IN THE MATTER OF:

(1) DELOITTE & TOUCHE

(2) MAGHSOUD EINOLLAHI

Appellants

and

THE EXECUTIVE COUNSEL TO THE FINANCIAL REPORTING COUNCIL

Respondent

REPORT OF THE APPEAL TRIBUNAL ON SANCTIONS AND COSTS

Bankim Thanki QC and **Ben Jaffey**, instructed by **Freshfields Bruckhaus Deringer LLP**, appeared on behalf of **Deloitte & Touche** and **Maghsoud Einollahi**.

Timothy Dutton QC and **Nicholas Medcroft,** instructed by **Slater & Gordon**, appeared on behalf of the **Executive Counsel to the FRC**

Introduction

1. On 30 January 2015 the Conduct Committee of the FRC sent to the Appellants and Respondent, and published, the report of the Appeal Tribunal, consisting of Sir Stanley Burnton as chairman, Mr J Gordon Jack (accountant) and Mr Roy Mawford (lay member), on the appeals of the above-named Appellants against the findings of the Disciplinary Tribunal in its report dated 2 September 2013.

2. The Appeal Tribunal had already exercised the power conferred by paragraph 10(3) of the Accountancy Scheme to extend the scope of the appeal to include

the findings of the Disciplinary Tribunal in relation to Project Platinum and the sanctions ordered by that Tribunal.

3. In this decision, we use the same abbreviations as in our substantive Report. References in this decision to a Member include a Member Firm, unless the context clearly indicates otherwise.

4. Our decisions were as follows:

(1) On Project Platinum, we allowed the appeal against the findings of misconduct under paragraphs 1.1, and 1.6 of the Formal Complaint; we dismissed the appeals and upheld the findings of misconduct under paragraphs 1.2, 1.3, 1.4 and 1.5 and 1.7 of the Formal Complaint.

(2) We allowed the appeal against the findings of misconduct in relation to Project Aircraft.

5. Project Platinum is described in paragraphs 30 to 38 of our Report, and it is unnecessary to repeat them in this decision. It will however aid the reader of this decision if we set out the allegations of misconduct on the part of Deloitte and Mr Einollahi that we upheld:

> 1.2 Between 1 January 2001 and 20 September 2001 [the Appellants] failed adequately to identify which of MGRG, PVH, or the Phoenix Four was Deloitte's client and failed thereby to act in accordance with Fundamental Principle 2 and the guidance in Statement 1.201 (paras. 1.1 and 1.5), Statement 1.203 (para. 3.0) and Statement 1.204 (para. 40).
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> 1.3 Between 1 January 2001 and 31 December 2001 [the Appellants] failed adequately to identify and consider potential or actual conflicts of interest between MGRG, the A-C shareholders in PVH, and the Phoenix Four and failed thereby to act in accordance with Fundamental Principle 2 and the guidance in Statement 1.201 (paras. 1.1 and 1.5), Statement 1.203 (para. 3.0) and Statement 1.204 (para. 4.0).

1.4 Between 1 January 2001 and 31 December 2001 they failed (i) to make it clear to MGRG that Deloitte did not represent them or act in their interests; (ii) to obtain informed consent from MGRG to Deloitte acting as corporate finance advisers to the Phoenix Four and (iii) to consider discontinuing with its engagement, and failed thereby to act in accordance with Fundamental Principle 2 and the guidance in Statement 1.203 (paras. 3.2 and 3.4).

1.5 Between 1 January 2001 and 31 December 2001 they failed to consider and put in place any or any adequate safeguards as between the Phoenix Four and MGRG, including advising MGRG to seek independent advice, and failed thereby to act in accordance with Fundamental Principle 2 and the guidance in Statement 1.203 (para. 4.0) and Statement 1.204 (paras. 4.0 — 4.4).

