

INDEPENDENT NEWS AND MEDIA PLC

Inspection

pursuant to

Section 748, Companies Act 2014

REPORT

by

SEAN GILLANE SC and RICHARD FLECK CBE

VOLUME 2

JULY 2024

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CHAPTER 7 – THE DATA INTERROGATION

A. The Order

1. Under the terms of the Order, we have been appointed to:

‘investigate and report on the affairs of the company in particular,

- (a) *the accessing by third parties (including but not limited to Trusted Data Solutions UK Limited, Trusted Data Solutions LLC, DMZ IT Limited, Specialist Security Services Limited, Reconnaissance Group Limited, Resilient Defence Limited, John Henry, Derek Mizak, Keith Duggan, Shane Henry, Robert Breen and Ron Cole) from October 2014 or thereabouts, of the Company's information technology systems and the collection, extraction and/or processing of data held therein (referred to hereinafter as the "Data Interrogation"), to include:*
 - (i) *the facts of and circumstances concerning the Data Interrogation;*
 - (ii) *the reasons for and the purposes of the Data Interrogation;*
 - (iii) *the knowledge of the Company's directors (the "Directors") of the Data Interrogation;*
 - (iv) *the results of the Data Interrogation;*
 - (v) *payment for the Data Interrogation;*
 - (vi) *the persons for whose benefit the Data Interrogation was conducted;*
and
 - (vii) *the adequacy of the Directors' response to notification of the Data Interrogation, including their investigation of the same and engagement with the Data Protection Commissioner.*
- (h) *whether any documents (including passwords to password-protected documents) falling within the parameters of directions given to the Chairman, Derek Mizak and/or DMZ IT Limited by the Director of*

Corporate Enforcement (the "Director") under sections 780 and/or 784 of the Act were not furnished to the Director as required and, if so:

- (i) the identification of the documents concerned;*
- (ii) the relevant circumstances; and*
- (iii) who was responsible for such documents not being furnished.*

and

- (i) Whether, arising out of the foregoing or any other matters identified by the Inspectors, there have been any breaches of:*
- (iii) The Data Protection Acts, 1988 to 2003 (as amended).'*

B. The Facts and Evidence relating to the Data Interrogation

Introduction

2. As the Data Interrogation is said to have arisen out of a cost cutting initiative, “*Project Quantum*”, and a concern that the legal costs payable by INM were unnecessarily high, it is necessary to begin by setting out the background to Project Quantum, and the internal investigations carried out by INM.

The contract for the provision of legal services by Simon McAleese, Solicitors to INM

3. In August 2002, Mr Simon McAleese, solicitor (as he then was) left Matheson Ormsby Prentice to set up his own firm, initially called ‘McAleese & Co, Solicitors’ – but later renamed ‘Simon McAleese, Solicitors’.
4. On 27 August 2002, Mr McAleese entered into arrangements to provide legal services to Independent Newspapers (Ireland) Limited for a four-year period. There were two elements to the arrangements:
 - Under the ‘Basic Contract’, McAleese & Co were to provide legal services for three titles owned by INM – “*Irish Independent*”, “*Evening Herald*” and “*Sunday Independent*”.
 - Under the ‘Supplementary Contract’, McAleese & Co took over certain other matters from Matheson Ormsby Prentice.

The contract contained termination provisions giving McAleese & Co the right to terminate the contract on six months’ notice (without cause) and INM the right to terminate the contract on three months’ notice if the service fell below the appropriate professional standard.

5. The Basic Contract was renewed on 15 September 2006 for five years to August 2011, the annual fee being increased by €150,000, with an annual increase in line with the Consumer Price Index.
6. In June 2009, recognising the economic crisis affecting INM’s business, Mr McAleese agreed to reduce the fee payable under the contract with INM by 10%.

7. On 15 December 2010, in anticipation of the expiry of the contract in August 2011, Mr McAleese sent to Mr Webb, then Chief Executive Officer of INM, a copy of the 2002 Contract and a further copy marked up (in manuscript) showing the amendments he proposed. Those amendments included:
- A contract period of 5 years commencing on 1 January 2011.
 - A fixed fee for the duration of the contract.
 - The deletion of all references to the Supplementary Contract.
 - The deletion of the existing termination clauses.
8. On 6 January 2011, Mr Denieffe sent an email to Mr Webb, then CEO of INM, suggesting that the draft contract should be amended to:
- Reinstate the termination clauses that had been deleted.
 - Provide that the work to be undertaken should include handling complaints to the Press Ombudsman.
 - Include six monthly performance reviews.

He then prepared an amended contract to reflect these points.

9. On 11 January 2011, following internal discussions, Mr Denieffe again revised the draft contract to remove the termination provision for cause and to provide for either party to terminate the contract without cause having given six months written notice.
10. On 13 January 2011, Mr Webb sent an email to Mr Denieffe asking him not to send the revised draft to Mr McAleese until he, Mr Webb, had reverted.

11. On 26 January 2011, Mr Webb sent an email to Mr McAleese saying:

Simon,

I need you to do up a new clean contract, following the last one. Please amend to include:

- *Term 5 years*
- *Contract covers Press Ombudsman*
- *No day limit on High court hearings*
- *Strict performance clause*
- *Price as advised on your last draft.*

Thanks

Joe'

12. Mr McAleese sent a revised draft contract to Mr Webb on 4 February 2011. A revised contract, incorporating the points listed in Mr Webb's email, was entered into on 4 March 2011.
13. Under the revised contract, Simon McAleese, Solicitors were retained by INM to provide legal services for five years from 1 March 2011 for an agreed annual fee. The contract provided for termination of the contract by INM if the firm failed to provide the services contracted for. The contract contained no provision for termination without cause.

Project Quantum and Simon McAleese, Solicitors

14. In May 2014, Mr Crowley resigned and Mr Buckley stepped into the role of Executive Chairman.

15. A sub-committee was formed, comprising Mr Buckley, Mr T. Buckley, Mr Marshall and Ms Mullane, to assist in the management of the company until a new chief executive was appointed.
16. The sub-committee generally met on a weekly basis. The agenda for these meetings included a regular report on a cost reduction programme known as 'Project Quantum', which had been set up in 2013 to target savings of €20 million across the various business units and departments.
17. In early 2014, INM had identified the provision of legal services as an area where an enhanced service could be provided and savings achieved.
18. Mr Marshall, a non-executive director with global publishing experience and expertise, was concerned at the level of the legal costs incurred by INM and urged the sub-committee to investigate this area. In particular, he thought that INM should try to reduce the costs it incurred in relation to defamation proceedings by improving the way libel risk was assessed and then handled. This would involve, first, improving the arrangements by which reports and articles that carried a risk of being the subject of defamation proceedings were identified and reviewed (by ensuring that independent legal advice was immediately available on site). This was a view shared by Mr Denieffe, Mr O'Kennedy, Mr Rae and Mr Buckley. Secondly, Mr Marshall thought it was important to ensure that the defence of any subsequent defamation proceedings was handled independently from such pre-publication work.
19. In June 2014, Bridget Reidy, Group Procurement Director, sent an email to Mr McAleese in which she explained that INM was formally approaching suppliers of legal services *"to fully understand the current service they provide and to look at the competitiveness of all arrangements"* and said that she wanted *"to have an initial open discussion where I can get a full understanding of the present agreement"* with INM.
20. Having pointed out that INM was contractually committed to instruct his firm until August 2016 on the terms set out in the March 2011 contract, Mr McAleese said that he was willing to discuss revisions to the way in which legal services were provided together with consequential changes to the terms of the existing contract. In the event, the practical implications of providing advice through lawyers based at INM's premises combined with INM's unwillingness to revise the terms on which it should be provided meant that no revisions to the March 2011 contract were agreed.

21. The initial McAleese contract had been negotiated by the previous management of INM. In the course of his review of the contract, Mr Buckley noted that the contract did not provide for termination of the contract without cause, as had been proposed by Mr Denieffe. When it became apparent that the email from Mr Webb to Mr McAleese dated 26 January 2011 could not be found, Mr Buckley became concerned that the contract might have been a special arrangement for Mr McAleese because he had assisted Mr O'Reilly in relation to a personal matter (as was rumoured within INM at that time).

The investigations undertaken by INM

22. In July 2014, Mr Buckley obtained legal advice on the enforceability of the McAleese contract.
23. On 29 July 2014, Mr Buckley asked Mr Doorly, then INM's company secretary, to obtain copies of correspondence, emails, and internal memoranda concerning the contract entered into in 2011. He also asked a number of questions relating to the negotiation of the contract.
24. Mr Doorly believes he also telephoned Mr McAleese who explained that the extension of the contract to 5 years was to reflect the commitment he was making to INM in terms of office facilities and staff costs.
25. On 31 July 2014, Mr Doorly provided Mr Buckley with a copy of the McAleese contract and related correspondence and screen shots from the mailboxes of Mr O'Reilly and Mr Donagher. He noted that the contract had been negotiated and approved by Mr Webb, with input from Mr Denieffe and Mr O'Kennedy, and that INM had not received separate legal advice. The documents he had located included an email that referred to a quote obtained from Kieran Kelly, a solicitor with expertise in the same area, which was comparable to the fee payable to Simon McAleese, Solicitors.
26. On 12 August 2014, Mr Buckley asked Mr Doorly a number of questions, focussing on the changes to the termination and notice provisions.
27. The email trail from mid-January to early February 2011, covering the latter stages of the renegotiation of the retainer, was incomplete. In particular it did not include the email dated 26 January 2011 from Mr Webb to Mr McAleese (see paragraph 11 above)

which Mr Buckley thought might explain why certain proposed termination provisions had been removed when the contract was finalised. Mr Buckley therefore asked Mr Doorly to take steps to locate a copy of that email.

28. With a view to locating any missing emails, Mr Doorly arranged for Mr McCarthy to carry out a search of INM's records. Mr Doorly gave Mr McCarthy specific criteria including the dates when communications took place and the names of particular individuals involved in the contract – Mr Webb, Mr Carlyle, Mr Denieffe and Mr O'Reilly. Mr McCarthy searched the email accounts of the individuals involved, but he was unable to find the email dated 26 January 2011 or any other material of assistance.
29. The exercise took Mr McCarthy a number of hours spread over a number of days and he then reported to Mr Doorly that he had been unable to find the missing email. Mr McCarthy attached screen shots of the mail boxes of those who might have been copied on correspondence relating to the contract.
30. On 21 August 2014, Mr Doorly provided a detailed response to the questions raised in Mr Buckley's email dated 12 August 2014 and highlighted the fact that INM had no right to terminate the contract with Mr McAleese without cause. He also reported that:

'There is no email traffic available on this subject between 13 January 2011 and 3 February 2011. There was no correspondence between Joe Webb and Michael Denieffe or Declan Carlyle. We have other evidence of correspondence between Joe Webb and Simon McAleese being Simon's 4 February reference to Joe Webb's email of 26 January 2011. This email of 26 [January] is not on our system. It has been deleted.'

31. At the end of August 2014, Mr Doorly asked Mr Buckley whether he had everything he needed in order to be able to pursue the investigation into the circumstances in which the McAleese retainer was entered into. Mr Buckley replied:

'Thanks for your assistance on this and hopefully I have everything I need at this stage'

32. Mr Buckley had also asked Mr Denieffe for assistance in locating relevant material – but he was unable to assist. Throughout the period when Mr Buckley was obtaining

information about the circumstances in which the McAleese contract was negotiated, Mr Denieffe and Mr Rae continued to discuss revisions to the retainer with Mr McAleese to find a solution acceptable to both parties.

33. Following a conversation with Mr McAleese on 30 September 2014, Mr Rae reported to Mr Buckley that:

'Simon [was] refusing to budge on providing an on-site service without [INM] first acceding to his request that 'money be on the table'.

'Michael and I concur that there is no logic to this position.'

'We should get advice on how we stand should we require him to provide us with a daily on-site service within the terms of the existing contract.'

34. Against this background, and having taken independent advice, INM recognised that it could not proceed with the proposed re-tender unless it could demonstrate either some impropriety in the circumstances or manner in which the contract had been entered into or that Mr McAleese was in breach of the terms of the contract so as to entitle INM to terminate it.
35. We asked Mr McAleese whether the renewal was on very favourable terms to him because it was a 'sweetheart' deal connected to other services provided by him to the O'Reilly family. He described that suggestion as *'utter nonsense'*.
36. He also told us that no-one from INM approached him and asked for the contract or for the correspondence related to it. Had they done so, he would have provided it without issue. In the course of the Investigation, and as the missing email was never found on INM's system, Mr McAleese provided us with a copy of the email dated 26 January 2011 from Mr Webb to Mr McAleese.
37. Mr Buckley remained suspicious of the disappearance of the 26 January 2011 email and the changes to the termination provisions in the contract (which he regarded as unduly favourable to Mr McAleese). He decided, therefore, to seek external assistance in locating the missing email or other information relating to the contract.

38. Mr Buckley told us that:

Mr Buckley: *I then realised that look, this is much bigger than I thought, the email of 26th January missing, and no other, I thought it a bit unusual, no other communications at all from either 11th or 13th January right through to 4th February in relation to the contract.*

...

Mr Gillane: *Did you discuss any of that with Mr Webb or Mr Denieffe or make direct enquiry of them?*

Mr Buckley: *With Mr Webb? Oh no. I probably discussed it with — I hadn't with Mr Webb. There was no way I was going to have any communication with Mr Webb. Mr Webb had left the company at that stage and as far as I was concerned there was something most unusual going on here. If I asked Mr Webb any questions I felt, even before I got that level of information, that I was to a degree being stonewalled but I persisted in getting the contract and getting what information I could. If I were to approach Mr Webb I think it would have been that here is a really important email missing, I didn't believe he was in any way going to help. By the way I kept, I wanted the number of people knowing about this to an absolute limit because otherwise other things could have gone missing as well that could have helped in terms of the search. If I could add, I felt that when I saw the email of the 13th January, when I saw the hold fire email there, well I certainly came to the conclusion that what was happening then is that Mr Webb was contacting his boss, Mr O'Reilly, to look, Mr Denieffe has this contract, you know, this is a copy of it, there are clauses in it and that Mr O'Reilly insists these clauses be taken out.'*

Mr Buckley: *I decided I hadn't everything and I think I went back to [Mr Doorly] and asked a list of questions about the contract and how it was put together. I asked him is this a commercial contract, was it approved by the Board, it wasn't approved by the Board. He felt it was a commercial contract because he*

was comparing from memory the cost of the contract, which was approximately 650,000, versus what Fanning Kelly would have done it for as I recall providing on site service for 600,000.

...

I was much more interested at that stage, it wasn't so much the cost then, it was the cost initially but I was much more interested in why would an open-ended contract be given to someone for a five-year period. That is what I was much more interested in.

Mr Gillane: *Your main focus was the lack of a termination clause without cause?*

Mr Buckley: *Exactly.*

Mr Gillane: *There is a termination clause in the contract but not one of the type you describe.*

Mr Buckley: *Exactly, there is.*

Mr Gillane: *Did you discuss or consider approaching Mr McAleese for some details in relation to the background to the contract?*

Mr Buckley: *I didn't know, I didn't approach him.*

Mr Gillane: *Was there a reason for that, would it not have been easy or relatively easy to get details from your own solicitor?*

Mr Buckley: *In actual fact I don't think I ever met Mr McAleese, I don't think I would know him if I saw him. I felt at that stage there was something wrong going on. Meeting Mr McAleese wasn't going to help me. Meeting Mr Webb wasn't going to help me. Contacting Mr O'Reilly certainly wasn't going to help me.*

Mr Gillane: *If that is your view –*

Mr Buckley: *It is.*

Mr Gillane: *Well and good if that was your view but there any discussion with Mr. Doorly to the effect to demand from our solicitor details about the arrangement that was entered into?*

Mr Buckley: *Well Mr. Rae from recollection had approached Mr. McAleese in relation to him providing on site service and providing service for online content and he said yeah, I am prepared to provide those services but on the basis that I get additional money.*

Mr Gillane: *I understand. What I am asking you is slightly different. Was there any discussion with Mr. Doorly or Mr. Rae or whoever, look, go to Mr. McAleese, he is INM's solicitor and require from him the detail about this was...*

Mr Buckley: *No, I didn't do that and I would have thought there was absolutely no point in doing it because whatever was happening at that stage, you know, was pretty serious and we weren't going to get anything from him and that was it. If you look at it, it is most unusual that no matter what was done, you know, the IT people in INM would be pretty familiar with this area, I am not an IT person at all. They weren't able to find the email and there was nothing else, as you mentioned, it was a kind of a total blackout in that area. Now the more questions I was asking of people I felt the more blackout there possibly could be. Even to get to that stage, I was finding, you know, quite a number of difficulties along the way.'*

Mr Buckley then explained:

'[I] decided then that, look, this requires to bring in somebody else. There was an email of the 26th, it is gone. Obviously, some expert [has] done it, it couldn't be found. I was being told that it couldn't be found. I thought well, you know, maybe it can be found, okay. So, I got in contact with John Henry to know would he make contact with Mr Mizak who had been in INM the previous year, 2013, because the then Chief Executive and myself were anxious to know could

we get ISO accreditation in the IT area and it was an absolute, total mess. He came back and said there is absolutely no way with the place in the disarray that it is in, there is no way that you are going to get ISO accreditation of any sort.'

Mr Buckley involves Mr Mizak and DMZ IT

39. Mr Buckley, both personally and in relation to his various interests including The Haven Project in Haiti, had a long-standing relationship with Mr Henry, who provided personal and property security and logistics services through his company, Specialist Security Services Limited.
40. In April 2013, Mr Henry introduced Mr Buckley to Mr Derek Mizak and his company, DMZ IT in the following circumstances:
 - Mr Buckley asked Mr Mizak to conduct an evaluation of the Information Technology (IT) systems at INM for the purpose of a possible ISO 270001 certification process.
 - Mr Mizak attended at the office of INM in April/May 2013 where he met with Mr Wilde and his staff and reviewed the INM IT systems and system architecture and the IT procedures.
 - In early June 2013, Mr Mizak reported to Mr Buckley that INM was not at a stage where it could reasonably expect ISO certification and that instead a number of significant steps in relation to IT management and governance would need to be taken and procedures implemented by INM prior to applying for ISO certification.
 - One of the issues identified was that a significant number of emails, which potentially contained proprietary INM information and sensitive and possibly personal information, had been removed from the system and sent to private email accounts.
 - Having been asked to investigate the circumstances in which emails had been sent to private email accounts, Mr Mizak reported to Mr Buckley and Mr Crowley that the largest and most identifiable instance of sending emails to the private external account of a user of the INM IT system was

from a named senior executive. He pointed out that it would be relatively straightforward for the INM IT Department to locate the emails concerned and any other emails on the INM IT system.

Mr Buckley and Mr Crowley asked Mr Mizak to visit INM, and to meet with Mr Wilde and to print out the emails that had previously been sent to private external email accounts. Mr Mizak then attended the offices of INM and he and Mr Wilde printed off a large volume of emails that had apparently been sent to private external email accounts.

41. Mr Wilde also recalled these events.

Mr Wilde: [Mr Mizak] was brought in by Vincent Crowley and Leslie Buckley to search through, to assist us to search through some files on the system regarding Gavin O'Reilly and Karl Brophy.

Mr Gillane: Okay. And did you have any role in relation to that in 2013?

Mr Wilde: Yes, I did, yes. I assisted on that and I printed out all the files, printed them out in hard copy.

...

On the instruction of Vincent Crowley and I left them up in his office.

Mr Gillane: And did you know what that related to?

Mr Wilde: I'm not quite sure what it was related to. I don't know. You see, I would be just told, I wouldn't be given the information.

Mr Gillane: Sure.

Mr Wilde: And nor would I want to know to be quite honest with you because it's not my business. My business is providing infrastructure, the nuts and bolts that they can put their data onto. What they put in there or what they are looking for is none of my concern.

Mr Gillane: All right, okay. Just in respect of that 2013 bit of work, when you say files, can you explain what that?

Mr Wilde: E-mails.

...

Mr Gillane: So you printed off e-mails in respect of both of those individuals?

Mr Wilde: Both of those individuals, yeah.

Mr Gillane: And Mr. Mizak helped you in relation to that?

Mr Wilde: Yes, because he was an expert on Backup Exec. Myself, Ronan McCarthy -- I printed them out from my office onto the printer and they stayed within the building. Didn't look at the content, put them in a box, took a photocopier box and brought them upstairs, left them with Vincent's secretary in a sealed box. So that was my first time I met Mr. Mizak.'

42. Beginning in or around June 2016, DMZ IT also provided IT security services to Mr O'Brien/Blaydon Limited.
43. Given his knowledge of Mr Mizak's IT expertise, Mr Buckley asked Mr Henry to arrange for Mr Mizak to meet him on 3 October 2014. At that meeting, Mr Buckley told Mr Mizak that he wanted to find any relevant documents or emails relating to the McAleese contract, including the email from Mr Webb to Mr McAleese dated 26 January 2011.
44. Mr Buckley also called Mr Wilde and asked him to join him at a meeting with Mr Mizak later on the same day.
45. When Mr Wilde joined the meeting with Mr Buckley and Mr Mizak, Mr Buckley explained that he wanted Mr Wilde to give Mr Mizak every assistance in his efforts to find the email of 26 January 2011, or any other emails related to the circumstances in which the contract with Simon McAleese had been finalised.

46. Mr Buckley gave Mr Mizak the names of those he thought might be relevant – Mr O'Reilly, Mr Webb and Mr McAleese. He told us that he *'could have mentioned Mr Donagher'*.
47. When Mr Buckley gave these instructions, he was Executive Chairman of INM and both Mr Wilde and Mr Mizak understood him to be doing so in that capacity.
48. Mr Buckley did not advise the INM Board that he had engaged Mr Mizak for this purpose. He also told Mr Wilde that there was no need for him to tell Mr Pitt about the search being undertaken by Mr Mizak at that time.
49. Both Mr Wilde and Mr Buckley gave evidence as to their recollection about their conversation as to whether Mr Wilde should tell Mr Pitt what was happening.

- Mr Wilde told us:

'Because I had never had a request before in my life from anyone from the board or anyone, it would never have come to me. Because what would happen is, if there was any sort of request like that it always came from someone internally like the CEO, the HR director or whatever for any sort of -- and I felt uncomfortable with this happening from the thing. So I said to him, I said 'listen, Robert should be aware of this', words to that effect. 'Oh', he said, 'no, he said, don't be troubling Robert, he doesn't need to know about this, he's only starting in the company and he's going to have to know. So ... I said fair enough.'

In a subsequent witness statement, Mr Wilde confirmed that he understood that on 3 October 2014, Mr Buckley was acting as Chairman and CEO.

- Mr Buckley told us:

Mr Gillane: Did you discuss with Mr. Wilde whether or not management or Mr. Pitt should now be brought into the loop in relation to what was being done?

Mr Buckley: *I don't believe I did. I have read in some affidavit whereby I seemingly said to Mr. Wilde, I have some recollection of it, but whether it was at that meeting of the 3rd October or whether it was at a later stage, but I can't recall ever contacting Mr. Wilde, that I said to Mr Wilde, look, there is no need to involve Mr Pitt. He is new into the business, to try and get through all the history of this is going to be difficult, he has a lot on his plate and that is it.'*

Mr Buckley: *... my recollection is, look, here is a new guy into the company, I don't want to be ... I don't want him getting involved in all this because he's probably going to be asking lots of questions of lots of people and the more questions the more people will start talking about it and maybe more cover up will happen. For various reasons I just didn't want him to be involved in it and he had a hell of a lot more to be involved in.'*

50. Mr Wilde briefed Mr McCarthy and instructed him to provide any assistance that Mr Mizak might need.
51. Mr Wilde told us that a management request for a document search was not unusual and could occur for a number of reasons, for example to facilitate compliance with discovery orders in legal proceedings, for the purpose of HR investigations or to respond to queries in relation to particular news stories. He told us that Mr Crowley had given directions in 2013 as to how such data searches were to be undertaken.

DMZ IT's search of INM's data

52. Mr Mizak started work at INM's offices at Talbot Street on 8 October 2014. Mr Wilde met with Mr Mizak and discussed the access that Mr Mizak would require to carry out his review of INM's back-up tapes.

53. Mr Mizak told the Data Protection Commission that he asked Mr Wilde and Mr McCarthy:

'for the names of the INM data custodians which [Mr Wilde] and [Mr McCarthy] believed may be relevant and in response they mentioned in general terms board directors; senior executives; managers; legal professionals etc. [Mr Wilde] gave [Mr Mizak] a few names and mailbox addresses on the INM IT system that the INM IT Department had previously examined in the search they had undertaken previously [in 2014]. These names were Joe Webb; Mandy Scott; Karl Brophy and Gavin O Reilly. No additional names were provided to DM.'

54. Mr Wilde's recollection of whether he had given any names to Mr Mizak was unclear. He told us:

Mr Wilde: *I think, and I can't recall this, but I would -- I think the name, I think Joe Webb and, who else, maybe Michael Denieffe. I'm not quite sure because it's been such a long time ago.'*

Mr Gillane: *Do you have a recall of giving him those names [Mandy Scott, Karl Brophy and Gavin O'Reilly] or would you have done that?*

Mr Wilde: *No, I wouldn't have given them but probably would have been aware, yes, they would have had to search through that stuff as well. Because obviously they have part of that. They were there, I think, before or when the thing may have been signed. But again I'm only surmising on this so I can't give you a definite on that.*

Mr Gillane: *Okay. But you have no recall of saying 'look, here are four relevant names to get started?'*

Mr Wilde: *Oh, no. Sure why would I? I have no interest in what they were looking for.'*

55. Mr McCarthy told us:

Mr Gillane: *Were you involved in briefing Mr. Mizak at all in relation to what it was that was to be looked for?*

Mr McCarthy: *No.*

Mr Gillane: *Did you ever sit down and have a discussion with him?*

Mr McCarthy: *No I never briefed Derek Mizak. I know directly who briefed Derek Mizak, it is I have to assume it is the Chairman. He referred to calling the Chairman on numerous occasions seeking guidance. In my company as well he referred to that, looking for a guidance and direction in relation to the next steps.*

He would go and make a phone call and come back and I wasn't subject to those discussions but he was obviously being instructed by somebody in relation to what tasks needed to be fulfilled.

Mr Gillane: *Just to be clear about that, do I understand it correctly then that there wasn't an occasion where you were tasked with sitting down with him to say who Simon McAleese was, who Mr. Webb was, who Mr. Carlisle was, who Mr. Denieffe was, briefing him in that sense?*

Mr McCarthy: *No, never at any stage did I have to brief him on that. At no stage did he tell me what his final list of -- he was directing us in relation to the names he was supplied with that he wanted to search.*

...

Mr McCarthy: *He was supplying us with the information relevant to the names of the search criteria that he had to carry out.'*

56. Mr Mizak was provided with an office and access to INM's systems. However, his access to INM's systems was limited by the fact that INM's systems were 'active', in the sense that they were required to support INM's day-to-day activities. An

arrangement was made for all the available tapes to be brought to Talbot Street from INM's other premises.

57. Mr Mizak began by establishing how INM's records were maintained, backed-up (using Backup Executive), and when the back-up tapes were overwritten or destroyed. Initially, he needed to identify what was in fact contained on INM's servers by reviewing its tapes and ultimately the back-up tapes. In the course of this exercise, Mr Mizak started to catalogue the tapes in order that he could carry out the required searches. Although INM operated a twelve-month retention policy in relation to back-up tapes, there were back-up tapes in various different locations which might not have been overwritten and so might have contained the 26 January 2011 email from Mr Webb to Mr McAleese.
58. Mr Buckley told us that Mr Henry liaised on his behalf with Mr Mizak.

'I found it difficult, I am not a technical person. Mr Mizak speaks, I am sure technically he is excellent, but I found it difficult to understand his language. I asked, you know, Mr Henry would become what I would call the liaison person. I just said to Mr Henry, look it takes a long time to understand what Mr Mizak is saying. I am probably not the most patient person and look, can he just facilitate and relate back to me what is happening.'

The involvement of TDS

59. Mr Mizak's approach was dependent on time being available to access or restore a tape on the INM system. As that system was in regular use, Mr Mizak's investigations were susceptible to delay.
60. As there was a huge amount of material involved, and given the scale of the exercise and the potential for delay, Mr Mizak suggested to Mr Wilde that a specialist data recovery company be engaged.
61. Mr Henry told Mr Buckley that Mr Mizak had suggested three possible courses of action – Mr Mizak could continue working at INM's offices; or equipment could be brought in to enable searches to be done on site (rather than rely on access to the INM system); or the tapes could be sent to a location where, with non-portable high-powered equipment it would be possible to catalogue the large volume of material in a short period of time.

62. Mr Mizak identified TDS as a data recovery company with equipment capable of cataloguing the material on the back-up tapes in a short period of time. TDS had facilities in Cardiff, Wales.
63. Mr Buckley authorised Mr Mizak to approach TDS.
64. On 23 October 2014, Mr Ron Cole (TDS UK) arrived in Dublin to assess the position and assist in the search. Mr Cole brought with him a portable library system with software that enabled him to scan, index and review tapes. Mr Cole was in Dublin for five days.
65. While Mr Cole was in Dublin, Mr McCarthy located Mr Joe Webb's mailbox on the INM system. Mr Mizak asked Mr McCarthy to provide Mr Cole with access to that mailbox.
66. It became clear to Mr Cole that it would be a substantial exercise to review and catalogue the tapes. That exercise was made more complex and time-consuming by the fact that the tapes were not stored in one location; they were spread around INM's different locations. The fact that the INM servers overwrote material after one year made reliance on back-up material more important.
67. On 30 October 2014, Mr Henry delivered a sealed envelope to Mr Buckley enclosing information about the three options and their potential cost. Mr Buckley authorised the transfer of the tapes to Cardiff. He did so without consulting Mr Wilde.
68. Mr Wilde was concerned at the implications for INM if all its back-up tapes were to be transferred to TDS. On 21 November 2014, Mr Buckley left a voicemail suggesting that Mr Wilde discuss the arrangements, and his concerns, with Mr Henry, who was to be responsible for the transfer of the tapes to Wales. Mr Wilde asked Mr Henry about the security plan for the storage and transportation of the tapes and asked for written assurance that the tapes would be totally secure. Mr Henry provided a letter of assurance drafted by TDS. Mr Wilde was reassured that the tapes would be secure.
69. We asked Mr Buckley whether he was concerned that the scope of the project, and the associated cost, was increasing and might outweigh the possible benefits. Mr Buckley said that he had no prior contact with or knowledge of TDS and that he relied on Mr Mizak's recommendation. He confirmed that he authorised Mr Mizak to engage TDS.

Mr Gillane: Was there any concern on your part at this point that this is part of a cost reduction exercise and it is starting to escalate a bit in terms of what is being searched for and you might be spending a pound to save a shilling?

Mr Buckley: It actually became bigger in my mind than just the cost reduction exercise. It started off being a very simple cost reduction exercise seeing if we can reduce it. All of a sudden it becomes this big issue of this email not being found, what was happening, were company funds being misused and who else was involved in this process. And are there people within the company that really are still involved in that process.'

70. On 26 November 2014, Mr Mizak sent a Non-Disclosure Agreement to be entered into between INM and DMZ IT to Mr Wilde, who signed it on behalf of INM. Mr Mizak explained that an identical agreement would be entered into between DMZ IT and TDS UK.
71. Mr Henry made the arrangements for the transfer of the tapes to Cardiff. The tapes were listed individually and packed into two pelican cases, which were then locked.
72. On 27 November 2014, the cases were transferred to TDS in Wales. A chain of custody record was created by Mr Mizak.

The work undertaken by TDS

73. TDS's role was to catalogue the material on the back-up tapes that met the criteria identified by Mr Mizak in order to allow him to properly search the content.
74. All the instructions given to TDS emanated from Mr Mizak – although in some instances those instructions were communicated to TDS by John Henry. TDS understood its client to be DMZ IT, acting on behalf of INM.
75. DMZ IT advised the Data Protection Commission that:

'The brief given to TDS by DMZ IT was 1. Receive; copy and assess the possibility of restoration of the INM backup tapes. 2. Restore any items in the mail boxes of M. Scott; J. Webb; K. Brophy; and G. O'Reilly and provide DMZ

IT with a copy of those restored mailboxes on a disc to enable key word/phrases searches to be undertaken by DM/DMZ IT. 3. Return the original back-up tapes to INM. 4. Hold a copy of the INM back-up tapes at TDS pending queries from DMZ IT as part of the Feasibility Study.'

76. The work undertaken by TDS to identify and restore email accounts involved:
- Cataloguing the available tapes. That involved accessing the meta-data on the tape to identify the servers backed up on each particular tape and creating a library which could be used to identify which tapes were required to access the information on a particular server.
 - Restoring the servers for which all the back-up tapes were available, and, in the case of email accounts, identifying the named users (custodians) on such servers.
 - Providing a report that identified all the custodians located and the volume of data related to each custodian.
 - Assembling the material related to the email accounts of the custodians identified by Mr Mizak – Mr O'Reilly, Karl Brophy, Joe Webb and Mandy Scott – duplicating that material and storing it in a separate Personal Storage File (a 'PST').
 - Copying the material in the PST to a separate output device, such as a USB drive or a hard drive. Having been encrypted, the USB drive or hard drive was provided to Mr Mizak in order to allow him to carry out the actual search. The information necessary to access the data was given to Mr Mizak separately.
77. TDS undertook the same process when locating documents and files, save that instead of searching for and restoring email accounts for particular custodians, TDS searched the metadata for a file name allocated to a document or file containing a keyword provided by DMZ IT.
78. TDS was not asked to review or search the email accounts or other files of the custodians identified by Mr Mizak. It was instructed to store such material in a PST and copy it onto a USB drive or hard drive.

79. Mr Clark, told us that, although TDS provided a number of reports (spreadsheets showing the data available for particular names) during 2015,

‘there was only one set of delivered actual PSTs. The rest were just requests of are the users there.’

80. All reports were password protected. As a matter of policy, TDS did not retain passwords once they had been communicated to a client. If a client had difficulty accessing data that TDS had provided or if there was a need to provide the data again, TDS’s policy was to recreate the data, encrypt it and provide it to the client with a new password.
81. During December 2014, TDS UK analysed the tapes that had been transferred to Wales and prepared spreadsheets identifying missing tapes. The identification of the missing tapes was shared with INM. INM’s IT personnel then located all but seven of those missing tapes.
82. On 12 December 2014, Mr Wilde became anxious to secure the return of the tapes. INM needed the tapes so they could be reintroduced into the back-up tape rota. In order to progress the return of the tapes, Mr Wilde asked Mr Buckley to speak to Mr Mizak to secure the return of the tapes.
83. On 18 December, Mr Henry sent a text to Mr Buckley confirming that the tapes had been catalogued.
84. On 29 December 2014, TDS arranged for the return of the tapes to INM. The tapes were delivered to INM on 5 January 2015.

The interrogation of data in 2015

85. Mr Wilde told us that he understood that any data or other material created by TDS had been destroyed following the work undertaken in December 2014 and the return of the tapes to INM. Mr Wilde and Mr McCarthy, therefore, had no knowledge or expectation that INM data would continue to be searched by TDS or Mr Mizak in 2015 – and Mr Mizak did not tell them that such work was continuing.
86. In fact, in order to be able to respond to supplemental requests after it returned the tapes to INM, TDS had copied the tapes provided to it.

87. In early 2015, Mr Henry, at Mr Mizak's request, arranged for a hard drive to be collected from TDS UK and delivered to Mr Mizak. Mr Mizak told us that the data on the hard drive was a reconstruction (to the extent possible from INM's back-up tapes) of the mailboxes of the four custodians – Mr O'Reilly, Karl Brophy, Joe Webb and Mandy Scott.
88. Mr Mizak told us that he continued searching the data on the hard drive provided by TDS in early 2015 before wiping the hard drive clean and destroying it.
89. Mr Buckley was aware that TDS had copied INM's tapes and that Mr Mizak in Dublin had access to the data copied onto the hard drive provided to him by TDS. His knowledge of the extent of the work and what it entailed technically was limited.
90. In order to search the mailboxes on the hard drive, Mr Mizak told us that he developed key words – such as "*barrister*", "*court*", "*defamation*", "*tribunal*" – and, in addition, used open source intelligence (that is information that is available publicly – e.g., in press and other reports or through the internet) to assist in the identification of individual custodians. He explained that the key word search approach and the identification of potential individual custodians using Open Source Intelligence was consistent with best practice in digital forensics and the technical training and qualifications of Mr Mizak.
91. Based on the work he had undertaken in early 2015, Mr Mizak sent lists of names and/or potential custodians to TDS asking TDS to establish whether the name identified had a mailbox on the INM server and, if so, the size of that mailbox. In response, TDS provided a number of reports (spreadsheets showing the data available for particular names). TDS provided the results of searches until November/December 2015.
92. The only report that has been disclosed in the course of the Inspection is a report entitled '*06_Feb_2nd_additional_users_request*'. That report was sent by TDS to Mr Henry on 14 February 2015. Mr Henry arranged for the report to be decrypted and then, on 16 February 2015, provided the document to Mr Mizak. Mr Henry and Mr Mizak told us that they did not provide a copy to Mr Buckley.
93. The report (set out below) identified 19 names (16 of which were described as 'new users targeted').

6 February Request: TARGETING 19 USERS/NAMES - INITIAL ANALYSIS

19 Users Requested, 3 previously targeted. 16 new users targeted

Email Search and Restoration:

Email data matches found for 6 of 16 targets. 71 mailbox extractions. 225 GB (before deduplication)

Email Extraction timeline: We can restore this data in 3 days.

Cost of email processing: We will have this on Monday evening. We first need a count of unique email databases from which we have to extract data.

User File Search and Restoration - "possible" :

NB: Additional searching required across all data. This is slow.

File data matches for 13 of 16 users. 642 MB of data. (before de-duplication)

File restoration timeline: about 10-14 days depending on tape count

Cost of restoration: We will have this estimate on Monday evening. We first need a count of tapes to restore to reach this data.

Requester Name	Number of Databases	Number of Exchanges/Emails	Approximate Size	Comments
Joe Webb		11		Run in first batch
Rory Godson		0		Checked in 1st additional users request
Karl Brophy		10		Run in first batch
Mandy Scott	5Mb	10	60Gb	
Johathan Nielson / Jonathan Nielson	3Mb	0		
Andrew Donoghue	12Mb	0		
Vincent Crowley	22Gb	11	60Gb	
Brendan O Connor	100Mb	16	5Gb	
Sam Smyth	120Mb	14	1Mb	
Donal Buggy	50Mb	10	70Gb	
Geremiah Healy / Jeremiah Healy	1Mb	0		
Jacqui O Brien / Jackie O Brien	0	0		
Mark Kenny	0	0		
Harriet Mansergh	0	0		
Maeve Sheehan	50Mb	0		
Nick Cooper	1Mb	0		
Ann Marie Healy	100Mb	10	30Gb	
josbourne@algoodbody.com	177Mb	0		
Jenny Kilroy	1Mb	0		

94. The individuals identified in the report, collectively referred to as the “19 Persons of Interest”, fell into a number of categories:

○ Employees and officers of INM

- Vincent Crowley Group CEO
- Joe Webb CEO Irish operations
- Donal Buggy CFO
- James Osborne¹ Chairman
- Karl Brophy Director of Corporate Affairs
- Ann Marie Healy Head of Group Treasury
- Andrew Donagher² Company Secretary
- Mandy Scott PA to Mr Gavin O’Reilly

○ Journalists/Broadcasters

- Brendon O’Connor Sunday Independent
- Sam Smyth Irish Independent
- Maeve Sheehan Sunday Independent

○ Moriarty Tribunal into Payments to Politicians and Related Matters

- Jeremiah Healy Senior Counsel to the Inquiry
- Jacqueline O’Brien Junior Counsel to the Inquiry

○ FTI Strategic Communications

- Jonathan Neilan³ Managing Director
- Mark Kenny Managing Director
- Harriet Mansergh Associate
- Jenny Kilroy

¹ This is the person referred to on the TDS Spreadsheet as josborne@algoodbody.com.

² This is the person referred to on the TDS Spreadsheet as Andrew Donoghue.

³ This is the person referred to on the TDS Spreadsheet as Johathan Nielson/Jonathan Nielson.

○ Others

- Nick Cooper Cable & Wireless, General Counsel
- Rory Godson Subsequently, CEO of Powerscourt

The report noted that two of the names had been '*Run in first batch*' and one had been '*Checked in 1st additional users request*'. This indicates that, by February 2015, Mr Mizak had made three separate requests for information on specified individuals. We have been informed that copies of these two other reports are no longer available.

95. Mr Mizak took no action on receipt of the schedule because the scale of additional work that would have been involved in restoring the email accounts could not, in his view, be justified.
96. In December 2015, TDS provided a further password protected report entitled '*Project 141020 Report 30 November 2015*' which related to user files (not email accounts). In a separate email, TDS provided the password for that document. TDS advised Mr Mizak that:

'It was a good while back that you inquired about additional custodian data. It doesn't seem to have been a priority. I assumed the brakes had been applied on your side and it was no longer relevant but as it happened Tom circled back and completed the analysis for you and sent me a report this week. Since Tom has done the work I see no harm in passing it on.'

'The keyword searches on the catalogue returned keyword hits of almost 150GB of file data. In order to get all that data we would have to restore 81 unique tapes.'

We have been informed that a copy of this report is no longer available.

97. Following completion of the project, TDS deleted the work product on its servers and the copy tapes, and destroyed all the records it held in early 2016.

Mr Buckley's awareness of progress in the project to interrogate INM's tapes

98. Between 8 October 2014 and 2 March 2015, numerous text messages passed between Mr Buckley, Mr Henry and Mr Mizak, the content of which related to the Data Interrogation.
99. Many of the texts sent by Mr Henry were sent on behalf of Mr Mizak. This came about because Mr Mizak's command of English in 2014 was in the course of development. Consequently, communication was more effective if Mr Mizak told Mr Henry what he wanted communicated to Mr Buckley and Mr Henry then sent an appropriate text to Mr Buckley (avoiding technical language). Mr Henry was neither an expert in, nor familiar with, technical IT issues. Mr Henry was acting throughout to support Mr Mizak and DMZ IT at their request.
100. Mr Buckley's awareness of the progress being made and developments in the work being undertaken by Mr Mizak and TDS is evidenced in the following exchanges:

- 8 October 2014 – Text exchange – Buckley and Henry

'all ok with Derrick ?'

'All ok and has desk and free access. He will be starting feasibility tomorrow in relation to back-up tapes and retrieval'

'Thanks John and pleased that all ok Leslie'

'Will keep on top of it'

'Thanks John Leslie'

- 9 October 2014 – text message – Henry and Buckley

'Hi Leslie. Would you know who was close to Joe Webb in ..'

- 13 October 2014 – text exchange – Mizak and Henry

'Confidential message re delta: John, I am waiting for backup tapes from CityWest to be delivered here since Wednesday. Strange reasons given why they are not here yet. John Webb mailbox has been migrated to the Microsoft Cloud - I am, asking for access to it since Wednesday - still don't have it. Based on my previous experience it looks to me that those guys are buying time, hoping that we will get tired. Without full cooperation my work is very very slow. If this will not improve by close of business today, we should have a chat with boss and suggest maybe give me another hand/help for this search or possible to talk to main man here.'

'Just looking at JW archive mailbox with mails going back to 1999!!!!!! Yuppie !!!!'

'Will have 39354 jw mails'

'Making some progress. Have solution to get stuff out as well. Got tapes. talk later.'

- 15 October 2014 – text message – Henry (for Mizak) and Buckley

'Hi Leslie. Can you ph when suits for update'

- 23 October 2014 – text exchange – Henry and Buckley

'Eng picked up this morning and in place in D1. There for next 5 days with updates every evening at 2100 hrs. He arrived at 11 this morning and I briefed him at the Airport'

'Thanks John. Any issue pls let me know Leslie'

'Will do'

- 24 October 2014 – text exchange – Buckley and Henry (reply from Mizak)

'Hi John is all ok? Leslie'

'Hi Leslie. All ok and eng working away. He will be on site until next Tues and over the weekend. Specialist equipment was delivered to my office today from UK and brought to Dublin 1. Receiving reports at 21.00 hrs daily.'

'Thanks John. If you need me over weekend give me a call. Leslie'

'Will do Leslie and thanks'

- 28 October 2014 – text message – Henry and Buckley

'Hi Leslie. Would you have 5 minutes. Am off the air from 4 to 5 this evening.'

- 30 October 2014 – text exchange – Henry (for Mizak) and Buckley

'Hi Leslie. Operator returned to Wales. Got Robert in US to send me bill to date. Also I will attach proposal in relation to getting tapes to Wales in order that significant cost reduction can take place. Tapes would be in facility for approx for 7 days before return to Dublin. Head of IT would be told it is to reduce significant cost as Ron would have to be in Dublin for at least 4-6 weeks. We would get new tapes in order that their operation in Dublin would not be affected. Will I get info in sealed envelope to your office to assist your decision for tape removal?'

'Thanks John that would great Leslie'

'ASAP thanks Leslie'

- 12 November 2014 – text exchange – Henry and Buckley

'Hi Leslie. Contact made and issued apologies as was jetlagged and catching up. Absolutely no issue ref items and we agreed receipt of goods. working now to plan movement'

'Thanks John if any problem pls let me know Leslie'

'Will Leslie and thanks'

- 16 November 2014 – text exchange – Buckley and Henry

'Hi John hope process going ok ? Leslie'

'Hi Leslie Yes we are working away and items to be in location tomorrow.'

'Got confirmation that we will be issued with all tapes. Hope all well''

'Hi John that's great and all well here TG Leslie'

- 18 November 2014 – email exchange – Henry and Buckley

'Hi Leslie

Hope all well. Derek sent this email yesterday and no response yet. He is going to resend now. Will keep you posted'

'Thanks John

Derek should pick up the phone in the morning requesting an immediate response as we could be [wasting] time and money

Arrived in Haiti earlier today and John and your guys really looking after me

Kind regards

Leslie'

'Hi Leslie

Sorry you may not have got my text and we got assurances of final amount a short time ago. So full compliance.'

- 20 November 2014 – text message – Henry to Buckley

'Hi Leslie how do you wish this to be handled'

- 24 November 2014 – text exchange – Henry and Buckley

'Hi Leslie all well ref meeting with Gerry and no issue. Will push on Regards jh'

'John that's great Leslie'

- 27 November 2014 – text exchange – Henry and Buckley

'Hi Leslie inter courier in Dublin awaiting to collect items. Derick has issued relative assurance documents to Gerry. I have secured boxes for transportation. Derek on standby to liaise handover at Talbot St'

'All ok 09.30 departure tmw morning'

'Thanks John and well done Leslie'

- 1 December 2014 – text exchange – Henry (for Mizak) and Buckley

'Hi Leslie items in Cardiff'

'Thanks John. Thanks so much Leslie.'

- 11 December 2014 – text message – Henry to Buckley

Hi Leslie could you phone when you get a chance ref project'

- 12 December 2014 – text exchange – Mizak to Henry (for transmission to Buckley)

'John , I know that I don't have any hard evidence for any wrong doing that all of this looks like someone do not want to disclose all of the sources of information we are looking for. It does look like some information could be hidden from me or even sanitised. Again - no hard evidence but based on my previous experience this is how it does look like'

'John, unfortunately we have a problem with the project. Despite assurances given by Gerry I haven't received all tapes. We can't restore some backups because tapes are missing from the sets. Even if we have been able to see those tapes before when on site on top of that we have identified that there must be another backup system in place which Gerry have never told us about before. As of today I have received inventory of additional 78 tapes which I didn't know before they exists. John, this project will not succeed without full cooperation of custodian of the tapes. Unfortunately, at this stage it looks like pulling those tapes piece by piece out of the custodian when we had an agreement that all tapes will be passed over to me'

- 18 December 2014 – text exchange – Henry (for Mizak) and Buckley

'Good morning Leslie. Tapes catalogued in total. As you know there may be requests in the future for more info which will hold up handover to Gerry. we are meeting tmw afternoon....Will you require Derek at meeting to brief on technicalities of possible request for more info? Regards JH'

'Think good to have Derek at meeting Leslie'

'Thanks Leslie. Am conscious of your time. Therefore I requested a document in non IT from the NY company in format to ensure we all understand where we are now and should we have any requests in the future. I have just received this document and can get it to you in person and will arm you for tomorrow's meeting. I will be issuing to D today also. Await your instructions. Regards JH'

'Derek made contact. Letter with Maria'

- 5 January 2015 – text exchange – Henry and Buckley

*'Hi Leslie, we received all items back to D1 and checked/correct.
Handed to Donal'*

'Donal works with Gerry'

101. These communications between October and December 2014 show that Mr Buckley was aware of each step of the examination of the back-up tapes being undertaken by Mr Mizak and TDS:

- The discovery of and subsequent provision of access to Mr Webb's email account with emails going back to 1999. (13 October 2014).
- The arrival in Dublin of Mr Cole of TDS and the provision of reports by Mr Cole to Mr Mizak. (23/24 October 2014).
- The intention to develop a proposal for the tapes to be transferred to Wales so that the search could be completed more quickly and at a lower cost. (30 October 2014).
- Confirmation that all tapes would be made available. (18 November 2014).
- Mr Wilde's concerns re security of tapes whilst en route to and at TDS had been addressed. (24 November 2014).
- The tapes had been couriered to TDS in Wales. (1 December 2014).
- The discovery that certain tapes were missing. (12 December 2014).
- Completion of the cataloguing of the tapes. (18 December 2014).
- Confirmation of return of the tapes to INM. (5 January 2015).

102. From January 2015, the focus turned to the output from the examination of the back-up tapes.

- 6 January 2015 – text message – Buckley to Henry

'Thanks John any good info ? Leslie'

- 7 January 2015 – text exchange – Buckley to Henry (for Mizak)

'John when will we know outcome of the exercise ? Leslie'

'Hi Leslie I have conference call at 1400 hrs today with Wales/US persons. We will discuss the best method to extract info from the library we have. If I could talk to you after this for briefing purposes'

'Thanks John. Pls give me a call later Leslie'

'No problem Leslie'

'Hi Leslie. Let me know when suits you to talk ref project.'

- 27 February 2015 – text message – Henry to Buckley

'Hi Leslie Do you have a few minutes for a chat re info on project jh'

- 2 March 2015 – text exchange – Henry (for Mizak) to Buckley

'Hi Leslie could we discuss Webb. May have something. Talk face to face rather than phone'

'Hi John how about 1.45 pm tomorrow ? Leslie'

'That's fine Leslie, Thanks'

Mr Pitt's conversation with Mr Wilde in June 2015

103. Mr Pitt became aware that the data held by INM had been searched in the following way:

- In June 2015, the Phoenix magazine published an article that quoted from a confidential, internal INM email sent by Mr Pitt's assistant, Lorraine Farrell, asking a number of people to review an autobiography of Richard Desmond, a co-shareholder with INM in the Star newspaper in the UK. The Phoenix article asserted that the email had set out what the review should say at the behest of Mr Pitt.
- Concerned at the disclosure of this email, Mr Pitt asked Mr Buckley for advice as to how he might establish the circumstances in which the email had been disclosed.
- Mr Buckley referred Mr Pitt to Mr Mizak and suggested that Mr Pitt speak to Mr Wilde, who had previously worked with Mr Mizak.
- Mr Pitt went to see Mr Wilde, who explained that, in 2014, on the instructions of Mr Buckley, Mr Mizak had arranged for INM data to be taken overseas to be searched for emails and other material.

104. In his response to an ODCE Statutory Requirement on 15 August 2017, Mr Pitt set out his recollection of the information given to him by Mr Wilde, which included that:

- *'The data of interest was regarding former directors, employees and possibly legal advisers';*
- *'The intent was to find information on those persons that would benefit a third party';* and
- The information *'was not to be shared with [him], the CEO.'*

105. In his responses to ODCE Statutory Requirements, Mr Wilde told the ODCE:

- It was his understanding that Mr Mizak was being engaged by Mr Buckley on behalf of INM to assist INM in the investigation of a contract.
- The records or emails related to the details of a contract that needed to be looked into (and, subsequently, that the contract was between INM and Simon McAleese, Solicitors).
- Mr Buckley had not intended that the information should never be shared with Mr Pitt – but that, as Mr Pitt had only just joined INM, he should not be concerned with this matter.

