IN THE MATTER OF

THE EXECUTIVE COUNSEL TO THE
FINANCIAL REPORTING COUNCIL

Complainant

and

(1) DELOITTE & TOUCHE
(2) MR MAGHSOUD EINOLLAHI

Respondents

DECISION ON LEAVE TO APPEAL

1 My decision on the Respondents' Notice of Appeal dated 1 October 2013 is as follows:-

(a) I refuse leave to appeal the findings of the Tribunal relating to Project Platinum (allegations 1.1 to 1.7).

(b) I grant leave to appeal the findings of the Tribunal relating to Project Aircraft (allegations 2.1 to 2.6).

(c) The question of leave to appeal against the sanctions imposed by the Tribunal does not arise.

Reasons

2 By their report dated 2 September 2013 ("the Decision"), the Disciplinary Tribunal (D Anthony Evans QC, chairman, and Richard Kennett FCA and George Helsby FIoD) determined that the Respondents (respectively "the Firm" and "the Member") were guilty of conduct which fell short of the standards reasonably to be expected of, respectively, a member firm and a member of the ICAEW, on 13 counts. Seven of the counts related to a transaction called "Project Platinum"; the remaining six related to "Project Aircraft". The parties to these transactions, and the keys to the abbreviated names of the entities involved will already be well-known to the parties to these proceedings and I therefore propose to use them without explanation, but always endeavouring to follow strictly the usage of the parties and the Inspectors' Report, identified in the next paragraph.

3 The basic facts concerning the two transactions are not set out in the Decision in a narrative form and it is therefore convenient to set them out here. They are derived from the report of the Inspection into the affairs of Phoenix Venture Holdings Limited, MG Rover Holdings Limited and 33 other companies, of which Chapters VII and XI were agreed by the parties to be accurate and relevant. References to the report below follow the abbreviation used at the hearing; thus BIS (the report), VII (chapter number), 74 (paragraph number).

The report is of great importance as the factual basis of the Formal Complaint, a source of conclusions not challenged by the Respondents, and the foundation of many of the Tribunal's findings.

Project Platinum

4 The subject matter of this transaction was the ownership of Rover Financial Services Limited, which remained in the hands of BMW (UK) after the sale of MGRG. RFS owned significant numbers of personal contract plans for the purchase of new Rover vehicles which provided for the payment of a guaranteed minimum value on the return of the vehicle. MGRG had entered into an indemnity of RFS in the event that the sale proceeds of the vehicles (the "RV") fell short of the guaranteed minimum payable to the customer. MGRG was exposed to a significant liability partly because there had been a "spike" in new vehicle sales on personal contract plans before the sale of MGR Holdings, leading to a significant number of returned vehicles in 2002 and 2003 (depending on the term of the plan). These returns might cause damage to MGRG both from depression of the RV by reason of the number of vehicles in the market, and from consequent suppression of demand for new vehicles. On the other hand, BMW was believed to have managed the portfolio badly, and there was a real prospect of significant profit from the effective management of the RFS portfolio.

5 In January 2001 BMW Leasing wrote to Mr Edwards as "deputy chairman MG Rover Group Limited" with details of the portfolio and seeking an indication of interest and price. BMW (UK) obtained some 20 confidentiality agreements from institutions, but only two indicative bids were received, from Capital Bank (a subsidiary of BoS) and GE Capital. In each case it was made clear to BMW (UK) by its adviser KPMG that the interest of purchasers and the price offered was based on the erroneous assumption that a BMW company would indemnify losses on the RV. KPMG's view was vindicated as the bids were withdrawn in May 2001 once it was known that the indemnity of RFS was a liability of MGRG.

6 MGRG did not respond to BMW's approach until April 2001, when Mr Barton of the Firm wrote on behalf of Mr Edwards "deputy chairman of MG Rover" to KPMG pointing out that MGR was in a "unique" competitive position as a purchaser of the RFS Rover portfolio. Mr Barton proposed that "we" would enter into a competitive process at the data room stage with a preferred shortlist of 3 bidders including MG Rover.