1.7 They proposed a contingent fee of £7.5 million and a 5% equity stake in the company to be owned by the Phoenix Four and in so doing failed adequately to identify, consider and safeguard against the self-interest threat namely that Deloitte had an interest in completing the transaction, earning a large contingent fee and acquiring an interest in the venture. They failed thereby to act in accordance with Fundamental Principle 2 and the guidance in Statement 1.201 (paras. 1.1, 1.4 and 1.5), Statement 1.203 (para. 9.0), Statement 1.204 (paras. 2.0 — 2.3) and Statement 1.210 (4.0).

6. The misconduct of the Appellants that we found proved is set out in our substantive Report, which is to be read with this decision.

7. We take this opportunity to thank counsel for both the Appellants and the Respondents for their clear, cogent and helpful submissions, a remark that is equally applicable to their submissions leading to our substantive Report. The submissions and evidence we have taken into account include those presented to the Appeal Tribunal after the hearing on sanctions and costs at the instigation of the Appeal Tribunal.

8. This is our decision on the Appellants' appeals against the sanctions ordered by the Disciplinary Tribunal and its costs order, and the applications for costs made to us by both the Appellants and the Respondents. Our decision is unanimous.

SANCTIONS

(a) The preliminary question: does the Executive Counsel have a right to be heard?

9. The first question to be considered by the Tribunal was whether the Executive Counsel was entitled to address us on the question of sanctions. Mr Thanki QC submitted that he was not so entitled; Mr Dutton QC submitted that he was.

10. Mr Thanki relied on the terms of Regulation 34 of the Accountancy Regulations:

> 34. The Disciplinary or Appeal Tribunal shall, at an appropriate stage in the proceedings but before making, affirming or amending an order or orders under paragraphs 9(8) or 10(12)(i) of the Scheme, invite representations from the Member or Member Firm concerned in respect of the possible orders that the Tribunal may make, affirm or amend under Appendix 1 to the Scheme. Such representations may be made orally (which may be made by a Representative) and/or in writing. The Member or Member Firm concerned may call witnesses in support of their representations. The representations shall not be directed to the validity of the finding of the Tribunal. The Executive Counsel shall inform the Tribunal of any previous findings made either under this Scheme or by a disciplinary body of a Participant against the Member or Member Firm.

11. It is remarkable that this paragraph does not mention that representations or submissions might be made on behalf of the Executive Counsel. Its wording gives substantial support to Mr Thanki's submission.

12. However, paragraph 34 must be read together with other provisions of the Regulations, and in particular Regulation 30:

> 30. Subject to the Scheme and to these Regulations, the conduct and proceedings of an appeal notified under paragraph 10(1) of the Scheme shall be determined by the Chairman of the Appeal Tribunal in consultation with the other members of the Tribunal.

13. Questions of practicality favour the admission of the Executive Counsel's representations on questions of sanctions. At the simplest level, he may be

able to give to the Tribunal information as to previous findings of misconduct that the Tribunal might not otherwise have. He may be able to assist the Tribunal in a case in which the respondent Member or Member Firm is not legally represented, where a settlement has been reached, or admissions made by the Member. Cases may also arise in which it is necessary for Executive Counsel to correct statements made on behalf of the Member.

14. In our view, Regulation 34 imposes duties on the Tribunal and confers rights on the Member. However, the Tribunal will wish to ensure that it has all the information available that is relevant to its decision on sanctions, and for that purpose will normally give the Executive Counsel an opportunity to address it. The Chairman is entitled to give the Executive Counsel this opportunity under Regulation 30. The Chairman did so in this case.

(b) Sanctions: substantive questions

15. The FRC has published guidance on sanctions provided by its Conduct Committee to which any Tribunal is required to have regard. The parties agreed that the Sanctions Guidance published by the FRC on 1 June 2014 ("the Guidance") is relevant to our decision, notwithstanding that it was issued long after the misconduct in question. We have carefully considered and have had regard to its contents as a whole, as well, of course, as the submissions of counsel on behalf of the parties. We refer below to certain paragraphs of the Guidance as being particularly relevant to our decisions.

