely in the UK.
17. By 2014 this successful business was owned by IPS UK. It had a turnover of some £7 million and employed around 30 people, garnering a number of awards and being listed in the Sunday Times 'Tech Track' as the fastest growing telecoms reseller in 2014.
18. Mr Richards and Mr Purves each held a 42.95% equity stake in IPS UK, holding all of the A shares and almost all of the B shares. One of the two minority shareholders was Mr Andrew Lindsell (“**Mr Lindsell**”) who held a 10.1% stake.
19. In late 2013 or early 2014 they decided to evaluate their options going forward: either to exit the business completely or to take on external investment in order to grow the business with them retaining both shares and management positions in the business, whilst at the same time reducing their risk exposure by realising some capital. The second option would involve seeking a capital injection, together with the experience and guidance necessary to put in place some of the corporate structures which would allow the business to grow to the next level.
20. In January 2014 they appointed Knight to advise them on their options. At the same time they also appointed Simon Howitt (“**Mr Howitt**”), of Show Consulting Limited, as chairman of IPS UK with a remit that included advising on the potentials of an outright sale of the business, institutional investment or some form of strategic partnership.
21. The Claimants decided to go with the second option, the pursuit of which became known as ‘**Project Spur**’. Mr Billingham and Ms Cockburn of Knight were responsible for conducting the sale process and advising on the key commercial terms of the proposed transaction.
22. The formal sale process was commenced in February 2014. A number of parties expressed interest and 12 of them signed non-disclosure agreements. These comprised 7 trade buyers and 5 private equity houses. A more detailed Information Memorandum was issued by Knight in March 2014, following which 7 parties expressed firmer interest and meetings followed. Indicative offers were then received from 6 parties: 4 trade buyers, Livingbridge (which at the time was called ISIS EP LLP but later changed its name to Livingbridge EP LLP) and Maven Capital Partners UK Plc (“**Maven**”, another private equity firm). However, it appears that by June 2014 only one of the trade buyers, GCI Telecom Group Limited (“**GCI**”) was left in contention, alongside Livingbridge, though Knight were expressing some doubt over the credibility of their contemplated purchase. I return below to the offers which had been made by GCI and the other potential buyers – Coms, Maven, Intercity and Adept (a further potential trade buyer, Node 4, having made an outline offer during a telephone call with Mr

Billingham, in April 2014, on which it did not follow up) – in the context of evaluating the Claimants’ loss of a chance under Scenario 2.

23. Mr Richards and Mr Purves decided to pursue the outline offer with Livingbridge. This would provide them with three key elements: (a) an initial cash payment; (b) an exit at 3-5 years following anticipated continued growth in light of the expertise offered by Livingbridge from which the value of their rollover equity would benefit; and (c) continued earnings until exit (with Mr Richards as CEO and Mr Purves as Sales Director).
24. Livingbridge made an indicative offer on 25 March 2014 with revised proposals following on 19 May 2014 and 25 June 2014. Livingbridge acted principally through Mr Paul Morris (“**Mr Morris**”).
25. Livingbridge’s offer of 25 June 2014 enclosed certain “*Key Points*” for the “*Legal Documents*”, including terms as to what would happen to any rollover equity should the Claimants, or Mr Lindsell, leave the business (“**the Leaver Provisions**”). This would depend upon the “class” of Leaver. For example, a person wrongfully dismissed would be a “*Good Leaver*” and receive Market Value for their shares. A person who resigned who was a “*Bad Leaver*” would receive only £1. An intermediate category of “*Other Leaver*”, including those dismissed on notice, would receive his so-called ‘vesting rights’ (of value) over time.
26. Livingbridge made a revised offer on 11 July 2014. Amongst other matters, this improved the vesting rights for an Other Leaver.
27. On 18 July 2014, Mr Billingham forwarded Livingbridge’s offer of 11 July 2014 to the Firm (then the First Defendant) to act for the Claimants. Indicative fees and a proposed scope of work were set out by the Firm on 21 July 2014. The following day Livingbridge sent draft Heads of Terms to Knight and, in late July and in the context of the Claimants confirming the Firm would be instructed but before it had been formally retained, Mr Adam Crossley of the Firm (“**Mr Crossley**”) had provided some advice on the leaver provisions in the draft terms. The Firm’s retainer letter was in due course issued on 19 August 2014.
28. The Firm’s team on the Transaction was led by Mr Crossley who was an experienced private equity lawyer. Mr Crossley was assisted principally by Mr Richard Coleman (a senior associate, private equity), Mr Jamie Crawford (an associate, tax) and Mr Lee Holland (a junior associate, private equity). Discrete advice was provided by Ms Kirsti Laird, an employment lawyer.
29. The circumstances in which the terms of the Transaction were negotiated, during the period of the Firm’s retainer, are obviously of central importance to the allegation of negligence on the part of the Firm and I return below, in later sections of this judgment, to the more significant aspects of the negotiations when considering, first, the evidence about them and then the substance of the allegation.
30. The Transaction completed on 3 December 2014. It involved the following:
 - i) A Share Purchase Agreement by which the shares in IPS UK were acquired by Company (then Newincco 1315 Ltd).

- ii) An Investment Agreement through which investment was made into the Company by a group of investors (“**the Livingbridge Investors**”) and by which the shareholdings in that company were established; the Livingbridge Investors holding the A and B shares, and the Claimants holding the C shares. The effect of the Investment Agreement was that the equity was held as to 30% by each of the Claimants, 5% by Mr Lindsell and 35% by Livingbridge. The Livingbridge equity was subject to potential dilution through the later issue of so-called “sweet equity” in favour of others.
 - iii) Articles of Association of the Company (“**the Articles**”).
 - iv) Service Agreements for each of Mr Richards and Mr Purves.
 - v) A Loan Stock Instrument in respect of £5,151,811 of loan stock held by Livingbridge.
31. In addition to their 30% shareholdings in the Company, the Claimants each received £2,297,950 in cash on the sale of their shares in IPS UK. This was the greater part of the cash sum of £4.7 million, before adjustments for net debt and deferred tax assets, which was split between the former shareholders of IPS UK, which also included Mr Lindsell, who held 10.1%, and Mr Scott Fawcett who held 4%. Mr Lindsell received £546,543 for his shares together with a 5% shareholding of D Shares in the Company. Mr Fawcett sold his shares for £127,603 and acquired no shares in the Company.
32. The Claimants became employed by the Company as CEO and Sales Director, respectively, with salaries of £200,000 per annum and performance-related bonuses of up to £131,000 p.a..
33. Both the Claimants and Livingbridge had originally intended that the Company would trade for about 3 to 5 years, before being sold to a trade buyer.

C. THE KEY TERMS OF THE TRANSACTION

34. I now turn to certain key provisions of the Transaction which were central to the Leaver Litigation and, given the outcome of that litigation, are also central to the present claim.

The RPP

35. Final heads of terms preceding the execution of the contractual documentation referred to in paragraph 30 above were signed by the Claimants and Livingbridge on 5 September 2014 (“**the Heads of Terms**”).
36. The Heads of Terms had provided for a share option scheme by which a further 7% of ‘sweet equity’ in the new company above a ‘hurdle’ (set at a level yet to be agreed) would be made available to key employees. That sweet equity would come at the expense of the Claimants’ share of the equity. They were to hold 30% equity ‘below hurdle’ and 26.5% equity ‘above hurdle’ in IPS Group. The remaining equity would be held 35% by Livingbridge and 5% by Mr Lindsell.

37. However, fixing the “hurdle” proved to be contentious, and the Claimants were dissatisfied at the prospect of having less equity than Livingbridge. Accordingly, the parties agreed that instead of the Claimants’ equity being reduced above the hurdle, there would be a ‘ratchet’ whereby Livingbridge would receive a preferential distribution below a multiple of its investment. In short, the agreement was that the Livingbridge loan notes would carry a variable “redemption premium” such that, on a qualifying sale of shares in the Company which led to the purchaser acquiring more than 50% of the shareholding voting rights, Livingbridge would receive a minimum of twice its initial investment in priority to other equity shareholders.
38. It was this agreement which resulted in the RPP.
39. The RPP is contained within article 13 of the Articles (headed “*Exit provisions*”) which provides:
- “13.3 *On a Share Sale the Proceeds of Sale shall be distributed in the order of priority set out in Article 13.2 unless the aggregate Proceeds of Sale distributed to the Living Bridge Investors is less than two times the Living Bridge Investment Amount in which case:*
- 13.3.1 the holders of the A Ordinary Shares shall be paid the Issue Price of each such Share, together with a sum equal to any arrears or accruals of any dividends calculated down to and including the date of actual payment (the “A Share Proceeds”);*
- 13.3.2 the holders of the B Ordinary Shares shall be paid the B Share Price of each such Share, together with a sum equal to any arrears or accruals of any dividends calculated down to and including the date of actual payment (the “B Share Proceeds”) plus an additional amount (the “Additional B Share Proceeds”) such that the A Share Proceeds, the B Share Proceeds and the Additional B Share Proceeds plus the Previous Distributions Amount in aggregate equal two times the Living Bridge Investment Amount; and*
- 13.3.3 the balance of such assets shall be distributed amongst the holders of all the Equity Shares (other than the A Ordinary Shares) in proportion to their respective nominal values by reference to the total nominal values of those Equity Shares in aggregate...”*
40. Article 13.2 regulated the distribution of the Company’s surplus assets on “*a return of assets on liquidation or capital reduction or otherwise*”. It was to the effect that (allowing also for the payment of any accrued dividend on the B Shares) all classes of share in the Company would, for that purpose, be treated *pari passu* as if they comprised one class of share and each had a nominal value of 0.1 pence. Essentially, the RPP in article 13.3 provided that on an “*Exit*” the Livingbridge Investors were to receive the Proceeds of Sale up to the value of two times the Livingbridge Investment Amount (the other shareholders receiving value for their shares – to the extent any was left – thereafter). If the Proceeds of Sale were significantly in excess of that value then, as holders of the C Shares, the Claimants would stand to benefit from a greater share of those proceeds under article 13.2.

41. By agreeing the RPP they also avoided the risk of dilution of their shareholdings through the later issue of sweet equity and also stood to gain under article 13.3.3 once the RPP fell away. However, the RPP effectively meant that the first £11.5m odd in value of the Company belonged to Livingbridge.

The Leaver Provisions

42. I have already mentioned in Section A above the litigation which arose over whether or the Claimants should have been categorised as Bad Leavers or Good Leavers when they were dismissed from the Company's employment in July 2015.
43. A Good Leaver was defined by the Articles so as to include an employee (not being a Bad Leaver) who ceased to be an employee in a number of defined situations, one of which was termination of employment in circumstances amounting to wrongful dismissal. Death or permanent incapacity to continue with employment and/or the Board's agreement (with "*Investor Consent*") upon Good Leaver status were other such situations. A Bad Leaver included (but was not limited to) an employee who terminated his contract of employment other than in circumstances which would constitute him a Good Leaver (though there was an express disapplication of this limb to Mr Richards, Mr Purves and Mr Lindsell) or where the termination was in circumstances of dismissal, or an entitlement in the Company to dismiss, for a reason justifying the employee's summary dismissal. The category of "*Resignation Leaver*" was created for Mr Richards, Mr Purves and Mr Lindsell to cover the situation of any of them terminating his employment other than in circumstances constituting him a Good Leaver. The provisions of article 18.3.4 (mentioned below) provided a financial disincentive to them giving notice of termination of their employment within the first two years.
44. The Articles made provision for the transfer of a "*Leaver's Shares*" upon him leaving the Company's employment. Article 17.3 ("*Transfers in respect of Leavers*") provided as follows:

"Within the period commencing on the relevant Leaving Date and expiring at midnight on the date falling 9 months after such date, the Investors may direct the Company by an Investor Direction immediately to serve a written notice on a Leaver notifying him that he is, with immediate effect, deemed to have served one or more Transfer Notices in respect of such number and class of his Leaver's Shares as is specified in the Investor Direction (the "Sale Shares")."
45. An Investor Direction was one given by those holding a majority of the A Shares (the Livingbridge Investors). In the event of a shareholder being deemed to have served a Transfer Notice, article 18.1 provided that the pre-emption rights contained in article 19 would apply to the Sale Shares so that the shareholder would be obliged to transfer his shares in accordance with those rights at a price ("*the Sale Price*") determined in accordance with article 18.
46. Skipping over its further terms in relation to a transfer by an Other Leaver further addressed in article 18.3.3 (and also the provision for Mr Lindsell's holding of D shares) article 18 provided:

“Save as otherwise set out in these Articles the Sale Price shall be:

18.3.1 In the case of a Good Leaver, the Market Value;

18.3.2 In the case of a Bad Leaver, £1 in aggregate for all the Sale Shares;”

.....

18.3.4 In the case of a Resignation Leaver, the Sale Price shall be determined as follows whether the price per share of each share shall be paid by any purchaser shall be the average price calculated in accordance the table below.

<i>Leaving Date</i>	<i>Class of Share</i>	<i>Sale Price</i>
<i>Up to and including the first anniversary of the Acquisition Date</i>	<i>C Ordinary Share</i>	<i>Two thirds at 0.01p per share and one third at the Market Value</i>
<i>After the first anniversary of the Acquisition Date</i>	<i>C Ordinary Share</i>	<i>One third at 0.01p per share and two thirds at the Market Value</i>

47. This meant that, if the Claimants resigned, they would forfeit at least one-third of Market Value.

48. The definition of Other Leaver meant a person who ceases to be an Employee other than in circumstances constituting him a Good Leaver or a Bad Leaver or a Resignation Leaver; and article 18.3.3 made similar provision in relation to the Claimants’ C Shares over the first two years but said they should receive Market Value thereafter.

49. The concept of “Market Value” therefore either determined or partly determined the Claimants’ entitlement in the event of them (or either of them) becoming a Good Leaver, a Resignation Leaver or Other Leaver and then receiving an article 17.3 Investor Direction.

50. The Articles defined Market Value as follows:

“Market Value” means such value as the transferor and (with Investor Consent) the Company shall agree within ten days after the date of the relevant Transfer Notice (or such longer period as shall be agreed between the transferor and (with Investor Consent) the Company) or, failing such agreement, such value as the Independent Expert shall determine pursuant to Article 18.3.4.”

51. Under article 18.4.1 (not 18.3.4), where Market Value fell to be determined by the Independent Expert that determination would be final and binding in the absence of manifest error and would be:

... on the basis which, in the Independent Expert's opinion, represents the market value of the Leaver's Shares at the Leaving Date as between a willing seller and a willing buyer as if the entire issued share capital of the Company were being sold in accordance with these Articles and, in making such determination, the Independent Expert shall ignore the fact that such Leaver's Shares may represent a minority interest and may be subject to the compulsory transfer requirements of Articles 17 (Transfers of Shares) and 20 (Tag Along and Come Along)."

52. Article 18.4.1 therefore postulated a hypothetical sale of the leaver's shares (with the three "disregards" directed by its final clause).

53. The Articles defined a "Share Sale" (the term used in the RPP provision of article 13.3 though not in article 18.4.1) to mean:

"..... the completion of any sale of any interest in any Shares (whether in one transaction or a series of related transactions) resulting in the transferee (either alone or together with its Connected Persons) holding a Controlling Interest in the Company"

54. They defined the term "Controlling Interest" to mean:

"..... an interest in shares in a company conferring in aggregate more than 50% of the total voting rights conferred by all the issued shares in that company, taking account at the relevant time of provisions regarding voting rights contained in the articles of association of that company"

D. EVENTS GIVING RISE TO THE LEAVER LITIGATION

55. Following completion of the Transaction the Claimants were engaged by the Company as CEO and Sales Director respectively, in accordance with the terms of the Service Agreements. Mr Morris and (on 29 July 2015, the date of the Claimants' later dismissal from employment) Ms Yateman-Smith were appointed as Investor Directors. Mr Lockwood was unanimously agreed as an independent Chairman and appointed with effect from 30 April 2015.

56. Clause 6.2 of the Claimants' Service Agreements provided that they were each entitled to the payment of performance-related bonuses, provided that £100,000 in "Surplus Cash" was generated each quarter, as calculated by a detailed spreadsheet model that had been repeatedly re-negotiated as part of Project Spur. The final iteration of the spreadsheet was v57 and in the Leaver Litigation it became known as "**Spur 57**". Spur 57 was prepared by Oakley Capital Corporate Finance ("**Oakley**") and dated 3 December 2014.

57. As May J noted in the Liability Judgment, the correct operation of Spur 57 was critical not only in setting expectations for performance and growth of the Company, but also in establishing whether or not there was sufficient free cash within the business to permit a bonus to be paid in any quarterly period.

58. The first quarter (“Q1”) following the Transaction was the period December 2014 to February 2015. In the Liability Judgment, the judge explained how the Claimants were paid their Q1 bonus through the March 2015 payroll. However, at a Board Meeting on 30 April 2015 the Finance Director was asked to prepare a cash flow extract to be attached to the minutes recording the payment of the Q1 bonuses. There followed a protracted period during which his work on Spur 57 generated a number of different results. However, by 9 June 2015, and although he was continuing to make adjustments to the figures, his calculations confirmed that the bonus test run in accordance with Spur 57 had not, after all, been met for Q1.

59. The judge described the position at that point in time at paragraph 16 of the Liability Judgment:

“In the meantime, [Mr Morris] and [Livingbridge] were becoming concerned at the performance of the business against the Spur 57 model predictions. The revenue targets which the model had forecast at the time of the sale were not being met. It had become necessary to embark on a re-forecasting exercise. Internal emails within [Livingbridge] reveal that there was dissatisfaction with the founder directors, particularly PR. The new non-executive chairman, [Mr Lockwood], met with some resistance from [Mr Richards] and [Mr Purves] to his interventions in, and suggestions for, the management of the business. [Mr Richards] and [Mr Purves], on the other hand, saw encouraging sales figures developing in the business, with a growing book of new customers, and were increasingly concerned that the application of the Spur 57 model appeared to be denying them a reward for their efforts in the form of a bonus”.

60. May J went on to explain that the first meeting of the Company’s Remuneration Committee took place on 1 July 2015 and to note that there was a factual dispute before her about whether or not the Claimants had by that time made any offers regarding repayment or off-setting of their Q1 bonuses. At paragraph 19 of the Liability Judgment she said:

“[Mr Richards] in particular continued to view the surplus cash/bonus issue as a matter needing resolution; throughout June and July he regularly pressed for further discussion concerning the operation of the Spur 57 model. Within [Livingbridge], however, plans were being progressed to remove [Mr Richards], and later also [Mr Purves], from the business.”

61. The judge referred to Mr Morris, Ms Yateman-Smith and Mr Lockwood planning ahead for the Claimants’ dismissal from employment. In her later findings she said that “[C]ertainly by mid-June 2015, and probably as early as April, [Livingbridge] had resolved to remove the founder directors from the Company. [Mr Morris] and [Ms Yateman-Smith] consulted lawyers in May and continued to consult them regularly up to the dismissal in July.” She said there was no evidence of a “bear trap” having been laid for the Claimants but concluded that once the removal of one or more of the Claimants was on the agenda “[Mr Morris], [Ms Yateman-Smith] and, in the end [Mr Lockwood] also, perceived events through that lens, unconsciously becoming increasingly ready to see and interpret statements and actions in an adverse light.”

62. At a Board meeting on 29 July 2015 it was resolved (by a vote of 3:2) that Mr Richards and Mr Purves should each be summarily dismissed from the Company's employment. The deciding vote was cast by Mr Lockwood.

E. THE LEAVER LITIGATION AND THE QUANTUM JUDGMENT

63. The Claimants issued their claim in the Leaver Litigation on 23 October 2015. They sought declarations and damages concerning their wrongful dismissal.
64. The Company's case in the Leaver Litigation was that it had been entitled to summarily dismiss the Claimants. Written notices were served upon each of the Claimants on 13 and 14 January 2016, operating as deemed Transfer Notices in respect of the entirety of their respective shareholdings, in accordance with article 17.3. As the Company considered them to be Bad Leavers, they were each required to sell for £1.
65. The service of the transfer notices led the Claimants to amend their claim to aver that they were entitled to be paid the Market Value of their shares as Good Leavers. In response, the Company's Amended Defence said that ignored the impact of the RPP.
66. The Company's case that it had been entitled to summarily dismiss the Claimants was based on three grounds:
- (a) their receipt and retention of a Q1 bonus payment made in March 2015;
 - (b) making threats to favour their own short-term interest in obtaining a bonus over the longer-term interests of the Company and its shareholders; and/or
 - (c) claiming expenses for personal expenditure.
67. The resulting issue as to whether the Claimants were Good Leavers or Bad Leavers was tried before Mrs Justice May over five days in early July 2016. The Liability Judgment was handed down on 22 July 2016. The Claimants had conceded that their conduct in relation to the bonuses and expenses were breaches of duties owed to the Company. However, the complexity of Spur 57 meant that their breach in relation to the Q1 bonus was an unwitting one. In relation to expenses, there had again been a breach but there was no question of dishonesty or bad faith and that they had acted inadvertently was not even contested. The judge therefore held that those breaches were "*...not so significant...*" as to amount to gross misconduct or otherwise justify summary dismissal. She entirely rejected the Company's second ground for dismissal, the supposed making of threats to act contrary to the interests of the Company.
68. Under the Liability Judgment the Claimants were therefore entitled to be treated as Good Leavers.
69. The Leaver Litigation then moved on to the question of the true value of their shareholdings in the Company under article 18.
70. The Company argued, and Claimants denied, that the RPP would apply to the Market Value even in a Good Leaver situation. The Company also contended that the

Claimants' shareholdings were worth nothing even without the impact of the RPP, a position adopted by the Firm in the present proceedings.

71. The first of those issues, which was one of construction of the Articles, came before May J at a further hearing on 5 September 2016.
72. The Company's skeleton argument before May J asserted that: "*A sale of the entire issued share capital as envisaged by Article 18.4.1 is effectively the same as a Share Sale as referred to in Article 13.3...*".
73. The Claimants' skeleton argument on the point highlighted (with my emphasis) that the hypothetical basis of the article 18.4.1 *valuation* was one of a sale of the entire issued share capital of the Company on which the hypothetical purchaser had no concern in the *distribution* of the purchase monies as between the sellers of different classes of shares, namely the impact of the RPP under article 13. Nor would the hypothetical willing buyer of *the entire issued share capital* (i.e. all classes of share) be subsequently concerned about the impact of the RPP on any later sale by him. The Claimants pointed out that the value of a Good Leaver's shares under article 18.4.1 is the proportion of the total value that is represented by his portion of the entire issued share capital. As a fall-back argument they said that, even if valuation is to be of the transfer only of the Good Leaver's shares, there was nothing in article 18.4.1 which required an assumption that article 13.3 should apply. Article 13.3 (the RPP) applied only on a "*Share Sale*" (which, as I have noted, could be of less than the entire share capital provided it involved the purchaser acquiring a "*Controlling Interest*"). The skeleton argument said: "*In the absence of a requirement that the valuation assume that there is a Share Sale, it should not do so. Of course, in fact there has been no sale of any interest in any shares, but a transfer of shares back to the Company.*" It went on to make points about the commercial absurdity of the Company's contrary contention.
74. For the purposes of the Quantum Judgment, May J was considering the issue of construction of the Articles (and whether the RPP applied to the Good Leaver's transfer of shares triggered by the process under article 17.3) against the background of the independent expert, Mr Adrian Nicholls of Ernst & Young, having by a letter dated 30 August 2016 indicated his view that it was appropriate to take the RPP into account on the valuation of the Claimants' shares pursuant to article 18.4.1. Mr Nicholls had not at that stage been asked to determine their Market Value. His letter was written in response to the judge's request that he should comment on whether article 13.3 had any relevance to the determination of Market Value. The Claimants said he had misconstrued the effect of article 18.4 and that this amounted to a "*manifest error*" for the purposes of the article.
75. May J addressed this argument at paragraph 19 of the Quantum Judgment:

"It seems to me that there is a very fine line between the court's role and that of the expert here: where does construction of the parties' agreement, which included the Company Articles of Association, end and the expert duty to assess market value begin? The impact, or otherwise, on Market Value (as defined) of a provision agreed between the parties designed to ensure a priority return to investors seems to me pre-eminently a matter for the expert and not one for the court. Moreover if the expert has decided, as E&Y has, that the redemption premium provision is to be taken into account in assessing the value of the Claimants' shares, can this

properly be said to be a “manifest error”, even if the court might take a different view? These are questions that I have found it very difficult to determine.”

76. Even though article 18.4 expressly contemplated that either party might reject what would otherwise be a binding expert determination by pointing to what was said to be a manifest error, the judge therefore expressed doubt about whether this did give the court any supervisory jurisdiction over a determination based upon an erroneous understanding of the application of the RPP; and that this was so even if the error arose directly out of the misinterpretation of the Articles. In his letter of 30 August 2016 Mr Nicholls had expressly (and obviously correctly) said that *“I provide my comments based on my experience as a valuer, but as far as the issue relates to the construction of the Articles from a legal perspective, this is of course a matter for the Judge”*.

77. However, the judge did not have to resolve the doubt in her mind because she went on to conclude that not only was Mr Nicholls not guilty of any error in the view he had expressed (which, as I explored with Mr Tozzi QC and Mr Leiper QC, necessarily would have been “manifest” from his expression of it on the single point of construction raised) but that he was correct in his view. She picked up the question raised at the end of her paragraph 19 and went on to say, at paragraph 20:

“Happily, I have not in the end needed to as my view of Article 18.4 accords with that of E&Y. I have concluded that the phrase “...market value of the Leaver’s Shares...as if the entire share capital of the Company were sold in accordance with these Articles” necessarily includes a recognition of the type of shares held by the Leaver. The Claimants held Class C shares whose realisable value was subordinated to the holders of the Class A and Class B shares by the provisions of Article 13.3. Any buyer purchasing the Claimants’ shares would purchase subject to the restrictions affecting realisable value imposed by Article 13.3.”

78. On the basis of that conclusion, it was not a mistake to have invited Mr Nicholls to express his view on the impact of the RPP even though (had the point come before me) my strong instinct would have been in favour of the court determining the question as a preliminary point of law and construction, uninfluenced by the view of an expert valuer.

79. The judge then considered the Claimant’s arguments against the application of the RPP which were based upon the commercially absurd consequences before returning to the point of construction at paragraph 23:

“In the end I return to the wording of Article 18.4 itself which seems to me to be clear: the expert is called upon to determine market value of the “Leaver’s shares”. There is no provision directing that the type or class of share is to be disregarded in that process, in circumstances where the Articles clearly contemplated that a “Leaver” might hold any one or more of many different classes of shares. As [the Company’s counsel] rightly submitted, Article 13.3 was a clause designed to protect LB’s investment by effectively subordinating the realisable value of classes of shares other than those held by the LB investors. To leave that circumstance out of account in assessing the market value of those other shares would in my view be contrary to commonsense, given the purpose of the clause, and would require explicit provision. It is significant, in this respect, that Article 18.4 does include explicit provision for ignoring the circumstance of a particular bundle of shares

being a minority shareholding or subject to compulsory transfer requirements, but not for their being shares of a class impacted adversely (or potentially adversely) by the provisions of Article 13.3.”

80. In its argument before me the Firm pointed out that May J made no finding that the forced transfer in accordance with article 17.3 was a “*Share Sale*” within the meaning of article 13.3. It was said that this was because of a concession made on behalf of the Claimants during the course of argument before May J. I have already explained in the Introduction how the Firm said this explains what it contended to be the error in the judge’s conclusion and an element of contributory fault on the part of the Claimants for the purposes of their present claim.
81. The judge had posed the question as to why the hypothetical sale referenced in article 18.4.1 would not also be a “*Share Sale*” for the purpose of article 13.3 because the hypothetical willing buyer would necessarily acquire a “*Controlling Interest*” if he acquired the entirety of the Company’s issued share capital.
82. That question prompted the following exchange between Mr Leiper and the judge (with my emphasis in bold of the words that are said by the Firm to have amounted to a concession that an article 13.3 “*Share Sale*” was taking place):

“MRS JUSTICE MAY: So doesn’t that make it a share sell –

MR LEIPER: That, with respect, the way I put the argument is in two stages. **The first stage is to consider whether or not there is a share sale of the entire capital and if there is then 13.3... and I accept that it appears that it would fall within the definition of “a share sale”**, but at that point what Article 13.3 does is it tells the sellers how they are to distribute the monies between themselves. For the purchaser, the purchaser determining the value of the company has no interest at all in what happens to the money that it pays to the sellers and that’s an internal matter. But in fixing the valuation of the entire share capital, then Article 13.3 just isn’t relevant to the purchaser. The purchaser is going to get the entire share capital and therefore it isn’t taking shares which have some way a lesser value, lesser potential future value.

MRS JUSTICE MAY: But isn’t it relevant that the leaver’s shares in question are Class C shares, so they are valuing Class C shares.

MR LEIPER: What they are doing is they should be taking a market value for the entire share capital and then they have to work out what proportion (**inaudible**) of the value of the company is held by the leavers.

MRS JUSTICE MAY: That is what you say.

MR LEIPER: Exactly, it is; precisely that’s what I’m saying, but there’s a reason to it, which is that what the valuer has to do is value the entire share capital. They have to look at the entirety. What the EY approach does (or the defendant’s approach does) is it adds a further stage, which is to say the market value has to take into account the fact that a specific type of share is going to be acquired by the purchaser, but that isn’t the exercise, the hypothetical exercise, which is being required by 18.4, which is that you have to reach a market value as if all of the shares were being sold at the same time. So

the purchaser gets all of the shares; they can do what they like with them, they can vary the Articles; they have a completely free hand because they get the entire share capital and that's what they are buying. So the value of the shares would be unencumbered by Article 13.3. That is there to deal only with the distribution of the monies as between the sellers.

MRS JUSTICE MAY: I think I am understanding the difference in the position, but why in that case would it be necessary to identify in clause 18.4.1 “the leaver’s shares”; why wouldn’t it say that proportion of the purchase price attributable to the amount of shares held by the leaver? It is important, isn’t it, for these purposes the kind of shares that the leaver holds?

MR LEIPER: I suggest it is not; it is a shorthand way of saying the shares that are held by a leaver (the definition is on page 42); all of the shares held by a leaver. It therefore is saying exactly what you suggested it might say in the alternative; a longer form way would be that part of the shares that the leaver holds at the time it was set. It is not specifically saying... if that were the approach, then it would be completely unnecessary to put in as if the entire issued share capital of the company were being sold because if you were only to look at the specific value of the specific leaver’s shares as at the date of their departure, then it is completely irrelevant what the valuation of the entire share (**inaudible**) would be. And it is precisely there where a purchaser would say, “Actually these shares are worth nothing to me because there is a redemption premium on them, which means that I’m not going to be able to do anything with them for some time.” So it is the insertion rather than the identification between the shares which is simply a shorthand way of saying (**several inaudible words**), which obviously is at the crux of this. It ignores though the importance of the words “as if the entire (**inaudible**) of the company were being sold”. There is no meaning to those words; they are simply superfluous on the EY defendant approach.