In those responses, Mr Wilde did not suggest that the information was being obtained for the benefit of a third party.

106. Whilst the information given to the ODCE by Mr Pitt significantly influenced the ODCE's decision to seek the appointment of Inspectors, we have not had regard to that information, or to any views or conclusions he may have expressed, in our consideration of the issues on which we are required to report in relation to the Data Interrogation. The conflict in the information provided by Mr Pitt and Mr Wilde in relation to the Data Interrogation is considered in Chapter 11, paragraph 105 to 133.

107. At the conclusion of this conversation, Mr Pitt instructed Mr Wilde that in future, he should operate a 'triple-lock' procedure for getting approval for searches of INM's data.

108. Mr Pitt then arranged for Mr Mizak to investigate the circumstances in which the Phoenix had obtained a copy of the confidential, internal email. Mr Mizak carried out investigations and could find no evidence that INM's systems had been hacked or how the email had leaked.

109. So far as Mr Pitt and Mr Wilde were aware, there were no further developments until TDS submitted its invoice in December 2015.

TDS Invoice

110. On 24 November 2015, Mr Breen sent an email to Mr Mizak with a draft invoice in respect of the work that TDS had done analysing the INM tapes. On 30 November 2015, he followed up and asked Mr Henry to whom it should be addressed. Mr Henry replied that the invoice should be sent to Mr Preston at INM.
111. On 7 December 2015, Ms Richards, TDS UK, sent an invoice for €46,260 to Mr Doorly. She also sent a copy of the invoice to Mr Preston on 18 December 2015.
112. Mr Preston sent an email to Mr Wilde and Mr McCarthy forwarding the invoice asking – *‘Do you approve this payment - think it is IT related?’*
113. Mr Wilde replied *‘This invoice is not for INM’*. Subsequently, in August 2017, in response to an ODCE statutory requirement, Mr Wilde explained that he had meant that the invoice should not be INM IT’s responsibility as no purchase order had been issued and no provision made for the expense in his department’s budget. Mr McCarthy confirmed to us that that was the reason why the IT department rejected responsibility for the TDS invoice.
114. On the basis of Mr Wilde’s response, Mr Preston decided not to pay the invoice. He reported the position to Mr Pitt in case TDS escalated to him the failure to pay the invoice.
115. Mr Pitt spoke to Mr Wilde who explained that the invoice related to the work that he had told Mr Pitt about in June 2015. Mr Pitt agreed with Mr Wilde’s view that INM should not pay the invoice – there was no purchase order, no documentation evidencing the instruction to do the work and no report or other output provided to INM.
116. Mr Pitt therefore told Mr Buckley that INM had received the invoice from TDS and asked what it related to. Mr Buckley told us:

‘I don’t recall that he asked me what it’s about. And he said “Look, what’s that about?” and I said “Oh, that’s, you know, that’s a company, TDS”, okay, and I said “Look, maybe you should just leave that with me.” Now, I also may have said, but I can’t recall, but I checked with my PA -- I may have said to him “Look, contact John Henry about that and he’ll be able to inform you.” I actually

can't recall that, but when I checked with my PA, he did either e-mail or contact her for John Henry's phone number, right.'

Mr Pitt told us that he spoke to Mr Henry who asked that the invoice be sent to him.

117. Mr Buckley told us that the amount of the invoice surprised him:

'I believe that I got an invoice from Mr Pitt after we [finished] a Management meeting, okay, and I was surprised - I think my surprise was that, oh, this was something a year later. ... And I was also surprised at the level of it and, you know, to be quite honest, I was somewhat embarrassed because here was a 46,000 bill, okay, that, you know, we didn't get anything for. I started off as a cost reduction exercise and, here, it's going to cost money.'

118. Mr Buckley discussed the invoice with Mr O'Brien and told him that he would be embarrassed to ask INM to pay the TDS invoice and they agreed that it would be appropriate for Island Capital to pay the invoice.

119. Mr Buckley told us:

'... look, I felt somewhat embarrassed. Here's an invoice for 46,000 that I had set out to try and save money for the company originally or else see whether funds were misused, neither of which I could prove, all right. So I decided to let's look at it. So I brought the email back. I contacted Mr O'Brien by phone and I said "Look Denis, ...". I think my words were "Denis, there's an invoice after coming in to INM. It relates to this email we were looking for." And he asked me some questions about that, I think, because he couldn't recall. And I refreshed his memory and I said "Do you know what - as you know - I find Robert Pitt a fairly difficult guy to deal with and we have a fairly strained relationship - I'd now be embarrassed going back to try to get him to get INM to pay the bill." And Denis' approach would be "Oh, okay, Leslie, I can kind of understand that. I'm a 30% shareholder in it. Let's get Island Capital/Blaydon ..." I'm sure he wouldn't have even mentioned Blaydon "... to pay for it, and that's how it happened.'

Mr O'Brien told us:

'Leslie rang me one morning, I don't know where I was, and said he got a bill, an IT bill, and he said "Look I'm in the middle of cost-cutting here. We've run up a bill that I didn't realise would be coming up at a level." It was a very high bill. He didn't expect it. And he said "Look, I'm trying to cut costs at INM and I'm a bit embarrassed by this." Like Leslie wouldn't know anything about IT and the cost of IT, you know, people. And he said to me would I mind if he got Island Capital to pay that? I said: "Look, you know, no problem. I said that's fine." And that was the end of it.'

120. On 15 January 2016, Mr Buckley gave the invoice to Mr Fagan. Mr Buckley signed the invoice to evidence his approval for its payment.
121. On 18 January 2016, Mr Fagan gave instructions for the amount due to be paid by Blaydon Limited as it was not a cost for Island Capital.
122. Between 28 January and 16 February 2016, the INM accounts department investigated whether the TDS invoice was still outstanding in order to establish the VAT position and, if not, whether it had been withdrawn or discharged by someone else. TDS confirmed that the invoice had been discharged by Blaydon Limited.
123. Mr Preston became aware that Blaydon Limited was a Denis O'Brien company after Mr Harton made enquiries about that company in August 2017, at Mr Preston's request, following service of statutory requirements by the ODCE.

DMZ IT Invoice

124. On 15 February 2016, having learned that TDS had been paid, Mr Mizak arranged for his wife, Ela Mizak, to ask Maria Daly, Mr Buckley's Executive Assistant, to whom DMZ IT should address its invoice.
125. Mr Buckley told Ms Daly that the invoice should be addressed to Island Capital. Ms Daly passed this information on to Mrs Mizak. DMZ IT sent its invoice to Ms Daly.
126. On 18 February 2016, Mr Buckley wrote on the invoice – *'Brian as discussed, Leslie'* – signed the invoice and left it in Mr Fagan's office.

127. Mr Fagan gave instructions for the amount due to be paid by Blaydon Limited on 23 February 2016.

Mr O'Brien's awareness of the Data Interrogation

128. Mr Buckley told us that, in about October 2014, he told Mr O'Brien that INM was:

'having issues in relation to a Simon McAleese contract, right, that there was an email of 26th January that couldn't be found, right. We had a discussion about it - and I think I mentioned to him, I'm sure I mentioned to him that I was getting Mr Mizak to look at it, right.'

129. Subsequently, on 28 January 2015, Mr O'Brien sent an email to Mr Buckley urging him to arrange that INM's legal work was transferred to Mr Meagher:

'Dear Leslie. I appreciate that you have been trying to help Paul Meagher and get business from INM and we discussed this last week. Would it not be possible for you to mention to Robert Pitt that there were protracted negotiations between Stephen Rae and Paul over many months and a deal was done on a handshake. Perhaps Robert needs direction as he has bigger fish to fry than reneging on an existing deal with a supplier. Let me know what you think, Denis'

Mr Buckley replied:

'I have done that yesterday and told Robert confidentially that there was a handshake between Stephen and Paul which must be honoured.

The difficulty is that Paul can't commence until early 2016 as Simon McAleese contract does not finish until then. Unfortunately there is no paper trail etc. highlighting our issues with him and consequently we have no basis to break his contract and if we did it would cost us circa 1m euro - I even got a 2nd opinion on this.'

130. Mr Buckley also confirmed that Mr O'Brien was probably aware of the work being undertaken by TDS in Cardiff.

Mr Gillane: Am I right in saying that the fact that TDS were doing work in Cardiff at the end of 2014/into 2015 was something that Mr O'Brien was aware of at that stage long before the bill arrived? In other words, he was aware of the exercise that you were engaged in in terms of....

Mr Buckley: Yeah, he probably was, yeah, yeah. Like, I can't recall, but he probably was.'

131. Mr O'Brien told us that:

- He first met Mr J. Henry over 20 years ago when, following intrusions at his home, it became clear that he and his family needed security. Over the intervening period, Mr Henry has provided security to Mr O'Brien's business interests in certain overseas locations. He explained that Mr Henry's business, Specialist Security Services, employs some 1,200/1,300 people who work for him. Mr O'Brien told us that Mr Buckley managed the relationship with Mr Henry.
- He met Mr Mizak when he was contracted to do some work for Mr O'Brien's business interests to ensure the security of the computer systems and in relation to GDPR. His contacts with Mr Mizak were incidental and he said that Mr Mizak did not have an office in his companies' premises.
- He confirmed that Mr Buckley did tell him that he was looking at the circumstances in which the legal services contract with Simon McAleese, Solicitors was renewed for five years.
- He denied any knowledge of the involvement of Mr Mizak and TDS or the work that they were doing:

Mr Gillane: What does seem clear on any view of it is that Mr Mizak is retained in or around October 2014 to do work, we'll say neutrally, in INM.

Mr O'Brien: *I did not know that.*

Mr Gillane: *Then?*

Mr O'Brien: *No*

Mr Gillane: *So you have no visibility on Mr Mizak being there?*

Mr O'Brien: *No.*

Mr Gillane: *Doing the work?*

Mr O'Brien: *No.*

Mr Gillane: *Interrogating tapes or anything of that nature?*

Mr O'Brien: *No.*

Mr Gillane: *I infer from what you said therefore Mr Buckley wasn't reporting to you that this was being done or anything of that nature?*

Mr O'Brien: *No.*

Mr Gillane: *Nor Mr Mizak?*

Mr O'Brien: *No.*

Mr Gillane: *Okay. In relation to that, did Mr Henry ever mention. Any role that he had at that stage in relation to what was going on?*

Mr O'Brien: *No.*

Mr Gillane: *Had you ...*

Mr O'Brien: *It would be rare for Mr Henry to ring me about anything, to be honest with you. He might describe an incident*

that happened in one of the countries but my interface with him was not frequent.

Mr Gillane: *Did you know as to whether or not Mr Henry also worked with Mr Mizak or used his services?*

Mr O'Brien: *No, I didn't. No. Not at that time.*

Mr Gillane: *Not at that time?*

Mr O'Brien: *Yeah.*

Mr Gillane: *So in relation to what was going on in INM then towards the end of 2014 and, again, what seems to be clear in terms of the movement of tapes to Cardiff, that would be something that you would have been unaware of?*

Mr O'Brien: *I wasn't aware of that, no, that level of detail. As far as I can remember, but I wasn't told about that. The next, or the only thing that I knew about was when the bill, Leslie rang me one morning about a bill.*

Mr Gillane: *Yeah.*

Mr O'Brien: *And he described, he said, look, I've run up a bill here, looking at this McAleese contract.*

Mr Gillane: *And just before we get to that, because I think we can deal with the bill, I suppose, separately*

Mr O'Brien: *Certainly, yeah.*

Mr Gillane: *... in terms of the matters. In 2014 and going into 2015 you had no knowledge, at all, of whatever was going on in INM and Cardiff in relation to the interrogation of tapes?*

Mr O'Brien: *No, I didn't, no.*

Mr Gillane: *And Mr Buckley wasn't reporting to you during that period about concerns that he maintained were extant about the Simon McAleese contract.*

Mr O'Brien: *I don't believe so, no.*

Mr Gillane: *Can I just ask you then in relation to an e-mail that may or may not be connected to, not so much, to the data issue but it fits in terms of time with the Simon McAleese issue. It's an e-mail dated 28th January 2015. Do you see that there from Mr Buckley to you?*

Mr O'Brien: *Yeah. I wrote to Leslie Buckley about Paul Meagher. Paul Meagher did libel for Communicorp and TV3. A very experienced guy. I, obviously, was introducing him to INM to see if he could get some business.*

Mr Gillane: *And, in relation to that, and Mr Buckley's response, and he refers to the contract not finishing and having a difficulty, I think, in getting paperwork in relation to it. Do you recall any discussion around that period with Mr Buckley about the McAleese contract still being an issue of concern?*

Mr O'Brien: *No.*

Mr Gillane: *And he never mentioned that he was engaged in ongoing work with Mr Mizak in relation to it then?*

Mr O'Brien: *He never told me about working with Mr Mizak. He may have said we're trying to look into the Simon McAleese contract.'*

- Mr Buckley called him when he received an invoice for the work undertaken for INM to look into the background to the McAleese contract. Mr Buckley told him that it was much higher than he had expected and, as he was in the middle of a cost-cutting exercise at INM, he was embarrassed to arrange for it to be paid by INM. He asked if Mr

O'Brien would mind if Island Capital paid the account. Mr O'Brien agreed – to save Mr Buckley embarrassment. Mr Buckley then arranged for the account to be paid by Blaydon, on behalf of Island Capital.

- He was not aware that DMZ IT's invoice was addressed to Island Capital or that, on receipt, Mr Buckley passed the account to Mr Fagan for payment.
- The payment of the two invoices by Island Capital (through Blaydon) did not occur because he, or any of his companies, had an interest in the work undertaken:

Mr Gillane: a submission that might well be made to us which is that, look, the reason Blaydon discharges the bill is because Blaydon has an interest in the work that was done and that's what I am trying to tease out.

Mr O'Brien: Absolutely not. Not true.'

Mr Buckley's evidence in relation to the report on the 19 Persons of Interest

132. Mr O'Brien told us that, when he learned of the list of 19 Persons of Interest in the course of the High Court hearing, he immediately called Mr Buckley. Mr Buckley told him that he didn't know what Mr O'Brien was referring to. Having read the newspaper reports, Mr Buckley called him to say that he didn't know where the list had come from. Mr O'Brien told us that he knew some of the names on the list, but whilst some might be persons with whom he had had previous disagreements, he would not regard all those listed as persons with interests adverse to him.

133. Mr Buckley denied all knowledge of the report on the 19 Persons of Interest.

- He told us:

Mr Buckley: The first I knew about 19 names was when I read about it in the press in April of 2018 and then in the ODCE affidavit. I absolutely [knew] nothing about it

Mr Fleck: And what was your reaction when you heard about it?

Mr Buckley: *I was absolutely shocked. I was shocked. I was down in my house in Oysterhaven and I'll tell you exactly how I found out. Mr. O'Brien rang me and he said "Leslie, did you read the papers this morning?" and I said "No, I didn't", all right? He said "There's reference to 19 names - what do you know about it?". I said "I know absolutely nothing about it", right, and he said "Well, I don't either. What's all of this about?". I said "I don't know." I then downloaded the papers and found it in The Irish Times, you know, headline. I was shocked, really shocked.'*

- When cross-examined, Mr Buckley said:

Mr Buckley: *All I can say, Mr. Rogers, is I know absolutely nothing about that document. Okay. The first I saw of it, or heard about it, was in March/April of 2016, I think, or 2017 maybe. I can't recall. But whenever it became public. I have no idea how that document came about. I gave Mr. Mizak and Mr. Wilde either three or four names on the 3rd of October, and that's my only involvement in relation to giving any names. I don't know how, I don't understand Mr. Mizak's technical approach to it. I wouldn't claim to understand one bit of it. And that's my clear position on it.*

...

Mr Rogers: *So did Mr. Mizak create this purely off his own bat without any direction from you? Is that what you're saying?*

Mr Buckley: *Absolutely.*

Mr Rogers: *I see. I have to suggest to you Mr. Buckley, that's a wholly improbable answer.*

Mr Buckley: *Well, Mr. Rogers, I'm telling the Inspectors that I had no hand, act or part in providing Mr. Mizak or Mr. Wilde*

with any other names except the names that I gave on the 3rd of October. And I'm clearly stating that.'

The knowledge of other directors and employees of INM

134. The members of the Management Committee, Mr T. Buckley, Mr Marshall and Ms Mullane, were aware that a review of the provision of legal services was being undertaken. Mr Kennedy, Dr O'Hagan, Mr Harrison, Ms Mullane and Mr Connolly had no knowledge of any aspect of the Data Interrogation undertaken on Mr Buckley's instructions in 2014. They only became aware of it in August 2017, after the ODCE served its statutory requirement in relation to this issue.
135. Those Directors were not, therefore, aware that:
- Mr Buckley had instigated a search of INM's data by Mr Mizak, DMZ IT or TDS.
 - To facilitate the search, Mr Buckley had authorised the transfer of all INM's back-up tapes to Wales.
 - TDS and DMZ IT invoices had been paid by Blaydon Limited.
136. Mr Marshall and Mr Doorly were aware that Mr Buckley had undertaken an investigation into the circumstances in which the contract with Simon McAleese, Solicitors was renewed in 2011. Mr Marshall told us that he became aware that Mr Buckley received an invoice in relation to the investigation which Mr Buckley considered too high to expect INM to pay and that Mr Buckley had arranged to pay that invoice personally.
137. The INM Directors, Mr Harrison, Mr Pitt and Mr Preston only became aware that the investigation had resulted in a report on the data held by INM in relation to the 19 Persons of Interest through an affidavit filed by the ODCE in support of its application for the appointment of Inspectors under section 748 of the Act.

138. On becoming aware of the report on the 19 Persons of Interest,

- Dr O'Hagan told us that he was:

'Horrified. Absolutely completely horrified. I mean, just beyond belief. You think you know people, you think you know their failings and all the rest of it. But that was just something. I mean, one of the most terrible things you could do with people, most serious things; to utilise the company, to access information or try and access it.'

- Mr T. Buckley told us that:

- He accepted Mr Buckley's explanation of the circumstances in which the Data Interrogation had been carried out;
- He was not happy that Mr Buckley arranged for Mr O'Brien to pay the TDS invoice – which he thought should have been paid by INM;
- He was astonished to learn that searches had been made in relation to 19 Persons of Interest because that suggested that the Data Interrogation was far different to what Mr Buckley had told them; and
- When asked by the Special Committee, Mr Buckley had failed to provide an explanation.

- Mr Harrison told us that he was devastated:

'I'm still at a loss for words over how I'd describe the data issue. It is probably one of the most serious matters that I have ever, ever encountered. This is a newspaper that relies on tip-offs and confidentiality at sources. So you're immediately worried that may have been compromised in some way. It's the goodwill of the business.'

- Ms Mullane told us that she accepted Mr Buckley's explanations until she learned of the wider interrogation of INM's data that had been

undertaken. When the interrogation into the 19 Persons of Interest became known, she was shocked and dismayed and recognised that those events could not be reconciled with the explanations given by Mr Buckley.

- Mr Doorly told us that:
 - He had no idea that tapes containing emails and documents had been taken off-site, copied and interrogated in October and November 2014 – particularly as the explanation was that the purpose was to investigate the circumstances in which the McAleese contract had been entered into – a review he had already carried out in August 2014.
 - He was horrified when he learned that numerous parties had had access to and were interrogating INM’s emails and documents almost at will and by the extent to which Mr Buckley was involved.
 - The searches in relation to the 19 Persons of Interest had nothing to do with the Simon McAleese contract.

Subsequent events

139. When Mr Pitt met with the Independent Reviewers on 27 January 2017, he referred to the work done by an outside entity that involved the interrogation of emails and correspondence of persons who previously worked for INM. The Independent Reviewers concluded that this was not a matter that fell within their terms of reference and so did not inquire into this matter.
140. On 10 August 2017, following the INM Board’s adoption of the Report by the Independent Reviewers the preceding day, Mr Pitt met the ODCE to disclose the information he was aware of relating to the Data Interrogation.
141. On 11 August 2017, the ODCE served a statutory requirement on INM requesting information about the Data Interrogation.

142. Following receipt of the ODCE statutory requirement, the Special Committee, acting on behalf of INM:
- Instructed McCann FitzGerald to make enquiries of those involved, including Mr Buckley, Mr Mizak, Mr Wilde, and Mr McCarthy.
 - On 22 August 2017, commissioned Deloitte to provide an independent report into the circumstances of the Data Interrogation and, following receipt of that report in October 2017, implemented a number of recommendations suggested by Deloitte to improve and strengthen INM's data protection infrastructure, policies and procedures.
 - On 24 August 2017, notified the Data Protection Commission ('DPC') of a potential breach of the Data Protection Acts 1988 to 2003.
143. In March 2018, INM was served with a copy of the ODCE's affidavit in support of the application to appoint Inspectors and learned, for the first time, of the February 2015 report by TDS identifying 19 Persons of Interest.
144. Following receipt of that information, the Special Committee, acting on behalf of INM, took the following steps:
- On 26 March 2018, it notified the DPC of the further information that it had received.
 - It notified in writing each of the data subjects potentially affected and published a general notification on the INM website noting that new information suggested the possibility that personal data held on INM's servers might have been put at risk of unauthorised disclosure.
 - On 4 April 2018, it re-engaged Deloitte to carry out an expanded investigation in the light of the further information.
 - It launched a programme to ensure compliance with the requirements of the General Data Protection Regulation and the Data Protection Act 2018.

- On 30 May 2018, it issued proceedings against Mr Buckley for breach of duty and an indemnity in respect of potential claims from the data subjects affected.

145. On 26 June 2018, the DPC commenced a formal investigation into the Data Interrogation.

146. In February 2021, INM received the DPC's final report which concluded that the Data Interrogation constituted a contravention by INM of various provisions of the Data Protection Acts 1988 to 2003 and made a number of recommendations to address the underlying issues which led to the findings in the report. We have been told by INM that all such recommendations were implemented by INM.

C. The Parties' Submissions

147. We asked each party to provide us with submissions addressing:

- The key relevant evidence relied upon;
- Any legal issues to be considered; and
- The conclusions/findings to be reached on the basis of that evidence.

We also asked that such submissions should include executive summaries in relation to each of the issues identified in the Order.

148. In relation to the Data Interrogation, we received submissions from the following parties:

- (i) Mr Buckley;
- (ii) The INM Directors;
- (iii) INM;
- (iv) Mr Mizak, John Henry, DMZ IT and others; and
- (v) Mr O'Brien and Blaydon Limited.

149. Mr Pitt, in his First and Second Submissions, and Mr Preston, in his First Submission, did not make submissions as to the conclusions we should reach on the evidence before us in relation to the Data Interrogation. Nor did they make submissions on the findings we should make in relation to paragraph (a) of the Order.

150. In the following sections, we set out the submissions made by those parties including, in full, the executive summary where provided.

(i) Mr Buckley

151. Mr Buckley provided the following Executive Summary:

- '89 *The Inspectors are tasked, in broad terms, with establishing the facts and circumstances of the Data Interrogation.*
- 90 *Critical to this is an allegation that the Data Interrogation was not undertaken for the purpose stated by Mr Buckley but was, in fact, motivated by an ulterior purpose. This concern arose initially following a statement made by Mr Pitt to the ODCE that INM's IT Director, Mr Wilde, had told Mr Pitt that the Data Interrogation was carried out to benefit a third party. It was also based, inter alia, on the Director's concern that there was no obvious connection between the 19 so-called 'Persons of Interest' and the investigation into the circumstances surrounding the negotiation of the renewal of INM's contract for legal services with Simon McAleese Solicitors ("**the McAleese Contract**"). The Inspectors now have evidence that the first of these allegations has been effectively withdrawn and the second is now explained in detail by the individual who actually carried out the Data Interrogation. Critically, the evidence shows that the 19 so-called 'Persons of Interest' spreadsheet was not created with any input from Mr Buckley, who knew nothing of the 19 'Persons of Interest' and only learned of same when Mr O'Brien alerted him to media reports.*
- 91 *The Inspectors have the benefit not only of evidence from a number of witnesses involved in the Data Interrogation itself (Messrs Mizak, Henry, Wilde, McCarthy and TDS), but also contemporaneous emails and text messages. It is submitted that all of this evidence supports Mr Buckley's case that, as far as he was concerned, what he was involved in was an investigation into the background of the McAleese Contract and nothing else – an investigation which arose in light of substantial concerns within INM about the services then being provided to INM and in light of information provided to Mr Buckley that crucial evidence in relation to the renewal of the McAleese Contract had been deleted from INM's system.*

92 *In engaging Mr Mizak to carry out the Data Interrogation, Mr Buckley was entitled to rely on Mr Mizak's expertise, and indeed Messrs Wilde and McCarthy, to ensure that the investigation was carried out lawfully.*

93 *Ultimately, and while the Company has been found to be in breach of its obligations under the Data Protection Acts 1988 to 2003 in relation to aspects of the Data Interrogation, it is submitted that there is simply no evidence that Mr Buckley was engaged in anything other than a legitimate investigation which was authorised in his then position as Executive Chairman.'*

152. Mr Buckley's submission then addressed the evidence and issues under a number of headings.

- Concerns regarding Legal Costs.
- The Services Provided.
- Internal Investigation of the McAleese Contract.
- Engaging Mr Mizak.
- Engaging TDS.
- Further Investigations.
- The TDS and DMZ IT invoices.
- To Benefit a Third Party?

In the following paragraphs we set out below the principal points relied on by Mr Buckley.

Concerns regarding Legal Costs

153. Mr Buckley emphasised the financial challenges facing INM in 2014 and role of Project Quantum in reducing legal costs which were considered to be very high. On a number of occasions, Mr Marshall had expressed concern at the fact that it was unwise to have the same firm giving pre-publication advice and then handling any

libel proceedings arising out of the material it had reviewed (as occurred under the McAleese Contract).

The Services Provided

154. The management of INM also wanted to have certain legal advice available ‘*on the floor*’ in the interests of speed and efficiency. Therefore, in June 2014, the INM Management Committee agreed that contracts to provide legal services should be put out to tender. However, when notified of that decision, Mr McAleese pointed out that he had a contract for the provision of legal services to INM until 28 February 2016 (i.e. for a further two years). He was also resistant to certain of the changes being requested.
155. Mr Doorly summarised the issues facing INM as follows:

‘I think the problem was the cost of it and the fact that we couldn't tender out that service at that point in time, as in 2014, and that we would have to wait until the contract expired in 2016. So it frustrated us from pursuing that cost. It wasn't just tendering; it was also we wanted to look at the option of bringing that service in-house, particularly pre-publication, as opposed to post-publication. So a number of issues there.’

Internal Investigation of the McAleese Contract

156. At that stage, Mr Buckley initiated an internal investigation into the circumstances in which the McAleese contract was renewed in 2011. The investigation focussed on the circumstances in which a clause allowing termination without cause and on notice only (in the January draft) had been replaced with a clause (in the contract signed in February 2011) requiring INM to show cause, rendering it a fixed term contract subject only to performance.
157. The investigation revealed that an email dated 26 January 2011 from Mr Webb to Mr McAleese was missing and could not be located in INM’s archives or back-up tapes, leading to the conclusion that the email had been deleted. That email was potentially significant because, from Mr McAleese’s reply, it was evident that Mr Webb had set out in that email the terms on which INM was willing to renew the McAleese contract for a further five years.

158. Mr Buckley submitted that he came to the conclusion that the missing email from Mr Webb to Mr McAleese might demonstrate that Mr Webb had been in contact with Mr O'Reilly (to whom he reported), discussing the removal of clauses that Mr McAleese objected to. These concerns were fuelled by a rumour within INM that Mr McAleese had obtained the contract by way of a special arrangement with Mr O'Reilly as a way of paying him for handling a private matter for Mr O'Reilly. If that proved to be the case, INM would have grounds to terminate the McAleese contract and make other arrangements.

159. As regards the inability to find the missing email, Mr Buckley's evidence was that:

'... [the IT people in INM] weren't able to find the e-mail and there was nothing else, as you mentioned, it was kind of a total blackout in that area. Now the more questions I was asking of people I felt the more blackout there possibly could be. Even to kind of get to that stage I was finding, you know, quite a number of difficulties along the way.'

Engaging Mr Mizak

160. Against this background, Mr Buckley concluded that he should obtain external expert assistance in *'finding the missing email from Mr Webb dated 26 January 2011 or any other emails related to that event.'*

161. Exercising his authority as Executive Chairman, Mr Buckley engaged Mr Mizak to take all necessary steps to finding the missing email and instructed Mr Wilde to give every assistance in completing the task. He did not inform the INM Board that he had engaged Mr Mizak – on the basis that the fewer people that were aware of it the better.

162. As regards Mr Pitt, Mr Buckley's evidence was that:

'he did not want to get Mr Pitt involved because he was probably going to be asking a lot of questions of a lot of people and the more questions the more people would start talking about it and even more cover up might happen. He also said that he had some recollection of telling Mr Wilde that there was "no need to involve Mr Pitt" as he was "new to the business" and it would be difficult to get through the history of the case and that he had a lot on his plate.'

163. Although Mr Webb's mailbox was located in early October 2014, Mr Buckley's evidence was that his concerns were growing:

'It actually became much bigger in my mind than just the cost reduction exercise. It started off as being a very simple cost reduction exercise seeing can we reduce it. All of a sudden it becomes this big issue of this e-mail not being found, what was happening, were company funds being misused and who else was involved in this process. And are there people within the company that really are still involved in that process. So all these things were going on in my mind, you know.'

Engaging TDS

164. At the end of October 2014, Mr Mizak contacted Mr Buckley to suggest three ways of progressing the investigation – two of which involved bringing in TDS with their expertise and greater facilities.
165. Mr Buckley approved the engagement of TDS and, in due course, the transfer of all INM's back-up tapes to their facility in Wales because that was the most cost-effective way of completing the investigation.
166. Mr Buckley submitted that:

'... by the stage the tapes had been sent to Cardiff the following emerges:

- (i) A preliminary investigation into the McAleese Contract had taken place internally within INM and involving INM IT personnel;*
- (ii) Mr Buckley had been informed that there was a significant gap in the correspondence in the run up to the contract being signed and that an email central to those negotiations had been "deleted";*
- (iii) Mr Buckley had been informed that not only that the email of 26 January 2011 had been deleted (even from archives), but that a clause allowing termination without cause and on notice only had been replaced with a clause requiring INM to show cause, rendering it a fixed term contract subject only to performance;*

- (iv) *This was in the context of rumours in INM to the effect that Mr McAleese had got the contract by way of a special arrangement and as a way of paying him off for handling Mr O'Reilly's divorce;*
- (v) *Preliminary reviews by an outside expert had failed to find the missing email;*
- (vi) *Mr Buckley was advised that there were three options on how to proceed and, with TDS having initially tried to complete the task on site but raised concerns about how long the task would take, Mr Buckley chose what he was informed was the fastest and most cost-effective one.*

At this point, when the tapes had been sent to Cardiff, it is submitted that there is no evidence whatsoever that Mr Buckley was engaged in anything other than an investigation into the circumstances surrounding the renewal of the McAleese Contract. The Inspectors are invited to consider all of the correspondence leading up to this point, and the evidence of those directly involved, all of which is consistent with Mr Buckley's evidence of the nature of the investigation in which he was then involved.

Furthermore, in engaging Mr Mizak to carry out the Data Interrogation, and having authorised the movement of the tapes to TDS in Wales, Mr Buckley was entitled to rely on the expertise of Mr Mizak (as he understood it), and indeed the IT department in INM as well as TDS, to ensure that the movement of the tapes was carried out properly and lawfully.'

167. Because Mr Wilde was anxious that the tapes should be returned as soon as possible, TDS copied the tapes and prepared a restored and de-duplicated copy of the four named mailboxes which was provided to Mr Mizak. In this way, the tapes could be returned but the investigation could continue.

Further Investigations

168. In relation to the work done in 2015 by Mr Mizak (and, on his instructions, by TDS), Mr Buckley submitted that:
- He had very little knowledge of Mr Mizak's actions.

- He was not aware of the manner in which Mr Mizak generated the names of individuals who might prove relevant to the search he was undertaking.
- He did not discuss search terms with Mr Mizak. Nor did he discuss the names of individuals to be searched.
- The reason Mr Mizak had no knowledge of those at INM who might be involved in the negotiation of the McAleese contract was probably due to two factors:

‘Firstly, the fact that limited instructions on scope were actually given by Mr Buckley to Mr Mizak ... Secondly, it is submitted that this is also consistent with Mr Buckley’s knowledge of the technical side of this project, which appears to be limited and which appears to have provided some basis for Mr Mizak’s reluctance to revert to Mr Buckley to clarify search terms’

Mr Buckley submitted that:

‘...these factors provide a substantial basis for reaching the conclusion that it is not surprising that Mr Mizak’s searches may have thrown up a volume of results which, while they may have been related to legal matters in general, appeared entirely unrelated to the renegotiation of the McAleese Contract itself.’

- There is no evidence whatever to suggest that he had any knowledge of the list of the 19 'Persons of Interest'.
- Mr Mizak reported very briefly on the work he was doing in 2015 because he was making little progress.

‘But as I said, later on I was limiting my even updates, because I didn’t have anything to update him except ‘I’m still working on it’, and that’s not exactly what you would be looking for.’

- Mr Mizak called him in late February or March 2015 to say that the search had been unsuccessful – in that the missing email(s) had not been found – and he recommended that work on the project should cease.

The TDS and DMZ IT invoices

169. Mr Buckley submitted that there was clear evidence that the two invoices were paid by Blaydon following a conversation he had with Mr O'Brien in which he explained that:

'he would be embarrassed trying to get INM to pay the bill, which (rather ironically) started as a cost reduction exercise.'

170. Mr Buckley noted that:

'it is difficult to understand why, if the exercise was carried out for any ulterior purpose and was to be paid for by Mr O'Brien, the TDS invoice would have been sent to INM in the first place.'

To Benefit a Third Party?

171. Mr Buckley submitted that Mr Wilde's evidence – namely, that he did not tell Mr Pitt that the project was to benefit a third party; nor did he say anything to link the project to Mr O'Brien – should be accepted.

Conclusion

172. Mr Buckley concluded by asserting that there is no evidence whatsoever to suggest that:
- he was engaged in anything other than an investigation into the circumstances surrounding the renewal of the McAleese Contract.
 - the Data Interrogation project was done to benefit a third party.

(ii) The INM Directors

173. The INM Directors made submissions in relation to two aspects of the Data Interrogation on which we are required to report – namely (iii) the knowledge of the Directors of INM of the Data Interrogation and (vii) the adequacy of the Directors'

response to notification of the Data Interrogation, including their investigation of it and their engagement with the Data Protection Commission.

Knowledge of the Data Interrogation

174. The INM Directors contended that the INM Board was not aware of the Data Interrogation until 11 August 2017 when the ODCE served a statutory request following the disclosure made by Mr Pitt to the ODCE the preceding day.

175. In support of that submission, the INM Directors relied on the fact that:

- Despite having authorised the Data Interrogation and receiving reports on the progress (or lack of progress) being made, Mr Buckley did not inform the INM Board of the Data Interrogation prior to the Board being informed of it through the ODCE request on 11 August 2017.
- Although Mr Pitt became aware of the Data Interrogation in the course of a conversation with Mr Wilde in June 2015 and was put on notice of the work done by TDS when he received the TDS invoice from Mr Preston,
 - Mr Pitt made no mention of it when he made his protected disclosure to Mr Kennedy on 11 November 2016.
 - Mr Pitt made no mention it at the meeting with Mr Kennedy and Mr Barton on 16 November 2016.
 - Mr Pitt did not suggest that the Data Interrogation should be included in the Terms of Reference for the Independent Review and accepted that the issue fell outside the Terms of Reference of the Independent Review.

The adequacy of the Directors' response to notification of the Data Interrogation.

August 2017

176. Following Mr Pitt's disclosure to the ODCE on 10 August 2017, the Directors became aware of the issue on 11 August 2017 through an ODCE requirement served that day.
177. The Directors arranged for INM to take the following steps to address the issues arising from the Data Interrogation, as they then understood them:
- The appointment of Deloitte to carry out a detailed investigation;
 - Interviews, through INM's solicitors, of all key protagonists so as to enable INM to respond to the ODCE's statutory requirements in a detailed and fulsome manner; and
 - The making of a notification to the Data Protection Commission.

In the following paragraphs we set out the reasons why the INM Directors submit that the steps the Directors took constituted immediate and appropriate action.

(a) The appointment of Deloitte

178. The Board met and resolved on 22 August 2017 to appoint Deloitte to conduct an investigation in relation to the facts and circumstances relating to the extraction of data.
179. The investigation by Deloitte was broad and wide-ranging and its objectives included establishing the sequence of events in relation to the data extraction and analysis in October/November 2014, specifically to ascertain:
- (i) The details relating to the initial instruction to the Head of IT.
 - (ii) The approach undertaken by the Head of IT to fulfil the request.
 - (iii) What information was provided by the Head of IT and to whom and in what format.

- (iv) What written or verbal terms of engagement were provided to Mr Mizak, and TDS and by whom.
- (v) What written or verbal reports were provided at the various stages, by whom and to whom.
- (vi) What INM data files were accessed and what work was carried out on site in INM offices by TDS and Mr Mizak. Who in INM facilitated this work.
- (vii) What data files were sent/provided to TDS in Cardiff. Who selected the files to be sent and what was the basis of selection.
- (viii) What controls were put in place in protect the data being sent from INM offices to Cardiff and who arranged same. Who in INM arranged the copying of the data files and handing over copies of the files for shipment.
- (ix) What data files were sent/provided by TDS from Cardiff to Mr Mizak in Dublin.
- (x) What if any contracts or NDAs where in place between INM, TDS and Mr Mizak.
- (xi) What was the total amount paid to TDS and Mr Mizak and by whom.

180. Deloitte also spoke to a number of key individuals for the purposes of their investigation, including Mr Buckley, Mr Pitt, Mr Wilde, Mr McCarthy, Mr Mizak and Mr Henry.

181. In October 2017, the Directors received the Deloitte Report into the data extraction and analysis. The minutes of a meeting of the INM Board on 18 October 2017 record the fact that “*the Deloitte report had been circulated and the Board accepted its contents*”. The Board also carried out a number of recommendations suggested by Deloitte to improve and strengthen its data protection infrastructure, policies and procedures.

(b) Carrying out interviews, through INM's solicitors, with all key individuals so as to enable INM to respond to the ODCE's statutory requirements in a detailed and fulsome manner

182. INM's solicitors, in addition to engaging Deloitte, separately sought explanations from Mr Buckley and a number of other key parties in respect of the TDS invoice and the Data Interrogation and specifically the basis for the invoice being discharged by a third party company, for the purpose of responding to the ODCE's statutory requirements.
183. The Board also sought answers from Mr Buckley regarding the reason for the invoice from TDS UK and the nature of the work undertaken. Mr Buckley agreed to meet with McCann FitzGerald and also with Deloitte. Based on the explanations that Mr Buckley provided, it was the Board's understanding that the work undertaken had related to a costs saving exercise by which he was trying to find out what had been negotiated and agreed with Simon McAleese, Solicitors, who had been standing legal advisers to INM for several years. Mr Buckley said that, as INM had not had the in-house capability to interrogate information held on back-up tapes, a third party service provider was brought in for that purpose. INM had engaged in cost cutting work during 2014 which Mr Buckley had overseen and that was the period to which the TDS invoice related.
184. The INM Directors gave evidence explaining that the explanation of the purpose of the Data Interrogation from Mr Buckley and the fact that the cost of it was defrayed by an entity connected with Mr O'Brien caused concern. Mr Buckley's position was that he felt he had an obligation to discharge the fees although nothing had been found and the Board members had no evidence on which to challenge Mr Buckley's explanation.
185. The Directors of INM, therefore, accepted Mr Buckley's explanation pending further investigation by Deloitte. The INM Directors submitted that that was a reasonable and appropriate response given that they had arranged for an independent investigation to be undertaken by Deloitte.

(c) Notification to the Data Protection Commission

186. On 24 August 2017, INM advised the DPC that its data had been the subject of a potential data security incident.

187. At this time, the Directors' understanding, based on what they had been told by Mr Buckley in relation to the data processing, was that its purpose was to find information regarding the negotiation of the Simon McAleese contract. The notification to the DPC was based on that understanding, which in turn relied on the account of the individuals involved.

188. The INM Directors submitted that, as explained by Dr O'Hagan:

'The Board was concerned that the invoice had been discharged by a company unconnected to INM, of which it was previously unaware, but accepted the Chairman's explanation as to why the invoice for the processing work had been discharged by Blaydon because Mr Buckley felt that it was not appropriate for INM to bear the cost of an exercise at his initiative designed to assist in cutting costs which had not borne any results. It was reasonable for them to rely (in writing to the DPC) on an unequivocal explanation of its Chairman in the absence of any explanation or information to the contrary.'

189. In the event, the Data Protection Commissioner's office responded the following day, confirming that the events notified did not constitute a personal data breach under their voluntary code of practice but might be a breach of section 2C of the Data Protection Acts and that INM should take steps to mitigate the risk of it happening again.

March 2018

190. In March 2018, following receipt of Mr Drennan's affidavit, new information came to light in relation to the Data Interrogation, including detail in relation to the "Persons of Interest" spreadsheet.

191. The Directors were disturbed by this new information as it suggested that the extent and nature of the Data Interrogation was potentially very different to that previously provided to the Board by Mr Buckley.

192. The INM Directors contended that, following receipt of this information, INM took immediate and appropriate steps to investigate the facts and circumstances that had come to light.

(a) The re-engagement of Deloitte

193. On 4 April 2018, INM re-engaged Deloitte to carry out an expanded investigation into the matter. The terms of that investigation were extended on 9 April 2018 when a formal engagement letter was signed. The scope of the Deloitte investigation was broad and its objectives, as set out in the letter of engagement, were as follows:

To review the new information in light of the first review and establish:

- (a) *if Mr Mizak or Mr Henry carried out a Data Interrogation, or authorised or instructed any other third parties to carry out a Data Interrogation, in respect of the 19 individuals or other users or individuals;*
- (b) *the purpose for which TDS UK Limited, Mr Mizak or Mr Henry, or others on their authority or instruction, carried out a Data Interrogation in respect of the 19 individuals or other users or individuals;*
- (c) *if Mr Mizak or Mr Henry provided copies of any of the Company data files or search results or information relating thereto to any third parties and if so what was the purpose of providing such information to third parties and if any of the Company data files or search results or information relating thereto remain in the possession of any third parties;*
- (d) *if TDS UK Limited, Mr Mizak, Mr Henry or others retained any copies of the Company data files following the return of the Company's back-up tapes to the Company's offices in December 2014;*
- (e) *when Mr Mizak was conducting searches on-site at the Company did he carry out any searches in respect of the 19 individuals or other users or individuals without the Company's knowledge;*
- (f) *what instructions were provided by the then Chairman to Mr Mizak regarding any Data Interrogation exercise;*
- (g) *when did any processing activities by TDS UK Limited, Mr Mizak, Mr Henry or others in relation to the Company data files commence and when did they cease;*

- (h) what records does TDS UK Limited hold regarding the tasks that it performed in relation to the Company's data;*
- (i) what is the knowledge of the former Chairman regarding the searches in respect of the 19 individuals or searches of any other users or individuals;*
- (j) what is the knowledge of the former Chairman of any other new information which emerges from this further review; and*
- (k) review the circumstances leading to the destruction of the back-up tapes and determine if this was performed in line with existing policies and procedures and to assess these policies and procedures against good practice.'*

194. In addition to this Deloitte again interviewed a number of relevant parties, including Mr Wilde and Mr McCarthy and also carried out a forensic review of internal company data to identify any further documents relevant to the Data Interrogation.

(b) Further notification to the Data Protection Commission

195. INM made a further detailed notification to the DPC on 26 March 2018 notifying it of the further information which had come to the attention of INM following receipt of Mr Drennan's affidavit regarding the data security incident previously notified to the DPC on 24 August 2017.

196. On 26 June 2018 (at which point each of Mr Terry Buckley, Mr Marshall, Mr Connolly, Mr Kennedy, Ms Mullane and Mr Doorly had left the Board of INM) the DPC wrote to INM notifying it of the commencement of a formal investigation. Throughout the next period INM cooperated fully with the DPC providing detailed information and responses to the DPC's questions in the context of this investigation.

197. The DPC carried out an investigation which focussed on whether INM had complied its obligations as a data controller under the Data Protection Acts 1988 to 2003 (as opposed to the purpose of the Data Interrogation and who was intended to benefit from it).

198. On 3 February 2021 the DPC issued a final Report in which it concluded that INM had contravened the following obligations applicable to it as a data controller under the Data Protection Acts 1988 to 2003:

- (a) *Section 2(1)(a) and 2D – the obligation that the personal data kept by INM be processed fairly;*
- (b) *Section 2A(1) – the obligation on INM to ensure that the requirements of section 2 are complied with and at least one of the conditions in section 2A(1)(a) to (d) is met;*
- (c) *Section 2C(3)(a) – the requirement to have a written contract in place between the data controller and any data processors;*
- (d) *Section 2(3)(b) and (c) – the requirements for data controllers to ensure that data processors guarantee and comply with appropriate technical security and organisational measures for processing of personal data;*
- (e) *Section 2(1)(d), 2C(1)(b) and 2C(2) – the requirement to determine and ensure that appropriate security measures are taken against unlawful processing of personal data, and to take reasonable steps to ensure that employees and staff members comply with such measures.’*

199. The DPC also made a number of recommendations directing INM to address the underlying issues which led to the DPC’s findings. All of the recommendations made by the DPC have been implemented by INM, in addition to which INM launched, in advance of May 2018, a comprehensive programme to ensure compliance with the requirements of the GDPR and Data Protection Act 2018.

(c) *Notification to data subjects potentially affected*

200. In light of the specific impact on data subjects, in March 2018, INM notified each of those data subjects potentially affected in writing and INM published a general notification on its website noting that new information suggested the possibility that personal data held on INM's servers may have been put at risk of unauthorised disclosure.

(d) Proceedings against Mr Buckley

201. INM commenced proceedings against Mr Buckley on 30 May 2018 for breach of duty and sought an indemnity in respect of potential claims against INM from data subjects affected.

Conclusion

202. The INM Directors' submitted that the Board's response to the issue, both in August 2017 and March 2018, was reasonable, appropriate and fully complied with their duties as directors to act in the interests of the Company and also to ensure the Company fulfilled its legal obligations under the Data Protections Acts.

(iii) INM

203. INM acknowledged that, in February 2021, the DPC, having carried out an investigation into the Data Interrogation, concluded that INM had breached a number of its obligations as data controller under the Data Protection Act, 1988, as amended in connection with the Data Interrogation. INM accepted the findings and recommendations of the DPC in full and did not appeal them.

204. INM contended that the Board's response upon learning of the Data Interrogation was immediate, comprehensive and appropriate. In this regard, the Company, through its Directors, took immediate and appropriate steps after it became aware of the Data Interrogation which included (i) engaging Deloitte to carry out a detailed investigation; (ii) carrying out interviews (through the Company's solicitors) so to enable the Company to respond to the ODCE; and (c) issuing a notification to the DPC. The Company has also adopted a zero-risk approach to data protection and implemented a comprehensive suite of policies and procedures in the aftermath of the Data Interrogation and following the introduction of GDPR.

205. In relation to the Terms of Reference relating to the Data Interrogation, INM:

- Adopted the INM Directors' First Submissions in relation to:

(iii) The Knowledge of the Directors of the Data Interrogation; and

(vii) The adequacy of the Directors' response to notification of the Data Interrogation.

- Made no submissions in relation to the matters raised in:

(ii) The reasons for and purposes of the Data Interrogation

In this context, INM noted that the Data Protection Commission was not in a position to determine the purpose for which the data processing giving rise to the Data Interrogation was carried out and did not offer a view as to why, or for what purpose, this interrogation occurred. Likewise, INM acknowledged that it has been unable to establish the purpose for which the Data Interrogation was conducted.

(vi) The persons for whose benefit the Data Interrogation was conducted.

206. INM made submissions in relation to the issues matters raised in:

(i) The facts and circumstances concerning the Data Interrogation.

(iv) The results of the Data Interrogation.

(v) Payment for the Data Interrogation.

The facts and circumstances concerning the Data Interrogation

207. INM submitted that:

'In many respects the purpose and extent of the Data Interrogation was and remains unknown to the Company, and the Company awaits the Inspectors' findings in that regard. What is described hereunder reflects the current state of knowledge of the Company regarding the Data Interrogation, based on information and documentation currently available to it. However, it bears emphasis that the Board of the Company was not aware of the Data Interrogation until 11 August 2017, long after the fact, and only following the

disclosure made by the then CEO, Mr Robert Pitt, to the ODCE on 10 August 2017.’

208. Based on a review of information and documentation available to it, primarily through this Inspection, INM provided a high level summary of the key events which is consistent with the facts and circumstances set out in section B above.

The results of the Data Interrogation

209. As regards the results of the Data Interrogation, INM set out its position as follows:

- *‘There has been a large amount of controversy around the scope of the work carried out by each of DMZ IT Limited, TDS UK Limited and Specialist Security Services from October 2014, which appears to have continued into 2015, and resulted in the generation of the “Persons of Interest” spreadsheet, containing 19 names (the “February 2015 List”).’*
- *‘Mr Mizak gave evidence to the Inspectors (which was consistent with his letter to the DPC dated 26 November 2018) that the February 2015 List was “automatically generated” after he ran certain search terms across the inboxes of the Data Subjects.*

However, two recent forensic reports carried out by Keith Borer Consultants and provided to the Company by the Inspectors on 30 August 2021 have cast some doubt on the explanations provided by Mr Mizak in relation to the generation of the February 2015 List. Keith Borer Consultants were instructed to search “for the names listed in the document “TARGETING 19 USERS/NAMES – INITIAL ANALYSIS” across each of the four relevant mailboxes. In certain instances they found that some of the 19 names do not appear in any of the mailboxes.

In the premises, the Company is not in a position, and does not purport, to provide any concluded view on the genesis of or explanation for the February 2015 List, which will be a matter for the Inspectors in due course’.

Payment for the Data Interrogation

210. INM submitted that the:

'costs associated with the Data Security Incident were ultimately discharged by an Isle of Man company called Blaydon Limited, of which Mr Denis O'Brien is the beneficial owner.'

Other Matters

211. In adopting the INM Directors' submission that the INM Board took immediate and appropriate steps to respond to, and address the issues arising from the Data Interrogation, INM drew attention to the lack of assistance it had received from Mr Buckley, DMZ IT and TDS:

'As regards Mr Buckley's involvement in the Data Interrogation, there is no evidence before the Inspection that Mr Buckley sought any instruction or authorisation from the Company in relation to the Data Interrogation. Moreover, when further information came to light in March 2018, no explanation was provided to the Company by Mr Buckley and in the absence of providing any satisfactory explanation to the Company, on 30 May 2018 the Company issued proceedings against Mr Buckley for breach of duty and sought an indemnity in respect of potential claims against the Company from data subjects affected.'

Those other protagonists involved in the Data Interrogation, including DMZ and TDS have also not provided any further assistance to the Company, save that in late 2018 Mr Mizak sent a letter to the DPC (copied to the Company) which contained some new information regarding the Data Interrogation.'

212. INM also drew attention to Mr Pitt's failure to report the Data Interrogation or the TDS Invoice to the INM Board:

'... based on the information available to the Company, Mr Pitt first became aware of the Data Interrogation (or aspects of it, at least) as early as June/July 2015. However, although Mr Pitt believed Mr Wilde and considered this to be an extremely serious matter, Mr Pitt failed to report the matter to the Board.'

and noted that Mr Pitt accepted in evidence that he did not bring the Data Interrogation or the TDS invoice to the attention of the Board or the attention of the Audit Committee of INM.

213. INM emphasised that it takes data protection very seriously and described the steps it has taken since learning of the Data Interrogation.