16. There is one matter we must mention at the outset. The fine imposed on Deloitte by the Disciplinary Tribunal was of £14 million; on Mr Einollahi it was £250,000. These fines reflected the findings of misconduct made by that

Tribunal, summarised in our substantive decision. In contrast, we have allowed the appeal against all of the findings on Project Aircraft; we have allowed the appeal against what was regarded by the Disciplinary Tribunal as the most serious misconduct of the Appellants, namely the alleged failure to have regard to the public interest; and we have quashed the finding of deliberate misconduct.

17. Whether or not we would have reached a different conclusion if we were a first instance tribunal, unaffected by a first instance decision, in our view fairness requires that the very substantial difference between our findings and those of the Disciplinary Tribunal is reflected in a substantial reduction in the fines imposed on Deloitte. We shall deal with the fine imposed on Mr Einollahi separately.

18. With these prefatory remarks, we turn to consider the applicable provisions of the Guidance.

19. Paragraph 9 of the Guidance is as follows:

> In determining the appropriate sanction, a Tribunal should have regard to the reasons for imposing sanctions for Misconduct in the context of professional discipline. Sanctions are imposed to achieve a number of objectives, namely:
>
> - to deter members of the accountancy profession from committing 'Misconduct';
> - to protect the public from Members and Member Firms whose conduct has fallen significantly short of the standards reasonably to be expected of that Member or Member Firm;
> - to maintain and promote public and market confidence in the accountancy profession and the quality of corporate reporting; and
> - to declare and uphold proper standards of conduct amongst Members and Member Firms.

> The primary purpose of imposing sanctions for acts of Misconduct is not to punish, but to protect the public and the wider public interest. Therefore a Tribunal's objective should be to impose the sanction or combination of sanctions necessary to achieve the objectives of the Scheme.

20. We also refer to, and have taken into account, paragraphs 10 to 13 of the Guidance.

21. Paragraph 18 of the Guidance sets out a non-exhaustive list of factors that a Tribunal will normally consider in order to assess the seriousness of the misconduct. We set out below those of the factors that we consider to be relevant in this case, and comment on them. We do not consider it appropriate, in considering their relative weights, to be quantitative rather than qualitative. We set out below our conclusions on them.

(i) The financial benefit derived or intended to be derived from the Misconduct

22. This is not a straightforward issue. Deloitte's fee for its work on Project Platinum was very substantial indeed: £7.5 million. We have no reason to believe that if it had properly addressed and dealt with conflicts, and ensured that MGRG was fully and properly advised, its fee would have been different. Equally, if ultimately the joint venture partner had been a subsidiary of MGRG, the fee may well have been the same. We bear in mind that the principal purpose of Project Platinum was to bring the RFS loan book into "friendly hands", an objective that was of existential importance to MGRG, and to that extent the Project was successful. We recognise that the Appellants' work on Project Platinum was of considerable value to MGRG. However, if the Project had been differently structured, the benefit to that company would have been very considerably greater.

(ii) Whether the Misconduct caused or risked the loss of significant sums of money

23. Again, the assessment of this factor is not straightforward. The Phoenix Partnership were expected to make a profit of some £7 million as a result of Project Platinum (see the references in paragraphs 109-115 of Chapter VII of the Inspectors' Report). In the event, their proceeds were some £14.4 million, but much of the increase resulted, we understand, from tax changes. Whether there was a real prospect of this money coming to MGRG is very much open to question. The corporate structure of the companies was such that ultimately the decision was that of the Phoenix Four, who had the power to dictate the outcome. We respectfully agree with the conclusion of the Inspectors that the members of the Phoenix Partnership other than Mr Howe wanted to secure the anticipated profits of Project Platinum for themselves. Nonetheless, in practice the Appellants acted as powerful advocates for the Partnership to ensure that it was they, rather than MGRG, who benefited from the expected very substantial profits. Whether, if the Appellants had acted properly, the directors of MGRG other than the Phoenix Partners would have successfully insisted on MGRG benefiting (in whole or in part) from the expected profits of Project Platinum is a matter of speculation.