7 The Firm considered methods of acquiring the RFS portfolio by means of securitisation using finance from Barclays and RBS as bridging finance before securitisation. By June 2001 the proposal from the Firm was that the portfolio should be acquired by a joint venture company owned with a financial partner. At this point, the proposal becomes an acquisition by that partner and "the Phoenix Partnership", and not either MGR Holdings or MGRG. The proposal made to BoS by the Member at a meeting on 25 June 2001 and recorded by their Mr Middleton was that the Phoenix Partnership "working with MG Rover in a transparent manner" would underwrite (and cash collateralise if necessary) what BoS required in relation to RV risk. "In exchange for taking the losses on RVs, they would wish the benefit of any surpluses", according to BoS's note of the meeting with the Member.

8 The objective advised on by the Member and communicated by him on behalf of Mr Edwards to Mr Griffiths (CEO of BMW Financial Services Group) in a letter also of 25 June 2001 was that the portfolio acquisition should be "fully ring-fenced from MGR Holdings" by using a company owned by the Phoenix Four and their financial partners. The

accompanying financial information included an evaluation of the risks of RV shortfalls in circumstances which included failure of the guarantee given by MGRG. The Member pointed out that BMW did not expect MGRG to survive after 9 May 2002, so that the Firm had assumed that RV shortfalls were 100% at risk after that date. MG Rover failure would depress RV still more than the recently experienced rate of 20%.

9 The final offer of the Members "client" (in the singular) "for the entire RFS portfolio" was similar as to price to those of Capital Bank and GE Capital, in the amount of 94.25% of net investment. The offer assumed no residual risk on BMW in relation to RV. Subsequent heads of agreement between BMW and "the purchaser" specified that "the issued share capital of RFS will be acquired by MG Rover Holdings Limited or another member of the Techtronic 2000 Limited group of companies".

10 At completion on 8-9 November 2001, the shares in RFS were transferred to PVH, but the portfolio was transferred by RFS to MGR Capital, a joint venture between the Phoenix Partnership and HBOS. The partnership borrowed £2m from HBOS and applied it in subscribing for preference shares in MGR Capital, which borrowed £300m from HBOS to pay the purchase price of the portfolio (£304.2m). MGRG paid £41m into a collateral account with a SPV called RV Capco, and RFS paid £12.6m into the same account, providing a fund of £53m to secure shortfalls in RV. The RFS deposit of £12.6m represented the estimated liability of BMW in respect of plans entered into for new registrations in April 2000, which BMW had agreed to bear. (The makeup and provenance of this £12.6m is set out in BIS VII 24.4.) MGRG received a release of its liability to indemnify RFS for RV shortfalls in so far as they exceeded the £41m deposited with RV Capco.

11 In the result, the more pessimistic projections of the outcome of the RFS portfolio (including the "doomsday scenario" of collapse of MGRG in May 2002) did not eventuate; Project Platinum realised significant profits for the Phoenix Partnership. The Inspectors summarised the matter thus (BIS VII 230) in dealing with the statements of the Phoenix Partnership in relation to Project Platinum:

In reality, however:

230.1. the Phoenix Partnership was involved in the joint venture because its members (other than Mr Howe) wanted the profits to accrue to them, not because that was the "*only option that was left*" or for reasons relating to the balance sheets of companies in the Group. Further, it was not the case that the only way to acquire the loan book was "*for The Phoenix Consortium members to yet again put their hands in their pockets and put personal monies at risk*". In fact, HBOS had expressed a preference for having a Group company as its joint venture partner; and

230.2. the members of the Phoenix Partnership had undertaken very little risk and expected large returns.

Project Aircraft

12 MGRG owned in 2002 a significant amount of group relievable tax losses (over £100m) from its manufacturing activities. The Phoenix Partnership directors entered into a transaction with Barclays Capital under which the tax losses of MGRG were used for no

consideration to set off tax due on the profits of a finance leasing company (later called PVL) owned ultimately by Barclays Capital. PVL was the lessor of aircraft leased to and operated by TUI, the tour operator group. PVL was brought into the MG Rover Group by being purchased by PVH at a price representing Barclays' share of the expected tax saving. The amount of the tax relieved against the profits of the aircraft leasing was divided in the proportions 35% to PVL, 32.5% to Barclays (paid by PVH as consideration for the shares in PVL) and 32.5% paid by PVL to TUI as a fee for amending the operating leases of the aircraft.