MRS JUSTICE MAY: But if you are right, why have the second part of that clause – “the independent expert shall ignore the fact” – why stipulate what bits you will ignore; if you are right and it’s just that proportion that the leaver’s shares is there to the overall amount, why would you ignore that?

MR LEIPER: I would suggest that is simply adding clarity to avoid there being any doubt. You have to ignore the fact that they are (**inaudible**) interest. The fact is that these shares (the shares that are to be transferred), those are the shares, they are a minority interest; that is a fact. But what this specifically says is you value entire capital and you do not take account of the fact that they are a minority shareholder. You do not discount that merely because they are a part of a shares only.

MRS JUSTICE MAY: No, but if you are right and you take the phrase “as if the entire (**inaudible**) capital of the company were being sold in accordance with these Articles” to mean you leave aside anything that is specific to the leaver in question, then you wouldn’t need to carve out the minority interest, subject to compulsory transfer.

MR LEIPER: I am not sure that is right. I can see what the valuer would say, “Well, I’ve got to value the entire share capital; they are worth £10 million. These shares are only 30 per cent, so I don’t feel comfortable just attributing 30 per cent of the value to say these shares are worth £3 million because ordinarily I would be taking into account

the fact that they are a minority interest. So it avoids any ambiguity on the part of valuers to discount from that that these shares were held by these individuals are not, in fact, the entire issued share capital. It does not make the words redundant, it is clarity, but what the defendant's approach does is make wholly redundant that phrase as if the entire share capital were being sold."

83. The reasoning in paragraphs 20 and 23 of the Quantum Judgment, quoted above, reveals that it was not any concession that the forced transfer constituted an article 13.3 "*Share Sale*" which underpinned the judge's conclusion. Instead, it was the assumption that the hypothetical buyer (for article 18.4.1 purposes) would be acquiring the Claimants' Class C Shares which, in the ownership of the buyer, would still be subject to the RPP. Mr Leiper's submission that the hypothetical exercise did not require the expert valuer to focus upon the actual subject matter of the transfer (i.e. the particular class of share held by the Leaver), when the assumption was that all of the Company's shares were being sold, was rejected. This was because the valuation was to be of "*the Leaver's Shares*" and (those being Class C Shares in the present case) there was no disapplication of article 13.3 alongside the other three "disregards" mentioned at the conclusion of article 18.4.1.
84. The Claimants sought to appeal against the Quantum Judgment, the effect of which was that their combined 60% interest in the Company was worth nothing (and which led May J to award the Claimants nominal damages of £1 each under that head of loss). In arguing that the judge's construction was wrong they repeated in their skeleton argument seeking permission some of the points made in their skeleton argument before the judge; including the point that nothing in wording of article 18.4.1 required an assumption to be made that article 13.3 would apply as it only applied to a "*Share Sale*" as defined.
85. On 25 May 2017, Floyd LJ granted permission to the Claimants to appeal against the Quantum Judgment on the basis that it raised a short point of construction and appeared to have a real prospect of success. I note that the grounds of opposition to the grant of permission, contained in the brief statement filed by the Company in accordance with PD 52C para. 9, did not rely upon the Claimants having made any meaningful concession in relation to article 13.3.
86. The appeals in the Leaver Litigation were compromised on 15 January 2018. The Claimants were each paid the sum of £87,500 under the settlement. The effect of the Quantum Judgment was that they were forced to transfer their shareholdings to the Company for a nominal sum so that they could be cancelled.

F. THE PLEADED CASES

87. The Claim proceeds on the basis that the Firm owed the Claimants a duty to act for them with the degree of skill and care to be expected from a reasonably competent firm of solicitors holding itself out as having the relevant expertise required to perform the retainer. The Claimants relied upon Firm's General Terms of Engagement (clause 12.1 of which expressly the Firm "*will use appropriate skill and care in providing our*

services in this matter in accordance with applicable professional standards") as well as an implied term or common law duty to the same effect.

88. The Firm accepts this duty of care was owed and that the standard of care required was that of a reasonably competent solicitor practising in the field of private equity. The Defence pointed to clause 12.3 of the General Terms of Engagement which provided that the Firm was entitled to limit its liability to " . . . *a just and equitable proportion of the total loss or damage after taking into account contributory negligence and the legal responsibility of any other person ...* ".

The Particulars of Claim

89. The Claimants allege that the Firm acted in breach of duty in the following respects:
- i) Failing to advise the Claimants of the risk that they could be wrongfully dismissed by the Company, be classed as Good Leavers and receive no or only a nominal value for their shareholding in the Company. The Claimants say a reasonably competent solicitor would have advised the Claimants on the basis of a worst case scenario, and in particular the risks that they were exposed to in the event that their relationship with the Livingbridge Investors broke down or those investors sought to take advantage of them.
 - ii) Failing to advise the Claimants that the RPP would apply to the calculation of Market Value for a Good Leaver. The Claimants say the Firm should have identified the point that the draft of the Articles would (alternatively could) be construed as meaning that the RPP would be taken into account in determining Market Value for a Good Leaver and advised the Claimants accordingly.
 - iii) Proceeding instead on the basis that the RPP would not apply in the calculation of Market Value for a Good Leaver.
 - iv) Failing to propose and include express language that the RPP would not apply in the calculation of Market Value for a Good Leaver. They say a reasonably competent firm of solicitors would have sought to include language within the draft Articles that the RPP would not apply in the calculation of Market Value for a Good Leaver.
90. The Claimants say that, had been they properly advised, they would have agreed terms with Livingbridge by which Market Value was defined to exclude the RPP in relation to a Good Leaver. They say the enterprise value of the Company on 29 July 2015 (their leaving date) was £11m and, on that basis, each of them has suffered a loss of £1.9m (i.e. Scenario 1). Their alternative case is that, had they been unable to agree such terms with Livingbridge, they would not have completed the December 2014 transaction and deal and would have agreed terms with alternative investors for the sale of their shares in IPS UK (i.e. Scenario 2). For the purposes of Scenario 2 they say the enterprise value of IPS UK on 3 December 2014 was £9.4m and that the value of each of their shareholdings in IPS UK was £4m. However, credit is to be given against that value for the sum of £2,297,950 which they each received for their shares, leaving them each with a loss £1,702,050.

91. The Claimants also seek to recover their costs of the Leaver Litigation (which they either would not have incurred or would have recovered) in relation to the issues relating to Market Value and the application of the RPP. These are claimed in the sum of £895,141.63 (which was borne equally between them).
92. The settlement of the appeals in the Leaver Litigation is said by the Particulars of Claim to have been in mitigation of their losses “*in circumstances in which there was a real risk of the Company going into administration*”, which also state that credit will be given for the sums received under it.

The Defence

93. The Firm says the RPP was decided upon as a matter of a commercial agreement reached by the Claimants (and Knight) without the involvement of the Firm. If it transpired to be a poor commercial bargain in the circumstances which came about (but would not have been foreseen in September 2014) then that was a matter for the Claimants and/or Knight. Paragraph 20 of the Defence relies upon certain emails of September 2014 in the first of which the Firm explained the effect of the RPP and where the others between the Claimants and Knight made it clear that the Claimants understood that the RPP was agreed in return for their equity in the Company not being at risk of dilution through the later issue of sweet equity. Paragraph 22 of the Defence points to comments made by the Firm upon the draft Articles (specifically article 13.3) in October 2014 where it highlighted Livingbridge’s right to receive “*two times the ISIS Investment Amount.*”
94. Each of the alleged breaches of duty summarised in paragraph 89 above is denied, with the Firm saying:
 - i) It was not obliged to warn the Claimants about every possible chain of events that might conceivably arise on each alternative reading of the Transaction documents, but only to advise upon material risks. A reasonably competent solicitor would have perceived the risk now identified by the Claimants fanciful in circumstances where, as at the date of the Transaction, (a) Livingbridge had no basis or incentive to dismiss the Claimants (wrongfully or otherwise) but instead wished to retain them in the business; (b) the Claimants exercised a considerable degree of control over the Company’s Board; and (c) the RPP did not (properly construed) apply to a forced transfer and exercise of pre-emption rights under articles 18.1 and 19. In any event, to the extent that the risk existed at all, it was a commercial consequence of the RPP on which they were advised by Knight and in respect of which the Defendants had no involvement.
 - ii) The RPP did not, on the proper construction of the Articles, apply in the determination of Market Value for a Good Leaver. The Firm says that had it advised the Claimants in the terms alleged, that advice would have been incorrect. The Firm was entitled to proceed in the manner it did in light of (a) the proper construction of the Articles, and (b) the fact that the RPP reflected a commercial agreement between the parties and one presented to the Firm as the basis for the transaction.

95. By a Response dated 11 November 2021 to the Claimants' Notice to Admit Facts, the Firm admitted that neither Mr Crossley nor anyone else from the Firm advised the Claimants that the RPP would apply to the Leaver Provisions or that there was a risk it would apply. The Response said that it was the Firm's case that the RPP does not apply to the Leaver Provisions and challenged the underlying assumption that the Articles could properly be interpreted in that way. It referred back to the Defence (paragraphs 22, 24, 48.1 and 49.1(c)) for the averment that Mr Crossley drew the Claimants' attention to the RPP and that it was clear that the Claimants were fully aware of it. It went on to say that May J only held as she did because of the Claimants' failure to argue before her that Article 13.3 was concerned with the distribution of Proceeds of Sale received from third party purchasers.
96. The Firm challenges the Claimants' case on causation in both Scenario 1 and Scenario 2.
97. On Scenario 1, it says that even if it had proposed an express carve out from the RPP in the Good Leaver scenario, such language would not have been accepted by Livingbridge and therefore not included in the Articles. As an alternative, the Firm says that the Leaver Litigation would still have come about and, by the end of it, the Company was in a parlous financial position and would not have been able to pay the Market Value of the Claimants' shares. The Firm denies responsibility for the greater part of the costs of that earlier litigation when the circumstances giving rise to it had nothing to do with advice given, or not given, by it. As noted in the Introduction, the Leaver Litigation is also the basis of the Firm's defence of contributory fault which rests upon the Claimants' conduct in bringing about their dismissal and the part they are said to have played in causing May J to reach the wrong conclusion in the Quantum Judgment.
98. Scenario 2 is challenged on the basis that the Transaction with Livingbridge was the only credible way by which the Claimants could achieve their commercial objectives. The Firm says the only other credible buyer was GCI, a trade buyer, whose purchase would have seen the Claimants leave the business altogether when that was not their plan.
99. Finally, the Firm says the Claimants have suffered no loss. On Scenario 1, it says that, even without the impact of the RPP, the Market Value of their shares would have been nil because the amount outstanding under the Livingbridge loan notes meant there was no value in the Company's equity. On Scenario 2, the Firm denies that the Claimants lost value beyond the cash received for their shares in IPS UK under the Transaction.

G. OBSERVATIONS UPON THE PLEADED CASES

100. With that outline of the parties' cases in mind, the following observations fall to be made.

Complexity

101. In his oral closing submissions, Mr Leiper QC referred to the "*unnecessary levels of complexity*" that had been built into the Firm's case and that it was in the Firm's

interests to make the case as complicated as possible. He gave as examples the Firm's argument that the decision in the Quantum Judgment came about because of the way in which the point about the RPP was argued in front of May J and how fanciful it was that the situation which both precipitated and emerged from the Leaver Litigation could have been in anyone's mind in the latter half of 2014 (the so-called misalignment of the stars, the cluster of which had grown in size as the Firm's argument developed).

102. There was certainly a difference in approach to the written submissions of each side; the Claimants' opening and closing submissions running to a total of 34 pages (with a decent number of cross-references to the trial bundle) and the Firm's comprising over 100 (with considerably greater cross-referencing). However, each set was a model of its type and I have found all four documents to be of great assistance in marshalling my thoughts upon the many issues raised.
103. The case is a convoluted one. Reflecting upon this lengthy judgment has confirmed its complexity in terms of the number of issues which the Firm is entitled to raise (in the sense of there being a point of substance to be addressed) in resisting liability to the Claimants. The above represents the barest outline of the Defence. On my rough-and-ready count, the Firm's points on liability, causation and loss involve it placing about 8 or 9 main hurdles in the way of the claim. Most of those embody more than one hindrance for the Claimants and more than one requires the correctness of the Quantum Judgment to be re-visited. The issues of loss have prompted extensive expert evidence and the need for separate analysis of the claim in respect of legal fees. Even if the Claimants complete the circuit to success, the Firm seeks to devalue their prize with its two points about the Claimants' contributory fault. All of this means there are a lot of points to be decided by a reference to a substantial amount of documentary, expert and witness evidence.
104. Before turning to the legal principles bearing upon the decisions, I need to highlight two further points about the issues raised by the pleaded cases. The first relates to article 18.4.1 and the second goes to the way the Claimants have pleaded their case on causation and loss.

Tensions generated by Article 18.4.1

105. The Claimants' complaint that the Firm failed to advise them about the risk that the RPP either did apply to the valuation of a Good Leaver's shares is obviously at odds with what they argued before May J, which is that article 13.3 had no impact upon the valuation process under article 18.4.1. Mr Leiper QC rightly said that he had no embarrassment, now the duly compromised Quantum Judgment has cast the die against his clients, in backing the reasoning of the judge. Indeed, as I shall explain he deployed one further argument on construction which, he said, would have strengthened the Company's argument in support of her conclusion. However, Mr Tozzi QC highlighted this point when submitting the duty upon the Firm should not be fixed with the benefit of hindsight; and that it was no part of that duty to advise that the court might misconstrue the articles in a way previously argued against by the Claimants.
106. Against that, Mr Leiper QC in his opening referred to the position which Livingbridge adopted on the point in the Leaver Litigation. He drew my attention to a witness

statement of Mr Morris (made in the Leaver Litigation) which expressed in quite trenchant terms Livingbridge's position that the RPP would apply to the valuation of a Good Leaver's shares. He also highlighted the position adopted by the Company's solicitors, DMH Stallard LLP, when engaging with the Claimants' then solicitors, Clyde & Co LLP, in the Leaver Litigation over the impact of the RPP. I return to the Company's stated understanding of the impact of the RPP on the valuation under article 18.4.1 when addressing the question of liability.

107. Mr Leiper also referred to his opponents' written opening where this view was endorsed (at least on the issue of causation) by the Firm saying that Livingbridge would not have been prepared to re-negotiate terms with the Claimants so that the Articles expressly stipulated that the RPP should not apply to the valuation of the Leaver's shares. He therefore pointed to the tension within the Firm's case as to whether or not (without such express clarification to the contrary) the RPP did apply in that situation.
108. As the point is central to that part of the Firm's defence which rests upon the contention that it was under no duty to advise the Claimants that the RPP applied on the valuation under article 18.4.1, when the Firm says it did not apply, I am required to determine this point afresh for the purposes of the present claim.
109. If I reach the same conclusion as May J on the point then the Firm still relies upon the other points summarised above to say that the risk which in fact materialised for the Claimants, and which led to their shareholdings in the Company being held to only nominal value, was not one in respect of which there was any negligent failure to advise or act.
110. However, were I to reach a different conclusion to that reached by May J in the Quantum Judgment, the Claimants nevertheless point to her ladyship's contrary view in saying that the Firm was under a duty to advise upon *the risk* that a court might conclude the RPP was to be taken into account in the determination of Market Value. The Claimants' reliance upon this risk as the basis of their allegation of negligence sits more easily with their position in the Leaver Litigation that the judge's interpretation of the Articles was wrong. That risk did in fact materialise, whether or not another judge like me would have accepted the Claimant's position and reached the opposite conclusion to May J.
111. It is this angle which also brings into play the Firm's causation defence (with the tension created between that defence and the Firm allying itself with the Claimants' earlier position on the interpretation of the Articles) which is to the effect that, had the Firm advised the Claimants upon the risk, it would have been a litigation risk that the Claimants would have been prepared to accept as the price of concluding the Transaction and/or a risk that, once highlighted in pre-completion negotiations, Livingbridge would not have agreed to eliminate by agreeing an appropriate revision of the Articles.

Scenarios 1 and 2

112. The Claimants' case on loss is predicated upon a loss of chance within the alternatives of Scenario 1 and Scenario 2. By the conclusion of the trial, they had not abandoned Scenario 1 (proceeding with the Transaction having agreed with Livingbridge that the RPP was to be disappplied on the valuation under article 18.4.1) but they recognised that the thrust of their evidence at trial supported Scenario 2: that they would have walked away from the Transaction (in the face of Livingbridge not being prepared to agree the point) and proceeded with a different transaction with an alternative investor.
113. The Claimants' case on loss (assuming the conclusions upon the meaning of the Articles and any correlative duty upon the Firm would support it in principle) does not rest upon the difference between the market value right under article 18.4.1 (1) with and (2) without the impact of the RPP. The Firm gave no warranty that the RPP had no impact upon the valuation under article 18.4.1. Instead, the case on loss rests upon those two alternative and hypothetical scenarios which arise on the assumption that the Firm should have flagged up that the RPP either would or could have had such an impact and that the Claimants (and either Livingbridge or others) would have acted accordingly.
114. It is these hypothetical scenarios which have resulted in the two alternative valuation dates of 3 December 2014 and 27 July 2015 as focal points for the expert evidence mentioned below. That said, in his closing submissions Mr Leiper QC made the point (by reference to paragraph 34(b) of the Particulars of Claim) that the alternative hypothetical transaction for the purposes of Scenario 2 was not fixed at the date of 3 December 2014 but instead might have taken some time to conclude in circumstances where (he submitted) the value of IPS UK at that date was increasing.

H. LEGAL PRINCIPLES

115. A significant number of authorities were included in the bundle before the court but there was no real controversy between the parties over the legal principles governing the claim.

Duty/Standard of Care

116. The Firm referred to the decision of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, where, at p. 402, he said: "*The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.*"
117. In the present case, the Firm's retainer extended to the negotiation and review of the Company's Articles. Mr Tozzi QC and Mr Wright, citing *Haigh v Wright Hassall* [1994] EG 54 and *Reeves v Thrings & Long* [1996] PNLR 265, submitted that nothing in the retainer derogated from the usual position that solicitors are not obliged to give business advice or to explain the commercial importance of the legal position. I return below to their submission that the RPP was the product of a commercial negotiation which was presented to the Firm as a concluded deal.
118. In *Midland Bank v Hett, Stubbs & Kemp*, at 403, the court identified the standard to which a defendant solicitor is to be held is that of the "*reasonably competent solicitor*" practising in the relevant field. It is not that of the "*particularly meticulous and*

conscientious practitioner [who] would, in his client's general interests, take it upon himself to pursue a line of inquiry beyond the strict limits comprehended by his instructions”.

119. In *Duchess v Argyll v Beuselinck* [1972] 2 Lloyd’s Rep 172 (later approved by the Court of Appeal in *Martin Boston Co v Roberts* [1996] PNLR 45) Megarry J said, at 185: “*hindsight is no touchstone of negligence*”. The level of care and skill to be expected of the Firm must therefore be assessed by reference to the position at the time they were acting in connection with the Transaction and its terms.

120. The Firm relied upon the following observation of Hobhouse LJ in *Reeves v Thrings & Long*, at pp. 288 – 289, in warning against the use of hindsight, and recognition that a commercial risk did subsequently materialise, to influence the argument as to what may fairly, justly and reasonably be expected of the Firm before it did materialise. The judge said he could:

“...understand why this appeal has been brought. In a case such as the present, it is easy for people to be wise after the event or for someone who has suffered financial loss to believe that loss has been caused by someone else’s fault. In evaluating the evidence about a transaction such as this, it is, in my judgment, always relevant to bear in mind that the nature of business is to assess and take commercial risks....Things undoubtedly went wrong for the plaintiff in 1990 and thereafter. But it is not sound to argue from how the problems of the plaintiffs were then seen to conclusions about how he must have viewed the transaction in 1986 under very different circumstances...” .

121. The Firm also relied upon the decision of Asplin LJ in *Barker v Baxendale-Walker* [2018] 1 WLR 1905, at [59ff], to illustrate the point that, in a transactional context, a solicitor is only reasonably to be expected to advise upon “significant” risks created by the language of the transaction. With counsel’s present emphasis through underlining, she said:

“59. In this case, it is not alleged that the Respondents were negligent to take the view of the construction of section 28(4) that they appear to have done...The question is whether in the light of all the circumstances no reasonably competent solicitor in the position of the Respondents would have failed to give the specific warning that there was a significant risk that the EBT arrangement would fail to be tax effective....

*60. It is important to appreciate that the court is considering what advice ought to have been given by the reasonably competent practitioner in the particular factual circumstances at the time. Of course, the advice which a reasonably competent solicitor would give in the circumstances turns substantially upon the view that he could take of the provision on which it turns. It is also dependent upon whether contrary arguments as to construction are of sufficient significance to require specific mention when taken with the degree of risk inherent in the circumstances and the importance in those circumstances of a balanced view of the provision. As Salmon LJ noted in *Dixie v Parsons* the question turns in part upon the likelihood or otherwise of a dispute”*

122. The very aggressive tax avoidance scheme in that case, with an attendant likelihood of a dispute which should have been obvious to any reasonably competent solicitor was contrasted by the Firm with the decision of Mr Mark Cawson QC (as he then was) in *Petrocapital Resources plc v Morrison & Foerster (UK) LLP* [2013] EWHC 2682 (Ch).
123. In *Petrocapital* the solicitor had given his view upon the true construction and effect of certain undertakings in convertible loan notes. The claimant argued he should have qualified his advice by saying that the matter raised construction issues that were highly arguable either way. The judge said that the view expressed by the solicitor was a perfectly tenable one which, the judge further concluded, accorded with the parties' true subjective intentions as the solicitor reasonably understood them. Nevertheless, he went on to say, at [171]:

“Whilst Mr Lukins was, or ought to have been aware that his advice was being sought in somewhat controversial circumstances, this was not a situation in which he was actually aware that the construction of the Undertakings was likely to be controversial or in which, in my judgment, a reasonably competent solicitor in Mr Lukins’ position (with knowledge of the parties’ subjective intentions) ought necessarily to have appreciated or advised that there were highly arguable construction issues that ought to be taken”

124. In submitting that a reasonably competent solicitor cannot be expected to set out the competing arguments on every point of construction that might arise in a case such as the present, Mr Tozzi QC and Mr Wright also referred to the following passage in Jackson and Powell on Professional Liability (9th Ed, 2021), at para 11-175:

“...There must of course be a sensible limit upon the solicitor’s duty to explain legal documents. When any such document (even a familiar document in common use) is put under the microscope, it will be found to abound with ambiguities, generalities or potential problems...”

125. I also return below to the Firm’s argument that it should not, in hindsight, be held liable for the outcomes in the Leaver Litigation (the Liability Judgment and the Quantum Judgment and the risk which materialised from them) which the Firm could not reasonably have anticipated before the conclusion of the Transaction.

Causation

126. The Claimants must establish that the Firm’s alleged breaches are the legally effective cause of it and not just something which gives rise to the occasion for loss: *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360, at 1374H-1375A, per Glidewell LJ.
127. The primary task for the court in approaching issues of causation in a negligence claim is that identifying the scope of the defendant’s duty. This is clear from the judgment of the majority of the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] 3 WLR 81, at [6], and their enumeration of the following questions:

“(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

(2) *What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care? (the scope of duty question)*

(3) *Did the defendant breach his or her duty by his or her act or omission? (the breach question)*

(4) *Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission? (the factual causation question)*

(5) *Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above? (the duty nexus question)*

(6) *Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)."*

Loss of a Chance

128. In *Perry v Raleys Solicitors* [2019] UKSC 5 the Supreme Court clarified the approach to be adopted by the court in its approach to the issue of causation where the claimant's claim is one for damages for loss of a chance caused by the defendant's professional negligence. Lord Briggs (at [37]) referred to the dividing line established in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 between those matters to be proved by the claimant on the balance of probabilities, and those to be addressed by reference to the assessment of the value of the lost opportunity. Like the present case, *Allied Maples* involved a claim to recover damages for loss, caused by the defendant solicitors' negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction.
129. When considering the loss of a chance, the breach question (as it is termed in *Manchester BS v Grant Thornton*) is to be approached by reference to the "*most likely non-negligent advice which would have been given*", as Morgan J expressed it in *Thomas v Albutt* [2015] PNLR 29 at [346]-[347]. He distinguished that from "*the most optimistic non-negligent advice that could have been given*" for the purpose of assessing what the claimants would have done had their barrister given the most likely non-negligent advice about the prospects of successfully defending a judicial review (of the grant of planning permission to them) with more detailed evidence of prejudice. Morgan J compared the chance of success actually enjoyed by the claimants with the chance of success determined by the most likely non-negligent advice and concluded, on the facts, that the difference between the two could not be said to be more than 5 to 10 per cent. That was a negligible improvement which should be disregarded for the purposes of awarding damages.
130. Applying *Perry v Raleys*, the claimant first has to prove on the balance of probabilities that he would have taken any necessary steps required of him to convert the receipt of competent advice into some financial (or financially measurable) advantage. In the

case of negligent advice given by a solicitor to the client, the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. For this reason there is no reason why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue which, as Lord Briggs explained, will give rise to an all or nothing outcome. If the claimant proves upon the narrowest balance of probability that he would have taken that step then he suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so. If he fails, however narrowly, to prove that he would have taken the requisite step, he gets nothing on account of the less than 50% chance that he might have done so.

131. If, however, the claimant does discharge the burden of proof upon him at that first stage, in relation to what he would have done, there is no trial within a trial on the second stage of evaluating the lost chance. As Lord Briggs explained, at [20], “[T]o the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation”. At this second stage the claimant must establish that he has lost a real or substantial chance. Where causation is dependent upon the acts of a third party such as Livingbridge, the balance of probabilities test does not apply and instead he “...must prove as a matter of causation that he has a real or substantial chance...” that the third party would have acted as the claimant contends: per Stuart-Smith LJ in *Allied Maples v Simmons & Simmons* at p.1614D. The quantification of the “loss of a chance” is an “*evaluative judgment*” for the Court: see *Wellesley Partners LLP v Withers LLP* [2016] Ch 529 at [125] per Floyd LJ.
132. Where this exercise involves evaluating multiple chances, the approach to be taken depends upon whether or not those chances are independent or interdependent. Independent chances are multiplied together to generate a final figure, as Bryan J explained in *AssetCo plc v Grant Thornton UK LLP* [2019] Bus LR 2291, at [432]-[448]. Where the contingencies are interdependent (or overlapping), a multiplicative approach is not appropriate; and the Court will need to make an evaluative judgment as to the overall figure: see *AssetCo v GT* at [421]-[431].

Contributory Fault

133. In argument, the Firm used the expression “contributory fault” rather than “contributory negligence”, which is commonly used (including in its own General Terms of Retainer), because the latter is shorthand for the categories of “fault” identified in section 4 of the Law Reform (Contributory Negligence) Act 1945, for the purposes of applying section 1 of the Act. The shorthand title of section 1 is “*Apportionment of liability in case of contributory negligence.*” Under the heading “Contributory negligence or failure to mitigate”, the Defence referred to the Claimants’ loss being caused or contributed to by “*their own negligence*”.
134. Section 4 provides:

““*fault*” means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.”

135. Section 1 provides for what the court considers to be a just and equitable reduction in the damages payable by the defendant “*having regard to the claimant’s share in the responsibility for the damage*” which is partly the result of his own fault as well as the defendant’s.
136. The Firm said there is no requirement that the “fault” in question is a breach of a duty owed to the defendant. On this point, the Firm relied upon a passage in Clerk & Lindsell on Torts (23rd Ed, 2021) citing *Nance v British Columbia Electric Ry* [1951] A.C. 601 at 611, per Viscount Simon:
- “When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the [claimant’s] claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.”*
137. It further relied upon the decision of Lloyd Jones LJ (as he then was) in *Blackmore v Department for Communities and Local Government* [2018] QB 471 for the proposition that a finding of contributory fault will not be precluded by the fact that the fault post-dates the Transaction or was unrelated to the duties undertaken by the Firm. In that case, a defendant employer successfully raised a defence of contributory negligence in an asbestos claim where the deceased had been a long-term smoker. The judge explained, at [25], that there was “*...no reason in principle for drawing a general distinction between a claimant who contributes to his injury by conduct related to his work and one who contributes to his injury by conduct unrelated to his work*”.
138. The Firm said the Claimants were in breach of their duties, including statutory duties, that they owed to the Company in their retention of their bonuses which led to the Leaver Litigation. It argued the Claimants were at either at fault or they had failed to mitigate their loss in not advancing the proper construction of article 13.3 before May J.

I. THE EVIDENCE

THE FACTUAL EVIDENCE

139. The only witnesses of fact were those on behalf of the Claimants.
140. Mr Crossley did make a witness statement on behalf of the Firm but I was forewarned by the Firm’s written opening that he might not be called as a witness and, reflecting their position on the point, I notified the parties that I would not read it unless and until a decision to call him as a witness had been made. That decision was not made and I have not read it.
141. On this aspect of the case the Firm relied upon well-known passage of the judgment of Leggatt J in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560

(Comm), [15] to [22], where the judge made observations upon the relative weight to be attributed to witness testimony compared to the information revealed by the contemporaneous documentation, and said at [22]:

“... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.”

142. Mr Tozzi QC and Mr Wright urged upon me the full cautionary note of this guidance. They said there was no doubt that the consequences of their catastrophic falling out with Livingbridge (and Mr Lockwood) and of the Quantum Judgment created in the Claimants' minds a profound and deep-seated grievance against the Firm. They no doubt now feel that they were not protected against a risk that led to them losing their equity in a business that they believe was worth £10 million, or perhaps even more, at the date of the Transaction, and which would have gone on to be worth many times that value. However, the claim against the Firm had to be looked at dispassionately and without the benefit of hindsight: see *Reeves v Thrings & Long* (paragraph 117 above).
143. In parallel with that point, the Firm criticised the adequacy of the witness statements of Mr Richards and Mr Purves which were said in its closing submissions to have been prepared *“either in large part or exclusively from memory with minimal or no reference to the contemporaneous documentation”*. Mr Tozzi QC made a particular criticism of Mr Richards that, having initially set out his recollection of events for the purpose of preparing his witness statement, unaided by contemporaneous documents, he then subsequently referred only to 7 documents for the purpose of checking the accuracy of that recollection. Mr Purves had referred to none. When asked about this, he pointed to the relatively recent date of his witness statement in circumstances where he had read many documents, many times, over the course of the present litigation and the Leaver Litigation. Mr Purves' evidence was described by the Firm as *“slapdash”*.
144. There were elements of their evidence which were inconsistent with the true contractual position. For example, Mr Purves' statement began with a reference to the Firm acting on the sale of *“my 30% stake”* in IPS UK *“our remaining shares (totalling a 60% share in the [the Company]) becoming worthless.”* Obviously, that was not a correct analysis of the Transaction.
145. However, I reject the general criticism levelled against Mr Richards and Mr Purves which led to them being described as unreliable witnesses in the Firm's closing submissions. In *Gestmin*, at [20], Leggatt J referred to the *“considerable interference”* with witness memory which resulted from what was then the procedure of preparing a witness for trial, as often as not when (as in the present case) a long time has already elapsed since the relevant events. He referred to the process beginning with initial draft by the lawyer and the statement being made, possibly following a number of re-drafts, after the witness's memory has been *“refreshed”* by reading the documents (including the court documents and other argumentative material as well as documents which the witness did not see at the time). All of this has now changed with the introduction of Practice Direction 57AC.