Conclusion

214. INM submitted that we should find:

- (a) *'that the Company was not aware of the Data Interrogation until it received a statutory requirement from the ODCE in August 2017;*
- (b) *that the Company and the Directors responded immediately, appropriately and effectively to the Data Interrogation;*
- (c) *that the Company acted swiftly in appointing Deloitte (twice);*
- (d) *that the Company acted swiftly in notifying the DPC (twice);*
- (e) *that the Company acted swiftly in notifying all affected data subjects following receipt of new information in March 2018 and endeavoured to keep all impacted individuals informed throughout the investigation by both Deloitte and the DPC;*
- (f) *that the Company cooperated fully with the DPC investigation, implemented significant reforms and did not dispute the findings of the DPC;*
- (g) *that while certain matters remain unclear to the Company – chief among them, the purpose and scope of the Data Interrogation – it has done everything it can to address the serious issues raised by that incident, and will continue to do so.'*

(iv) Mr Mizak, John Henry, Shane Henry, Keith Duggan, DMZ IT Limited, Specialist Security Services Limited, Reconnaissance Group Limited and Resilient Defence Limited

215. We received a joint Submission on behalf of Mr Mizak, Mr John Henry, Mr Shane Henry, Mr Duggan, DMZ IT, Specialist Security Services Limited, Reconnaissance Group Limited and Resilient Defence Limited. These submissions are referred to collectively as the 'DMZ Submission'. Where necessary, the specific individual or entity is referred to.

216. Based on a review of information and documentation available to it, primarily through this Inspection, DMZ IT provided a high level summary of the key events which is consistent with the facts and circumstances set out in section B above.

The DMZ Submission concluded that:

'[Mr Mizak] entered into a commercial relationship with INM to carry out the data search; there is no evidence to suggest that this was in any way improper.

The evidence strongly indicates that INM was genuine in seeking to have the McAleese issue investigated.

The evidence points to [Mr Buckley] having commenced the project under a fundamental misapprehension as to the ease and speed with which it was to be completed and the project never really progressed beyond its initial stages.

Whatever the technical deficiencies in compliance with data protection law, the evidence suggests that elaborate efforts were made to protect data integrity by having a comprehensive chain of custody record and a policy of destroying material as and when it ceased to be used as part of the investigation.

The decision that Island and not INM would pay for the relevant services was not a matter with which DM was realistically likely to be concerned.'

217. Mr Mizak gave extensive evidence on the manner in which he carried out searches to identify custodians who might have material that was relevant to the McAleese

contract. In the DMZ Submission, Mr Mizak summarised the approach he took in the following terms:

- *'[Mr Mizak] was required to search through INM's backup data for the purposes of identifying any material that may have been relevant to the McAleese contract. To do this, he needed to use a set of search terms to narrow the dataset. In this regard, [Mr Buckley's] input in preparing search terms was extremely limited. He simply stated what his issue was (the McAleese contract) and explained that he had failed to obtain information about this. [Mr Buckley] had previously asked the INM IT office to do this, but they had been unable to find anything.'*
- *'... the starting point in assembling a set of search terms was to identify the potential custodians of the information that was being interrogated; in this regard [Mr Mizak] was given an initial list of 4 names.'*

While [Mr Buckley] was not involved in the process of providing DM with the names of custodians, [Mr Mizak] provided updates during the course of which the identity of custodians would have arisen. Once [Mr Mizak] had the initial list of four custodians, he was able to extrapolate the names of other potential custodians of relevant information from his analysis of their information. The list of custodians consequently grew.

What followed was an iterative process whereby the list of custodians and keywords was built by DM using his academic and practical experience as a forensic IT specialist.'

- *'[Mr Mizak] picked these search terms himself and they were not fed to him by parties within INM such as [Mr Buckley] or [Mr Wilde]. While [Mr Mizak] did consult with INM staff and ask them whether names that frequently occurred in searches could potentially be relevant, he was the primary driver behind the preparation of the relevant search terms rather than a passive recipient of search terms and potential custodians from parties such as [Mr Wilde] or [Mr Buckley]. In particular, [Mr Buckley] confirmed in his oral evidence that his own input had been confined to the provision of the names of the original four custodians.'*

To the extent that a suggestion has been made that [Mr Mizak] was, in fact, targeting people on the basis of having taken positions against [Mr O'Brien] (e.g. barristers and former INM executives) this is not supported by any evidence. It is also inconsistent with the fact that, after having been given the initial four custodian names to target in his searches, [Mr Mizak] did not give detailed reports of his evolving list of targets to [Mr Buckley] and his searches (focusing on legal and media professionals) were entirely consistent with his investigation of the McAleese issue.'

- *'In conducting his searches, DM had recourse to an analytical process known as "Open Source Intelligence" (often known by the acronym "OSINT")'*
- *'At all stages, the use of OSINT interacted with the information being obtained from INM's own sources, with the former "enriching" the latter.'*
- *'The use of OSINT represented an augmentation and not a substitution for the INM database.'*
- *'The use of OSINT was thus a completely normal and legitimate tool for analysing information and augmenting DM's searches of material on the INM databases.'*

218. On this basis, Mr Mizak submitted that:

'the preparation of keyword methodologies for the purposes of investigating the McAleese issue proceeded in a manner that was reflective of the limited instructions that [he] was given as to potential custodians. All of the evidence is consistent in indicating that [he] was not being fed information or guided by anybody in this context.'

219. DMZ IT submitted that the outcome of the Data Investigation was that:

'While the work that was carried out was part of the [Data Interrogation] was a technical success, it was a failure as regards the primary objective of uncovering material information concerning the McAleese contract. The [Data Interrogation] produced a work product, in the form of reports presented to [Mr

Buckley] but the only material finding in each report was that nothing had been found.'

220. DMZ IT submitted that it's reports:

'... were represented to [Mr Wilde], in the first instance and, albeit reduced to more general and less technical terms to [Mr Buckley] in the second. [Mr John Henry] was a regular conduit for [Mr Mizak's] communications with [Mr Buckley]. [Mr Mizak] regularly reported his work and his findings to [Mr Buckley] and, in the initial period after the inception of the forensic investigation, [Mr Buckley] took a keen interest in how it was progressing. However, he gradually became less interested as more time passed and nothing of a material nature was found.'

221. DMZ IT submitted that:

'the [Data Interrogation] was a project borne of a fundamental misapprehension as to the ease with which the task could be completed and which failed to produce any kind of work product which reflected the amount of time and money invested in the project. As [Mr Mizak] stated in his evidence, this was a project which, in spite of the enormity of the temporal and financial resources devoted to it, never extended beyond a feasibility study – which study indicated a clear lack of feasibility.'

222. DMZ IT submitted that:

- *'[t]he arrangements for paying TDS were dealt with primarily by [Mr Wilde] and approved by [Mr Buckley]. [Mr Mizak's] involvement in the invoicing and billing was limited.'*
- *'[t]he evidence supports the position of [Mr Mizak] that at all times he was working for and on behalf of INM through his company, DMZ and had full access to senior executive staff at INM, including [Mr Wilde], its head of IT. At no stage was he ever told anything which led him to believe that there was any other client. However, [Mr Mizak] submitted his invoices to such entities as he was told to issue them to, so when [Mr Buckley's] personal assistant told him to submit his bill to Island Capital Services Limited, he did so. [Mr Mizak] saw no need to question the arrangement*

as it was frequently the case in his business that he would do work for one company and be billed by another. In this regard, he simply assumed that Island was “at Mr. Buckley’s office”. [Mr Mizak] has no recollection of ever being told not to bill INM.’

223. Mr Mizak contends that he was unaware of the decision making processes taking place behind the scenes relating to the discharge of DMZ IT’s invoice and that there is no evidence to suggest anything untoward in the discharge of DMZ IT’s invoice by Island Capital/Blaydon.

224. DMZ IT submitted that this Report could not contain findings in relation to:

- *‘breaches of the Data Protection Act 2018 (the “DPA”) or Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (“GDPR”);*
- *‘the conduct of individuals who are not directors or officers of INM.’*

225. We considered these submissions and the bases on which they were made in Chapter 5 and, for the reasons set out in paragraph 70 to 116, we rejected them.

Conclusion

226. DMZ IT concluded by submitting that:

- *‘There is no evidence to suggest that Mr Mizak, Mr John Henry, Mr Shane Henry, Mr Duggan, DMZ IT Limited, Specialist Security Services Limited, Reconnaissance Group Limited or Resilient Defence Limited engaged in any wrongful activity.’*
- *‘[We] do not have the power to make adverse findings in [our] report in relation to Mr Mizak, Mr John Henry, Mr Shane Henry, Mr Duggan, DMZ*

IT Limited, Specialist Security Services Limited, Reconnaissance Group Limited or Resilient Defence Limited. This is because:

- (a) The Data Complaint is the only one of the Complaints which are relevant to such persons.*
- (b) The Director is not a supervisory authority for the purposes of GDPR and it is thus contrary to EU law for the Director or the Inspectors to assume the power to investigate and make findings against Mr Mizak, Mr John Henry, Mr Shane Henry, Mr Duggan, DMZ IT Limited, Specialist Security Services Limited, Reconnaissance Group Limited or Resilient Defence Limited on the basis of section 748.*
- (c) Further and/or in the alternative, the Director is confined to investigating the conduct of INM and its officers and the Inspectors are correspondingly confined to making findings in relation to INM and its officers.*
- (d) The persons referred to above are not officers within the meaning of the Act. Rather, they are (at best) agents of INM and the Director and Inspectors are thus precluded from investigating or sanctioning them.*
- (e) Further and/or in the alternative, the Director and Inspectors are confined to investigating breaches of the Act or of duties that specifically apply to INM or its officers, not to breaches of legal obligations more broadly such as those arising under GDPR of the DPA.'*

(iv) Mr O'Brien and Blaydon Limited

227. We received the following brief submissions on behalf of Blaydon Limited and Mr O'Brien:

- Mr O'Brien and Blaydon were not involved in the Data Interrogation, and it was not done at their request.

- The evidence given by Mr O'Brien and Mr Fagan accurately summarises the position. From that evidence, it is clear that they were removed from the events that occurred or are alleged to have occurred.
- Mr O'Brien had nothing to do with and knew nothing about the list of 19 names, Mr O'Brien said in his evidence that some of the names could be viewed as *contra* to him, but not others. In order to be of assistance, he provided a table setting out the position regarding each of the names on the list, i.e., whether he knows the person or not and whether the person could be viewed as "*contra*" to him. On the basis of that evidence, Mr O'Brien submitted that to characterise the list as an "*anti-O'Brien list*" would be erroneous.

D. Our Conclusions

228. Having considered the evidence and submissions we have received, our findings are set out below under the headings in the Terms of Reference in the Order.

(i) *The facts of and circumstances concerning the Data Interrogation*

229. In Section B. above, we have set out in some detail the facts and circumstances concerning the Data Interrogation. In our view, the key facts can be summarised as follows:

- (i) In June 2014, in the course of a cost saving initiative (Project Quantum), INM identified the provision of legal services as an area where an enhanced service could be provided and savings achieved, particularly in relation to defamation proceedings.
- (ii) A proposed tender process was initiated to enable the introduction of new arrangements and to ensure competitive pricing.
- (iii) As Simon McAleese, Solicitors had a contract to provide legal services that did not expire until 28 February 2016, they were unwilling to engage in the tender process. Further, they were not willing to agree to the proposed new arrangements (in particular the provision of on-site advice) without appropriate resources and revised remuneration arrangements.
- (iv) Following discussion at the Management Committee, Mr Buckley investigated whether there might be grounds to terminate the contract with Simon McAleese, Solicitors and in the course of that investigation, focussed on the circumstances in which the contract had been entered into.
- (v) Internal investigations revealed that, when the contract was renewed in 2011, changes were made to the contract terms which Mr Buckley considered favourable to Mr McAleese following the intervention of Mr Webb. One email from Mr Webb to Mr McAleese (and possibly others) could not be located in INM's records and Mr Buckley was advised that it had been deleted.

- (vi) After INM's internal investigation had failed to locate the missing email(s), Mr Buckley decided to engage an independent expert, Mr Mizak of DMZ IT, to review INM's data, and try to recover the missing material.
- (vii) On 3 October 2014, Mr Buckley explained to Mr Mizak the search to be undertaken. Mr Buckley gave Mr Mizak the names of the following individuals who he thought might have information relating to the renewal of the McAleese Contract – Mr Webb, Mr O'Reilly and Mr McAleese (and, possibly, Mr Donagher). He instructed Mr Wilde to provide all necessary assistance.
- (viii) The search of INM's data proved to be a slow and time-consuming exercise. Mr Mizak therefore advised that a specialist data recovery company be engaged to carry out the search following his, Mr Mizak's, instructions. He recommended that TDS be engaged. Mr Buckley accepted Mr Mizak's advice and recommendation.
- (ix) In October 2014, Mr Mizak located Mr Webb's mailbox, but it did not contain the missing email from Mr Webb to Mr McAleese. The focus then turned to INM's older back-up tapes that might not have been overwritten and so might have contained the 26 January 2011 email from Mr Webb to Mr McAleese.
- (x) It proved impractical for TDS to carry out the search of INM's back-up tapes in Dublin using transportable equipment, as it was inefficient and, again, time-consuming. So Mr Mizak recommended that INM's back-up tapes be transported to TDS's facilities in Wales.
- (xi) Mr Wilde was concerned at the suggestion that all INM's back-up tapes should leave INM's premises. To address that concern, Mr Buckley instructed Mr Mizak and Mr John Henry to ensure that appropriate security arrangements were in place following which Mr Wilde's concerns were allayed.
- (xii) On 27 November 2014, Mr John Henry arranged for the back-up tapes to be taken to TDS's premises in Wales.

- (xiii) In December 2014, TDS:
- Copied all the back-up tapes so that it would be in a position to carry out such searches of the metadata on those tapes;
 - Created a library from the metadata on the back-up tapes summarising the material on each tape; and
 - Recovered the mailboxes of four particular custodians – Mr O’Reilly, Mr Brophy, Mr Webb and Ms Scott – and transferred the restored mailboxes to a hard drive for use by Mr Mizak.
- (xiv) On 29 December 2014, the back-up tapes were returned to INM.
- (xv) In early January 2015, the hard-drive prepared by TDS was delivered to Mr Mizak.
- (xvi) In January 2015, Mr Buckley advised Mr O’Brien that there were no grounds on which to terminate the legal services contract with Simon McAleese, Solicitors.
- (xvii) In early 2015, Mr Mizak compiled lists of names that he maintained might have information about the circumstances in which the contract with Simon McAleese, Solicitors had been renewed. He told us that the lists of names were developed by searching the four mailboxes on the hard-drive provided by TDS and by use of Open Source Intelligence.
- (xviii) Mr Mizak sent the lists of names to TDS asking it to establish whether such individuals had mailboxes on the INM server and, if so, the size of such mailbox.
- (xix) TDS then provided a report indicating whether any such mailbox existed and, if so, the volume of material that would need to be restored and searched to establish whether relevant material existed.
- (xx) In the documentation produced to us in the course of this Investigation, there are references to four such reports having been prepared by TDS.

- (xxi) Both Mr Mizak and TDS confirmed that, in accordance with their normal procedures on the conclusion of an engagement of this nature, they would have destroyed copies of any reports that they would have retained.
- (xxii) As a result, only one of the reports prepared by TDS survived. It was disclosed by Mr Mizak to the ODCE in response to a statutory requirement. That report, dated 6 February 2015, set out the material available in respect of the 19 Persons of Interest.
- (xxiii) The 19 Persons of Interest comprised 8 employees and officers of INM, 3 journalists/broadcasters, 2 senior counsel, 4 employees of FTI Strategic Communications and 2 other individuals.
- (xxiv) Between October 2014 and March 2015, Mr Buckley received updates by text or by telephone from Mr Mizak (often through Mr John Henry) on the progress being made.
- (xxv) In June 2015, Mr Pitt consulted Mr Buckley because he needed assistance to establish how a confidential email had been leaked to the Phoenix magazine. Mr Buckley referred him to Mr Mizak and told him that Mr Wilde would know how to contact him, having worked with him in the past.
- (xxvi) Mr Pitt spoke to Mr Wilde and, whilst there is a dispute as to what exactly was said, it is clear that Mr Wilde told Mr Pitt that Mr Buckley had authorised INM data to be searched by Mr Mizak and others and that that had involved the data being transferred to a location overseas.
- (xxvii) At some stage during 2015, Mr Mizak advised Mr Buckley that he had been unsuccessful in locating the missing email(s).
- (xxviii) In December 2015, TDS sent an invoice for the work it had undertaken to Mr Preston, who forwarded it to Mr Wilde. Mr Wilde replied saying '*not for INM*'. On that basis, Mr Preston declined to pay the invoice and advised Mr Pitt on that decision.

- (xxxix) Mr Pitt realised that the TDS invoice related to the work that Mr Wilde had told him about and so mentioned the invoice to Mr Buckley. Mr Buckley told Mr Pitt to contact Mr Henry in relation to the invoice.
- (xxx) Mr Buckley spoke to Mr O'Brien and explained that, in the context of a cost-cutting exercise that had been unsuccessful, he was embarrassed at the level of the fee incurred. Mr O'Brien agreed that the invoice should be paid by Island Capital and it was subsequently paid by Blaydon on behalf of Island Capital.
- (xxxix) Shortly thereafter, DMZ IT submitted an invoice and this, too, was paid by Blaydon on behalf of Island Capital.
- (xxxixii) Mr Wilde and Mr McCarthy were the only INM personnel involved in or aware of the Data Interrogation.
- (xxxixiii) Mr Buckley did not tell the Directors that:
- He had instigated a search for missing documentation or information in relation to the 2011 renewal of that contract.
 - He had authorised a search of INM's data by Mr Mizak, DMZ IT or TDS.
 - To facilitate the search, Mr Buckley had authorised the transfer of all INM's back-up tapes to Wales.
 - The TDS and DMZ IT invoices had been paid by Blaydon on behalf of Island Capital.
- (xxxixiv) Mr Buckley did not consider or obtain advice on the legal or regulatory implications of the transfer of INM's tapes for interrogation by a third party.
- (xxxixv) Mr Pitt became aware that INM's files had been transferred overseas and searched by a third party in the course of his conversation with Mr Wilde in June 2015. He did not report this information to the Directors. Similarly, he did not report the existence of the TDS invoice to the Directors when he became aware of it in December 2015.

(xxxvi) Mr Pitt disclosed the Data Interrogation to the ODCE on 10 August 2017. The ODCE served statutory requirements on INM and other relevant parties on 11 August 2017. That was the first occasion on which the INM Board became aware of the Data Interrogation authorised by Mr Buckley.

(ii) The reasons for and the purposes of the Data Interrogation

230. At the outset (in Autumn 2014), Mr Buckley initiated the Data Interrogation because:

- There had been concerns within INM at the level of legal costs being incurred under the McAleese contract and there was a view that the nature of the services to be provided should be extended (see paragraphs 17 to 21 above);
- INM failed to negotiate revisions to the McAleese contract to address these issues and was unable to terminate the contract because the contract did not contain provisions permitting termination without cause;
- He wanted to find a basis on which to terminate the McAleese contract and believed that that might be provided if he could locate the email from Mr Webb to Mr McAleese dated 26 January 2011 and any related material; and
- The disappearance of that email from INM's records heightened his suspicion that the terms on which the McAleese contract was renewed were unduly favourable to Mr McAleese.

231. By the Autumn 2014, Mr Buckley had concerns about the circumstances in which the McAleese contract had been renewed in 2011. Those concerns were exacerbated by the apparent disappearance of Mr Webb's email to Mr McAleese dated 26 January 2011. Mr Buckley also had concerns about INM's requirements in respect of the provision of legal services more generally. We should note that, in the course of our Inspection, we have seen no evidence to suggest that there was anything untoward in the renewal of the contract, which was for the same five year period as the previous contract, or to substantiate any suggestion that it was in fact renewed on unduly favourable terms to Mr McAleese.

232. Mr Buckley told us that he pursued the Data Interrogation because his suspicions were heightened by the absence of the missing email from Mr Webb's mailbox.

Mr Gillane: Was there any concern on your part at this point that this is part of a cost reduction exercise and it is starting to escalate a bit in terms of what is being searched for and you might be spending a pound to save a shilling?

Mr Buckley: It actually became much bigger in my mind than just the cost reduction exercise. It started off as being a very simple cost reduction exercise seeing can we reduce it. All of a sudden it becomes this big issue of this e-mail not being found, what was happening, were company funds being misused and who else was involved in this process. And are there people within the company that really are still involved in that process. So all these things were going on in my mind, you know. When I was given the three options I said okay, can this be done safely and can this be done rapidly and they said yes.'

233. We have concluded that, following the discovery of Mr Webb's mailbox in October 2014 and confirmation that it did not contain the email dated 26 January 2011 from Mr Webb to Mr McAleese, Mr Buckley's interest in locating the missing email expanded to include the other related concerns that he had identified in his evidence set out above.

234. In reaching that conclusion, we noted that:

- There was no further mention of the missing email in communications between Mr Buckley, Mr Mizak and Mr Henry at any time after mid-October 2014 (following discovery of Mr Webb's mailbox).
- In fact, the communications that followed relate to the involvement of TDS, the transfer of the back-up tapes to TDS premises in Wales and then the work being undertaken by Mr Mizak in 2015.

- The communications relating to the work being undertaken by Mr Mizak in 2015 are indicative of a different focus (emphasis added in the following quotations):

- 6 January 2015 – text message – Buckley to Henry

*'Thanks John **any good info ?** Leslie'*

- 7 January 2015 – text exchange – Buckley to Henry (for Mizak)

*'John **when will we know outcome of the exercise ?** Leslie'*

*'Hi Leslie I have conference call at 1400 hrs today with Wales/US persons. **We will discuss the best method to extract info from the library we have. If I could talk to you after this for briefing purposes**'*

'Thanks John. Pls give me a call later Leslie'

'No problem Leslie'

*'Hi Leslie. **Let me know when suits you to talk re project.**'*

- 27 February 2015 – text message – Henry to Buckley

*'Hi Leslie Do you have a few minutes for a chat **re info on project** jh'*

- 2 March 2015 – text exchange – Henry (for Mizak) to Buckley

*'Hi Leslie **could we discuss Webb. May have something. Talk face to face rather than phone**'*

'Hi John how about 1.45 pm tomorrow ? Leslie'

'That's fine Leslie, Thanks'

Phrases such as *'any good info'*, *'outcome of the exercise'*, *'extract info from the library'* *'talk ref project'*, *'info on project'*, *'could we discuss Webb'*, and *'May have something, and 'Talk face to face rather than phone'* are not compatible with a search for a missing email.

235. We also noted that, at the time those text messages were sent, Mr Buckley had accepted that INM did not have grounds to terminate the McAleese contract. On 28 January 2015, Mr Buckley advised Mr O'Brien:

'Unfortunately there is no paper trail etc highlighting our issues with [Simon McAleese] and consequently we have no basis to break his contract and if we did it would cost us circa 1m euro – I even got a 2ND opinion on this.'

236. In relation to the names of the 19 Persons of Interest, we are not persuaded that all were generated in the manner described by Mr Mizak for the following reasons:

- When instructing TDS, Mr Mizak asked TDS to copy the mailboxes of Mr Webb, Mr Brophy, Mr O'Reilly and Ms Scott.
- It was logical to include:
 - Mr Webb – as he was the person who had sent the email dated 26 January 2011 setting out the terms Mr McAleese was to include in the 2011 contract;
 - Mr O'Reilly – as he was the person Mr Buckley suspected of having benefitted from the favourable terms agreed with Mr McAleese and
 - Ms Scott – as she was Mr O'Reilly's personal assistant.
- No explanation has been given for why Mr Brophy's mailbox was copied to the hard drive provided to Mr Mizak.
 - Mr Buckley did not give Mr Brophy's name to Mr Mizak on 3 October 2014.

- Neither Mr Wilde nor Mr McCarthy gave Mr Brophy's name to Mr Mizak.
- There was no reason to believe that Mr Brophy could have had any information relevant to the renewal of the McAleese contract:
 - His employment by INM as Director of Corporate Affairs began on 31 January 2011 (subsequent to the missing email from Mr Webb to Mr McAleese).
 - His name does not appear on any of the email correspondence relating to the renewal of the McAleese contract.

However, it is relevant to note that Mr Mizak had printed emails from Mr Brophy's mailbox in the course of the exercise he had undertaken in 2013 (see paragraph 40 above).

- If Mr Buckley had mentioned Mr Donagher's name on 3 October 2014, as he thought might have been the case, it would have been logical for Mr Mizak to have given his name to TDS
- Not all of the 19 Persons of Interest in the February 2015 Report could have been identified by Mr Mizak through searches of the mailboxes provided to him by TDS.
 - In order to establish whether all the 19 Persons of Interest could have been identified from the hard drive, we asked INM to provide us with copies of the mailboxes of Ms Scott, Mr Webb, Mr Brophy and Mr O'Reilly and we arranged for those mailboxes provided by INM to be examined to ascertain whether searches of the nature described by Mr Mizak would produce the names of all of the 19 Persons of Interest.
 - The examination was undertaken by Mr Ross Donnelly, Keith Borer Consultants. The mailboxes he examined were in the form they were in when steps were taken to secure them. As a consequence, it cannot be certain that the mailboxes were in exactly the same state as they were when examined by Mr Mizak in 2014/2015.

- Nevertheless, Mr Donnelly reported that the mailboxes contained:
 - Significant numbers of emails passing between or referring to Mr Webb, Mr Godson, Mr Brophy, Ms Scott, Mr Crowley, Mr O'Connor, Mr Smyth, Ms Sheahan, Mr Buggy and Ms Healy.
 - Significant numbers of emails passing between or referring to employees of FTI Strategic Communications – Mr Kenny, Ms Mansergh and Ms Kilroy.
 - 29 emails that referred to Nick Cooper. 22 of such emails were in Mr Brophy's mailbox and 7 were in Ms Scott's mailbox.
 - No emails that referred to the Counsel to the Moriarty Tribunal – Mr Jeremiah Healy or Jacqueline O'Brien.
 - No emails that referred to Johathan Nielson/Jonathan Nielson, Andrew Donoghue, or josborne@algoodbody.com.
- Mr Mizak told us that where a Person of Interest was not identifiable by searching the four mailboxes on the hard drive provided by TDS – namely Jeremiah Healy, Jacqueline O'Brien, Johathan Nielson/Jonathan Nielson, Andrew Donoghue, or josborne@algoodbody.com – that person would have been identified through the use of Open Source Intelligence.
- There is no dispute that:
 - The names of the Counsel to the Moriarty Tribunal – Jeremiah Healy, Jacqueline O'Brien – could have been obtained using Open Source Intelligence.
 - The list sent to TDS was intended to refer to Jonathan Neilan, Andrew Donagher and James Osborne.

- However, if Mr Mizak had used Open Source Intelligence, he would have been able to give the correct names to TDS and he would not have given:
 - Alternative and/or misspelt names – ‘*Johathan Nielson/Jonathan Nielson*’;
 - An incorrect name – ‘*Andrew Donoghue*’; or
 - An email address – ‘*josborne@algoodbody*’.

For these reasons, the only conclusion on the evidence available to us is that Mr Mizak obtained these names in a manner other than through Open Source Intelligence.

237. In reaching these conclusions, we note that Mr Mizak’s suggested use of Open Source Intelligence did not emerge until 25 March 2019.

- He did not mention his use of Open Source Intelligence:
 - When responding to the ODCE requirements;
 - In the course of his discussions with Deloitte whilst they were preparing their first (2017) report; or
 - In his reports to the DPC in November 2018.

When replying on 26 November 2018 to the DPC’s question ‘*What search criteria did you use?*’, he replied:

*‘Words and phrases such as defamation; Judgement; contract; court; Investigation; Inquiry; tribunal; barrister; solicitor; dispute; decision; award; libel; agreement; negotiation; legal services etc. and once responsive names in relation to such words/phrases were disclosed **from the restored mailboxes of four named persons at INM** then DMZ IT asked TDS UK to examine the copy of the INM backup tapes it held at that time to see if such names had mailboxes on the INM system and, if so, to provide a list of such mailboxes and the size of such*

mailboxes for the purpose of the Feasibility Study.’ [Emphasis added]

- Mr Mizak first mentioned the use of Open Source Information when interviewed by us on 25 March 2019 – when he told us:

‘And we have been pulling as well information from Open Source intelligence sources, so openly available sources, just trying to associate various different terms and people with different connections.’

Overall Conclusion

238. We accept that at the outset (in Autumn 2014), Mr Buckley initiated the Data Interrogation because he was concerned at the terms on which the McAleese contract had been renewed and by the deletion from INM’s systems of communications relating to that renegotiation. In these circumstances, he believed that, if the email from Mr Webb to Mr McAleese dated 26 January 2011 could be located, he might be able to establish grounds on which to terminate the McAleese contract.
239. After he had been advised that the email from Mr Webb to Mr McAleese could not be found (notwithstanding that Mr Webb’s mailbox had been found and restored), Mr Buckley authorised the continuation of the search for the missing email.

He did so, even though:

- The objective of Project Quantum and the renegotiation of the McAleese contract was to reduce costs; and
- The continued involvement of Mr Mizak, the involvement of TDS and the transfer of all INM’s back-up tapes to TDS’s premises in Cardiff would involve considerable expense.

When we asked Mr Buckley whether there was:

“... any concern on [his] part at this point that this is part of a cost reduction exercise and it is starting to escalate a bit in terms of what is being searched for and you might be spending a pound to save a shilling?”

Mr Buckley told us that:

'It actually became much bigger in my mind than just the cost reduction exercise. It started off as being a very simple cost reduction exercise seeing can we reduce it. All of a sudden it becomes this big issue of this e-mail not being found, what was happening, were company funds being misused and who else was involved in this process. And are there people within the company that really are still involved in that process. So all these things were going on in my mind, you know. When I was given the three options I said okay, can this be done safely and can this be done rapidly and they said yes.' [Emphasis added];

240. We have, therefore, concluded that the search for the missing email from Mr Webb to Mr McAleese was expanded to address the other concerns identified by Mr Buckley – namely that other persons connected with INM had been acting with ulterior motives or for concealed purposes otherwise than for the benefit of INM and his desire to find information about those who might be involved.
241. From the evidence we received and the documentation disclosed to us it is clear that a number of lists of names were provided to TDS by Mr Mizak. However, other than the list of 19 Persons of Interest, no such lists were disclosed to us. Both DMZ IT and TDS told us that all documents and work product had been destroyed on, or shortly after, completion of the work they had been retained to do. As a result, our Investigation has been significantly hampered by the absence of such contemporary documentation. Access to that contemporary documentation and the identity of the individuals named would, in all probability, have shed further light on the issues with which we are concerned and, in particular, the parameters of the Data Interrogation.
242. In reaching these conclusions, we were not persuaded by the evidence given by Mr Mizak as to the manner in which he generated the names that he provided to TDS following the location of Mr Webb's mailbox in October 2014 because:
- The inclusion of Mr Brophy's mailbox on the hard drive provided by TDS to Mr Mizak is inconsistent with the original objective of the Data Interrogation.
 - The 19 Persons of Interest included a number of individuals – such as the Counsel to the Moriarty Tribunal and Mr Cooper, who was General

Counsel to Cable & Wireless – who could not have had any involvement in or information about the renewal of the McAleese contract.

- *Johathan Nielson/Jonathan Nielson*, *Andrew Donaghue*, and *josborne@algoodbody.com* did not appear in the mailboxes inspected by Mr Donnelly and, in our view, could not have been identified for inclusion in the list of 19 Persons of Interest using Open Source Intelligence.

243. In circumstances where we are not persuaded by Mr Mizak's explanations as to the manner in which he generated the names provided to TDS and in the absence of further contemporaneous documentation or information, or any other evidence, to shed light on the parameters of the Data Interrogation, bearing in mind the very serious nature of the allegation and the degree of care which we have to exercise in reaching a conclusion, we do not think it would be appropriate to speculate on how the list of the 19 Persons of Interest or any other lists were compiled.

244. In view of the fact that Mr O'Brien's knowledge of the Data Interrogation was limited to the fact that Mr Buckley was pursuing enquiries into the circumstances in which the McAleese contract was renewed in 2011 and that Mr Buckley had engaged an external companies to provide resources, there is no evidence that Mr O'Brien was aware of the expansion of the ambit of the Data Interrogation that occurred after October 2014 and the work being done by Mr Mizak and TDS in relation to individuals such as the 19 Persons of Interest.

(iii) The knowledge of the Company's Directors of the Data Interrogation

245. We are satisfied that:

- In the course of Project Quantum, the provision of legal services was identified as an area where an enhanced service could be provided and costs saved. Accordingly, INM sought changes to the terms on which legal services were provided to it.
- After Mr McAleese rejected a request to revise his firm's contract to provide legal services to INM, Mr Marshall and Mr Doorly were aware that Mr Buckley began investigating the circumstances in which the McAleese contract had been renewed and whether there were any

grounds on which to terminate it. Mr Pitt also became aware that the McAleese contract was under review when participating in discussions prior to joining INM.

- The Directors were unaware of the Data Interrogation. In particular, they did not know that:
 - Mr Buckley had engaged Mr Mizak, DMZ IT and TDS to search INM's data for the email dated 26 January 2011 or other information relevant to the renewal of the McAleese contract;
 - Mr Buckley had authorised the transfer of INM's back-up tapes to TDS's offices in Wales; and
 - Mr Buckley had arranged for the TDS and DMZ IT invoices to be paid by Blaydon on behalf of Island Capital.

In our view, these were matters that Mr Buckley should have reported to the INM management and the INM Board.

- Mr Pitt became aware that INM's files had been transferred overseas and searched by a third party in the course of his conversation with Mr Wilde in June 2015. He did not report this information to the INM Board. Similarly, he did not report the existence of the TDS invoice to the INM Board when he became aware of it in December 2015. Whether he owed a duty as a director of INM to report such matters to the INM Board on becoming aware of them is considered in Chapter 11, paragraphs 32 and 33.
- INM, including its Directors, only became aware that its data had been searched in this way, and that reports had been requested by Mr Mizak and prepared by TDS on persons unconnected with INM, when statutory requirements were served by the ODCE on it, Mr Buckley, Mr Wilde and Mr McCarthy following a protected disclosure made by Mr Pitt to the ODCE on 10 August 2017.

(iv) *The results of the Data Interrogation*

246. We are satisfied that:

- The Data Interrogation did not result in the discovery of the email from Mr Webb to Mr McAleese dated 26 January 2011. Nor did it provide any explanation for the disappearance of that email from INM's records.
- The only outcome from the Data Interrogation were the results of the searches undertaken by TDS on Mr Mizak's instructions – only one of which has survived – the February 2015 report into the 19 Persons of Interest.
- Although the February 2015 report identified the existence of metadata evidencing the existence of emails and/or other documentation on the INM tapes that referred to some of the 19 Persons of Interest, no action was taken to obtain and review such material by TDS, Mr Mizak or any other person.

(v) *Payment for the Data Interrogation*

247. It is not in dispute that:

- Mr Buckley approached Mr O'Brien and asked that Island Capital pay the TDS invoice;
- Mr O'Brien agreed that the TDS invoice should be paid on behalf of Island Capital; and
- Mr Buckley arranged for the DMZ IT invoice to be paid on behalf of Island Capital.

248. Mr Buckley asked Mr O'Brien to agree that the costs of the Data Interrogation should be borne by Island Capital because he realised that:

- It would become difficult, without embarrassment, to explain in the context of a cost-cutting exercise, the nature and scale of the work

undertaken by DMZ IT and TDS having regard to the issue it was said to address, and why such work had extended into 2015.

- It would have been difficult to explain and justify to the Board why he had authorised the removal of all of INM's backup tapes to an overseas facility.

(vi) **The persons for whose benefit the Data Interrogation was conducted**

249. Mr Mizak and Mr Wilde understood that they were undertaking the Data Interrogation on the instructions of Mr Buckley. They also understood that Mr Buckley gave those instructions in his capacity as Executive Chairman of INM – which, in their view, legitimised the interrogation of INM's data.

250. However, INM told the ODCE that:

'Mr Mizak has stated that because INM were not his customer and he was working for a different customer he did not invoice INM for the services.'

This became relevant to the ODCE's concerns at the purpose for which the Data Interrogation was undertaken.

251. In paragraphs 238 to 243 above, we set out the reasons why we are unable to reach a conclusion as to the purpose for which the Data Interrogation was undertaken following the location of Mr Webb's mailbox at the end of October 2014.

The adequacy of the Directors' response to notification of the Data Interrogation, including their investigation of the same and engagement with the Data Protection Commissioner

252. In considering the adequacy of the Directors' response on learning of the Data Interrogation, there are two aspects to be considered – the steps they took (including the advice they received and the investigations they commissioned) and, in doing so, the mindset with which they approached the issue.

253. The adequacy of their response must also be considered in light of the information available to them on two different occasions – in August 2017 (following receipt of the ODCE statutory requirements) and March 2018 (following receipt of the ODCE

application to appoint Inspectors and Mr Drennan's grounding affidavit with the disclosure of the TDS results of the 19 Persons of Interest search).

The steps taken by the Directors

254. The steps taken by the Directors on becoming aware of the Data Interrogation in August 2017 and in March 2018 are set out in paragraphs 176 to 202 above.

255. We have considered the Directors' response in the light of the information then available to them – in other words, without the benefit of hindsight. We have also had regard to the fact that throughout the Directors (through the Special Committee) acted on legal advice.

256. Having done so, we are satisfied that the Directors took the appropriate actions by:

- In August 2017
 - Instructing Deloitte to carry out an independent investigation;
 - Instructing McCann FitzGerald to interview the principal persons involved; and
 - Reporting the Data Interrogation to the proper authority – the DPC.
- In March 2018
 - Re-engaging Deloitte with terms of reference extended to address the new information available to them;
 - Making a further report to the DPC;
 - Notifying data subjects potentially affected by the data breach; and
 - Commencing proceedings against Mr Buckley.
- Following receipt of the DPC's report, see paragraphs 197 to 199 above, INM took appropriate steps to implement the recommendations made in that report.

The mindset of the Directors

257. The second area to be considered is whether the Directors approached the issue of the Data Interrogation with an appropriately open mind.
258. Examples giving rise to concern at the Directors' mindset were set out in Mr Drennan's affidavit in support of the appointment of Inspectors. In the course of the ODCE proceedings, INM's report to the DPC dated 24 August 2017 was criticised on the following grounds:
- It downplayed the issue as being one that '*may*' have place personal data at risk when it was clear that the contents of INM's IT systems and back-up tapes respectively would have included personal data.
 - It described the Data Interrogation as providing DMZ IT and TDS with access to INM's IT systems and back-up tapes "*... for a limited business purpose*".
 - It asserted that the personal data was processed for limited purposes in accordance with the instructions provided to DMZ IT by the Chairman of the Company.
 - It characterised the incident as being one in which the principal issue was the absence of a signed non-disclosure agreement between INM and DMZ IT.
 - It failed to refer to the fact that the TDS and DMZ IT invoices were discharged by Blaydon, the beneficial owner of which is Mr O'Brien.
 - It failed to update the DPC by providing it with a copy of the October 2017 Deloitte Report.

August 2017

259. The approach taken by the Directors in August 2017 cannot be seen in isolation. So far as they were concerned, disclosure of the Data Interrogation took place against the following background:

- On 19 October 2016, they had discussed and agreed that Mr Pitt was not the person to lead INM.
- On 11 November 2016, Mr Pitt had made a protected disclosure to Mr Kennedy raising issues relating, primarily, to Mr Buckley's conduct in relation to the sale of INM's shares in APN and the proposed acquisition of Newstalk.
- On 18 November 2016, Mr Pitt had made a protected disclosure to the ODCE.
- A Sub-Committee had considered Mr Pitt's protected disclosure and concluded that there was no substance to the issues raised by it.
- Mr Preston had made a protected disclosure to Dr O'Hagan on 5 December 2016 (and he met with the ODCE on 20 December 2016).
- On 7 December 2016, following continued complaints by Mr Pitt at the manner in which his protected disclosure had been considered, the INM Board commissioned an Independent Review of Mr Pitt and Mr Preston's protected disclosures by two appropriately qualified individuals unconnected to INM.
- During early 2017, the ODCE served various statutory requirements on INM and others.
- On 24 July 2017, the Independent Review Report was received and considered by the INM Special Committee. Although unable to reach a

conclusion on the disputed evidence relating to the proposed acquisition of Newstalk, the Independent Reviewers concluded that:

‘on an objective analysis there was no act or matter identified that constituted a wrongdoing or potential wrongdoing.’

In relation to the allegations relating to the sale of INM’s shares in APN and editorial interference. They also concluded that neither INM nor its shareholders had suffered any financial loss or damage as a result of the matters that led to the review.

- On 9 August 2017, the INM Board met and accepted the conclusions reached by the Independent Review, agreed to implement certain recommendations made by it and accepted the Special Committee’s recommendation that the Board should treat its consideration of the issues arising from Mr Pitt’s protected disclosure as concluded. Mr Pitt reserved his rights in relation to INM’s handling of his protected disclosure and the outcome of the Independent Review.
- On 10 August 2017, Mr Pitt made a further protected disclosure to the ODCE in which he reported his concerns at the Data Interrogation.
- On 11 August 2017, the ODCE served statutory requirements on INM and others arising out of Mr Pitt’s disclosure of the Data Interrogation.

260. Having questioned Mr Pitt’s rationale for making his disclosure in November 2016, having addressed his concerns at the Sub-Committee’s process and findings by establishing the Independent Review, and having received a Report from the Independent Reviewers that seemed to have drawn a line under the issues raised by Mr Pitt, it was understandable that the Directors viewed this latest development with dismay and more than a little scepticism. And that scepticism would have been reinforced by Mr Wilde’s explanation of events – which tallied with Mr Buckley’s explanation and differed from that given by Mr Pitt first to the OCDE and then to Deloitte.

261. Having reviewed the notification to the DPC, we are satisfied that all the relevant information was included – with one exception. Given that the data breach involved the removal of all of INM’s data and back-up tapes, not only from INM’s premises,

but overseas, and the potential sensitivity of Blaydon as a related party, the fact that the costs of the Data Interrogation had been paid by Blaydon, an entity beneficially owned by Mr O'Brien, INM's majority shareholder, should have been reported to the DPC.

262. Although the Directors contend that INM was under no obligation to notify the DPC of the data breach and that the information omitted was not relevant to the matters falling within the remit of the DPC, in our view it would have been more appropriate, and consistent with full disclosure of all material facts if the notification to the DPC had included the information regarding the payment of the costs of the data interrogation by Blaydon.
263. In our view, subject to the omission of the information relating to the payment of the costs of the Data Interrogation by Blaydon, the letter to the DPC was legitimately circumspect and the language used did not reflect an inappropriate mindset.

March 2018

264. The situation in March 2018 was wholly different. The ODCE had applied for the appointment of Inspectors and had filed a lengthy grounding affidavit that included information that it had obtained through its enquiries, some of which was unknown to the Directors.
265. The information unknown to the Directors included additional information about the Data Interrogation and, in particular, evidence that searches undertaken by Mr Mizak and TDS were not consistent with the explanations that had been given to them by Mr Buckley. That evidence included the TDS report on the data available in relation to the 19 Persons of Interest.
266. The Directors were, variously, *'horrified'*, *'devastated'*, *'shocked and dismayed'*.
267. They commissioned a further extensive and focussed investigation by Deloitte. They reported the latest information to the DPC and, as they were required to, they took steps to notify those who might be affected by the data breach. And they commenced proceedings against Mr Buckley to protect INM's position.
268. We are satisfied that the Directors reacted to the further information about the Data Interrogation with commitment and in an appropriate manner.

Other Matters

(a) Whether Mr Buckley, Mr Mizak and/or DMZ IT failed to produce Reports prepared by TDS and passwords to open such reports

269. In the course of the ODCE application for the appointment of Inspectors, the Director drew attention to apparent deficiencies in the documents produced pursuant to the requirements served on Mr Buckley, Mr Mizak and DMZ IT.

270. The Director was concerned that Mr Buckley, Mr Mizak and DMZ IT had failed to produce:

- Reports prepared by TDS setting out the results of its analysis of INM's data pursuant to instructions given by Mr Mizak, and
- The passwords required to open such reports.

271. We have not identified any evidence to suggest that Mr Buckley was sent or had in his possession, power or control any reports prepared by TDS, whether password protected or otherwise. Nor have we identified any evidence to suggest that Mr Buckley was sent or received any passwords to access such reports.

272. In these circumstances, Mr Buckley was not in breach of any statutory requirement served on him requiring production of such reports and passwords.

273. Mr Mizak told us that on the conclusion of a project for a client, DMZ IT's invariable practice was to destroy all the material that had been received.

Mr Gillane: *Is it your practice -- I mean, I think it's referred to on occasion in the papers that there's a practice - you may as well deal with it now - in relation to destruction of records, is that right?*

Mr Mizak: *Yeah, yeah, yeah.*

Mr Gillane: *And can you just explain what that is, the practice of the company?*

Mr Mizak: *So what we do operate, any confidential information, yes, would be destroyed with once the project is finished. So the project is finished, the information is destroyed. I don't store information for the customer. So all the relevant information are passed to the customer. So if this is assessment, all the penetration tests or anything like that, all the findings, including all the artifacts, are passed to the customer together with report, yes, and then there's no recall, I'm not storing that information.*

Mr Gillane: *Okay. And I mean, I understand that in terms of returning or destroying data which you've been contracted, effectively, to assess, analyse, interrogate, whatever it is, but did I understand there to be a broader practice in the company of also destroying background material, for example letters of engagement or contracts or...*

Mr Mizak: *Now, I could keep sometimes work products if I create a new form, new policy, new document, yes, I could anonymise it and use it as the – as later on for a template, yes. But generally I wouldn't keep...*

Mr Gillane: *I mean, for example, is it the company policy to destroy the NDA once the job is done?*

Mr Mizak: *Once it's not valid, yes. Because –*

Mr Gillane: *And so you'd retain no record at all of its terms or –*

Mr Mizak: *Yeah.*

Mr Gillane: *And in terms of any actual signed letter of engagement or contract, what's the policy there?*

Mr Mizak: *Once the invoice is paid, it's...*

Mr Gillane: *But not until then?*

Mr Mizak: *If contract is over, yes, then I'm not keeping documentation.'*

274. As a result, whilst acknowledging that reports had been provided by TDS which had not been produced to the ODCE, Mr Mizak was adamant that such reports were no longer in his possession, custody or control.

275. TDS told us that it returned to INM all the materials provided to it and destroyed all the work product – including the reports or analyses that it had carried out.

Mr Clark: *We don't keep -- anything we do, the PSTs that we actually create are the original copy. We don't keep a copy of that because it's actually written to the drive that goes out the door and encrypted, right. So we don't retain that.*

...

The work proper, the temporary data, that whatever we've given to the customer they've have. We don't keep any of that, those reports either because they are irrelevant to us. In fact from a data protection and you know shared custody perspective we don't keep the work product ...

...

So when we produce the deliverables, had the project closed down, everything, all the work product on the servers and of course the tapes themselves were nuked, shredded and we have -- it's in our security protocol what we would do with that, yes.

276. Both Mr Mizak and TDS maintained that it was industry practice to destroy all such material on completion of a data analysis project unless a client requested otherwise in anticipation of further analysis being required. The rationale for this practice being that this was the best way of avoiding any breach of client confidentiality and because it removed the need to retain vast quantities of data.

277. In this context it is also appropriate to note that the materials that Mr Mizak and DMZ IT produced to the ODCE included a number of reports and documents sent by

TDS to Mr Mizak and DMZ IT that were password protected. Such passwords were not included in the documentation provided.

278. The ODCE served a specific requirement on Mr Mizak and DMZ IT requiring provision of the passwords necessary to access the reports and documents (or provision of the documents without password protection).
279. In response, Mr Mizak advised the ODCE that, as he did not have the passwords to access the reports and documents, he would try to obtain them from TDS (or Mr John Henry, through whom certain documents had been transmitted). However, neither TDS nor Mr John Henry had access to such passwords as they had been destroyed along with all other documents relating to the project.
280. In these circumstances, we accept that Mr Mizak and DMZ IT, TDS and any other person involved in the Data Interrogation had destroyed any reports and prepared in the course of the Data Interrogation, and any passwords required to access such reports.
281. Accordingly, at the time when the ODCE served statutory requirements on them, Mr Mizak and DMZ IT did not have in their possession, custody or control any reports prepared by TDS, or indeed any other party, or any passwords required to access such reports and so were not in breach of any statutory requirement served on them requiring production of such reports and passwords.

(b) TDS

282. As set out in Chapter 4, paragraphs 38 to 45, TDS did not respond to statutory requests for the production of relevant documents or other material. Nor did Mr Breen, Mr Cole or any person who was directly involved with the Data Interrogation give evidence in the Investigation.

283. TDS's failure to participate complicated our Investigation in a number of respects as we were unable to confirm various matters of which it had first-hand knowledge. However, we are satisfied that:

- TDS was engaged by DMZ IT with the knowledge and approval of INM's head of IT, Mr Wilde, on the instructions of Mr Buckley, INM's Chairman.
- There were no facts or matters to cause TDS, Mr Breen or Mr Cole to question whether the instructions they received were anything other than properly authorised by INM.
- The assignment involved cataloguing data tapes in order to create a searchable data library. As such, there was nothing unusual in what TDS was asked to undertake. Indeed, it was an exercise that it undertakes for companies carrying out internal investigations, for law enforcement agencies investigating criminal offences, and for parties faced with substantial; volumes of data produced in legal proceedings.

284. In those circumstances, there are no grounds on which to criticise the actions taken by TDS/TDSUK, Mr Breen and Mr Cole in the course of the Data Interrogation.

(c) *John Henry, Shane Henry, Keith Duggan, Specialist Security Services Ltd, Reconnaissance Ltd and Resilient Defence Ltd*

285. The involvement of John Henry, Shane Henry, Keith Duggan, Specialist Security Services Ltd, Reconnaissance Ltd and Resilient Defence Ltd was limited to:

- Acting as a conduit for communications between Mr Mizak, TDS and Mr Buckley;
- Transporting the back-up tapes to and from INM's premises to TDS's premises in Wales; and
- Collecting the hard drive from TDS and delivering it to Mr Mizak.

In undertaking such actions, they were acting on instructions given to them by persons with ostensible authority to act on behalf of INM – namely, Mr Buckley, Mr Wilde and Mr Mizak.

286. In those circumstances, there are no grounds on which to criticise the actions of John Henry, Shane Henry, Keith Duggan, Specialist Security Services Ltd, Reconnaissance Ltd and Resilient Defence Ltd.

(d) Whether, arising out of the foregoing or any other matters identified by the Inspectors, there have been any breaches of the Data Protection Acts, 1988 to 2003 (as amended)

287. Following notification of the Data Interrogation by INM, the DPC carried out an investigation into whether INM had complied with its obligations as a data controller under the Data Protection Acts 1988 to 2003. In February 2021, the DPC issued a final report in which it concluded that INM had contravened various sections in the Data Protection Acts. The DPC also made a number of recommendations directing INM to address the underlying issues which led to the DPC's findings. All of the recommendations made by the DPC have been implemented by INM.