13 The salient feature of Project Aircraft is that MGRG received no consideration at all for the surrender of its losses, notwithstanding the willingness of the owners of the profit-making companies to pay a significant share of the tax relieved in order to acquire the benefit of them.

14 The Inspectors' Report stated (BIS XI 29):

> As will already be apparent, the Group's share of the returns from Project Aircraft accrued to PVH and a subsidiary (viz. PVL) in which MGRG had no interest (and thereafter, to an extent, to the Guernsey Trust) and not to MGRG. That this was so was the result not so much of the fact that PVL was a subsidiary of PVH (as opposed to MGRG) as of the fact that MGRG was not paid for the losses that it surrendered. The fact that PVL was a subsidiary of PVH rather than MGRG did not of itself prevent the benefits of the deal from accruing to MGRG. As Mr Einollahi explained,
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> "*... there is absolutely no reason why* [PVL] *could not pay consideration for the tax losses it used. It is not the structure which causes that to be in a form that it is. It is the agreement of the two parties whether they pay consideration or they don't.*"

15 The Inspectors concluded (BIS XI 48) that it was not in MGRG's interests to surrender its tax losses for no consideration. Although Barclays was not prepared to deal with MGRG as its counterparty, nevertheless, PVH could not secure the benefits of the transaction without the co-operation of MGRG.

The grounds of appeal

16 The Scheme (paragraph 8(6)) requires me to give permission to appeal if I am satisfied that there is an arguable case for appeal in respect of one or more of the matters set out in paragraph 8(2) of the Scheme. In relevant respects, the bar is set high: an appellant must allege that a decision is perverse, and in relation to penalty, that the sanction is manifestly unreasonable. As the Regulations (paragraph 10) provide that an appeal is a review, I propose to consider the Notice of Appeal on the basis that an appellant must show an arguable case that no reasonable Tribunal, properly directing itself as to the law, could have reached the finding sought to be appealed on the evidence before it. On the other hand, a respondent is also entitled to appeal on the ground of an error of law, to which the concept of an arguable case is more readily adapted. Many propositions of law are capable of being formulated as an argument, however, without any real prospect of acceptance. Consistently with the practice of the Court of Appeal, I intend to apply the test whether the argument has a real as opposed to a fanciful prospect of success. In relation to grounds which are founded on an allegation of serious procedural or other irregularity, I

shall adopt the test whether arguably there has been an injustice by reason of the irregularity in question.

17 The preliminary paragraphs of the notice of appeal make broad general allegations concerning the findings of the Tribunal. A generalised allegation of perversity is contained in paragraph 7, where it is alleged that the Tribunal failed to consider any of the central submissions of the Respondents. This allegation is broken down into (a) failures to give proper reasons; (b) failure to take into account or understand "every key aspect of the defence advanced by the Respondents", and (c) reaching a perverse decision. The secondary allegation in paragraph 7 is of mistake of law by misinterpreting the Institute's Fundamental Principles and Guidance.

18 This portmanteau approach is insufficient to justify permission to appeal unless it is subsequently specifically applied in the Notice of Appeal to the individual findings made by the Tribunal. In particular, in a matter involving a large quantity of evidence and legal submissions, such as this case, it is not necessary that the Tribunal discuss each and every aspect of the submissions of the Respondents in relation to the submissions of the Executive Counsel, provided that the Tribunal has given sufficient reasons for its finding and has indicated the evidence on which it has relied. Moreover, the Tribunal have stated that they have read the closing submissions of both parties. An appellate review should not assume that the Tribunal have failed to consider the material which is recited in its decision, or to impute a failure to bear in mind the evidence adduced including that constituted by the Inspectors' report and the witness statements (as they appear after cross-examination), unless it appears that their finding is contradicted by uncontentious evidence, or in other words, is perverse.