146. In my view the witness statements of Mr Richards and Mr Purves properly reflected the Statement of Best Practice in the Practice Direction. The suggestion that their accounts of events should have been guided more firmly by the contemporaneous documents is one which smacks of reverting to the practice deprecated in *Gestmin* at potential cost to the honest account of matters known personally to them which it was their duty to give. Greater reference by them to such documentation would almost certainly have resulted in a substantial expansion of their written evidence-in-chief even if it highlighted only the key aspects identified in the lengthy Sections B, C and D of this judgment. It would also have carried with it a significant risk of “leading questions” (defined in the Practice Direction to cover not just putting words into the mouth but also information into the mind) undermining their personal account of matters.
147. Mr Leiper QC made a number of observations about the absence of evidence from Mr Crossley. One was that it meant that the court had been deprived of value of what Leggatt J in *Gestmin*, at [22], ascribed to “*the opportunity that cross-examination affords to subject the documentary record to scrutiny and to gauge the personality, motivations and working practices of a witness*”. Mr Leiper said it was surprising that the disclosure contained no file notes of conversations with the Claimants save for one at the beginning of the retainer (and from which it was unclear whether Mr Crossley’s thoughts, or the content of one or more meetings or calls, or a mix of all these). He also made the forceful points that the Claimants had no opportunity to test Mr Crossley on his understanding of the suggested distinction between a commercial risk and a legal risk and that the court has no idea of what Mr Crossley himself understood the RPP to mean. Mr Leiper observed that, as it is the Firm’s case that the RPP was a commercial agreement and that the Articles simply reflected that deal, with Livingbridge expressing in the Leaver Litigation the firm view that the RPP applied to any form of exit from the business and that the Claimants should have appreciated as much, it would be entirely proper to infer that Mr Crossley might also have assumed the same.

Mr Richards

148. Mr Richards gave evidence over 1½ days.
149. I found Mr Richards to be a straightforward witness who gave measured and thoughtful responses to the questions put to him.
150. However, I do accept the Firm’s criticism of that part of Mr Richards’ evidence which did appear to involve reconstruction of events, in hindsight, which involved Mr Lockwood pursuing his own agenda in supporting his and Mr Purves’ removal from the Company. There was no evidence to support that and it is inconsistent with the findings of May J. The judge rejected the idea that Livingbridge had laid a “*bear trap*” for the Claimants, though she did conclude that, once their removal from the Company was on the agenda, Livingbridge and Mr Lockwood had begun to perceive relevant events through that lens.
151. The principal points put to Mr Richards in cross-examination by Mr Tozzi QC were (1) the Claimants’ reliance upon Knight and Mr Howitt when deciding in 2014 to favour the Livingbridge bid over one made by the potential trade buyer GCI : (2) their further reliance upon those advisers (but not the Firm) to agree with Livingbridge upon the

Leaver Provisions so far as the exit value of their shareholdings in the Company were concerned and the debate about them was concluded before the Firm was instructed; (3) the lack of reality behind Mr Richards' view that, allowing for the cash received under the Transaction, he and Mr Purves were rolling over the remaining value of a business which they considered to be worth around £10m, in the form of equity in the Company, when their respective shareholdings in the Company were treated by them as having a value of £90,000.

152. In his witness statement, Mr Richards referred to his understanding over matters of Board control and went on to say:

“We asked Adam about any other risks time and time again and it was probably the focus of nearly every conversation we had with Adam. Pretty much at the end of every meeting or call that Keith was involved in he would ask: "Adam, tell me how we're going to get fucked? I am 50 something years old and can't afford for this to go wrong and start again". I also expressed my concerns along similar lines and I remember that we negotiated gross misconduct being redefined to a narrow range of things because we wanted to mitigate this risk as much as possible as well (from being something frivolous to an actual proved event). I wanted to make sure that my remaining 30% shareholding in the holding company were absolutely going to be worth something to me whatever happened.”

153. He accepted that Mr Billingham and Mr Knight had undertaken the commercial aspect of the negotiation but he likened their role to that of an estate agent in a conveyancing transaction where the legal drafting remained to be addressed.

154. In response to Mr Tozzi's suggestion that the Leaver Provisions were effectively a done deal before the Firm was instructed, Mr Richards:

“..... but these will still be subject to Mr Crossley reviewing those as part of the deal arrangement. So this is all the -- this is what a deal is gonna look like, we're gonna send that over to our lawyer and our lawyer is gonna review that in the round.”

And:

“..... we had conversations in September cause we had Andy Lindsell added into some of those as well, so we certainly did have conversations with Adam Crossley around the leaver provisions and what effect they would have on me and my shares. And, you know, I think -- I think somewhere in the other leaver provisions there was provision that added in around, if I had a minimum amount, I'd get a salary or I wouldn't be restricted and that would have been part of the conversation we had with Adam Crossley around if we got X amount less for our shares, then my restrictions would fall down. So, you know, I may have got some of the times wrong, but I certainly had these conversations with Livingbridge, with the people you said in the email and with Adam Crossley.”

155. The Firm suggested that the evidence Mr Richards gave in cross-examination about having discussions with Mr Crossley about “the leaver provisions” in September 2014, after Heads of Terms had been agreed with Livingbridge, was unreliable evidence. I do not accept that. I understood Mr Richards to be talking as much about the restrictive

covenants as the so-called vesting rights, that would bind him upon leaving, and the interaction between those covenants and the value of those rights. He referred to continuing discussion with Mr Crossley on this aspect “*because it was all tied in together.*”

156. In particular, Mr Richards was taken to an email which Mr Crossley wrote to the Claimants on 13 November 2014 on the subject of “restrictive covenants”. Mr Richards’ view at the time was that they should not be subject to restrictive covenants on leaving the Company if they received less than £400,000 each for their shares. When asked about this, he said:

“Yes, and I remember having a conversation with Adam Crossley about this because the likelihood of our shares being worth less than 400K was something that we considered to be remote, given that the business had a value of £10 million and we had 30 per cent of it. So that was -- that's why we agreed that level.”

On this point he also said:

“In effect, the purpose of this was that in the event that we were leavers, that we would either get the equivalent of a year's salary or two-years' salary to remain restricted by the value of ours shares or we wouldn't be restricted. So that was the -- that was what we were aiming to --”

157. When tested by questions in cross-examination which went to the Firm’s causation defence, in particular the assertion that he and Mr Purves would have been happy to take the risk which materialised in the Quantum Judgment because the chance of either of them becoming Good Leavers in the early life of the Company’s business was so slim (almost non-existent) and the Livingbridge offer was otherwise so attractive, Mr Richards said:

“Well, we done that deal on the basis of the advice we received and as -- as our claim sets out -- and well, my position is really clear on it, we wouldn't have done the deal if my shares were only worth a pound. It was -- it's the equivalent of selling your house and getting a mortgage on it for 30 per cent and then the bank coming back the day after you've taken the mortgage and owning all of your house. It just wouldn't have happened under any circumstances.”

And:

“what I expected and what I wanted from the legal advice is this could happen and your shares could be bought for a pound and had I received that advice, that is the advice that Livingbridge had the benefit of and that's what I'd have expected to receive, that advice that my shares could have been bought for a pound.”

Mr Purves

158. Mr Purves gave evidence over half a day.

159. He was a little more recalcitrant than Mr Richards when giving evidence though as his cross-examination moved on he became more willing to expand upon his answers.
160. Mr Tozzi QC was able to point to certain inaccuracies in Mr Purves' witness statement, most obviously that in the first paragraph he referred to the loss as a result of the sale of his "30% stake" in IPS UK when, of course, he had sold all of his shares in that company in return for both cash and a fresh shareholding in the Company. Referring also to the fact that Mr Purves appeared not to have refreshed his memory by reference to any of the contemporaneous documents before signing it, Mr Tozzi said that Mr Purves' witness statement indicated a slapdash approach to the facts.
161. I am not persuaded that criticism sticks, at least so far as undermining his fundamental complaint against the Firm is concerned. Mr Purves' subsequent answers revealed that he accepted the proper analysis of the Transaction but he also said "*I had 30 per cent of the new business*" and "*[i]t's relating here to the 30 per cent that I lost in the new business*" and "*I understand that to read that I lost 30 per cent when I was wrongly dismissed in the new firm*". The issue over the EBITDA multiple to be implied from the terms of the Transaction (which I address below in the context of the expert evidence) perhaps lends some support to Mr Purves' broad brush but technically inaccurate way of looking at the Transaction.
162. As with Mr Richards, I agree with the Firm that Mr Purves has come to the unjustified conclusion, with the benefit of hindsight, that Mr Lockwood had reached a decision to side with Livingbridge in ousting them from the Company.
163. Mr Purves's witness statement referred to assurances given to him by Mr Crossley that it would only be grounds of gross misconduct that would result in the Claimants leaving the Company, given that they were key to the business, including at a meeting at the Firm's offices attended by Livingbridge. Mr Tozzi suggested that any assurances about the security of their position within the Company would have come instead from Mr Howitt and from Knight. Mr Purves responded:

"A. Mr Howitt was not in the meeting when we met Charles Russell and Adam [Crossley], many occasions, and I used to ask Adam every time we met, and to the point he used to smile at me in the end because I'd asked him so many times "Tell me" -- excuse my language -- "how I'm gonna get fucked because I'm 50 years old, I've worked 13 years in this business, this is my daughter's inheritance. This business, myself and Paul have grown, I need to know what the absolute downside of this. How can it go wrong? Give me the worst-case scenario." And I asked it so many times, and he used to smile at me and say, "Keith, relax, there's only bad leaver provisions here. You're not going to do any of those." I said, "No, I'm not gonna do any of those that are in the bad leaver provision." He said, "They're never going to get rid of you."

Q. Mr Crossley said they're never gonna get rid of you; is that your evidence?

A. "Why would they get rid of you?"

Q. Well, which is it?

A. I didn't think for one minute they would ever get rid of me.

Q. Are you saying Mr Crossley said they would never get rid of you?

A. Many occasions.

Q. They are his words: "They would never get rid of you"?

A. He probably said, "Why would they get rid of you? You are so key to the business, you and Paul."

Q. Are you sure? Let's be clear about this, it's quite important.

A. Well, I'm going back seven years. He said, "Why would they get rid of you?"

164. At another point in his cross-examination Mr Purves described himself as "*a parrot*", repeatedly asking "*Give me the worst-case guys*".

165. The Firm is right to point out that Mr Purves gave contradictory evidence about whether or not, on one occasion, Mr Crossley responded reassuringly in front of representatives of Livingbridge when that would seem most unlikely given the nature of the reassurance. Mr Purves quickly accepted Mr Crossley had not done so. However, that does not mean that Mr Purves' evidence about him generally signalling the worst case scenario is to be rejected. I accept that evidence. Of course, there is no claim against the Firm that it failed to protect the Claimants against the risk of their removal but his evidence supports the case for saying that the financial implications of the Leaver Provisions ought to have been carefully scrutinised by it.

166. The Firm also correctly pointed out that the making of "worst case scenario" requests had not been pleaded. However, Mr Leiper was right to say that it was not a necessary element of the pleading of a failure to advise and act in relation to article 18.4.1, as opposed to evidence of the factual background of the circumstances in which the Firm gave the advice it did.

Mr Billingham

167. The Firm accepted that Mr Billingham sought to answer the questions put to him in cross-examination to the best of his ability but said that his evidence was also to be considered against the *Gestmin* warnings. Mr Billingham gave clear and direct answers in response to the questions put to him, though he was careful to make it clear when he had no recollection of a particular event.

168. Mr Billingham was a co-founder of Knight in 2008. He explained that Knight's advisory corporate finance business was "*completely sector focused*" in specifically advising businesses and entrepreneurs in the technology and telecoms sector. He said that, by 2014, Knight had arranged about 40 deals in that sector.

169. Mr Billingham was cross-examined by Mr Wright on three main topics: (1) the level of market interest in IPS UK in 2014; (2) his analysis of the value of the offers made by

GCI and Livingbridge; and (3) the Claimants' negotiation of the RPP as a commercial aspect of the deal with Livingbridge without the involvement of the Firm.

170. So far as the last of those matters is concerned, Mr Billingham freely accepted that Knight had been responsible for advising the Claimants on the commercial implications of the terms being negotiated with Livingbridge from the Spring of 2014 onwards. However, he was at pains to point out that Knight did not offer legal advice. He accepted that the risks of the Claimants being dismissed from the Company were regarded as slim at the time the Leaver Provisions were being negotiated.
171. His position in relation to the division of responsibility as between Knight and the Firm was reflected in the following exchange:

“Q. So your view was that the risk of not clearing the redemption hurdle was a very small one?

A. Yes, or all of us assumed it was a small one, yes.

Q. And that that was really a matter for the claimant's commercial judgment and your commercial advice?

A. Yes, and it was called an exit redemption premium I think, wasn't it?

Q. That sort of commercial decision making was nothing to do with the lawyers, is it?

A. Well, I think the way it's drafted in the articles of association I would argue it is because I think, as we've seen, what's happened is that the redemption premium has been applied even though ISIS haven't had their exit.

Q. Yes, well, could I put it this way, no one intended it to operate on a false transfer, it was always intended to operate on an exit?

A. Yes, when we looked at the redemption premium, we looked at it on an exit basis.

Q. That was the intention, wasn't it?

A. That's what it was called, yeah.

JUDGE RUSSEN QC: For the avoidance of doubt, you've each used the phrase "exit"; what do you mean, Mr Billingham, by "exit"?

A. I suppose it would be living -- the exit -- the sale of the business.

JUDGE RUSSEN QC: These two parties, about to themselves contract, exiting the business?

A. Yes, so when they exit, when they sell it together, which couldn't happen for three years unless they both agreed it, that's -- that's when we understood that that's when it would kick in.”

172. I return to what Mr Billingham said about the value of IPS UK implied by the Transaction in my analysis of the expert evidence below. In this section of the judgment, I focus upon his evidence on the first topic, which was the interest in IPS shown by potential bidders (in particular GCI) in 2014. It will be necessary to revert to this below when considering the Claimants' case on causation under Scenario 2.
173. Mr Billingham explained that in 2014 the technology and telecoms sector was one in which the interest of private equity firms was relatively new. Knight had not then done a private equity deal. The idea of doing such a deal, as opposed to one with a trade buyer, would have been his. He explained that Ms Cockburn's professional background had been in private equity.
174. Mr Billingham recognised that the sending out of a teaser document in early 2014 had not generated a great number of expressions of interest (through requests for an information pack) but said that he did not feel particularly disappointed by that. He said that there was a lot of interest in information technology businesses at the time but that IPS UK was of a smaller scale than many of them. He also explained that the level of interest in a potential acquisition is to a large extent dependent upon timing and whether or not a potential purchaser or investor might already be tied up pursuing another transaction.
175. He explained this when he was asked about a list of 15 potential trade buyers "*we think could be interested in a transaction that involves a significant earn out*" which he sent to the Claimants on 14 March 2014. Having accepted that Knight would probably need to verify some of those on the list a little further, he said this in response to the suggestion that he would not have left any realistic potential buyers off the list:

"The -- the -- the main reason would be timing. If they were doing their own transaction, or if they got another transaction on, we might have had a conversation with them and they'd be saying -- because we talked to buyers all the time in the market a sort of -- partly where we add value, you know, we focus on the market, but we do talk to the buyers knowing what they're looking for and there would be times when a buyer you think is a right buyer for a business but it's not just the right time because they're either maybe doing their own private equity process or they've got another transaction on, so therefore wouldn't include them at that time."

and (having explained that Knight would know if a business was engaged in another transaction) he said:

"Well, not even necessarily with us because, you know, they would be saying -- we're constantly asking people are you looking for opportunities and any one time they might say "yes, we are now" or "no we're not because we've got a transaction on." We wouldn't know who it was but --"

176. Mr Knight went on to say that, casting his mind back to 2014, he could not think of any potential buyers he would have left off the list for this reason. However, his general

point about the interest of particular potential buyers being sensitive to timing was borne out by what he said about Knight's dealings with GCI in 2014. He also explained that another private equity firm included on his initial list, BGF, had already invested in GCI and had said they did not want to be conflicted. Knight reported in May 2014 that BGF were "*considering through GCI only.*"

177. Mr Billingham's witness statement summarised the outline offers made by interested parties after Knight had met with them: (1) Livingbridge at 7.5x EBITDA; (2) GCI at up to 6x EBITDA plus an earn-out; (3) Intercity at up to 5x EBITDA; and (4) Adept at 5x EBITDA. He explained that the multipliers were of an EBITDA of approximately £0.94m, adding "*[H]owever, during this process the actual run rate EBITDA increased to c£1.2m, which increased the value of the four respective offers.*"
178. In testimony, Mr Billingham explained that by early May 2014 the interest in IPS UK was limited to that of GCI, Livingbridge and Maven who had also made an outline offer of 5x EBITDA. However, Maven was not regarded as competitive and by June only Livingbridge and GCI were in contention. He said "*it would have been nice to have at least one other strong private equity offer*" but explained that, at the time, the business of IPS UK was at the smaller end of the market from the perspective of private equity interest.
179. He said that negotiations with GCI slipped because of their involvement in another deal but, in any event and confirming the view he expressed in the contemporaneous correspondence, said that Knight clearly favoured the offer from Livingbridge. Mr Billingham clarified that the offer from Livingbridge involved a higher multiplier of EBITDA (7.5x) because it had by then become the practice of private equity firms to offer a higher value for shareholdings on the basis they would enjoy a priority over any later sale proceeds from the business under loan notes held by them.
180. So far as GCI was concerned, Mr Billingham did harbour doubts about GCI being a credible buyer of IPS UK. This was because "*it would have been their first sizeable transaction since the BGF investment.*" However, his evidence was that Mr Wayne Martin (the CEO of GCI) remained keen. He rejected the suggestion that BGF (a substantial minority shareholder in GCI) would not have been keen on the purchase of IPS UK, saying:

"I don't recall that being the case. I mean, Wayne was a CEO and still -- a founder CEO and still -- I think he still held 80 per cent of -- of the equity, roughly, at the time. So he was still the senior party, but obviously BGF would have had consent matters."

"But I don't recall BGF being against it, it was more that they hadn't been -- I don't think Wayne had brought them into the process at that stage because they were looking at this other one."

181. Mr Billingham explained that it was because GCI were engaged in another deal that heads of terms were only drawn up for the Livingbridge offer. He said:

"Well, as I said, I think we probably said rather than draft heads of terms for both let's focus on the ISIS offer for now because, as it says, GCI were closing another deal, so we had a bit more time anyway, there was no rush for GCI."

182. Mr Billingham gave that answer by reference to his email of 16 June 2014 to the Claimants and Mr Howitt in which he reported that GCI “*are trying to close a deal in the next 2 weeks and then IPS will become their priority.*” On 7 July 2014 he reported that he had spoken to Mr Martin who had told him that the completion of GCI’s other deal had slipped to late July. Mr Billingham accepted that the meeting with BGF that Mr Martin had suggested to him did not take place and that matters thereafter slipped with GCI because of their other deal and the decision of the Claimants to focus upon Livingbridge.
183. So far as concerns the value of the offer which GCI had by then made, Mr Billingham explained how, by early May 2014 and using the forecasts in the Information Memorandum (and EBITDA of approximately £0.94m), GCI were proposing an initial consideration of £4m, deferred consideration of £1m in GCI shares (conditional upon the EBITDA being maintained at completion of the deal) and an earnout to be measured at the end of 2 years on the basis that the EBITDA would be multiplied 6x and the two cash payments would then be deducted. The net earnout payment would be as to the first £2m in cash, the next £4m in GCI shares (valued at 10x EBITDA) and any balance in cash.
184. Although Mr Richards had suggested they might press for less than £4m to be in GCI shares, Mr Billingham was concerned that might send out the wrong message to GCI and sour negotiations. The proposal that the Claimants’ shareholding should benefit from a ratcheted dividend if GCI was not sold after 2 years (so that there would be a financial incentive for GCI to buy them out rather than pay such a dividend) was rejected. GCI’s response was “*not agreed, but there is a dividend policy already in place and this will apply to these shares.*”
185. The proposal also involved the Claimants continuing with their salaries of £90,000. Mr Billingham pointed out that this was probably on the low side but beneficial to the EBITDA on earnout “*because every pound of salary would have cost £6 on the earnout.*” He also considered that there would be cost-saving synergies on a trade deal with GCI (proposed to be split 75% to GCI and 25% to IPS UK for the purpose of EBITDA calculations) and although there would not be massive synergies there would be some financially beneficial ones.
186. That is how matters stood with GCI by mid-May 2014. Having by then had a meeting with Mr Morris and received Livingbridge’s offer letter on 25 June 2014, Mr Richards later sent an email to Mr Billingham, on 27 June 2014, saying he and Mr Purves did not feel able to proceed with the GCI deal as it stood (he also said the Livingbridge terms were unacceptable and too weighted against them). So far as GCI was concerned, they said they would require a cash only deal, with no shares, or one where the shares attracted a significant dividend until sold with a long stop date of 24 months before GCI were obliged to buy them.
187. Mr Billingham confirmed that matters did not thereafter develop with GCI while the Claimants engaged with the revised proposal made by Livingbridge on 11 July 2014. That was the situation which Mr Billingham was addressing when he said there was “*no rush for GCI*”. In his email of 27 June, Mr Richards said they would like to have a meeting with GCI over the Claimants’ suggested terms within the next fortnight with a view to then commencing the due diligence process with them. He concluded: “*[I]f we are unable to proceed with the GCI deal with a deal structure similar to the terms*

outlined above then we should park the process and review our options again in January 2015.”

188. In his witness statement, Mr Billingham said:

“15. During what became a longer than expected process, transactional activity in the telecoms sector remained buoyant, and had the transaction not completed with ISIS there would have been an opportunity to go back to the other parties that had made offers, particularly GCI, to start negotiations again. This period would also have allowed new parties to review the business and to consider making an offer as new potential buyers were entering the sector as a result of increased private equity investment in communications technology providers (both directly and indirectly).

16. During the exclusive process with ISIS, Wayne Martin, founder and CEO of GCI, made it very clear to the Claimants and Knight that should negotiations not complete he would be very interested in revisiting their offer.”

189. The contemporaneous documents and the evidence which Mr Billingham gave about them, and about how the appetite of a particular buyer may well depend upon whether other transactions are in progress, support those statements.

190. I accept Mr Billingham’s evidence as demonstrating that the prospects for the Claimants securing another purchaser for IPS UK in late 2014 were favourable.

THE EXPERT EVIDENCE

191. The case management order of HHJ Pelling QC dated 16 April 2021 gave each party permission to call experts in the field of forensic accountancy with the evidence to be confined to the issues of the valuation of the Claimants’ shareholdings in IPS UK Ltd and the Company as at 3 December 2014 (“**the First Valuation Date**”) and 29 July 2015 (“**the Second Valuation Date**”) respectively.

192. The Claimants called Mr Stephen Skeels FCA (“**Mr Skeels**”) as their expert. Mr Skeels is a partner at Mazars LLP, London, and the firm’s Global Head of Valuations. Mr Skeels has considerable experience in providing expert opinions on valuation matters though he accepted he had previously only provided expert evidence in one High Court matter.

193. The Company called Mr Mark Taylor FCA (“**Mr Taylor**”) as its expert. Mr Taylor is the Managing Director of the London office of Secretariat International UK Ltd. He has worked in forensic and investigative accounting since 1991 and given expert evidence in civil litigation, arbitrations and criminal prosecutions.

194. The experts were asked to express their opinion upon the value of the Claimants’ shareholdings as at the two dates. The First Valuation Date was date of the Transaction when the Claimants sold their combined 85.9% shareholding in IPS UK. The Second Valuation Date was the date of the Claimants’ dismissal from the Company. The subject

matter of their valuation as at that date was the Claimant's combined 60% shareholding in the Company, both on the basis that it was subject to the RPP and not subject to it.

195. The experts agreed that the First Valuation Date, in accordance with their respective instructions, was to be treated as immediately before the Transaction took place.
196. The experts also agreed that "fair market value" was an appropriate standard of valuation and that fair market value can be defined as the price at which an asset would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.
197. The experts also agreed that, for the enterprise value ("EV"), the Earnings Before Interest, Tax, Depreciation and Amortisation ("EBITDA") multiples approach was the most appropriate methodology to assess the value of both IPS UK and the Company.
198. As Mr Skeels explained, the EBITDA multiple is the best proxy for enterprise free cash flows because it incorporates both the revenue and operating costs of the business and excludes non-cash depreciation and amortisation items. It is therefore commonly used where stable profits have been generated by a company and where market conditions do not affect the volatility of a company's profitability, such that profit multiples are a good indicator of value.
199. The experts assumed that the underlying business (and therefore the approach to the calculation of the EV) of IPS UK and the Company remained largely the same between the two valuation dates.
200. Mr Skeels calculated the value of the Claimant's Shareholdings in IPS UK at the First Valuation Date to be £8m. He based this on a pro rata share (85.9%) of the equity value of the business of IPS UK valued at £9.4m. For the First Valuation Date, Mr Skeels adopted multiple of 8.2x EBITDA. This is the midpoint of range of EBITDA multiples between 7.7x and 8.7x and it was applied to maintainable EBITDA of £1.1m per annum.
201. Mr Skeels valued their shareholdings in the Company at the Second Valuation Date at £3.5m (his midpoint figure, assuming the RPP had no impact on their value). This was based upon an equity value of the Company of £6.3m of which £5.5m was available for distribution after making deductions for the priority distributions to the A and B shareholders (604,000 representing the issue price of each class and the accrued interest on the B shares) and for the issue price of the shares in Classes C and D (£195,000). Mr Skeels used an EBITDA multiple of 8.3 to reach his valuation, this being the midpoint of a range of multiples of 8.1x and 8.4x. He adopted an EBITDA of £1.3m per annum.
202. Mr Taylor valued the Claimants' shareholding in IPS UK at the First Valuation Date at £4.6 million. This was based upon him taking 85.9% of the midpoint of his range of valuations of the equity of IPS UK of £4.1m and £6.5m. He considered that a range of multiples between 4.2x and 6.0x EBITDA was appropriate to value IPS UK as at 3 December 2014 based on the offers received for IPS UK in 2014. Like Mr Skeels, he used a maintainable EBITDA figure of £1.1m p.a. for his high and midpoint valuations (but one of £1m for his low valuation). He noted that his valuation was materially

similar to the sum of just short of the £4.6 million cash which the Claimants received on 3 December 2014 pursuant to the Transaction, which he said indicated that the Claimants received fair market value for their interest in IPS UK at the time of the Transaction.

203. Mr Taylor valued the Claimants' shareholding in the Company at the Second Valuation Date at nil, even before any deduction for the RPP. This was based upon his assessment that, as that date, the Company had a negative equity value of between (negative) £2.6m and £0.9m and his use of an EBITDA multiple in the range of 4.0x to 6.6x (the midpoint being 5.3x) as at that date. This was applied to a range of EBITDA between £0.6m and £0.9m p.a. (the midpoint being £0.7m).
204. The principal areas of agreement and disagreement between the expert were set out in their Joint Statement dated 25 November 2021.
205. As I have noted, for the purposes of valuing the shareholding in IPS UK on the First Valuation Date they agreed that the figure of £1.1m was an appropriate estimate of EBITDA (that figure had been recorded by Livingbridge's financial advisors, Baker Tilly, in their Financial Due Diligence Report dated 20 November 2014 in relation to the Transaction). That said, Mr Taylor had also used a figure of £1.0m for the low end of his maintainable earnings range. This was derived from a Due Diligence Report prepared by Livingbridge's advisers, CIL Management Consultants ("CIL") on 14 November 2014, just 6 days earlier.
206. For the purposes of the valuation on the Second Valuation Date the experts agreed that the Company's total debt at that date was £5.4 million and that surplus cash should be deducted from the total debt to calculate net debt. They disagreed about the amount of surplus cash but were agreed that the amount of net debt was immaterial to the valuation. They were agreed the Claimants' shareholdings at that date had no value if it was appropriate to apply the RPP. However, there was a significant difference between the experts so far as the EBITDA and the EBITDA multiple were concerned.

A Summary of the Experts' Disagreement

207. Section 4 of the Experts' Joint Statement summarised the areas of disagreement between them. This was helpfully shown in the following tables

The First Valuation Date

£ million	Skeels 1			Taylor 1		
	Midpoint	Low	High	Midpoint	Low	High
EV/EBITDA Multiple	8.2x	7.7x	8.7x	5.1x	4.2x	6.0x
EBITDA	1.1	1.1	1.1	1.1	1.0	1.1
Enterprise Value	9.4	8.8	9.9	5.4	4.2	6.6
Net debt	-	-	-	(0.1)	(0.1)	(0.1)
Equity value	9.3	8.8	9.9	5.3	4.1	6.5
Claimants' 85.9% share	8.0	7.5	8.5	4.6	3.5	5.6

The Second Valuation Date

£ million	Skeels 1			Taylor 1		
	Midpoint	Low	High	Midpoint	Low	High
EV/EBITDA Multiple	8.3x	8.1x	8.4x	5.3x	4.0x	6.6x
EBITDA	1.3	1.3	1.3	0.7	0.6	0.9
Enterprise Value	11.0	10.8	11.2	4.2	2.4	5.9
Net debt	(4.7)	(4.7)	(4.7)	(5.0)	(5.0)	(5.0)
Equity value	6.3	6.1	6.5	(0.9)	(2.6)	0.9
Claimants' 60% share (no RPP)	3.5	3.4	3.6	Nil	nil	0.5
Claimants' 60% share (with RPP)	Nil	Nil	0.2	Nil	nil	nil

208. The most significant areas of disagreement between the experts were therefore over the appropriate EBITDA multiple, for the purposes of the First Valuation Date and the Second Valuation Date, and the appropriate EBITDA figure for the Second Valuation Date.
209. The first of these differences reflected their differing approaches to the calculation of the EV of both IPS UK and the Company.
210. Mr Skeels' range of EBITDA multiples for IPS UK at the First Valuation Date was derived from the Comparable Companies and Comparable Transactions identified in his report and then adjusted with a discount of 44% for lack of marketability ("**DL**OM") and a premium of 30% for the fact that the Claimants' shares gave control (a "**Control Premium**") together with other relevant adjustments. He did not rely upon the Transaction (and whatever EBITDA multiple might be implied from it) because he was assessing fair market value immediately before the Transaction.
211. Mr Taylor, on the other hand, derived his EBITDA multiples from the Transaction (and his analysis of what Livinbridge considered the implied range of multiples to be) and the other indicative offers made in 2014. He considered the multiples implied by the Transaction and the indicative offers to be the best indicator of market value, given the Claimants' pleaded case that they would have agreed terms with an alternative investor had they not concluded the Transaction. Mr Taylor agreed that some of the Comparable Companies identified by Mr Skeels were comparable to IPS UK and 5 such companies were common to their separate lists of comparables. However, Mr Skeels included 4 others (and would have included a fifth if a meaningful multiple could have been derived from it) which were not agreed and Mr Taylor included one which was not recognised by Mr Skeels. Mr Taylor considered Mr Skeels' DL^{OM} of 44% to be reasonable but challenged his use of a Control Premium of 30%. Mr Taylor did not regard the Comparable Transactions identified by Mr Skeels to be appropriate comparables and there was limited overlap between those identified by Mr Skeels and those which Mr Taylor would have relied upon if he had adopted Mr Skeels' basis of valuation.
212. On their conflicting analysis of the Transaction, the experts disagreed upon the implied EBITDA multiple within it. At the risk of gross simplification, this turned upon whether, under the Transaction and in addition to £4.6m cash paid, the Claimants and

Mr Lindsell had received shares in the Company whose equity value at that point was nil because the Company was loaded with debt (per Mr Taylor) or which had an entry value of £5.7m (per Mr Skeels). The disagreement between them does not rest upon the RPP impacting upon the value of the Claimants' shareholding in the Company: Mr Taylor's point was that the Company's indebtedness to Livingbridge under the loan notes meant that none of the shares in the Company were worth anything at the First Valuation Date. Again, Mr Skeels said that the agreement that the First Valuation Date was immediately before the actual sale to Livingbridge meant that there was no need to consider the value of the Company as at that date.