24. However, we do not accept that the fact that MGRG had to tie up over £40 million by way of security to substitute for its indemnity in respect of the resale prices obtained on returned vehicles should count against the Appellants. Even if Project Platinum had resulted in a joint venture between BoS and a subsidiary of MGRG, it is likely that such security would have been required.

(iii) Whether the Appellants' failures were intentional or unintentional

25. It was not alleged by the Executive Counsel that the Appellants were guilty of deliberate misconduct. The allegation was, rather, that they lost sight of their duties to MGRG and ceased to be objective.

(iv) The nature, extent and importance of the standards breached

26. This factor is related to the previous. We regard the requirements of objectivity, the assessment of relevant conflicts of interest and compliance with the duties associated with those conflicts as of great importance, in the case of corporate finance work as well as auditing. Those duties were particularly important in the present case by reason of the size, importance and impact on employees, suppliers and others of the business of MGRG.

(v) Whether the Misconduct adversely affected, or potentially adversely affected, a significant number of people in the United Kingdom (such as the public, investors or other market users, consumers, clients, employees, pensioners or creditors)

27. We refer to the previous paragraphs of our decision. The misconduct we have found clearly potentially affected large numbers of people.

(vi) Whether the Misconduct could undermine confidence in the standards of conduct in general of Members

28. Given the importance of MGRG and the notoriety of the conduct of the Phoenix Four, the misconduct in question was liable to undermine confidence in the profession. Conversely, a failure to impose significant sanctions on the Appellants, notwithstanding the considerable passage of time since the misconduct occurred, would be liable to undermine confidence in the profession and its regulation.

(vii) In the case of Deloitte, the effectiveness of its relevant procedures, systems or internal controls

29. It would seem that internal controls that might have prevented the misconduct we have found appear to have been absent, or at best ineffective.

(viii) In the case of Deloitte, when its senior management became aware of the Misconduct and what action was taken at that point

30. We infer that Deloitte did not consider there had been misconduct, since it denied there had been any. We have no evidence as to what if any steps have been taken to prevent a recurrence.

(iv) Whether Mr Einollahi was in a senior position; whether he caused others to commit misconduct; and whether he was solely responsible for the Misconduct.

31. Mr Einollahi was in a very senior position: he was a corporate finance partner and the lead client service partner for MGRG, a very substantial client. His leadership led to others being involved in the actions we have criticised, in particular Nigel Birkett, a manager in the firm, and Ian Barton, a corporate finance director of the firm. Mr Einollahi bears by far the greatest responsibility for the misconduct.

THE DISCIPLINARY TRIBUNAL'S ASSESSMENT OF THE SERIOUSNESS OF THE MISCONDUCT AND OF THE FINES THAT ARE APPROPRIATE.

32. In our view, the most important factors to be taken into account are:

(1) The Appellants' egregious failures properly to consider conflicts and the interests of MGRG, and their overwhelming consideration of the interests of the Phoenix Four and the Phoenix Partnership.

(2) The sums of money involved and potentially involved and the importance of MGRG and its business to a large number of people, and therefore the impact, or potential impact, of the misconduct.

(3) Mr Einollahi's experience, seniority, leadership and responsibility, and the time during which the misconduct continued are additional significant factors.

(4) The need to mark disapproval of the misconduct, to emphasise publicly that it was unacceptable, and thus to promote public confidence in the regulation of the profession.

(5) The need to make it clear to the profession that such conduct will meet with a substantial sanction.

33. These factors require the imposition of a substantial fine.

34. We do not think it appropriate to seek to compare this case with other decided cases. We accept that consistency of decisions is desirable. However, the wide differences in facts and contexts renders a comparison unhelpful.