Project Platinum - grounds of appeal

19 In paragraphs 9 to 13 of the Notice of Appeal, an exiguous account of Project Platinum is given. The Tribunal found that it was indeed essential to the survival of MGRG that the RFS portfolio should come under the management of a company or companies with an incentive to maximise RVs and limit the indemnity liability of MGRG. This is not the same proposition as that incorporated in the Notice of Appeal, that "the successful completion of Project Platinum was ... essential to the survival of MGRG".

20 It is important to observe that the allegations relating to Project Platinum are all introduced by the phrase "in relation to the transaction known as 'Project Platinum' the conduct of [the Respondents] fell short" of the relevant standards. The history of that project and the evidence about it is therefore material to each of the allegations.

The finding under allegation 1.1:

Between 1 January 2001 and 31 December 2001 [the Respondents] failed adequately to consider the public interest before accepting or continuing their engagement in relation to Project Platinum (in particular as corporate finance advisers to 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 1.4) and, from 1 August 2001, with the guidance in Statement 1.200 (paras. 2.2, 2.4 and 2.5).

21 The first submission is that there is no "special class of public interest companies". Paragraph 15 of the Notice of Appeal goes on to develop the submission that the requirements of the Fundamental Principles and the Guidance bear differently on audit work, for example, and corporate finance work, in which the accountant may accept an engagement which is designed primarily with a view to advancing a particular client's case.

22 In paragraph 16, the Notice of Appeal refers to the Tribunal's analysis of the question arising in relation to the public interest in this case in paragraph 43 of the Report. The elements referred to are:

(a) whether PVH (or any of its subsidiaries) "was a public interest company";

(b) whether the "Respondents were aware of it being a public interest company";

(c) whether this was "relevant to the Respondents"

23 The Notice of Appeal robustly describes this as "fundamentally wrong", alleging that the Tribunal equated the public interest with a "'public interest company' (whatever that may have meant)". The Notice of Appeal goes on to allege that the Tribunal wrongly assumed that what was in the interests of a public interest company is also in the public interest.

24 In paragraph 17 the Notice of Appeal goes on to criticise the conclusion of the Tribunal that they are "completely satisfied that 'the MG Rover Group' falls within the definition of being a public interest company and there is in our view abundant evidence of that". It is rightly pointed out that there is no such definition in the Guidance. It is alleged that the Tribunal applied a test in relation to the public interest which is not in the Guidance and thereby made an error of law.

25 On the evidence, the phrase "public interest company" was introduced into the proceedings by the parties themselves, and was adopted by the Respondents in their instructions to Mr Standen, their expert witness, as is made clear by his cross-examination at page 81-82. The phrase (which he had used in inverted commas) had come from the question on which he had been asked to report. He expressly accepted that MGRG as a manufacturing company while not automatically a "public interest company", might engage the public interest.

26 Reading the findings on this matter as a whole and together, the Tribunal clearly understood what aspects of the public interest were engaged by the work undertaken by the Respondents. This is particularly clear from paragraph 50, in which the Tribunal quotes from the Member's oral evidence that MGRG was "a quasi-public interest company". At paragraphs 36 and 53 of the Report, the Tribunal expressly notices the Respondents' argument that "the obligation is not simply to consider 'the public interest' but 'the public interest and its bearing on the work'". This proposition is not rejected: at paragraph 59 the Tribunal quotes the Member more extensively, at day 7, saying that anything connected with MGRG which took profits or assets out of it was a public interest "potential issue". The Tribunal here clearly invoke this evidence in the process of applying the Respondents' submission.

27 It is in my judgment clear that the Tribunal did not regard themselves as applying a definition from the Guidance, but were qualifying MGRG as a public interest company in

consequence of the public interests which were engaged by reason of its importance to the local economy and the other matters referred to in the Report. This holding was clearly linked to the evidence given. In my judgment, there is no arguable case that the Tribunal misdirected themselves in the manner alleged.