213. For the Second Valuation Date, Mr Skeels again used the Comparable Companies to calculate the range of EBITDA multiples. He applied a DLOM of 40% and a Control Premium of 30%. For this valuation he used Comparable Transactions (adding three and removing one from the list he had used for the First Valuation Date) only as a cross-check of those multiples.
214. Mr Taylor, on the other hand, continued to use the Transaction and the offers received by the Claimants in 2014 as a starting point and updated his multiples for the First Valuation Date by measuring the impact of changes in the industry by calculating the movement in the multiples obtained for comparable public companies between the First Valuation Date and the Second Valuation Date. He did this by looking at the comparable companies he had identified in engaging with Mr Skeels' approach to the First Valuation Date (and resisting Mr Skeels' addition of the further company for which no meaningful data was available as at that date) and taking the percentage change in their median and mean multiples between the First Valuation Date and the Second Valuation Date. Mr Taylor considered Mr Skeels' DLOM of 40% to be reasonable but again challenged his use of a Control Premium of 30%
215. The significant difference between the experts over the appropriate EBITDA for the Company at the Second Valuation Date reflected Mr Skeels' adoption of the Spur 57 model (dated 3 December 2014) and Mr Taylor's reliance upon subsequent reforecasts of the Company's performance.
216. Mr Skeels said Spur 57 was agreed by the parties as part of the Transaction and adopted an EBITDA of £1.3m p.a.. Mr Taylor relied upon management reforecasts of July 2015 and September 2015 (saying the figures in the latter was based on actual figures to July 2015 which would have been known to the Company). Allowing for the deduction of management costs, this produced a range of £0.6m to £0.9m p.a.. Mr Skeels said (and Mr Richards' evidence gave some support for this) that the reforecasts reflected a slower revenue growth than anticipated in the first few months of 2015 and were not an indication of material long term decline. He also said that Mr Taylor had incorrectly made adjustments for certain costs (in particular Livingbridge's advisory fees) which should be regarded as one-off rather than costs incurred in the normal course of business.

Criticism of Mr Skeels' Approach

217. Mr Tozzi's cross-examination of Mr Skeels began with Mr Skeels accepting that in the one High Court matter in which he had given expert evidence that evidence had not

been accepted. The case in question was included in a supplemental bundle of authorities. I put no store by this point. It provides scant material for some kind of “similar fact” reasoning, particularly when in the present case Mr Skeels stuck resolutely to the analysis in his report. If previous lack of success on the part of professionals appearing in court was to be held against them in future cases then many litigants would quite soon find themselves without satisfactory representation.

218. The main criticisms levelled by the Firm against Mr Skeels’ valuation were directed to:

- i) His reliance upon Comparable Companies and (for the First Valuation Date) Comparable Transaction methodology in his valuation when, as Mr Skeels explained in his Report, the Market Approach involved (with the Firm’s emphasis) “...*analysing metrics derived from the financial performance of, and/or transactions involving shares in, the subject company if on an arm’s length basis or, if such information is not available, companies which are considered “comparable” to the subject company, for example companies operating in the same or similar sector and geographic location for which such information is publicly available*”.
- ii) Accordingly, his disregard of the Transaction for the purposes of the First Valuation Date because it post-dated that date. The Firm said that, as a result he had ignored the best real evidence of the value of the business and the extensive pre-Transaction documentation about the consideration payable under the Transaction, including what had been identified as the consideration for the Claimant’s shares in IPS UK in their 2015 tax returns.
- iii) His omission of any reference to the Livingbridge Investment Committee Memorandum dated 7 November 2014 (“**the LIM**”) when deriving the implied multiples for the Transaction even though he relied upon Mr Billingham’s explanation of the EBITDA multiple.
- iv) His disregard of the Transaction for the purposes of valuing the Company at the Second Valuation Date.
- v) His reliance upon Mazars “house view” for using a Control Premium of 30% when it emerged in cross-examination that he had relied on data from the Capital IQ database which he had failed to exhibit to his report (which exhibited older data). This was criticised as being “slapdash”
- vi) His failure to take account of the CIL report when considering maintainable EBITDA as at the first valuation date, saying it was older than the Baker Tilly report, when it was only 6 days older and, as Mr Skeels accepted, the core of those reports would be based on the same data.
- vii) His adherence to the appropriateness of Spur 57 in calculating the EBITDA for the Second Valuation Date, even though (as emerged in the Leaver Litigation) the Claimants and the Company had come to regard the model as unreliable.
- viii) His discounting of a BDO LLP Report on maintainable EBITDA as at the Second Valuation Date, for reasons which included an iteration of a Board forecast dated 8 September 2015 when, as Mr Taylor pointed out, the Board

pack of that date used EBITDA materially identical to (in fact marginally higher than) the earlier July 2015 forecast referred to by Mr Skeels.

- ix) His use of “cross-checks”, which were said to be nothing of the sort. In particular, Mr Skeels said the EV of the business had risen by about 20% by the Second Valuation Date (even though the Firm said it had significantly underperformed), but his revenue multiple cross-check (using a multiple of between 1.6x and 1.7x based on the Comparable Companies, as adjusted) produced a very significantly greater value, whereas his alternative Income Approach valuation actually saw its value fall. The Firm said this made a nonsense of the whole exercise.

Criticisms of Mr Taylor’s Approach

219. The Claimants’ main criticism of Mr Taylor’s approach to the valuation on the First Valuation Date was that he had valued the business of IPS UK (immediately before the Transaction) by reference to the structure adopted by Livingbridge to carry the Transaction into effect. This involved him ascribing a value of nil to the Company, because the Company was from the outset laden with Livingbridge debt, and to feed that into his valuation of business of IPS on a sale basis (i.e. debt free basis, much as I seek to explain below on the quite separate analysis of article 18.4.1) prior to the Transaction.
220. A closely related criticism was that Mr Taylor had misunderstood the LIM and how the EBITDA multiple he derived from it – a range of 4.0x to 5.3x according to whether the EBITDA was taken to be £1.2m or £0.9m - was at odds with how Livingbridge and Oakley (whose draft Exit Report dated 17 October 2014 the LIM relied upon) approached the valuation of IPS UK prior to the Transaction. Mr Taylor used the range of multiples implied by the Transaction (on his analysis of it) to support his conclusion that 4.2x to 6x was a reasonable range of multiples at the First Valuation Date.
221. Mr Taylor was criticised by the Claimants for taking an EBITDA of £1m p.a. for his low point valuation (though not his high and midpoint ones) at the First Valuation Date when the CIL Report, upon which he relied in doing so, showed the figure for 2014 to be £1.2m.
222. The Claimants said that Mr Taylor’s approach at the Second Valuation Date was also confusing. He had taken his valuation on the First Valuation Date (which they said was flawed for the reasons just outlined) and then used the Comparable Companies methodology, which he had previously rejected, to adjust that valuation for the passage of time. They said his preferred EBITDA figure of £0.6m was contrary to the figure of £0.9m which he said was “knowable” to the Company’s Board by July 2015.

The Expert Evidence: Conclusions and Reasoning in Support

223. I am satisfied that Mr Skeels and Mr Taylor were clearly doing their best to assist the court on what are far from straightforward valuation exercises.

224. I do not accept the Firm's description of Mr Skeels as an unsatisfactory and partisan expert. The Firm described him as such on the assumption that Mr Skeels' approach to the valuing IPS UK and the Company was wrong, not least because he took no account of the Transaction in reaching his value for either of them and he had ignored the LIM and the conclusions drawn from that by Mr Taylor.
225. Nor do I accept that Mr Taylor's independence was somehow compromised, as the Claimants suggested it was by him taking (for the purpose of his lower valuation) an EBITDA of £1m from the CIL Report when the figure for 2014 in that report was £1.2m. He said "*I am looking at providing the range and I think that is something that would inform the view of somebody buying.*"

Conclusion

226. Having heard the experts and reflected upon their Reports and their Joint Statement I have concluded that Mr Skeels' evidence is to be preferred.
227. I have reached this conclusion for 5 principal reasons which, in summary, are:
- i) Mr Skeels' use of the Market Approach was justified in circumstances where the experts were agreed that First Valuation Date was to be treated as immediately before the Transaction took place;
 - ii) Mr Skeels gave convincing evidence to support his use of Comparable Companies and Comparable Transactions (the latter in his calculation of EV at the First Valuation Date and as something of a cross-check for his valuation at the Second Valuation Date);
 - iii) although Mr Taylor disputed Mr Skeels' use of a Control Premium, I find that a premium of 30% was a reasonable one for Mr Skeels to use. Mr Taylor accepted the DLOM of 44% (First Valuation Date) and 40% (Second Valuation Date) applied by Mr Skeels in his Market Approach;
 - iv) the use of an EBITDA of £1.1m for the First Valuation Date was reasonable; and
 - v) Mr Skeels' analysis of the Transaction, for the purpose of ascertaining implied EBITDA multiples is to be preferred to Mr Taylor's analysis. The implied multiple in the range of 8.2x (based on an EBITDA of £1.1m) which Mr Skeels derived from the terms of the Transaction supports his range of 7.7x to 8.7x (midpoint 8.2x) obtained using the Market Approach. My preference of Mr Skeels' analysis (when he did not rely upon the terms of the Transaction as the basis of his valuation at the First Valuation Date but Mr Taylor did) is a significant factor in my decision to prefer generally the evidence of Mr Skeels.
228. That said, I have concluded that Mr Skeels' EBITDA of £1.3m for the Second Valuation Date is too high a figure. In my judgment, it would not have been agreed by the hypothetical seller and buyer to have been as low as Mr Taylor's £0.6m to £0.9m but the disagreement between the experts, by reference to financial material available by

July 2015, has led me to conclude that the EBITDA for the Second Valuation Date should be £1.1m. This is the mid-point between Mr Skeels' figure and Mr Taylor's higher figure. It is the same EBITDA as that used for IPS UK on the First Valuation Date only about 8 months earlier. As I explain further below, the competing evidence over the EBITDA at the Second Valuation Date, by reference to the Company's performance in the 7 months following the Transaction, has led me to conclude that it is safest to revert to the consensus about what it was taken to be (for IPS UK) just before the Transaction took place.

229. Having assessed the expert evidence I conclude that the value of the Claimants' shareholding in IPS UK at the First Valuation Date was £8m. I conclude that the value of their shareholding in the Company at the Second Valuation Date was £2.57m.
230. These valuations are explained by the following tables. For the purposes of the Second Valuation Date, in circumstances where the experts agreed that the Company's net debt was immaterial, I have split the difference between them to reach a net debt figure of £4.85m:

First Valuation Date (£ million)

EV/EBITDA Multiple	8.2x	7.7x	8.7x
EBITDA	1.1	1.1	1.1
Enterprise Value	9.4	8.8	9.9
Net debt	-	-	-
Claimants' 85.9% Share	8.0	7.5	8.5

Second Valuation Date (£ million)

EV/EBITDA Multiple	8.3x	8.1x	8.4x
EBITDA	1.1	1.1	1.1
Enterprise Value	9.13	8.91	9.24
Net debt	(4.85)	(4.85)	(4.85)
Equity Value	4.28	4.06	4.39
Claimants' 60% Share (no RPP)	2.57	2.44	2.63

Reasons

231. I now expand upon the reasons for my conclusions above by focusing upon the most important points to emerge from the voluminous and detailed expert evidence.

The Market Approach

232. Mr Skeels' use of Comparable Companies and (for the First Valuation Date) Comparable Transactions methodology was in accordance with International Valuation Standard 105. IVS 105 explains that the Market Approach is most applicable where:

“(a) the subject asset has recently been sold in a transaction appropriate for consideration under the basis of value,

(b) the subject asset or substantially similar assets are actively publicly traded, and/or

(c) there are frequent and/or recent observable transactions in substantially similar assets.”

233. Mr Taylor’s evidence was that the use of Comparable Companies and Comparable Transactions was not justified, as the First Valuation Date, where objective market data was available in the form of the Transaction and the indicative bids that were made for IPS UK in 2014. In oral evidence, Mr Taylor said:

“[i]t depends what evidence you’ve got available to you. And sometimes when you are valuing a company the market comparables is all you’ve got or the comparable transactions, and so in – if that is all you’ve got, then that might be what you have to rely on. But if you’ve got information about the actual company and you’ve got what people are actually willing to pay for it and companies have done detailed due diligence and have given you all the information you need, then you don’t need to go to rule of thumb, multiple of valuation and try and infer values when you’ve got the hard evidence available to you.”

234. At the First Valuation Date there had been no transactions in IPS UK’s shares. There had been the other indicative bids, alongside Livingbridge’s, but they were not “transactions” within the meaning of IVS 105. This is illustrated by the fact that each of those other indicative bids were based on EBITDA of circa £0.9m p.a. when, as Mr Billingham explained, the actual run rate EBITDA increased to circa £1.2m during the offer process.

235. In these circumstances, Mr Skeels’ approach of adopting the Market Approach by considering Comparable Companies and Comparable Transactions (assuming them to be such) was justified and an appropriate method by which to derive EBITDA multiples for IPS UK.

236. This conclusion is reinforced to a limited degree by the fact that Mr Taylor adopted the approach of looking at Comparable Companies for the Second Valuation Date, though it is important to note that he was doing so for the purpose of checking for variances from his EBITDA multiple calculation derived from his analysis of the Transaction. As he put it in cross-examination:

“all the detailed data that I relied on for the transaction was back at December 2014, so I thought I ought to see what I can do to update it, so I tried to see if there was any evidence from the comparables and what I found was that some went up and some went down. It’s not particularly helpful, so I widened my range. So the high end of the range went up a little bit and the low end of the range went down a

little bit. So -- so it wasn't a particularly conclusive exercise, it wasn't a particularly clear evidence of movement."

237. As Mr Leiper QC highlighted during his cross-examination of Mr Taylor, it is noteworthy that in January 2016 the Company's solicitors in the Leaver Litigation, DMH Stallard, wrote to the Claimants' then solicitors, Clyde & Co, in terms designed to show that the Claimants' shareholding in the Company was worthless with or without the impact of the RPP. The solicitors set out the Company's valuation methodology a "Sector Valuation Multiple" (of 7.9x which was adjusted to 7.17x to reflect a liquidity discount of 10%) which was "[P]er a bucket of comparable transactions subject to liquidity discount due to scale". Mr Taylor said the underlying analysis was not clear or how it fitted with the DLOM applied by Mr Skeels. However, the range of multiples identified in the letter were closer to those adopted by Mr Skeels for the Second Valuation Date than Mr Taylor's.
238. A costs budget filed by DMH Stallard at the end of the previous month shows that the Company had already incurred legal costs of approximately £12,000 in connection with expert evidence. This was most likely with BDO who later produced their Report in April 2016 and to aspects of which I return again below. Having identified a range of EBITDA multiples by reference to the comparable companies identified by them, BDO said "[W]e have therefore taken a 25% discount to the "low" FY15 and FY16 multiples, to arrive at range of 8x and 7.2x" for the Company.
239. As for Mr Taylor's analysis of the Transaction, this was, for the purposes of the valuation exercise, *after* the date to be taken for estimating the price between the hypothetical willing seller and willing buyer (which, per IVS 104 quoted by Mr Skeels in his Report, does not mean a *particular* willing buyer), However, to the extent that Mr Taylor prays in aid the common sense of looking at what Livingbridge was "*actually willing to pay*" for ISIS UK then, as mentioned above and developed further below, I believe the exercise supports Mr Skeels' evidence.

Comparable Companies

240. In challenging Mr Skeels' reliance upon the Comparable Companies identified in his report, Mr Tozzi QC suggested that he had identified inappropriate companies as comparable ones. The ones he selected were listed companies with significantly greater turnover than IPS UK.
241. The disagreement between the experts over the choice of Comparable Companies was summarised in paragraph 4.8 of the Joint Statement. Of the 9 companies identified by Mr Skeels' Report (though he had excluded the EBITDA multiple of one on the basis that it was an outlier, with a significantly higher multiple than the other companies) Mr Taylor agreed that 5 (including that outlier) were comparable to IPS UK at the First Valuation Date. Mr Taylor had included a sixth company in his list of comparable ones, which Mr Skeels had not, but Mr Taylor's view was that a very low EBITDA for the last 12 months ("LTM", as at that date) and no reported EBITDA for the next 12 months ("NTM") meant that an EBITDA multiple from that company was not meaningful.

242. In addition to 5 companies that were common to Mr Skeels' and Mr Taylor's lists, BDO's Report dated 25 April 2016 identified (for the purpose of valuing the Company as at 29 July 2015) a sixth which Mr Skeels had also included: KCOM Group Plc. Those six, and another company for which no meaningful data could be obtained, were said by BDO to be ones "*which we have identified as being comparable to [the Company]*".
243. Mr Taylor said that Mr Skeels was wrong to include other companies within his Comparable Companies. He said the turnover of two of them was too large (over £500m) to be comparable to IPS UK or the Company and that the business descriptions of two others indicated that they did not operate in the same industry as them. One of these was KCOM Group which I note BDO had identified in their report as a comparable.
244. The court is inevitably in something of a quandary on a point like this when presented with a stark difference of opinion presented by two highly experienced and qualified experts. Mr Taylor said they had applied different search criteria and had come up with different comparables and he recognised that Mr Skeels was considering the previous 2 year period rather than his own 5 year period. He fairly recognised that *two* valuers looking for comparables "*are always going to come up with a slightly different population.*".
245. Mr Skeels said he had made adjustments for size in relation to the two large companies questioned by Mr Taylor. As to the other two, he said their business was within the same sector of business operations of IPS UK. In cross-examination he accepted that IPS UK (and the Company) occupied "*a different space*" within the IT sector but these other companies were relevant as comparators when in most cases there is never a directly comparable business doing the exactly the same as the company being valued. His view was that IPS UK could be benchmarked against others within the wider sector. He also said that, if the two companies in question were to be excluded from his calculations, there would be no impact on his median EBITDA multiple (of 10.7x before adjustments) and his average multiple would increase (from 10.3x to 10.5x before adjustments).
246. Those answers from Mr Skeels, together with the overlap between his selection of Comparable Companies and those identified by Mr Taylor (and BDO), indicate that his approach to their selection was a valid one.
247. A comparison of the expert reports (Skeels para. 5.4.4 and Appendix 5.2 and Taylor para. 5.2.27 and Appendix 6) does not reveal a significant discrepancy between the EBITDA multiples derived by the experts for their common Comparable Companies, save that Mr Skeels did reach a materially higher multiple for one: Alternative Networks Plc, at 14.8x, compared with Mr Taylor's 12.1x (LTM) and 7.6x (NTM). I have no reason to question the analysis adopted by Mr Skeels at his Appendix 5.2.

Control Premium and other adjustments

248. Mr Skeels adopted a Control Premium of 30% and DLOM of 44% (40% at the Second Valuation Date) in reaching the EBITDA multiple for IPS UK.

249. However, it is important to note, as Mr Skeels explained in his evidence, that the Control Premium applied by him related to the Comparable Companies and he had used it only in the context of those companies. This was because the market prices shown by the data for those listed companies revealed prices for a marketable minority parcel of shares, so a Control Premium has to be added to reflect what the buyer would have to pay to acquire a controlling stake. The following exchange summarised his position on the Control Premium and DLOM (the figures in his Table 5.2 showed his figures for the revenue, EV and last 12 months EBITDA multiple of the Comparable Companies identified by him):

“JUDGE RUSSEN QC: So -- then you've done a sort of negative against IP Solutions in relation to the DLOM [sic] and you've done a positive in relation to the control premium?”

A. Correct.

JUDGE RUSSEN QC: So the point, as I presently understand you, Mr Skeels, is that your point about control premium is: please bear in mind that the figures in the table at page -- sorry, table 5.2, are not reflective of control premia?

A. Correct, effectively what those are -- yes, so what I've done is I've taken the market capitalisation effectively of each of the comparable companies and I've grossed it up by 30 per cent and then reduced it by 44 per cent to end up at a multiple that can then be used to value the company.

JUDGE RUSSEN QC: For an off-market purchase of a majority stake in IPS UK?

A. Indeed. I'm not saying that you would pay a premium or not for IPS, I'm just saying in terms of the methodology used to come up with a value of the business, you have to make those adjustments to make that data comparable.”

250. The DLOM was not challenged by Mr Taylor but Mr Skeels' use of a Control Premium was.
251. Mr Taylor confirmed in his oral evidence that the Control Premium “...*could be zero...*” , and that in this particular case he had “...*seen no evidence that supports the application of a control premium, so I have applied a zero control premium*”. Mr Skeels said that Mr Taylor had “*confused the issue by talking about control premiums more generally to do with other transactions. I only use it in the context of those comparable companies.*”
252. When, in the context of the Leaver Litigation, Mr Nicholls of Ernst & Young gave the court the benefit of his opinion on the approach to the valuation of the Claimants' shares under the Articles (as I explain below in the next section of this judgment) he said that, if he had been directed to value a minority stake, then he would consider applying a “[D]iscount for lack of control, or “*minority discount*”, reflecting that holders of a minority parcel of shares are unable to control, amongst other things, the strategy and direction of the business, as well as timing and method of exit”. As Mr Taylor accepted, Mr Skeels' Control Premium is the inverse of such a “**DLOC**”.

253. Mr Taylor’s Supplemental Report (prepared after the Joint Statement) set out in some detail the controversy over the routine application of a Control Premium and, referring to the previous recognition of it in the US courts, said: “[I]t is thus apparent that there is a strong body of opinion that control premiums should not be applied unless there are very specific circumstances that justify one.” Mr Taylor recognised that “when a buyer perceives that a company’s profit is not being maximised or the overall value of the target can be enhanced, the buyer might be persuaded to pay a premium above the established market price.” His view was that control premiums only exist where the hypothetical purchaser would have an opportunity to materially improve the cash flow or economic benefits generated by the business and would be willing to pay for that opportunity. He said he had seen no evidence that this was the case in respect of IPS UK and that a “generic and universal intent” on the part of the management and Livingbridge to improve the future operations of the business, which is how he described the matters relied upon by Mr Skeels, was not sufficient to justify one.
254. As I have explained above, this was not the context in which Mr Skeels was applying his Control Premium. Mr Skeels said in evidence: “I’m slightly puzzled because I’m using control premium to deal with the comparable companies.” His Report said: “[A]fter application of the DLOM and Control Premium, the Average EBITDA multiple derived from Comparable Companies is 7.5x and the median is 7.8x.”
255. Mr Skeels was criticised by the Firm for taking what he described as the Mazars “house view” (derived from a range of 25% to 40% for Control Premium) of the appropriate premium – 30% - to be applied to reflect the value of acquiring control of the company through the purchased shares when the guidance on control premiums indicates that the appropriate premium in any particular case depends upon a number of company-specific factors. It also emerged during Mr Skeels’ cross-examination that he had used more recent Capital IQ “merger stat” data on this aspect than that exhibited to the report (which was based on data from the United States). In his testimony, Mr Skeels said:
- “If you look at the empirical data for listed company takeovers where effectively people have bought a controlling stake or companies have bought a controlling stake in that business, generally speaking the price that ends up being paid is somewhere between 25 and 40 per cent higher than the day before the announcement of the transaction.”*
256. Although it is unsatisfactory that Mr Skeels had relied upon unexhibited data to support his Control Premium, I have been persuaded by his evidence that a Control Premium should be applied to reflect the fact that the quoted share prices of listed comparable companies will reflect the purchase of a “marketable minority” holding. As Mr Skeels said in his Report, the minority investor typically cannot influence the strategic direction of the business and/or have access to its cash flows in the same way that a controlling shareholder of a private company can. As such the difference between a controlling stake and a marketable minority stake is the Control Premium.
257. Although Mr Taylor’s Supplemental Report had focused upon the need for a Control Premium to be justified by specific financial benefits to be gained through the acquisition of control, and he maintained his position that in this case the premium was zero, the answers he gave in cross-examination put a bit of a gloss on that. I refer to the following exchanges in the transcript:

“Q Can we then go to your supplemental report which is 13 at C/2581. You here describe at 3.2.2 the principle of control premium. And could you just read that paragraph 3.2.2 to yourself?

(Pause)

A. Yes, I've read that.

Q. So in effect what you are describing here is that on occasion a buyer will pay a premium because they believe that they're particularly able to create additional value over and above other purchasers of the same interest?

A. That's what I say there, yes.

Q. And so a business is for sale in its entirety, so 100 per cent. There are two possible purchasers. One is prepared to pay a certain value, but another is prepared to pay a premium because they believe that they are going to be able to achieve particular synergies, create additional value, more than the other purchaser will be able to; that's what you are describing here?

A. That's right, yes.

Q. And that is different, isn't it, from identifying the difference between paying to acquire a small number of trading shares and paying to acquire a controlling majority?

A. I think so, yes, yes.

Q. Now, if we could look, please, at the joint report at C/35. So looking at the right-hand column -- sorry, I'll give you a moment to find the page.

A. Okay.

(Pause)

Yes.

Q. So looking at the right-hand column, your overall position is that no control premium should be applied. Mr Skeels suggests a figure of 30 per cent is a reasonable estimate for a control premium. You make a number of criticisms of that, which we went through yesterday. You haven't suggested an alternative reasonable estimate, have you?

A. Zero.

Q. Okay.

A. I've said no control premium, so yes.

Q. So you are saying no control premium, it's zero and that's it. So there isn't an alternative hypothesis where you posit a figure of say 20 per cent, you just aren't prepared to go there?

A. No, I've seen no evidence that supports the application of a control premium, so I have applied a zero control premium.

Q. Now, could I ask you to look back in your original report at 2234 in C.

JUDGE RUSSEN QC: Just on that point, you say it's zero, Mr Taylor. Is that because, as I read in your principal report, paragraph 4.2.5, that the exercise of reaching market value is:

"... a hypothetical one which assumes that neither the buyer nor the seller is under any compulsion, transaction is at arm's length [et cetera]. This means that FMV is an impersonal standard of value rather than a personal standard of value."

Tell me if that is a different point, but is that part of the reason why you say you don't look to the hypothetical willing buyer and assume that buyer's acquiring a majority or --

A. No, that's a slightly different point, this would -- being an impersonal standard is -- is taking into account that there are no synergies. So if -- when buying a company you could combine them and make savings, then there would be a particular value to you for getting those synergies and so you would be willing to pay more. The control premium is more that if you have control over the whole company you can improve it in some way that would increase the value of the company. So you would be willing to pay more because you think if you control it you can do better than it's doing at the market -- at the multiple of the -- of the market price, yes.

JUDGE RUSSEN QC: Thank you. Yes, thank you, I interrupted you, Mr Leiper.

MR LEIPER: Just looking back, if we may, at C/2581, paragraph 3.2.2, you are describing whether or not you take into account synergies. So if when buying a company you'd combine them and make savings, so there would be particular value to you for getting those synergies and so you would be willing to pay more, that's what you are describing in that paragraph, 3.2.2, isn't it?

A. Yes.

Q. And that is what you describe as the principle of control premium?

A. Yes, yes.

Q. But in your answer to his Lordship you said that the control premium was different. It's more that if you have control over the whole company you can improve it in some way. So you appear don't you -- just let me finish the question -- you appear, don't you, to be confusing your definitions of control premium?

A. In the exhibits that I attached and discussed the control premium we can see that there's schools of thought that there are different levels of control premium, one is financial control premium and one is strategic control premium, and we are being a little ambiguous in our language in not explicitly saying which one we're talking about. And they're in my exhibits and there are charts that show them, we can -- I

can find a reference and for, my Lord, if that would be helpful. But yes, there are two different aspects of control premium and we have been confusing them a bit.

Q. Well, you say "we", you've been very clear in your supplemental report about how you are defining the principle of control premium, haven't you?

A. I have taken the view that there is no control premium and that is putting both of them together.

Q. You have been -- if I may repeat the question -- you have been very clear in your definition of control premium for the purposes of your supplemental report in paragraph 3.2.2, haven't you?

A. I think, no, it's -- it's usually by operating the company in a more efficient manner or by benefiting from synergies, and then when a buyer perceives that a company's profit is not being maximised, I'd say that definition now of control premium is -- is the two effectively put together in what I am now apologising for being a slightly ambiguous way when we could have gone deeper into the theory of control premium and split them out.

Q. I am not going to go over your earlier answers, let's move on.”

258. Mr Taylor’s answers about strategic control acquired by the buyer provide some support for the application of a Control Premium to reflect the more general advantages to a buyer acquiring strategic control over the direction of the business. Although Mr Skeels had applied it in reaching his EBITDA multiples for the Comparable Companies, I note that the LIM (Section 1A : “Investment Case” and Section E: “Commercial”) and the minute of the meeting of the Livingbridge Investment Committee on 11 November 2014, at which final approval to proceed with the Transaction was given, indicate that Livingbridge considered there to be some advantages to the business in the Company acquiring strategic control of it.
259. When BDO LLP prepared a Report dated 25 April 2016 for the Company, headed “Valuation of Minority C Shares”, they made the point that they had not been appointed as independent expert valuers under the Articles and that “[P]ro-rata valuations will lead to a higher valuation of minority shareholdings because, in assuming that a hypothetical third party acquirer is purchasing the entirety of the business it is assumed that a premium would be payable for control and liquidity.” BDO explained that when looking at the EBITDA multiples of comparable quoted companies, where those “multiples reflect a minority position, we have adjusted our analysis to include a bid premium of 30%, on the assumption that in a buy-out of the business, a purchaser would pay a premium to acquire control.” Like Mr Skeels, BDO applied the premium in their analysis of their comparable companies. Their approach lends further credibility to Mr Skeels’ inclusion of Control Premium. By a Note dated 27 May 2016, Alix Partners commented upon that report. They noted that “[C]ontrol premiums are an area of debate in the valuation community” and that BDO had applied one of 30% but did not criticise the percentage adopted.