CHAPTER 8 – THE PROPOSED ACQUISITION OF NEWSTALK

A. The Order

1. Under the terms of the Order, we have been appointed to:

‘investigate and report on the affairs of the company in particular

- (b) the proposed acquisition in 2016 by the Company from, Communicorp Group Limited (“Communicorp”) of Newstalk Radio (the “Proposed Newstalk Acquisition”), to include the role played by Leslie Buckley (the “Chairman”), then Chairman of the Board of Directors (the “Board”), in relation to the Newstalk Acquisition.*

and

- (i) Whether, arising out of the foregoing or any other matters identified by the Inspectors, there have been any breaches of:*

- (i) The Companies Act, 2014.’*

B. The Facts and Evidence relating to the Proposed Acquisition of Newstalk

The Development of INM's Acquisition Strategy

2. The sale of its holding in APN transformed INM's financial position. With the proceeds, INM was able to repay the outstanding amounts due to its bankers. This resulted in the release of the covenants constraining INM's ability to invest, make acquisitions and pay dividends. The strategy of controlling costs, and servicing and repaying debt that INM had, of necessity, pursued since 2009 was no longer appropriate. Investors and other stakeholders wanted INM to find new areas of business and build an income flow that would support the payment of dividends or distribute its surplus funds.
3. On 24 September 2015, the INM Board discussed the approach it should take to the future development of the company. Recognising that the opportunities for growth in its traditional areas of business were very limited, the Board established a Mergers & Acquisitions Committee ('M&A Committee'). The members of the M&A Committee were Mr Kennedy (Chair), Mr Harrison and Mr Connolly. Mr Buckley, Mr Pitt and Mr Preston were not members of the Committee, but frequently attended its meetings. Meetings would also be attended on an ad hoc basis by relevant individuals.
4. At the same meeting, the Board approved the engagement of Gerald Flood to advise on potential acquisitions and their evaluation. Gerald Flood, a former corporate finance partner at KMPG, was recommended by Mr Kennedy. He was retained because the INM Board was aware that the senior management team had limited experience of large corporate finance transactions and public company acquisitions and wanted to avoid situations where potential acquisitions were presented to the Board without being properly thought through.
5. On 6 October 2015, the M&A Committee met. The members of the Committee present were Mr Kennedy and Mr Harrison. Mr Leslie Buckley and Mr Connolly gave their apologies. In addition, Mr Pitt, Mr Preston, Mr Flood and Mr Doorly attended as observers.

6. The Committee agreed that its objectives should be to:
- Provide oversight, guidance and support to the management and the Board in relation to acquisition activities.
 - Engage with management in relation to the appraisal of acquisition targets.
 - Provide effective support to the Board in relation to the appraisal and approval of acquisition opportunities and make recommendations to the Board where appropriate.

The Committee emphasised that *'the initial acquisitions must be earnings enhancing and that, as confidence grows, the Group can then look at medium to longer term plays'*.

7. The M&A Committee considered draft Terms of Reference which provided that the Committee should:
- Consider the Group's acquisition strategy;
 - Set the criteria for acquisition targets;
 - Set terms of reference for its activities;
 - Review information on individual acquisition targets and approve further negotiations, recommend to the Board for acquisition, or not approve the proposed acquisition;
 - Review the effectiveness of the acquisition process, including the skills/experience of the acquisitions team; and
 - Review the budget and expenditure of the Group's acquisition activities.

8. The M&A Committee also:
- Approved the recruitment of a head of Mergers & Acquisitions, Cormac McNulty;

- Discussed the acquisition process to be followed by management;
 - Discussed the methodology to be applied in the search for acquisition targets and the criteria to be applied to the targets being examined;
 - Agreed the format of the information to be provided on targets; and
 - Approved the budget for M&A activity.
9. The M&A Committee (Mr Kennedy and Mr Harrison) met again on 21 October 2015. The Committee considered:
- An M&A Strategy Document which identified four streams for potential acquisitions – print publishing, digital, E-commerce and the 3rd leg (being activities that could deleverage INM from print and publishing); and
 - Criteria for the financial appraisal of acquisition targets.
10. The M&A Strategy Document was presented to the INM Board at its meeting on 30 October 2015. The Introduction & Background to that document stated:

'INM has a market leading position in print-publishing in its markets (ROI & NI). Even in the face of declining circulation revenues and a move from print-advertising to digital solutions, this channel is still highly profitable and creates strong FCF [Free Cash Flow]. This FCF combined with strong cash reserves and zero debt allows INM the opportunity to acquire new businesses that will grow and diversify the Group.'

The aim of growing and diversifying the business is important because:

Traditional revenues are facing long-term decline and the current digital revenue stream is at a very low base. INM is exposed to market changes in a narrow segment.

It will grow profitability and improve cash-flows.

EPS needs to be improved.

INM will achieve a re-rating of its stock and increase shareholder value.

In executing this strategy, INM will no-longer be a purely print-publishing operation, but will have diversified revenue and EBIT streams across three pillars:

Print publishing (including printing and distribution of printed products); declining LFL revenue streams but highly profitable, driven by consolidation and cost control.

Digital - products and services offered on virtual platforms and leveraging the audience there, growing revenue streams with high margins and positive profit growth.

3rd Leg - products and services which deleverage INM from publishing (print and publishing) and protect it from being fully exposed to market or economic adjustments within that segment. Revenues and EBIT characterised by high growth and margins.'

11. The M&A Strategy Document contained:

- Financial targets for 2015 to 2020, by which time the strategy was expected to deliver:

'EBIT of €70m (EBITDA €83m) with revenues in the region of €440m' and '[v]alue creating acquisitions in new channels such as digital and 'Third-Leg' will create EBIT of €31m by 2020, a CAGR of 66%. These high margin acquisitions, when maturing, would increase EBIT margin from 12% to 19% and require a total Capex of €80m on acquisitions, supplemented by FCF generated from normal operations.'

- acquisition criteria, which included that:

'[b]usiness cases and their execution [should] lead to growth rates and operating margins within acquisition targets that are higher than in core business so as to exponentially improve overall group performance.'

- Financial and commercial measures to be applied to acquisition targets. These were set out in a separate appendix and included:
 - High growth and/or in sectors where long-term growth is easy to see;
 - Nearing break even or in low profitability. Healthy operating margin clearly achievable through accelerating growth;
 - Pay-back in less than 5 years.

26 January 2016 – Meeting between Mr Buckley, Mr Pitt and Mr Preston

12. On 26 January 2016, Mr Buckley, Mr Pitt and Mr Preston met to discuss a strategy document, including INM's strategic objectives, that formed part of the January 2016 board papers.
13. There is a dispute about the views expressed by Mr Buckley at that meeting. Mr Pitt told us that he raised the position of smaller shareholders who had been through the bad times with INM and would appreciate a dividend to be paid and the share price to appreciate in value.

'And Mr. Buckley said something like, you know "He's not interested in the share price and this isn't -- his priority in running the company is for Mr. O'Brien and Mr. Desmond.'

14. Mr Buckley has consistently denied prioritising any particular shareholder or shareholders and, in particular, has denied making the statement attributed to him by Mr Pitt. Although present, Mr Preston had no recollection of the meeting or of comments of this nature. In the course of cross-examination, Mr Pitt accepted that this would have been a shocking and memorable thing for Mr Buckley to have said.
15. Following the meeting, Mr Pitt spoke to Mr Kennedy about the conversation that he had with Mr Buckley and his concerns at remarks made by Mr Buckley which Mr Pitt had interpreted as being indicative of a wish to favour certain shareholders.

Mr Pitt's appointment as a director of INM

16. In the period between his appointment as CEO in October 2014 and December 2015, the INM Group returned to revenue growth (by slowing the decline in print publishing and increasing growth in digital) and rationalised its printing capability.
17. On 28 January 2016, on Mr Buckley's recommendation, Mr Pitt was appointed a director of INM.

INM Board's strategy discussions between January and July 2016

18. The INM Board discussed strategy at its meeting on 28 January 2016.
 - It reviewed the target of achieving revenues of €451m and an EBIT of €48m by 2020 and concluded that they were reasonable.
 - It noted the recruitment of Cormac McNulty to head INM's M&A activity.
 - It noted that *'multiples of 8-9 times earnings must have growth/synergy potential in order to achieve payback of 5-6 years'*.
19. At INM Board meetings in March, April and June, management reported on progress in seeking potential acquisitions. Although management identified a number of potential targets, progress was slow and few were pursued. That lack of progress in making acquisitions was a matter of concern to the Board.
20. Mr McNulty, who joined in April 2016, told us that there was significant momentum to acquire new businesses that would diversify INM away from print publishing. He said that there was a focus on digital – but:

'The high quality digital had very high multiples attached. Then if you look at second or third tier that might be cheaper you get a far higher risk profile. I think a constant challenge we [had] and I think other publishers are still having is that it is very difficult to know exactly how to access digital without paying huge prices. I think a lot of these businesses are far from proven. Again with the financial challenges of the traditional publishing sector you couldn't really take too many risky bets, it was about trying to be conservative with the M&A strategy.'

21. At its meeting on 2 June 2016, the INM Board discussed:

'the CEO's report and noted the decline of print publishing. The Board discussed strategic responses taking place in New Zealand and Australia with strategic alliances being created by TV, radio and print - such as, for example, shared newsrooms. The Board asked if there was an opportunity to :

- Create a strategic alliance with, say, RTE, TV3, Communicorp;*
- Create a unique Irish voice (viz-a-viz Google, Facebook);*
- Draw learnings from New Zealand and Australia.*

The Board agreed that this is a significant strategic issue and asked that more time be allocated to this at future board meetings.'

22. These strategic challenges were again discussed by the Board at its meeting on 20 July 2016. The minutes of that meeting record that:

'Robert Pitt presented a paper on a possible corporate strategy roadmap. Management had been requested by certain shareholders to confirm that they had presented such possibilities to the Board and the discussion was aimed at making sure management had met that obligation. The paper, he said, had been prepared against the backdrop of tough trading conditions, Brexit, and share price weakness which, coupled with INM's significant cash balance, is creating pressure for a return of cash to shareholders. The possible roadmap, he said, offers a starting point for discussions on the value and timing of initiatives being outlined.

He outlined the key corporate objectives as:

- To create value for all shareholders; and*
- To diversify the Group.*

The key steps for H2, 2016 being:

- To build an M&A track record; and*
- To implement corporate actions to re-position the Plc.*

These corporate actions include:

- *Addressing the significant pension deficit - and providing certainty and protection to current employees/future pensioners.*
- *Completing the capital restructure to facilitate dividends; and*
- *Agreeing and communicating the Group's dividend policy.*

In addition, he proposed that the Board consider:

- *A stock consolidation; and*
- *A name change from Independent News and Media Plc to INM Plc.*

The Board discussed the proposed roadmap, the issues of pension, dividends and M&A activity and noted:

- *That cash is currently INM's competitive advantage within the industry;*
- *That INM cannot resolve the pension issue, the dividend issue and progress the M&A agenda all at the same time;*
- *The need to prioritise M&A;*
- *That funding the pension liability with cash gives up competitive advantage; and*
- *That it would not be comfortable paying a dividend without resolving the pension issue.'*

20 July 2016 – Meeting between Leslie Buckley and Robert Pitt

23. Following the Board meeting on 20 July 2016, Mr Pitt had a private conversation with Mr Buckley in the course of which they discussed a number of issues that had arisen. These issues related to the size of the INM Board (an issue that Mr Pitt had raised previously), aspects of the corporate strategy roadmap and the presentation of a paper on an editorial matter.
24. In relation to the corporate strategy roadmap, Mr Pitt mentioned the importance of having a clear strategy and that one issue to be considered was INM's low share price, which was of concern to certain institutional shareholders, and the consequential impact on INM's attractiveness as an investment. However, Mr Buckley did not

attach the same importance to increasing INM's share price to meet the expectations of a particular group of shareholders.

25. Mr Pitt discussed this conversation with Mr Kennedy. In commenting on the conversations on 26 January 2016 and 20 July 2016, Mr Kennedy told us:

'Although I cannot recall specific dates on which any particular conversations between myself and Mr Pitt took place, I do recall that on a few occasions, possibly as far back as January 2016, Mr Pitt raised with me conversations he had with the Chairman, where, in Mr Pitt's view, the Chairman was indicating to him that the interests of certain shareholders should be preferred over other shareholders.

I listened to Mr Pitt's concern, and when I interrogated the matter with Mr Pitt further on any occasion we spoke, based on what Mr Pitt was saying, I was in no doubt that there were no actual proposals which could be considered as attempts to prefer the interests of certain shareholders over others.

It was clear to me that these conversations were the result of a breakdown in communication between the CEO and the Chairman, and that Mr Pitt was taking a particular interpretation of certain comments which may have been made by the Chairman. In addition to this, from my point of view, in my time in INM I had never witnessed any examples of the Chairman seeking to prefer the interests of the major shareholder and there hadn't been any such proposals brought to the Board since I joined the Board in 2012 that appeared to be an attempt to prefer the interests of certain shareholder. Therefore I did not consider it necessary or that there was a basis for me to take any action in this regard.

I would have expected in the normal course that two senior business people working together, albeit expressing different views on matters, should have been in a position to resolve this. To my mind, in hindsight, this was the beginning of the breakdown of the relationship between the CEO and Chairman.'

26. Following his meeting with Mr Pitt on 20 July 2016, Mr Buckley met with Ms Doyle to discuss the concerns he had about Mr Pitt's performance and style, which he asked her to discuss with Mr Pitt. The points raised were:
- Mr Pitt's relationship with Mr Buckley, the management team and members of the INM Board;
 - The presentation of a paper relating to an editorial matter; and
 - Mr Pitt's suggestions/questions relating to the Board and its size.

Mr Pitt's discussions with Mr Buckley and Mr Kennedy about his continuing role with INM

27. On 31 August 2016, Mr Pitt met with Mr Buckley. At that meeting, Mr Pitt told Mr Buckley that, although he enjoyed his role as CEO of INM, he was concerned at aspects of his relationship with the Board.
28. He went on to suggest that INM might need a different kind of CEO for the challenges now facing INM and so the Company might need to advance its longer term planning for a new CEO. Mr Buckley encouraged Mr Pitt to reflect before making any decision to resign.
29. At a subsequent meeting on 5 September 2016, Mr Buckley encouraged Mr Pitt to speak with Mr Kennedy. Mr Buckley called Mr Kennedy and asked him to meet with Mr Pitt.
30. Mr Pitt met Mr Kennedy on 7 September 2016 to discuss his future with INM. Mr Pitt repeated what he had said to Mr Buckley. Mr Kennedy asked whether Mr Pitt had a problem working with Mr Buckley. Mr Pitt assured Mr Kennedy that he did not. Mr Kennedy told us that:

'He went out of his way to say that Leslie had been very good to him and had given him a real opportunity to be a Chief Executive of a Plc, an interesting and exciting one, he liked the job and Leslie had been good to him. So all positive on that front.'

31. At a further meeting on 14 September 2016, Mr Kennedy formed the view that Mr Pitt did not intend to stay on as Chief Executive Officer of INM. However, Mr Kennedy told us:

I said to him:

“Robert, I would like you to think very carefully about what you are now talking about because if you set that in motion you may find the time frame may not be your choice.”

32. In giving evidence, Mr Pitt maintained that he did not indicate an intention to resign and that he wanted to discuss succession planning and whether he was the right kind of person to lead INM in the long term.
33. Both Mr Buckley and Mr Kennedy took away from their respective discussions with Mr Pitt the clear understanding that he intended to resign and this was reflected in text exchanges between Mr Buckley and Mr Kennedy and between Mr Buckley and Dr O’Hagan. However, both tried to dissuade him from doing so.
34. On 19 September 2016, following his return from holiday, Mr Buckley spoke to Mr Pitt and told him that he had prepared a draft press release and proposed to advise the Board of Mr Pitt’s decision to resign at the Board meeting on 21 September 2016. After Mr Buckley rejected Mr Pitt’s suggestion that he remain in office while INM looked for a new CEO, without announcing that Mr Pitt would be leaving, Mr Pitt asked for time to consider his position.
35. 28 September 2016, Mr Pitt told Mr Buckley that, having reflected, he was fully committed to a long term role with INM.

The discussions between INM and Communicorp regarding Newstalk

The origins of the proposed acquisition

36. Over a number of years there had been discussions within Communicorp about potential synergies between INM and Communicorp, including Newstalk. However, initial high-level analysis did not suggest that cooperation between those two companies would give rise to savings which would be regarded as compelling for Communicorp as a whole. Given that INM and Newstalk were both news-gathering

organisations however, there was clear potential for savings related to Newstalk specifically. These were in line with the level of synergies discussed with INM in due course (in the order of approx. €2.1m).

37. In summer 2016, Communicorp looked at a complete cost restructuring of its business. This included looking at Communicorp's business – with and without Newstalk – and the potential for synergies through cooperation between, or by combining, Newstalk and INM's News Department.
38. Despite the apparent potential for synergies, given that both Newstalk and INM were news-gathering organisations, the analysis did not suggest that cooperation between the two companies would give rise to significant savings. On 8 July 2016, Mr Claffey sent an email to Mr Buckley in which he said:

'While one would think intuitively a merger could have benefits for at least Newstalk, analysis done by Stephen Kane on potential synergies does not show compelling savings.'

Mr Claffey told us that this was based on high-level, blue sky thinking without input from INM.

39. Mr O'Brien first began to contemplate the sale of Newstalk in June/July 2016, around the time that the Wireless Group/TalkSport transaction occurred.
40. Mr O'Brien told us that in his mind, Newstalk was a trophy asset:

'It will be – was turning to be a good business and we had a plan to take out costs that were all realistic and well thought out and we knew the business was going to turn positive EBITDA and, really importantly, we had a phenomenal digital offering, which is where INM should be, should have been.'

41. He said to Mr Shorthouse:

'... this is a media asset, it's adjacent to INM. If we are going to sell this business, we should offer it to INM because, if we don't offer it to them first and let them have a quick look at it and if we sell it without telling them we are going in a sales process, they would have been very upset

...

So I said “Let’s quickly show it to them. If they are interested, fine. If they are not, no problem” and then we would go into a process to see if we could get mainly News Corp, to be honest with you, given that they already had a radio business and a newspaper business in Ireland, we could maybe get News Corp to buy the business.’

42. On 1 September 2016, at the end of a meeting attended by Mr Buckley, Mr O’Brien and Mr Shorthouse, Mr O’Brien indicated that he planned to sell Newstalk.

43. Mr Buckley told us:

‘... as far as I was concerned, when Newstalk was mentioned to me, this was a national talk radio licence that probably would never, certainly in my lifetime, become available again. So on behalf of all the shareholders of INM, I felt it more than appropriate to have a close look at that.’

For this reason and as he thought there were opportunities to increase profitability from potential synergies, he indicated that Newstalk might be of interest to INM and said that he would mention the possibility to Mr Pitt. He also highlighted the need to handle any discussions carefully because anything involving Mr O’Brien had a tendency to attract publicity.

44. On 5 September 2016, Mr Buckley briefed Mr Pitt on the opportunity to acquire Newstalk and told him that Mr Shorthouse would be in touch to arrange a meeting with the Communicorp team.

45. On the same day, Ciaran Davis, Chief Executive Officer of APN, gave a presentation at Communicorp’s offices in which he described the steps APN had taken to consolidate its print and radio news interests and, by doing so, achieve significant synergies. The presentation was attended by Communicorp personnel and by Mr Pitt from INM. This presentation highlighted the potential savings that could be achieved through the merger of print and radio newsrooms and coordinated sales of advertising.

46. On 7 September 2016, Mr Shorthouse emailed Mr Buckley and said that he would contact Mr Pitt and set up a meeting *‘to discuss the full range of possible areas for co-operation’*. That evening, Mr Shorthouse telephoned Mr Pitt and proposed a meeting between INM and Communicorp. Mr Shorthouse also sent an email to Mr Claffey

asking him to attend a meeting with Mr Pitt, Ms Gaffney and Ms Slowey, respectively the Chairman and Chief Financial Officer of Communicorp, the aim being to discuss the possible ways INM and Newstalk could work together.

47. At about the same time, Ms Gaffney briefed Ms Slowey on the possible sale of Newstalk to INM and asked her to work with Mr Pitt as necessary to progress those discussions.
48. Shortly thereafter, Mr Pitt and Ms Slowey met and discussed the lessons from the presentation by Ciaran Davis, the potential synergies that might be available, and Newstalk's financial performance. In their discussion, and against a background where Mr Pitt had no financial information for Newstalk other than that it was loss-making, Mr Pitt talked down the possible price to acquire Newstalk and Ms Slowey countered, emphasising the unique opportunity that it represented.

15 September 2016 – Mr Pitt's first meeting with Communicorp

49. The first meeting between INM and Communicorp took place on 15 September 2016 at the offices of Communicorp. It was attended by Mr Pitt, Mr Shorthouse, Ms Gaffney, Ms Slowey and Mr Claffey, a director of Island Capital. At that meeting, the focus was on the reasons why it made commercial sense for INM to work together with Newstalk. In light of the presentation by Ciaran Davis, Mr Pitt agreed that a combined print/radio business might work provided that any such arrangement would be commercially attractive to INM.
50. Mr Claffey recalled that Mr Pitt had said that he was very interested in acquiring Newstalk. However, Mr Pitt also noted that as Newstalk was a loss-making business, the acquisition would:

'have to make commercial sense now, it has to be something which is going to be a good deal for INM shareholders.'

Those present also recognised that a number of regulatory approvals would be required.

51. At the end of the meeting, it was agreed that the proposal should be explored further and a meeting was arranged for 21 September 2016. It was agreed that Communicorp would prepare some information on Newstalk for Mr Pitt to review, including

financial information. Communicorp would consider any regulatory approvals that might be required, while Mr Pitt was to investigate the corporate considerations – including the fact that the transaction would be a related party transaction under the Irish Stock Exchange Rules. There was no discussion of valuations at that initial meeting.

52. That evening, Mr Shorthouse sent a text to Mr Buckley to say that:

'Had a useful session with Lucy, Gervaise, Robert and Pat. Plan to meet again next week to move forward. Have booked lunch for us with Denis next Friday. Am around tomorrow between various meetings if you want to chat.'

53. On 19 September 2016, Mr Buckley sent a text to Ms Gaffney advising that:

'I met Robert when I got back this afternoon and there won't be any announcement this week as he is gone away to consider after my chat with him. Very enthusiastic about the meeting last week but understandably concerned about the price required.'

54. In the context of Communicorp's internal planning, Ms Gaffney sent an email to Mr Shorthouse and Mr Claffey in which she reported a conversation that she had had with Mr Buckley in the course of which he had said that he was:

'primarily concerned that he can sell this to institutions and that it would not be perceived as a sweetheart deal with the accompanying flack experienced by Siteserv.'

20 September 2016 – M&A Committee meeting

55. The INM M&A Committee met on 20 September 2016. It was attended by Mr Kennedy, Mr Buckley, Mr Pitt and Mr Harrison. Ryan Preston, Cormac McNulty, Gerard Flood and Michael Doorly were in attendance. As was usual at M&A Committee meetings, management gave an update on the status of potential acquisitions. However, no mention was made of the possible acquisition of Newstalk.

21 September 2016 – Island Capital presentation on Newstalk

56. On 21 September 2016, a second meeting took place. It was attended by Mr Pitt, Mr Shorthouse, Ms Gaffney, Ms Slowey and Mr Claffey. Island Capital had prepared a presentation on the merits of the proposal. That presentation:
- Was based on the premise that INM had expressed interest in acquiring Newstalk.
 - Suggested that a *'synergistic transaction could 'unlock' value for both buyer and seller'*.
 - Noted that Newstalk was due to be awarded a new 10 year licence in October 2016 and that it was probable that it would contain a condition prohibiting a sale or transfer of the licence for 2 years.
 - Summarised Newstalk's financial performance. Following successive years of operating losses culminating in a loss of €2.1m in 2015, operating profits were projected from 2017 onwards.
 - Recognised that there would be a number of regulatory considerations and a need to engage with the Broadcast Authority of Ireland.
 - Noted that under the Irish Stock Exchange Rules, the transaction would require shareholder approval and, given Mr O'Brien's interests in both parties, the transaction would be treated as a 'related party' transaction and Mr O'Brien would not be allowed to vote on any resolution related to the transaction.
57. At the end of the meeting, both sides agreed to progress the discussions in order to see whether an agreement could be reached. Although Mr Claffey suggested that INM had sufficient information to formulate an indicative offer, the parties agreed that their respective Chief Financial Officers should discuss possible synergies and cost savings and that both parties would obtain regulatory advice. A further meeting was scheduled for 6 October 2016.

21 September to 28 September 2016 – INM internal discussions

58. INM's M&A strategy was discussed at a Board meeting on 21 September 2016. The Board concluded that, given the increasing decline in print, diversification was a priority and requested that workshops on strategy be scheduled immediately after each of the Board meetings in October, November and December. The Board was not advised of the discussions with Communicorp.
59. Mr Pitt first mentioned the possible acquisition of Newstalk to Mr Preston on 27 September 2016. Mr Preston told us that Mr Pitt told him:

'... that there was challenges with this because of who the shareholder was, related party transactions and, also, to be fair, we had been to see investors as part of investor roadshows -- there was concern on the investor's mind that there was a large pot of cash in the business and they wanted that shared with all the shareholders and we weren't paying the dividend at that time and they were worried that that cash could go to some of the major shareholders ahead of them. There was no logic behind that but it was on their mind.'

60. The following day, Mr Pitt met with Mr Buckley and Mr Preston and briefed them on the progress that had been made in the discussions. Mr Pitt told us that, in addition to the commercial, regulatory and corporate considerations identified above, the principal points that he raised were that:
- As any transaction would be a related party transaction, Mr Kennedy would probably need to be involved.
 - Any negotiations would need to be handled sensitively as, in his view, a reasonable purchase price would be of the order of €12m, and that he expected Communicorp to be much more aggressive in its valuation.

Mr Buckley didn't express any particular views about the merits of the transaction or recall any price being mentioned.

61. At this meeting, Mr Pitt raised a concern that INM's institutional shareholders would expect that, if Mr O'Brien was receiving a significant payment for Newstalk, INM should pay a dividend. Mr Buckley said that a decision to acquire Newstalk and a decision to pay a dividend were two different matters. As a result of this discussion,

Mr Buckley suggested that he and Mr Pitt should meet with Davy and ensure that they were clear about the implications of acquiring Newstalk.

62. It is unclear when Mr Buckley advised Mr Kennedy that INM was considering buying Newstalk from Communicorp.
- Mr Buckley said that he told Mr Kennedy about the possible acquisition of Newstalk either on 5 September 2016 at the same time as he briefed Mr Kennedy of his conversations with Mr Pitt in relation to Mr Pitt's future (paragraph 29 above) or after his return from holiday (paragraph 34 above).
 - Mr Kennedy said that he received a call from Mr Buckley sometime in September in the course of which Mr Buckley told him that Newstalk might be for sale and, as it could be of strategic interest, it would be considered. Mr Buckley volunteered that he was aware that it would be a related party transaction (and would therefore have implications for Mr Connolly and himself) and that Davy would be retained on behalf of INM.

28 September 2016 – Meeting between Mr Kane and Mr Preston

63. Following his conversation with Mr Preston on 27 September 2016, Mr Pitt emailed Mr Kane suggesting a meeting with Mr Preston. That meeting took place the following day in the course of which Mr Kane took Mr Preston through Newstalk's key financial data and performance.

6 October 2016 – Meeting to discuss regulatory advice

64. On 6 October, 2016, Mr Pitt met Ms Gaffney, Mr Shorthouse, Ms Slowey and Mr Claffey. Ms Slowey reported that they had received legal advice indicating that an acquisition might be expected to encounter regulatory challenges because it would reduce plurality in the media sector, but that these were not insurmountable. Island Capital's note of the meeting recorded that:

'relatively little had progressed since the last meeting and Ms Gaffney expressed disappointment at the lack of progress.'

65. Later that day, Mr Pitt met with Ms Kelly, a regulatory lawyer with Matheson. Her reaction to the proposed acquisition was that:
- The Competition and Consumer Protection Commission were likely to raise concerns, but those should be capable of being addressed.
 - Significant challenges were likely to be raised as a result of the reduction of plurality in the media sector. As a result, INM was likely to be required to give undertakings that would require the two companies to be kept separate. That, in turn would affect the attractiveness of the transaction to INM.
 - The Broadcast Authority of Ireland was unlikely to raise any different issues.
66. On 6 October 2016, Communicorp instructed IBI to prepare a valuation. Mr Claffey and Mr Kane met with IBI on 7 October 2016.

10 October and 13 October 2016 – Meetings with Davy

67. Following the decision to engage Davy, on 10 October 2016, Mr Pitt met Mr Ivan Murphy, Head of Corporate Finance at Davy, to brief him on the transaction being considered.
68. Immediately after that meeting, Mr Pitt and Mr Murphy met Mr Buckley at his office to discuss INM's possible acquisition of Newstalk. Having explained the rationale for such an acquisition – based on Ciaran Davis's presentation to Communicorp and the potential savings APN had achieved by bringing print and radio together – the meeting turned to consider the likely reaction of institutional shareholders to the acquisition of an asset from Mr O'Brien and whether there would then be increased pressure for payment of a dividend or a share buy-back.
69. Mr Murphy took the view that the proposed acquisition of Newstalk would be assessed by INM's shareholders on its merits, particularly as INM had stated that it intended to use its available resources to diversify away from print. Mr Murphy emphasised that INM would have to demonstrate that such an acquisition would be the right step for INM to take. Furthermore, as a related party transaction, such an acquisition would require shareholder approval and a circular (including a synergy

statement). In such circumstances, he explained that consideration should be given to sounding out significant shareholders to see if they would support the proposed acquisition. Against that background, Mr Murphy advised that the issue of payment of a dividend would be viewed as a separate matter.

70. Mr Murphy confirmed that Mr O'Brien would not be able to vote on any shareholder resolution to approve the acquisition and that Mr Connolly and, in all probability, Mr Buckley would not be able to vote on any Board resolutions relating to the proposed transaction. Mr Murphy agreed to provide a memorandum setting out the provisions governing related party transactions.
71. On 13 October, 2016, Mr Pitt and Mr Preston met with Mr Murphy, Mr French and Mr Barry Murphy. At the meeting, Davy provided INM with:
 - A memorandum setting out the implications of proceeding with a related party transaction, including the requirement for shareholder approval, and confirmed that Mr Buckley and Mr Connolly would be regarded as non-independent directors and so would not be able to vote on Board resolutions relating to the proposed acquisition of Newstalk. The memorandum did not address the involvement of associates of related parties in negotiations or internal discussions.
 - A desk-top analysis which included a summary of recent transactions in the sector. Mr Murphy explained that it focused on the appropriate valuation methodology – not least because Davy had very limited information on Newstalk's financial performance.
72. Both INM and Davy personnel were asked to sign Non-Disclosure Agreements. Given that INM was a long-standing client of Davy, Mr Murphy regarded this as unusual. However, he accepted that this reflected the sensitivity of a transaction involving INM's major shareholder.
73. Later that day, Mr French sent himself a note of the meeting recording the subjects discussed. He noted that, because Newstalk was loss-making and being sold by INM's majority shareholder, the rationale for the purchase and the price being paid would have to be soundly based.

74. Following the meeting, Mr Pitt provided Mr Buckley with the documents prepared by Davy.
75. Later that day, Mr Pitt met with Ms Kelly. Following further research and reflection, her views on media plurality had become more negative and she suggested that a management contract might be an easier way to release the potential synergies.

14 October 2016 – IBI presentation valuing Newstalk at €30-35m

76. On 14 October 2016, a meeting took place attended by representatives of INM (Mr Pitt, Mr Preston, Mr Buckley), Davy (Mr Murphy), Communicorp (Ms Gaffney, Mr Claffey, Ms Slowey, Mr Shorthouse and Mr Kane) and IBI (Mr Godfrey and Mr Heffernan). The purpose of the meeting was to provide INM and Davy with information about Newstalk.
77. Mr Godfrey and Mr Heffernan took the meeting through a presentation IBI had prepared on Newstalk. That presentation:
- Valued Newstalk at between €30-35m and supported that valuation using a number of different methodologies.
 - Suggested that a discounted cashflow at a 10% discount rate would support a valuation of over €50 million.
 - Referred to the fact that approximately €37 million had been invested in positioning Newstalk as a competitive national radio station.
 - Projected cost savings of c.€3.4 million.
78. Having listened to the presentation, INM's representatives did not react to the valuation or the basis on which it had been prepared. They said they would consider IBI's presentation and respond in due course. The discussion then turned to the regulatory advice that each party had received.

79. When we asked for their reactions to the valuation put forward by IBI:

- Mr Pitt told us:

'... they showed a valuation which was in the region of 30 to 35 million and they showed several ways of how they had calculated that. I can't remember the exact detail of it now, but a few ways and I think averaging out that the band which it was lying in was 30 to 35 million, yeah, and, in my head, I was just saying this is the level of craziness now that it's come to.'

- Mr Buckley told us:

Mr Buckley: ... look, that's a fairly high value, but, you, know, if you're doing the job of the vendors selling the product, you're going to put your best foot forward, okay? So to be honest, I didn't take much notice of it, you know. As far as I am concerned, they had a selling job, but I wasn't even commenting on it.

Mr Gillane: I mean, you saw it then more as a kind of a sales pitch?

Mr Buckley: Quite right.

Mr Gillane: But just in terms of the number itself even internally before the meeting ends, was there any sense -- because you get this sense from other people, rightly or wrongly, that, look, that number was sort of immediately recognisable as being sort of off the wall as a price?

...

Mr Buckley: But, again, it didn't matter to me what number they were putting on the table, okay, because, like, when you're selling a product, you're going to put the highest figure you possibly can. If you are selling a house, you're going to have to probably reduce the price of the house at a later stage, okay.

So, like, I was only – we were only having a first initial discussion with the sale of the house, okay, as far as I was concerned.'

- Mr Preston told us:

'I was stunned

...

So if it was me, I would have just walked away then.

...

... because I would have felt extremely uncomfortable spending 30 to 35 of our 60 million and having to sit down with shareholders who I would two, three or four times a year to say "I just spent 35 million of your cash which you can't access because I'm not paying a dividend and you are getting a loss-making radio station for that." That's a hard sell.'

- Mr Murphy told us that he thought the price was completely disproportionate to the trading performance of Newstalk and that:

'... my jaw would have dropped in terms of how they had approached what I didn't think was a very sensible approach to valuing the company.

...

... we've all seen what we call bid-offer spreads – you know, start very wide and narrow down over time and, you know, these things are very iterative and ultimately there's a – you know, there can be situations where the bluff is taken out and ultimately people become more commercial.

...

So I think my sense of it was, look, if these guys really want to get 30 or 35 million for the business, I think you should walk away and I don't think you should continue this conversation or discussion or negotiation, call it what you will, because it's just so far out of what any reasonable person might think Newstalk is valued at, that, actually, really you can only do yourself damage by engaging in it really at this stage.'

80. When leaving the meeting, Mr Buckley and Mr Murphy had a brief discussion about the IBI valuation. Mr Buckley told us:

'I remember walking with Mr. Murphy to the lift, which would have probably taken all of less than 60 seconds, okay, and Mr. Murphy said "Wow, that's a pretty high figure", okay, and I just said "Yeah, I'm sure it is" or, you know, I can't actually recall what I said.'

He also told us that he:

'always thought that they [Davy] were somewhat conservative, and the IBI figures I always thought were too high'

Mr Murphy did not recall Mr Buckley either agreeing or disagreeing with those views.

81. We asked Mr Buckley to explain whether he was concerned at the approach being taken by Communicorp. He told us:

'... all I wanted to do is to just get a figure that would get us to the table because the IBI figure and the Davy's figure were immaterial, to be honest. When you think of it, any of those figures were totally immaterial because it was going to be dependent on the findings of due diligence.'

82. Mr Murphy told us that he was not aware of Mr Buckley's strategy, and that:

'... that's a difficult strategy to pursue if that, in fact, was the strategy because you know, if one is to do due diligence and spend time and, you know, executive time and professional time on these situations, it's going to cost the company some money. And, you know, if, as we said at the outset, if you're so far apart in terms of spread, I would see little point in doing that and I would not be encouraging our own client to be engaging in that discussion or spending that money because, you know, you're so far apart.'

He also told us:

'... when you are acquiring a business like this, it's not the historic numbers that matter; it's actually the numbers that will arise over the next few years,

which are inevitably then somewhat subjective in the sense that you're relying on, you know, everybody's best commercial judgements around what the growth rates of the revenue and the profits might be and, equally, in terms of cost savings that will arise as a result of the acquisition, you know, what those might be and how they might be shared or whatever. So they are fairly critical subjective inputs into what's intended to be a forward-looking valuation because, if you were to look at it on a historic basis where the company had not made a lot of profits, you would obviously be assigning a very low, a low valuation to it, irrespective of the amount of invested capital in the business.'

83. Following the meeting, Ms Gaffney spoke to Mr O'Brien. She reported to Mr Claffey that Mr O'Brien wanted an offer the following week, regardless of regulatory considerations and that that had been communicated to Mr Pitt. Mr Claffey suggested that the best approach would be to develop a commercial but realistic deal for both sides and then address the regulatory issues.

17 October and 18 October 2016 – Davy valuations

84. Following the meeting on 14 October 2016, Davy began modelling different assumptions in conjunction with INM's management (primarily, Mr Preston and Mr McNulty), and developing a response to the IBI valuation.
85. With the benefit of INM management input, Davy prepared two valuations. The valuation dated 17 October 2016 contained a valuation range of €14-18.4 million with an outside valuation of €26.4 million. The valuation dated 18 October 2016 contained a valuation range of €11-15.3 million with an outside value of €21.5 million.
86. The key differences in the IBI and Davy approaches to valuing Newstalk can be summarised as follows:
- Growth Projections:
 - IBI assumed an annual growth rate of 8%.
 - Davy assumed an annual growth rate of 3%

- Performance:
 - IBI assumed that Newstalk would be making a profit of €1.9m by 2019 and used that year as the baseline year for valuation purposes.
 - Davy assumed that Newstalk would make a profit of €0.3m in 2018 and used that year as the baseline year for valuation purposes.
- Synergies:
 - IBI assumed that synergies totalling €3.4 million per annum could be achieved and allocated 50% to 100% of such synergies to the vendor, Communicorp.
 - Following regulatory advice, Davy assumed that synergies totalling €2 million per annum could be achieved and allocated 50% or 25% of the benefit to the vendor.
- Price Multiple:
 - IBI assumed a multiple of 11.5x-12.5x based to a substantial extent on the price at which the Wireless Group had been sold to News Corp.
 - Davy did not consider the multiple on which the purchase of Wireless Group was calculated (18.4x) to be an appropriate comparable to take into account as the Wireless Group's portfolio included TalkSport, an established and profitable sports channel. Davy used a multiple of 9x- 11x.

18 October 2016 – Meeting to discuss the regulatory considerations

87. On 18 October 2016 (16.00) a meeting took place attended by Mr Pitt, Mr McNulty, Ms Kelly, Mr Claffey, Ms Slowey, Mr Kane, and Mr Hickey. The meeting focused on the regulatory issues and the identification and valuation of potential synergies.
88. INM said that it had reviewed the IBI valuation paper and that, as any synergies would be achieved by the purchaser, those synergies should not be included by the

seller in its calculation of the purchase price. INM also challenged the assumption that revenue would grow at 8% per annum.

89. In a note of the meeting, Mr Claffey recorded that Mr Pitt was very negative and did not think he could convince Davy to support the assumptions being put forward by IBI.
90. At the end of the meeting, Communicorp asked for a non-binding offer by Friday, 21 October 2016 so that it could be considered at a Communicorp board meeting taking place that day.

18 October 2016 – INM M&A meeting

91. On 18 October 2016, a meeting of the M&A Committee took place. It was attended by Mr Kennedy, Mr Buckley, Mr Pitt and Mr Harrison. Mr Preston, Mr McNulty, Mr Flood and Mr Doorly were also in attendance.
92. Management presented to the Committee a slide deck relating to the potential acquisition of a large UK listed company ('Project Canary'). The slide deck had been prepared by Trillium, advisor to the potential target. The Committee had reservations about the proposed acquisition arising from the target's poor performance, Trillium's long association with the target and the fact that management had not, at that stage, adequately developed the business case to support the acquisition. Although it was not convinced that this would be a suitable acquisition, and would require more work before it could receive Board approval, the Committee agreed that management should present the proposed acquisition to the Board at its meeting the following day.
93. Although an update was given on the status of potential acquisitions under consideration, no mention was made of the possible acquisition of Newstalk at the meeting of the M&A Committee or the subsequent Board meeting.
94. Mr Pitt told us that he asked Mr Buckley whether he should include the possibility of acquiring Newstalk on the upcoming M&A Committee agenda:

I asked Mr Buckley should I put [Newstalk] on the agenda for the M&A Committee, which I believe would have been on the 17th, if we had an M&A Committee at that time, I think we did, but we definitely didn't put it on the M&A Committee agenda, he asked me not to, okay. I asked him should we

discuss it at the main board meeting as well, okay, because there was a serious, not issue, a serious discussion to be had about a very large acquisition that we were proposing for a plc in the UK and I was told as well no, not to put it on the thing.'

95. Mr Buckley accepted that he may have told Mr Pitt that the possible acquisition of Newstalk should not be on the agenda for the M&A Committee meeting or the Board meeting on the following day.

Mr Gillane: ...can I ask you was there a positive decision made, look, to keep this proposed acquisition away from, as it were, the M&A Committee and the Board in terms of letting people know that this was even being thought about or talked about?

Mr Buckley: There would have been – I was really anxious to keep this under cover for as long as possible right. If we got to a situation whereby, all right, there was a figure where we could get in and do due diligence, then of course the M&A Sub-Committee would become aware of it, right, and if course, there are members of the Board sitting on the M&A Sub-Committee and the Board would become aware of it, right. But until it became that we had any substance to it, I didn't want this to be, to get out there, right. Just I'll go back to what I said yesterday, people love chitchatting about Denis O'Brien.

Mr Gillane: Did Mr. Pitt -- I think it is suggested at some point that Mr. Pitt asked; 'Look, should I put this on the agenda?', and you told him not to, specifically?

Mr Buckley: He may have. He may have. But why would you put it on agenda? On the agenda of Board Meetings, is it?

Mr Gillane: Yes.

Mr Buckley: Yes. Why would you put it on the agenda of a Board Meeting when it hasn't even gone to the M&A Sub-committee?

Mr Gillane: Or sorry, or even put it on the agenda for the M&A?

Mr Buckley: *Yeah. I wouldn't even do that at that stage because we didn't get to a stage whereby – you see, I think it is important, sorry, I think it is important to recognise a seller, Communicorp were selling the company, they would not want the buyer to know too much about their business if there wasn't a price range that they appeared, look, there's a price range that I think we would be happy with, but of course, we understand that it's dependent on due diligence, okay. So from Communicorp's point of view, right, from my point of view, I wanted to get a situation whereby well, at least Communicorp would say; 'Okay, look, we are not particularly happy with that price, but look, we will accept it to go ahead and do due diligence, maybe it will improve the price or maybe it will decrease the price', all right. But no seller wants to disclose the information about their business unless they are in an arena there whereby, look, I think that could satisfy the buyer.*

Mr Gillane: *And a deal is likely?*

Mr Buckley: *And a deal is likely.'*

96. Mr Kennedy, the Chair of the M&A Committee, told us that he was not aware that this issue had been discussed between Mr Pitt and Mr Buckley. He did not raise the issue as he did not think that the proposed acquisition was ready for consideration by the M& A Committee.

Mr Kennedy: *There was a sensitivity in relation to the confidentiality aspect of it, that unless this was going to travel then it wasn't something that should be talked about because obviously if it was talked about and it got out and it didn't go ahead there was lots of damage done.*

Mr Gillane: *That is fair enough*

Mr Kennedy: *That would be an issue of sensitivity, but not in any way that this is not going to go through due process.*

Mr Gillane: *At this stage there was this sensitivity about it leaking out?*

Mr Kennedy: *Absolutely*

Mr Gillane: *Did he express that to you?:*

Mr Kennedy: *He just did express the extreme sensitivity/confidentiality of it, yes, but didn't say that it won't go on to M&A. I suppose if I look at the views of either Murphy or Davy you would have said this was a very early stage discussion, and that is what it was. It wasn't at a point where it would come on to M&A, which would be a wider audience, unless you felt you had something that was going the travel.'*

97. As to whether the proposed acquisition should have been disclosed to the M&A Committee, the views of the other Directors varied:

○ Dr O'Hagan told us:

Mr Gillane: *It's not a science. But can I, and I don't want to put words in your mouth, can I take it in relation to a transaction of this type –*

Dr O'Hagan: *Yes*

Mr Gillane: *-- given the sensitivities that you've just mentioned, sooner rather than later would have been wiser?*

Dr O'Hagan: *Yeah. I think the concept of conflict, real or perceived, has to be at the very front of any, every director's mind because what you may feel is something that is not in any way difficult or don't see it as being a conflict, other people may see it as that. And subsequently it, I have said it would be much wiser for Mr. Buckley to have informed others and, particularly given the history of the relationship between O'Brien and -- but in terms of the actual progress of the transaction when it should have gone to the M&A Committee,*

...

I think the wider point is: should the directors of the Board be aware of a discussion going on between the representative [of the] major shareholder and the company in terms of a possible acquisition, albeit that the acquisition, in itself, could have been a good acquisition at the [right] price.'

- Mr T. Buckley said that Mr Buckley should have informed the M&A Committee of the opportunity and then stepped aside from the discussion. He also thought that Mr Pitt should have informed the M&A Committee.
- Mr Harrison told us that the failure to inform the M&A Committee, of which he was a member, of the discussions to acquire Newstalk was 'outrageous'.

Mr Harrison: It was outrageous, okay, that we had gone to the trouble, and I appear to be the only person in this whole process that is focussed on the internal controls being put in place for Mergers and Acquisitions in the company because I went to every one of the meetings. I sat through hours of should we pay an extra hundred grand for a magazine in Belfast or twenty grand over here and for the biggest, the most sensitive acquisition to even have got to the point of sitting down and valuations being done, even if they were desktop based or engaging with a vendor, right, how that could happen without it coming into the M&A Committee to me is just completely unacceptable and a real breach of the system of internal control in the business. Added to that is the complication, it is a potential transaction with the biggest shareholder in the company. And this is Irish media we are talking about where there had been a huge amount of comment and controversy about concentration of media ownership in this country.

For something like that to even get to the point it did to me is just unbelievable.

...

Mr Gillane: *But it seemed reasonable, not that there is any fixed view on it, to infer from the terms of reference of the M&A Committee and the purpose of it being set up that it was to do precisely what you have described which is to guide all of these...*

Mr Harrison: *Not just guide, it is a policing mechanism for the M&A activity in the business. The reason it is set up is to leverage whatever knowledge and wisdom the board members have about deals that might be happening, but also to make sure you don't lose a fortune on bad acquisitions by management. It is also the pillar on which one of the strategic -- there was three strategic parts of the business, the existing print business, M&A or acquisitions and digital. This is the control mechanism that sits underneath that pillar. For it to have been ignored in my view is, well, I think it is a very serious thing, okay.*

Mr Gillane: *Can I ask you, I take it you would reject any proposition to the effect no, that is not what the M&A Committee was about, that you could go out and negotiate deals and bring it back as a proposal?*

Mr Harrison: *We had an M&A pipeline so if you look at the M&A board packs you will see a pipeline of deals, prospects et cetera, right up to, you know, offers and all the rest of it. At the very minimum it had to be in the pipeline. Radio as a sector was certainly fair game, right, but Newstalk as an opportunity should have been in that pipeline. Mr. Pitt knew about Newstalk, as soon as he met Mr. Shorthouse at the start of September it had to go into the*

pipeline as far as I am concerned. At that point I would have insisted on special measures being taken because of, well first of all really, do we want to talk about buying a radio asset in Ireland off Mr. O'Brien and all the hassle that will come with that all the way up through the process. You have to basically -- I wouldn't even hang around to wait for Mr. Buckley or Mr. Connolly to declare a conflict of interest, I would assume they have a conflict of interest and manage is on that basis and even set up a carve out of the M&A Committee from the Board and manage it that way. I think by not doing that, and there was three very well paid senior executives of the company who chose not to do that, did not report to the M&A Committee that it existed as a project in September and October of that year and for them to crop up on the 23rd November to me was shocking.

Mr Harrison: *Mr. Pitt, Mr. Preston and Mr. McNulty are the executives whose jobs it is to manage M&A or who have got responsibility for it. Then you have Mr. Buckley and Mr. Kennedy also members of the board, right, and in fairness to Mr. Kennedy I think it was very late on he learned of Newstalk, that discussion, is that correct?*

Mr Gillane: *I think it may be in September.*

...

Mr Gillane: *I infer from what you are saying that far from this being the kind of proposed transaction that would be excluded from M&A, it has got all the hallmarks of one that should be front and centre in it because of those sensitivities and so on.*

Mr Harrison: *Absolutely.'*

- Mr Connolly told us:

'With regard to the role of the M&A committee, of which I was a member, I understood it to be management's job to bring deals to the M&A Committee. This was their job irrespective of any perspective that the chairman had. Deals can be brought at any stage to an M&A Committee particularly if they are of a material size or if the Company is starting to commit resources to exploring it. Certainly at a point at which the company has retained external advisers one would expect that the committee would be briefed and consulted.'

'I do not understand why Mr Pitt as CEO did not inform the M&A Committee or the board of the talks in relation to NewsTalk. He relies on the fact that Leslie Buckley told him not to raise it, and then states that it wasn't well enough advanced and it probably suited him not to raise it as he wanted to spend time on Project Canary. Clearly the way to deal with any concerns he had was to avail of the layers of corporate governance procedures within the company. What a CEO should do is say I am concerned, I am committing resources to look at this possible acquisition, I want to discuss it, I have engaged competition advisers, I want direction on it, irrespective of any desire on the part of the Chairman not to bring NEDs into the loop on the discussions.'

- Ms Mullane accepted that there was no point in taking it to the Board unless there was a prospect of agreement being reached.

'I was surprised, frankly, that Jerome Kennedy hadn't been brought in earlier -- it would have made sense as Jerome was the Head of M&A -- that he hadn't been brought in earlier. And, yet, I took that as a -- it was exploratory, you know, it was an exploratory discussion. There was no point in bringing it to the Board unless there was a serious conversation.'

- Mr Marshall's view was that the proposed acquisition should not have been referred to the M&A Committee or the Board:

'if the finance director and the CEO and the Chairman can't agree. Why waste everyone else's time.'

98. Communicorp was also concerned that the possibility of Newstalk being sold to INM (or at all) did not become public as that would have unsettled the business (and particularly the staff). For that reason, Communicorp ensured that the only people aware of the discussions were Ms Gaffney, Ms Slowey, Mr Kane, Mr Claffey and Mr Shorthouse. Other directors of Communicorp, including Mr Connolly, were not told of the discussions.

18 October 2016 – Conversation between Mr Preston and Mr Kennedy

99. Following the M&A Committee meeting, Mr Preston had a separate conversation with Mr Kennedy about an upcoming meeting with the Pension Authority in relation to INM's proposal to wind-up two defined benefit schemes. In the course of that discussion, Mr Preston mentioned the wide differences between the Communicorp/IBI and Davy valuations, the difficulties he was having reconciling the parties' differing views on the synergies achievable, and that he and Mr Pitt felt under pressure to proceed with the acquisition of Newstalk.

100. Mr Kennedy told us:

Mr Gillane: *He recalls meeting you on 18th and discussing the proposed acquisition and I think he says he referred to there being a bit of pressure on, do you recall anything like that?*

Mr Kennedy: *I don't particularly recall that, you know, but Robert would have been saying to me that they were under pressure to get on with it from the Chairman who was by nature somebody who liked things to move along pretty quickly anyway and wanted this to move along and felt that it wasn't moving along and the engagement, as he would have seen it, on either the synergy issues or the regulatory issues wasn't at the pace that the Chairman would have liked. So that was a pressure that I was aware of, yes.'*

Concerns at lack of progress

101. Mr O'Brien told us that, fairly quickly, he concluded that the negotiations were going nowhere:

'But I was getting data points from the meeting and I said "Jeez, this will never happen, this will never happen." And then I was saying in my own mind, okay, there's a natural ending to that when it's end -- it's really talks about talks -- then I need to move away from them and go on to my next... '

'You know, there was eight or nine meetings and still no offer, no offer letter, nothing, and it was so embryonic and nobody -- he didn't seem to cut to the chase, as such, and say "I'm not going to do this deal" or "Here's my offer - I'm gone" or, you know, "Would you consider this?".'

102. Mr Buckley told us:

'I got a view probably around that stage that both Robert Pitt and Ryan Preston, okay, were being very negative about this, okay, and everything was an issue, right. And when you're doing acquisitions, of course there are obstacles, of course there are issues, okay, but, like, "Oh, gosh, the newsrooms can't be joined together" -- okay, so they can't be joined together, okay, can we kind of move on? There are other things we could be looking at. I wasn't getting any of the positives and there would have been positives, okay, but I wasn't getting any of that, which certainly was starting to frustrate me.'