28 Turning to the third question - "relevance to the Respondents" - the Notice of Appeal refers to part of paragraph 55 of the Reasons. The Notice of Appeal argues that the Tribunal's statement in the quotation was wrong, as a matter of construction of the Guidance. Examination of the quoted passage in the context shows that the Tribunal did understand the meaning of the guidance. In paragraph 53, the Tribunal referred to the Respondents' submission that the obligation of an accountant was not simply to consider the public interest, but the public interest in its bearing on the work. That reference continues: "It was said that the public interest will bear heavily on audit work, especially of a major company. We agree with this last sentence but it is not confined to audit work, and the public interest must be very relevant to a company in the circumstances of MG Rover Group and its acquisition and running and the corporate finance work done in relation to it".

29 In paragraph 55, the submission rejected is: "A corporate financier, [Counsel] said, provides support for commerce by giving best advice to his or her client, not by assuming the role of the market or regulators or government and deciding which bidder in a corporate transaction has the public interest on their side." In saying that they did not "accept this to be the position" the Tribunal went on to say that this implied that the Respondents had no obligation to consider the public interest, which was not consistent with the ICAEW guidelines. They then refer to the importance to the Phoenix Four that the loan book came into "friendly hands". This is a clear reference to the issue of conflict of interest, to which the question of public interest in relation to MGRG was clearly relevant, as the Member admitted (see paragraph 59).

30 The Notice of Appeal at paragraphs 20-22 sets up a chain of reasoning which the Tribunal's Report does not contain. The objection by both the Respondents and Mr Standen was to the proposition that a corporate finance adviser who is an accountant must decide on public interest grounds which client to advise, or which person it is in the public interest should become the purchaser of an asset. Reading the Tribunal's decision as a whole, it can be seen that this proposition is not only not adopted or supported, but is irrelevant to their reasoning. The Tribunal, in my judgment, correctly identified that the Phoenix Four had a personal interest in securing the RFS portfolio for themselves. The whole context of the proceedings, and the narrative in BIS VII, showed that the Respondents had been acting for MGR Holdings and MGRG in the context of the RFS portfolio sale, in addition to the Phoenix Four. As is demonstrated by the Tribunal's findings and reasoning in relation to the question of conflicts of interest, the Respondents should clearly have considered the public interest in MGRG's receiving the benefit of wholly independent corporate finance advice, before the destination of the ownership of the RFS portfolio was settled.

31 In my judgment, the Notice of Appeal does not set up an arguable case that the Tribunal either made an error of law (by misconstruing or misapplying the Guidance), or committed any procedural injustice (by failing to give proper reasons), or made a perverse finding under allegation 1.1.

The finding under allegation 1.2:

Between 1 January 2001 and 20 September 2001 [the Respondents] 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);

32 The ground of appeal in relation to this finding (Notice of Appeal paragraphs 25-27) is that the finding in paragraph 66 of the Report that the Phoenix Four were clients of the Firm from the outset of Project Platinum to the knowledge of the Firm and the Member is inconsistent with a breach of the Fundamental Principle and the Guidance referred to. Implicit in this ground is a submission as to the meaning of the Guidance, namely that adequate identification of the client may be a subjective and not an objective matter. On this construction, the fact that the Member alone knew that the Phoenix Four were the clients without creating any objective evidence of that fact is sufficient to discharge this obligation. Reading the relevant paragraphs of the Report (62-67) as a whole, however, the Tribunal clearly (a) rejected the proposition that the Member's knowledge in itself was sufficient, and (b) decided in all the circumstances of this case that it had been necessary to create (by an engagement letter) objective evidence of the fact.

33 The Notice of Appeal goes on to allege unfairness in finding misconduct, because there is no finding by the Tribunal that anyone was in fact misled as to the Respondents' status (Notice of Appeal paragraph 28). The Tribunal makes this finding in paragraph 66: "We know too that the Respondents were represented at an MG Rover Group Limited Board Meeting and made a presentation to the Board thus suggesting that they were acting for MG Rover and not the Phoenix Four."

34 There was substantial material tending to show that, regardless of the Member's state of mind, numerous others, both within and without the Firm, had been led to believe that the Firm was acting in relation to RFS for both or either of MGR Holdings (PVH) and MGRG, or had reasonably formed that view without being disabused by the Member or any written record of the Firm to the contrary. It is only necessary to mention BIS VII 9, 14, 17, 65 and 66 for references to the correspondence between January and June 2001 which was conducted by or on behalf of MGRG or PVH (MGR Holdings) by the Firm with the involvement of the Member, in relation to the acquisition of the RFS portfolio by a Group company, and not the Phoenix Four.