260. The fact that BDO used the same percentage, and Mr Skeels' reference to his firm recognising a range of 25% to 40% for Control Premium, indicates to me that a Control Premium of 30% was a reasonable one for him to adopt.
261. Aside from the DLOM and Control Premium, Mr Skeels had made what he accepted in cross-examination were largely subjective adjustments to take account of such factors as size, diversity of operations and other specific issues relevant to the Comparable Companies. Looking at what BDO had done in April 2016, Alix Partners said:
- “[G]enerally, we would prefer not to discount multiples by completely subjective amounts – it makes a mockery of conducting the comparable company exercise. It is sometimes necessary where there are limited comparables or a proxy sector has to be used but in a contentious situation this approach would be attacked. Moreover, if the adjustment is significant, and 25% is, it starts to suggest a lack of real comparability anyway. A preferred approach is to identify different potential forecasts.”*
262. This was put to Mr Skeels in cross-examination. He did not agree with it. He said *“[I]t’s general accepted practice in the market to is [sic] to use comparable data set to which there are subjective adjustments made.”* He said the adjustments could often be of a significant amount, say 25% to 40%. When it was suggested to him that the IPS was an immature business with a turnover of approximately £6m and could not properly be compared with any of the companies listed in his Table 5.2, Mr Skeels agreed and said *“to become a listed company, which is what comparable companies are, you won't get listed if you are as small as our company was and they would always be bigger.”* He said that it was relevant to look at other companies, large and small, for the purpose of establishing the market view of the sector, provided an appropriate adjustment is made for the difference in size.

Comparable Transactions

263. Mr Skeels' further reliance upon what he said were Comparable Transactions, in order to provide a range of EBITDA multipliers for the First Valuation Date, was also criticised on the basis that the transactions identified by him were not in fact comparable. Mr Tozzi QC challenged those relied upon by Mr Skeels both by reference to the nature of the business carried on by the relevant company which was the subject matter of the transaction and the significantly greater EV of that business.
264. The experts summarised their differences over the selection of Comparable Transactions, for the purposes of the First Valuation Date, at paragraph 4.9 of their Joint Statement (and, less significantly given that they were used by Mr Skeels only as a cross-check, at paragraph 4.15 in relation to the Second Valuation Date). There was limited overlap between those identified by Mr Skeels and those which Mr Taylor would have relied upon if he had adopted Mr Skeels' basis of valuation. Mr Taylor's view was that there were no appropriate Comparable Transactions as at the First Valuation Date.
265. As with their search for Comparable Companies, the difference between them reflected different search criteria. Mr Skeels had searched for transactions in the industries of

(a) internet services and infrastructure; (b) IT consulting and other services; (c) integrated telecommunication services; and (d) wireless telecommunication services. Mr Taylor had searched for the acquisitions of majority stakes in companies operating in the IT or telecommunication services industries. In his Report he also addressed 3 comparable transactions which BDO had considered to be comparable transactions but, having researched the target companies, concluded that “[G]iven the inherent and important differences of these transactions to IPS UK, I do not consider it appropriate to use these multiples to derive a valuation of IPS UK as at the First Valuation Date.”

266. As with his selection of Comparable Companies, the issue is one of assessing the reliability of Mr Skeels’ approach. Mr Taylor did accept in cross-examination that BDO had identified two transactions upon which Mr Skeels had relied but which he (Mr Taylor) did not consider to be appropriate Comparable Transactions. In including them within their list, BDO had said: “[W]e have sought to identify transactions in the market where the acquired company is sufficiently comparable to IPS to support a valuation.” Oakley had also identified one of those two as a comparable transaction in their draft Report.

267. When challenged over his selection of Comparable Transactions, Mr Skeels said:

“Well, it's the same answer as I gave for the companies, there's never a direct list of completely and exactly comparable transactions, it's the job of the valuer to find ones which are comparable enough to be used in the exercise and obviously that's a matter of subjective judgment.”

268. As with my conclusion in relation to the Comparable Companies, albeit with significantly less support from other valuers identifying the same ones, I consider Mr Skeels’ approach to the selection of Comparable Transactions to be a valid one.

EBITDA for the First Valuation Date

269. As appears from the table in paragraph 207 above, the experts were agreed that an EBITDA of £1.1m was appropriate for the First Valuation Date, though for his low end valuation Mr Taylor had used an EBITDA of £1m. He took this from the CIL Report dated 14 November 2014 which used an EBITDA of £1m for 2015. Although he recognised that the £1.1m figure that he and Mr Skeels had agreed upon was “a good figure” (it was the one adopted by Baker Tilly for 2014 in their Due Diligence Report dated 20 November 2014) he said that, if available, the CIL Report would inform the view of a potential purchaser.

270. In cross-examination, Mr Taylor was asked why a prospective purchaser would not also be informed by CIL’s EBITDA figures for 2014 (£1.2m) and 2016 (£1.6m) and why the Baker Tilly and CIL figures for 2014 should not be averaged out. Mr Taylor’s response was “I think the range could have been 1 to 1.2”.

271. In my judgment, this confirms the correctness of the £1.1m EBITDA figure on which the experts were otherwise agreed.

EBITDA multiple implied by the Transaction

272. Mr Taylor said the Transaction implied an EBITDA multiple of 4.0x if the EBITDA was taken to be £1.2m or 5.3x if the EBITDA was £0.9m. This was on the basis that the Transaction indicated that IPS UK had an EV of approximately £4.9m at the First Valuation Date. He also referred to the LIM (which was dated 7 November 2014) which, he said, showed that Livingbridge had valued IPS UK at £5.7m based on an EBITDA multiple of 4.7x (using a forecast EBITDA of £1.2m) and 5.3x (using an EBITDA of £0.9m) which Knight had used in their Information Memorandum of March 2014.
273. Mr Taylor took his £4.9m figure from the cash consideration of £4.7m odd which Livingbridge had paid under the Transaction and the £195,000 retained for the subscription of shares in the Company by the Claimants and Mr Lindsell. In fact, as Mr Taylor recognised in cross-examination, it was the Company which purchased the shares in IPS UK (using the monies provided by the Livingbridge Investors). The 35% equity stake in the Company which Livingbridge acquired had “*minimal or nil equity value*”.
274. Mr Skeels took a fundamentally different view of the amount invested by Livingbridge under the Transaction. He said that, in addition to the cash of £4.7m and the £195,000 for the subscription of the C and D Shares, Livingbridge had also invested £105,000 in A Shares, £480,000 in B Shares and £5.2m in the form of loan stock issued by the Company: an additional £5.7m. The cash sum having been paid to the shareholders of IPS UK, he described the £5.7m as the entry value of the Company. On the basis that the Claimants acquired 60% of the Company with that entry value (i.e. £3.4m) and received approximately £4.6m of the cash it could therefore be said that they had received £8m for their combined 85.9% shareholding in IPS UK. This would indicate that the value of IPS UK (100% of its equity) was £9.4m. Accordingly, based on an EBITDA of £1.1m, the Transaction gave an implied multiple on the range of 8.2x. As noted above, Mr Skeels was criticised by the Firm for not referring to the LIM. He said it was not relevant, having dealt with the implied value of the Transaction in his report.
275. I return below to the issue of the value of the Claimants’ C Shares in the Company (as opposed to their acquisition cost) when addressing the points made about the treatment of them in their tax returns. Mr Taylor’s point in relation to implied multiple at the First Valuation Date was that the Company had no equity value “*from just before to just after the Transaction*” because its EV comprised only Livingbridge’s loan notes, so that Livingbridge’s 35% shareholding had no value.
276. As Mr Leiper put the point to Mr Taylor in cross-examination, this reasoning does appear to bring into account the post-Transaction debt in the exercise of the pre-Transaction valuation of the business. This is not just a point about the First Valuation Date being immediately before the Transaction. On Mr Taylor’s approach, the existence of the Livingbridge loan notes substantially reduces the value of the business (in the Company’s ownership) by reference the fact that most of the monies used to fund its acquisition were borrowed on the security of the loan notes. When the subject matter of the valuation on the First Valuation Date is the shareholding in IPS UK, and that is determined by reference to the EV of that company which owns the business, there is in my judgment limited value in looking at the manner in which the purchaser of the business proposes to structure and fund the purchase. The price of an asset does

not depend upon whether the buyer is flush with cash or in the red (any more than it depends upon priority distribution rights as between different classes of shareholder of the buyer, such as the RPP, which govern the position when the asset comes to be re-sold).

277. When the investment in the Company, as purchaser, takes the form not just of lending but also an equity stake (the A, B, C and D Shareholdings held by Livingbridge, the Claimants and Mr Lindsell) it is not unreasonable to assume that the shareholders in the Company, as the willing buyer, consider it has acquired a business of some value. As Mr Leiper observed, a willing buyer does not value the hope of a future return from the business at nil. As the LIM, which I address below, expressed the point in relation to the C and D Shares (in Section 1B: “Deal Structure”): “[M]anagement are rolling existing value into ordinary shares” (my emphasis). Given the investment recommendation in the LIM, which noted the proposed RPP, Livingbridge must surely have thought the A and B Shares also had value (especially given the RPP) notwithstanding the debt owed by the Company to Livingbridge. I deal below with the pre-Transaction correspondence from Livingbridge indicating what (in excess of the £5.1m odd owed to it) it considered the value of the business acquired from IPS UK to be.
278. However, the real focus at the First Valuation Date is upon the value of the business in the hands of IPS UK as the willing seller.
279. In his testimony, Mr Billingham explained that “*the way to look at a private equity offer is how much are you giving up of your business, for the cash amount and how much are you retaining.*” In his email to the Claimants of 19 May 2014, attaching Livingbridge’s formal offer, he said:

“As always with PE you could look at the valuation a number of ways, but broadly valuations on day 1;

o Isis paying £5.5m for a 35% stake (and £5.4m loan note)= £10.31

o Paul and Keith receiving £2m each to dilute them by 17.5% (and factoring in a 25% 'share of loan note)= £10.08m

This is clearly a huge premium on the Day 1 valuation of a trade deal”

280. When asked about Mr Billingham’s calculation, Mr Taylor said it did not make any sense at all. He said the Company:

“..... is worth about 5 million and it owes about 5 million, and then they have tried to give an upside to the various parties as to what might happen in the future by issuing shares in Newco. But at the time of the transaction those shares in Newco have no value because Newco has just got debt and an asset that are of equal and opposite value.”

281. However, Mr Billingham’s explanation for it was:

“It’s all to do with structuring. At the end of the day, if someone’s paying 5.5 million for a 35 per cent stake surely to get to 100 per cent valuation you’d divide five and half by the 35%.”

282. On Mr Billingham’s approach, therefore, the fact that the Company had borrowed from Livingbridge, under secured loan notes, the monies used to acquire IPS UK should not distract from the point that Livingbridge was prepared to pay £5.5m for a 35% shareholding in the Company which had acquired the business. His calculation of £10.31m did not ignore the debt owed to Livingbridge. After the grossing up suggested by his answer above (which produces a figure of £15.71m) he deducted the amount of the loan (£5.4m) to reach £10.31m.
283. In my judgment, Mr Billingham’s approach correctly focuses upon the question of what the Livingbridge offer indicated the value of the business to be in the hands of IPS UK, the seller, without the distraction of a different valuation of the buyer (which is put at nil because of the way the purchase was funded). Mr Skeels correctly summarised this basic point when he said the EV is *“the same the day before and the day after”* and *“[S]o the enterprise value, in my view, hadn’t changed between the two dates; how you allocate that value has.”* He explained further:
- “Yes, I think I’m taking the -- my view of what the business is worth prior to the transaction happening, and effectively saying it cannot have changed value at that level over -- over a two-day period. So on the day before, all of that value is attributable to the vendors; the day after they effectively have received 4.6 million and there’s a balance of -- they own 60 per cent of the company which has whatever that debt is 5.5 million of debt 5.7 million of debt in it and the enterprise value is the same, you take off the 5.7 of the debt and what’s left is effectively the value for the total equity of the business at that point in time.”*
284. In section 4.3 of his first Report, Mr Taylor explained that the EV of a business will always equal the sum of all investment interests in the business and he explained that the investment interests can consist of equity, debt securities and unsecured loans. It seems to me that, by focusing upon the investment interests in the Company, and essentially upon the Livingbridge debt rather than the shares which he regarded as worthless because of that debt, Mr Taylor has allowed his analysis of the EV of the Company (or possibly even what amounts to a net asset valuation of the Company) to devalue the EV of IPS UK.
285. On Mr Taylor’s analysis, there is something of a self-fulfilling prophecy in his conclusion that the Claimants, through the cash received of £4.6m, obtained from Livingbridge full market value for their shares in IPS UK because it gives no credit (beyond par value) for their shareholding in Company which has acquired what was clearly regarded by all parties to the Transaction as a valuable business. To express the point another way, as Mr Leiper did, it is as if the £5.7m odd invested by Livingbridge in the Company (over £5.1m of loan stock and approximately £585,000 for the A and B Shares) was made notwithstanding they had already paid the Claimants full market value for the business. This does indeed seem counterintuitive.

286. The Firm and Mr Taylor also placed significant reliance upon the LIM. Mr Morris was one of the three authors of this document but there was no evidence from any of them as to what they meant by the section relied upon by the Firm. In particular, the Firm referred to the following passage in the LIM (again in the section addressing the structure of the deal):

“4. Entry pricing

Due to management rolling into ordinary equity we are measuring entry pricing on a money back basis. Having agreed the deal pre-FD costs the business is expected to achieve £1.2m EBITDA outturn and a 4.75x entry multiple. Annualised Run Rate at 31st October 2014 is £1.38m (adjusted for FD costs and CTO payrise) implying an entry multiple of c 4.2x.

We are comfortable with entry pricing in the context of both comparables and trading multiples provided by Oakley with trading peers and comparable transaction c7-9x. The discount applied to entry is based on two factors i) immature business model and ii) dealer contribution to overall profitability. However, smaller assets continue to attract similar multiples, validated by the acquisition of Proximity Communications (FYDEC13 EBITDA of £1.3m) to Maintel earlier in October for c.7.4x. Proximity had lower growth and margins and only 50% recurring revenue vs IPS c90% recurring revenue.”

287. At their meeting on 11 November 2014, the Livingbridge Investment Committee noted that “[T]he investment team confirmed that they believe the entry price for acquiring the asset is attractive.”
288. Mr Tozzi QC questioned Mr Skeels as to why he had ignored this clear evidence in the LIM that Livingbridge had calculated the multiple at 4.2x to 4.75x. Mr Skeels said he had not referred to it because “*I don’t think that’s the right value for the business at the first valuation date.*” However, he said that his report had dealt with the implied value of the Company (£5.7m) based on the Livingbridge investment amount. His implied multiple (of 5x by reference to that amount) was in essence the same thing as what he described as “*the cash multiple of what they’ve put up for the business*” which was shown by the LIM. Mr Skeels said the multiples of 4.2x to 4.75x were addressing the initial upfront consideration. By “*cash multiple*” he meant that Livingbridge were focusing upon the cash return on their investment and that those particular multiples did not take account of the deferred elements (or equity value of the Company) under the Transaction.
289. With some trepidation, given that none of the authors of the LIM were before me to explain it, I have concluded that the Firm has read too much into the quoted passage which, I note, begins with the statement “*Due to management rolling into ordinary equity we are measuring entry pricing on a money back basis.*” Mr Taylor said he did not think the phrase “*on a money back basis*” was a term of art, though he did recognise that the focus appeared to be on their return from their investment. However, he maintained that it indicated the price they were willing to pay under the Transaction.

290. Looking at Section 1B of the LIM it is clear that the entry multiples of 4.75x and 4.2x are derived from the £5.7m explained at the beginning of that section, according to whether the EBITDA is taken to be £1.2m or £1.38m. I would note here that, if the EBITDA is taken as the £1.1m adopted by the experts for the First Valuation Date, then the reverse calculation would lead to a multiple of approximately 5.2x. Mr Taylor said the LIM indicates the price Livingbridge were willing to pay for the business. However, as I read it, the reverse calculation of the different multiples is based upon the amount of funding Livingbridge was committing to the Transaction. The two are different things, especially when (as explained in the section: “*Sources*” and “*Uses*”) £1.021m of that £5.7m was going in “*deal fees*”, leaving an “*EV*” of £4.716m. When commenting upon Livingbridge’s formal offer of 19 May 2014, which referred to the funding of transaction fees of £1m, Mr Billingham said this was “*incredibly high but not unusual*” and said the Claimants should suggest that Knight’s fees were also included. The transaction fees and costs associated with making an investment are highly relevant to the return that the investor (incurring those costs in an amount specific to him) but whether they should influence the price of the investment is quite another matter.
291. It therefore seems to me that this section of the LIM was illustrating the multiple that would be required (at the different EBITDA figures) for Livingbridge to secure the repayment of the principal amount of their funding (i.e. “*on a money back basis*”). This approach seems to have been prompted by the fact that the Claimants and Mr Lindsell were rolling over equity into the Company (“*[D]ue to management rolling into ordinary equity*”) and the implied EBITDA multiples seem to have been calculated from the perspective of Livingbridge as funder. Although the £5.7m does include the nominal value of its shareholding in the Company as well as its loan stock, the implied multiples required for Livingbridge to get its money back took no account of the RPP attached to the Livingbridge shareholding; though in the same section its impact had been illustrated with the observation that “*.... if we sold IPS the day after completion for £11.5m, all proceeds would come to ISIS as all value would shift in the equity structure to ISIS until 2 x returns is achieved*”.
292. Therefore, following on from my observations above in relation to the EBITDA implied by the Transaction, the calculation of the implied multiples in the LIM does not appear to have taken account of that part of the EV of IPS UK which was carried into the shareholdings in the Company.
293. The implied range of EBITDA multiples which Mr Taylor derived from the LIM and from Transaction terms is also at odds with the multiple which Mr Morris on behalf of Livingbridge was using in the run up to the Transaction.
294. On 24 March 2014, Mr Morris wrote with Livingbridge’s indicative offer which he said was “*based on an Enterprise Value of £.7 mlllion which represents 7.5x FY14 EBIT of £935k as detailed in the I[nformation] M[emorandum]*.”
295. On 19 May 2014 Mr Morris submitted Livingbridge’s formal offer which, at that stage contemplated that the Claimants would each receive £2m in cash (Mr Lindsell £500,000) and, because of the sweet equity arrangement then proposed, a 25% shareholding in the Company. This was on the basis that Livingbridge would provide £6.5m of funding (including £1m for transaction fees) and one of the conditions of the

offer was Livingbridge being “*satisfied with the adjusted underlying EBITDA for the year ended 30 November 2014 being not materially less than £1.1m.*”

296. The formal offer did not refer to any multiple of that figure. However, on 2 July 2014, Mr Morris wrote to Mr Billingham with further proposals from Livingbridge. These included: “*I propose that we acquire a further 10% from Kevin and Paul at a cost of £1m. This is a premium to the current valuation we have applied of 7.5x the earnings of £1.1 m. ISIS will therefore hold 45% of Newco and Kevin and Paul will hold 21.5% each.*”
297. As Mr Taylor recognised, the premium price of £1m for an additional 10% shareholding was in excess of the £825,000 which the current valuation of £8.25m (7.5x £1.1m) adopted by Livingbridge would indicate. He accepted in cross-examination that on 24 March and 2 July 2014 Livingbridge were talking about an EBITDA multiple of 7.5x.
298. The contemporaneous documents also show that Mr Crossley understood that Livingbridge were basing their offer on a 7.5x EBITDA multiple. On 26 August 2014, Ms Cockburn sent him and the Claimants (copying Mr Billingham) an email which was directed to the “hurdle” for the issue of the sweet equity contemplated at that time. She set out her understanding of the proposal in three points, the first of which was: “*The business is currently valued at £8.25m by Isis based on £1.1m EBITDA rate multiplied by 7.5.*” Mr Crossley began his response with “*I agree with your understanding as set out below.*” His handwritten notes on the draft Articles reviewed by him also referred to:

“Value co

7 x 5 x 1.1 EBITDA

-> 8.2%

2m cash

1.589m rolled

-> 17.2 hard

26.5 with sweet

65%”

299. In addition to providing an indication that the rolled over equity in the Company was being treated as having more value than the nominal price of the shares (see below) this shows that the 7.5x multiple was clearly in Mr Crossley’s mind.
300. The Firm contended that Mr Taylor’s analysis that a consideration of £4,910,842 (before adjustments) was paid for the shares IPS UK was supported by clause 3 of the Share Purchase Agreement, a consideration table prepared by PwC in October 2014, the Firm’s tax clearance letter (which adopted that analysis of the consideration) mentioned below, and the Claimants’ own tax returns.

301. On my reading of them, each of these documents shows what the consideration was (or was proposed to be) under the Transaction but none of them provides the basis for inferring that was the EV of IPS UK. In order for that to follow the value of the consideration shares in the Company (which has acquired the enterprise) would have to be the same as their nominal value of £0.01 each: a total of £205,000 across the Claimants' 18 million (odd) C Shares and Mr Lindsell's 1.5 million D Shares. Of course, Mr Taylor says they were not even worth that, being valueless at issue regardless of the RPP, but the point is that these documents did not put any value on the rolled over equity.
302. In my judgment, this highlights the difficulty of attempting to determine the EV of IPS UK by reference to the consideration received by its shareholders when that includes an ongoing stake in the enterprise through shares in the Company: the rolled over equity. A £0.01p C Share is not necessarily worth the same as one pence of the cash consideration. The value of the share will reflect the Company whether that is measured by reference to its EV or some other basis of valuation.
303. It is the case that the PwC table pre-dated the Transaction (though it was focusing upon the basic structure of it) and it was headed "Project Spur - Consideration (EV £4.9m)." The footnotes to the table show that EV figure equates to the "*headline proceeds*" which are the total of the "*implied total cash out per the offer letter and the rollover stake (65%) in Newco*". Again, therefore, this appears to be an exercise in reverse reasoning by which the EV is assessed by reference to the consideration payable but where the actual value of the rollover equity (as opposed to its face value) is not known. In my judgment, the limitations of this are obvious when the position of Mr Fawcett is considered. As appears from the PwC table and the SPA, he was selling his 4% shareholding in IPS UK but not also "paid" any rollover equity. Yet, as I understand the position, he acquired a 4% share of what PwC then described as the "*headline proceeds*" (and, under provisions of some complexity, 4% of the Purchase Price under the SPA). If so, that shows that no separate thought was given to the value of the rollover equity.
304. In an email to Mr Crossley of 25 August 2014, Mr Usman Choudhary of PwC outlined the proposed structure of the deal with Livingbridge, saying:
- "this is a "relatively" simple way to achieve what is desired commercially and without unnecessarily complicating the tax position. In addition, this should help with the presentation of the deal, as one where the-EV of the Target is c£5m, consistent with the cash consideration which is being paid to the exiting shareholder".*
305. I believe the terms of that email reinforce the limitations of a PwC valuation prepared for tax purposes. It is clear that Livingbridge valued IPS UK at significantly more than £5m.
306. The Claimants were cross-examined about what they had said in their tax returns about, firstly, the value of the consideration they had received in shares under the Transaction and, later, about the loss which they suffered for capital gains tax purposes as a result of the Quantum Judgment. For my part, I would have been surprised if they had inserted any figure other than £90,000 for their consideration shares. Mr Taylor talked about

that being their “*face value*” and I established with him that he meant their par or nominal value.

307. My broad understanding of CGT is that it is a tax on the gain measured by the difference between the *acquisition cost* of an asset (ignoring for present purposes that there may have been further capital expenditure upon it) and its disposal price. It may be that HMRC will deem the latter in certain circumstances to have been a disposal at market value, if the actual sale price was lower, but it would be surprising if the taxpayer could, with a view to reducing or eliminating what would otherwise be the later taxable gain, be permitted to inflate the deemed acquisition cost by relying upon not what he paid for the asset but what he said it was *worth* when he acquired it. As things turned out the Claimants reported a capital loss. However, if their fortunes within the Company had turned out as they had hoped back in December 2014 and they had each, say, sold their shares in the Company in 2018 for £5m, I cannot imagine that HMRC would have accepted that they should be treated as having acquired them on the earlier date at the kind of value which Mr Skeels would have put upon them.
308. This understanding does not directly address the Claimants’ earlier tax returns, and their completion of those on the basis that the consideration in shares was worth £90,000 to each of them, save that it is consistent with them later reporting that, in effect, they paid that sum for them. It was the par value which was reported to HMRC and not some as yet unrealised price reflecting their then value (whether that was the kind of value indicated by Mr Skeels or, as Mr Taylor would have it regardless of the RPP, zero).
309. However, even if my basic understanding of the tax position is flawed in a material respect, the fundamental point remains that the reasoning behind and the full implications of the PwC valuation could not be fully explored at trial in the absence of its authors. Further, as the Claimants pointed out, Mr Crossley was involved in this tax aspect. He and his colleague Mr Crawford wrote to HMRC on 22 October 2014 seeking certain tax clearances and the letter explained that there was “*no deferred consideration*” payable to the Claimants or Mr Lindsell but, unlike Mr Fawcett, they were required by Livingbridge to “*effectively reinvest the balance of the £4,910,842 equity value payable for the [IPS UK] shares (£195,000) into [the Company]*” and “[*t*]he reinvestment will be achieved by them each rolling over a proportion of their shareholdings in order to achieve the final shareholding figures in [the Company] Newco set out again in appendix 1.”
310. Had he been called to give evidence, Mr Crossley would no doubt have been asked about this and might well have assisted in explaining the purpose and implications of the PwC valuation so far as actual value of the required reinvestment in the Company was concerned.

EBITDA for the Second Valuation Date

311. The Company’s EBITDA to be used for the Second Valuation Date was a far more contentious matter than that to be used for the first.
312. Mr Skeels based his £1.3m EBITDA figure on the figure for 2015 in Spur 57. This had been agreed between the parties 7 months previously and there was no evidence of any

expected long-term decline in the performance of the business during that period. Mr Taylor said the appropriate range was £0.6 to £0.9m based on management forecasts prepared in July 2015 and the forecast presented to the Board in September 2015 (the latter including figures actually known about by the Second Valuation Date). His evidence was that the EBITDA of £0.6m from the July 2015 forecast was the best indication of the management's expectations of the Company at the Second Valuation Date.

313. The principal differences between them were summarised in paragraphs 4.17 and 4.18 of their Joint Report. Mr Taylor said that the Spur 57 Model could not be relied upon when by the Second Valuation Date the Company was performing under forecast and there had been numerous re-forecasting events by July 2015. Mr Skeels questioned whether the two forecasts relied upon by Mr Taylor had been prepared on a consistent basis (the first was "Adjusted EBITDA" and the later one was "Trading EBITDA"). He said that, by taking the adjusted figure of £0.6m, Mr Taylor had allowed for adjustments which did not reflect costs incurred in the normal course of business (in particular Livingbridge's advisory fees). Mr Taylor disagreed, saying that the costs in question were incurred in the normal course of business.
314. In their Report dated 25 April 2016 BDO identified a high EBITDA of £766,000 and a low EBITDA of £211,000. By that stage BDO had available the Company's December 2015 forecast and the low figure of £211,000 was the predicted EBITDA for 2016 in that forecast. It was not a figure adopted by Mr Taylor. BDO's high figure represented the figure of £897,000 identified in the July 2015 reforecast reduced by £131,000 because that was said to be a "super-profit" generated by a one-off contract with the Co-op. The resulting figure of £766,000 was within the middle of Mr Taylor's EBITDA range.
315. The BDO report referred to the buoyancy of the Unified Communications market and the long-term growth expectations associated with the sector but also noted "*the operational issues being experienced by the Company at the Valuation Date.*" For the Second Valuation Date (as identified in these proceedings), BDO said:

"For our "high" earnings estimate we would consider that the Company could be priced using the 8+4 FY15 forecasts (£897k) less the super profit attributable to the Co-op contract (£131k), arriving at £766k. This estimate of maintainable earnings would likely represent the highest possible metric given it takes no account of the downward trajectory of earnings compared to FY14 and does not reflect management's concern that EBITDA would further decrease (a concern reflected in the December 2015 forecasts)."

316. In commenting upon that report Alix Partners said BDO had taken "*an overly pessimistic view of IPS's performance and of the value of the C Shares*". Alix Partners made it clear that they had not performed their own analysis of the Company's past or future performance and that they were providing high level comments based on the information available to them. In relation to BDO's EBITDA figures, and in addition to noting that no explanation had been given for treating the Co-op profit figure differently from any other non-recurring item, they said:

“The July 15 reforecast represents a downgrade from Dec 14. Although revenue was still projected to grow, the EBITDA forecast declined by 32%. BDO chose to use the lower EBITDA figure (£897k) as the basis of their maintainable earnings figure apparently without making their own assessment of:

- why earnings had moved from growth to decline;*
- why the change was so abrupt (32% drop in EBITDA in seven months);*
- which costs had increased most significantly and whether those increases were temporary; and*
- whether the “operational and strategic issues” reported to them were (i) as significant as claimed and (ii) relevant in circumstances where, even by the Company’s own figures, it was forecast to bounce back to high growth within two years.*

In ‘normal’ circumstances, we would agree that the July 15 reforecast would probably present the most appropriate set of figures to adopt since they were prepared relatively close to the valuation date. However, BDO has failed to acknowledge that there is some dispute as to whether the July 15 reforecast is a fair representation of the business at that point, or whether the increased costs result from changes which Livingbridge had made (or intended to make) during FY2015 and which would unfairly prejudice the Shareholders if included in the valuation.”

317. I mention the views of Alix Partners and BDO because they essentially foreshadowed the conflicting evidence of Mr Skeels and Mr Taylor (though, unlike BDO, he placed no reliance upon the December 2015 forecast which was after the Second Valuation Date).
318. Mr Skeels was taken in re-examination to the section in the BDO Report which addressed the Company’s forecast financial performance and which summarised the December 2015 forecast indicating that EBITDA would reach £4.56m by 2019. Mr Skeels said that the timing of the Company’s growth had changed from Spur 57 but *“effectively long-term it’s heading in the right direction.”* Many of his answers in cross-examination were to the same effect: that *“the business was -- beginning to trend upwards, there was no longer term decline in the prospects of that business, the market in which it operated in was generally performing very well.”* He said the willing buyer and the willing seller would look at the forecast position as it was at the Second Valuation Date *“and not necessarily some of the issues that caused the reduction in the numbers that we just looked at in the early months of 2015”.*
319. Mr Richards also gave evidence that it was *“documented in the various board packs that the model was three to four months behind”* and that, applying hindsight from what in fact happened in 2015, it had taken the wrong starting point for items of recurring revenue which, he said, was 90% of the Company’s revenue. He thought the inputs were correct but not the timing of them adopted by Spur 57.