103. Both Mr Kennedy and Mr Murphy told us that they sensed that Mr Pitt and Mr Preston were not enthusiastic about the proposed acquisition.

19 October 2016 – INM Board Meeting

104. On 19 October 2016, an INM Board meeting took place. The atmosphere in the meeting was strained and this was exacerbated by a contentious discussion about how the cost reduction programme was presented to the Board.
105. Management made a presentation on Project Canary. The presentation was not well received and the Board seemed less than enthusiastic about the possible acquisition of a UK plc. No mention was made of the proposed acquisition of Newstalk.

106. Various Directors gave us their views of the meeting:

- Mr Buckley thought that Mr Pitt was *'very defensive and treated the Board with some disdain'*;
- Mr Harrison said that *'it was an awful meeting basically'*;
- Dr O'Hagan said that *'the interactions just weren't good'*;
- Mr T. Buckley said that *'there was a lot of tension between the Chief Executive and the rest of the Board'*;
- Mr Kennedy said that:

'Mr Pitt's presentation on this proposed acquisition [Project Canary] ... was a turning point in which most of the Board came to the view that Mr Pitt was not the person to lead the company into the next phase.'

107. At the end of the board meeting, at Mr Harrison's request, the non-executive directors had an informal discussion without Mr Pitt or any members of management present. They discussed whether Mr Pitt was the right person to lead INM at a time when the focus had turned from financial management to strategic vision. The unanimous view was that Mr Pitt was not the right person to lead INM at this time and that Mr Buckley and Mr Kennedy should discuss Mr Pitt's departure as CEO with a view to achieving a smooth succession. The non-executive directors anticipated that that discussion would take place before the November Board meeting.

108. Following this discussion, Mr Buckley and Mr Kennedy discussed when they should speak to Mr Pitt. Although Mr Buckley suggested doing so that day, Mr Kennedy suggested they wait until they had decided the approach to adopt and obtained legal advice. Mr Kennedy also said that consideration needed to be given to the conduct of the ongoing Newstalk discussions.

109. In the event, Mr Buckley arranged to meet Mr Pitt for 13.00 on 11 November 2016. He told us that, at that meeting, he had intended to discuss Mr Pitt's exit from INM. However, the meeting was pre-empted by Mr Pitt's protected disclosure to Mr Kennedy earlier that day (see paragraph 177 below).

110. In light of the disclosures that both Mr Pitt and Mr Preston made later, some of the non-executive directors suspected that Mr Pitt and Mr Preston had overheard the non-executive directors' discussion.

111. Mr Marshall went further. He told us that:

Mr Marshall: Well, it did seem a bit strange that we had the NED meeting where he was in the room next door and he obviously heard the discussion and then within two weeks, he did a protective disclosure.

Mr Gillane: Do you recall that being said or discussed?

Mr Marshall: No, but you have got to look at joining the dots and think we have had this meeting and it wasn't apparent to anyone until later that the wall didn't go all the way up and he was in the room next door, so he would have heard the whole discussion.'

When cross-examined, Mr Marshall subsequently acknowledged that he had no direct evidence that Mr Pitt had overheard the conversation. He told us that:

'... I have to admit, if it was me and I thought I was going out the door, I'd be listening somewhere.'

112. Both Mr Pitt and Mr Preston denied being able to overhear the non-executive directors' discussion. Mr Pitt was asked whether he knew or suspected that the non-executive directors had been discussing his future at INM:

Mr Guerin: I should just formally put to you, arising out of the cross-examination of you in relation to where you were after you left the Board meeting, and the period of time that passed between that and the meeting with Mr. Buckley, Mr. Preston and Mr. Kennedy

...

that you certainly had the opportunity to learn something of what was happening in the boardroom during that time?

Mr Pitt: *Well, my answer to that is that I did not learn anything of what was happening in the boardroom at that time.*

...

I completely deny that.

Mr Guerin: *And I think probably more importantly, that even if you didn't actually listen in to or hear what was happening in the Board meeting, you must have had a very real concern that what was being discussed was you and/or your future in the Company, given the events that had taken place at the Board meeting itself?*

Mr Pitt: *Well, again, I did not hear, okay. You said "even if I did" - I did not hear... We've dealt with that.*

Mr Pitt: *I'm just making sure I'm being very clear about that*

Mr Guerin: *You've said that. I'm asking you a different...*

Mr Pitt: *So regarding what might – whether I had any idea about whether my future was being discussed in the Company, to be honest, if I thought anything was being discussed in the Board meeting, it was about the fact that we had made the presentation about the Canary Project, that it was probably quite surprising to the Board. As I said at the last time, I kind of felt that they reached a situation where they realised that the future was not going to be a simple one. They seemed – I used the word “deflated”, yeah, because I kind of thought they felt as if “okay, well we're not going to just do small little things and add them all, we're going to have to make a very big step on this”, and that's what I thought it was about. So I didn't think that they were discussing my future in the context of what later came out.'*

113. Given the unsatisfactory nature of the Board meeting and as the subsequent non-executive directors' meeting was unusually long, a number of directors suggested that, even if he had not overheard the discussion, Mr Pitt would have realised that the non-executive directors were discussing the meeting that had just taken place and

whether he should remain Chief Executive and would, therefore, have recognised that his position was at risk.

19 October 2016 – Meeting between Mr Buckley, Mr Kennedy, Mr Pitt and Mr Preston

114. After the INM Board meeting, Mr Buckley, Mr Pitt and Mr Preston met to discuss the proposed acquisition of Newstalk. Mr Kennedy joined at Mr Buckley's request. Although all four had been involved in discussions regarding the proposed acquisition of Newstalk, this was the first meeting relating to the proposed acquisition of Newstalk which Mr Kennedy had attended.
115. Mr Pitt and Mr Preston set out their views on the valuation – €30-35 million – that IBI had presented at the meeting on 14 October 2016. They raised four particular points:
 - The synergies would be limited by the regulatory considerations and that, as behavioural undertakings were likely to be required, the company would face continual regulatory oversight.
 - Synergies were an important part of the commercial rationale for the acquisition of Newstalk by INM. If built into Communicorp's valuation, the benefit of such synergies would not accrue to the benefit of INM's shareholders. In their view, as any synergies would be realised by INM - and not contributed by Newstalk - those synergies should be built into the enterprise value on a discounted basis that reflected the fact that such synergies were uncertain and would be achieved by INM.
 - Revenue growth at 8% per annum seemed unwarrantedly high. INM's view was that 3% per annum was more realistic.
 - It was inappropriate to base the valuation of Newstalk on the profit projection for 2019.

Against this background, and given the lower multiple that INM considered appropriate having regard to other transactions in the sector, Mr Pitt and Mr Preston expressed the view that a realistic valuation should be around €14 million.

116. They said that, in view of Communicorp's request for an indicative offer, they intended to put those views to Communicorp at the meeting scheduled for the following day.

117. Mr Buckley told us that he thought that management:

- Was taking an unduly negative view.
- Not focussing sufficiently on the strategic opportunities, as he saw it, of combining radio with publishing and print.
- Should be working on refining the potential synergies to see if it was possible to narrow the gap between the parties' valuations.

He was also critical of, and frustrated by, the lack of speed with which he perceived management to be progressing the discussions.

118. We received a considerable amount of evidence about the discussion that then took place:

- Mr Pitt told us that:

[Mr Buckley was] annoyed that we hadn't done more on the valuation. Annoyed that things hadn't gone faster.

...

That we hadn't come to a number or whatever, or we hadn't agreed, or we could have done more work on synergies, we couldn't say what the synergy was, we couldn't say exactly what the payroll saving was going to be.'

- Mr Preston told us that:

[Mr Buckley was] definitely angry with me and definitely angry because I was not helping the situation.'

Mr Preston also attributed Mr Buckley's annoyance to the unsatisfactory performance by management at the Board meeting that had taken place earlier that day.

- Mr Buckley told us:

'[I] got a little annoyed and frustrated that things weren't moving fast enough'

'In my own mind, I thought, look, here's an asset that I think is a really good strategic asset -- would be of value to INM and it would be worth paying a little extra, right. In hindsight, what I probably should have said is that I think it would be worth putting on the table a little bit extra and leave the due diligence sort it out. But that's what was in my mind. So I have no issue and, I can't recall saying it, but I think I would have said it, "I think in this case it's worth paying a bit extra.'"

When asked why, when it ran counter to his natural instinct, he was prepared to pay a little bit extra, he contrasted the Newstalk transaction with the smaller and non-strategic deals that INM had done and then said:

'But in other situations and in the Newstalk situation, right, all I was trying to do was, yes, I felt that we should pay a little more for this because I thought from a strategic point of view, this would be really good, we would have radio and we would have publishing and print. It would certainly significantly help the business for all shareholders, right, and give us more time to try and get other acquisitions in, right, which we were failing to do and I thought this would be a good -- so, yes, I was prepared to pay a little bit. I was prepared to go a little bit more, okay. But then it would have been dependent on due diligence.'

Throughout his evidence, including when cross-examined, Mr Buckley was clear that he never told Mr Pitt and Mr Preston that they should be prepared to offer €30-35 million.

- Mr Kennedy told us that:

'I am on record as saying that the [IBI] number was just not viable at all.'

'... we went through a discussion about the synergy, and the Chairman indicating that he wanted things moving more quickly and he really wanted this thing resolved and why weren't they over there every day to get agreement on what the synergies should be, could be. Similarly there was a brief update on the meetings with the legal firm and getting advice on plurality and related issues.'

119. Notwithstanding his concerns at the pace of progress, Mr Buckley said he thought INM should respond to Communicorp's request for an indicative offer by the following day.

120. Mr Kennedy focussed on the need to comply with INM's governance process and made it clear that an offer could not be made, whether on a non-binding basis or otherwise, unless the transaction had been considered by the M&A Committee and approved by the Board. He also made it clear that, in his view, the proposal was not ready for consideration by the M&A Committee and that any indicative valuation or offer had to be supported by Davy. He told us that:

'[Mr Buckley] didn't say anything at all as to why he was looking for the indicative [offer], other than that he was given a request and he had to go back the following day. I said 'no', and that was it. That is important, though, that was it. He didn't jump up and down or shout at me or say, I totally disagree, that was it.'

121. At the end of the meeting, it was agreed that INM was not in a position to make an indicative offer to Communicorp and that management would continue working with Davy to find a valuation of Newstalk which they could support and would be more likely to be acceptable to Communicorp. Mr Pitt said that he would update Mr Buckley at their meeting the following day.

122. After Mr Buckley left the meeting, there was a brief discussion in the course of which Mr Pitt and Mr Preston said that their positions would be untenable if the acquisition occurred at the proposed IBI price. Mr Kennedy said that he understood and confirmed that Davy's valuation would be presented to the M&A Committee and the INM Board.

20 October 2016 – Meeting between Mr Buckley and Mr Pitt

123. On 20 October, 2016, Mr Buckley and Mr Pitt discussed the meeting that had taken place the previous day.
124. At this meeting, which was the first occasion when Mr Pitt alleged Mr Buckley put improper pressure on him to increase the proposed offer for Newstalk, Mr Buckley was critical of what he perceived as being Mr Preston's negativity and the slow pace at which the discussions with Communicorp were progressing. Mr Pitt described Mr Buckley's approach as confrontational and aggressive.
125. In his evidence to us, Mr Buckley:
- Accepted that, in an attempt to encourage Mr Pitt to adopt a more positive approach to the proposed acquisition, he had been critical of what he perceived as being Mr Preston's negativity;
 - Reiterated his view that the Newstalk acquisition was by far the most strategic acquisition that INM had looked at; and
 - Told us:

'I remember saying 'I want to do this deal', right. Whether I said 'regardless' or not, I can't recall right, but I do recall saying 'I want to do this deal'. But of course I wanted to do the deal, but it was always going to be dependent on whether all the figures stacked up and whether it was going to be right – but I wanted to do the deal.'
 - Accepted that, in frustration at the negative approach being taken, he had described an offer of €14 million as an insult to INM's majority shareholder;
 - Agreed that he had said that Mr O'Brien had bailed out INM in 2014 – but denied that he had said that Mr O'Brien deserved a reward for having done so.

- Acknowledged that he had been *'very direct'* – and emphasised that:

'... all I wanted to do was move fairly fast, get to the table as fast as we can, and then either, through due diligence, we would either move forward or it was all over, okay. But let's do that as fast as possible because I don't want any leaks and I didn't want to be wasting time on this, all right. And I felt at times that, look, you know, because of all the negativity, that neither Mr Pitt or Mr Preston were actually looking at this is a strategic, positive way. It was all negative, negative, negative.'

126. Following the meeting with Mr Buckley, Mr Pitt called Ms Kelly to check that the assessment of the regulatory position had not changed.

127. Mr Pitt then called Mr Kennedy (12.30) and expressed concerns about the meeting he had had with Mr Buckley.

- Mr Pitt told us that, in reporting the conversation, he told Mr Kennedy that Mr Buckley:
 - Was very anxious to move the negotiations forward;
 - Had said that Mr O'Brien had saved INM and deserved to be rewarded; and
 - Was putting him under increasing pressure.
- Mr Kennedy described it as *'a brief enough conversation'*. He told us that Mr Pitt:
 - Described having a difficult conversation with Mr Buckley and that Mr Buckley wanted things moved forward;
 - Did not mention the suggestion that Mr O'Brien should be rewarded for having saved INM; and

- Had reported that Mr Buckley had said that he wanted the deal done – but not that that was regardless of Davy’s advice on price.

128. Mr Kennedy asked whether Davy had provided an updated valuation. He also offered to speak to Mr Buckley, an offer which Mr Pitt declined.

20 October 2016 – Meetings with Communicorp to explain INM’s valuation of Newstalk

129. On the same day (15.30), Mr Preston and Mr Kane met to discuss the synergies that they thought could be achieved. Mr Kane had identified €3.4 million of costs savings. However, €1.3 million were regarded as unobtainable for regulatory reasons, reducing the potential synergies to €2.1 million.

130. That meeting was followed by a meeting (16.00) attended by Mr Pitt, Mr Preston, Mr Claffey, Ms Slowey and Mr Kane. Mr Pitt explained INM’s position on valuation, including that he and Mr Kane had agreed that the available synergies would not exceed €2.1 million. Mr Pitt noted that the discussions were at an early stage in INM’s process and would have to be considered by its M&A Committee.

131. In the course of this meeting, the Communicorp team emphasised that Mr O’Brien was interested in selling Newstalk and that the sale process would be opened up if INM did not make a worthwhile offer. In fact, IBI was already preparing an Information Memorandum for use in discussions with other potential purchasers of Newstalk.

132. At the end of the meeting, Mr Pitt said that, following discussion with Mr Buckley, INM would put forward a valuation which would have Davy’s support.

20 October and 21 October 2016 – Davy’s revised valuations

133. On 20 October 2016, Davy finalised its response to the valuation put forward by IBI – entitled 'Draft Discussion Document'. The key points made were that:

- Overly optimistic synergy assumptions were made by IBI.
- Valuation methodologies and multiples appeared inappropriate (given Newstalk was loss-making), arbitrary and selective.

- Synergies should be valued on a basis that reflects that fact that they are subject to significant uncertainty and variability. Davy's valuation took 50% and 75% of synergies into account.
- Revenue growth should be predicated on 3% per annum.
- The resultant valuation range was '*significantly overstated*'.

Davy did not change the methodologies used and concluded that '*an [enterprise value] range of c. €11 to €15 million could be supportable*' with the highest value it would be prepared to support being €16.7 million.

134. Mr Pitt sent a copy of Davy's rebuttal document to Mr Kennedy. Mr Kennedy replied:

'Thanks Robert, this version of the Davy valuation model is still WIP and has a number of moving parts. I expect that various discussions today will deal with most of these and the next draft will hopefully be a more final version of the Davy views on the valuation range. Please forward the Friday morning updated position.'

135. On 21 October 2016, Davy provided further valuation summaries based on different revenue growth assumptions. An assumption of 4% revenue growth resulted in a valuation range of €12.7m to €16.5 million. An assumption of 5% revenue growth resulted in a valuation range of €14.3m to €18 million.

21 October 2016 – Meeting between Mr Buckley and Mr Pitt

136. On 21 October 2016 (9.15), Mr Pitt met Mr Buckley in his office. He gave Mr Buckley a copy of Davy's latest valuation document and pointed out that the valuation range was €11-15m with an outlying valuation of €16.7m. Mr Pitt said that the valuation could, at a stretch, be increased to €17.5m. Mr Pitt said that he could not recommend a higher figure. Mr Buckley said that he was due to meet Mr O'Brien later that morning, and would communicate that figure to him.

137. In his evidence, Mr Buckley has maintained that the figure discussed, and which he subsequently put to Mr O'Brien was, €18 million. Although not a matter of significance, on balance, this seems unlikely as that would imply that there was no change to Mr Pitt's position between 21 and 28 October – which is inconsistent with

subsequent events, including the conversations on 28 October between Mr Buckley and Mr Pitt, and between Mr Pitt and Mr Kennedy.

138. Following the meeting, Mr Pitt met with Mr Preston and phoned Mr Kennedy. He told Mr Kennedy, but not Mr Preston, that Mr Buckley's position had "*mollified*" since the previous day.

21 October 2016 – Meeting between Mr Buckley and Mr O'Brien

139. Mr Buckley met Mr O'Brien and Mr Shorthouse and gave them a copy of the Davy rebuttal and valuation. He told them that INM would be willing to proceed on the basis of a valuation of €17.5 million. Mr O'Brien said that he would consider the valuation. Mr Buckley sent a text to Mr Pitt to say that he had had a conversation with Mr O'Brien who was considering the valuation.

140. A brief meeting took place after the Communicorp board meeting that day. The meeting was attended by Mr O'Brien, Ms Gaffney, Ms Slowey, Mr Kane, Mr Claffey, Mr Shorthouse and Mr Godfrey. Mr Shorthouse reported that Mr Buckley had told him that INM would not consider making an indicative offer at the valuation in the IBI paper. IBI said it could react to the Davy rebuttal and agreed to review the Davy paper.

141. That day, Mr Pitt learned that Newstalk's Editor in Chief, Garret Harte, had resigned. This had not been disclosed in the course of his discussions with Communicorp.

22 October 2016 – IBI's second valuation

142. Following receipt of the Davy draft discussion paper, IBI developed a discussion document which valued Newstalk at €25 million, which Mr Claffey shared with Ms Gaffney and Mr Shorthouse on 22 October 2016.

25 October 2016 – Conversation between Mr Buckley and Mr Shorthouse in New York

143. Mr O'Brien, Mr Shorthouse and Mr Buckley attended a Digicel board meeting in New York on 24 and 25 October 2016. On the second day, Mr Buckley and Mr Shorthouse had a brief meeting. Mr Shorthouse told Mr Buckley that IBI's figure had come down to €26.8 million. The assumptions used by IBI in this revised valuation were not

discussed. Mr Buckley said that he would discuss the revised valuation with Mr Pitt the following day.

144. Mr Buckley told us:

'... in my mind, 26.8 was still a pretty high figure for Newstalk. But I thought, well, okay, they're moving, maybe there's something else and if I can get Davys to fully understand all the assumptions in the IBI documents, maybe there's something there and that we can move. In my mind at that stage, I thought oh, okay, if we could move with a 2 in front of it to 20 maybe, then maybe we could get into a serious discussion.'

26 October 2016 – Meeting between Mr Pitt and Mr Claffey

145. At Mr Claffey's request, Mr Pitt met with Mr Claffey on 26 October 2016 (12.00) to discuss the Island Capital/IBI view of the valuation paper provided by Davy. In summary, IBI thought that an 3% annual growth rate was too low and maintained that 8% was achievable, that the synergies had not been adequately reflected and that the valuation multiple (of 9-11) was too low.

146. Mr Claffey said that IBI, having reviewed certain assumptions, had revised its valuation to €26.8 million and provided Mr Pitt with a copy of that revised valuation. Mr Claffey concluded by encouraging INM to put its best foot forward in a non-binding indicative offer.

147. Mr Pitt said the he would reflect further and emphasised that any offer would be subject to due diligence and shareholder approval. Mr Claffey noted that this was not unexpected. Mr Claffey did not hear further from Mr Pitt.

26 October 2016 – Meeting between Mr Buckley, Mr Pitt and Mr Preston

148. Following his discussion with Mr Claffey, Mr Pitt met Mr Buckley for a routine one-to-one meeting (12.30). Mr Preston also joined this meeting. There were thirteen matters on the agenda, including a capital re-structuring proposal with an EGM scheduled for 5 December 2016 and ongoing negotiations with the trustees of INM defined benefit schemes. This was the second of occasion when Mr Pitt alleged Mr Buckley put improper pressure on him to increase the proposed offer for Newstalk.

149. In the course of the meeting, Mr Pitt raised a number of matters that annoyed Mr Buckley, namely:

- Mr Pitt raised the possibility of disposing of INM's print assets, noting the progress that APN had made by adopting such a strategy. This annoyed Mr Buckley as it was contrary to INM's approved acquisition strategy that Mr Pitt was meant to be progressing.
- Whilst discussing a plan to restructure senior management to save costs in 2017, Mr Pitt raised the possibility of dispensing with the position of Editor in Chief.

150. When the discussion turned to the proposed acquisition of Newstalk, Mr Buckley asked whether Mr Pitt had received the revised IBI valuation. Mr Pitt confirmed that he had received the document and had yet to review it internally and with Davy. Mr Buckley asked Mr Pitt and Mr Preston whether they wanted to do the deal. Mr Pitt said that they did, provided it was at the right price.

151. Mr Pitt reiterated that the transaction was attractive at the right price. He said that whilst his initial valuation had been in the region of €10m, he had been able to reach a valuation of €17m. Mr Buckley was annoyed as he assumed that Mr Pitt was going back on the figure –€17.5m – given to Mr Buckley the previous day.

152. In the course of the meeting, he said:

- *'I'm very disappointed in both of you'*
- *'Do you not get it, lads?'*
- He wanted to do the deal.
- That, whilst he recognised the importance of Davy's view of value, Davy could be influenced by management's views.

153. The matters discussed in this meeting were also the subject of extensive questioning in the course of oral evidence, during which:

- Mr Pitt told us that Mr Buckley said that:
 - He wanted to acquire Newstalk at the price proposed by IBI;
 - Davy will write whatever INM tell them to write;

And that he understood this to mean that Mr Buckley wanted him to go back to Davy and find a way to value Newstalk at €26.8 million.

Mr Pitt acknowledged that management could legitimately influence Davy's valuation range by providing different assumptions in relation to factors affecting projections of future performance.

- Mr Preston told us that Mr Buckley said that:
 - He was not going back to Mr O'Brien on price again, by which he understood Mr Buckley to mean IBI's latest figure –€26.8m – as he was not aware that Mr Buckley had responded to that figure the previous day;
 - Davy could be influenced by management's approach to the assumptions on which the valuations were based.
- Mr Buckley told us that:
 - Mr Pitt and Mr Preston were being very negative. They didn't see this as a trading process;
 - He did say '*Do you not it, lads?*' He said this in the context of Newstalk being a strategic asset that was available to INM on an exclusive basis and that, therefore, management should be trying to work out a way to make a deal work;
 - He probably did ask Mr Pitt and Mr Preston – '*[D]o you want to do this deal?*'

- He did say that he wanted to do the deal. But he was adamant that he did not say that he wanted to do the deal at the IBI price – or anything equivalent to that;
- He probably did say that:

‘Davy can be persuaded or influenced or educated ... to improve those figures if they really have a close look and understand, fully understand, the IBI assumptions’.

- He did say *‘Look, I’m really disappointed’.*

It is apparent from the evidence we received that a number of misunderstandings occurred – in particular as to whether Mr Buckley, expressly or impliedly, indicated that he wanted to proceed on the basis of the latest IBI valuation. These misunderstandings significantly influenced Mr Pitt and Mr Preston’s understanding of Mr Buckley’s position and their approach to the proposed acquisition of Newstalk.

154. Mr Buckley said that he would ring Mr Kennedy to discuss the position. As he was leaving, he asked when Mr Pitt would be in a position to respond to the IBI valuation. Mr Pitt said he would speak to the INM team and Davy.
155. Shortly after the meeting, Mr Preston discussed his concern at the tone of the meeting, which he regarded as threatening, and his personal position with Mr Kennedy. Mr Kennedy offered to speak to Mr Buckley, but Mr Preston asked him not to.
156. Following a request from Mr Pitt, Mr Kennedy called Mr Pitt that afternoon (14.10). Mr Pitt reported his concerns at the comments made by Mr Buckley. Mr Kennedy said that Mr Pitt had reported that Mr Buckley was anxious to do the transaction and was continuing to apply pressure. However, Mr Kennedy said that Mr Pitt had not told him that Mr Buckley had said that there was a need to get Davy’s valuation increased. Mr Kennedy said that he would speak to Mr Buckley.
157. Mr Buckley spoke to Mr Kennedy when driving home that evening and expressed his frustration with management’s approach and the pace of negotiations.

27 October 2016 – Davy's revised valuation

158. On 26 October 2016 (17.00), Mr Pitt and Mr Preston spoke to Mr Murphy and Mr French to review the revised valuation produced by IBI. Davy said that it saw no reason to vary its earlier valuation and, as a result, said that it regarded the valuation of €26.8 million as very high and unsustainable if presented to shareholders when seeking their support for the transaction.

159. Mr Murphy told us:

'You know, 26.8 is obviously a material improvement, but it's still miles away from where we think value is and by a huge quantum. So, in fact, even if you were to progress things and announce to that market that we're buying a loss-making business which has a bunch of synergies for €26.8 million, it would be very difficult to persuade people this was good value. So, I think, on any basis, it just wasn't going to fly at that price.'

160. Mr Pitt wanted reassurance that Davy would stand by its valuation and so he called Mr Murphy to seek that confirmation. Mr Murphy told us that he confirmed that Davy would stand by its valuation and methodology even if he received *'a call from somebody's jet'* – a reference to Mr O'Brien that he described as *'flippant but accurate'*.

161. The following evening, Davy provided INM with a draft response to the revised IBI valuation entitled 'Further Valuation Considerations'. That paper stated that Davy believed IBI's revised valuation overvalued Newstalk:

'by using aggressive valuation inputs that do not take account of the inherent risks and uncertainties of the [Newstalk] business and of achieving future earnings estimates'.

162. Davy noted that the IBI valuation:

- Relied on one methodology. Given the inherent subjectivity and uncertainty of valuing a loss-making business, Davy argued that using a range of methodologies provided a more robust and informed valuation framework.

- Used a two year forward looking highly subjective 2018 EBITDA (which assumed €3m of EBITDA growth – from negative €1.7m EBITDA in 2015 to positive €1.3m in 2018).
- Ascribed 75% of future synergy value to Communicorp.

Davy concluded by saying that it continued to believe that a valuation range of €11 to €15m provided a *'fair and appropriate valuation range for [Newstalk], and represents an attractive exit for a business that has been challenged and loss-making, and whose future value is uncertain.'* It also noted an updated illustrative range of €12.3m to €15.6m, with a DCF valuation of €16.9 million.

163. In relation to the role of management in the development of a valuation, Mr Murphy told us:

'I don't think [Mr Pitt] was ever encouraging us to move up in terms of our assessment of where value was. And, you know, it's not just a mechanical exercise to arrive at a valuation, as we've discussed earlier. It does involve a good deal of subjective input and very often what Management's view -- and they are the best placed people to take a view on what the future benefits of the combined platform might be - you know, what their view of the commercial benefits can be a very important component of valuation.'

164. On receipt, Mr Pitt forwarded a copy of the Davy response to IBI's revised valuation to Mr Buckley, Mr Kennedy and Mr Preston.

165. Mr Buckley told us he:

'was wondering why they were dragging, because it was at such an early stage, why they were dragging Jerome Kennedy into it again, right.'

but that he:

'was never unhappy that [Mr Kennedy] was involved.'

166. On the same day, Mr Preston called Mr Kennedy from Belfast to update him on various matters. Mr Preston told us that Mr Kennedy had told him that he had had a *'stinking'* call with Mr Buckley (which Mr Preston understood to have been in

relation to the Newstalk valuation). Mr Kennedy did not recall the call from Mr Preston, but was clear that he never used such language and did not have a difficult call with Mr Buckley.

167. On 28 October 2016, Mr Buckley forwarded Mr Pitt's email and the Davy response to Mr Shorthouse and asked Mr Shorthouse to call him.

28 October 2016 – telephone conversation between Mr Buckley and Mr Pitt

168. Early on 28 October, Mr Buckley (who was in Portugal) called Mr Pitt, who then called him back. This was the third occasion when Mr Pitt alleged Mr Buckley put improper pressure on him to increase the proposed offer for Newstalk. In the course of that conversation:

- Mr Buckley expressed disappointment that Davy's valuation range had not moved up.
- Mr Pitt explained that the IBI assumptions and valuation had been discussed with Davy and with Mr Murphy.
- Mr Buckley questioned whether Mr Pitt wanted to acquire Newstalk.
- Mr Pitt said that he was willing to go to €18 million (subject to due diligence).
- Mr Buckley did not ask Mr Pitt to increase the amount INM should be willing to offer.

169. Mr Pitt said that Mr Buckley had accused he and Mr Preston of not wanting to do the deal and of trying to sink the transaction. Mr Buckley denied saying that or anything like it. As far as he was concerned, once he knew that Mr Pitt would not go higher than €18 million, he knew the negotiations were over.

170. Mr Pitt immediately called Mr Kennedy (09.10) to report the latest conversation with Mr Buckley. Mr Kennedy questioned the basis on which Mr Pitt had said that INM would be prepared to offer €18 million. Mr Pitt explained that he thought he could stretch the synergies a little more and reduce the price through the due diligence

process. Mr Kennedy told us that Mr Pitt did not tell him that Mr Buckley had accused him of trying to sink the transaction.

171. Mr Buckley called Mr Shorthouse immediately after his call with Mr Pitt and told him that €18 million was the best that INM could offer. Mr Shorthouse's reaction was that that would not be acceptable. Mr Buckley did not speak to Mr O'Brien. Mr Buckley did not report his conversation with Mr Shorthouse to Mr Pitt or Mr Preston. On the same day, IBI produced a first draft Information Memorandum in anticipation of a wider sales process for Newstalk.

28 October to 8 November 2016

172. Mr Pitt was on holiday between 29 October and 6 November 2016. During that period, the possible acquisition of Newstalk was not mentioned. Nor was Mr Pitt told that the proposed acquisition was no longer being pursued.
173. On 2 November 2016, Mr Buckley had a meeting with Mr Preston and Ms Doyle about the pensions proposals and the budget for the following year. As Ms Doyle was present, there was no mention of Newstalk and Mr Buckley did not refer to his conversation with Mr Shorthouse.
174. Following his return from holiday, Mr Pitt had meetings in Dublin and Belfast, Mr Buckley requested a call to discuss issues relating to the acquisition of Celtic Media, but the call did not take place.
175. On 10 November 2016, Mr Buckley and Mr Pitt travelled separately to London for a meeting with Dermot Smurfit, following which they flew back to Dublin. Mr Buckley offered Mr Pitt a lift to the airport, which Mr Pitt declined.
176. On the same day, Mr Claffey contacted LK Shields to instruct them that the potential transaction with INM would not be proceeding for the moment.

11 November 2016 – Mr Pitt's disclosure to Mr Kennedy

177. On 11 November 2016, Mr Pitt made a protected disclosure to Mr Kennedy in relation to a number of matters, but primarily in relation to the proposed acquisition of Newstalk.

178. Following his meeting with Mr Pitt, and as agreed with Mr Pitt, Mr Kennedy called Mr Buckley and told him that a complaint had been made by Mr Pitt.

16 November 2016 – Meeting at McCann FitzGerald’s offices

179. On 16 November 2016, at Mr Kennedy’s request, Mr Pitt met with Mr Kennedy and Mr Barton to formalise and amplify Mr Pitt’s protected disclosure. Mr Preston was present as a note-taker for Mr Pitt.

17 November 2016 – Mr Buckley’s email to Mr Pitt

180. On 17 November 2016, at the suggestion of Mr Kennedy, and having taken advice from McCann FitzGerald, Mr Buckley sent an email to Mr Pitt, and copied to Mr Preston, in which he said that:

‘having considered the potential acquisition of Newstalk, taking into account the gap between the IBI and DVY valuations, there is no point in progressing the discussions any further.’

181. Mr Buckley also sent an email to Mr Byers in which he said that:

‘... it was not proposed to proceed any further with the transaction that was under consideration.’

Mr Barton then sent an email to Mr Pitt advising him that Mr Buckley had confirmed that the proposed acquisition was not proceeding.

Subsequent events

182. At the INM Board meeting on 24 November 2016, Mr Buckley informed the Board that

‘INM management had a look at the potential acquisition of Newstalk but taking into account the gap between IBI and Davy valuation that there was no point to further pursue.’

183. On 28 March 2017, Ms Gaffney advised the Communicorp Board of the discussions that had taken place with INM in autumn 2016.

The knowledge of other Directors of INM

184. The only Directors aware of the discussions taking place with Communicorp relating to the possible acquisition of Newstalk by INM were Mr Buckley, Mr Kennedy and Mr Pitt.

185. The other Directors had no knowledge of the proposed acquisition of Newstalk or the discussions taking place.

C. The Parties' Submissions

186. We asked each party to provide us with submissions addressing:

- The key relevant evidence relied upon;
- Any legal issues to be considered; and
- The conclusions/findings to be reached on the basis of that evidence.

We also asked that such submissions should include executive summaries in relation to each of the issues identified in the Order.

187. In relation to the proposed acquisition of Newstalk, we received submissions from the following parties:

- (i) Mr Buckley;
- (ii) The INM Directors;
- (iii) INM;
- (iv) Mr Preston; and
- (v) Communicorp

188. In the following sections, we set out the submissions made by those parties including, in full, the executive summary where provided.

(i) **Mr Buckley**

189. Mr Buckley provided the following Executive Summary:

'260 The allegation against Mr Buckley in relation to the proposed Newstalk acquisition is that he attempted to inflate the price offered for Newstalk, favouring Communicorp (and Mr O'Brien) to the detriment of INM.

261 There were two parties to the proposed Newstalk acquisition, the buyer INM and the seller Communicorp. Ultimately, the parties were too far apart on price and the deal did not conclude.

262 *It is clear following cross-examination that the most serious allegation, that Mr Buckley said that he wanted to do the deal at the latest IBI price, is no longer made. There is substantial evidence contradicting the assertion that Mr Buckley ever said such a thing including, most notably, from Mr Preston who was present at the relevant meeting on 26 October 2016. Even Mr Pitt no longer insists that Mr Buckley said this (see submissions below).*

263 *It is not in controversy but that ultimately the final valuation suggested by INM for Newstalk was a valuation agreed to by Mr Pitt. In doing so, Mr Pitt was willing to go above and beyond what Davy was recommending and was so willing based on his own estimate of the value of the proposed acquisition to INM.*

264 *Mr Preston's evidence that he thought that there was a lot of misunderstanding in relation to Newstalk as a whole and that "part of the problem with this whole process, we weren't communicating" is clearly something which must be carefully considered. In this regard, it is submitted that no finding adverse to Mr Buckley should be sustained in circumstances where a reasonable possibility exists that the allegation of wrongdoing is essentially based on a misunderstanding.*

265 *Mr O'Brien has given evidence that he ultimately sold Newstalk for €30 million and that INM was the underbidder. The Inspectors also provided Mr Buckley with letters from Bauer Media valuing Newstalk at €27.5 million. While it is, of course, accepted that this valuation cannot decisively determine the 'true value' (which is by definition a floating concept determined by the price a willing buyer is prepared to pay in conjunction with the price a willing seller is prepared to sell at) of the business to INM at the time of the contemplated transaction, it is submitted that it ultimately suggests Mr Buckley's enthusiasm for the deal was more justified than the negativity towards the deal expressed by Messrs Pitt and Preston.'*

190. Mr Buckley then addressed the evidence and issues under a number of headings:

- Background – 26 January 2016

- Background to the Proposed Acquisition
- August/September 2016 – Mr Pitt considers Resigning
- Newstalk Proposal
- Negotiations Intensify
- The Board Meeting on 19 October 2016
- The Meeting between Messrs Buckley, Kennedy, Pitt and Preston on 19 October 2016
- 20 October 2016
- 21 October 2016
- 26 October 2016 – Meeting with Messrs Pitt, Preston and Buckley
- 27/28 October 2016

In the following paragraphs we set out the principal points relied on by Mr Buckley.

Background – 26 January 2016

191. Part of the background to Mr Pitt’s allegation that Mr Buckley sought to prioritise certain shareholders was the exchange between Mr Buckley and Mr Pitt that took place on 26 January 2016 (see paragraphs 12 to 15 above).
192. Mr Buckley submitted that if he had made the statements alleged, the position acknowledged by Mr Pitt - that they were shocking and memorable - is correct and it is inconceivable that Mr Preston would not have remembered them.

Background to the Proposed Acquisition

193. Mr Buckley submitted that the proposed acquisition of Newstalk was closely aligned with INM's strategy. At its meeting on 2 June 2016, the INM Board minutes record that:

'The Board discussed strategic responses taking place in New Zealand and Australia with strategic alliances being created by TV, radio and print – such as, for example, shared newsrooms. The Board asked if there was an opportunity to:

- *Create a strategic alliance with, say, RTE, TV3, Communicorp;*
- *Create a unique Irish voice (viz-a-viz [sic] Google, Facebook);*
- *Draw learnings from New Zealand and Australia.*

The Board agreed that this is a significant strategic issue and asked that more time be allocated to this at future board meetings.'

194. Mr Buckley's evidence was that he knew that radio was on the list of possible acquisitions and that a national talk radio licence provided a great opportunity for INM in circumstances where it did not have many other good potential acquisitions. He also said that he thought it was a once in a lifetime opportunity to obtain a national talk radio licence.

August/September 2016 – Mr Pitt considers Resigning

195. There is a conflict of evidence in relation to Mr Pitt's discussions with Mr Buckley and Mr Kennedy in August and September 2016 regarding his future at INM. Both Mr Buckley and Mr Kennedy took away from those discussions that Mr Pitt was resigning; Mr Pitt told us that he was concerned to discuss succession planning and whether he was the right person to lead INM in the long term.
196. Mr Buckley submitted that these interactions are important because:

- *'It is a feature of the evidence throughout the Inspection that there are multiple occasions where Mr Pitt has a wholly different interpretation of what was said in a meeting or conversation than the other parties to that*

conversation. In this instance, there is a dispute about whether or not Mr Pitt made clear to Messrs Buckley and Kennedy that he was leaving INM.'

- *'The matter is of central importance for a second reason too – Mr Pitt has a logical reason for seeking to minimise his relationship difficulties in INM and to minimise his recorded intention of resigning from INM as this issue is directly related to the issue of his motivation for the making of a protected disclosure.'*
- *'... if Mr Pitt had laid down any sort of marker with Mr Buckley of the type he described [by refusing to make the payments to Island Capital and others], and if Mr Buckley had any sort of improper intent in respect of the proposed Newstalk acquisition as alleged by Mr Pitt, it is highly implausible that, when presented with an opportunity to let Mr Pitt go over the course of precisely the same month when the proposed Newstalk acquisition came into being, Mr Buckley would not simply have grabbed it. In fact, there is no issue that Messrs Buckley and Kennedy did everything they could to keep Mr Pitt in his position, even encouraging him that he might be involved in a significant acquisition on INM's behalf.'*

Newstalk Proposal

197. Mr Buckley submitted that as the negotiations to acquire Newstalk began, the position was as follows:

- *'INM's acquisition strategy had not been successful to date;*
- *the Board had been considering strategic alliances with similar companies (including Communicorp) within the previous couple of months;*
- *the proposed Newstalk acquisition fitted in with that strategy;*
- *Mr Pitt had decided to stay on as Chief Executive, at the urging of Mr Buckley and Mr Kennedy, and like Mr Buckley appeared to be enthusiastic about the Newstalk deal; and*

- *There were significant concerns about confidentiality, given the nature of the related party transaction.'*

Negotiations Intensify

198. Mr Buckley submitted that, as the negotiations progressed, he became concerned that Mr Pitt was becoming progressively more negative about the proposed acquisition. He referred to the evidence given by representatives of Communicorp and Davy, who were gaining the same impression.

The Board Meeting on 19 October 2016

199. Mr Buckley submitted that at the INM Board meeting on 19 October 2016:

'Mr Pitt presented a proposed acquisition that was termed 'Project Canary' to the Board. It suffices to say that there appears to be wide-ranging acceptance that the presentation went down extremely poorly with the Board. Mr Pitt describes a kind of stillness in the room, "the energy went out of the room". Mr Pitt accepted that it was possible that this was the point in time at which he realised the Board lost confidence in him. The Inspectors have evidence from many of those present at the meeting, including Mr Kennedy, Mr Connolly, Mr Harrison and Mr Terry Buckley. Mr Preston said that the meeting was not only difficult for Mr Pitt but also difficult for him. He accepted that the Board members' reaction to the proposal (which had not been approved by the M&A Committee) was that they were "very unimpressed" and that management got a bit of a beating from the Board.'

200. At the end of the meeting:

'Mr Harrison called for a meeting of the non-executives after the Board meeting. According to Mr Terry Buckley, at that meeting "everybody spoke up and to a man said that he [Mr Pitt] wasn't the man to take the company forward.'"

201. Mr Buckley submitted that we:

'ought properly to come to the conclusion that there can be no doubt that, by 19 October 2016 (at the latest), the Board had lost confidence in Mr Pitt, for

reasons related to his interpersonal skills and executive performance and entirely unrelated to his handling of the APN transaction or the proposed Newstalk transaction.'

And that:

'It is not credible that Mr Pitt would not have known or understood this at that time.'

The Meeting between Messrs Buckley, Kennedy, Pitt and Preston on 19 October 2016

202. In his submission, Mr Buckley accepted that he was frustrated with the level of progress in the negotiations with Communicorp. He also accepted that that frustration may have been unjustified:

'... in light of the evidence of Mr Preston concerning the burden of work he was carrying, on different subject matters all of considerable importance to the Company, ... any impatience expressed by Mr Buckley at this meeting was misplaced at best and unjustified, even insensitive, at worst. But that is a world away from the allegation of placing improper pressure on the executive team to agree a price which could not be justified for a potential acquisition. What it shows, in truth, is that there is a rational and compelling explanation for the sense of pressure Mr Preston described, which is both independent of and wholly inconsistent with the much more serious wrongdoing that has been alleged by Mr Pitt.'

203. Although there is conflicting evidence as to who raised Communicorp's request for a 'non-binding' or 'indicative' offer, it is clear that the question of an offer was discussed and that Mr Buckley supported the suggestion of making an offer as requested by Communicorp. It is also clear that Mr Kennedy said that no such offer could be made and that Mr Buckley deferred to Mr Kennedy's views without objection.

204. Mr Buckley concluded:

'The evidence of what occurred at this meeting, and the reactions of all parties present, is of significant importance. Any suggestion that Mr Buckley was willing to or attempted to avoid proper Company procedures, or was pushing the proposed transaction forward in a dictatorial way without regard to the

Company's interests, or was willing to override the views of the Company's management, its appointed outside experts, or its experienced independent directors must alike be roundly rejected. Mr Buckley sought the input of the Company's senior independent director, just as he had sought the appointment of reputable external advisers, and he deferred to the guidance he received and did so without objection.'

20 October 2016

205. Mr Buckley and Mr Pitt gave different accounts of their discussion on 20 October 2016.

○ Negativity

Mr Pitt's evidence was that Mr Buckley was annoyed with Mr Preston, rather than Mr Pitt, for his apparent negativity towards the proposed acquisition.

Mr Buckley's evidence was that he was critical primarily of Mr Preston and that, by expressing that criticism, he wished also for Mr Pitt to see matters in a more positive light.

○ Do the Deal Regardless

Mr Pitt said that Mr Buckley said that he wanted to do the deal '*no matter what*' or '*regardless*' and that he understood that this meant regardless of price.

Mr Buckley accepts that he might have said '*regardless*', but only if the figures stacked up. He contended that it cannot have been said in the context of price or formal valuations prepared by or for INM because Mr Pitt accepted that:

- It would be reasonable for any person to understand that the use of the word "*regardless*" meant regardless of the negativity that Mr Buckley had just criticised and with which Mr Buckley had expressed his frustration.

- “*regardless*” could not have been in relation to a valuation which had not yet been raised at that point in the conversation
- An Insult to Mr O’Brien

Mr Buckley accepted that, in frustration, he described a possible valuation of €14 million as being an insult to Mr O’Brien and that he referred to Mr O’Brien as having bailed out INM in the past.

However, he did not accept that he said that Mr O’Brien deserved to be rewarded.

- Mr Pitt Recounts the Meeting

Mr Buckley submitted that his account is more likely to be true than Mr Pitt’s account in light of Mr Kennedy’s evidence that Mr Pitt did not recount anything to the effect that:

- Mr Buckley had told him that Mr O’Brien deserved to be rewarded.
- Mr Buckley wanted to do the deal regardless of what Davy were saying.

He further submitted that:

‘if Mr Pitt had actually told Mr Kennedy that Mr Buckley intended to do the deal no matter the Davy valuation and for the purposes of rewarding Mr O’Brien, then Mr Kennedy would have been duty bound to get involved. Mr Pitt accepted that, if his account were true, it would have been the most serious thing that he had come across in his professional and commercial career. It is submitted that it is highly unlikely that Mr Kennedy would not have taken immediate action had he heard such an allegation, particularly in circumstances where Mr Kennedy had no difficulty in standing up to Mr Buckley about making an indicative offer.’

He concluded:

'In short, there is a clear contradiction between Mr Pitt and Mr Kennedy, in circumstances where the allegation, had it been made by Mr Pitt, would have been both shocking and unforgettable. Mr Pitt's partial retreat from the proposition that he made the allegation to Mr Kennedy on 20 October, and his failure to recount the allegation to Mr Preston, compel the conclusion that Mr Pitt must not have made the allegation that he later did. In those circumstances, it is submitted that the Inspectors cannot avoid concluding that Mr Buckley did no more than express a desire to proceed with the negotiations with Communicorp regardless of the negativity of which he was critical. In so saying, he did nothing improper. It is submitted that the allegation made by Mr Pitt to the effect that Mr Buckley expressed an intention or willingness to do the Newstalk deal regardless of price or the Davy valuation was a false and fabricated allegation.'

206. Mr Buckley concluded by submitting that the events at the meetings on 19 and 20 October 2016 need to be looked at in their larger context:

'Mr Pitt's performance at the board meeting on 19 October, and the consequent coming to a head of the non-executives' lack of confidence in him, placed Mr Buckley, as Chairman, in a very difficult position at a time when Mr Pitt as Chief Executive was leading the negotiation of a highly sensitive strategic acquisition from a related party. Mr Buckley had supported Mr Pitt in the face of criticism by others and had encouraged him in his role when Mr Pitt was the subject of criticism and considering his position in INM. The prospect of losing his Chief Executive at that point and in those circumstances was undoubtedly troubling. To then find the following day (as others were finding independently around the same time) that this same Chief Executive was negatively disposed towards the transaction, even to the extent that he was suggesting an offer well below what competent independent advisers were willing to recommend, must have been, at a human level, not merely troubling but intensely annoying. That annoyance of course occurred against a background of some impatience on Mr Buckley's part, which was both personally characteristic of him and objectively reasonable, given the attractions of a bilateral process which was unlikely to remain available for long, and particularly in light of the failure to progress the

acquisitions strategy more generally. These circumstances provide a full explanation for Mr Buckley's actions and utterances during this time period and are wholly inconsistent with any improper motive.'

207. In conclusion, Mr Buckley contended that Mr Pitt's acceptance that:

- Mr Buckley's preference for a bilateral process was a legitimate one; and
- If Mr Buckley held that view, it made sense to move quickly, to put one's best foot forward while the bilateral process was still available and to put pressure on the executive team to find out what the best price was that they were willing to pay

represented a complete vindication and endorsement of his overall approach to the proposed transaction.

21 October 2016

208. Mr Buckley had a further discussion with Mr Pitt on 21 October 2016 in the course of which Mr Pitt told Mr Buckley that the most recent Davy valuation was €11 –€15 million with an outlying range of €16.7 million which *'could reach up to a stretch valuation of €17.5 million'*. Mr Buckley, who was meeting Mr O'Brien later that day, said that he would communicate that number to him.

209. In support of his contention that he was not prepared to acquire Newstalk at an inflated price, Mr Buckley relied on:

- A note of an internal Communicorp meeting on 21 October 2016, which records that Davy had provided a valuation paper which rebutted a number of the assumptions set out in the IBI valuation and that this Davy valuation paper had been shared with Dominic Shorthouse by Mr Buckley *'in the context of explaining that INM would not consider an indicative offer at the valuation set out in the initial IBI Valuation Paper.'*

- Ms Gaffney's email in which she said that Mr Buckley:

'... is primarily concerned that he can sell this to institutions and that it would not be perceived as a sweetheart deal with the accompanying flak experienced by Siteserve [sic].'

210. Mr Pitt subsequently called Mr Kennedy to say that Mr Buckley's position had 'mollified' since the previous day – although Mr Kennedy did not recollect the conversation.

211. Mr Buckley submitted that the fact that his position had mollified:

'is entirely consistent with the possibility that any frustration expressed by Mr Buckley in the preceding couple of days reflected impatience or annoyance with the pace of events and the lingering management negativity that caused that slow pace. If, on the other hand, there were any truth in the allegation that Mr Buckley was engaged in an effort to artificially and corruptly inflate the price the Company was willing to pay, his having mollified his position at this time simply makes no sense.'

26 October 2016 – Meeting with Messrs Pitt, Preston and Buckley

212. Following a meeting with Communicorp, Mr Pitt met with Mr Buckley and Mr Preston. In the course of the meeting, a number of issues arose and Mr Buckley's submission in relation to each is summarised below.

'Denis is not a seller'

213. Mr Pitt raised the possibility of selling INM's print assets so as to be able to invest in more modern channels. Although he said that he envisaged the possibility of selling regional print titles, he accepted that Mr Buckley may have understood that he was referring to all INM's print assets.

214. Mr Buckley accepted that, in the course of discussing Mr Pitt's suggestion, he said that '*Denis is not a seller*' – and contended that he made this comment in the context of the Board's and his own desire for Mr Pitt to focus on acquisitions, and not on disposals.

'Not going back to Mr O'Brien on Price'

215. In the context of a discussion about the price payable for Newstalk, it is unclear what figures were mentioned – Mr Pitt noted the price €17 million; Mr Preston noted a price of €16 million. Whichever figure was mentioned, it was lower than that communicated to Mr O'Brien on 21 October 2016. In those circumstances, Mr Buckley submitted that he would have been entirely justified in saying that he was not going back to Mr O'Brien on price.

Moving Davy

216. Mr Buckley submitted that if one has a data input, then it is possible to legitimately influence value range. He submitted that there would be nothing untoward in saying that Davy need to understand all the assumptions – and so could be moved on price.
217. Mr Buckley accepted that he said '*do you not get it lads*' and that he was disappointed in them.

Do the Deal at the IBI price?

218. Mr Buckley's evidence was that he wanted to do the deal – but did not say that he wanted to do the deal at the IBI price. Mr Pitt's evidence was that Mr Buckley did say that he wanted to do the deal at the IBI price.
219. Mr Buckley submitted that the evidence given by Mr Pitt and Mr Preston when cross-examined did not support that the allegation that Mr Buckley had said '*at the IBI price*' or anything like it.
- Mr Preston accepted that Mr Buckley did not say the words '*at the IBI price*' – but that that was his understanding of what Mr Buckley meant.
 - Mr Pitt was cross-examined about what was actually said on 26 October 2016 and he said that he asked Mr Buckley if he intended to do the deal at the latest IBI price and Mr Buckley agreed that he did. Mr Pitt was asked how reliable was his evidence on the issue and he replied. "*Well, I said I'm not sure, Mr Guerin, yeah. So I don't state adamantly that that's what I said and I can stand corrected on it.*" Mr Pitt went on to say that he was confused about it. The run of his evidence afterwards suggests that

this confusion appears to be around whether he asked Mr Buckley to clarify whether he wanted to do the deal at the latest IBI price or whether Mr Buckley said this himself unprompted. When asked if his recollection is incorrect, Mr Pitt accepted that “*it’s possible*”. When it was put to him whether it was possible that he simply misinterpreted Mr Buckley on this issue (that he wanted to do the deal at the IBI price) Mr Pitt said that “*you can never rule it out, but I don’t think I did, okay.*”

220. Mr Buckley also referred to Mr Kennedy’s evidence that when Mr Pitt spoke to him following the meeting with Buckley, he reported that Mr Buckley had said that he wanted to the deal – but he had not said that Mr Buckley wanted to do the deal at the IBI price.