35. We do not think it appropriate to quantify the fine in terms of the remuneration received by Deloitte on Project Platinum. Whether or not that would be otherwise appropriate, it is not in this case because of the uncertainty as to whether, absent the misconduct, MGRG would have received the sums extracted by the Phoenix Partnership, and because of the benefit to MGRG of the successful completion of the Project, largely due to Mr Einollohi and Deloitte, in terms of the bringing the resale of personal contract plan vehicles into so-called friendly hands.

36. Nonetheless, we reject the submission of the Appellants that a six-figure fine would be appropriate. Such a fine would be, and would be viewed publicly, as insignificant given the factors to which we have referred, and particularly those mentioned in paragraph 32 above, and Deloitte's very substantial resources.

37. However, we bear in mind the following matters that have led us to reduce the fine from what we would otherwise have ordered:

(1) Mr Einollahi's previous impeccable professional record, and Deloitte's reputation and absence of previous significant findings of misconduct.

(2) Mr Einollahi's hard work seeking the survival of MG Rover, accepted by Mr Millett on day 4 of the hearing before the Disciplinary Tribunal (see transcript Day 4 page 206). Most of his work, over a period of some 5 years, was not the subject of criticism on the part of the Inspectors, or indeed by the Executive Counsel.

(3) The very considerable time that this matter has been pending, with what we assume must have been associated stress and concern.

(4) The effect, in terms of personal hurt and damaging publicity, of the unwarranted finding of deliberate misconduct and of the findings of misconduct that we have set aside.

38. Taking all the circumstances and factors to which we have referred into account, we have concluded that the appropriate amount of the fine to be imposed on Deloitte is £3 million.

39. As mentioned above, the fine imposed on Mr Einollahi by the Disciplinary Tribunal was £250,000. We do not think that a fine of this amount would necessarily be excessive for the misconduct we have found to have been committed. Nonetheless, there must be at least a nominal reduction to mark the substantial success of his appeal and the reduction in the misconduct proved against him. The appropriate figure in these circumstances is in our opinion a fine of £175,000.

Other sanctions

40. In our judgment, a reprimand would not sufficiently mark the seriousness of the misconduct we have found. It requires a severe reprimand to be given to both Mr Einollahi and Deloitte. The Executive Counsel rightly accepts that in the light of our substantive findings, an exclusion order against Mr Einollahi is not appropriate. It follows that no other sanction is required.

COSTS

(a) The costs in issue

41. We are concerned with:

(1) The costs of the FRC investigation by the Executive Counsel of the then Accountancy Investigation and Discipline Board (AIDB) and subsequently the Accountancy and Actuarial Discipline Board into the conduct of Deloitte in the course of their work in auditing and advising companies in the MG Rover Group (see paragraph 1.1 of the Grant Thornton Report dated 11 January 2012).

(2) The costs of the Executive Counsel of the FRC and of the Appellants in the proceedings before the Disciplinary Tribunal and before the Disciplinary Appeal Tribunal.

(3) The parties' costs of the judicial review proceedings in which the Appellants challenged the refusal of leave to appeal in relation to Project Platinum. These proceedings were compromised after counsel for the Executive Counsel submitted that under 10(3) of the Accountancy Scheme the Appeal Tribunal could itself extend the scope of the appeal from the decisions of the Disciplinary Tribunal so as to include the findings in respect of Project Platinum, on terms that this Tribunal could determine what order should be made for the costs of those proceedings.

42. The parties' costs are very substantial. We were informed that the Executive Counsel's costs of the investigation were about £1.8 million, of the prosecution of the Formal Complaint (including the costs of the proceedings before the Disciplinary Tribunal) about £2 million. The Executive Counsel also seeks a contribution to the costs of the Disciplinary Tribunal and of the Appeal Tribunal. The Executive Counsel sought a contribution towards the Disciplinary Tribunal's costs of £112,020.