320. Mr Taylor said of the forecast figures: *“I think that anybody looking at the expected future level of the performance of a company that has reforecast so many times in a short timescale I don't think they'd place much value in future forecasts. So I think the actual historic numbers are probably safer than looking at forecasts still.”* However, he accepted in cross-examination, by reference to a summary of valuation methodology in the BDO Report, that in considering the appropriate level of earnings for the company in question the matters which are to be taken into account include the historical performance of the company, the expected level of future operating performance and factors such as wider industry performance.
321. Mr Skeels defended his EBITDA figure of £1.3m on the basis that:
- “..... given that the numbers that we have for post the deal are a matter of dispute between the parties, and actually we're only talking about 7 or 8 months afterwards, I took the view that the most contemporaneous numbers to use were the model that was agreed by both sides prior to the transaction taking place would be the best starting point to look at to use -- to generate the EBITDA number.”*
322. Although the two dates of course relate to the valuation of different companies, the First Valuation Date and the Second Valuation Date are only about 8 months apart. Allowing for the inescapable point that the operating costs of the Company were obviously not the same as those of IPS UK (see, for example, Mr Taylor's use of EBITDA figures which are adjusted for all the management costs associated with the Company) it is striking that Mr Taylor's suggested EBITDA figure of £0.6m represents a reduction of over 45% from the £1.1m figure used for IPS UK at the First Valuation Date. That said, Mr Skeels has increased the figure from £1.1m to £1.3m even though, as Mr Tozzi put to him, the Company had in fact underperformed against the Spur 57 projections and the figures which showed that had been prepared in accordance with proper accounting practice.
323. In my view, there is force in Mr Skeels' riposte that the hypothetical seller and buyer would look at the underlying performance and potential of the Company over the next 2 to 3 years when considering the maintainable earnings of the business. He had support for that in the summaries of valuation methodology and the December 2015 forecast figures (for 2018 and 2019) contained in the BDO Report. However, the questions raised by Alix Partners upon the 2015 figures (paragraph 317 above) were not explored before me in a way which might have enabled me to reach a firmer view upon whether he was being unduly optimistic, Mr Taylor was being too pessimistic, or perhaps a bit of both.
324. In my judgment, given the significance difference of opinion between the experts upon the implications for the Company's maintainable earnings of the figures actually achieved during the short history of its trading life after the First Valuation Date, it is reasonable to take their (substantial) consensus over the earlier EBITDA for IPS UK as providing a firm steer on the appropriate EBITDA figure for the Company on the Second Valuation Date some 8 months later.

325. Adopting the same figure of £1.1m means that I have chosen an EBITDA which is midway between Mr Skeels' figure and Mr Taylor's higher figure. I believe that doing so reasonably reflects the differences between them over the later EBITDA figure.

J. THE INTERPRETATION OF ARTICLE 18.4.1

326. It is sensible at this stage to grapple with the proper interpretation of article 18.4.1. The point permeates issues of liability and causation. It is also one to be determined independently of the evidence.

327. In *Arnold v Britton* [2015] AC 1619, at [17], Lord Neuberger PSC said:

“...identifying what the parties meant through the eyes of a reasonable reader...save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision...”

328. In *“The Ocean Neptune”* [2018] 1 Lloyd's Rep 654, at [8], Popplewell J (as he then was) provided the following neat synopsis of the guidance given by the House of Lords and later the Supreme Court to the construction of commercial documents such as the Articles:

“There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101; Re Sigma Finance Corporation [2010] 1 All ER 571; Rainy Sky SA v Kookmin Bank [2012] 1 Lloyd's Rep 34 ; [2011] 1 WLR 2900; Arnold v Britton [2015] AC 1619; and Wood v Capita Insurance Services Ltd [2018] Lloyd's Rep Plus 13; [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival

constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

329. Although the Firm submitted otherwise, in suggesting the conclusion of May J was plainly wrong, I do not find the meaning of article 18.4.1 easy to discern. At first sight, its aim appears to be clear: to give the leaver a proportionate share of the equity of the Company determined by fair market value reasoning with no minority discount being applied. Whether it achieves that is not so obvious. Moreover, as I said to the parties during the course of closing submissions, using the parlance of the CPR on permission to appeal, this Section 9 judge is being asked by the Firm to doubt the correctness of the decision of a High Court Judge.
330. Nevertheless, and with the inevitable resulting diffidence further reinforced by recognition that a more authoritative ruling on the point was not provided by the Court of Appeal, because the appeal from May J was compromised, I have concluded that May J did misconstrue article 18.4.1 in the Quantum Judgment.
331. Before giving my reasons for that conclusion I summarise the rival arguments upon the meaning and effect of the provision.
332. In now supporting the conclusion reached by May J, and the reasoning in paragraph 23 of the Quantum Judgment, the Claimants say that, in reaching a value of the Leaver's Shares, the valuer must assume that the entire share capital is being sold in accordance with the Articles. Article 18.4.1 does not refer to a “Share Sale” (as defined in the Articles) because the hypothetical sale of all the shares necessarily includes a lesser transaction involving the transfer of a shareholding sufficient to confer upon the transferee a majority shareholding (a “Controlling Interest”) for the purposes of meeting that definition. The valuer must assume that there is a mutual exit as between all existing shareholders (and all classes of them) and the valuer must also assume that this is through a sale. Article 13.3 is titled “Exit provisions” and the Articles define an “Exit” as meaning a “Listing or a Share Sale.” This means the valuer, determining value by reference to a hypothetical sale, must take account of the RPP in article 13.3; and unless and until that has been satisfied, there is no value in the C Shares.
333. In the course of his opening submissions I raised with Mr Leiper the potential implications of the Quantum Judgment in that it impliedly (though not expressly) rests upon the notion that the valuation process requires recognition of a Share Sale for article 13.3 purposes. I suggested that the greater the scope of the Investor Direction (by Livingbridge) under article 17.3, the cheaper the price for the Leaver's shares becomes, in that a direction in relation to 5% of the Claimants' respective shareholdings (or, say, Mr Lindsell's 10%) would not trigger the “Controlling Interest” requirement under an article 13.3 “Share Sale” whereas a direction in relation to the entirety of their shareholdings would. I agreed with Mr Leiper that the scenario was (if for that reason alone) a fanciful one. However, in his closing submissions Mr Leiper highlighted the flaw in my assumption. It overlooked that the hypothetical sale is one where the Leaver's shares (whatever percentage of them has been made the subject matter of the Investor Direction) are being sold alongside all other shares in the company, including any held by him which were not the subject of an Investor Direction. That is his point about the hypothetical sale necessarily embracing a lesser Share Sale.

334. Mr Leiper QC noted the two particular features of the Leaver's Shares: (a) that they are a minority shareholding, to which a discount would ordinarily be applied and (b) that they are shares of a particular class (in the Claimants' case C Shares and in Mr Lindsell's case D Shares). He said that article 18.4.1 requires that the first be ignored, but that the second be recognised. In his closing submissions, he emphasised that the valuer is to assume a sale "*in accordance with these Articles*". As I mention in Section K below, this phrase was introduced at a fairly late stage of the legal drafting process. This, he submitted, was language which specifically enjoins the valuer to take account of the RPP, if applicable, at the point of valuation. Those words have no meaning unless they refer to the RPP. Taking issue with the Firm's argument that article 13.3 is dealing with an entirely separate point of how any proceeds of sale are to be distributed between shareholders, rather than the valuation of the entire equity held between them, Mr Leiper said it did not follow that the earlier provision was irrelevant when assessing the value of the shares of the Leaver. It does not provide the valuation of the Company but it informs the valuation of those shares.
335. Mr Leiper's emphasis in his closing submissions upon the reference to the hypothetical sale of all of the shares in IPS UK "*in accordance with these Articles*" caused me to consider whether there were other provisions within the Articles, aside from article 13.3, regulating such a sale. As illustrated by Mr Leiper's argument as to why article 18.4.1 does not refer to the (potentially) smaller transaction conferring a "*Controlling Interest*", the focus of article 13.3 is upon a sale which might be less than that of the entire issued share capital. After a quick review of the Articles generally, I raised with counsel the question of whether or not there might be such other provisions. The provisions of article 17 (Tag Along and Come Along) being expressly disapplied by the language of article 18.4.1, I tentatively suggested that the provisions in article 19 might potentially be of some significance for the purposes of this notional sale to a willing buyer, despite the fact that all existing shareholders are assumed to be selling to a willing buyer and that, on its face at least, article 19.9 ("*the Seller shall not be entitled to sell any of the Sale Shares for which no buyer has been found*" (sic)) appears to preclude rather than permit the sale of any shares otherwise than to those pre-emptively entitled to take them up, even if they do not want to buy them.
336. On my subsequent review of the Articles, the only other provision which might be said to regulate a sale of all of the shares in IPS UK is article 16.4 which states that (save for transfers pursuant to the Tag Along and Come Along provisions) "*no Shares may be transferred unless 1. an Investor Consent has been obtained; and 2. save as otherwise required pursuant to the Investment Agreement, the proposed transferee has entered into an agreement to be bound by the Investment Agreement in the form required by that agreement.*" The Investment Agreement is a complex document (containing provision for such matters as the sweet equity) and, at first sight, there are provisions within it which Livingbridge, as holder of loan stock separate from its shareholding, might wish to secure a purchaser's adherence to even if the purchaser is deemed to also be buying the Livingbridge shareholding. However, the parties did not address the terms of the Investment Agreement at trial and I therefore proceed on the basis that there are no other provisions in the Articles which obviously detract from Mr Leiper's suggested link of the relevant words back to article 13.3.

337. On behalf of the Firm, Mr Tozzi QC and Mr Wright made a number of points in support of their argument that May J's interpretation of article 18.4.1 was wrong. Summarising their closing submissions, these were:
- i) A forced transfer under article 17.3 did not constitute an "*Exit*". "*Exit*" is not referenced anywhere in articles 17, 18 or 19 and neither is the expression "*Share Sale*" used in article 13.3. The Claimants did not in fact sell their shares in IPS UK but instead transferred them back to the company. The Company's own pleaded case in the Leaver Litigation recognised there was no Share Sale.
 - ii) The forced transfer would not or might not lead to the acquisition of a Controlling Interest for the purposes of a qualifying Share Sale. Encouraged, perhaps, by my observation during opening submissions (see paragraph 333 above) the Firm pointed to the scenario of an Investor Direction in relation to a smaller percentage of the Claimants' shares or (given that he would also be vulnerable to the RPP) on given in relation to Mr Lindsell's 5% D shareholding. There was a unitary definition of Market Value for any Leaver in Article 18.4.1 and no room for saying that, although the RPP could not apply to a forced transfer of Mr Lindsell's shares as a Leaver, it does apply to a forced transfer by the Claimants. If the analysis does not work for Mr Lindsell, it does not work at all. The Firm also referred to article 19.1 which provided for an Investor Direction that the Sale Shares be offered to "*...the Company and/or a replacement Employee; and/or an existing Employee; and/or an Employee Trust...*". If the shares were offered to another employee (e.g. Mr Lindsell) then he would not acquire a Controlling Interest. It was also said that Livingbridge could not acquire a Controlling Interest (as defined) because article 13.4 provided that "*...the votes capable of being cast by the holders of the A Ordinary Shares together shall not in aggregate in any circumstances...exceed more than 49.9% of the votes capable of being cast...*".
 - iii) Article 13.3 is concerned with the distribution of the "*Proceeds of Sale*" following a Share Sale, as defined. That definition requires the "*completion*" of the sale of shares. A provision which presupposes that the consideration for the shares which are the subject of the Share Sale has already been ascertained cannot be used as a mechanism to determine the amount of that consideration. The RPP works sensibly in the context of a sale of shares to a third party but not in the case of the determination of Market Value on a forced transfer. In the absence of actual proceeds of sale, it does not make sense to talk about the RPP applying.
 - iv) Even if the existence of Proceeds of Sale could be presumed for article 18.4.1 purposes, without the value of them first being identified in accordance with that provision it cannot be known whether the distribution in respect of the Leaver's Shares would be in accordance the *pari passu* regime of article 13.2 or instead subject to the RPP in article 13.3. May J did not consider the first possibility.
338. These competing submissions have led me to conclude that, in my judgment, the Quantum Judgment was wrong in its interpretation of article 18.4.1. Save that the Firm's submissions about the absence of a resulting Controlling Interest (distinct from the more basic point that there was no Share Sale) are vulnerable to Mr Leiper's riposte

noted in paragraph 333 above, I find the Firm's analysis of article 18.4.1 to be the correct one.

339. With the above-noted diffidence, I have concluded that May J (clearly influenced by the opinion of Mr Nicholl, the valuer, whose view on the point she regarded as "*pre-eminent*") was distracted from the fundamental point that the basis of the valuation of the Claimants' shareholdings was a hypothetical sale not an actual one. And it was one where the subject matter of the presumed sale, as at the Leaving Date, was all the shares in the Company.
340. In my judgment, the second of the article's three "disregards" reinforces the purely hypothetical nature of the sale underpinning the expert determination under article 18.4.1. Just as the first matter to be disregarded required the Leaver to benefit from the appropriate proportion of the total value of the Company's equity without any minority discount, so too the instruction to disregard the fact that they may be subject to article 17 (under which the Claimants were deemed to have served Transfer Notices) requires the actual circumstances in which they are being sold to be ignored. The expert valuer is directed to assume that a sale of all the shares in the Company to a willing buyer is taking place, at the earlier Leaving Date, and not just the transfer of the Leaver's shares in accordance with the pre-emption provisions of article 19. The hypothetical basis of the valuation is further reinforced by the fact that he is required to determine the value of the Leaver's Shares, which the Articles define to mean *all* of the Shares held by a Leaver (or to which he is entitled) on the Leaving Date even though the Sale Shares covered by the article 17.3 Investor Direction might be a fewer number of them.
341. The parties to the presumed sale are "*a willing seller and a willing buyer.*" In the Quantum Judgment the judge in effect gave the hypothetical buyer credit for the fact that the Class C shares are encumbered by the RPP. The class and quantity of the shares which were the subject matter of the Claimants' transfers ("*the Leaver's Shares*") meant the valuer was required to consider the position as if there had been a Share Sale so far as the impact of the RPP was concerned. To put it another way, the judge was valuing the seller's net "equity" in the subject matter shares.
342. As Mr Tozzi QC and Mr Wright observed, this was akin to the judge saying a house being sold for £1m should not be treated as having that value because it is mortgaged and the owner will have to suffer the deduction of, say, 90% of the sale proceeds in discharge of the security.
343. I agree with them that this cannot be the right approach when an independent valuer was required to determine *the market value* of the Leaver's Shares. This entails looking at what they are worth on the market or, if there is no market as such, what they are considered to be worth to the purchaser. The seller having shown a willingness to sell, the market price of an asset is determined at least as much by the appetite of the buyer (a point which clearly emerges from the disputed expert valuation evidence in this case) and a buyer is not generally concerned as to what the seller does with the proceeds of the sale price upon which they are agreed. A seller would receive short shrift from a buyer if he suggested the market price of the asset should be higher because he, the seller, was (for reasons specific to him) obliged to relinquish the whole or part of the sale proceeds to someone else; and the opposite would hold true for a buyer trying to price the asset by reference to the seller's lesser interest in its proceeds of sale.

344. There is in my judgment certainly no basis for qualifying the market value of the Leaver's Shares when the hypothetical purchaser is also acquiring the Class A and Class B shares which enjoy priority under the RPP. The Quantum Judgment did not engage with the words "*as if the entire issued share capital of the Company were being sold.*" It is not clear to me why the hypothetical buyer of the C Shares should expect, or why the hypothetical seller would be willing to give, credit for a provision whose value is acquired (on the hypothetical purchase of the A and B Shares) under the very same transaction. Reverting to the house purchase analogy, rather than the conventional sale of the property at its market price leaving the vendor's solicitors to then account to the mortgagee for any sums secured on the proceeds, it is as if the estate agent is offering the property for sale still encumbered by the mortgage but with the purchaser also acquiring the mortgagee's interest. The purchaser would not expect to pay less than the market price of the property in those circumstances.
345. These high level and abstract observations reinforce the Firm's essential point that a provision which regulates the distribution of Proceeds of Sale upon completion of an actual sale cannot properly inform, let alone determine, what the amount of those proceeds should be taken to be. The approach adopted in the Quantum Judgment to my mind involved an impermissible leap from a contractual provision about *valuation* for the benefit of one particular shareholder (article 18.4.1) to one directed to the quite different issue of *distribution of value* amongst all (article 13.3). The resulting conclusion that the Claimants' shares had no value begged the very question which the expert was required to determine by assessing value independently of article 13.3 (or indeed article 13.2).
346. As the Claimants submitted to May J, the RPP can be of no significance to the willing buyer under article 18.4.1 when, under the hypothetical sale, he is acquiring "*the entire share capital of the Company*". The judge said "[a]ny buyer purchasing the Claimants' shares would purchase subject to the restrictions affecting realisable value imposed by Article 13.3" but the notional purchaser would not be affected at all by the order of priority between different classes of share if he owned them all.
347. The purchaser's *presumed* ownership would, for example, extend to Mr Lindsell's 5% D shareholding. That continuing shareholding of Mr Lindsell (in fact) was also exposed to the RPP but, on the judge's reasoning with the RPP "debited" against the value against the Claimants' shares, it might perhaps be regarded as presumptively benefiting from the *pari passu* provisions of article 13.2.
348. If Mr Lindsell had become a Leaver the following year, what "credit", if any, would he be entitled to in the determination of the market value of his D Shares as a result of the fact that the Company (to the benefit of Livingbridge as the holder of a greater stake of the Company's reduced issued share capital) had already deployed the RPP on the redemption of the Claimants' shares? However unlikely in practice, the same point would apply to any of the Claimants' C Shares which were not subject to an article 17.3 Investor Direction and instead retained by them. Similarly, why should the notional purchaser's acquisition of the Claimants' C Shares (which were in fact redeemed by the Company but for present illustrative purposes are to be analysed separately from the A and B Shares held by him) be on the basis that their value is obliterated by the RPP when, in his sole ownership, the Company might grow in value to the point where article 13.3 not only ceases to be a burden upon them but instead operates to the financial advantage of their holder? Again, even on its approach of looking at the

particular shares which are being valued under article 18.4.1, the Quantum Judgment did not look at the position from the perspective of the willing buyer and what he would be prepared to pay for shareholdings which had this potential.

349. In my judgment, such conjecture over the distribution rights between particular classes of share only serves to highlight that it has no place in the pro rata apportionment to the Leaver's Shares of the fair market value of the Company which is required under article 18.4.1.
350. I believe that my conclusion about the meaning of the article is also consistent with business common sense. Resort can be had to this notion under the guidance summarised in the "*The Ocean Neptune*". Commercial common sense can be assessed against the factual matrix in which the Articles were agreed. The evidence shows that, at the time of the Transaction, the parties envisaged that the business would be grown for a period of around 3 to 5 years before the shareholders realised their interests, either on a listing or through a share sale.
351. In the Leaver Litigation the Claimants had highlighted what they said was the commercial absurdity of the conclusion in the Quantum Judgment both in argument before the judge and in their successful application for permission to appeal. They pointed out that the Company's construction produced an outcome where, in return for their 42.95% stakes in IPS UK, the Claimants were each paid just under £2.3m in December 2014 and received a 30% shareholding in the Company. However, they would then receive nothing for that remaining equity stake in the business. The effect of the transfer of a Good Leaver's shares to the Company under article 19.1 and their resulting cancellation meant that Livingbridge took majority control of the Company with no further investment. As the catalyst for this was in fact the Claimants' wrongful dismissal by the Company, Mr Leiper had observed that this would allow for the most unscrupulous conduct by the private equity investors.
352. Further, the judge's construction also meant that the Claimants were worse off than if they had each been a Resignation Leaver or Other Leaver. Under the provisions of the Articles (see Section C above) they would in that eventuality have received a return of a fraction of the nominal value of their respective holdings of 9 million C Shares and a fraction of Market Value, according to the timing of their departure from the Company. It is clear (particularly from the Other Leaver provisions in article 18.3.3) that such a valuation would be less than Market Value. However, on the analysis in the Quantum Judgment, the Claimants would have been better off had they resigned than had they been wrongfully dismissed. They would also be in the same position whether they were Good Leavers or Bad Leavers unless the Company achieved a certain value.
353. In the Quantum Judgment, Mrs Justice May recited the arguments based upon commercial absurdity and the Company's competing submission that it did not justify the court in "reading down" the clear wording of article 18.4.1. The judge did not address it beyond saying that, in the end, she returned to the wording of that provision. For my part, I find the argument - in particular the incongruity between that provision and articles 18.3.3-4 - more persuasive.
354. In reaching my contrary conclusion on the meaning of article 18.4.1, I have been troubled by the phrase "*in accordance with these Articles*" as highlighted by Mr Leiper QC. As I mentioned above, my instinctive reaction at the hearing was to think this

might relate to some other provision in the Articles touching upon the procedure or mechanics of an authorised sale of the Company's entire shareholding when in fact there appears to be no obvious candidate. They are a puzzlement. Nevertheless, for the reasons given above I do not consider that these words justify the prior valuation being informed by article 13.3, any more than it should be by the *pari passu* provisions of article 13.2.

355. There is also the point, highlighted by May J, that article 13.3 was not included alongside the other "disregards" in the concluding words of article 18.4.1. The omission formed a key part of her reasoning. For the reasons explained above, I have concluded that the potential impact of the RPP on a distribution should not encroach anyway upon the valuation process, but I return below to this point relied upon by her when addressing the issue of liability.

K. FINDINGS ON LIABILITY

356. The Firm puts much store by the point that the RPP was negotiated before it was instructed. It is said that this was part of the commercial negotiation between the Claimants and Knight, on the one hand, and Livingbridge on the other.

357. The third phase of the work covered by Knight's retainer dated 6 January 2014 was:

"Phase Three: Heads of Terms to Completion

We will review the heads of terms offered by the preferred buyer and offer advice on key terms and timetable. Once heads of terms have been agreed we will set out a detailed timetable for the transaction and await the buyer to commence formal documentation. We will assist in the due diligence process to ensure that any requirements of a prospective purchaser can be met with minimum disruption to IPS and will provide a secure electronic data-room to host any information. We will liaise with the legal advisers to ensure that the deal progresses smoothly and provide support and input into the asset purchase agreement as required with a view to maximising value, minimising your deal costs and completing the transaction within the agreed timetable."

358. The RPP was agreed in principle, in place of the proposal that the Claimants' equity in the Company should be the source of any future sweet equity for others, in a discussion between Knight and Livingbridge on 19 September 2014. On 22 September, Ms Cockburn sent an email which summarised further discussions that morning around the RPP with forecast figures designed to show "[T]he EV that is required before the redemption premium falls away will depend on the returns Isis has received through the life of the deal plus the amount of cash/net debt in the business at exit".
359. By that stage the Firm had been retained and Mr Crossley had provided some advice on the leaver provisions in the draft Heads of Terms which Livingbridge had earlier sent to Knight on 22 July 2014. However, the Firm was not involved in these commercial negotiations over the RPP.

360. The Firm’s retainer letter dated 19 August 2014 confirmed that “[W]e will advise in relation to Project Spur” and that the services to be provided included “reviewing and negotiating the investment agreement, newco articles of association and loan note instrument.”
361. On 1 October 2014, Livingbridge’s solicitors, Olswang LLP, circulated drafts of the Sale and Purchase Agreement, Tax Schedule, Investment Agreement and Loan Stock Instrument. By an email of 3 October 2014, Mr Crossley made some observations about these documents in anticipation of a later telephone call with the Claimants and Knight.
362. Olswang had said on 1 October that the draft articles for the Company would follow once the share structure was finalised and that they anticipated only minor amendments to the Investment Agreement once it had been. On 10 October 2014 they circulated the draft Articles.
363. By his email to the Claimants (and copied to Mr Billingham and Ms Cockburn) dated 14 October 2014, Mr Crossley provided his comments on the draft articles and attached a copy of them duly marked up with the suggested changes. He made a comment on the calculation of the Livingbridge investment amount for the purposes of the RPP and included within his other comments the following:
- “Share rights - Exit (article 13.3)-we have added a definition of Previous Distributions Amount so that this is taken into account when calculating the 2 x ISIS Investment Amount for the B Shares. See also the amendment to ISIS Investment Amount referred to above.*
-
- Transfer arrangements - Market value (clause 18.4) - we have made this clear that no minority discount should be applied in determining the market value of a Leaver's shares”*
364. Mr Crossley’s annotations on the draft articles (“sale of whole – no minority discount”) shows that the phrase “as if the entire issued share capital of the Company were being sold” in article 18.4.1 as well as the disregard of any minority discount emanated from him (F/117).
365. Olswang further amended the draft articles on 3 November 2014 (F/170). They had included (and highlighted by underlining them within the draft article 18.4.1) the additional the words “in accordance with these Articles” at the end of the phrase just quoted (F/5123 and F/155). Those words had not been included in the preceding draft of 30 October 2014 (compare F/4332, F/5619 and F/5716). By the “CRS Comments: 13 November 2014 (subject to client comment)” the Firm indicated, with a tick, that it was content with the revised wording which became article 18.4.1.
366. In commenting upon the revised draft articles received from Olswang on 3 November, the Firm addressed the provision as follows: “Article 18.4 Market Value - There should be no discount for minority shareholding” (F/170, 174).

367. On 28 November 2014, Olswang forwarded the Articles with article 18.4.1 in the language agreed for the purposes of the Transaction (F/6696 and F/6927).
368. In summarising the Firm's defence I have already mentioned that it admits that neither Mr Crossley nor anyone else at the Firm advised the Claimants that the RPP would apply to the Leaver Provisions or of the risk that the Articles could be interpreted as meaning that the RPP applied in the implementation of those provisions.
369. It obviously follows from my own analysis of the RPP that advice from the Firm that the RPP *would* apply in the determination of the Market Value of the Claimants' shares under article 18.4.1 would not, in my judgment, have been correct advice.
370. However, the key point which survives this observation is whether the Firm was under a duty to advise the Claimants of the risk that its language *could be read* as importing the potential impact of the RPP into the valuation exercise.
371. That this risk was a significant one is demonstrated by the following:
- i) The Company's service on 14 January 2016 of Sale Notices upon the Claimants notifying them that each of their shareholdings had been allocated to the Company at the price of £1.
 - ii) The correspondence written by DMH Stallard on behalf of the Company before the Liability Judgment in the Leaver Litigation. By a letter dated 20 January 2016, within days of the Share Transfer Notices served upon the Claimants, those solicitors were saying that the effect of the RPP was that there would be no distribution to shareholders other than Livingbridge unless the proceeds of sale were at least £11.474m. In a without prejudice letter dated 26 April 2016 they asserted: "*In terms of the legal analysis, the value of their shares is affected by the redemption premium in Article 13.3. This is a consequence of the fact that the buyer of any shares will acquire them subject to the rights that attach to those shares. It is not a function of them each holding a minority interest in the company.*"
 - iii) The view expressed by BDO LLP in a valuation report dated 26 April 2016 obtained by the Company where they said: "*the Livingbridge Priority Return represents a priority claim on the capital of the business and would therefore need to be factored into the valuation regardless of whether the valuation approach was pro-rata or minority.*"
 - iv) The terms of Mr Morris's witness statement (in the Leaver Litigation) dated 10 June 2016. At paragraphs 32 to 34 of that statement Mr Morris said that the Claimants had agreed the RPP as reflecting his condition that "*no other shareholders would accrue any value unless and until Livingbridge had made a two-times return*". At his paragraphs 193 to 196 he set out the grounds for his belief "*that the difference between the Good Leaver Value and the Bad Leaver Value is zero*". Mr Morris said it would be "*absurd*" to ignore the impact of the RPP on the valuation of a Leaver's shares: "*Surely if we had wanted to treat Leavers differently and exclude them from the effect of redemption premium we would have provided for that in the Articles?*"

- v) The view expressed by Mr Nicholls, of Ernst & Young, in his letter dated 30 August 2016 (albeit that he said it was a question of legal interpretation for the judge).
 - vi) The terms of the Quantum Judgment.
372. As Mr Leiper QC has highlighted, the court has not benefited from the evidence of Mr Crossley of his own assessment of this risk. However, a substantial risk within a transaction clearly materialises when one party to it says its terms bear a meaning which is fundamental to the value of the other party's rights under it and, despite the counterparty challenging and litigating the point on grounds genuinely held, persuades a High Court judge that its interpretation is the correct one.
373. In addition to saying that the RRP represented a commercial deal which was a matter for the Claimants and Knight, the Firm's Defence (paragraphs 48.1 and 49.1(c)) says "*[T]he wording of the Articles corresponding to the Redemption Premium agreement was drawn to the Claimants' attention as set out in paragraphs 22 and 24 above*".
374. It is correct that the RPP was the result of commercial re-negotiation of the proposal that the Claimants should bear the impact of any later sweet equity. It is also true that Mr Crossley drew attention to article 13.3 in his comments upon on 14 October 2014. He said he had "*added a definition of Previous Distributions Amount so that this is taken into account when calculating the 2 x !SIS Investment Amount for the B Shares.*" In the same email he commented upon article 18.4: "*Transfer arrangements - Market value (clause 18.4) - we have made this clear that no minority discount should be applied in determining the market value of a Leaver's shares.*"
375. However, as is admitted by the Firm, there was no advice upon the connection between the two provisions.
376. Nevertheless, the Firm forcefully resists the deduction that it must therefore have been negligent. It says the risk that the RPP would impact upon the valuation was not a significant one and that a transactional lawyer cannot reasonably be expected to advise upon every litigation risk. It would say that there is too big a dose of hindsight in my reasons for concluding that risk was substantial and one upon which the Firm should have advised. Each of the points identified in paragraph 371 above materialised after the date of the Transaction. Having said that, I do not think it would be right to infer from my own conflicting view reached over 7 years later that Mr Morris's stated belief a Good Leaver was subject to the RPP was one which it did not genuinely hold prior to the completion of the Transaction. I note that, in the Liability Judgment, May J rejected the notion that the statements of the Livingbridge witnesses contained untruths.
377. I accept the general force of the Firm's point that the risk in fact materialised through the alignment of a number of factors, none of which would have been regarded as likely when viewed prospectively from the time of the Transaction. In their submissions, Mr Tozzi QC and Mr Wright talked about the risk having arisen as a result of the subsequent "*misalignment of the stars*" in a way that the Firm should not be held to have anticipated as giving rise to a significant risk.
378. The highly unlikely concatenation of events identified by the Firm were the following:

- i) First, a situation in which Livingbridge would want to summarily dismiss the Claimants when, as at the date of the Transaction, there was no reason at all why it should wish to do so. Livingbridge was relying upon the management team (especially the Claimants) to run the Company's business. Much of the debate over the Leaver Provisions during the negotiation of the Transaction were about Livingbridge wishing to tie in the Claimants by stipulating that they would lose rollover equity in the event that they decided to resign. In cross-examination, Mr Purves accepted there was "zero chance" that he or Mr Richards would be dismissed.
 - ii) Secondly, the existence of grounds for Livingbridge being able to summarily dismiss the Claimants. Under the Articles, this would require the agreement of the independent Chairman, Mr Lockwood. The series of events by which the Claimants came to lose the confidence of Mr Lockwood could not have been reasonably foreseen.
 - iii) Thirdly, any summary dismissal would have to be wrongful (as it is no part of the Claimants' case that the Firm failed to warn them about the consequences of them being Bad Leavers). Again, this outcome under the Liability Judgment should not have been anticipated when Livingbridge would be expected to act cautiously and with the benefit of legal advice.
 - iv) Fourthly, the court would then have to accept the Company's construction of the impact of the RPP upon articles 18.4.1 when the Firm would have said (and I have found) that the Quantum Judgment was wrong on this point. The Firm highlights the view expressed by the Claimants' solicitors in the Leaver Litigation, Clyde & Co, when the Company raised the point. They said the Company's construction was "*wholly uncommercial*", "*quite extreme*" and "*clearly not intended*".
 - v) Lastly, the valuation of the Company would need to be such that it was the RPP (as opposed to the inherent equity value of the company) that meant that the Claimants might receive no or only nominal value for their shares. If the equity value of the Company was nil or very low, there was no risk to the Claimants, because they would receive nothing or next to nothing for their shareholdings, whether or not the RPP applied. The Claimants' firm belief was that the Company's equity value would have risen over time, meaning that the RPP would fall away. This meant that the risk presented by the impact of the RPP was greatest soon after completion of the Transaction and, the shorter the period after completion, the less likely it would be that the Claimants would be dismissed. Again, the Firm says, there was no significant risk to the Claimants.
379. Most of these were indeed commercial risks, on which it was not for the Firm to advise, though the fourth was a litigation risk which would carry with it an exposure to the legal costs of arguing the point of construction and which encapsulates the risk which I am addressing for the purpose of deciding whether or not the firm is liable.
380. These points go to the allegations in the Particulars of Claim (paragraphs 30(a) and 31(a)) that the Firm was in breach of duty because it "*failed to advise the Claimants of the risk that they could be wrongfully dismissed, be classed as Good Leavers and receive no or nominal value for their shareholding in the Company*" when a reasonably

competent firm of solicitors would have “*sought to advise the Claimants on the basis of a worst case scenario, and in particular the risks that they were exposed to in the event that the relationship with the Investors broke down or the Investors sought to take advantage of them.*”

381. In my judgment, those allegations do rest heavily upon hindsight and it would be wrong and contrary to authority to find the Firm was negligent in the advice given or not given in 2014 by reference to the events which later occurred. This is particularly so when the terms of the Liability Judgment provide no real support for a conclusion that Livingbridge decided to summarily dismiss the Claimants *because* it realised it had put one over on them in the drafting of article 18.4.1. I have already noted that May J rejected the idea of a “*bear trap*” having been set for them.
382. The Firm contends that Mr Purves’ acceptance that there was no chance of the Claimants being summarily dismissed was, by itself, fatal to their case on both liability and causation.
383. However, the admonition against reliance upon hindsight as the touchstone of negligence is one that applies to both parties. Mr Leiper QC responded to the Firm’s suggestion that the existence of the risk to be warned against was one which depended upon a “*fanciful*” chain of events by saying that wrongful dismissal is a reasonably common occurrence. He said that almost any party entering into a transaction has the hope and expectation that it will run smoothly; all the more so in a relational contract, where mutual trust is the starting point. But those are cases where, if things go wrong, they can go particularly badly wrong. And that is why legal advice is necessary: the situation is unthinkable for the client to contemplate, but it is the duty of the lawyer to anticipate the unthinkable but predictable.
384. It is important to emphasise that the Particulars of Claim also contain distinct allegations that the Firm failed to advise the Claimants that the RPP would apply to the calculation of Market Value for a Good Leaver when a reasonably competent firm of solicitors would have (1) identified that the draft Articles would (alternatively could) be construed as meaning that the RPP would be taken into account in determining Market Value for a Good Leaver and advised them accordingly; and (2) included language within the draft Articles that the RPP would not apply in the calculation of Market Value for a Good Leaver.
385. In response to this, the Defence makes four essential points. The first is to the effect that positive advice from the Firm that the RPP would apply to the determination of Market Value would have been wrong advice. In the light of my interpretation of article 18.4.1 this cannot be gainsaid. The second is that any application of the RPP to that determination was a commercial consequence of the RPP; an agreement which had been reached (commercially) between the parties and presented to the Firm as the basis for the transaction. Further, Mr Crossley drew attention to it on 14 October 2014. The third point is that, whilst it is admitted that the Firm was obliged to advise on the basis of a *reasonable* worst case scenario, it is denied that it was obliged to advise on the basis of every conceivable scenario that might arise on every construction of the Articles. The fourth point is that the language of the Articles contained standard wording for private equity transactions of this kind and, had the Firm proposed a carve-out of the RPP from the determination of value, it would not have been accepted by Livingbridge and hence not included.