35 This material was deployed by the Tribunal in the Report in relation to allegation 1.3, at paragraphs 86-88 in dealing with the issue whether there were conflicts of interest.

36 I am unable to find that there is an arguable case for appeal on the ground of either perversity or a serious procedural irregularity in relation to allegation 1.2.

The finding under allegation 1.3:

Between 1 January 2001 and 31 December 2001 [the Respondents] 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).

37 Paragraph 33(a) of the Notice of Appeal attacks the Tribunal's finding in paragraph 73 of the Report that a firm must identify its clients or potential clients, on the ground that "a firm owes no obligations of loyalty to the (... large or even indeterminate) group of persons or firms who are its 'potential clients'". This point is not arguable in this context. The potential clients were all identified: the Tribunal made clear findings that there were more than one potential clients for whom the Firm was providing services. The Tribunal's approach was entirely consistent with Guidance paragraph 4.3, which refers to disclosure to "clients or potential clients". Equally the Tribunal recognized the "work rule" which would have allowed Deloitte to act for all of the persons or groups named in this allegation, provided that safeguards existed to preserve confidentiality and manage conflict (paragraph 72 of the Report, which goes wider than suggested in paragraph 30 of the Notice of Appeal, and explicitly in paragraph 82, quoting Guidance paragraph 4.2 in terms).

38 At paragraph 33(b) of the Notice of Appeal it is suggested that the Tribunal ignored the text of the Guidance which makes it discretionary to record the results of consideration of conflicts. This does not raise an arguable ground of appeal: although the language is not beyond criticism, the Tribunal was indicating a conclusion that in this context if the Firm found a conflict of interest it should consider whether it must also make a record. In the context of the whole issue the Tribunal's holding did not amount to holding the Firm or the Member to higher standards than were in force at the time of the negotiation of the transaction.

39 The next ground is that the Tribunal's holding that there was an obvious conflict between MGRG and the Phoenix Four was perverse. The Inspectors' Report (BIS VII) makes it clear that it was at all times at least strongly arguable that:

(a) The opportunity to enter into Project Platinum was a corporate asset of MGRG, so that the Phoenix Four could not exploit it personally without the informed consent of MGRG.

(b) The Phoenix Four could not rely on unanimous voting shareholder consent to their dealings as directors of MGRG because

(i) that company's articles were narrower in this respect than those of PVH;

(ii) MGRG was not solvent at the time of Project Platinum (or of Project Aircraft – see below).

40 In light of those findings, and paragraphs 79-89 of the Tribunal Report (in particular the confidentiality agreement made between BMW and MGRG concerning a potential acquisition of the RFS portfolio by MGRG), the Tribunal were clearly entitled to find that the relevant conflicts existed. Paragraph 35 of the Notice of Appeal complains that in paragraph 78 of the Report, the Tribunal's agreement with the Executive Counsel expressed there is egregiously unfair because of its lack of reasoning. This ignores paragraphs 79-89 which in the context give ample reasons for their agreement.

41 For the reasons given by the Inspectors' Report and set out in paragraph 39 above, it cannot be said that the matters set out in paragraph 36 of the Notice of Appeal are a substantial or correct statement of the corporate position so as to be conclusive of the question of existence of a conflict between MGRG and the Phoenix Four in this context. In addition, proposition 38(d) that it did not matter where new acquisitions sat in the corporate group, is plainly unarguable. The A-C shareholders and MGRG as a whole, including its creditors, had the strongest possible interest in seeing that MGRG retained all its corporate opportunities and cash flow as against the Phoenix Four's desire to "ring-fence" the cash flowing from RVs. No shareholder would benefit from a dividend unless and until MGRG had made sufficient profits to justify the board in declaring a dividend. The interests of A-C shareholders were aligned with MGRG's interests.