(b) The parties' contentions

43. The Appellants accept that they are liable for the costs of the Executive Counsel relating to the charges of misconduct that have been found proved. However, they contend:

(1) Any order for costs in favour of the Executive Counsel should be reduced by the amount of the Appellants' costs in defending and appealing charges on which they succeeded.

(2) None of the costs of the investigation into their conduct in relation to MG Rover should be recovered from them.

(3) If contention (1) was not well-founded, the Appeal Tribunal should exercise its power under paragraph 9(10) of the Accountancy Scheme to award the Appellants their costs of defending the charges in relation to Project Aircraft and in appealing the finding of deliberate misconduct.

(4) The FRC should pay their costs of the judicial review proceedings.

44. The Executive Counsel contends:

(1) The Appellants should be ordered to pay 70 per cent of his costs below. This is said to reflect the approximate proportion of the costs that are attributable to the misconduct found in respect of Project Platinum.

(2) The Appellants should pay 40 per cent of his costs of the appeal to this Tribunal. Those costs are approximately £357,000.

(3) The costs order in relation to the judicial review proceedings should follow the costs order in relation to the appeal. We understand the Executive Counsel's contention to be that the Appellants should pay 40 per cent of his costs of the judicial review proceedings. His costs of the judicial review proceedings are about £164,500.

45. We have not been asked to quantify any costs in our order. We understood that notwithstanding the requirements in paragraph 9(8)(ii) and (9) and paragraph 10(12)(iii) of the Accountancy Scheme[1], it was agreed that in default of agreement we should leave the quantification of the costs that we do order to a costs judge. Where we are not making an order for all the costs of any process to be paid by a party, but do make an order for payment of some of the costs, we should assess a percentage of the costs in question to be paid pursuant to our order.

46. In each case, we are concerned with reasonable party-and-party costs. These costs are to be assessed by a costs judge on the standard basis, if not agreed.

(c) The applicable principles

47. The provisions of the Scheme and the basic principles applicable to the claims for costs are not seriously contentious.

48. Where all the charges in the Formal Complaint are all found to be proved, the Member should, absent other considerations, be ordered under paragraph 9(8)(ii) of the Scheme to pay all the costs of the investigation and the disciplinary proceedings.

49. An order that the Executive Counsel pay any costs of the Appellants may only be made if we find "that no reasonable person would have delivered or pursued all or a substantial part of a Formal Complaint": paragraph 9(10) of the Scheme.

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[1] Paragraph 9(8)(ii) requires the amount to be paid by the Member to be determined by the Disciplinary Tribunal. Paragraph 9(9) confers power to order that the FRC pay a *specified* sum in respect of the Member's legal costs. Paragraph 10(12)(iii) refers to the amount of costs of the appeal to be paid by an appellant "the amount to be so paid to be as determined by the Appeal Tribunal".

50. Where, as here, not all the charges in the Formal Complaint are upheld, subject in particular to the restriction in paragraph 9(10) the Tribunal should make such costs order or orders as it considers fair and just in all the circumstances of the case.

THE APPEAL TRIBUNAL'S DECISION

(i) The costs of the investigation

51. These costs are those incurred by the Executive Counsel from the commencement of the investigation until the delivery of the Formal Complaint. We were informed that they amount to over £1.8 million.

52. In the first place, the costs of an investigation carried out by the FRC are borne by it, and indirectly by the accountancy profession. Those costs are recoverable from a Member if, and only if, the investigation results in a charge of misconduct that is ultimately upheld (or admitted). If an investigation is wide-ranging, and only a minor part is concerned with the charge that is upheld, we see no good reason why it would in general be fair or just to order the Member to pay the entirety of the costs of the investigation. Different considerations may apply if the Member may be said to have brought about the investigation in all its width, but that is not suggested here.