386. That last point goes to the issue of causation and loss of a chance. It is the second and third points which are the response to the Claimant's complaint that the Firm did not advise them that the wording (standard or not) created the *risk* that the RPP could be held to impact upon the Market Value of the Claimants' shares.

Liability: Conclusion

387. In my judgment, those are not good defences to the allegation that the Firm was in breach of duty in failing to identify that risk and to take steps with a view to eliminating it (if Livingbridge agreed) by appropriate drafting. I find the Firm was in breach of its duty of care in that respect.

388. I now set out my reasons for reaching that conclusion:

- i) As I have concluded above, the risk was a significant risk even though it actually (and quickly) materialised in circumstances which neither the Claimants nor the Firm anticipated before the conclusion of the Transaction.
- ii) The risk was one created by the language of article 18.4.1. It is no answer for the Firm to say, correctly, that the RPP was the result of commercial negotiation between the Claimants (and Knight) and Livingbridge. The Firm was responsible for negotiating and reviewing the draft Articles to ensure that the legal provisions were fully aligned with the Claimants' understanding that the RPP applied to an "exit" involving Livingbridge and to consider whether the provisions could be read as having a wider impact. In his testimony, Mr Richards likened the position to a house purchase where the buyer agrees the terms of purchase with the assistance of an estate agent but the transaction is then passed to his solicitors to advise upon its legal implications. He drew much the same kind of distinction when in his email to Mr Morris of 18 August 2014: "*Hi Paul thank you for the revised heads, as per Keith's email below we are both happy with the heads, I understand Paul B has forwarded to Speechleys to sanity check but the key commercial areas are all fine with us we and look forward to pushing ahead and getting this deal completed in October.*" The Claimants were entitled to a further sanity check when Olswang later circulated draft Articles addressing the RPP. On 10 November 2014 (after the draft Articles had been amended to reflect the RPP) Ms Cockburn sent an email to Mr Crossley and Mr Billingham saying: "*Just as a heads up - had a quick call with Paul R, he has concerns about the value of his shares if he becomes a leaver as well as the timing of receiving cash if he is a leaver. I made the point that this was covering old ground but suggested we discuss together on the call this afternoon*".
- iii) The Claimants' evidence, which I accept and which is supported by Ms Cockburn's email just quoted, is that they repeatedly raised with Mr Crossley their concern that their equity in the Company should be protected: see Section I above. I do not rely upon their evidence to hold the Firm liable as if it had somehow guaranteed their shareholding was free of any transactional risks aside from the Company's commercial and financial misfortune, or what Mr Richards referred to as preserving value for him "*whatever happened*". Mr Tozzi QC was

of course correct to say that it is no part of the pleaded case against the Firm that Mr Crossley gave any such wider assurance nor that he advised upon the prospects of the Claimants becoming a Leaver of any classification. However, their repeated requests to focus upon the potential downsides of the Transaction, so far as their continuing equity was concerned, should have prompted careful consideration of the implications of the language of article 18.4.1 as it evolved during the course of the Firm's retainer.

- iv) The contemporaneous documents show that the language of article 18.4.1 was not "standard wording". The Firm did not press this contention at trial; though its closing submissions did say that articles such as 13.3 and 18.4.1 were common, so that Mr Crossley was not obliged to go further than ensuring a minority discount was not applied. Those documents also show that the Firm engaged with Olswang over the wording. Although I have found the meaning of the phrase to be inconclusive, and Mrs Justice May placed no reliance upon it, this included the agreed insertion of the words "*in accordance with these Articles*" in relation to the notional sale of the Company's entire share capital. This was, therefore, a contractual provision which was under scrutiny by the lawyers in the weeks prior to the Transaction. It was squarely within the Firm's focus upon the impact of the Leaver Provisions.
- v) Although the particular circumstances in which May J came to construe the language of article 18.4.1 were ones not reasonably foreseen by the Claimants and the Firm, the risk was (for so long as the RPP remained a factor) one which attached to the Claimants' shares however they might acquire Good Leaver status. Aside from wrongful dismissal, death and incapacity from employment were other grounds on which either of them might have become a Good Leaver. By their very nature these others would be unexpected events. However, the perceived unlikelihood of any of these Good Leaver events arising does not mean that the legal risk, contained within a provision designed to come into operation if they did, is one that is to be treated as not significant. The Firm could not be expected to advise upon the likelihood of any of the Good Leaver grounds arising for either Mr Richards or Mr Purves but, given the focus upon the contractual provision which anticipated that they might arise, it was in my judgment reasonable to expect it to advise upon the risk that the provision could be construed in a way which operated to their very significant financial detriment.
- vi) Market Value, as determined under article 18.4.1, was not just key to the valuation of the C shareholding in the event of either Mr Richards or Mr Purves becoming a Good Leaver, whether the basis for him leaving was wrongful dismissal, incapacity or death. It also underpinned the valuation in the event of either of them becoming a Resignation Leaver or Other Leaver. These were all potential leaver scenarios relevant to the Claimants' requests that Mr Crossley should consider the potential worse case outcome. The fact that the risk which presented itself in the Quantum Judgment caused the most acute detriment for a Good Leaver does not mean it was not a risk for a Resignation Leaver or Other Leaver. I have referred in Section I above to Mr Richards' evidence about the discussion he had with Mr Crossley about the restrictive covenant arising upon him leaving the Company. That proceeded on the basis that the duration of those

covenants would be linked to the receipt of a substantial payment for his shares. Again, this should have prompted the Firm to focus upon the definition of Market Value.

389. For these reasons, I conclude that the Firm fell short of the standard of care required of a reasonably competent solicitor practising in the field of private equity transactions. It is one thing to say that it cannot reasonably have been expected to predict a future misalignment of the stars. It would be quite another to conclude that it would be imposing an unduly onerous and unwarranted duty of care upon Firm to say that it should have undertaken a cross-check upon the meaning and effect of a provision on which it had drafting input.
390. The Firm's retainer extended to negotiating and reviewing the Articles and, within the wider class of Leaver Provisions under which the Claimants were looking for protection. Article 18.4.1 and the various Leaver Provisions to which it was applicable were firmly within the Firm's sights as part of that review. It is no answer to say that the Claimants' own commercial judgment was that the RPP would fall away as a relevant factor over time (whether or not as quickly as, say, the first 2 years when they might each then as an Other Leaver have obtained the Market Value) when the risk of its impact upon the determination of value has not been identified in the first place.
391. In my judgment, the reasonably competent solicitor would have questioned the implications of the wording of article 18.4.1 when viewed against the RPP and, having done so and thereby unearthed the principal points of construction addressed in the Quantum Judgment and by me above, highlighted the resulting risk and suggested that an attempt be made to eliminate it.
392. Instead, the Firm's advice upon article 18.4.1 was essentially limited to the disregard of any discount for a minority holding which it had secured for the Claimants. No advice was given about the risk presented by the RPP. This case is to be contrasted with the *Petrocapital* case where the solicitor did give what the court found to be "highly tenable" advice about the effect of the undertakings under scrutiny in a concluded contract.
393. If the Firm had flagged up to the Claimants the risk that the RPP could be considered as impacting upon Market Value, at the same time expressing its view that the proper interpretation of article 18.4.1 meant it should not do so, then, on considered reflection, I would have said that view was not only tenable but correct. However, the fact is that the risk of the RPP having such impact and, crucially so far as the extent of that risk was concerned, the likely view of Livingbridge on the point, were not brought to the Claimants' attention by the Firm. A significant risk went unspotted.

L. CAUSATION

394. The Firm's arguments on causation raise a number of matters to be decided which are not straightforward.

395. The Firm says that Scenario 1 would not have arisen as the Claimants would have proceeded with the Transaction, on the terms they did, even if the risk of article 18.1.4 being construed against them had been highlighted. It says that the most likely non-negligent advice from the Firm would have been that there was a small risk that the provision might (wrongly) be construed that way, in limited and unlikely factual circumstances, and the Claimants would have taken that risk. The Livingbridge deal was the best one available (and the only one which met the objectives behind Project Spur) and the Claimants would have regarded the risk of being summarily dismissed as very low.
396. The Firm's defence within Scenario 1 also involves compound factors in the evaluation of the loss of any substantial chance for the purposes of the reasoning in *AssetCo plc v Grant Thornton*: the chance that Livingbridge would have agreed to revise the Articles and the prospect that, at the end of the liability stage in the Leaver Litigation, the Company would have been in a financial position to pay the value of the Claimants' shareholdings as I have found it to be at the Second Valuation Date.
397. The defence of Scenario 2 rests upon the same contention that the Claimants would not have walked away from the Transaction. The Firm then says there was no real prospect of the Claimants finding an alternative investor who would have offered the value for the Claimants' shareholdings as I have determined it to be at the First Valuation Date.

Scenarios 1 and 2

398. In his closing submissions, Mr Leiper focused upon Scenario 2 though he made it clear that he was in no sense abandoning Scenario 1. However, he recognised that the evidence as it has emerged indicates that Livingbridge would not have contemplated any change to the RPP. As this would have been a red line for the Claimants, the refusal of Livingbridge to agree a change to article 18.4.1 would have meant the Claimants would have walked away from the Transaction.
399. I am satisfied by the Claimants' evidence, on the balance of probability, that if advised that there was a significant risk of the RPP applying to the determination of Market Value, as applicable to the various leaver scenarios, then they would have insisted that Livingbridge agree it be disapplied under article 18.4.1 or, instead, walked away from the Transaction.
400. I should at this stage say that I do not accept the Firm's submission that the most likely non-negligent advice it would have given the Claimants was that there was a "*small risk*" of article 18.4.1 being construed so that the RPP impacted upon the Market Value of the C Shares. For the reasons given in support of my finding of liability, I consider that for the advice to have been non-negligent it would have to have identified the risk to be a significant one, carrying with it a potential impact across all Good Leaver situations.
401. That said, the tenor of the Claimants' evidence suggests to me that, even if the Firm had identified the risk as a slim rather than substantial one, they would not have been happy to proceed with the Transaction unless the risk was eliminated.
402. Mr Richards was asked about his preparedness to agree to the risk of the Other Leaver provisions applying to him, he said:

“So the other leaver provisions I would have got market value, a third of my market value which would have been approximately £1 million, in the event that I was dismissed in the first 12 months. So that was my – my position was I thought the -- the risk was if I'm dismissed I get another million pounds. If I'm dismissed after 12 months I get two-thirds of that value, whatever the value would be, and if I resigned after two -- 12 months I'd get two thirds of that. “

403. Mr Purves also spoke in his evidence about preserving his daughter's inheritance in the form of his shares. He was also asked about the prospect of him being dismissed the day after the Transaction and, referring to the risk which had in fact materialised, responded:

“Which would be £1 million -- yes, so let's look at both scenarios. You've got a pound and you've got £1 million. The likelihood of us getting fired, I said zero maybe that's extreme, it's very, very unlikely, especially in the first six months. So the minimum I felt we'd get would be two-thirds which would be £2 million, so I'm not sure how you compare a pound and £1 million. Because if it's said there is a chance, there is a chance, you may be fired and as a good leaver you'd get a pound --”

404. Neither Claimant, therefore, would have agreed to a provision which carried with it the risk that a substantial part of the value he had built up in IPS UK would be lost if he were to die at a time when the RPP still worked to Livingbridge's advantage. On my assessment of the evidence neither of them would have agreed to the sale of their combined 85.9% shareholding in IPS UK for just under £4.6m, with the significant risk of receiving nothing more, when the pre-Transaction negotiations indicated that IPS UK was worth significantly more than that sum.

405. Their testimony confirmed their witness statements on this point.

406. Mr Richards said:

“Had anyone advised me that the result of agreeing the deal with Livingbridge was that I could be dismissed the day after the transaction and only get £1 for the remaining 30% of my shares then I absolutely would not have proceeded. Why would anyone gamble that kind of money in receiving £2m for 12.5% and risking losing the remaining 30% of their shares for £1? It does not make sense. I was trying to de-risk and take some money off the table, not to gamble the remaining value of my shares that I retained.”

407. Mr Purves said:

“If I had been told that the Leaver provisions were impacted by the redemption premium I would absolutely not, no way at all, in any circumstances let the deal happen. We were not under any pressure to do the deal, the business was flying, we were earning a huge amount of money. We were growing year on year.”

408. This evidence therefore requires an evaluation of what would then have happened.

409. It is not so much the evidence at the trial which has cast further light on the likely resistance of Livingbridge to a change to the Articles but, instead, those matters which

emerged from Livingbridge and the Company's solicitors in the context of the Leaver Litigation. I have referred to those above in identifying the significant risk which the Articles, as adopted, carried for the Claimants.

410. My own, different interpretation of the Articles obviously raises the question of whether that was a piece of legal posturing which, as things turned out, proved to be of greater than expected effect; and whether, therefore, Livingbridge might have yielded on the point if the Claimants had raised it before the Transaction completed. That Livingbridge would or might well have agreed to the change, if the Firm had raised the point on behalf of the Claimants, is not necessarily at odds with my finding that the Articles in their adopted form did carry a significant financial risk for the Claimants which in fact went unnoticed by them.
411. On this point, I note that the LIM (*Section B: "Deal Structure"*) contained the following which perhaps suggested that Livingbridge did regard the Market Value provision in the Articles as having some real value for the Claimants in certain leaver situations. It said:

"3. Material legal Issues

Founder shares have the following leaver provisions for removal for under performance:

1/3rd vests at completion

2/3rds vests after 12 months

Full vesting after 24 months

There is also a vesting associated with Founder resignation:

1/3rd vests at completion

2/3rds vests after 12 months

Remaining 1/3rd does not vest

All other conditions are in line with our standard positions."

412. However, I bear in mind that the RPP came into existence as a result of the Claimants holding out for more equity and Mrs Justice May for one (other judges could well agree) might regard as unconvincing a conclusion by me that there was a significant chance that Livingbridge would have agreed to a change in the Articles.
413. The approach in *Allied Maples v Simmons & Simmons* requires the Claimants to show that they had a real or substantial chance, as opposed to a speculative one, of persuading Livingbridge to agree such a change. The assessment of this hypothetical situation rests upon the court drawing inferences from the evidence available to it.

414. Consideration of the documentary trail of the commercial negotiations leading up to the Transaction, the evidence given about those negotiations at trial, and the evidence which Mr Morris gave in the Leaver Litigation, all lead me to conclude that the chance of Livingbridge agreeing that the RPP should not apply in the determination of Market Value cannot be described as other than speculative.
415. It follows that I find that the Claimants have not established that they lost a real or substantial chance for the purpose of Scenario 1. This means it is not necessary to consider the Firm's further point that by the time the Leaver Litigation was finally determined (a date which the Firm put at mid-to-late 2017 allowing for the pursuit of the Company's appeal against the Liability Judgment) the Company's financial position was such that the Claimants would not have recovered the value of their shareholding as I have found it to be at the First Valuation Date.
416. It is therefore necessary to focus upon Scenario 2, as the Claimants did in their written and oral closing submissions.

Evaluation of Scenario 2

417. Again, this is an exercise in drawing inferences from the evidence for the purpose of assessing the likelihood of this hypothetical scenario coming about.
418. It is unrealistic to contemplate that any such alternative transaction would have been concluded by the Second Valuation Date but that is the date the parties have adopted for assessing the likelihood of another investor or purchaser offering the Claimants terms which reflected the value of IPS UK at that date. The pleaded claim is for the difference between the aggregate value of their shareholding at £8m (or £4m each) after giving credit for the £4,595,900 in aggregate (or £2,297,950 each) received under the Transaction. On that basis, they say that have each suffered an aggregate loss of £3,404,100 (or £1,702,050 each) before giving credit for the sum of £175,000 received under the settlement of the cross appeals in the Leaver Litigation.
419. The evaluation of the prospect of the Claimants concluding a deal with an alternative investor begins with their view of the business in 2014.
420. Mr Richards said:

“No, I would have walked away from [the Transaction]. You know, I was – you know 2014 was probably one of the best years of – of my life, we were living a really good lifestyle, we were doing really well, we were growing a very successful business, our business was recognised in the industry as being an early adopted or cloud communications. We won numerous industry awards. We were shortlisted for the Times Tech Target Award and, you know, we could have grown the business quite easily for another year or two to £15 million organically. What we felt we wanted to do was get a partner that would drive that on quicker, but I certainly wouldn't have resist – sorry, I certainly wouldn't have risked the value that I had tied up in my shares”

421. Mr Purves said:

“If the deal was not based on us getting full share value, there would have been no deal, none at all and this would have been the case even if Livingbridge had been the only deal out there because we were not desperate. It was desperation, it wasn't a fire sale, we weren't struggling. The business was not going backwards. We had no debt, we had no outside investment or bank loans, ... You know, we had a huge amount of cash in the bank, and we were paying ourselves handsomely. This wasn't a struggling business ...”

422. In his witness statement, Mr Purves said: *“We were not under any pressure to do the deal, the business was flying, we were earning a huge amount of money. We were growing year on year.”*
423. Although this evidence is to the effect that the Claimants were in no rush to conclude a deal, it clearly shows that they would have been prepared to agree terms with an alternative buyer to Livingbridge if they received what they regarded as proper value for their shares in IPS UK.
424. In the context of summarising Mr Billingham's evidence, I have already explained how, on 27 June 2014, Mr Richards sent an email to Mr Billingham saying that he and Mr Purves would require a cash only deal with GCI, with no shares, or instead one where any shares in GCI attracted a significant dividend until sold with a long stop date of 24 months before GCI were obliged to buy them. On 13 September 2014, Mr Purves sent an email to Mr Richards saying that, if Livingbridge would not agree to them each having a 30% shareholding, then *“I'm up for waiting for a trade deal and having 2 years and out.”*
425. I am satisfied that the evidence given at trial about the events of 2014 proves that it is more likely than not that the Claimants would have pursued an alternative deal, even if that meant having to wait for the right offer. The Claimants thought time was on their side in that respect, though the Firm was right to point out that in an email of 18 November 2014 Mr Billingham had pointed out the *“need to invest in the business”* in weighing up the “pros” and “cons” of *“maintaining independence”*.
426. Indeed, in urging upon me the conclusion that the Claimants would have proceeded with Livingbridge, notwithstanding the known risk of the RPP applying in a lever situation, the Firm said the Claimants would not have put off a sale indefinitely. The Firm referred to an email which Mr Howitt sent to the Claimants on 7 July 2014 in which he referred to some of the issues presented by the Livingbridge proposal, when they wanted to *“take cash off the table”*, and said *“[I]f you decide to carry on as you are, you will face these same issues further down the line.”*
427. The momentum was therefore behind the Claimants concluding a deal with someone.
428. That is the first element of the issue of causation within Scenario 2. The second involves an assessment of the likelihood that, looking to conclude an alternative deal, they would find a purchaser at the price indicated by that valuation.
429. As the Firm submitted, and I accept, the higher the notional price taken for the purposes of Scenario 2, the slimmer the chance that the Claimants would have secured a buyer at that price. That said, it must be remembered that Mr Skeels' £8m valuation of the

Claimants' shareholding in IPS UK (£8.031m to be precise) was the midpoint valuation between a low valuation of £7.540m and a high of £8.522m.

430. Mr Tozzi QC, in his cross-examination of Mr Skeels said the litmus test of the value of IPS UK was what a purchaser would actually pay for the company not what a valuer indicates the EV to be. Mr Skeels responded to the effect that his approach adopted standard valuation methodology and that it would be for the vendors to decide whether they should sell their shareholding at a price indicated by the fair market value of the company.
431. I have to assess the likelihood that the Claimants would have found an investor willing to buy (or invest) on the basis that their shareholding was worth £8m.
432. The thrust of the Firm's case on this was that there was no realistic prospect that such a buyer would be found.
433. My summary of Mr Billingham's evidence in Section I above notes that he made very clear how the interest of a particular investor or buyer might depend upon whether or not it was at the time engaged in another deal.
434. In his witness statements Mr Billingham said:

"... transactional activity in the sector remained buoyant, and had the transaction not completed with ISIS there would have been an opportunity to go back to the other parties that had made offers, particularly GCI, to start negotiations again. This period would also have allowed new parties to review the business and to consider making an offer as new potential buyers were entering the sector as a result of increased private equity investment in communications technology provides (both directly and indirectly). ... Since 2014 the telecoms sector has seen significant increases in volumes of transactions for communication technology providers like IPS and increases in valuations for such companies."

And:

"The ICT market was a growing market and one which was buoyant from a transaction perspective. There was a lot of private equity and trade interest in transactions. That transaction activity has continued right to this day and it continues to attract private equity investment. Had Paul and Keith not gone with Livingbridge deal there would have been other options, they may not have been immediate, but over the next 6 months or so they would have had lots of opportunities with both trade buyers and other private equity firms as the business was performing well."

435. In his evidence, Mr Taylor said: *"I recall that there was a perception that the UC market was growing and a good market to be investing in, yes."*
436. In cross-examination Mr Billingham was taken to his "pros" and "cons" note (and the point against maintaining independence that *"Exit options reduce with trade as the only likely acquirer"*) and he accepted that he was making the point that, if the Livingbridge

offer did not work for the Claimants, then a trade purchase would be the exit route. His note had said that trade buyer valuations were “*traditionally lower*” and that, if the Claimants were to maintain their independence, then they should “[W]ork with Knight on how best a trade sale be executed and the best price -follow-up on feedback from trade buyers.”

437. I accept Mr Billingham’s evidence about the general level of interest in transactions within the sector. As Mr Leiper submitted, it is consistent with the views expressed at the time by both Livingbridge and Oakley in addressing interest in the sector over the anticipated period of Livingbridge’s investment.

438. In addressing Livingbridge’s later “Exit”, the LIM stated:

“The M&A market for UC assets is buoyant with the sector proving attractive to a broad set of trade and private equity buyers. Ongoing growth in customer demand for UC solutions, particularly amongst SMEs, and convergence across the telecoms, hosting and IT space should continue to fuel appetite within these groups over the medium term.”

After identifying the core buyer groups it continued:

“Based on the above we are satisfied that there should be sufficient trade appetite to provide an exit route at our target exit multiple of ~7-9x EBITDA. This is in line with the entry valuation range (see page 3 for comparable transactions) and Oakley has confirmed that the current market valuations appear to be sustainable over the next four years.”

439. I have already explained how the LIM stated the authors were “*comfortable with entry pricing in the context of both comparables and trading multiples provided by Oakley.*”

440. Oakley’s draft Exit Report had stated:

“We expect increasing appetite and interest in the UC sector from both trade (integrated telcos, data/telco only players and managed IT service players) and PE driven by increasing importance and demand by SMEs, continuing attractive market growth dynamics and continuing IPS’ attractive financial profile.”

441. As the offer from GCI was the only one to be taken forward in 2014 for consideration in parallel with the Livingbridge offer, it was inevitable that the Firm’s submissions focused upon an analysis of the true value of that offer. This began with the point that, as I have noted, Mr Billingham had expressed doubt at the time over the credibility of GCI as a buyer given that this would have been its largest investment to date.

442. Mr Taylor’s evidence was that the fair market value of the GCI offer was £5.1m. He had valued the contingent consideration element using an option pricing model and said that simply applying GCI’s EBITDA multiple of 6x to £1.2m (per Spur 57) did not produce a “*meaningful number*”. He said that contingent earnouts had an element of risk attached to them, in that they were “*stretch goals*” dependent upon targets being hit, but obviously recognised that achieving the targets would produce the earnout. He

had used a software system to value the deferred consideration (£1m after 12 months, conditional upon EBITDA being maintained) and the earnout (and shares and cash). He valued the first at £473,000 using one pricing model and the second at £674,620 using another (noting that, because these two elements of the offer were linked and he had valued the second as if the first had not been paid, that produced an overvaluation). Mr Taylor accepted that GCI had based their offer on 6x EBITDA rather than the range of 4.7x to 5.1x implied by his valuation of their offer.

443. Mr Skeels had not prepared a detailed assessment of the GCI offer for the purpose of comparing its value to others, including Livingbridge's offer. He said his firm used option pricing models to value earnouts and contingent consideration. His evidence was to the effect that EBITDA multiple depended upon the inputs put into the model. He described the GCI offer as being "*£4 million up front and up to about another 7 or 8 million of contingent consideration*". Acknowledging that he had not analysed the offers of Livingbridge, GCI, Intercity or Adept, Mr Skeels said:

"Well, what I haven't done is done an actual calculation of the each of the implied value of each of those transactions. For example, the GCI Telecom Group offer, if you were to do an analysis of that you effectively discount the future earnings that might come from it, actually in total adds up to something like £9.6 million."

444. In considering the value of the offer from GCI which was not just in cash but included additional consideration which rested upon imponderables, the court is therefore faced with one experienced valuer suggesting it was worth £5.1m and another suggesting it was worth almost twice that. Mr Billingham said of the GCI offer: "*So if the business had grown as we were forecasting, there would have been a significant payment at the end as well.*"

445. In circumstances where I have preferred Mr Skeels' analysis of the EBITDA multiple to be implied from the Transaction, I see no reason why I should ignore his view in favour of Mr Taylor's lower figure. As with my approach to the Company's EBITDA at the Second Valuation Date, and perhaps with even greater justification given the broader brush evaluation required at this stage of the judgment, it seems sensible to assume that the GCI offer had a value of somewhere between their figures of £5.1m and £9.6m. On that basis, I consider the figure of £7.2m which Mr Leiper put to Mr Taylor (6x £1.2m) to be more meaningful than Mr Taylor was prepared to concede.

446. I have also noted in Section I above Mr Billingham's evidence that the negotiations with GCI came to a pause because GCI were finalising another deal at a time when the Claimants decided to pursue the Livingbridge offer. In his witness statement, Mr Billingham said:

"During the exclusive period with ISIS, Wayne Martin, founder and CEO of GCI, made it very clear to the Claimants and Knight that should negotiations not complete he would be very interested in revisiting their offer"

447. It is also clear from Mr Billingham's "pros" and "cons" document of mid-November 2014 that, at that time, he clearly thought there would be purpose in Knight working further on a sale to a trade buyer at the best price and following up on earlier indicative offers. That exercise would no doubt have involved him following up with the indicative offerors Adept and Intercity (and Node 4), by reference to the increased "run

rate EBITDA” he mentioned in his evidence, and also testing whether other trade buyers (and private equity firms aside from Livingbridge and Maven) might by that later stage have developed an appetite for IPS UK.

448. My evaluation of the chance that the Claimants would have secured £8m for their shareholding under an alternative transaction does not of course require a finding that GCI, or indeed any other particular buyer or investor, would have provided it. However, GCI’s interest in IPS UK and what Mr Billingham, Livingbridge and Oakley were saying about the attraction of the UC sector to trade buyers and private equity investors all feed into the assessment of the percentage prospects of the Claimants doing so.
449. I recognise, of course, that there was no question of GCI providing anything like £8m in the form of cash consideration but then neither did Livingbridge under the Transaction against which any damages for the Claimants’ loss of a chance is to be measured. In my assessment of the expert evidence in Section I above, I have explained why there was more to the valuation of the Transaction than the up-front cash received by the Claimants.
450. Mr Leiper QC submitted that the evidence demonstrated that there was a strong prospect of the Claimants securing another purchaser. Having reflected upon the evidence given at the trial, I assess the chance that the Claimants would have found a buyer for their shares at the price of £8m (under a purchase of IPS UK valued at £9.4m) at 75%.