221. Mr Buckley concluded:

‘In light of the above, it is submitted that Mr Buckley’s account that he did not say that he wanted to do the deal at the IBI price is much more likely to be true, and ought to be preferred by the Inspectors, for the following reasons:

- (i) Mr Buckley’s evidence is supported by Mr Preston;*
- (ii) When this was put to Mr Pitt he was less than certain (to put it at its mildest);*
- (iii) A contemporaneous email note made by Mr Preston makes no mention of doing the deal at the IBI price; and*
- (iv) Mr Pitt said that he recounted Mr Buckley’s comments in detail to Mr Kennedy, but Mr Kennedy denies that doing the deal at the IBI price was said to him.’*

27/28 October 2016

222. After Davy had reviewed IBI’s second valuation, Mr Pitt called Mr Buckley. Mr Buckley accepted that he had told Mr Pitt that he was very disappointed. He gave evidence that he had been hoping that the gap would be closed between the Davy and IBI valuations. He then asked Mr Pitt to confirm whether €18 million was the maximum price that Mr Pitt would support – which Mr Pitt did. Mr Buckley did not

ask him to go over €18 million. Mr Buckley denied accusing Mr Pitt of trying to *'sink the transaction'*.

223. Mr Buckley submitted that:

'Even taken at is very height, it is difficult to see what impropriety Mr Pitt attaches to this conversation with Mr Buckley on 28 October 2016. This must be considered particularly in the context of Mr Pitt's acceptance that Mr Buckley is tenacious and persistent in business affairs, that there was pressure to do a lot of work in a very short time and in light of Mr Buckley's then view of Mr Pitt's negativity (in which he was not alone).'

224. Mr Buckley concluded:

'While the Inspectors will have to make certain determinations in relation to credibility on what was said during the contested meetings, the following emerges even before those issues are resolved:

- (i) While Messrs Pitt and Preston spoke of pressure, there is justifiable explanation for this given Mr Buckley's desire to maintain exclusivity and for INM to put its best foot forward;*
- (ii) There was substantive work to be done in relation to the underlying assumptions and both Mr Buckley and Mr Kennedy record that this could have been done more quickly;*
- (iii) There are various bases for the conclusion that both Mr Pitt and, in particular, Mr Preston were not positive on the transaction (at least into October);*
- (iv) Any movements on price on the INM side had objective justification from both executive management and Davy as part of a legitimate finance exercise as opposed to being the result of any inappropriate pressure;*
- (v) The last price move came from Davy on 27 October 2016 which provided an outside valuation of €16.9m and which was communicated to Communicorp; and*

(vi) *The last valuation actually put to Communicorp (€18m) was the price agreed to by management, specifically Mr Pitt as Chief Executive, and was a figure that he was personally willing to stand over.'*

(ii) **INM Directors**

225. The INM Directors summarised their position in the following terms:

'There has now been extensive cross examination of, in particular, Mr Pitt, Mr Preston and Mr Buckley in relation to the proposed Newstalk acquisition. While it is principally a matter for those parties to make submissions to the Inspectors in relation to how certain conflicts on the evidence should be resolved (in terms of who said what and what was meant by statements said), arising out of the cross examination, it is submitted the following findings can be made on the evidence:

- (a) *the process was at a very preliminary stage in October 2016; no documentation had been prepared by management (to include a management proposal and an independent report from Davy, both of which would have been necessary to take the matter to M&A Committee) and Mr Pitt was aware that it could have fallen away very quickly;*
- (b) *Mr Buckley was impatient and unhappy about the pace at which Mr Pitt and Mr Preston were progressing discussions and expressed his unhappiness to them;*
- (c) *Mr Buckley was frustrated by the Davy valuation and expressed that frustration to Mr Pitt and Mr Preston;*
- (d) *Mr Preston could not see any deal to buy Newstalk making money for INM and his obvious negativity in relation to the deal irritated Mr Buckley;*
- (e) *Davy was involved from an early stage advising on valuation and related party issues. There was no realistic prospect of any deal being approved*

by the M&A Committee without Davy's support for the proposed valuation;

- (f) Mr Pitt, Mr Preston and Mr Buckley were all aware that before any deal could be progressed it would have to pass the scrutiny of the M&A Committee and it would have to be satisfied that any valuation was justified;*
- (g) Mr Kennedy made that explicitly clear in the presence of Mr Pitt and Mr Preston to Mr Buckley in a meeting on 19 October 2016;*
- (h) Mr Pitt and Mr Preston knew that this was a thorough process including from their experience in relation to Project Canary. Their experience in relation to Project Canary would also have made them aware of the documentation they would be required to prepare to take the matter to M&A Committee;*
- (i) all those involved, including Communicorp, at all times knew that any deal would require M&A Committee approval, Board approval and shareholder approval, as well as regulatory approval;*
- (j) Mr Pitt and Mr Preston confirmed in evidence that they had no reason to believe at the time that either the M&A Committee or the Board would do anything other than properly examine any proposed deal and ensure that any valuation was properly justified;*
- (k) on his own evidence, Mr Pitt first felt improper pressure from Mr Buckley to progress the deal at the meeting on 20 October. That pressure abated the following morning, and there was no other pressure from Mr Buckley to do the deal until 26 October. Mr Pitt's evidence was that he was again concerned by Mr Buckley's reaction at the meeting on 26 October and felt improper pressure to do the deal. Mr Pitt alleged Mr Buckley also sought to put pressure on 28 October. On his own evidence, Mr Pitt felt no pressure after 28 October;*
- (l) Mr Preston maintained that he felt pressure from 18 October but could only speak first-hand about the 19 and 26 October meetings, which he attended. He agreed that he had believed that Mr Pitt was under sustained pressure from Mr Buckley during this period up to 28 October. Mr Preston*

believed that the proposal to acquire Newstalk had gone away after 28 October;

- (m) Mr Pitt instructed Mr Preston to take notes of what was said at meetings in relation to Newstalk, which Mr Preston was unaccustomed to, and Mr Pitt shared his impressions of meetings, which he had recorded in notes to himself, with Mr Preston during October;*
- (n) Mr Pitt and Mr Preston each spoke to Mr Kennedy about concerns they had in terms of Mr Buckley's behaviour in their discussions. Mr Kennedy listened to their concerns and offered more than once to speak to Mr Buckley on their behalf. They turned down those offers;*
- (o) While Mr Pitt and Mr Preston expressed concerns to him to the effect that Mr Buckley was keen to progress the deal, Mr Kennedy was reassured by the facts that:
 - (i) they did not wish him to intervene with the Chairman;*
 - (ii) he knew that no transaction could progress without his input and going before M&A;*
 - (iii) any valuation would have to be supported by Davy to get approval from M&A;*
 - (iv) he would have a keen focus on Davy's advice; and*
 - (v) any deal would ultimately have to go before the Board.**
- (p) viewed against the backdrop of:
 - what Mr Pitt and Mr Preston knew at the time in terms of the checks and balances in place;*
 - what Mr Buckley knew in terms of the checks and balances in place;*
 - the fact that neither Mr Pitt or Mr Preston took up the offers by Mr Kennedy to speak to Mr Buckley;**

- *the fact that neither Mr Pitt nor Mr Preston made any report to the Board in relation to their concerns;*
- *the fact that it is clear following cross examination of Mr Pitt and Mr Preston that statements made by Mr Buckley likely had meanings other than the meanings attributed to them by Mr Pitt and Mr Preston both at the time and/or at the time of making their protected disclosures, and that they accept that Mr Buckley did not say some of the things attributed to him; and*
- *and the fact that Mr Pitt and Mr Preston failed to disclose information to the Inspection about the extent of their interactions and actions regarding their respective disclosures on Newstalk*

the evidence in relation to the proposed acquisition of Newstalk does not support a finding of Mr Buckley applying improper pressure onto Mr Pitt or Mr Preston or any actions on his part constituting a fraud or attempted fraud on the Company; and

- (q) *the evidence does support a finding that INM's processes and structures operated as they should and that there was never any risk of INM acquiring Newstalk at an inflated price.'*

226. The INM Directors then made the following submissions in relation to the meetings that took place between Mr Buckley, Mr Pitt and Mr Preston.

- 19 October 2016

'This meeting (and the undisputed evidence in terms of what occurred) is a critical part of the factual context against which the credibility of Mr Pitt's (and subsequently Mr Preston's) assertions that they in the days following felt under a threat by way of improper pressure to do a deal for Newstalk at an inflated price and that they held concerns that there was a risk to the Company and/or the shareholders in respect of same must be assessed.'

○ 20 October 2016

It is clear from both Mr Pitt and Mr Buckley's evidence of that meeting that it was a contentious meeting. Mr Buckley was frustrated and annoyed by Mr Pitt's negativity towards the proposed deal. It is also clear that there are differences in opinion about what was said, and what Mr Buckley intended to convey. In particular, Mr Pitt alleged that Mr Buckley said he wanted to do the deal "regardless" and that Mr Pitt interpreted that as meaning "regardless of concerns that management had about the value of the business and he wanted to do it [inaudible] with the price which would have been the price of the seller". It was put to Mr Pitt on behalf of Mr Buckley that while Mr Buckley accepts he may have made a statement about "wanting to do the deal regardless", he meant regardless of negativity of INM management, not regardless of any Davy valuation.

Mr Pitt under cross examination agreed that he had asked the question of Mr Buckley about the valuation at the end of the conversation and he accepted that the word 'regardless' could not in fact be a reference to the Davy valuation. Mr Pitt however, nonetheless maintained his position that he believed Mr Buckley wanted to do the deal regardless of concerns management had, and at a price favourable to the seller. It was pointed out to Mr Pitt in cross examination that Mr Preston when copying and pasting from the amended McCann FitzGerald note of the meeting on 16 November did not carry across the allegation that Mr Buckley wanted to do the deal regardless of the Davy valuation. Furthermore, there was no record of Mr Preston having said that on 5 December 2016 when he made his disclosure to Dr O'Hagan. Mr Pitt said it was possible that he had not told Mr Preston that Mr Buckley wanted to do the deal regardless of Davy's valuation.

Based on the cross examination, it seems likely that Mr Pitt in his original evidence and his note to self of 20 October misinterpreted Mr Buckley's statement of 'wanting to do the deal regardless'.

○ 21 October 2016

Mr Pitt in his evidence agreed he had suggested that valuation [€17.5 million] for the first time in that meeting. Mr Pitt also confirmed under

cross examination that he did not feel any pressure at that meeting. He said “In this meeting at all I didn’t feel any pressure. It was actually a very big relief, and I thought that maybe it was an aberration of Mr Buckley on the 20th”.

Mr Pitt in describing to the Independent Reviewers how the pressure was starting to get to him on 21 October, told them that the pressure was “intense” and “sustained” and gave the ODCE the impression that he was under continuous pressure. Mr Pitt accepted under cross examination, however, that it was not continuous pressure and that the three alleged instances were on 20, 26 and 28 October. Mr Pitt accepted that he told the ODCE he was under pressure on 21 October to agree a €30m valuation, and that he had not told the ODCE that Mr Buckley’s position had mollified on 21 October. He accepted that the statement in the ODCE note that Mr Buckley was “still arguing for the €30m plus price to be agreed” was “not true”. It was also put to Mr Pitt that he had not told Mr Preston that the pressure was off on 21 October. Although Mr Pitt said he believed he had done so, Mr Preston was clear that Mr Pitt never made him aware that the pressure had eased. Mr Preston believed that following the meeting on 20 October there was sustained pressure on Mr Pitt from Mr Buckley to pay in excess of €30m for Newstalk.’

○ 26 October 2016

‘It is not in dispute that Mr Buckley became annoyed at the 26 October meeting. The broader agenda of the meeting appears important in this context. First, it was put to Mr Pitt that Mr Buckley was annoyed by a suggestion by Mr Pitt that INM should dispose of its print assets, at a point when they were discussing acquisitions; that the Board had an issue with him not advancing the acquisition strategy; and, that being so, he was not reading the room very well when he proposed disposing of assets and it was like “a red rag to a bull”, a proposition with which Mr Preston agreed but which Mr Pitt did not accept. Mr Pitt accepted, however, that it was a priority to focus on acquisitions. Second, Mr Pitt accepted that the statement in his note to self to the effect that a disposal strategy was off the table to protect Mr O’Brien’s interests regardless of what was best for INM was his commentary, and not something that Mr Buckley said at the meeting. Third, the evidence indicates that at this meeting Mr Pitt

dropped the figure that he was prepared to pay for Newstalk below the figure discussed with Mr O'Brien the previous week, leading Mr Buckley to say he was not going back to Mr O'Brien on price. It was put to Mr Pitt that having indicated a willingness to go to €17.5m (or €18m as the Chairman recalled it) he was now valuing Newstalk at €10m to €16m, but that he said he believed the value was closer to €10m. There does not appear to be a dispute that Mr Pitt did express these views on figures. It is readily understandable that this development was from Mr Buckley's perspective exasperating.

Mr Buckley accepts he said something to the effect of "I'm very disappointed in you both". Mr Pitt alleges that Mr Buckley at the meeting said that he wanted to do the deal at the IBI price. Mr Buckley strenuously disputes this, and it runs counter to his having put a figure of €18m to Mr O'Brien the previous week, and having according to Gervaise Slowey sought to reduce expectations at the Communicorp end. Mr Preston's evidence under cross examination was that he does not recall Mr Buckley saying he wanted to do the deal at the IBI price – he recalled Mr Buckley saying he wanted to do the deal and accepted that he had interpreted that as meaning he wanted to do the deal at the IBI price. Mr Preston admitted that Mr Buckley had never said he wanted to pay €35m for Newstalk and when he said that in his protected disclosure he had "got that wording wrong".

Mr Pitt also alleges that Mr Buckley said at the 26 October meeting that Davy could be influenced by management and that they would write whatever INM management told them to. Mr Buckley denies that he said that. Mr Buckley says that what he meant to convey to Mr Pitt and Mr Preston was to ensure that Davy understood IBI's assumptions on the basis that IBI would have had more information on Newstalk than Davy. Mr Pitt accepted under cross examination that it could be entirely legitimate for management to influence Davy on aspects of valuation. Mr Ivan Murphy also confirmed there are areas where management can legitimately try to influence valuation. In fact having done so, Mr Pitt reported back by email on 27 October forwarding a revised Davy analysis which did not change the valuation range substantially, but which he said Davy were confident in standing over, as referenced below.

Mr Pitt was cross examined extensively on his note of the 26 October meeting on behalf of Mr Buckley. It is submitted that what emerges from Mr Pitt's concessions is that:

- (a) more likely than not his note of that meeting is not a complete or accurate record of what occurred, and is in part commentary rather than a record of what was said;*
 - (b) Mr Pitt misinterpreted aspects of what Mr Buckley said;*
 - (c) Mr Buckley formed the view that Mr Pitt was reverting to a price lower than what he had stated previously and that this caused significant annoyance on the part of Mr Buckley towards Mr Pitt; and*
 - (d) Mr Buckley did not explain in any detail to Mr Pitt or Mr Preston his apparent objective of getting to the table so that INM could then do due diligence, but Mr Pitt already held that view having forcefully conveyed the same view to Communicorp earlier that day.'*
- 28 October 2016

'On 28 October, the third alleged occasion of improper pressure, Mr Pitt called Mr Buckley who was in Portugal. He was apparently responding to a missed call from Mr Buckley. It appears both Mr Buckley and Mr Pitt's evidence is that on this call Mr Pitt confirmed to Mr Buckley that €18m was the maximum which INM were prepared to go to. Mr Buckley said in his view, in circumstances where that price had already been communicated to Mr O'Brien and was not going to do it, as far as he was concerned "it was all over". Mr Pitt alleged that this conversation was another instance of improper pressure to increase the price at which INM would buy Newstalk. Under cross examination, however, it was put to Mr Pitt that while Mr Buckley accepted he asked whether €18m was the maximum Mr Pitt would pay he did not ask him to go above €18m, and Mr Pitt accepted that that was so.

Mr Pitt accepted that by the time the call finished he had made clear his maximum price to Mr Buckley. It was put to Mr Pitt that based on that call and what occurred the matter was in reality finished at that point. Mr Pitt did not accept that and suggested that it might not have been finished in Mr Buckley's mind. Mr Pitt agreed that he did not follow up with the Chairman after 28 October. There was also no suggestion by Mr Pitt that there was any further instance of improper pressure after this call.'

227. The INM Directors noted that both Mr Pitt and Mr Preston acknowledged that Mr Kennedy had offered to speak to Mr Buckley in light of their concerns at the pressure he was putting on them. They submitted that:

'[n]either of them adequately explained why, if they genuinely felt improper pressure (in the nature of what is alleged to be an attempted fraud) was being exerted, they did not take up that offer.'

228. The INM Directors concluded that:

'considered in the round, the evidence - in particular following the cross examinations of Mr Buckley and Mr Pitt - strongly suggests that there was a serious breakdown in communications. It is submitted that Mr Buckley and Mr Pitt had trouble understanding each other. The evidence suggests that Mr Buckley was not as clear as he should have been about his strategy and views; Mr Pitt badly misinterpreted aspects of what Mr Buckley said to him; and Mr Preston made assumptions based on what Mr Pitt was passing onto him, and not passing onto him, about his interactions with the Chairman. Mr Pitt and Mr Preston's refusals to avail of reasonable offers of intercession from Mr Kennedy, resulted in them not taking appropriate steps as CEO and CFO to raise any concerns they had with Mr Buckley and/or Mr Kennedy as Senior Independent Director and/or the Board or any other member thereof.'

229. In relation to the protections in place in terms of checks and balances in the company (the M&A Committee, the Board, the fact that Davy would independently opine on

valuation and be required to provide a “*fair and reasonable*” report) the INM Directors submitted that:

The M&A Committee

- *‘Mr Kennedy in his evidence expressed the view that the proposal was in any event not at a stage where it was ready to go before the M&A Committee.’*
- *‘While there were some differing views among the NEDs as to whether the proposal should at that point have been put before the M&A Committee, there is no doubt that any proposal could not have proceeded without at some point being put for consideration before the M&A Committee. There is also no doubt that if Mr Pitt (or Mr Preston) wished they could have asked that the proposed acquisition be added to the agenda, but they did not.’*

The Board

- *‘The proposed acquisition was never tabled for discussion by the Board and Mr Pitt and Mr Preston at no stage identified any concerns about it to the Board. Mr Buckley’s evidence was that it was decided not to inform the Board of INM as to the proposed sale in order to try to keep the discussions at the initial stage confidential. The only member of the Board aware of the potential acquisition was Mr Kennedy.’*
- *‘The evidence from members of the Board was consistent that any proposal put before the M&A Committee, and subsequently the Board, would be subjected to close scrutiny. Mr Terry Buckley explained that the asset would be valued very closely by the M&A Committee and very closely by the Board’*
- *‘... there were differing views amongst the NEDs in their evidence about whether, given the exploratory stage at which the discussions were at, it should have been brought to the Board at that time, and some members thought it might have been preferable if it had been.’*

- *Mr Kennedy explained his view that he could understand the desire for confidentiality at the initial stages, that it was at a very preliminary stage with no management papers, and that before it could progress at all the deal would have to come before the M&A Committee. The purpose of the M&A Committee was to “thrash out” deals before they were presented to the Board for consideration.’*

The role of Davy

‘... in reality the acquisition had no prospect of being approved without Davy backing the price proposed. Mr Kennedy made it clear at the 19 October meeting that the Davy valuation would ‘rule the day’. Mr Murphy confirmed in his evidence it would be very difficult for a Board (or M&A Committee) to approve a valuation put forward by management that was not supported by Davy, and that it would be virtually impossible for a Board to approve a valuation that was not supported by management or Davy.’

230. The INM Directors concluded that the evidence in relation to the checks and balances that existed:

‘shows there was in fact no risk to the assets of the Company or interests of shareholders because there was no prospect of any deal being done without the M&A Committee (and subsequently the Board) being satisfied that the figures were justified and had a sound basis. Second, these protections were facts of which both Mr Pitt and Mr Preston (and Mr Buckley and the members of the Board) were all aware at the time. It is submitted that the credibility of the allegations that they felt under improper pressure to do a deal at an inflated valuation (and their respective interpretations of statements made by Mr Buckley at the time) must be assessed against those facts and their awareness of them.’

231. The INM Directors concluded by summarising their assessment of the evidence in relation to the allegations of improper pressure:

‘At the time of the protected disclosure, the substance of the allegation made by Mr Pitt (and then subsequently copied by Mr Preston) in relation to Newstalk was that Mr Buckley was putting improper pressure on management to do the

deal at the IBI price and/or to persuade Davy to write a valuation reflecting the IBI price.

In the Independent Review process, these allegations were characterised explicitly by Mr Pitt in terms of fraud or an attempted fraud on the Company. In his interviews with the Independent Reviewers, Mr Pitt said he had told Mr Kennedy at the time that he was under a lot of pressure in relation to acquiring Newstalk and was trying to manage the pressure. He described the pressure as “so intense, so sustained.”

Under cross examination Mr Pitt was tested on the pressure he felt. He ultimately identified that there were three occasions where he felt improper pressure was exerted by Mr Buckley to do the deal at an inflated price, being, 20 October 2016, 26 October 2016 and 28 October 2016. Both Mr Pitt and Mr Buckley were cross examined extensively on the conversations that occurred on these dates. Mr Pitt agreed under cross examination that in fact there was no improper pressure at all between 20 and 26 October. He also agreed that there was no improper pressure put on him before 20 October and that the pressure he felt at that stage was partly the normal pressures associated with working life. Mr Pitt further accepted that he was incorrect in telling the ODCE that the pressure got to him on 21 October to agree to a €30m plus valuation, when in fact the pressure abated on 21 October.

Leaving aside the conflict on the evidence as to what was said (or what was meant by words said) in the relevant meetings between Mr Pitt and Mr Buckley (and on one occasion Mr Preston), it is submitted that, however those conflicts are resolved, the credibility of the allegations made by Mr Pitt (and subsequently Mr Preston) concerning alleged improper pressure — which were described by Mr Pitt in terms of an attempt to defraud the company — has to be considered against a number of important facts.

Mr Pitt as CEO had a duty to take action to address any actions that he perceived amounted to an attempted fraud on the Company. Mr Pitt was cross examined on why, if he genuinely held a concern at the time that Mr Buckley’s behaviour towards him was an attempt to defraud the Company, he did not make a report to the Board. Mr Pitt initially sought to suggest that he had done so through making a protected disclosure. There was no adequate explanation given by Mr Pitt under cross examination however as to why he felt it necessary to make a

protected disclosure at that stage rather than for example, raise any concerns he held through a communication to Mr Kennedy or the Board more generally. However, he ultimately accepted that irrespective of concerns he may have held in relation Mr Buckley's reaction to any such report, he as CEO had a responsibility to report such a matter to the Board.

There is no dispute that both Mr Pitt and Mr Preston during the period from 18—27 October were consistently offered assistance by Mr Kennedy, which they declined. Mr Kennedy, who had demonstrated his ability to insist on proper governance, was available to management.

Mr Pitt and Mr Preston both knew there was no prospect of any acquisition of Newstalk (or even an indicative offer being made) without the matter coming before the M&A Committee, and if they had any doubt in relation to that prior to 19 October, they certainly knew it in circumstances where at that meeting Mr Kennedy explicitly told Mr Buckley that was the case.

There could be no risk to shareholders (or the assets of the company) in circumstances where any proposed acquisition would have to be scrutinised by the M&A Committee and subsequently go before the Board.

Both Mr Pitt and Mr Preston at the time believed that Mr Kennedy and/or the Board would not approve a deal if it could not be justified on the figures.

Both Mr Pitt and Mr Preston had no reason at the time to believe that the procedures in place to protect the company would not have worked properly.

Mr Buckley had a robust style of engagement.

While it might in hindsight have been preferable if Mr Buckley had stepped back from the discussions, Mr Buckley would not have been involved in any decision making in relation to Newstalk given that he was a related party.

Davy had already been engaged and any valuation put before the M&A Committee to be successful would have had to be supported by Davy.

When Mr Pitt told Mr Buckley on 28 October 2022 that €18m was the maximum figure INM would be prepared to go to in any offer, Mr Buckley did

not ask him to reconsider and there was no further discussion about the deal between them.

Neither Mr Pitt nor Mr Preston after 28 October 2016 spoke to Mr Kennedy or ever made any report to the Board (or any member thereof) of any concern in relation to a risk to the Company until Mr Pitt made his protected disclosure to Mr Kennedy on 11 November 2016.

It is submitted that the cross examination of Mr Pitt and Mr Preston in relation to the Newstalk issue is strongly indicative of a breakdown in communications between Mr Pitt and Mr Buckley. It is further submitted that the evidence does not suggest that Mr Pitt or Mr Preston could in reality have under improper pressure felt a necessity to do any deal at an inflated price, particularly given both Mr Kennedy's involvement, Davy's involvement and the necessity that any deal was going to go before M&A, then the Board and the shareholders (excluding Mr O'Brien). It is clear that they felt under pressure in terms of Mr Buckley's impatience and felt under pressure because they were aware that Mr Buckley was in favour of the acquisition. It is also important that the evidence is clear that Mr Buckley was also well aware of the checks and balances as was Communicorp. From a legal perspective however, and in the context of an allegation of attempted fraud, there is a significant difference between pressure to progress negotiations and the allegation of improper pressure to pay an excessive amount for an asset to benefit a major shareholder.

The exaggerated account that Mr Pitt gave to the ODCE on 18 November (when Mr Kennedy was not present and unable to question the version of events being presented, by contrast with 16 November), taken with the ODCE's observation that he was "extremely anxious" to get their confirmation that he had made a protected disclosure, and his failure to tell the Inspection about having shared his notes to self with Mr Preston prior to his making his protected disclosure, are evidence which significantly undermines the credibility of Mr Pitt's account both at the time of his disclosure and in the Inspection of what occurred in relation to Newstalk (and in his evidence more generally). Further, an important part of the backdrop against which the credibility of Mr Pitt and Mr Preston's complaints of improper pressure must be assessed are their admitted respective concerns for their own employment, which it would appear on the evidence were very much in both their minds at the time they first made these allegations in the context of their respective disclosures.'

(iii) INM

232. INM submitted that:

‘if the transaction were to have progressed it would have to have been considered and approved by the M&A committee, the Board, the shareholders and Davy would have provided an independent expert valuation. This is significant as it shows that there was in fact no risk to the assets of the Company or interests of shareholders because there was no prospect of any deal being done without the M&A Committee (and subsequently the Board) being satisfied that the figures were justified and had a sound basis. In addition, Mr Pitt, Mr Preston and the members of the Board were at all times aware of these Company procedures and protections.’

(iv) Mr Preston

233. In his submission, Mr Preston addressed the following issues:

- Newstalk – a loss making business.
- Newstalk – a strategic acquisition?
- Mr Buckley’s targeted criticism of Mr Preston’s “negativity” towards Newstalk.
- The meeting of 26 October 2016.

Newstalk – a loss making business

234. Mr Preston submitted that:

‘From the date of its establishment until the point of its proposed acquisition by INM, Newstalk had, at all times, being a loss-making business. In the financial year prior to the proposed acquisition, Newstalk was projected to suffer a loss of €2.1 million in 2016, adjusted downwards to €1.4 million when account was taken of certain once off expenditures. In 2015, Newstalk had, in fact, suffered a loss of €1.7 million. At a minimum these figures required that a robust critical assessment of the value of Newstalk to INM should have taken place.

In this context, Mr Preston himself has also given uncontested evidence of the limited financial benefit that could have been achieved from the acquisition of

Newstalk. In this regard the CFO stated during the course of his interview on 18 December 2018 that:

“For me, it was not a strategic acquisition. It was even, like, at that time, I think we had cash of, shall we say – in 2015, we had cash of €59.7 million in the bank, so circa 60 million. If we spent 30 to 35 million of that on a radio station, that really left us with 30 and we have pension commitments – so you wouldn’t have been able to do anything else. So we would have been betting the business on a radio station that was currently loss making; that may, if everything worked perfectly in a wonderful world, generate a million in profits, say a million or million and a half profit. You would have ruined the business.”

Mr Preston continued by pointing out as follows:

“You would have spent half your cash to generate 1.5 million. 1.5 million would not have made any difference to our business at all.”

235. Mr Preston’s responsibilities as CFO involved financial reporting, budgeting, financial forecasting and audit responsibilities. It was, therefore, an essential part of Mr Preston’s job as CFO to act prudently in the financial interests of the Company.
236. Therefore, it entirely understandable and correct that Mr Preston’s dominant focus in relation to the Newstalk transaction was from a financial perspective. Mr Buckley had no entitlement to disregard or seek to over-ride Mr Preston’s bona fide concerns in relation to the proposed Newstalk acquisition.

Newstalk – a strategic acquisition?

237. Mr Buckley’s response to the fact that Newstalk was a loss making business has been to claim that it would have been a “*strategic*” acquisition for INM. While Mr Buckley relied upon the strategic importance of Newstalk, this importance was never communicated to Mr Preston. In the absence of any such communication on the part of Mr Buckley, Mr Preston cannot be criticised for any failure to appreciate the allegedly strategic value of Newstalk. If it were the case that Mr Preston had been presented with reasoned arguments to justify the suggested strategic importance of Newstalk and to justify paying a financial premium for its acquisition, he would naturally have considered and engaged with such a discussion. However, Mr Buckley

omitted not only to explain why Newstalk was a strategic acquisition, he failed even to state to Mr Preston that it was a strategic acquisition at all.

238. The proposition that Newstalk was considered to be a strategic acquisition is not consistent with the acquisition criteria approved by the M&A Committee on 21 October 2015. Those acquisition criteria included:

- Where diversification from print or digital publishing was under consideration, the relevant profitability criteria were:
 - *“Nearing break even or in low profitability.*
 - *Healthy operating margin clearly achievable through accelerating growth”.*
- The revenue criterion applicable to such an acquisition was to be *“In sector where long term growth easy to see and market still not defined.*
- In respect of payback period, the timescale was to be less than 5 years.
- In respect of competition authority considerations, the tolerance for risk was to be *“zero level of risk to be referred to any process”.*

The proposed acquisition of Newstalk met none of these criteria.

239. In conclusion, Mr Preston submitted that Newstalk was not identified as a possible acquisition target during the course of M&A Committee discussions or otherwise at board level. Furthermore, it is clear that an acquisition in the area of radio was not a priority, and in fact, far from being a strategic imperative, radio acquisitions were scarcely on the agenda of INM at all.

Mr Buckley’s targeted criticism of Mr Preston’s “negativity” towards Newstalk

240. Mr Preston submitted that, in the course of his evidence, Mr Buckley had:

- *‘accepted that the concern raised by Mr Preston in relation to the IBI valuation was, in fact, legitimate in the performance of his role as CFO.*

- *confirmed that the specific context for the criticism directed personally towards Mr Preston was the fact that Mr Preston had, on the previous day, referred to his own valuation of Newstalk at an asset value of €10 million*
- *when it was put to him that Mr Preston’s “negativity” was simply a function of the CFO taking a cautious, professional approach to the question of value for money, Mr Buckley’s only response was to state that:*

“I don’t know how he could have put a value on that business with the lack of information he had. Right. Davys would have been much more experienced in valuing assets. Right.”

241. Mr Preston contended that, against the background of that evidence, Mr Buckley’s criticisms were unjustified and inappropriate because:

- Mr Preston’s job was to act prudently in the financial interests of the Company. Mr Preston was therefore obliged to express his concerns to Mr Buckley in relation to the proposed Newstalk acquisition and was, in due course, equally obliged to inform the Board of his concerns in relation to the pressure exerted by Mr Buckley to progress a transaction in respect of which he had significant misgivings.
- In light of the fact that Newstalk was a loss making business, Mr Preston’s financial concern in relation to the proposed acquisition was thoroughly justified.
- Financial prudence and emphasis on cost cutting is something which Mr Buckley had historically expected – and insisted upon receiving – from Mr Preston as CFO at all times prior to the proposed Newstalk transaction. The difference in approach in the proposed Newstalk transaction was, in all of the circumstances, wholly incongruous. Rather than seek to exert downward pressure on the proposed acquisition price Mr Buckley sought to do the opposite in a manner that was entirely out of character for him and which caused Mr Preston to have legitimate cause for concern.

- The valuation of €10 million suggested by Mr Preston at the time aligned with the valuation then provided by Davy of €11 – €15 million which then stated that:

‘Our desktop valuation analysis concludes that an [enterprise value] range of €11 million to €15 million could be supportable for [Newstalk]. Our analyses highlights the critical valuation driver being the achievement of cost synergies.’

At that time Davy were of the view that the valuation then advanced by Communicorp for Newstalk was based upon a flawed approach consisting of:

‘Aggressive revenue and synergy assumptions...the questionable application of certain valuation multiples and methodologies in the IBI paper.’

This being so, criticism of Mr Preston’s stance in relation to the value of Newstalk cannot be rationally justified by Mr Buckley.

- Mr Buckley provided no reasoned explanation for his antagonism to Mr Preston’s concern in relation to Newstalk. His retrospective justification was that Mr Preston lacked valuation experience but has conceded that this concern was never raised at that relevant time.

242. Mr Preston submitted that :

- Mr Buckley sought, by his criticism, to silence Mr Preston from expressing his legitimate and bona fide concern in relation to the proposed Newstalk transaction because he:
 - Deterred Mr Preston from expressing his financial concerns in relation to the proposed acquisition of Newstalk.
 - Exerted pressure on Mr Preston to proceed with the proposed acquisition in a manner and at a pace that was inappropriate and not in the best interests of INM.

- Mr Buckley breached his own fiduciary obligations to INM. The unreasoned, aggressive and illogical manner in which he pursued his criticism was in breach of his obligation of skill, care and diligence and his obligation to avoid a conflict of interest and act in the best interest of INM.
- By singling out Mr Preston for such unusual and personal criticism Mr Buckley's criticisms had the natural effect of causing Mr Preston to be concerned for his position in the Company.

The meeting of 26 October 2016

243. Mr Preston was unaware of the second IBI valuation of Newstalk – at €26.8 million – until it was disclosed by Mr Buckley at the beginning of the meeting on 26 October 2016.
244. In relation to the key issue arising from that meeting – namely whether Mr Buckley said or communicated a desire to acquire Newstalk at the IBI price – Mr Preston submitted that, although Mr Buckley did not state in terms that he wanted to do the Newstalk deal at €26.8 million, that was the effect of what Mr Buckley was saying. In support of this submission, Mr Preston relied on the following:
- Mr Buckley stated that he was not prepared to go '*back to Denis on price*'.
 - Mr Buckley did not tell Mr Pitt or Mr Preston that he considered the IBI valuation of €26.8 million to be too high (as he has said in evidence) – although that view was directly relevant to the issue under discussion, namely the appropriate value of Newstalk.
 - Mr Buckley accepted that he said to Mr Pitt and Mr Preston '*Do you not get it lads?*' – but did not explain that he was referring to the strategic benefit that he perceived in acquiring Newstalk.
 - Mr Buckley did not explain his approach to the negotiations – namely to make an offer that would enable the negotiations to proceed to due diligence and then, through due diligence, to revise the offer downwards.
 - The threatening nature of Mr Buckley's behaviour at the meeting.

245. Mr Preston concluded that:

‘the meeting of 26 October 2016 had the undoubted impact of communicating Mr Buckley’s unambiguous desire to move forward with the proposed Newstalk transaction at an inappropriately high price. Placed in the broader context of a Chairman who had placed himself in a hopelessly conflicted position - and who had only 6 days previously stated that he would not let Mr Preston’s negativity get in the way of doing the deal - it is submitted that Mr Buckley clearly sought to exert improper pressure upon Mr Preston in relation to Newstalk. That pressure was exerted in a manner and in circumstances which clearly breached Mr Buckley’s fiduciary duties to the Company. In all of these circumstances it is submitted that Mr Preston was plainly right to draw these issues to the attention of the Board of INM when he made his Protected Disclosure.’

Breaches of section 228 of the Act

246. Mr Preston contended that Mr Buckley owed a number of duties to INM under section 228 of the Act (the text of which is set out in Chapter 5, paragraph 156). In particular, he contended that Mr Buckley owed duties under:

- Sub-section (f) to *“avoid any conflict between the director’s duties to the company and the director’s other ... interests ...”*
- Sub-section (g) to *“exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both:*
 - (i) the knowledge and experience that may reasonably be expected of a person in the same position as the director; and*
 - (ii) the knowledge and experience which the director has.”*

247. Mr Preston submitted that the duty to avoid conflicts of interest:

“... applies even where the fiduciary’s personal interest “possibly may conflict” with his duty, but only if a reasonable person “looking at the relevant circumstances would think that there was a real sensible possibility of conflict”.

248. Turning to Mr Buckley's conduct, Mr Preston asserted that Mr Buckley:

“improperly placed himself at the centre of a negotiation between INM and Communicorp where his relationship with Mr O'Brien clashed (or, at a minimum, had the potential to clash) with his obligation to INM. It is submitted that the duty to avoid a conflict of interest necessarily required Mr Buckley to distance himself from the proposed acquisition of Newstalk from the outset.

Instead of recusing himself from the outset, Mr Buckley instead adopted the role of promoter, negotiator and “go between” in connection with the proposed Newstalk transaction. Mr Buckley should never have assumed this position and compounded his error by directing that the proposed Newstalk transaction was not brought before INM's M&A Committee or the Board itself in the manner which would have been appropriate in at that time.

...

Mr Buckley's dominant focus was to ascertain the greatest sum that INM would pay for Newstalk, which he then conveyed to Mr O'Brien as an initial offer to Communicorp.

...

The effect of Mr Buckley's conflict of interest was that his role in the negotiation was one which focused upon the highest figure that INM would be prepared to offer for Newstalk, rather than the more appropriate focus being the lowest figure that Communicorp would accept. This illustrates the conflict at the heart of Mr Buckley's conduct which demonstrates that the Chairman had placed himself in a situation in which a reasonable objective observer would undoubtedly have apprehended a conflict of interest.”

249. Mr Preston submitted that:

“... the proposed acquisition of Newstalk by INM was one which, on any objective assessment, required careful scrutiny and consideration having regard inter alia to the large sum of money involved, the regulatory considerations at issue and the self-evident potential for conflict.”

and that:

“... Mr Buckley was required to operate at an increased level of care having regard to the undoubted wealth of his corporate experience. In addition, it is submitted that the extent of Mr Buckley’s duty was further heightened by the fact that he was not only a director, but Chairman of the board of INM.”

250. Against that background, Mr Preston contended that Mr Buckley failed to exercise due skill, care and diligence by:

- Asserting, but failing to explain, the strategic importance of acquiring Newstalk;
- Disregarding and seeking to over-ride Mr Preston’s concerns, given in his capacity as Chief Financial Officer of INM, at the financial implications of proposed acquisition of Newstalk, a loss-making business; and
- Criticising Mr Preston for alleged negativity and pursuing this criticism in an unreasoned, aggressive and fundamentally illogical manner.

251. Mr Preston concluded:

“... in the broader context of a Chairman who had placed himself in a hopelessly conflicted position - and who had ... previously stated that he would not let Mr Preston’s negativity get in the way of doing the deal - it is submitted that Mr Buckley clearly sought to exert improper pressure upon Mr Preston in relation to Newstalk. That pressure was exerted in a manner and in circumstances which clearly breached Mr Buckley’s fiduciary duties to the Company.”

(v) Communicorp

252. Communicorp submitted that:

- *‘The allegation advanced by Mr Pitt is to the effect that Mr Buckley, as Chairman of INM, applied pressure to Mr Pitt and Mr Preston to do a deal for the acquisition of Newstalk at a price greater than that which they believed to be the fair value for the proposed acquisition.*

...

- *There are clearly disputed matters of fact as between Mr Pitt and Mr Buckley and as between Mr Pitt and Mr Kennedy. It is also possible (as is apparent from the evidence of Mr Preston) that what appeared to be disputed matters of fact may turn out to be genuine misunderstandings between the relevant parties.*
- *[It was] not present at and did not participate in any of the disputed communications as between Mr Pitt on the one hand and Mr Buckley and Mr Kennedy on the other hand and there is no evidence to suggest that [it] sought to influence those discussions in any way.*
- *As between professional valuers of companies (Davy and IBI) there is room for genuine difference as to the appropriate valuation of a proposed acquisition or sale. A vendor is entitled to look for a full, good or great price; there is nonetheless an amount of evidence supportive of a greater price than that advocated by Mr Murphy, including the valuation of €27.4m (which has been disclosed to the Inspectors) placed on Newstalk by Bauer Media which acquired Communicorp (including Newstalk) in May 2021.¹*
- *Within any company there is scope for different views and genuine disagreement as between members of management and the board as to the merits of any particular transaction, including a proposed acquisition and therefore the price which the company ought to be willing to pay for such an acquisition. However, the evidence shows that all parties involved in the discussions regarding the potential transaction were aware at an early stage of: (a) the internal approvals required by INM including the M&A subcommittee and the board; (b) the requirement for shareholder approval (in which Mr O'Brien would not participate); and (c) the external regulatory approvals required from the BAI, CCPC and the Minister for Communications. [Communicorp was] acutely aware of the internal and (intense) external scrutiny that such a transaction would be subject to, and this was expressly discussed with INM. No transaction had any prospect of being approved without Davys and management backing any proposed price. In the circumstances, Mr Pitt was in a very strong*

¹ In 2021, Mr O'Brien sold Communicorp, including Newstalk, to Bauer Media Group. Of the price paid for Communicorp, Bauer attributed to Newstalk €27.4 million to Newstalk (on a cash free/debt-free basis).

position to raise any concerns or reservations he may have had about the proposed transaction, were it to have proceeded further within INM.

- *The relevant discussions, both within INM and as between the parties to the proposed transaction and their representatives, took place over a short period of weeks in the months of September and October 2016, with a limited number of people in INM and Communicorp involved in the discussions. The discussions did not even get to a stage of INM making a non-binding offer.*

- *Robert Pitt reached a wholly wrong conclusion about the proposed fees that were mooted in the APN transaction and he has made very serious allegations on foot of that conclusion. Mr Pitt stated that, in the aftermath of APN, he felt he had to be very vigilant in relation to matters going forward and he added that: “It meant that I would have to be very careful about how things would be done, yeah” and that he “remained wary, vigilant of the situation”. This misplaced "vigilance" has resulted in further serious allegations in respect of the proposed Newstalk transaction, including that it was a means of diverting funds from INM to INM's majority shareholder, Mr O'Brien. It is respectfully submitted that the incorrect conclusion he reached in respect of APN coloured his view of Newstalk and that he mistook Mr Buckley's enthusiasm to do a deal on Newstalk with enthusiasm to do a deal at an inappropriate price.'*

D. Our Conclusions

253. Under the Order, we are required to investigate and report on the proposed acquisition of Newstalk, including the role played by Mr Buckley.

254. As will be apparent from Section B, there is little dispute about the events that occurred in the course of INM's consideration of the acquisition of Newstalk from Communicorp.

- (i) The possibility of INM acquiring Newstalk was initiated by Communicorp.
- (ii) Mr Pitt recognised the potential synergies that could be achieved by combining the two companies, but was concerned that INM should not overpay for a company that had never made a profit and was ultimately owned by INM's major shareholder, Mr O'Brien.
- (iii) Both parties recognised that there were potential regulatory issues that could reduce the potential synergies achievable.
- (iv) Discussions between the parties took place between 1 September and 28 October 2016. Communicorp, which negotiated with INM on an exclusive basis between 1 September and 28 October 2016, was concerned to maintain impetus and pressed for an indicative offer to be made.
- (v) The discussions were not reported to either the M&A Committee or the INM Board. Within INM, only Mr Buckley, Mr Kennedy, Mr Pitt, Mr Preston and Mr McNulty were aware that discussions were taking place.
- (vi) Communicorp and INM retained independent advisers, IBI and Davy respectively, to advise on the value of Newstalk.
- (vii) There was a very substantial difference on the valuations – IBI's initial valuation was between €30 and €35m; Davy initially valued Newstalk at between €14 and €18m and then revised that valuation to between €11m and €15m. The difference was attributable to different views on:
 - (a) the assumptions made as to the potential synergies achievable;

- (b) which party should take the benefit of such synergies;
 - (c) the annual growth rate to be assumed; and
 - (d) the base year to be used for the valuation calculations.
- (viii) Mr Murphy thought that the IBI valuation was unrealistically high and that the gap between the valuations was too large to be bridged.
- (ix) Mr Buckley regarded the acquisition of Newstalk as a strategic opportunity and, in the course of several conversations in October 2016, he urged Mr Pitt and Mr Preston to reassess their approach to the potential synergies and to IBI's valuation methodology with a view to a bridging the gap between the parties' valuations.
- (x) In the course of those meetings, Mr Pitt and Mr Preston disagreed with Mr Buckley's approach and reported their concerns about the course that the negotiations were taking to Mr Kennedy.
- (xi) Mr Buckley was frustrated by what he regarded as a negative attitude on the part of Mr Preston and, to a lesser extent, Mr Pitt.
- (xii) Although IBI reduced its valuation to €26.8m, Davy concluded that its final indicative valuation range of €12.3m to €15.6m provided a fair and proper valuation range for Newstalk and, therefore, the gap between the parties remained too large to be bridged.
- (xiii) By the end of October 2016, the negotiations had reached an impasse and the discussions came to an end without an indicative offer having been made (although there does not appear to have an occasion when the parties agreed to terminate the discussions).

255. Having considered the evidence and submissions we have received, our conclusions are set out below under the following headings:

- (i) Would the proposed acquisition of Newstalk have met the acquisition criteria established by the INM Board?

- (ii) Should the proposed acquisition of Newstalk have been referred to the M&A Committee ?
- (iii) Did Mr Buckley put improper pressure on Mr Pitt and Mr Preston to increase INM's valuation of Newstalk?
- (iv) Did Mr Buckley put improper pressure on Mr Pitt and Mr Preston to increase INM's valuation above that which was supported by the independent advice available and above that which they thought was appropriate? In particular, did Mr Buckley state that he wanted INM to value Newstalk at the IBI valuation – €26.8 million?
- (v) In the course of the negotiations to acquire Newstalk, was Mr Buckley seeking to promote Mr O'Brien's interests?
- (vi) Was Mr Buckley's involvement in the negotiations to acquire Newstalk appropriate?
- (vii) The role of Communicorp.

Would the proposed acquisition of Newstalk have met the acquisition criteria established by the INM Board?

256. The sale of its shareholding in APN transformed INM's financial position.

257. The net proceeds from the sale enabled INM to repay the Group's indebtedness in full, thereby completing the Group's deleveraging strategy and releasing INM from the restrictions on its activities (in terms of acquisitions, dividends and distributions, share issuance, share buybacks, capital expenditure and financial covenants). As a consequence, INM had approximately €120m available for acquisitions.

258. In these changed circumstances, INM stated publicly that it intended to put in place a lower cost, revolving credit facility, providing it with enhanced flexibility in relation, inter alia, to the opportunities to invest in digital strategy, including in relation to acquisitions and investments.

259. In order to oversee the acquisition(s) it intended to make, INM established a committee of the board – the M&A Committee. Its terms of reference are set out in paragraphs 6 and 7 above.

260. The M&A Committee developed criteria that potential acquisitions should be capable of meeting and financial and commercial (set out in paragraph 11 above). Those criteria were approved by the INM Board. The financial and commercial measures to be applied to acquisition targets included:

- High growth and/or sectors where long-term growth is easy to see;
- Nearing break even or in low profitability healthy profit margin;
- Pay-back in less than 5 years.

261. In his evidence to us, Mr Buckley has consistently asserted that the acquisition of Newstalk was a strategic opportunity. For example, he told us that:

‘... this one was by far the most strategic, all right, because when we looked at it, when I looked at it at first, I thought we could combine the news, but then okay, we couldn’t but we could have used our own sales people, we could have used content and we could have made it, you know, it would have increased our revenue and our revenue was at that stage going south, was in decline, and this would have increased it. So, this would have given us time, and quite a number more years, okay, to look at other acquisitions, okay, and to be able to get into a DCC-type situation, right. So, from that point of view, it was strategic.’

262. However, he did not express this view to Mr Pitt or Mr Preston at any stage during the discussions in 2016, even though that would have been a natural view to emphasise when urging them to view the possible transaction more positively.

263. In our view, Mr Buckley’s belief in the merits of acquiring Newstalk was also influenced by his growing frustration at INM’s failure to make any strategic acquisitions and his concern that the failure to progress INM’s acquisition strategy would give rise to investor dissatisfaction at the INM’s failure to reduce its dependence on print-publishing and, therefore, put INM’s long-term future at risk.

264. By contrast, Mr Pitt saw the acquisition of Newstalk as opportunistic and only worth pursuing if the company could be acquired at a price that reflected its loss-making track record and uncertain potential.

'[I]t was opportunistic because ... radio was never seen as strategic. Strategic would have been digital, okay, some distribution assets. Radio was never on the radar as that.

...

opportunistic would be that you would be able to buy at a very good price in terms of the value you're putting on that and very quickly take a cost out of it or put the revenue up, okay, in a way that the payback would be less than one year.

...

So very, very clear that it was an opportunistic asset and Ryan Preston and myself would have discussed that as well -- and Cormac McNulty, we would have discussed it too. I don't think we ever put the word "strategic" around it.'

265. Mr Preston was not persuaded that INM should acquire Newstalk. He told us:

'It was not a strategic acquisition. It was even, like, at that time, I think we had cash of, shall we say, - in 2015, we had cash of €59.7 million in the bank, so circa €60m. If we spent €30 to 35 million of that on a radio station, that really left us with €30m and we have pension commitments - so you wouldn't have been able to do anything else. So we would have been betting the business on a radio station that was currently loss-making; that may, if everything works perfectly in a wonderful world, generate a million of profits, say a million and a half profit. You would have ruined the business.'

'I could not see how it would generate substantial game-changing revenues to be strategically important.'

266. When the directors of INM learned of the discussions to acquire Newstalk, there were differing views. Mr Marshall told us that he would have welcomed the acquisition of Newstalk as he had been advocating the acquisition of a radio station.

267. By contrast, Mr T. Buckley told us that the proposed acquisition of Newstalk could have made commercial sense and fitted within the overall strategy at the time – at the right price. He went on to say that:

'I have experience of valuing media assets. I had looked at the Radio industry in Ireland as part of my role in Clear Channel. We never invested due to ownership restrictions. I think I would have been an influential voice on the Board when it came to valuation. I would have taken a very cautious view on the value of this radio station. Newstalk was a "talk radio" station. Talk radio is difficult to make money from. It is far more expensive to get personalities compared to DJs on music stations. The Irish market is also a small market for talk radio with a very strong competitor in RTE Radio 1. This would have coloured my view on how I would have valued Newstalk and I would have needed a lot of persuasion on the asset as a basic proposition.'

268. In our view, whatever may have been the views of particular individuals, it is clear that the proposed acquisition of Newstalk did not meet the specific acquisition criteria established by the M&A Committee and approved by the INM Board.

Should the proposed acquisition of Newstalk have been [referred to/considered by] the M&A Committee?

269. From the views summarised above, it is clear that the proposed acquisition of Newstalk raised a range of issues on which opinions could reasonably differ:

- Did the proposed acquisition meet the criteria for strategic acquisitions that had been approved by the INM Board?
- Would the synergies in areas such as advertising, sales, and marketing, offset the fact that Newstalk had been loss-making since incorporation?
- Would the utilisation of a substantial proportion of INM's available funds, without gaining positive profit growth, make commercial sense?

270. In these circumstances, the proposed acquisition of Newstalk should have been reported to and considered by the M&A Committee at its meeting on 18 October 2016 (at the latest) and should not have been held back on the grounds that it was not sufficiently advanced.