53. We entirely accept that it was reasonable for the Executive Counsel to instruct Robson Rhodes to report on the conduct of Deloitte, and for Grant Thornton to be instructed to continue and to complete that work after the amalgamation of the two firms. (We refer to Grant Thornton as including Robson Rhodes in the period before their amalgamation.)

54. The Grant Thornton report devoted some 120 of its approximately 380 pages to Project Platinum. It considered and reported in addition on Deloitte's work on the acquisition of MGRG, the corporate restructuring, the completion accounts, Project Slag/Salt, Projects Aircraft and Trinity, Project Patto, the audit of the Group and audit independence. Of these, only Project Platinum and Project Aircraft resulted in allegations of misconduct, and only those relating to Project Platinum were upheld. It follows that Deloitte should not be ordered to pay the entirety of the costs of Grant Thornton's work. The same applies to the Executive Counsel's legal costs. Deloitte should be ordered to pay the proportion of those costs that fairly relates to Project Platinum.

55. There is another factor to be considered. The Inspectors' Report is a thorough account of Project Platinum and Deloitte's part in it. In our view it was a sufficient basis for the formulation of the charges and their prosecution. The formulation of the charges relating to Project Platinum on the basis of the Report and the documents referred to in it should have been relatively straightforward and speedy. Yet it took over a year after the publication of their Report for the draft Formal Complaint to be served. The draft Formal Complaint included charges relating to Deloitte's work on the acquisition of MGRG by the Phoenix Four, the corporate restructuring, the completion accounts dispute between Techtronic (2000) Ltd and BMW, Project Salt/Slag, Project Trinity and Project Patto, in addition to Project Platinum and Project Aircraft. Deloitte responded to the draft about 3 months later. It then took 9 months for the Formal Complaint to be drafted and served. It was, of course, restricted to Project Platinum and Project Aircraft.

56. During the period from the publication of the Inspectors' Report in September 2009 and the service of the Formal Complaint in January 2012 a considerable amount of work was carried out on behalf of the Executive Counsel, and therefore considerable costs incurred by him. The fees of Grant Thornton for their work in this period were almost £290,000 (excluding VAT). It was reasonable of the Executive Counsel to consult Grant Thornton when formulating the Formal Complaint, and we take that into account. However, for the reasons we have given (principally the scope of the Grant Thornton work beyond that concerning Project Platinum, but also the availability of the Inspectors' Report on Project Platinum), much of these costs should not be recoverable from Deloitte.

57. Counsel's fees in the same period were some £429,000, including VAT, and the same comment applies to them. However, in their case there is a further point. In about May 2011 the Executive Counsel changed counsel. In the place of Ian Winter QC and Mr Barnard, Timothy Dutton QC and Nicholas Medcroft were instructed. This must have involved significant duplication of costs, as Mr Dutton and Mr Medcroft had to master the facts and evidence that had already been considered by their predecessors.

58. Deloitte made no separate point on their costs of addressing, successfully to a substantial extent, the draft Formal Complaint, and we have left them out of account.

59. Taking all these matters into account, our conclusion is that Deloitte should be responsible for 20 per cent of the costs of the investigation.

(ii) The costs below

60. We include in these costs the costs incurred by the Executive Counsel from the delivery of the Formal Complaint to the completion of the proceedings before the Disciplinary Tribunal. We were told that they amount to just over £2 million.

61. Undoubtedly, the greater part of these costs related to Project Platinum. The Executive Counsel contends that 30 per cent of his costs related to Project Aircraft, and accordingly seeks 70 per cent of his costs. The statistics set out under paragraph 66 of the Executive Counsel's skeleton argument for the hearing on 30 January 2015 support this estimate; indeed, they suggest that it is conservative. However, we take into account the fact that some of the costs on Project Platinum related to charge 1.1 and 1.7, and a significant part related to the allegation that Mr Barton held himself out as advising MGRG at the Board meeting of 12 October 2001, all of which ultimately failed. A reduction from 70 per cent is therefore appropriate.