Legal Fees

451. The Claimants’ pleaded case against the Firm is that, had they been properly advised, they “*would not have incurred (or would have recovered) their costs in [the Leaver Litigation] in relation to the issues relating to Market Value and the application of the Redemption Premium Provision, which amounted to £895,141.63 (as to which liability was shared equally between the Claimants).*”
452. The Claimants’ witness statements did not address the legal fees further. They each simply said “[*T*]he losses that are claimed are set out in the Particulars of Claim.” Despite the language quoted above, it appears from the narrative in the various invoices relied upon by the Claimants and a letter from the Claimants’ solicitors dated 19 November 2021, that the costs related to the entirety of the Leaver Litigation. That letter recalculated “*the Leaver Litigation Costs*” at £908,234.16 on the basis that two fee notes from a firm of accountants had been omitted from the calculation in the Particulars of Claim.
453. The Firm’s Defence does not admit the amount of the costs incurred by the Claimants but also disputes that the Firm’s alleged breach of duty was the legally effective cause of them. The Firm says that the Claimants would still have been summarily dismissed as Bad Leavers on 29 July 2015 and the Leaver Litigation would have resulted irrespective of what was said or done about the drafting of article 18.4.1. The Claimants would have to have pursued the litigation at least up until the Liability Judgment (and any appeal from it) in any event. That stage of the Leaver Litigation related to whether

or not the Claimants were Bad Leavers, and not the consequences of them being Good Leavers.

454. As to the amount of the costs, by her Order dated 30 November 2016 May J ordered that the Company pay the Claimants' costs of the Leaver Litigation down to the date of the Liability Judgment and that the Claimants should pay the Company's costs thereafter. Agreement between the parties that the Claimants' costs entitlement should be fixed at £400,000 and their liability should be £50,000 meant that, under a Consent Order dated February 2017, the parties agreed that the Company would make a net payment of £350,000 to the Claimants in full and final settlement of any costs claims and cross-claims (including a payment on account of £80,000 already made). Their Settlement Agreement of 15 January 2018 recorded that "*..... all costs orders made in the High Court Proceedings have been satisfied in full*".
455. The Firm's opening submissions identified the sum of £760,963.79 as having been paid by the Claimants in the costs of the Leaver Litigation as well as related employment tribunal proceedings. As the Company agreed to pay a further £20,000 plus VAT towards their costs of the tribunal proceedings (to be added to the £350,000 recovered against the costs of the Leaver Litigation) the most that could be recovered against the pleaded claim of around £895,000 would be the sum of £386,963.79. However, the most that the Firm could be liable for would be the Claimants' exposure to the costs relating to the Quantum Judgment. For that purpose, the Firm said the Claimants' own costs should be taken to be the same as the £50,000 they agreed to pay the Company, for its costs relating to the Quantum Judgment and the most it could be liable for would be the sum of £100,000. Moreover, that would be the cap upon such liability before the discounting required (whether under Scenario 1 or Scenario 2) for loss of a chance.
456. The Firm said that, if anything, that £100,000 cap was too generous as the Quantum Judgment related to other issues aside from the interpretation of article 18.4.1. However, I think that submission ignores the point that the £50,000 which the Claimants agreed to pay the Company almost certainly reflected the compromise of a claim by the Company under a larger costs bill, just as the £350,000 which the Company agreed to pay them appears to have been significantly less than they had incurred with Clyde & Co.
457. The Firm's opening submissions contained a helpful table of the invoices rendered to Claimants by Clyde & Co both in respect of their own fees and the invoices of Alix Partners. I have considered those invoices with the date of the Liability Judgment in mind: 22 July 2016. That is a date which fell within the invoice period of 9 July 2016 to 31 August 2016 covered by Clyde & Co's Invoice dated 6 October 2016. The narrative within that invoice indicates that (in addition to the solicitors' time spent in advance of and in relation to the handing down of the Liability Judgment on 22 July 2016 and Mr Leiper's fees for the handing down (£6,730)) it was the first of 8 invoices which related to the costs of the Quantum Judgment. I have not included the ninth (dated 25 January 2018 and in the VAT inclusive sum of £50,000) because it appears that was an invoice which the Claimants paid towards the success fee of Clyde & Co mentioned below.
458. The invoice dated 6 October 2016 (reduced by, say, approximately one-third to the VAT inclusive sum of £50,000) and the subsequent 7 invoices (including two from Alix Partners to each of the Claimants) total £276,065.69 including VAT. With my notional

adjustment, that appears to be the sum which the Claimants incurred in respect of their own, unrecovered costs of the Quantum Judgment. Adding the notional £25,000 which I have included for the costs relating to the Liability Judgment covered by the October invoice which straddles work relating to both judgments, the earlier invoices indicate that the sum of approximately £480,000 was the amount of the Claimants' costs of the Liability Judgment which were agreed with the Company in the sum (before set off) of £400,000.

459. At first sight, therefore, the Claimants' exposure to costs relating to the Quantum Judgment (their own and the Company's) appears to be in the region of £326,000. However, it may well be that the Clyde & Co invoices of 6 October 2016 and later dates also covered work in relation to the employment tribunal proceedings. The documents in the trial bundle (E/349ff and E/363ff) do not reveal when in 2017 those proceedings were compromised. To the extent that the invoices do cover costs of the employment tribunal dispute, I bear in mind that the Claimants made a recovery of £24,000 including VAT against them.
460. The detail of the Claimants' legal and forensic accountancy costs which were referable only to the Quantum Judgment was not the subject of submissions by either the Claimants or the Firm. Based upon the approach in the preceding four paragraphs, I think it is reasonable for me to proceed on the basis that their total net liability for the costs of the Quantum Judgment was approximately £300,000 including VAT (£326,000 less £24,000). I have derived this approximate sum from the Firm's total of £760,963 (minus the last success fee invoice of £60,000) rather than the pleaded total of £895,141 (or the £908,234 mentioned in the letter dated 19 November 2021 from Cardium Law). So far as the legal costs are concerned, the table of invoices in the Firm's submissions tallied with what Clyde & Co said had been paid by the Claimants in their letter mentioned next.
461. The pleaded total of professional costs incurred in the Leaver Litigation is quite close in amount but significantly different from the amount of £889,567 identified in a letter from Clyde & Co dated 15 March 2022. As I explain below, that letter identified the solicitors' calculation of their own fees by reference to an uplift under a conditional fee agreement. Mr Leiper QC handed me the letter on the last day of trial during his closing submissions. This was in circumstances where Mr Richards had been cross-examined about the claim to legal fees and could not say which of the particular invoices identified by the Firm had been paid. Mr Richards did tell me that moneys received from the Company in the Leaver Litigation would have been paid to Clyde & Co and credited towards their invoices, but that there was a contingent liability to the solicitors. He believed a first instalment of £50,000 towards a success fee had been paid. He also said he understood the conditional fee agreement with Clyde & Co had been disclosed; and in re-examination he identified in the bundle the Discounted Conditional Fee Agreement dated 28 April 2016 ("**the DCFA**").
462. Clyde & Co's letter of 15 March 2022 explained that they had acted for the Claimants in the Leaver Litigation under the DCFA. The letter confirmed that the Claimants had paid in full all of the invoices that Clyde & Co had rendered to them. So far as Clyde & Co's fees, ignoring disbursements, were concerned they had been paid £452,225 plus VAT (when the correct VAT exclusive figure should have been £444,783 because discounted hourly rates had sometimes been overlooked) but because the Claimants had achieved a "win" in the Leaver Litigation they were entitled to charge at the basic rates

set out in the DCFA. The fees at those rates amount to £889,567.62. Allowing for an initial payment of £50,000 paid by the Claimants towards the balance due under the DCFA in February 2018, the balance due under it was £387,342 plus VAT.

463. The letter went on to explain that, following the conclusion of the Leaver Litigation, Clyde & Co had agreed with the Claimants that the balance under the DCFA (before credit for the £50,000) would be revised to the lower of 20% of the Claimants' net recovery from the Firm in the present proceedings and the original sum of £464,810. Any entitlement to interest had been waived. Clyde & Co concluded by saying "[A]s the dispute between [the Claimants] on the one hand and Charles Russell Speechlys on the other is ongoing, we have not yet issued an invoice in respect of the balance payable pursuant to the DCFA" and they had no objection to the letter being shown to the court.

464. As Mr Tozzi QC highlighted, the DCFA identified a "win" as:

"The Claim is finally decided in your favour, whether by a court order, a deemed order, an award or by an agreement by which you are to receive any one or more of (a) a declaration that you are good leavers: or (b) damages for wrongful dismissal; or (c) an order for costs in the High Court proceeding."

465. Mr Tozzi submitted that no part of this definition of a win could be linked to the Firm's responsibility in relation to the drafting of article 18.4.1. I agree.

466. The work covered by the DCFA was:

"..... in relation to your claims in the High Court and Employment Tribunal against IP Solutions Group Limited ("the Opponent") for a declaration and compensation as a result of the termination of your employment with immediate effect on 29 July 2015"

467. Although the original claim in the Leaver Litigation had by the date of the DCFA been amended (on 4 March 2016) to plead the claim to Market Value in response to the Share Transfer Notices served in January 2016, in my judgment, any attempt by the Claimants to recover damages for the element of uplifted costs under the DCFA falls (the relevant "harm" for these purposes) falls foul of the answer properly to be given to the scope of duty question identified in *Manchester BS v Grant Thornton*, at [6], before one gets to further negative answers on the factual causation question, the duty nexus question and the legal responsibility question.

468. So far as the last two are concerned, a putative claimant in a later professional negligence claim cannot (or at least cannot generally) "double his money", in the form of the damages sought to be recovered from the negligent defendant who has created the initial risk, by agreeing with a third party that the loss engendered by a known risk should have a *greater* value than would otherwise be the case. Mitigation of loss is one thing, and to be reasonably expected, but amplification of it is quite another, and is not. I note that the DCFA was signed the same day as DMH Stallard had sent their without prejudice letter relying on the RPP but, even before that, the Claimants knew the position being taken by the Company on the RPP. Even if the Firm could be said to be responsible for the commencement of the claims that were the subject matter of the DCFA, there is no evidence in the present case that the only way in which the Claimants could (with the legal representation required for the task) continue to contest the point

on the construction of the Articles, in an attempt to mitigate if not avoid their loss, was by entering into the DCFA.

469. However, that point deals with the irrecoverable fees charged at the “*basic rates*” identified by the DCFA and Clyde & Co’s letter dated 15 March 2022. There remain what they described as “*our discounted charges*” which the Claimants did incur in relation to the Leaver Litigation. As I have explained above, in the absence of specific submissions on the point, within the total costs of the Leaver Litigation, I have taken the sum of approximately of £300,000 (including VAT) to relate to the Quantum Judgment and the balance to relate to the Liability Judgment and the employment tribunal proceedings.
470. Mr Leiper QC submitted that the entirety of the Leaver Litigation costs (as pleaded) should be recoverable from the Firm. He said that that the Firm’s negligence was the legally effective cause of those costs being incurred because “*had the Claimants been properly advised they would not have exposed themselves to the risk of termination.*”
471. I do not accept that submission. It seeks to impose upon the Firm responsibility for the fact of their dismissal rather than the financial consequences of it, when only the latter was within the scope of its duty, and it is not supported by the evidence.
472. The decision in *Manchester BS v Grant Thornton*, at [23], confirms that the court is entitled to consider the counterfactual situation (i.e. whether the claimants’ actions would have resulted in the same loss if the advice given by the defendant had been correct) as a useful cross-check on a causation point but it should not determine its outcome. In particular, it should not displace the scope of duty question (and the attendant duty nexus question).
473. The evidence does not support the conclusion that the Claimants’ actions within the management of the Company, which caused the Company to dismiss them summarily, were influenced at all by their understanding of the Leaver Provisions any more than, as I have already explained, it supports the conclusion that the Company’s own understanding of them played any part in its decision to take that step. The counterfactual situation in Scenario 1 involves the Claimants being *less* averse to the risk of termination (assuming they vindicate their Good Leaver status) because the receipt of proper advice from the Firm would, on that scenario, have clarified the RPP point in their favour. And the counterfactual behind Scenario 2 involves them not being employed by the Company in the first place. These observations reinforce the point that the answer to the duty nexus question must be against the Firm being liable for the costs which relate to the Liability Judgment.
474. However, in my judgment, the answer to that question is different when it comes to the litigation costs that relate to the Quantum Judgment. The language of the Articles which led to them being incurred was within the purview of the Firm’s duty. They would not have been incurred had the Firm not been negligent (though the involvement of the third party purchaser of IPS UK requires further evaluation of the Claimant’s chances of avoiding them) and there is a direct nexus between them and the Firm’s duty of care. Further, the uncertainty and ambiguity in the language of the Articles meant that it was reasonable for the Claimants to incur those costs. The scope of duty question, the factual causation question, the duty nexus question and the legal responsibility question are each answered in favour of the Claimants.

475. The chances that the Claimants would have avoided the costs of the Quantum Judgment are confluent with my assessment of the Claimants' prospects of success under Scenarios 1 and 2. I have concluded that they have not lost any real or substantial chance of avoiding those costs by clarifying the meaning of the Articles through agreement with Livingbridge. Even though the costs of the Quantum Judgment (though not those of the Liability Judgment) would have been avoided by one, there was no real chance of such an agreement. However, in accordance with assessment of the Claimants' chance of success under Scenario 2, I assess the chance that they would have avoided the Leaver Litigation with the Company, and with it this element of the costs, by concluding a sale with another purchaser, at 75%.

M. QUANTIFICATION OF LOSS

476. In the light of the above findings, and subject to the issue of contributory fault addressed in Section N below, I can address the Claimants' claims for damages relatively briefly.

Scenario 1

477. On Scenario 1, I find that the Claimants have suffered no loss.

Scenario 2

478. On Scenario 2, the headline figure for the Claimants' combined loss is £6m (£8m x 75%). However, against that sum must be set the cash sum of £4,595,900 which they received under the Transaction, leaving at net figure of just over £1.404m. That net figure is subject to reduction for the credits identified below.

Legal Fees

479. The Claimants' loss on the litigation costs is £225,000 (£300,000 x 75%). This is also subject to the reduction for the credits (applied once) identified below.

Credits

480. It is common ground between the parties that the Claimants' loss of £1.629m falls to be reduced by the sum of £175,000 received under the settlement of the appeals in the Leaver Litigation, leaving the figure of £1.454m.

481. The Firm says there should be further credits against that sum. These are said to be in respect of credits for any remuneration or damages for wrongful dismissal and/or unfair dismissal received from the Company. However, in my judgment there is a misconception in the Firms' approach to these further credits, particularly when regard is had to the fact that the loss stems from Scenario 2.

482. In the draft of this judgment circulated to the parties on 14 April 2022 I had suggested that this misconception on the Firm's part extended to one of fact as well as principle. My then understanding of the outcome of the Leaver Litigation meant that that the Firm was seeking to debit the Claimants twice over in respect of the same sums.

483. The Firm says the damages should be reduced by the sum of £65,500 by reference to the two Q1 bonuses received by them and which were under scrutiny in the Leaver Litigation and the damages which were ordered to be paid to them in the Leaver Litigation. It further says that, even though the Claimants were not entitled to the bonuses of £32,750 each, they retained the benefit of them because they were offset against a later bonus to which they would have become entitled had they not been wrongfully dismissed.
484. By her Order dated 30 November 2016, May J ordered the Company to pay the Claimants damages for wrongful dismissal (in slightly different sums) which were quantified “*taking into account payments due from the Claimants to the Defendant pursuant to the Defendant's counterclaim.*” Accordingly, the Claimants appear to have been debited with the amount of their bonuses in the calculation of the damages: £103,872 for Mr Richards and £104,714 for Mr Purves. However, the parties then cross-appealed her two judgments. My previous understanding had been that the Claimants had not received *both* the £175,000 under the settlement of those appeals *and* payment of those damages. However, in making observations upon the draft judgment, Mr Tozzi QC and Mr Wright QC drew my attention to a letter dated 13 December 2021 from Cardium Law which confirmed that the Claimants had recovered the damages awarded by May J following the Liability Judgment, thereby indicating that the settlement sum was received in addition to those damages. This was confirmed by Mr Leiper QC on behalf of the Claimants.
485. Nevertheless, I believe the Firm’s approach remains misconceived in seeking to credit the Claimants with items that are unrelated to the loss for which it is liable. This applies to the retained bonuses (which, as explained above, appear to have been taken into account by May J in her damages award), the salary they received from the Company during the 8 months of their employment (£133,333 each, at least pre-tax, at the rate of £200,000 p.a.) and the £78,000 they received in damages for unfair dismissal. The Firm argued that all three items must be taken into account in calculating the Claimants’ damages. The Firm recognised that, against those sums, there should be offset the likely salary which they would have received from an alternative buyer of IPS UK and referred to the salaries of £90,000 each which were contemplated for the Claimants during a two year earnout period with GCI. On this approach, the Firm reached a net credit against both Claimants of £336,000. Again, I note that calculation includes the wrongful dismissal damages in the sum of £208,586 and also (having regard to the nature of the actual and notional receipts in question) that these are all pre-income tax figures.
486. However, whether the suggested pre-tax credit should be £336,000 or more like £127,500, the exercise proposed by the firm appears to confuse what I might describe as the “capital loss” for which the Firm is liable and “income losses” for which it is not. In my analysis of the Firm’s liability in respect of legal fees in Section I above, I have expressed the reasons why the Firm’s liability does not extend to the costs of the Liability Judgment. The Firm is instead liable for its negligence in relation to the Articles and the impact they had upon the value the Claimants actually received for their shares in IPS UK. The nature of the claim meant that the Order of 16 April 2021 confined the expert evidence to the issue of share valuation at the First Valuation Date and the Second Valuation Date.

487. In my judgment, applying a credit for what the Claimants received from their employment with the Company (whether paid in salary, bonus or damages for the loss of either) as compared with what they might have earned with another buyer of IPS, involves an impermissible encroachment upon the proper calculation of the loss for which the Firm is liable. The position might be otherwise if the Firm had been held liable for the Claimants' dismissal and the financial consequences of that. It might then be appropriate to set against the damages certain credits in respect of the (net) loss of their employment benefits and/or damages in lieu of those benefits.
488. However, particularly when their damages are instead fixed by reference to the capital loss under Scenario 2 and that is determined as at the First Valuation Date, it is not appropriate to go further than comparing what capital sum the Claimants received from the Company with what capital sum they might have received from an alternative buyer. Comparing what the Claimants received from their employment with the Company and what they might have received through employment by an alternative buyer, over a certain period after the First Valuation Date, involves pure conjecture. The expert evidence was not directed to a comparison between the Claimants' wider financial package under the Transaction and an alternative package they might have obtained elsewhere; and (allowing for Mr Billingham's observation that every pound of salary would come at a multiplied cost for the purposes of any earnout, fixed by reference to EBITDA, under an alternative transaction) neither was the factual evidence.
489. Mr Billingham's evidence about the impact upon an EBITDA-based earnout of the Claimants drawing a higher salary under the alternative transaction under Scenario 2 illustrates the point as to what is and is not relevant in the calculation of the damages recoverable from the Firm. The prospect of them drawing a lower salary than that in fact paid by the Company, in the interests of getting a bigger earnout payment two years later, is one aspect of the task of evaluating the Claimants' chances of finding an alternative buyer at £8m. However, in that process of evaluation, I have made no assumption that the buyer would pay them a salary in a specific sum, or indeed that the buyer would employ them at all. I would add that, if I had instead found the Firm liable under Scenario 1, there would have been no comparison at all with the value of a hypothetical alternative transaction, whether or not involving the Claimants in remunerated employment, and their receipt of the salary and bonuses (and damages for the wrongful, summary curtailment of their receipt) from the Company would have been a neutral factor in quantifying the loss recoverable from the Firm.
490. The only element of loss suffered by the Claimants beyond the capital loss determined as at the First Valuation Date is that in respect of the legal costs of the Quantum Judgment. I note again that the Firm has not been held liable for the Leaver Litigation costs generally because the duty nexus question on those has been answered in its favour. If there is no "duty nexus" between the Firm's negligence and the financial consequences of the Claimants' dismissal from employment then in my judgment it is wrong, on the calculation of the damages for which the Firm is liable, to credit it with the value of items arising in the employment context that have no nexus with its breach of duty and the actual loss which those damages reflect. They are *res inter alios acta* and (at the danger of overlooking the obvious point that the Claimants had to earn their salary and any bonus by giving the Company their service, valued accordingly, in return) they are to be analysed as collateral benefits. They are too remote from the loss which is recoverable from the Firm to be brought into account.

491. In my judgment, that point holds good notwithstanding that the Firm's liability extends beyond the "capital" loss in respect of their lost share value and includes their loss in the shape of the litigation costs incurred in connection with the Quantum Judgment after the First Valuation Date.
492. In his evidence, on the topic of credits, Mr Richards explained how the sums payable by the Company had been remitted to Clyde & Co and applied by them towards payment of the legal fees, as one might expect. In paragraph 454 above I have referred to the agreement between the Claimants and the Company which also had the effect of the Claimants receiving £400,000 towards the costs of the Liability Judgment. On my assessment of the amount of the costs they incurred in relation to the Liability Judgment (see paragraph 458 above) that would still have left them with a shortfall in their recovery of those costs of around £80,000. Even if I am wrong in my general conclusion that the employment related benefits are collateral to the quantification of the damages payable by the Firm in respect of the litigation costs, the point about the "duty nexus" mismatch between the Firm not being held liable in respect of the costs of the Liability Judgment but yet being able to claim credit for sums which went in payment of those costs would appear to hold good at least to the extent of that £80,000.
493. The Firm also referred to Mr Taylor's Report where, in addition to the cash consideration received under the Transaction, he identified two further elements of "*further consideration potentially paid to the Claimants.*" These were the sum of £85,900 retained at completion and the Claimants' pro rata share of £90,763 deferred consideration which appears to have been payable upon the crystallisation of certain tax assets. This was not explored further in the evidence and in the absence of any evidence that the sums (of some part of them) were received by the Claimants it is not appropriate to reduce the Claimants' damages by reference to these amounts.
494. Accordingly, I am not persuaded that the Claimants' damages should be reduced below £1.454m.

N. CONTRIBUTORY FAULT

495. I have addressed the concept of "fault" for the purposes of the Law Reform (Contributory Negligence) Act 1945 in Section H above.
496. The Firm argued that any damages payable to the Claimants ought to be reduced on account of their contributory fault and failure to mitigate. Two matters were relied upon:
- i) the Claimants being at fault in taking and retaining the bonuses that led to their summary dismissal by the Company; and
 - ii) the Claimants being at fault in not advancing the proper construction of article 13.3 before May J.
497. Although the Firm relied upon the Claimants' alleged breaches of duty to the Company in relation to the first matter, the Defence was pleaded more loosely. Under a heading "Particulars of Negligence", it referred to their failure "*to behave reasonably in respect*

of their bonus entitlement and / or managing to alienate the other directors of the Company so as to lose the confidence of Livingbridge and the nonexecutive Chairman (albeit that their summary dismissal was wrongful)”.

498. Mr Tozzi QC and Mr Wright were not specific in their opening submissions as to which statutory duties in respect of which the Claimants were “*inescapably*” in breach by reason of the those matters. However, I recognise that the general duties owed by each of them as a director of the Company under Part 10 (Chapter 2) of the Companies Act 2006 included the duty to act in a way that he considered in good faith to be most likely to promote the success of the Company (section 172), the duty to exercise reasonable care, skill and diligence (section 174), and the duty to avoid a situation in which he had or could have a direct or indirect actual or potential conflict of interest with the Company (section 175).
499. The Company’s Amended Defence and Counterclaim in the Leaver Litigation had pleaded what it described as the “no conflict” and the “no profit” rules “*as codified in section 175 of the 2006 Act*” (though I think the latter more so by section 177 in terms of what is required to avoid the director being held accountable for the profit). Breach of that duty was alleged by the Company and relied upon not only in support of its counterclaim for a declaration that the Claimants were Bad Leavers but also for repayment of the bonuses received and other expenses charged to the Company.
500. In the Liability Judgment, May J found, in relation to the bonus, that the Claimants had “*obtained, albeit unwittingly, Company funds which they were not eligible to take, a state of affairs which rendered them in strict breach of their duties as directors of the Company and giving rise to an obligation as directors to account.*” Similarly, in relation to the expenses, “*in respect of which further examination demonstrated that they were not entitled, [they] were technically in breach of the duty to account.*” The judge rejected the other allegation levelled against the Claimants: that they had made threats against the interests of the Company.
501. However, for the purposes of analysing the Firm’s pleaded case on contributory fault, it is necessary to go further than recognising that “strict” or “technical” breaches of duty had been established against them. May J considered those breaches, both separately and together, for the purpose of deciding whether they constituted a material breach of the directors’ duties, justifying summary dismissal, or gross misconduct within the meaning of their Service Agreements. She concluded they did not. She said:
- “For the avoidance of any doubt I make it clear that in my view, even taking all matters together, there was insufficient to justify summary dismissal, whether under clause 14 of the service agreement or at common law.”*
502. The conclusion in the Liability Judgment was therefore that the Claimants were entitled to a declaration that they were wrongfully dismissed from their employment.
503. Yet the Firm’s Defence invites me to conclude that the Claimants were at fault in bringing about the termination of their employment “*(albeit that their summary dismissal was wrongful)*”. Mr Leiper QC described this as an ambitious argument given the findings of May J. I agree. It is tantamount to inviting me to second guess the outcome of the Liability Judgment in the absence of the Company when, as I established with Mr Tozzi QC on the first day of the trial, there was no question of the

circumstances of the Claimants' dismissal (as opposed to the finding in the Quantum Judgment) being re-litigated between the present parties. That this is not a good defence of contributory fault is revealed by contemplating the difficulty I would face, if the Claimants are not to be taken to be blameless in the light of the Liability Judgment, in determining how much at "fault" they should be taken to be on a reading of the Liability Judgment alone. The Firm did not suggest anything other than that the reduction in damages should be "*substantial*".

504. That leaves the second matter of contributory fault (the argument over the interpretation of article 13.3) upon which the Firm relies. The Firm's alternative analysis of this in terms of a failure to mitigate perhaps recognises that this could involve the concept of "fault" under section 4 of the 1945 Act (see Section H above) being stretched too far. To my mind, there is an obvious question as to whether *the Claimants* could be said to have been guilty of contributory fault, through a breach of some *duty on their part*, by failing properly to argue their case on construction before May J. If Mr Leiper QC will forgive me (as my view is that there is nothing in the point) the more obvious analysis of the position as the Firm would have it – including analysis of the professional duties arising in connection with the proceedings in her court – would be that the Claimants were victims of a breach of duty of care owed to them on that occasion.
505. If, therefore, the Claimants were guilty of a failure to mitigate, it would be in not suing Mr Leiper, and possibly his then instructing solicitors, for his/their professional negligence in not properly arguing the point of construction before May J and recovering at least something towards the damages otherwise payable by the Firm (including potentially all of the costs of the Quantum Judgment as I have identified those above).
506. However, the logic of the Firm's argument would, if allowed, go further than that. If, vis-à-vis the Firm in the present proceedings, the Claimants and their lawyers in the Leaver Litigation are to be treated as one and the same for the purposes of assessing contributory fault, then the Firm's position on the true (and plain) construction of article 13.3 is such that their failure to persuade May J accordingly raises the question of whether the Firm should be held liable at all. The "legal responsibility question" identified in *Manchester BS v Grant Thornton*, at [6], might indicate that the Claimants' contributory fault was the sole effective cause of their loss. The language of section 1 of the 1945 Act – "*as the result [partly] of [the defendant's] own fault*" – must now be read in the light of the legal responsibility question which is directed not only to matters of mitigation but also whether "*damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it.*"
507. In Section K above I have explained why the Firm's argument does not carry it that far. The Firm's negligence resulted in a substantial risk that the Articles could be interpreted in the way favoured by May J. The explanation for my own different interpretation given in Section J above does not detract from that risk.
508. Nor am I persuaded that the Firm should be relieved of some of its liability by reference to the Claimants' contributory fault or their failure to mitigate in relation to the argument over the Articles. I have set out the reasoning of May J in the Quantum Judgment in Section E above. In that section I have also set out the passage in the transcript which the Firm relies upon for present purposes. However, as I have already

said above, it is clear that May J reached the conclusion she did in the face of clear and (for my part) cogent arguments by the Claimants to the contrary.

509. In his closing submissions to me, Mr Leiper QC pointed out that Firm's pleaded case on this point was that the Claimants had "*failed to argue that Article 13.3 is concerned with the distribution of "Proceeds of Sale" received from a third party purchaser*", though the Firm had sought to expand upon its criticisms of the argument before May J in Norton Rose Fulbright's letter dated 1 December 2021 (served in response to a Notice to Admit). The pleaded case is undermined by the transcript of the hearing before May J and the terms of the Claimants' skeleton argument before her.
510. In engaging with the Quantum Judgment, the Defence also stated that the Claimants' argument "*was principally based on the alleged lack of commercial sense*" and "*[I]n effect the applicability of Article 13.3 was conceded by the Claimants subject to its proper construction.*" These points are not made out either.
511. Although not pleaded in support of the defence of contributory fault, I also consider the complaints in the letter to be unjustified. They amount to the overall complaint that the Claimants' argument before May J was inappropriately truncated. Reading the written and oral submissions, I do not share that view. Although the Claimants now say she was right, at the time they were presenting clear and powerful arguments against the conclusion she reached.
512. I also accept Mr Leiper's point about the context in which the Claimants were advancing their argument about the inapplicability of article 13.3. That argument has to be considered in the light of the Company's laconism in saying (in its Defence) "*the market value that appears to be contended for fails to take account of Article 13.3*" and (in its skeleton argument) "*[A] sale of the entire issued share capital as envisaged by Article 18.4.1 is effectively the same as a Share Sale as referred to in Article 13.3*". Lest it be overlooked, there is also the obvious point that, although I have come down on side of the Firm's interpretation of the Articles, expressed at much greater length than by the previous protagonists, the process of getting there was not entirely straightforward: see Section J above.
513. For these reasons I therefore reject the Firm's defence based on contributory fault or a failure to mitigate.

O. DISPOSAL

514. I therefore award damages in favour of the Claimants in the combined sum of £1.454m.
515. This judgment has been handed down remotely by email circulation to the parties. The handing down is adjourned for the purpose of extending the time for any application for permission to appeal. Any such application for permission should be made to me in writing by 4pm on 13 May, with any written submissions in opposition being filed by 4pm on 1 June 2022. In the absence of any further direction for an oral hearing (whether attended or remote) the application(s) together with and other consequential issues on which the parties are not agreed will be determined by me on the papers. In

my decision of the application(s) for permission to appeal, if made, I will make provision for the date for filing an Appellant's Notice under CPR 52.12(2).