42 This ground of appeal is not supported by the reference in paragraph 36(e)(iii) to the advice of Mr Potts QC, because, as the Inspectors found, he expressly pointed out that the terms of the Articles of Association of MGRG were not before him, and they were in fact different from those of PVH. In addition, he advised (BIS VII 195) that there would need to be a resolution of the board of MGRG ratifying any conduct of the directors which was in conflict with their duty. The reference to the profits accruing to the D Shareholders in any event is also not conclusive of the question of conflict or potential conflict: such profits would accrue to them only if (a) capable of being declared as dividends from MGRG and (b) eligible to be treated as separate from the Group as it was in December 2000. Both of these matters were questions on which MGRG would have been able to negotiate. The balance sheet solvency of MGRG at material times depended on the Phoenix Four waiving or not enforcing the debt of £337 million (as at 31 December 2001) owed by MGRG to Techtronic (which they did control): BIS VII 205. On the Inspectors' findings, MGRG clearly had a case that they would have had to do so in order to validate a benefit to them which was minute in comparison with the Techtronic debt.

43 All of these matters were regarded as debatable by the Inspectors. The Tribunal plainly found that they were not an answer to the question arising before the Phoenix Four started negotiations on Project Platinum for their own benefit: namely whether the conflicts alleged had existed and were material. Thus, although the matters set out in the Notice of Appeal were arguable both ways, they could not render the Tribunal's decision perverse unless it could be shown that MGRG had no negotiating position at all; in other words that all the contentions of the Phoenix Four as to the validity of their acquisition of the RFS portfolio were unanswerable.

44 The further point to be made on this ground of appeal is that under the Articles of MGRG profits (if any) in MGRG were to be attributed to D shareholders to the exclusion of A-C shareholders not because they arose from a "new venture" or a "new acquisition" but because A-C shareholders could participate in such profits if they were "derived from and were fairly attributable to companies in the MG Rover Group at December 2000". MGRG was such a company and the opportunity was presented to the Group itself by BMW (BIS XXV 34). Again, there was evidence that MGRG had a viable negotiating position, and the points made in paragraphs 36(f) and 37 do not eliminate the conflicting interest which the Tribunal found or determine the question which the Firm ought to have considered.

45 The Tribunal Report refers at paragraph 77 to the evidence of Mr Johnson, the National Risk Partner of the Firm, and of Mr Holmes, also of the Firm. The Notice of Appeal asserts (paragraph 38) that these witnesses did not make the concessions which the Tribunal records. Assuming that this is arguably true, paragraph 77 does not constitute the central or core finding of fact, such as to make the finding as a whole arguably perverse.

46 For those reasons, I refuse leave to appeal against this finding.

The finding under allegations 1.4, 1.5 and 1.6:

> *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).*
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> *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).*
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> *Between 1 January 2001 and 31 December 2001, they held themselves out as advising MGRG, or allowed MGRG to believe that they were advising them, when in fact they were advising the Phoenix Four, and failed thereby to act in accordance with Fundamental Principle 2 and, with due care, in accordance with Fundamental Principle 4.*

47 For reasons already given in relation to allegation 1.3, it is not in my judgment arguable that the Tribunal reached perverse decisions or committed any substantial injustice in its reasons in relation to these three allegations. The conflicts relied on by the Executive Counsel were amply supported by the evidence; there was clear evidence of the Firm conducting itself as if either or both of MGRG and the Group as a whole were its clients even after the transaction became a sale of the portfolio to the Phoenix Four's joint venture company outside the Group; and the Notice of Appeal fails to recognise and deal with the fundamental distinction between the Phoenix Four as individuals and as members of the board of MGRG.

48 The closing submissions of the Respondents themselves were that allegations 1.5 and 1.6 were repetitive of allegations 1.2 to 1.4.

The finding under allegation 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).

49 The "self-interest" threat was in this case real and had an impact on the shape of the transaction and the identity of the parties to it. The Inspectors made findings at BIS VII 117-142 which show that the Member himself was conflicted between stalwart protection of his remuneration demands and the unlikelihood that Abbey, if a joint venture partner, would tolerate the contingent fee and the equity share which he had demanded. Since Abbey was an audit client of the Firm, moreover, the Firm would be prohibited from holding a concurrent interest with Abbey in the joint venture company, at least in the US (which was relevant to the Firm and to Abbey). As First National (the Abbey car subsidiary) was preferred as a partner for MGRG (a statement of Mr Edwards to the Inspectors: BIS VII 118) in the realisation of the RFS portfolio, its virtual exclusion from negotiations until a very late stage (August 2001) had a significant impact on MGRG's negotiating position.