62. The question then arises whether any order or any reduction in the costs payable to the Executive Counsel should be made in respect of Deloitte's ultimately successful defence of the charges relating to Project Aircraft, the charge of failing to take the public interest into account and charge 1.6 relating to Project Platinum.

63. In our judgment, no such deduction should be made unless the requirement for an order for costs in favour of a Member under paragraph 9(10) is met. A deduction has the same effect, in practical terms, as an order in favour of a Member: it is a set-off against the costs payable by the Member of the costs

payable to him. It follows that we have to decide whether "no reasonable person would have delivered or pursued all or a substantial part of [the] Formal Complaint".

64. It was certainly reasonable for the Executive Counsel to pursue allegation 1.6, notwithstanding that we did not find it proved. .It ultimately failed not because it should not have been made or pursued, but by reason of the lack of an appropriate finding by the Disciplinary Tribunal.

65. We do not find the question whether the charges relating to Project Aircraft were such that no reasonable person would have preferred or pursued at all easy. Looking at Chapter XI of the Inspectors' Report alone, it is difficult to see why the charge was preferred, and more difficult to see why it was pursued after Deloitte's unsuccessful strike out application. On the other hand, the charges received some support from Grant Thornton, and of course they were upheld by the Disciplinary Tribunal. Not without considerable hesitation, we have concluded that Deloitte have not surmounted the high hurdle imposed by paragraph 9(10).

66. We have similar concerns about the charges of failing to take into account the public interest. However, the costs associated with these charges could not have been substantial. No witnesses were called specifically to support them, and the argument that the Appeal Tribunal upheld was legal.

67. Since the Executive Counsel did not advance a case that Mr Einollahi and through him Deloitte had been guilty of deliberate misconduct, there is no basis for reducing the Executive Counsel's costs order on account of the quashing of the finding that there had been such.

68. We conclude that Deloitte should pay 60 per cent of the Executive Counsel's costs under this head, to include the costs of the Disciplinary Tribunal.

(iii) The costs of the judicial review proceedings

69. Both sides claim to have succeeded in these proceedings, Deloitte because they obtained reconsideration of the refusal of leave to appeal on Project Platinum (and succeeded in part in their appeal against the Disciplinary Tribunal's findings on it) and on the sanctions imposed on them (on which they have also succeeded) and the Executive Counsel on the basis that the claim for judicial review was ultimately withdrawn. The Executive Counsel contends that Deloitte should have been aware of the power conferred by paragraph 10(3) of the Scheme. Deloitte could fairly make the point that in its summary grounds of opposition and indeed in its Detailed Grounds of Defence (and presumably similarly in any correspondence before the commencement of the proceedings) the FRC did not contend that there was this suitable alternative remedy available to Deloitte. The possibility of its availability was not mentioned until it appeared in paragraph 41c of the Executive Counsel's skeleton argument.

70. In our view the fair and just result is that there should be no order for the costs of the judicial review proceedings.

(iv) The costs of the appeal to this Tribunal

71. The Executive Counsel is entitled to his costs of upholding the findings of misconduct that we upheld. We were told that these amount of some £357,000, exclusive of the costs of the Appeal Tribunal itself. His estimate of

his costs attributable to those findings is 40 per cent. We see no reason to come to a different conclusion.

72. We therefore order Deloitte to pay 40 per cent of the Executive Counsel's reasonable costs of the appeal to this Tribunal, plus the same percentage of the costs of the Tribunal itself.

The costs order against Mr Einollahi

73. In principle, given that there is no real difference between the responsibility of Deloitte as a firm and of Mr Einollahi for the misconduct that we found, the costs order should be against both of them. We understand that in practice it is Deloitte that will meet the liability. We do not consider that this is a reason to depart from the liability that principle indicates. It follows that the order for costs will be against both Deloitte and Mr Einollahi jointly.

Stanley Burnton

25.3.2015