- The M&A Committee’s objectives were to:
 - *“Provide oversight, guidance and support to the management ... in relation to acquisition activities.”*
 - *“Engage with management in relation to the appraisal of acquisition targets.”;*
- The M&A Committee had emphasised that *‘the initial acquisitions must be earnings enhancing’*;
- The M&A Committee had established, and the INM Board had approved a Strategy Document that established;
 - acquisition criteria, which included that:
 - ‘[b]usiness cases and their execution [should] lead to growth rates and operating margins within acquisition targets that are higher than in core business so as to exponentially improve overall group performance.’*
 - The financial and commercial measures to be applied to acquisition targets were expected to include:
 - *High growth and/or in sectors where long-term growth is easy to see;*
 - *Nearing break even or in low profitability. Healthy operating margin clearly achievable through accelerating growth;*
 - *Pay-back in less than 5 years;*
- The proposed acquisition of Newstalk did not meet the financial or commercial criteria adopted by the M&A Committee and approved by the INM Board;

- The M&A Committee had routinely reviewed a list of all the acquisitions under consideration by management and its consideration was not limited to proposed acquisitions that had reached an advanced stage; and
- There were divergent views on the merits of acquiring a radio station and the likely cost of doing so.

271. In the course of that consideration, the M&A Committee (or, if referred to it by the M&A Committee, the INM Board) would have had the opportunity to consider:

- Whether the opportunity to acquire Newstalk should be pursued;
- The implications arising from the fact that, if it did proceed, it would be involve a major acquisition from INM's largest shareholder; and
- Mr Buckley's role in the conduct of the negotiations.

Did Mr Buckley put improper pressure on Mr Pitt and Mr Preston to increase INM's valuation of Newstalk?

272. Mr Buckley told us that he wanted to reach the stage where INM had made an indicative offer (or equivalent) that was acceptable to Communicorp so that, INM would continue to have exclusivity whilst undertaking due diligence before entering into final price negotiations.

273. To achieve that objective, Mr Buckley acknowledged that he wanted the gap between the valuations of Newstalk put forward by IBI and the valuations emerging from Davy and the INM management to narrow.

274. As he was convinced by the merits of the proposal and he thought that Mr Pitt and Mr Preston were adopting a negative approach to the proposed transaction, Mr Buckley gave credit to the arguments advanced by IBI on behalf of Communicorp and pressed Mr Pitt and Mr Preston, working with Davy, to review the assumptions used by IBI with a view to narrowing the gap.

275. We are satisfied that, because Mr Buckley was frustrated by what he regarded as a negative attitude on the part of Mr Preston and, to a lesser extent, Mr Pitt, Mr Buckley intended to put pressure – but not improper pressure – on Mr Pitt and Mr Preston to

actively progress the negotiations, including increasing INM's valuation of Newstalk, in order to reach a basis on which negotiations with Communicorp could continue.

276. However, as a result, Mr Pitt and Mr Preston thought that Mr Buckley wanted to increase INM's valuation above that which was supported by the independent advice available and above that which they considered appropriate to acquire a company that was, in their view, of limited strategic merit.

Did Mr Buckley put improper pressure on Mr Pitt and Mr Preston to increase INM's valuation above that which was supported by the independent advice available and above that which they thought was appropriate? In particular, did Mr Buckley state that he wanted INM to value Newstalk at the IBI valuation – €26.8 million?

277. In their disclosures, both Mr Pitt and Mr Preston alleged that Mr Buckley put pressure on them to increase INM's valuation – either to the figure put forward by IBI or to a figure significantly closer to the IBI valuation than they had contemplated.

278. Mr Pitt and Mr Preston based their allegations on conversations with Mr Buckley that occurred on three occasions – on 20 October, 26 October and 28 October 2016.

279. Those conversations have been the subject of extensive evidence and cross-examination. That evidence and the parties' submissions as to the conclusions we should reach are set out above. Our conclusions on the most significant of the matters discussed at those meetings are set out below.

20 October 2016 (Mr Buckley and Mr Pitt)

280. At the meeting on 20 October 2016 attended by Mr Buckley and Mr Pitt:

- Mr Buckley was frustrated by what he perceived to be Mr Preston's negative approach to the transaction.
- Mr Buckley said that he wanted to do the deal – and that he wanted to do the deal 'regardless'. But he did not say, at that time, what he wanted to do the deal regardless of.

Mr Buckley intended Mr Pitt to understand that he wanted to do the deal regardless of Mr Preston's negativity. However, Mr Pitt understood him

to be saying that he intended to do the deal regardless of the price at which Newstalk was valued by INM's management.

- Mr Buckley and Mr Pitt discussed INM Management's valuation of Newstalk (being up to €14 million) and Mr Buckley said that he regarded an offer of €14 million as an insult to Mr O'Brien.
- Mr Buckley did say that Mr O'Brien had bailed out INM in 2014 – but did not say that Mr O'Brien therefore deserved a reward.

281. It follows that Mr Buckley did not say explicitly, nor did he intend Mr Pitt to understand, that he wanted to acquire Newstalk at the valuation proposed by IBI.

26 October 2016 (Mr Buckley, Mr Pitt and Mr Preston)

282. At the meeting on 26 October 2016 attended by Mr Buckley, Mr Pitt and Mr Preston:

- Mr Buckley said:
 - *"I'm very disappointed in both of you"*
 - *"Do you not get it lads"*
 - That he wanted to do the deal; and
 - That Davy could be influenced by management's views.
- In making these comments, Mr Buckley was referring to, but did not explain that:
 - His disappointment related to Mr Pitt and Mr Preston's negativity, as he perceived it;
 - He was referring to Mr Pitt and Mr Preston's failure to see the strategic significance to INM; and
 - In saying that Davy could be influenced by management's views, he was referring to the role of management in any valuation process

involving the future performance and, therefore, value of a business – where management’s views would be relevant to the assumptions used in the valuation model.

- Mr Pitt said that he would be willing to proceed on the basis of a valuation of €17 million. As Mr Buckley had already communicated a valuation of €17.5 million to Mr O’Brien (as Mr Pitt was aware), Mr Buckley said, understandably, that he wasn’t willing to go back to Mr O’Brien on price.

283. In relation to the matters discussed at this meeting, it is important to note that Mr Buckley has accepted that he made, or does not deny making, the statements attributed to him at the meeting on 26 October 2016 (other than his willingness to buy Newstalk at the valuation by IBI namely €26.8m).

284. However, as Mr Buckley did not explain his comments, Mr Pitt and Mr Preston understood Mr Buckley’s position to be that he was not willing to dispute the latest IBI valuation – €26.8 million.

285. For the avoidance of doubt, we should make it clear that, in our view:

- Although Mr Buckley made it clear that he expected the INM valuation to move towards the IBI valuation, he did not say that he wanted INM to value Newstalk at the IBI valuation – €26.8 million; and
- In referring to management’s influence on the valuation by Davy, Mr Buckley was doing no more than acknowledging that the assumptions that management were willing to support would be relevant factors in the valuation made by Davy.

28 October 2016

286. In the course of the telephone conversation between Mr Buckley and Mr Pitt on 28 October 2016, following a brief discussion about the approach taken by Davy in developing its latest valuation:

- Mr Buckley asked Mr Pitt for the highest valuation that he would support.
- Mr Pitt said that he would be willing to support a valuation of €18 million.

- Mr Buckley did not ask Mr Pitt to increase that figure.
- Mr Buckley made clear his disappointment at the figure of €18 million.

Mr Buckley's disappointment reflected his recognition that €18 million would not be sufficient to meet Mr O'Brien's expectations – although he did not say that to Mr Pitt.

Overall conclusion

287. In those circumstances, and in light of the evidence we have heard:

- A significant contributory factor in the misunderstandings that occurred was Mr Buckley's failure to take Mr Pitt and Mr Preston into his confidence and explain:
 - Why he thought the acquisition of Newstalk met the acquisition criteria established by the INM Board.
 - Why he was not adopting his usual approach to the acquisition of a company or business – namely focussing on acquiring it at the lowest possible price.
 - Why he urged management to encourage Davy to have regard to the assumptions used by IBI.
 - The negotiation strategy that he thought should be adopted – namely to agree a price that would enable INM to access further information and undertake due diligence.
- As a result, Mr Pitt and Mr Preston interpreted comments made by Mr Buckley in a way that Mr Buckley had not intended – the three most significant examples being that:
 - He wanted to do the deal '*regardless*'.
 - The message that Mr Buckley intended to give was that he wanted to do the deal regardless of management's negativity.

- However, Mr Pitt and Mr Preston understood Mr Buckley to be wanting to do the deal regardless of the price required.
- He was not going back to Mr O'Brien on price.
 - Having misunderstood Mr Pitt's reference to a lower valuation he had put on Newstalk at the outset of the negotiations, Mr Buckley intended that to mean that he was not going to reduce the valuation developed by INM that he had already reported to Mr O'Brien.
 - However, Mr Pitt and Mr Preston understood Mr Buckley to be saying that he was not willing to further debate the price to be paid to acquire Newstalk following receipt of the second IBI valuation.
- Davy could be influenced by management.
 - By saying that Davy could be influenced by management, Mr Buckley was seeking to encourage management to promote more optimistic assumptions for inclusion in the Davy valuation.
 - However, Mr Pitt and Mr Preston understood Mr Buckley to be saying that they should tell Davy the valuation they wanted and that Davy would then be able to adjust the assumptions to achieve that result.

288. As a consequence, Mr Pitt and Mr Preston were concerned that they were being pressured by Mr Buckley to increase INM's valuation of Newstalk in order to support a figure significantly higher than they or Davy considered appropriate to acquire a company that was, in their view, of limited strategic merit. As a result, their concerns at the way the proposed acquisition was being handled increased.

289. From his various conversations with Mr Pitt and Mr Preston, Mr Kennedy was aware that they were concerned at the pressure being applied by Mr Buckley. From those discussions, Mr Kennedy understood that Mr Buckley's objective was to encourage them to adopt a more positive approach to the proposed acquisition, to pursue the

discussions with Communicorp more speedily and to be more open-minded about the price that might be paid.

290. Mr Kennedy therefore offered to speak to Mr Buckley about Mr Pitt and Mr Preston's concerns at the approach he was taking in relation to the negotiations to acquire Newstalk and the pressure they felt under. When they declined those offers, Mr Kennedy concluded that it would be inappropriate for him to speak to Mr Buckley without their permission.
291. In our view, this was a missed opportunity as a discussion under the auspices of Mr Kennedy would have provided an opportunity to understand the reasons why Mr Buckley was keen to acquire Newstalk and his approach that he thought should be taken in the negotiations and clarify the statements he had made which concerned them. Mr Preston would also have been able to address Mr Buckley's criticism of the speed with which he was progressing the negotiations – by pointing out the complex capital restructuring and the negotiations related to INM's defined pension schemes that he was leading at the same time. As these issues were complex and challenging, they also contributed to the pressure that Mr Preston felt under.
292. Mr Pitt and Mr Preston also bear some responsibility for the misunderstandings that arose because they relied on their interpretation of Mr Buckley's comments – and failed to take steps to ensure that that they had done so correctly. In our view, they should have raised their concerns at the approach that Mr Buckley was taking and at what they perceived to be the inappropriate pressure he was imposing on them with Mr Buckley directly or should have authorised Mr Kennedy to do so.

In the course of the negotiations to acquire Newstalk, was Mr Buckley seeking to promote Mr O'Brien's interests?

293. We next turn to consider whether Mr Buckley put pressure on Mr Pitt and Mr Preston to increase INM's valuation of Newstalk because he wanted to promote Mr O'Brien's interests at the expense of the interests of INM's shareholders generally.

294. We accept that Mr Buckley encouraged Mr Pitt and Mr Preston to put a valuation on Newstalk that exceeded the valuations prepared by Davy because:

- He believed the acquisition of Newstalk would be regarded as a positive step in the move away from print-publishing;
- He was concerned that the failure to progress INM's acquisition strategy would give rise to investor dissatisfaction at the INM's failure to diversify away from dependence on print-publishing and put INM's long-term future at risk; and
- He thought that such an increased valuation was required to ensure that Communicorp continued to negotiate on an exclusive basis with INM.

295. We also accept that Mr Buckley was well aware that:

- The acquisition of Newstalk would be a related party transaction to which particular listing requirements applied, including the provision of a fairness opinion;
- Any transaction involving Mr O'Brien would be scrutinised by the INM Board before proceeding; and
- Any such related party transaction was likely to be rigorously considered by INM's shareholders to ensure that Mr O'Brien was not receiving preferential treatment.

296. It follows that Mr Buckley's approach to the negotiations to acquire Newstalk was not motivated by a desire to promote Mr O'Brien's interests at the expense of the interests of INM's shareholders generally.

Was Mr Buckley's involvement in the negotiations to acquire Newstalk appropriate?

297. A feature of INM's handling of the opportunity to acquire Newstalk was the role played by Mr Buckley, in circumstances where it would have been a related party transaction.

298. The Listing Rules in relation to related party transactions are designed to prevent a related party from taking advantage of its position in the company and to prevent any perception that it might have done so. To achieve this, a related party is precluded from voting on any resolution relevant to the transaction. Similarly, those with common business interests with the related party would be regarded as non-independent and, as associates of the related party, should not vote on any such resolution.
299. The effect of the Listing Rule requirements was that Mr O'Brien would have been precluded from voting his shares in INM on any resolution relating to the proposed acquisition of Newstalk and Mr Buckley and Mr Connolly would have been precluded from voting in any Board resolution relating to that acquisition – for example to approve the acquisition of Newstalk and any consequential resolution required to give effect to such an acquisition.
300. The Listing Rules do not address the role that those with common business interests with the related party may play in any negotiations with the related party.
301. In the event, Mr Buckley repeatedly promoted the merits of the proposed acquisition of Newstalk in meetings with Mr Pitt and Mr Preston and they became concerned that his approach was influenced by his relationship with Mr O'Brien. This arose in circumstances where he had:
- Failed to explain the strategic importance of the opportunity to acquire Newstalk and the negotiating strategy that he thought should be adopted in order to be successful;
 - Failed to engage with Mr Pitt and Mr Preston in relation to their concerns at the assumptions used by IBI. In the course of doing so, Mr Buckley expressed little interest in the assumptions on which the valuation advice provided by Davy, INM's independent corporate finance advisers, was based and urged Mr Pitt and Mr Preston to pay more regard to the approach taken, and the assumptions used by IBI, the financial advisers to Communicorp; and
 - Positioned himself as negotiator and communicator of INM's position by interfacing with Mr Shorthouse, Ms Gaffney, and Mr O'Brien, and communicating INM's position to Communicorp.

302. This situation was further exacerbated by the fact that Mr Buckley did not ensure that the M&A Committee or the INM Board was aware that INM was in discussions to acquire Newstalk from Communicorp, a company owned and controlled by INM's major shareholder, Mr O'Brien.

303. Mr Harrison thought that the proposed acquisition should have been reported to the M&A Committee at the earliest opportunity. He told us that:

'There was no doubt in my mind that there was a potential conflict of interest for Mr Buckley and Mr Connolly'

'There was no requirement for an acquisition to be ready for the M&A Committee. If it was a potential deal, it was at the M&A Committee. End of point. There was no requirement that management would have to be able to stand over it before they come into the M&A Committee. The whole idea of M&A was to stop the Company wasting money and time on bad acquisitions. And, you know, if there's a bad deal in the offing and you can say straightaway that doesn't make sense or that doesn't fit with the strategy or that that's going to cost a lot of money, you could just basically argue it out at inception...'

304. Mr Buckley justified his decision not to advise the M&A Committee or the INM Board on the need for confidentiality.

305. Whilst the maintenance of confidentiality was clearly important, we are not aware that there were any grounds on which to be concerned that the members of the M&A Committee or the INM Board would disclose the existence of those negotiations.

306. In our view, in circumstances where he was the non-executive Chairman of INM and a nominee of Mr O'Brien, Mr Buckley should:

- Have ensured that the opportunity to acquire Newstalk was passed to INM's management to progress;
- Have left management to determine whether to proceed with the negotiations with Communicorp and, if so, on what terms.

- Have informed the M&A Committee that the possibility of acquiring Newstalk from INM's major shareholder was actively under consideration.
- Not have involved himself in the negotiations to the extent that he did; and
- Not have actively engaged with those representing Communicorp after the initial indication that Communicorp might be willing to sell Newstalk.

(v) The Role of Communicorp

307. There are no grounds on which to criticise the approach adopted by Communicorp, its directors and those advising it in relation to the negotiations for the sale of Newstalk to INM.

CHAPTER 9 – INM’S HANDLING OF THE PROTECTED DISCLOSURES MADE BY MR PITT AND MR PRESTON

A. The Order

1. Under the terms of the Order, we have been appointed to:

‘investigate and report on the affairs of the company in particular:

- (e) *The Board’s response to the disclosures and/or attempted disclosures made*
- *by Robert Pitt, then Chief Executive of the Company (the “Chief Executive”) in November 2016, concerning the Proposed Newstalk Acquisition and the proposed payment of the Success Fee (the “Pitt Disclosure”); and*
 - *by Ryan Preston, then Chief Financial Officer of the Company, in December 2016 concerning the Proposed Newstalk Acquisition (the “Preston Disclosure”).*

and

- (i) *Whether, arising out of the foregoing or any other matters identified by the Inspectors, there have been any breaches of:*
- (ii) *The Protected Disclosures Act, 2014.’*

B. The Facts and Evidence relating to the INM'S handling of the protected disclosures made by Mr Pitt and Mr Preston

28 October to 11 November 2016

2. On 1 November 2016, while he was away on holiday, Mr Pitt contacted Mr Byers to ask whether he could obtain legal advice from McCann FitzGerald in relation to his position as a director of INM. Mr Byers advised him that he was entitled to obtain legal advice on his personal position and that the costs of doing so should be met by INM. However, McCann FitzGerald could not provide that advice as the firm acted for INM.
3. Having spoken to a former colleague, (ex-PWC and a barrister) who gave him some general advice, Mr Pitt concluded that he should obtain advice from an Irish law firm and he approached Donal Spring at Daniel Spring & Co. (who he had first contacted on 28 October 2016, following his telephone call with Mr Buckley in the course of which he had said that the highest valuation of Newstalk that management could support was €18 million.)
4. On his return, Mr Pitt spoke to Mr Preston and reported that he had received advice from a former PwC colleague that breaches of Company law might have occurred in relation to the affairs of INM.
5. Mr Pitt called Mr Kennedy and asked if they could meet urgently. Mr Kennedy agreed to reschedule his commitments so that he could meet Mr Pitt as requested. The date when Mr Pitt first called Mr Kennedy is unclear - evidence having been given that the call took place on either 8 or 10 November 2016.
6. On 10 November 2016 (in the evening), Mr Pitt telephoned Mr Preston, told him that he intended to make a protected disclosure in relation to his belief that breaches of the Act had occurred and asked him whether he wanted to join him in making that disclosure. Mr Preston told us that he became concerned that Mr Pitt's disclosures in relation to Mr Buckley might impact on his own position and increase the risks to his own continued employment.
7. Ms Slowey called Mr Pitt to establish whether INM was going to put forward a revised proposal in relation to proposed acquisition of Newstalk. Mr Pitt told us that this

conversation took place shortly before he met with Mr Kennedy on 11 November 2016.

8. Early on 11 November 2016, Mr Pitt met Mr Preston and told him that he was meeting Mr Kennedy at 10.00. In the course of that meeting, Mr Pitt again raised the possibility of Mr Preston making a protected disclosure. He recommended that Mr Preston consult Daniel Spring & Co and assured him that his legal costs would be covered either by INM or by Mr Pitt, himself.
9. The interactions between Mr Pitt and Mr Preston regarding the possibility that Mr Preston might make a protected disclosure are considered in Chapter 11, paragraphs 57 to 73.

11 November 2016 - Mr Pitt's first disclosure to Mr Kennedy

8. On 11 November 2016 (10.00), Mr Pitt met Mr Kennedy at the Conrad Hotel and made a disclosure to Mr Kennedy in his capacity as the Senior Independent Director.
9. Mr Pitt decided to make his disclosure to Mr Kennedy, the Senior Independent Director, because he thought it would help that Mr Kennedy had some knowledge of the APN and Newstalk matters.
10. In the course of his disclosure, which was oral, not written, Mr Pitt raised three concerns, namely that:
 - On three separate occasions Mr Buckley pressurised him, in his view improperly, to increase the valuation of Newstalk above that considered appropriate by management and supported by Davy;
 - In the course of the APN transaction Mr Buckley had suggested the payment of funds for services that had not been provided to INM; and
 - There had been instances of editorial interference.

Mr Pitt asked Mr Kennedy to formally inform the rest of the Board that he had made a disclosure in relation to Mr Buckley's conduct. He confirmed that he would cooperate with any process to address the situation.

11. Mr Kennedy told us that he listened to Mr Pitt, but did not probe any of the matters raised by him. He told Mr Pitt that he would need to take legal advice on how to handle this development and Mr Pitt's request that he advise the INM board that Mr Pitt had made a protected disclosure together with details of the matters that he had raised.
12. Mr Pitt also asked Mr Kennedy to speak to Mr Buckley to cancel the meeting scheduled for 13.00 that day (see Chapter 8, paragraph 109). Mr Kennedy said that, when cancelling Mr Pitt's meeting with Mr Buckley, he would have to brief Mr Buckley and that, in doing so, he would have to explain the gravamen of Mr Pitt's disclosure. Mr Pitt agreed to that happening.

Mr Kennedy's meeting with Mr Buckley

13. Shortly after the meeting, Mr Kennedy telephoned Mr Buckley and told him that a complaint had been made by Mr Pitt. Mr Kennedy and Mr Buckley met that afternoon, in place of Mr Buckley's meeting with Mr Pitt.
14. Mr Buckley told us that:

'When Mr Kennedy informed me of the complaint that Mr Pitt had made against me, I was very shocked. I had a terrible feeling of being let down: I had always supported Mr Pitt since he joined INM in 2014 because, in spite of the fact that at times I found Mr Pitt challenging to work with, he was the CEO of the business. I was very shocked when I heard that Mr Pitt had made very serious allegations against me and, in particular, at the fact that Mr Pitt had gone off and made a complaint to Mr Kennedy without ever having raised these matters with me. In those circumstances, I think it is understandable that I would contact Mr O'Brien – not just as the major shareholder or as the ultimate counterparty in the Newstalk transaction, but as a very long-standing and trusted associate, friend and advisor over many years'

15. In the course of that meeting, and given the risks to INM from a breakdown in relations between the Chairman and the Chief Executive, they concluded that someone should be approached to act as a mediator to try and resolve the differences between Mr Buckley and Mr Pitt. Mr Buckley suggested approaching Mr Ed Molloy, an experienced HR adviser.

16. Mr Kennedy told us:

'I decided that, with Mr Buckley, I needed to try and see could we move this thing forward relatively quickly because of the seriousness of what was at stake here and the potential implications if they didn't get our hands around it as quickly as we could. So I put it to him that there was an emerging serious difference between himself and the CEO and one way of dealing with that would be to get somebody to mediate.'

'So here we have a public company and we have a chairman and chief executive who now are getting into a very, very difficult relationship situation. It happens to be a media company as well. The risk of it spilling out into the public domain is very, very high. Reputational damage to two individuals, potentially very high. Reputational damage to the company, very high. Damage to you over the value follows quickly from that. So it doesn't come much more serious, as far as I was concerned.'

17. Mr Kennedy told us that he emphasised the importance of keeping the issue confidential. Mr Buckley told us that Mr Kennedy did not impress on him the importance of confidentiality.
18. Mr Buckley told us that at the end of the meeting Mr Kennedy asked him whether the proposed acquisition of Newstalk was proceeding. When Mr Buckley told him that it was not proceeding, Mr Kennedy asked whether Mr Pitt was aware that that was the position. Mr Buckley explained that he had not had an opportunity to tell Mr Pitt and Mr Kennedy suggested that Mr Buckley send Mr Pitt an email telling him the position. Mr Kennedy didn't recollect this conversation and told us that he only learned that the proposed acquisition was not proceeding on 17 November 2016.

Mr Buckley's actions after meeting with Mr Kennedy

19. Following his meeting with Mr Kennedy on 11 November 2016, Mr Buckley telephoned:
- Mr O'Brien and told him that a serious issue had arisen between Mr Pitt and himself.

- Mr Shorthouse and left a voicemail advising him of the complaint. Mr Shorthouse left a voicemail in reply. The following day, Mr Buckley sent the following text to Mr Shorthouse:

'Hi Dominic, thanks for your voicemail. I'm meeting the mediator at 12.00 noon on Monday and will give you a buzz after that. He's playing a very nasty game. Hope you're having a good weekend. Leslie'

- Mr Michael Walsh, a close associate of Mr Desmond, because Mr O'Brien thought Mr Desmond might know Mr Pitt's family.

20. Having spoken to Mr Walsh, Mr Buckley exchanged the following text messages with Mr O'Brien:

'Hi Denis, I've just spoken with Michael Walsh and he says that there's some confusion that Dermot or Michael don't know the Pitt family so I'll go with plan A. Leslie'

'Go with Molloy? Regards Denis'

'Thanks Denis'

21. On 13 November 2016, Mr Buckley met Mr Heneghan and told him that a dispute had developed between Mr Pitt and himself in order that Mr Heneghan was briefed in case he received a press enquiry. Later that day, Mr Heneghan received a call from the Irish Times, having learned, independently, of a dispute between Mr Buckley and Mr Pitt.
22. On 14 November, 2016, Mr Buckley met with Mr Molloy and, although he was aware that Mr Pitt objected to the involvement of *'an independent HR professional'*, briefed him on the dispute. Mr Buckley hoped that Mr Molloy might have some suggestions as to how the situation that had arisen might be resolved. This initiative did not proceed.

The steps taken by Mr Kennedy following his meeting with Mr Buckley

23. Later on 11 November 2016 (19.59), Mr Kennedy emailed Mr Pitt to say that he had recommended to Mr Buckley:

'that an experienced, independent HR professional would be helpful to broker a way forward. I am hopeful that such a person will be engaged early next week.'

24. Mr Pitt replied (22.25):

'Thank you for your email of 19.58, however, I am a bit puzzled by the contents to be honest. I made a disclosure to you as the senior independent Director under the Protected Disclosures Act 2014 relating to matters of the gravest nature which impact upon the company, its shareholders, its employees and the public interest. With respect, while I described the impact on me personally of what has been happening, I did convey that this is not a HR issue and I do not see how it could be regarded as such.'

You informed me you were going to take independent legal advice so I would like to ask if you have done so?

I also requested that you inform the other members of the Board. I presumed you were doing so given the seriousness of the matters I raised with you.'

25. On 12 November 2016 (11.07), Mr Kennedy replied to Mr Pitt saying:

'It was clear from our discussion yesterday morning that a serious situation had developed and I can assure you I am treating the matter very seriously. During our discussion yesterday, you [said] that your relationship with the Chairman had broken down and this adds to the complexity of the situation.'

My immediate response to your position is to establish an independent externally resourced process to deal with the matter. I am recommending that the process be led by an experienced, independent professional who will meet with you and establish the facts from your point of view. The process will seek to get more detailed and specific information from you. In the interests of

fairness and due process this person should also meet with the Chairman and hear his version of the matters being referenced by you.

The reference in my [email] to you that the person was a senior HR professional was to indicate his experience and seniority not to describe his role.

You will recall yesterday for various reasons I stated that I would not take on an intermediary role.

I understand that this is a very stressful situation for you and you may feel that various actions should be taken immediately. I suggest we proceed with caution to maintain confidentiality and to avoid any rush to judgement before due process. Any internal or external leaks about this matter could be hugely damaging.

If you find this proposal acceptable, and I hope you do, please confirm on Monday morning. If you do not find it acceptable I will consider the situation in consultation with a legal adviser.

To ensure fairness and transparency by me I am sending a copy of this email and your email of last evening to the Chairman'.

26. Mr Kennedy forwarded copies of his email exchanges with Mr Pitt to Mr Buckley. Not having taken legal advice, and therefore, not appreciating the confidentiality obligation that attaches to a protected disclosure, Mr Buckley forwarded the email exchange to Mr Shorthouse, which he thought was appropriate because he was the person who had introduced the proposed acquisition of Newstalk to INM.
27. On 13 November 2016 (20.40), Mr Pitt sent an email to Mr Kennedy accepting that Mr Kennedy was taking the matter seriously and putting on record that he wanted other people present when he attended meetings with Mr Buckley. He said:

'I do accept and believe that you are taking the situation extremely seriously. Lest there be any confusion my relationship with the Chairman has suffered because of the matters I relayed to you and until the matter is resolved, I think better that my future meetings with the Chairman be structured so that others such as yourself are present. I must stress that this is not a HR issue, it is far wider than that.

I accept completely that all matters I raised are subject to thorough investigation and that others will be required to also state their memory of what has taken place.

I made the disclosure to you as the Senior Independent Director of the Company. I did not ask nor expect you to act as an intermediary. In fact I asked you to inform the rest of the Board. I believe that is what you should do as it is not appropriate for you, I or the Chairman to decide on any actions or procedure in regard to these matters in view of their very serious nature until the Board has considered them.'

28. On 14 November 2016, Mr Kennedy met with McCann FitzGerald in order to get advice as to how the situation should be handled. Later that week, Mr Kennedy sent an email to Mr Pitt in which he said that he had met with McCann FitzGerald every day that week - which he said was an indication of how seriously he was taking the issue and the complexity of the situation.
29. INM has claimed legal privilege in relation to all the legal advice given by McCann FitzGerald and the Counsel retained by them and any legal advice in documents provided to us that set out or referred to that advice have been redacted.
30. On 15 November 2016, Mr Kennedy sent an email to Mr Pitt asking him to meet him together with Mr Barton. In that email, Mr Kennedy said that:

'So far as the information which is troubling you may involve suspicion or allegation or wrongdoing on the part of a person connected with the Company, the Company takes the matter extremely seriously and it will be followed up promptly and, where necessary, investigated in accordance with a clearly defined process.'

31. Mr Kennedy advised Mr Pitt that the purpose of the meeting would be:

'to get precise details and further clarity on the matters you want to disclose and to give you an opportunity to provide me with any further information or documents concerning those matters.

....

I understand that the process to follow up on information provided under the protected disclosures legislation should be conducted independently, and so far

as possible, confidentially. Therefore, I consider on advice that the matter should not be brought to the board at least until the initial phase of the process has been completed.'

16 November 2016 - Mr Pitt's meeting with Mr Kennedy and Mr Barton

32. On 16 November 2016, Mr Pitt met Mr Kennedy and Mr Barton at the offices of McCann FitzGerald. Mr Pitt was accompanied by Mr Preston as note-taker.
33. The meeting lasted about two and a half hours and involved considerably more detail than Mr Pitt had given to Mr Kennedy on 11 November 2016. After the meeting,
 - Mr Barton made a detailed attendance note based on the manuscript notes that he made in the course of the meeting.
 - Mr Pitt set out his recollection of the meeting in an email to himself.
 - Mr Preston set out the main points in an email to Mr Pitt based on manuscript notes made in the course of the meeting.

Mr Preston noted, and Mr Kennedy accepted, that Mr Pitt referred to his notes and was specific about meeting dates, times and attendees as evidenced by the detail in Mr Barton's manuscript and typed attendance notes. Neither Mr Kennedy nor Mr Barton requested copies of Mr Pitt's notes.

34. At the start of the meeting, McCann FitzGerald made it clear that the purpose of the meeting was to ensure that the basis on which Mr Pitt was making a protected disclosure was clearly understood - and was not the investigation itself.
35. Further, at the end of the meeting, Mr Kennedy said that they needed to consider whether the information given was sufficient for Mr Pitt's disclosure to be a protected disclosure under the 2014 Act.
36. After the meeting ended, Mr Preston asked to speak to Mr Kennedy and Mr Barton. He told us that he confirmed that Mr Pitt was telling the truth and asked whether he should be making a protected disclosure. They told him they were not able to advise him.

37. That evening, Mr Buckley exchanged the following texts with Mr O'Brien:

'Jerome not responding to text or VM so presume meeting still in progress. Leslie'

'Got your message. Thanks. Talk in the a.m.'

17 November 2016

38. On 17 November 2016, Mr Kennedy advised Mr Buckley that Mr Pitt had provided more information about the matters he had raised at his meeting with Mr Kennedy on 11 November 2016. Mr Buckley called Mr O'Brien and told him that Mr Pitt had made a disclosure.
39. On the same day, at the suggestion of Mr Kennedy, and having taken advice from McCann FitzGerald, Mr Buckley sent an email to Mr Pitt, and copied to Mr Preston, in which he said that:

'having considered the potential acquisition of Newstalk, taking into account the gap between the IBI and DVY valuations, there is no point in progressing the discussions any further.'

Mr Buckley also sent an email to Mr Byers in which he said that:

'... it was not proposed to proceed any further with the transaction that was under consideration.'

Mr Barton then sent an email to Mr Pitt advising him that Mr Buckley had confirmed that the proposed acquisition was not proceeding.

40. On 17 November 2016, Daniel Spring & Co, on behalf of Mr Pitt, wrote to Mr Kennedy criticising his handling of Mr Pitt's protected disclosure. In particular, they criticised Mr Kennedy for questioning whether Mr Pitt's disclosure was a protected disclosure under the PDA and for not having reported Mr Pitt's disclosure to the Board of INM.

41. Mr Kennedy told us that:

'There was no doubt in my mind that this was a protected disclosure situation. There's legal argument as to what fully meets the requirements of the legislation in relation to protected disclosure. That's the only kind of two streams there were. But in terms of was I dealing with a protected disclosure situation, absolutely, and no doubt about that. And in going to the Board and preparing for that, that's what we were -- so we were having to prepare on that basis.'

42. Mr Kennedy also rejected any suggestion that he should have informed the Board of the situation as soon as possible after meeting Mr Pitt on 11 November 2016:

'I wasn't going to go to the Board half prepared or with a kind of a mumbo jumbo kind of a "Well, we've got this big problem chaps - what will we do about it?". So I just felt that the appropriate thing to do in that situation was to get good advice, be prepared for that Board meeting and then let the Board members decide whether they wanted to accept that as a way forward or whatever they wanted -- but at least give them a proper understanding of what was happening.'

18 November 2016

43. In his email to Mr Pitt dated 17 November 2016, Mr Buckley had asked Mr Pitt to confirm that their one-to-one meeting on 18 November would take place. Mr Pitt replied the following day saying that he would not be attending. Daniel Spring & Co also wrote on behalf of Mr Pitt saying that Mr Pitt had previously asked Mr Kennedy to inform Mr Buckley that Mr Pitt *'did not feel comfortable meeting with [him] in the current circumstances'*.

44. On 18 November 2016, Mr Kennedy sent two emails to Mr Pitt:

- In the first (10.50) Mr Kennedy said that he was considering whether Mr Pitt's detailed disclosure met the requirements of a "protected disclosure". He also asked Mr Pitt to attend a meeting at McCann FitzGerald's offices:

'to hear [his] proposals for presenting workable solutions to the board at next weeks meeting'.

- The second (11.15) set out his views on the position that had been reached:

'As regards bringing your disclosure before the Board, I have given careful consideration to your request and taken advice on the matter. The considered view is that it would not be consistent with the intent of the Protected Disclosures Act that disclosures be confidential and also having regard to the rights and interests of all those involved in the matters raised, particularly when a person centrally involved in the events raised has not had an opportunity to comment or give their version of events.

I have not heard from you in relation to Sean Barton's mail to you of yesterday evening arising from the Chairman's mail to you confirming that it was not now intended to proceed further with the discussions around the possible transaction. I am conscious that the interests of the company as a whole do require that there be an effective working relationship between the Chairman and the Chief Executive Officer and, quite aside from how this particular matter is dealt with, I have to do what I can to attempt to ensure that that relationship does function effectively.

With the above in mind, I will be happy to meet you again as soon as possible and invite you to meet at McCanns offices at 16.00pm this afternoon.'

Mr Kennedy forwarded copies of both emails to Mr Buckley.

45. Prior to the proposed one-to-one meeting (12.00), Mr Buckley encountered Mr Pitt in the office and, having gone into Mr Pitt's office, told Mr Pitt that he was not prepared to proceed on a basis where they only met if someone else was present and asserted that if Mr Pitt did not attend one-to-one meetings in the usual way, the business could not be run properly and he would be interfering with the management of INM. Mr Pitt reported that conversation in an email to Mr Spring.
46. Mr Pitt agreed to meet Mr Kennedy and that meeting (16.00) took place at McCann FitzGerald's offices. It was attended by Mr Pitt, Mr Spring, Mr Kennedy and Mr Barton and the practical issues facing INM and the individuals concerned were

discussed. In particular, Mr Pitt suggested that he should be accompanied when meeting with the Chairman. However, no resolution was reached.

47. Before attending the meeting at 16.00, Mr Pitt discussed the situation with Mr Spring and then decided to make a protected disclosure to the ODCE. That disclosure, was made at 13.25 on 18 November 2016. INM only became aware that this disclosure had been made on 24 November 2016.
48. Mr Pitt told us that:

'I had interpreted these e-mails, including the two from Jerome that day, the interaction with Mr Buckley, okay, that the protected disclosure I had made was not going to be recognised as a protected disclosure; that Mr Kennedy was not going to bring it before the Board, okay, and that he was intending to still treat this or try to treat this as a HR matter, okay, and I was very seriously concerned at the meeting at 4:00p.m. that day I would be dismissed and the company would take the risk of me taking action against them on that and clouding the waters.'

49. On 19 November 2016, Daniel Spring & Co called McCann FitzGerald and asserted that Mr Kennedy was conflicted because of his involvement in aspects of the matters that were the subject of Mr Pitt's disclosure.

21 November 2016 - INM Board meeting to establish Sub-Committee constituted to consider Mr Pitt's disclosure

50. The directors of INM met on 21 November 2016 (18.00) to approve the establishment of a committee of the Board to consider Mr Pitt's disclosure to Mr Kennedy and, with legal advice, make recommendations to the Board.
51. The meeting was chaired by Mr Kennedy. In the absence of Mr Buckley and Mr Pitt, Mr Byers explained that an issue had been raised by Mr Pitt that concerned Mr Buckley.
52. The Board resolved that a committee of the Board ('the Sub-Committee') should be established comprising Mr T. Buckley, Mr Kennedy, Mr Marshall and Dr O'Hagan and Terms of Reference were adopted. A further Board meeting was scheduled to take place on 23 November.

53. The Terms of Reference recorded that the Sub-Committee had:

'been established

- *to consider an issue that has been raised by the CEO concerning the Chairman and to examine what actions should be taken to deal with the matter;*
- *to take such steps as it considers necessary to clarify the matters at issue including by inviting written comment from, or interviewing, interested parties or otherwise as it may determine; and*
- *with legal advice, to make recommendations to the Board on the issue.'*

54. Mr Kennedy had discussed the proposal to establish a Sub-Committee with Mr Buckley, but not with Mr Pitt, in advance of the Board meeting.

55. On 21 November 2016, Mr Buckley instructed A&L Goodbody, recognising that McCann Fitzgerald could not act for him personally as it represented INM.

Attendance notes prepared by McCann FitzGerald

56. McCann FitzGerald did not prepare an attendance note of the INM Board meeting on 21 November 2016. They did, however, prepare:

- A draft and final form minute of the Sub-Committee meeting on 22 November 2016 at 10.00.
- An attendance note and a draft and final form minute of the Sub-Committee meeting on 23 November 2016 at 13.15.
- An attendance note and a final form minute of the INM Board meeting on 23 November 2016 at 18.00.

The final form minutes recorded only the sequence of events and the decisions taken at those meetings. The attendance notes and draft minutes provide a more detailed record of the discussions that took place at those meetings. Whilst some witnesses took issue with individual points, those present at those meetings accepted that the

attendance notes or draft minutes reflected the substance of the discussions that took place.

22 November 2016 – Sub-Committee meeting

57. The Sub-Committee (other than Dr O'Hagan) met at McCann FitzGerald's offices on 22 November 2016 (10.00) to determine how to take matters forward.
58. At the outset of the meeting, the Sub-Committee considered Daniel Spring & Co's assertion that Mr Kennedy was conflicted because he had been involved in certain conversations that formed the background to the issues the Sub-Committee had been established to consider.
59. In Mr Kennedy's absence, Mr Barton briefed the Sub-Committee. The Sub-Committee understood that the suggestion that Mr Kennedy was conflicted was based on the fact that Mr Pitt had made his disclosure to Mr Kennedy. The Sub-Committee was not made aware of Mr Kennedy's discussions with Mr Pitt in relation to the APN and Newstalk transactions.
60. In Mr Kennedy's absence, the Sub-Committee concluded:

'It was noted ... that Mr Kennedy was not a party or a witness to any of the central conversations involving the CEO and the Chairman which formed the basis of the CEO's key concerns. It was concluded that there was no obvious risk of conflict on the part of Mr Kennedy and that it would significantly inhibit the effective performance of the Committee's work if Mr Kennedy were not to be a member.'

61. After reviewing the McCann FitzGerald's attendance note of the meeting with Mr Pitt on 16 November 2016, the Sub-Committee discussed the issues, and expressed the following provisional views:
 - (i) Mr Pitt's motivation for making the protected disclosure was irrelevant.
 - (ii) Mr Pitt might have become aware of the conclusion reached at a meeting of the non-executive directors after the October 2016 Board meeting that Mr Pitt was not the right person to take the company forward and that his departure should be arranged.

- (iii) The statement in the attendance note of the meeting on 16 November 2016 that Island Capital had added no value in relation to the sale of INM's holding in APN was simply wrong as Mr Hayes was of significant help on the ground in Australia and that Island Capital's request was a proper commercial request for payment for services provided. Further, as these events had occurred in March 2015, Mr Pitt would have raised these concerns earlier if he had been seriously concerned by them. Therefore, that there did not seem to be merit in pursuing this issue further.
- (iv) The concerns expressed about editorial interference were speculative in nature and could not be regarded as establishing any fact.
- (v) Although the potential acquisition of Newstalk did not proceed, the concerns raised by Mr Pitt raised significant issues.

62. The minutes of the meeting record that the Sub-Committee:

'... concluded that the matters raised comprise one core issue (around discussions concerning a transaction that was under contemplation) and two subsidiary issues (one relating to a suggested fee associated with a transaction in 2015 and one relating to an alleged comment concerning editorial matters) and perhaps also a general complaint in the nature of bullying, although it was noted that any such complaint can be dealt with through the ordinary grievance procedure.

6. Process/next steps

Having received and considered legal advice on the Committee's functions and duties, the Committee concluded that it should proceed as follows:

(1) it should send the note prepared by McCann FitzGerald of the statement given by the CEO to Mr Kennedy at the meeting on 16 November 2016 to the Chairman of the Company and invite the Chairman to attend before the Committee to respond to the matters raised in the CEO's statement, and permit him to deliver a written response if he wished. Given the importance of dealing with the matter as expeditiously as possible, the Committee proposed that such meeting be held on 23 November 2016.

(2) Subject to considering the Chairman's response, the Committee would consider whether it needed to invite the CEO to attend before the Committee or to provide a written response if necessary to any matters raised in the Chairman's response.

(3) Having regard to the potential adverse impacts on the effective management of the Company of having this matter remain unresolved for any significant period, the Committee should complete its duties as expeditiously as possible.'

Revisions to the note of Mr Pitt's disclosure on 16 November 2016

63. Later on 22 November 2016 (12.28), Mr Barton sent a copy of the attendance note he had made of the meeting with Mr Pitt on 16 November 2016 to Mr Spring and said that the Sub-Committee would be in touch to progress matters.
64. Mr Spring arranged for the note to be reviewed by Mr Pitt. When replying (12.57), Mr Spring repeated his view that Mr Kennedy was conflicted and should not be a member of the Sub-Committee. Mr Pitt reviewed the attendance note, made a number of amendments to it and returned the amended version to Mr Spring (and sent a copy to Mr Preston). Mr Spring sent (14.11) the amended attendance note to Mr Barton.
65. Although it was unclear whether Mr Pitt's revisions related to matters that had in fact been mentioned or discussed at that meeting, or were additional matters introduced by Mr Pitt, the revisions were accepted as being supplemental to matters actually discussed at the meeting and no objection was raised in relation to the proposed additions.
66. On the evening of 22 November 2016, Mr Buckley met with Mr Heneghan because there were rumours that Mr Pitt would leave INM. The following day, Mr Heneghan sent some draft media statements catering for various alternative situations, together with draft Questions & Answers.

23 November 2016 – Sub-Committee meeting

67. The Sub-Committee reconvened on 23 November 2016 (13.15) at the offices of A&L Goodbody.

68. The Sub-Committee reviewed the revisions to the attendance note and concluded that the revisions did not materially change the nature or characteristics of the issues which had been raised or the outline of the facts asserted, and it did not raise any new issue. A copy of the revised attendance note was provided to Mr Buckley (who subsequently provided an updated statement to the Sub-Committee – see paragraph 81 below).
69. Mr Buckley then joined the meeting, together with his legal advisers. He read a prepared statement to the Committee. In response to questions by the Sub-Committee, Mr Buckley:
- Described his relations with Mr Pitt over the period from the end of August to early November 2016.
 - Advised the Sub-Committee of the discussions that he and Mr Kennedy had had with Mr Pitt in late August/early September relating to his possible resignation.
 - Reported the issues that Mr Pitt had raised about his relationship with the Board members and the non-executive directors' discussion after the October 2016 Board meeting which led to the conclusion that Mr Pitt was not the right person to lead INM at that time.
 - Asserted that it had been a significant advantage having Island Capital and Mr Hayes assisting INM in Australia in circumstances where INM executives did not have the capital markets experience to handle a transaction of this nature and Mr Connolly was compromised by a conflicts issue.

Mr Buckley and his legal advisers then left the meeting.

70. After Mr Buckley left the meeting, the Sub-Committee discussed the way the possible acquisition of Newstalk had been handled. In particular, the Sub-Committee noted that:
- An acquisition of Newstalk would make good commercial sense and be consistent with the Board's strategy;

- It was appropriate to retain Davy to advise INM;
- INM had correctly resisted Communicorp's request for a non-binding offer as the request had not been considered by the M&A Committee or the Board;
- The valuations proposed by IBI had, correctly, been referred to Davy for advice;
- The gap between the parties' valuations was substantial and it was understandable that Mr Buckley should try to establish the highest price that it would be appropriate for INM to offer; and
- The heart of the issue was Mr Pitt's assertion that Mr Buckley had pressurised him to move the price INM should offer to the figure put forward by IBI - €26.8 million – and that the intent behind this alleged pressure was to benefit Mr O'Brien.

71. The Sub-Committee considered what further steps it might take to advance its understanding. It considered whether:

- To give Mr Pitt the opportunity to respond to Mr Buckley's rejection of Mr Pitt's assertions. It concluded that this would not advance matters as the facts were not in dispute other than a stark difference in the accounts of what Mr Buckley had said to Mr Pitt and Mr Pitt would simply refute Mr Buckley's version of those conversations.
- To seek input from other Board members or members of senior management. It concluded that any such input was unlikely to be decisive and risked creating undesirable divisions within the management team.
- There were other individuals or materials outside INM that could be of assistance and concluded there were not.

72. The Sub-Committee decided that as it did not have the powers to investigate the respective positions of Mr Pitt and Mr Buckley, it should assess the probability of each version of events.

It concluded that Mr Buckley's account was more credible because:

- It was obvious that the Mr Buckley would not have been able to persuade the M&A Committee and the Board to pay an inflated price for Newstalk in the face of a much lower independent valuation by Davy.
 - There was no incentive for Mr Buckley to behave in the manner alleged.
73. The Sub-Committee noted that there was no suggestion that the Company, any shareholder or other person had suffered loss as a result of the matters alleged by Mr Pitt.
74. Against this background, the Sub-Committee decided it was satisfied by Mr Buckley's account and that nothing would be gained by continuing the process by taking steps that seemed unlikely to add any value. It concluded that it was important to address the matter promptly and effectively, to avoid unnecessary risk of disruption of the management of the Company's operations and to restore business as usual as quickly as possible.
75. The attendance notes prepared by McCann FitzGerald, record the Sub-Committee's view that:
- *'... it was clear that any issue with the APN deal in no way warranted a PD. It was clear that value had been added by the involvement of Island Capital and based, on the Committee's knowledge, RP's allegation in this regard was factually incorrect.'*
 - *'...it might be considered somewhat convenient that he had at this stage sought to make a PD.'*
76. From both attendance notes it is clear that throughout their discussions, the members of the Sub-Committee had in mind:
- the decision that the non-executive directors had reached on 19 October 2016 that Mr Pitt was no longer the right person to lead INM; and
 - The damaging effect a breakdown in relations between the Chairman and the Chief Executive would have on the operations of the company.

As a result, the Sub-Committee gave extensive consideration to the merits of, and the process for, terminating Mr Pitt's employment as Chief Executive of INM.

77. The following extracts from the attendance notes indicate the nature of the discussion and the matters considered:

- *'[Mr Marshall] said that it wouldn't make sense if RP were to remain in place up until the EGM. [Mr T. Buckley] agreed but was concerned that they should not rush the process. [Dr O'Hagan] said that they had heard no evidence of wrongdoing, the Board had lost faith in the CEO and that they would now need to move as quickly as possible to terminate the employment of the CEO.'*
- *'[Mr T. Buckley] made the point that if the Board was unanimous in its position on RP it would be difficult to call them all liars. [Mr Kennedy] agreed and wondered what should be their next step: whether they should take a Board decision to the effect that RP was terminated or some other move. [Mr T Buckley] said that they didn't have Board minutes evidencing the agreement reached on 18 October. [Mr Kennedy] wondered if this evening would be too soon to finalise their decision at Board level. [Mr Marshall] suggested that they should first move to say that the Committee had decided on all three issues and that these were not considered PDs, before dismissing the PD. [Mr T Buckley was of the view that they should first formally implement the decision of the Board on 18 October and then afterwards determine that there had been no issue with the PD. [Mr Kennedy] said that it would be better if the other members of the Board were able to make their decision in light of the findings of the Committee. [Dr O'Hagan] was in agreement with [Mr Kennedy]'*
- *'[Mr Kennedy] said that he felt the situation had soured so much that RP would have to go immediately rather than in six month's time. [Mr Marshall] suggested that they should have an informal discussion with the Board members first, then they should discuss the three issues raised in RP's disclosure before determining that there was no concern with any of the issues. [Mr Kennedy] said he did not feel the need to continue the process any further but he would like to discuss with the Board how they had come to their conclusion.'*

- *'[Mr Marshall] said that they could bring the matter to the Board's attention before checking if everyone was in agreement with the conclusion reached at the October meeting concerning RP's position. [Mr Kennedy] said that he would like to move quickly and he felt there was a danger in allowing a delay before the Board made its decision as Donal Spring would bring an application for an injunction.'*
- *'[Dr O'Hagan] emphasised the damage being caused to the business and the likelihood that this would all come into the public domain. They need to finalise matters as soon as possible and it was only a matter of cost.'*
- *'[Mr Marshall] said that if they were prepared to accept two years then there might be no need for lawyers and they could finalise the issue quickly.'*

78. The minutes of the Sub-Committee record that:

'The Committee carefully considered the statement made by the Chairman of the Company. It was noted that much of the factual sequence in relation to the [Newstalk] discussions was entirely consistent between the CEO's and the Chairman's statements.

The Committee also noted in particular that there was no suggestion anywhere in the CEO's statement that the Company or any shareholder or other person had suffered any loss, harm or disadvantage arising from the issues raised covering a span of two years (apart perhaps from the CEO himself, per his allegation). This gave a high level of confidence that the Company's governance processes and checks and balances are appropriate, robust and effective.

In the circumstances, the Committee determined unanimously that it should conclude that having examined the matter referred to it, it should conclude that there was no evidence of wrongdoing or of any issue or matter which raised a serious concern for the Company and in the circumstances it should recommend to the Board that no further action in respect of the issue should be taken. It also determined unanimously that it should verbally report on its work and recommendation to the Board at the next available opportunity.'