50 Again, the breach of the relevant Standards does not depend on the outcome (eg that the Phoenix Four insisted on reduction of the equity stake to a value which the Member and at least one other person in the Firm considered trivial, so that the equity stake was dropped). For similar reasons, the justifiability of the fees, and their size were not relevant to this issue. There is no arguable case that these matters justify the clearly proved failure to act in accordance with Fundamental Principle 2.

Project Aircraft - grounds of appeal

51 As I consider that there are arguable grounds of appeal in relation to allegations 2.1 to 2.6, I do not propose to give detailed reasons in relation to each allegation. Some of the grounds stated in the Notice of Appeal are grounds which I have held not to be arguable in relation to Project Platinum, and I do not resile from those decisions. The following matters, however, are in my judgment arguable grounds for appeal.

52 The Tribunal's reasoning in respect of Project Aircraft is arguably flawed because it attributes the consequences of the transaction (the availability of a significant part of the proceeds to be applied to the personal benefit of the Phoenix Four) to the conduct of the Firm and the Member. It is clearly arguable that no further client agreement in relation to this transaction was necessary to follow that for Project Salt/Slag, because it was an engagement to provide tax advice on a group basis to the whole Group, now headed by PVH.

53 The structure of the transaction in contemplation did retain the benefit of it within the Group. It is arguable that the duty to see that MGRG was properly compensated for giving up its tax losses was on the board of MGRG advised by its solicitors. The Inspectors found that the relevant questions were identified and advised on by Eversheds, as described by the Inspectors at BIS XI 36-41. These were, arguably, not matters for the Firm to advise on, as tax advisers.

54 In stark contrast to Project Platinum, the Inspectors make virtually no reference to any conduct of the Firm or the Member in relation to Project Aircraft. Where they do so, it is to point out that the issue of payment to MGRG was not the subject of advice from the Firm. Advisers from the Firm (other than the Member) pointed out to the directors that this question was not the proper subject of tax advice: BIS XI 32-35.

55 The finding which is implicit in the decisions of the Tribunal in relation to each allegation about Project Aircraft is that the Respondents ought to have foreseen that the proceeds of the project would not be applied even in part for the benefit of MGRG but would be applied contrary to the interests of the Group in bonus payments to the Phoenix Four's Guernsey Trust. Such a finding is arguably perverse.

56 The finding in paragraph 155 of the Tribunal's Report is arguably a misconstruction of the relevant standards. A formal, informed consent from MGRG to the Firm's advising on the disposal of its tax losses, even if it had been necessary, would arguably have justified the Firm in continuing to advise on the project. It is clearly arguable that the holding that the Firm would in those circumstances have to cease to act is perverse.

57 The finding in paragraph 159 is also arguably perverse, for the reasons given in paragraphs 53 and 54 above.

58 The only substantive objection to the contingent fee in this case is that it was to be charged for advice to a group with different component companies in a different structure (Tribunal Report paragraph 178). But arguably the only objectionable feature of Project Aircraft and the concomitant sale and leaseback of the MGTF tooling in the next transaction was the absence of compensation for MGRG. This was arguably outwith the scope of the Firm's engagement. If so, the self-interest of the Firm was a driver towards completing the transaction so that the losses of MGRG were sold. The decision on compensation for MGRG was arguably not a subject for their advice, and in that case would therefore not be influenced by their self-interest.

Sanctions - grounds of appeal

59 As I am giving leave to appeal in respect of part of the Notice of Appeal, the Appeal Tribunal will be entitled to deal with the sanctions imposed by the Tribunal in accordance with paragraph 10(12)(i) of the Scheme (July 2013 version) if the appeal succeeds. I therefore express no opinion on the question whether the sanctions imposed by the Tribunal were arguably "manifestly unreasonable" in the light of their findings.

Richard de Lacy QC

15 November 2013