23 November 2016 – Meeting at 16.45

79. At the end of the meeting, Mr Kennedy advised the Sub-Committee that arrangements had been made to meet with Mr Buckley at 16.45, shortly before the Board Meeting scheduled for 18.00.
80. Following the Sub-Committee meeting, Mr Barton sent the following email to Mr Inverarity:

‘It would be of enormous assistance if you could send me any revised version of Mr Buckley’s statement/submission as soon as possible for circulation to the [Sub-Committee] as they are anxious to conclude their deliberations this evening if they can.’

80. The meeting took place in the offices of McCann FitzGerald and was attended by Mr Buckley, Mr Kennedy, Dr O’Hagan, Mr Marshall and Mr T. Buckley from INM and Mr Barton and Mr Byers from McCann FitzGerald. The meeting has been variously described as a meeting of the Sub-Committee with Mr Buckley and a meeting arranged by Mr Kennedy with INM’s lawyers to obtain advice. INM asserted legal professional privilege in relation to the notes of that meeting.
81. Mr Buckley’s revised statement/submission was delivered to, and signed by, him whilst he was attending the meeting at 16.45. The revisions primarily responded to matters arising from Mr Pitt’s revisions to the attendance note of the meeting on 16 November and did not change the substance of Mr Buckley’s evidence to the Sub-Committee.

23 November 2016 – INM Board meeting

82. The Board of INM met at 18.00 on 23 November 2016 to receive a report from the Sub-Committee.
83. Mr Buckley and Mr Pitt having left the meeting, Mr Kennedy reported on behalf of the Sub-Committee. According to the detailed attendance note prepared by McCann FitzGerald, Mr Kennedy reported:
- The sequence of events leading up to the Sub-Committee’s consideration of Mr Pitt’s protected disclosure.

- The procedure that had been adopted by the Committee.
- The three issues raised in Mr Pitt's disclosure:
 - The proposed payment to Island Capital in respect of services provided on the APN transaction;
 - Mr Buckley's alleged interference with editorial independence; and
 - The proposed acquisition of Newstalk.
- Mr Buckley's denial of the allegations made.
- His discussion with Mr Pitt '*whether he wanted to deal with these matters as HR issues*', a suggestion which Mr Pitt had rejected.
- Dr O'Hagan's view that Mr Pitt was using the protected disclosure legislation to protect his position.
- The Sub-Committee's conclusion that the disclosure made by Mr Pitt '*did not amount to a [Protected Disclosure]*'.

84. The minutes of the meeting record that Mr Kennedy concluded by reporting that:

'[T]he Committee, having carefully reviewed and considered the issues that had been raised, had concluded unanimously that there was no evidence of any wrongdoing on the part of the Chairman and no matter of concern for the Company with respect to the issues raised and accordingly that no further action by the Company in response to the issue as raised was necessary or appropriate.'

85. McCann Fitzgerald advised that if a person asserted that a disclosure was made under the PDA, the Act gives that person protection. McCann Fitzgerald also explained the courses open to Mr Pitt depending on how the Company responded.

86. At 19.30, Mr Buckley and Mr Pitt re-joined the meeting and were informed of the conclusions of the Sub-Committee and the Board. Mr Pitt asked Mr Kennedy to

repeat his statement so he could write it down. At the behest of Mr Byers, Mr Kennedy repeated his statement:

'The issue raised by the CEO about the Chairman has been considered at Sub-Committee level and has found no evidence of any relevant wrongdoing under the Protected Disclosures Act 2014. That was communicated to the Board and accepted unanimously.'

87. The Board minutes record that:

'After lengthy discussion and deliberation, IT WAS RESOLVED that the Committee's report and its conclusions be adopted by the Board.'

Events following the Sub-Committee's report

88. On 24 November 2016, Mr Buckley sent a text to Mr O'Brien:

'Sorry Denis only just got txt and thanks Board last night agreed that Roberts Claim does NOT come under Protective disclosure act TG. Interesting to see how Pitt responds. I'm on way to City West for normal INM board meeting and ring later. Leslie.'

89. In the course of the Board meeting, Mr Buckley informed the Board that:

'INM management had a look at the potential acquisition of Newstalk but taking into account the gap between IBI and Davy valuation that there was no point to further pursue.'

90. On 24 November 2016, Daniel Spring & Co wrote to the directors of INM criticising the manner in which the Sub-Committee had considered the matters raised by Mr Pitt and the conclusions reached by it on the grounds that:

- Mr Kennedy should not have been a member of the Sub-Committee.
- The Sub-Committee did not interview Mr Pitt or any other person with relevant information.

- The Company was not competent to decide whether Mr Pitt had made a protected disclosure within the meaning of the PDA.

Daniel Spring & Co concluded by calling for a proper investigation to be conducted by an appropriately qualified independent person. Daniel Spring & Co also advised the directors of INM that Mr Pitt had made a protected disclosure to the ODCE.

91. McCann FitzGerald replied, rejecting the complaints made in relation to the procedure adopted by the Sub-Committee and by the Board and asserted that, in INM's view, the actions taken by the Sub-Committee and by the Board constituted a "*proper and reasonable response to the issue raised*". The letter further stated that having regard to the conclusions of the Sub-Committee and the Board, INM did not consider Mr Pitt's disclosure to the ODCE as appropriate. In light of that disclosure, INM noted that Mr Pitt was '*plainly treating the matter as concluded within INM*'.
92. There followed extensive correspondence between Daniel Spring & Co, on behalf of Mr Pitt, and McCann FitzGerald, on behalf of INM.
93. On 25 November 2016, Mr Buckley sent the following email to Mr O'Brien:

'As discussed I am enclosing, on a strictly private and confidential basis a copy of my Presentation to the Sub Committee on Wednesday, November 23rd.

As you are aware Donal Spring has sent a note saying that they are going to make a protected disclosure to the ODCE and we have replied.

Please see copy of both emails attached.

I am also forwarding you a list of queries from Mark Paul in the Irish Times and we are stating we have no comment to make however this may not stop him from writing something in relation to a possible dispute between the Chairman and Chief executive of INM'

Mr Buckley explained that he had sent this email because he thought Mr O'Brien should be updated on the position given that there was developing press speculation.

29 November 2016 – INM Press Statement

94. On 26 November 2016, there was speculation in the press about INM and, in particular, an article in the Irish Times referring to tensions at Board level.
95. Mr Heneghan developed a draft of a statement to be issued by INM responding to the press rumours which he circulated to the Board on 27 November 2016. Although approved by the non-executive directors, Mr Pitt disagreed with it on the grounds that it referred to:

‘a disagreement between me and the Board which needs to be brought to the attention of the Stock Exchange.

In fact the disagreement between the Board and I arises from a Protected Disclosure made by me to the Senior Independent Director Mr Jerome Kennedy of extremely serious issues for the Company, its shareholders and employees concerning the Chairman’.

96. McCann FitzGerald sent an email to Mr Pitt, on behalf of the non-executive directors, maintaining that the draft press statement was not misleading and stating that, whilst the Company had decided not to issue the draft press statement, it would monitor the situation so as to be able to assess whether a disclosure obligation had arisen.
97. On 27 November 2016, Mr Buckley forwarded copies of the email correspondence, including the draft press statement to Mr O’Brien. Mr Buckley and Mr O’Brien then had the following email exchange:

‘Leslie

Robert is trying to ratchet up pressure on board. The Board had to make it’s own decision and cannot be influenced by his constant attacks on the process the Board has set up under Jerome Kennedy

Warm regards

Denis’

‘Denis

Despite the fact that I clearly stated that I wanted the statement to be issued it was clear, after considerable discussion, that the Board was not of that view so I felt it would be dangerous and wrong for me to push it to a vote which I have never done since I took the chair.

Denis at this difficult time I need and believe I have the unanimous support of the Board

*Kind regards
Leslie'*

'Leslie

*I understand totally
He is an awful person*

*Thanks
Denis'*

'Dear Denis

Thanks - he is a nasty piece of stuff

*Kind regards
Leslie'*

98. Press speculation continued and the Board again considered the position at a meeting on 28 November 2016 (19.15) at which the Board concluded that the Company had an obligation to issue a press statement. Mr Pitt was present and approved the statement and its release.
99. On 28 November 2016, Mr Buckley forwarded to Mr O'Brien the press statement that had been issued in response to media speculation.
100. Released at 07.00 on 29 November 2016, the statement read as follows:

'Independent News & Media plc (the 'Company'), noting recent media speculation, confirms that an issue arose between the Chief Executive Officer

and the Chairman in relation to the terms of a possible acquisition by the Company. Discussions on the possible acquisition ended at a preliminary stage and the acquisition was never considered by the Board. The CEO raised the issue with the Company's Senior Independent Director. The Board established a sub-committee to review the issue and the sub-committee reported to the Board that no issue of concern arose for the Company. The Board has, with the agreed absence of the CEO and Chairman, unanimously adopted the committee's report.

The Board and the Company's management remain fully focussed on the business and in ensuring that day-to-day operations are conducted as normal.'

Conference call with Senior Management of INM

101. On the evening of 28 November 2016, a conference call took place to brief INM's senior management on the reasons for the statement to be issued the following day. When the call started, Mr Byers explained the reason the statement was being issued. Mr Pitt then explained to management that it was a difficult time for the Company, that it was important to concentrate on the business and he encouraged the staff to focus on their work.
102. Mr Buckley responded that Mr Pitt's actions had damaged the company and that the management of the business in the last couple of months had been unacceptable. In subsequent correspondence relating to events at this meeting, McCann FitzGerald stated that Mr Buckley's concerns related to operational matters and, in particular, Mr Pitt's refusal to meet him on a one-to-one basis as would be necessary for the proper management of a large listed company.

Mr Preston's disclosure

103. Following his conversations with Mr Pitt on 10 and 11 November 2016, Mr Preston contacted Daniel Spring & Co seeking legal advice and spoke with Mr Donal Spring on 14 November 2016.
104. Mr Preston had discussed his position with Mr Kennedy on two occasions because he was concerned about his position and the implications for his family:
 - 14 November 2016 following Mr Pitt's first disclosure to Mr Kennedy.

- 16 November 2016 following the meeting at McCann FitzGerald's offices. Mr Barton was also present. Mr Preston expressed his concerns about his own position. Mr Barton and Mr Kennedy explained that they could not advise Mr Preston as McCann FitzGerald represented INM.
105. On 18 November 2016, Mr Pitt told Mr Preston that he had made a protected disclosure to the ODCE and, in the course of doing so, he had included Mr Preston so that he would be protected. Mr Preston made a note recording the conversation:
- 'Robert Pitt highlighted he had made a disclosure to a governing body [I cannot remember the name] and that he had included me in the disclosure and I would therefore be protected. Robert Pitt again stated I would be okay.'*
106. Mr Preston had further conversations with Mr Kennedy, following a meeting regarding pensions on 25 November 2016, and with Dr O'Hagan on 28 November 2016.
107. On 30 November 2016, Daniel Spring & Co wrote to McCann FitzGerald on behalf of Mr Preston following a conversation that Mr Preston had with Mr Kennedy and Mr T. Buckley on 28 November 2016 in the course of which Mr Preston advised them that he wished to make a formal protected disclosure. Daniel Spring & Co asked McCann FitzGerald to confirm the manner in which the Company proposed to investigate Mr Preston's disclosure.
108. McCann FitzGerald replied saying that INM had concluded that the appropriate course would be for Mr Preston to make his disclosure to Dr O'Hagan, who would then report to the Board and a decision would be made as to the appropriate course to be taken. In the event, Mr Preston deferred his protected disclosure until after INM's EGM on 5 December 2016.
109. Having met Dr O'Hagan on 2 December 2016, Mr Preston contacted Dr O'Hagan on 4 December 2016 and arranged to meet him the following day at the offices of Daniel Spring & Co.
110. Dr O'Hagan, Mr Barton, Mr Preston and Ms Paula Murphy, of Daniel Spring & Co, were present at the meeting on 5 December 2016. Mr Preston had a memorandum with him from which he read out the matters he wanted to raise by way of protected disclosure.

111. The following day, Mr Preston sent Dr O'Hagan and Mr Barton the memorandum that he had had before him at the meeting the previous day. He advised them that he intended to provide a copy of the memorandum to the ODCE.

112. In the memorandum, Mr Preston recorded information that:

- He had first-hand knowledge of;
- He had learned from an email that Mr Pitt had sent to himself and forwarded to Mr Preston on 17 October 2016; and
- He had learned from the revised McCann FitzGerald attendance note of the meeting on 16 November 2016, which Mr Pitt forwarded to him on 22 November 2016.

Material from the McCann FitzGerald attendance note that Mr Preston included in the memorandum were in italics – to distinguish that material from his first-hand knowledge. The background to, and the material used in, the note that Mr Preston prepared for his protected disclosure to Dr O'Hagan, is considered in Chapter 11.

113. On 7 December 2016, the Board of INM resolved that the Sub-Committee should be authorised to consider the matters raised by Mr Preston and, having done so, to make recommendations to the INM Board.

114. Following the meeting, McCann FitzGerald:

- Asked Mr Buckley to provide a statement in response to the matters raised by Mr Preston.
- Advised Daniel Spring & Co of the decision to refer Mr Preston's disclosure to the Sub-Committee. It added that the Sub-Committee might conclude that Mr Preston's disclosure should be considered in the context of a separate, external review that the Board had also resolved to establish.

115. Following correspondence from the ODCE to Daniel Spring & Co on 2 December 2016, Mr Preston met the ODCE on 20 December 2016 and made a disclosure based on the disclosure that he had made to INM.

The Independent Review

116. As no further proposals had been made by INM in response to Daniel Spring & Co's letter dated 24 November 2016 (see paragraph 90 above), Daniel Spring & Co wrote to McCann FitzGerald on 30 November 2016 requesting:

'a proper investigation into the matters which [Mr Pitt] has raised by an independent third party without delay.

In the event that the Board of Independent News and Media plc do not agree to this request by 1.00pm tomorrow, we have been instructed to apply to the High Court for a Mandatory Order compelling the Board to do so.'

117. On 5 December 2016, McCann FitzGerald advised Daniel Spring & Co that:

'[t]he non-executive board members of INM have considered the issues raised in the correspondence. While they consider that there is no basis or justification for any form of application to the courts, they are concerned that any such application could only prove highly damaging to the interests and effective management of INM.

In these circumstances, and having regard to the continuing uncertainty, adverse media attention and disruption of INM's operations arising from these issues, the non-executive board members have concluded that there should now be a review of the matters raised by [Mr Pitt] and all related matters. This review will be carried out by a suitably qualified and experienced person independent of INM, who would, at a minimum, speak to all persons identified as having relevant information to provide and who would, having reviewed all these matters, report to the INM board on his/her conclusions.'

118. On 7 December 2016, an INM Board meeting took place attended by all the directors other than Mr Connolly (who did not attend), Mr Buckley (who was not present as the meeting related to matters concerning him) and Mr Pitt (who left the meeting as it involved matters affecting him). The Board decided to establish:

'[A] review of the matters raised by Mr Pitt and all related matters to be carried out in accordance with Terms of Reference in the form appended to these minutes (subject to any amendments suggested by the person appointed to lead

the independent review and with any such other amendments as any Director (other than the Chairman and the CEO) may approve) to be carried out by a suitably qualified and experienced person independent of the Company approved by the Directors (other than the Chairman and the CEO)'

119. McCann FitzGerald advised Daniel Spring & Co of the establishment of the independent review and provided a copy of the draft Terms of Reference.
120. McCann FitzGerald approached a number of Senior Counsel to establish their availability to carry out the independent review and whether they had any conflict. Brian O'Moore SC (as he then was) and John Gleeson SC confirmed their availability. McCann FitzGerald asked for the views of members of the Board. Neither Mr Pitt nor Daniel Spring were consulted.
121. Mr Buckley sent a text to Mr O'Brien in relation to the persons being proposed as Independent Reviewer. Mr O'Brien replied that Mr Brian O'Moore SC:

'is against me in a case that Declan Ganley and Comcast are taking re mobile phone licence. Avoid if possible'

Mr Buckley then advised McCann FitzGerald that he objected to the appointment of Mr O'Moore SC. Subsequently, Mr Buckley explained that he objected to Mr O'Moore SC on the grounds that he was acting in a patent case against a company, Nualtra, in which Mr Buckley was a major shareholder – and that he regarded it as:

'... hugely important that [I] had someone absolutely independent, that I could totally trust, and that I could go in and tell them my situation ... I wasn't looking for [Mr O'Brien] to sign off. I was looking for him to say look, Jesus, is that person a really good person and that could do a job like this, right.'

122. On 9 December 2016, Mr Buckley and Mr O'Brien had the following text exchange:

'Denis, do you know John Gleeson ... He is being recommended for review? Leslie'

'Yes v good guy ... denis'

123. There then followed correspondence between McCann FitzGerald, A&L Goodbody and Daniel Spring & Co in the course of which detailed points on the Terms of Reference for the Independent Review and whether the Sub-Committee (or the Independent Review) should consider Mr Preston's disclosure were debated.
124. On 14 December 2016, having obtained the agreement of A&L Goodbody and Daniel Spring & Co, McCann FitzGerald wrote confirming that Mr David Barniville SC (as he then was) and Stephen Kingon had been retained as joint independent reviewers.
125. The Sub-Committee met on 21 December 2016 and concluded that it should not consider Mr Preston's disclosure and that the independent review was the more appropriate forum within which to consider Mr Preston's disclosure.
126. On 23 December 2016, the independent board members finalised the Terms of Reference and sent them to the interested parties and to the Independent Reviewers. The final text of the Terms of Reference provided that the Independent Reviewers should report on:

'(1) whether on an objective analysis any act or matter identified constituted wrongdoing or potential wrongdoing of a kind recognised in law (including within the meaning of the Protected Disclosures Act 2014);

(2) whether arising from the matters reviewed, it appears on an objective analysis that loss or harm has been suffered by INM, its shareholders, any of its officers or employees or any other person to whom INM owes or may owe duties; and

(3) whether any issue or event identified was inappropriate having regard to principles of corporate governance.'

The Terms of Reference also provided for the Independent Reviewers to present recommendations or suggestions as to what further action, if any, the INM Board should take to address the consequences of any issue or event identified.

127. On 17 January 2017, the INM Board met to decide how it should handle a request from the ODCE made on 11 January 2017 for production of books and records. The Board established a sub-committee of the Board (the 'Special Committee'), comprising

Mr T. Buckley, Mr Harrison, Dr O'Hagan and Mr Kennedy, to handle all matters arising in relation to the independent review and the investigation by the ODCE.

128. Mr Barniville and Mr Kingon interviewed Mr Pitt, Mr Preston, Mr Buckley, Mr Kennedy and Mr Murphy. They also corresponded with, or received submissions from, those individuals and Mr McNulty.
129. In the course of the Independent Review, Mr Barniville and Mr Kingon considered whether to provide for cross-examination. They concluded that the process they had been asked to conduct under the Terms of Reference did not require or indeed permit them to provide for cross-examination. Although the Terms of Reference set out a procedure that was described as '*not intended to be prescriptive*', they concluded that to permit cross-examination would be to convert what was intended to be a review into some sort of tribunal of inquiry or quasi court-like process which they did not believe to be the intention of the Board.
130. Mr Barniville and Mr Kingon delivered their report on 25 July 2017. In their report, the Independent Reviewers concluded that because cross-examination did not take place, they were unable to reach any conclusion on two issues relating to the proposed acquisition of Newstalk.
131. On 9 August 2017, the Special Committee submitted a Report to the Board of INM setting out the principal findings of the Independent Reviewers:

Newstalk

'In the absence of cross-examination in a court or tribunal like setting (which is not the exercise we were asked to conduct), we have reluctantly come to the conclusion that we are unable to resolve the stark conflict of evidence on these two allegations in relation to the Newstalk discussions.'

...

'In those circumstances, we are not in a position to reach a conclusion on whether in respect of those allegations there was a 'wrongdoing' or a 'potential wrongdoing' of a kind recognised in law (including within the meaning of the 2014 Act)'

APN

'We have concluded on the evidence that Island Capital did do work of significant value to INM in connection with the sale of INM's shares in APN. We were particularly persuaded by the evidence given to us by Mr Kennedy in this regard'

'For the reasons we set out earlier, we conclude that on an objective analysis there was no act or matter identified which constituted a wrongdoing or a potential wrongdoing of a kind recognised in law (including within the meaning of the Protected Disclosures Act, 2014) in connection with the APN transaction and we report to the Board in those terms'

Other matters

The Independent Reviewers reported that they had, on an objective analysis of the evidence and material available, identified no act or matter that constituted a wrongdoing or potential wrongdoing of a kind recognised in law relating to:

- Alleged interference with editorial independence.
- An alleged blocking strategy in relation to the sale of INM's print assets and the alleged comments made about giving preference or priority to certain shareholders. In this regard, the Independent Reviewers said:

'We did not see any concrete evidence of any preference or prioritisation being given to particular shareholders, including Mr O'Brien and we have accepted Mr Kennedy's evidence in that regard'.

Corporate Governance

'Having regard to our inability to resolve the stark conflict of evidence between Mr Pitt and Mr Preston and Mr Buckley in connection with the allegations relating to the Newstalk discussions, we have not been in a

position to reach a conclusion as to whether there was a breach of applicable principles of corporate governance arising from the central allegations in relation to those discussions.

As regards the APN issue, we do not accept that there was a breach of applicable principles of corporate governance by Mr Buckley in relation to the request for payment to Island Capital. We have, however, concluded, that the failure to tie down an agreement with Island Capital at an earlier stage was not good corporate governance. We have also concluded on this issue that there was an acute and appropriate awareness on the part of those involved in the transaction within INM and its external advisors of the duties of disclosure which would arise in relation to any payment made to Island Capital.'

Breach of the Protected Disclosures Act, 2014

'We have concluded that the manner in which INM initially dealt with the disclosure made by Mr Pitt through the Board and through the [Sub-Committee] established by it breached Mr Pitt's right to fair procedures. However, that breach was significantly remedied by the decision to establish the independent review on 7 December 2016 and by INM's support for that review in the period thereafter. This issue did not arise in relation to Mr Preston's disclosure as no steps were taken by the [Sub-Committee] to deal with 'Mr Preston's disclosure save to decide that it should also be included as part of the independent review.'

132. The Special Committee reported to the Board the submissions made by Daniel Spring & Co to the effect that the Newstalk issue had not been resolved because of the absence of cross-examination in the process. It reported that it had been advised that any suggestion that cross-examination could have occurred in the Independent Review was misconceived. The Special Committee, therefore, recommended that the Board should regard the consideration of the Mr Pitt's allegations as concluded.
133. The Special Committee also recommended that the Board consider the recommendations put forward by the Independent Reviewers. These related to:
 - The approach to be followed in the case of future related party transactions.

- The need to review INM's whistle blowing policy.
- The procedures to be followed when INM established a committee to consider a disclosure made by senior management.

134. The Independent Reviewers also recommended that:

'consideration be given to attempt to restore relations among those concerned by means of mediation or similar process.'

135. At its meeting on 9 August 2017, the INM Board considered the Independent Reviewers' Report, its findings and recommendations, and the actions that should be taken in light of that Report. Following consideration, the Board resolved that:

'the independent reviewers' report be adopted and accepted by the Board and that the Board determine that its consideration of the CEO's allegations be treated as concluded.'

'the Company's legal advisers, in consultation with the company's public relations advisers, prepare a draft statement for approval by the Board on 11 August 2017.'

'the report's recommendations be accepted.'

'the company's legal advisers be mandated to enter into discussion on a 'without prejudice' basis with Mr Pitt and Mr Buckley and their respective legal advisers to explore whether the parties might agree an approach to resolve the issues mentioned in the report in the interests of the Company.'

136. In accordance with the decision of the Board, INM took the necessary steps in September 2017 to initiate the mediation recommended by the Independent Reviewers.

137. Mr Pitt participated in that mediation. Mr Pitt resigned as a Director and Chief Executive of INM with effect from 13 October 2017.

Mr Preston

138. After the report by the Independent Reviewers was provided to INM, Mr T. Buckley met Mr Preston and discussed his future with INM. Mr T. Buckley told us that he and Mr Preston:

'agreed a 12 month deal to put water between the Independent Review and his exit from the company which was to be split between six months work with INM and the option for Ryan to take the second six months as a payment in lieu of notice. This was to give Ryan certainty over the next 12 months. Ryan Preston asked what would happen if he might want to stay long term in INM. We agreed that if both parties were happy this was fine. We agreed that Ryan and the Chairman would meet to reconcile any differences and agreed that we would put this agreement in writing when everything had settled down.'

139. However, when it was put to Mr Preston that it was a friendly conversation and that Mr T. Buckley's message was that he should wait six months after the report before making a decision about his future, Mr Preston replied:

'The actual conversation was "You will be leaving the business in twelve months - you can work for six months and we will give you six months payment in lieu", and I said "Well, you know, is there a way I can stay in the business?" and it was made very clear to me there was no way I could stay in that business. I explicitly remember that.'

140. Subsequently, Mr Preston had an opportunity to read parts of the report by the Independent Reviewers. After he had done so, Dr O'Hagan exchanged emails with Mr Preston in the course of which Mr Preston said that for his part, he had told the truth and he accepted *'the Executive Summary and Recommendations and see these as bringing an end to the process for me'*. He asked that that be minuted. In fact, the Board minutes recorded that he *'was satisfied to treat the consideration of the allegations as concluded'* and did not record the statement Mr Preston had requested.

141. In January 2018, Daniel Spring & Co wrote to McCann FitzGerald alleging that Mr Preston had been:

'undermined and attacked by Mr Buckley - as Chairman of INM - in a campaign of naked reprisals stemming directly from the protected disclosures made by

him. Mr Buckley has used INM board meetings as a vehicle to criticise and unfairly attack Mr Preston. He has been singled out for invidious criticism by Mr Buckley, in response to which none of the board members have afforded Mr Preston the support and protection which he rightly deserves.

Furthermore, Mr Buckley has made his animus very clear in conversations with Mr Preston. At a meeting held in Mr Buckley's office on 25 October 2017 in the presence of Mr Michael Doorly, former company secretary and the new CEO of INM, Mr Buckley told [Mr Preston] that he expected him to leave the employment of INM within 6 months and threatened that there would be consequences if he continued to pursue his concerns through the offices of Daniel Spring & Co. In a particularly menacing exchange Mr Buckley told [Mr Preston] that he is connected to a lot of business people in Dublin and noted that Mr Preston is 'still a young man with [his] career ahead of [him]'. In that context Mr Buckley also remarked, quite gratuitously, on the possibility that [Mr Preston] would be likely to need a favourable reference when seeking new employment. During this meeting Mr Buckley also stated unambiguously that the issue of [Mr Preston's] protected disclosure [had] caused Mr Preston's future in INM to be limited and remarked that the Board wanted a CFO with a new approach.'

142. Mr Doorly was present at the meeting and he told us that:

Mr Doorly: I can understand the interpretation but what I would say was an attempt and the tone I thought was more along the lines of if I was your father advising you, you know, I would be advising you about, you know, your career options going forward. That would be from Leslie Buckley's perspective and I could hear that in terms of tone if I was advising you. But if I was the recipient hearing what is being filtered through, that would be a fair reflection of what would have been heard as opposed to what was being said. So it is somewhere in the middle. Its tone is where the difference is but is that the general gist of the message? Yes. Was it delivered in that raw fashion? No. But it was the gist of the message.

Mr Murphy: I will just raise one question perhaps that you might ask if I raise it, which is the question is that the language used in the

letter is one of threats, menace, harassment. Insofar as that's concerned, was the meeting conducted in that form?

Mr Doorly: No, it was more a father to son, if you were my son, and I think Leslie Buckley used those words, and if I was trying to help you and advise you. So if I – I am not Leslie Buckley but if I was in his shoes I would believe I was trying to be helpful but if I was in Ryan Preston's shoes listening to what I am hearing, that would be a fair interpretation of what Ryan heard. But I was there and it is a bit of, there is two sides to it. I can't deny anything there but at the same time the tone was just, it was different. But it was the same end message.'

143. McCann FitzGerald did not address the merits of the matters raised in Daniel Spring & Co.'s letter. They simply replied saying:

'..our client confirms that your client is very well regarded and respected as Chief Financial Officer of the Company. Further that the Company is committed to upholding his standing and reputation within the Company.'

144. Following this exchange an unsuccessful mediation took place between INM and Mr Preston.
145. On 22 February 2018, Daniel Spring & Co wrote to McCann FitzGerald regarding INM's relationship with Mr Preston and attached an appendix setting out a summary of the key events that had occurred following Mr Preston's protected disclosure to Dr O'Hagan which, it was contended, represented a catalogue of occasions when Mr Preston was wrongfully treated following his protected disclosure.
146. Mr Preston remained in his role as CFO of INM until January 2019.

The Investigation by the ODCE

147. On 21 March 2017, INM announced its 2016 results and included a statement that the ODCE had issued a request seeking production of documents by INM.
148. On 10 August 2017, Mr Pitt made a disclosure to the ODCE in relation to the Data Interrogation issue.

149. On 11 August 2017, the ODCE served on INM a Statutory Requirement in relation to the Data Interrogation issue.
150. On 22 August 2017, Mr Pitt sent a memorandum to the INM Board setting out his knowledge and position in relation to the Data Interrogation issues and explaining why he thought the proposed INM response to the ODCE Requirement was incomplete, incorrect and misleading.
151. On the same day, the INM Board appointed Deloitte to conduct a review relating to the extraction of data from INM. On 24 August 2017, INM notified the Data Protection Commission of a potential data breach.

Relations with Mr Buckley

152. The Special Committee tried to manage the relationship between Mr Buckley and Mr Pitt. However, at meetings between March and May 2017, the Special Committee considered Mr Buckley's position as Chairman, particularly as he was questioning the authority of the Special Committee and its decisions.
153. In March 2017, Dr O'Hagan asked Mr Buckley to stand aside pending the outcome of the Independent Review. Mr Buckley refused to do. In April 2017, Mr Buckley said that he would not stand down whilst Mr Pitt was at INM. In May 2017, the possibility of taking formal steps to ensure the departure of Mr Buckley was considered. In the event no such steps were taken.
154. Mr Buckley resigned as Director and Chairman of INM on 1 March 2018.

C. The Parties' Submissions

155. We asked each party to provide us with submissions addressing:

- The key relevant evidence relied upon;
- Any legal issues to be considered; and
- The conclusions/findings to be reached on the basis of that evidence.

We also asked that such submissions should include executive summaries in relation to each of the issues identified in the Order.

156. In relation to the INM's handling of the protected disclosures by Mr Pitt and Mr Preston, we received submissions from the following parties:

- (i) Mr Buckley;
- (ii) The INM Directors;
- (iii) Mr Pitt; and
- (iv) Mr Preston.

157. In the following paragraphs, we set out the submissions made by those parties including, in full, the executive summary where provided.

(i) Mr Buckley

158. Recognising that it was for INM and the INM Directors to address the issues arising from the manner in which INM handled the protected disclosures made by Mr Pitt and Mr Preston, Mr Buckley limited his Submissions in relation to this issue to the circumstances in which he canvassed the views of Mr O'Brien in relation to the appointment of Mr Brian O'Moore SC as an Independent Reviewer.

159. Mr Buckley submitted that:

28 *While [he] had limited involvement in INM's handling of the protected disclosures, a complaint has been raised surrounding [his] objection to Mr Brian O'Moore SC as independent reviewer. Mr Buckley had received a text message from Mr O'Brien stating that Mr O'Moore SC was against Mr O'Brien in a case in relation to a mobile phone licence and that he should "avoid if possible". Mr Buckley agreed in his evidence that Mr O'Brien was seeking to avoid the appointment of Mr O'Moore and said that on further examination he found out that Mr O'Moore was also acting in a case against a company in which he was then a major shareholder.*

29 *This reflects Mr Buckley's earlier account that having found out about the case involving Mr O'Brien, through discussions with McCann Fitzgerald, he found out that Mr O'Moore was also acting against a company in which he was a major shareholder and that there was no way he wanted such a person appointed as an independent reviewer. Mr Buckley's evidence was that it was:*

"...hugely important that I had somebody absolutely independent, that I could totally trust, that I could go in and tell them my situation, right, and that I had somebody commercial as well right."

30 *It was put to Mr Buckley that, in informing Mr Byers of this concern, he did not raise the concern that Mr O'Brien had raised and Mr Buckley said that he did not know if he did or didn't. It is submitted that ultimately nothing turns on it – a highly qualified person had been proposed and Mr Buckley had a concern in relation to what he perceived (rightly or wrongly) as a potential conflict. The fact that Mr O'Brien also saw a potential conflict, which appears to have added to Mr Buckley's concerns, is not at all irregular and it is submitted that Mr Buckley acted entirely properly in raising objection to Mr O'Moore SC. Ultimately, alternative highly qualified individuals were chosen in relation to whom, it seems, there were no perceived conflicts.'*

(ii) **The INM Directors**

160. The INM Directors' Submissions involved legal submissions in relation to, first, the legal framework against which the Board's handling of the protected disclosures should be considered and, secondly, whether the protected disclosures were, as a matter of law, disclosures within the meaning of section 5 of the PDA.
161. These submissions are considered in Chapter 5 above.
162. The Executive Summary to the INM Directors' First Submission was as follows:

'The situation facing the INM Board in November 2016, following the making of the Pitt Disclosure, was unprecedented. The issues raised by Mr Pitt impacted the company at the highest level. They involved INM's CEO accusing its Chairman of attempted fraud and dishonesty in relation to the company's affairs. Not only were the issues of the utmost gravity for the organisation, but the media company also had to grapple with an immediate, acute breakdown of relations between its two most senior officers and the risk of significant damage to the company's interests and its share price, with a corresponding risk to its shareholders.'

The Board's conduct is specifically isolated for examination in the Inspection under the Terms of Reference and the NEDs' actions and decisions have been the subject of extensive evidence and, in some cases, cross examination or further examination by the Inspectors. What the evidence shows is that they, both individually and collectively, responded appropriately and properly, applying their experience, expertise and acumen as business people to assess the facts being presented to them under pressure, with the benefit of advice, and with an intense focus on the interests of the company and its shareholders. The actions of the Board must be considered in the context of the facts and circumstances that then arose, rather than through any application of hindsight. In considering the steps that they took it is important to have regard to the highly unusual challenges facing the Board at that time and the factors which influenced and constrained their handling of the situation. (Unless otherwise indicated, references in these First Submissions to "the Board" refers to the Board of INM excluding Leslie Buckley and Robert Pitt.)

The NEDs were very experienced non-executive directors. Each of them was extremely conscientious in his or her role and in his or her duties to the company. It is a peculiarity of corporate governance structures that non-executive directors are to a large extent reliant as regards corporate information on what is provided to them by the executive directors in the company. The executive directors are given the freedom to run the business, with access to the non-executive directors for strategic guidance, oversight and supervision. The corporate governance structure assumes that the non-executive directors will let the executive directors get on with managing the business, while ensuring that appropriate checks and balances are in place commensurate with their obligations as company directors.

Business activity inherently requires rapid decisions based on incomplete information. A reasonable decision made in a pressured environment may be criticised years later when all information comes to light. There is always a risk of attributing a high probability to an event occurring, simply because it occurred. Insofar as concerns the handling of Mr Pitt's disclosure, the decision makers did not have the benefit of knowing what would happen – they had to weigh up the possibilities, probabilities and risks based on what they knew, or were told, at the time.

In these First Submissions certain relevant legal principles are first identified and the relevant evidence on which the NEDs rely is then addressed. Each section contains a summary of the findings that the NEDs submit should be made on the basis of the evidence.

It is important to note that following the first phase of the Inspection, draft statements of relevant facts and evidence were produced by the Inspection, which sought to identify the evidence that was undisputed. A review of those documents now, following the extensive evidence given in the second phase of the Inspection, demonstrates how essential that process of testing the evidence has been in identifying the actual facts underlying the Inspection and the conclusions that it should draw. The evidence referenced in the original draft statements, in particular of Mr Pitt and Mr Preston, now appears in a markedly different light.

The NEDs instinctively took the view in November 2016 when they were faced with the Pitt Disclosure that it did not quite make sense, and that it felt

inappropriate that these issues should be raised in this way by the CEO. Nevertheless, they were faced with a serious allegation by the CEO that the Chairman of the Board had sought to defraud the company. They had no hesitation in deciding that such allegations had to be properly addressed. The NEDs acted urgently and responsibly to deal with the situation, while seeking as far as possible to protect the company from any fallout. What was essentially at issue was a concern by Mr Pitt that in his interactions with Mr Buckley, Mr Buckley was focused on benefitting the major shareholder to the detriment of the company and was pressuring Mr Pitt to collude with him against the company's interests. The Board was sceptical of this for a number of reasons related to mechanics of the proposed Newstalk acquisition and the checks and balances in place. They were conscious also of their experience of working closely with Mr Buckley since 2012. They had had no experience of him seeking to favour the major shareholder in that way. Mr Pitt was not alleging that INM or any shareholder or person had suffered any loss, harm or disadvantage arising from the issues raised which, in the case of the APN issue spanned a period of two years. This gave the Disclosures Committee and the Board a high level of confidence that INM's governance processes and checks and balances were appropriate, robust and working as they should. Having discussed the issues in some detail, the Disclosures Committee concluded that there was no evidence of wrongdoing or any issue or matter that raised a serious concern for INM, and the Board, having itself discussed the matter in detail, adopted its recommendation. All directors must exercise judgement in difficult situations, as was the case here, and are afforded a wide margin of discretion in relation to exercising their judgement as to what is in the best interests of the Company. The NEDs have been criticised under cross examination for perceived failures in this process. It is, however, striking that following a much more detailed process of investigation, the Independent Reviewers ultimately reached similar conclusions to the Disclosures Committee. For the reasons set out in detail in these submissions, from both a legal and business perspective, the steps taken by the Disclosures Committee and the Board in handling the disclosures were at all times undertaken on the basis of what they believed to be in the best interests of the Company and having regard to the real commercial exigencies faced at the time by the Company.

In November 2016, in circumstances where there was a clear danger that the company would become inoperable having regard to the breakdown in its leadership structure, the NEDs acted swiftly to deal with the twin challenges of

ascertaining whether there had been serious wrongdoing by the Chairman and finding a solution to the sudden deterioration in the relationship between the two men. The NEDs knew that Mr Pitt had proposed or considered leaving the company a short time before. They had also, more recently, formed a collective view that he was not the right person to lead the company into its next phase. Under those circumstances, they understandably had regard to the possibility that his actions in making the protected disclosure were primarily directed at self-preservation. Surprise at the course of action Mr Pitt had chosen was a major factor in the speed at which the Disclosures Committee, and the Board, acted. As CEO, he was in a different position to most employees, as he had every power at his disposal to make proper enquiries and take any necessary action when issues arose.

The data issues that Mr Pitt raised in his second ODCE disclosure in August 2017 were extremely serious. Yet he had kept them secret, without reporting them to the Board or the Data Protection Commissioner, or the Company's DPO, despite being responsible for risk within the organisation. He had not mentioned them at all in his November 2016 disclosures, notwithstanding that he was at that stage making allegations of fraud against Mr Buckley. It is impossible to reconcile his approach in this regard with his duty to act in the interests of INM and his actions are in strong contrast to the immediate steps taken by the Board upon being informed of the data issues both in August 2017 and upon learning of the additional information concerning the search for 19 individual names from the ODCE affidavit.

When Mr Preston made his disclosure there was again no hesitation on the part of the Board in determining that it required investigation. The Independent Review that was established to examine both disclosures was extremely thorough, robust and independent. As noted, its findings largely accorded with the conclusions of the Disclosures Committee, save that it was unable to reach any conclusion on the stark conflict of evidence between Mr Pitt and Mr Buckley on Newstalk and recommended mediation. The Board adopted and put in train all of the recommendations and did the same following the Deloitte reports and, ultimately, the Data Protection Commissioner's report into the data interrogation.

For all of the reasons set out in these submissions, the NEDs' handling of the disclosures of Mr Pitt and Mr Preston undoubtedly met the standards expected of them as directors and was reasonable in all the circumstances.'

163. The Executive Summary was supported by the following Summary Conclusions in relation to the Board's handling of Mr Pitt and Mr Preston's protected disclosures:

'6.6 Based on the evidence that the Inspectors have heard in relation to the Disclosures, the conclusions set out below can be drawn. The evidential basis for these is addressed in the following sections of the document. The summary conclusions set out below focus on the issues of particular relevance to the Board's response and, in particular, the NEDs' responses to the Disclosures. They are not intended to provide an exhaustive summary of the evidence on all of the issues.

- (a) From July 2016 to September 2016 Mr Pitt was considering leaving his role as CEO of INM and communicated to Mr Buckley that he felt INM may wish to look for a new CEO, ultimately deciding after a number of weeks that he would commit to his role at INM. Mr Pitt also spoke to Mr Kennedy about this during September 2016.*
- (b) Mr Pitt was a competent cost cutter. Tasked by the Board with effecting INM's strategic acquisition strategy, however, and with additional resources and supports to assist him, by September 2016 Mr Pitt had failed to do so to any meaningful extent.*
- (c) While Mr Pitt actively engaged in preliminary discussions with Communicorp in respect of the potential acquisition of Newstalk through September and October 2016, he was wary of the proposal and favoured a much larger acquisition of a UK entity ("**Project Canary**"), which he believed would be a 'game changer' for INM.*
- (d) Mr Preston, who as CFO reported directly to Mr Pitt, had an intense workload in October 2016, was stressed as a result and was prone to worrying about his security of employment because of his family commitments.*

- (e) *In September 2016 Mr Pitt instructed Mr Preston, who was unaccustomed to taking notes of what people said at meetings, to take notes of all meetings in relation to the Newstalk transaction.*
- (f) *Mr Pitt privately shared his notes of meetings with Mr Preston during October 2016, but neither he nor Mr Preston disclosed to the Inspection the fact that he had done so until it emerged under cross examination.*
- (g) *Mr Pitt's presentation on Project Canary at the Board meeting on 19 October was obviously badly received. The NEDs had real concerns about the commercials of the suggested strategy and the poor quality of the presentation and formed the view that Mr Pitt was not the person to take INM into its next phase. Whether or not Mr Pitt was aware of the nature of the NEDs' only discussion after the Board meeting, he was aware that his performance was under critical appraisal.*
- (h) *Mr Pitt and Mr Preston were under pressure from Mr Buckley during October to progress the Newstalk negotiations and to narrow the gap between the IBI and Davy valuations. The discussions between Mr Pitt and Mr Buckley in relation to Newstalk culminated in a conversation on 28 October 2016, during which Mr Pitt informed Mr Buckley that INM's maximum price was €18m. Mr Buckley expressed severe disappointment to Mr Pitt in this regard.*
- (i) *Mr Pitt's immediate concern following this call as he prepared to go on leave was his security of employment, leading him to seek employment law advice and determine that he would make a protected disclosure.*
- (j) *On learning that Mr Pitt intended to raise issues about Mr Buckley's conduct, Mr Preston was very concerned that if Mr Pitt went to the Board it might impact his (Mr Preston's) security of employment.*
- (k) *Mr Pitt put significant pressure on Mr Preston to join him in making a disclosure, so that he would not be the only person raising the issues and because he wanted the support of another person who*

was involved. Mr Pitt should not have placed pressure of this kind on an employee.

- (l) Neither Mr Pitt nor Mr Preston disclosed to the Inspection the fact that they had spoken on 11 November just prior to Mr Pitt's meeting with Mr Kennedy, or that Mr Pitt had offered to cover Mr Preston's legal costs of making a disclosure.*
- (m) Mr Kennedy understood from his discussion with Mr Pitt on 11 November that Mr Pitt was making what Mr Pitt considered was a protected disclosure and had made very serious allegations concerning Mr Buckley. He also understood that Mr Pitt and Mr Buckley's working relationship had broken down and was extremely concerned about the implications of this for INM.*
- (n) Mr Kennedy acted promptly and appropriately in respect of the Pitt Disclosure, proposing an independent process to address what had taken place. Mr Pitt rejected that proposal and indicated he wanted the Board to be immediately informed. Mr Kennedy exercised his judgement in determining that it would not be satisfactory to go to the Board 'half-baked'.*
- (o) The following steps that Mr Kennedy took in his immediate response to the Pitt Disclosure were reasonable and appropriate, having regard to the complex and unprecedented nature of the situation that presented to him, and the implications for the business:*
 - (i) Meeting Mr Pitt promptly at his request;*
 - (ii) Promptly offering to bring in an independent third party professional to ascertain the facts;*
 - (iii) Keeping in touch with Mr Pitt over the course of the weekend after he made his initial verbal disclosure;*
 - (iv) Taking legal advice;*

- (v) *Notifying Mr Buckley of the fact of the Pitt Disclosure and the nature of the issues raised, emphasising the confidentiality of the matter and keeping him informed;*
- (vi) *Arranging for Mr Pitt to place the detail of his disclosure on the record at a meeting overseen by a solicitor on 16 November;*
- (vii) *Notifying the Board that disclosures had been made and obtaining approval for a process for their examination, involving the appointment of a Disclosures Committee;*
- (viii) *Participating in the Disclosures Committee; and*
- (ix) *Applying his knowledge, business acumen, experience and good judgement to carefully evaluate the substance, context and relative likelihood of the matters raised.*
- (p) *On 21 November 2016 the Board was informed of the Pitt Disclosure and decided to establish a committee (the Disclosures Committee) to consider the issues and make recommendations to the Board. This was a reasonable and appropriate response in particular in circumstances where Mr Pitt had rejected a suggestion of an independent process at that stage.*
- (q) *The members of the Disclosures Committee understood the gravity of the matters being alleged, and they understood what was being alleged. The following steps that the Disclosures Committee took in response to the Pitt Disclosure were reasonable and appropriate and within the broad margin of discretion which directors of a company have, having regard to the complex and unprecedented nature of the situation that presented and the implications for the business:*
- (i) *Meeting promptly to consider the matters the subject of the Pitt Disclosure;*
- (ii) *Carefully considering and deciding upon the suggestion that Mr Kennedy might have a conflict of interest;*

- (iii) *Requesting a response from Mr Buckley and meeting with him and his solicitors to consider his response, and questioning him on matters arising from his response;*
- (iv) *Giving further consideration to the matters raised following that meeting; and*
- (v) *Applying their knowledge, business acumen, experience and good judgement to carefully evaluate the substance and context of the matters raised and the relative likelihood of the versions of conversations put forward by Mr Pitt and Mr Buckley, having regard to their knowledge of the personalities involved, the background and all of the relevant facts concerning the relationship between the two individuals and the Company's corporate governance procedures.*
- (r) *The Disclosures Committee were at all times acutely conscious of their obligations as directors to act in the interests of the company. There was a tension between needing to investigate the Disclosure and the need to make decisions quickly so as not to leave the Company at risk of being inoperable due to the breakdown in relations. The Disclosure Committee as part of their consideration of the issue appropriately had regard to the need to stabilise the company's leadership, to prevent damage to INM given the unprecedented situation with which they were faced, and to inform the market of the circumstances that had arisen.*
- (s) *The Disclosures Committee considered but decided not to interview Mr Pitt following hearing from Mr Buckley on the allegations made by Mr Pitt. INM and the NEDs have accepted and acknowledge that it would have been better if the Disclosures Committee, having heard Mr Buckley's response to the allegations had invited Mr Pitt to address them. Any unfairness in failing to hear further from Mr Pitt was however promptly rectified by putting in place the Independent Review, an external process fully independent of the company with Terms of Reference into which Mr Pitt inputted.*

- (t) *The Board's decision on 23 November to adopt the recommendation of the Disclosure Committee was a reasonable one having regard to the experience of the NEDs on the Disclosure Committee and the information available to the Board.*
- (u) *Mr Pitt's prevarication as to whether he would remain with INM, the effective 'vote of no confidence' in Mr Pitt by the NEDs on 19 October, Mr Pitt's threats of litigation against the Company in November and his significant delay in raising issues which he now presented as attempted fraud, led some of the NEDs to question his motivation. It was reasonable that those directors had questions in respect of Mr Pitt's motivation, and it was reasonable for the NEDs to have had regard to that factual background in exercising judgement in respect of the credibility of Mr Pitt's account of what had been said by Mr Buckley. Mr Pitt's motivation in making the disclosure was not, however, relevant to the question of whether or not he had made a protected disclosure within the PDA, and was not treated as such.*
- (v) *The Board and its members at all times acted reasonably and appropriately and within their margin of discretion in handling Mr Pitt's disclosure, having regard to their duties as directors to the Company and in particular, having regard to the unusual and unprecedented circumstances of same including:—*
- (i) *The fact that the protected disclosure was made by the CEO.*
- (ii) *The failure by Mr Pitt as CEO to take any steps prior to making the protected disclosure to address the concerns he had in any or any meaningful manner having regard to his own duties as CEO and director.*
- (iii) *The fact that the allegations involved the CEO, the CFO and the Chairman of the company, effectively making the company inoperable at a commercially sensitive time.*
- (w) *Mr Preston's primary concern in making the Preston Disclosure was to protect his security of employment and his family, given the*

pressure he was under from his CEO. Most of what Mr Preston reported was admitted to be hearsay and was lifted directly from the Pitt Disclosure.

- (x) The Board nonetheless took the Preston Disclosure seriously and determined that it required investigation, and its response to the Preston Disclosure in deciding that it would be included in the Independent Review was reasonable and appropriate.*
- (y) The Independent Review was an appropriate and reasonable response to the Disclosures in circumstances where Mr Pitt was not satisfied with the outcome of the internal process and where the Preston Disclosure also required full investigation. It would be impractical and unreasonable to expect that any process to investigate protected disclosures made to a company or organisation must provide for cross examination.*
- (z) The NEDs worked collaboratively as a Board and with Mr Buckley, and had respect for him in his role as Chairman, and they were also appropriately independent and robust in their interactions with him when circumstances required it.*
- (aa) Mr Pitt remained as CEO of the Company until October 2017. Mr Buckley remained as Chairman until March 2018. Mr Preston remained as CFO until January 2019.*
- (bb) The NEDs were at all times acutely conscious of their duties as directors of INM to the Company and its shareholders and properly discharged those duties in their handling of the Disclosures.*
- (cc) The Board's response to the Disclosures was diligent, responsive and conscientious. It was imperfect procedurally, but it was appropriate and reasonable and within their margin of discretion in all the circumstances. All involved acted in good faith commensurate with their role as non-executive directors. The NEDs were faced with an unprecedented situation presenting significant risk for the Company, with no blueprint to follow, a CEO who rejected an external process and a breakdown of relations at the highest level of*

the organisation. The NEDs each brought their skill, experience, knowledge and judgement to bear in assessing the relative likelihood of the specific matters alleged and obtained legal advice throughout, protecting the Company's interests and those of its shareholders and employees.'

164. In their First Submission, the INM Directors addressed the following issues:

- The Background to the Pitt Disclosure.
- The Pitt Disclosure.
- How the Board responded to the Pitt Disclosure.
- Background to the Preston Disclosure.
- The Board's Response to the Preston Disclosure.

Background to the Pitt Disclosure

165. The INM Directors contended that:

- *'Uncertainty as to whether Mr Pitt would stay in his role at INM formed the backdrop to events in October 2016 and how the Pitt Disclosure presented to Mr Kennedy, who first received the disclosure, the Disclosures Committee and the Board in November 2016.'*
- *'... having regard to the lack of any major strategic acquisitions during his tenure, the evidence given in the Inspection by the members of the Board of what occurred at the Board meeting, the atmosphere at same and the assumption which Mr Preston acknowledged he made as regards the discussion of the NEDs after the meeting, that Mr Pitt must have been aware that his performance as CEO at that stage was under appraisal.'*
- *'... [Mr Pitt] must have seen the writing on the wall after the Board meeting, which likely significantly contributed to the stress he was under in relation to the Newstalk discussions.'*

The Pitt Disclosure

166. Having set out the events leading up to Mr Pitt's meeting with Mr Kennedy on 11 November 2016, including Mr Pitt's interactions with Mr Preston, the INM Directors submitted that:

'... the timeline of events related to Mr Pitt's performance and/or position in INM in the immediate period leading up to the making of the disclosure is highly relevant for a different reason. These facts, together with others, caused the NEDs to question the credibility of Mr Pitt's account of his interactions with Mr Buckley. It is submitted that it is now clear that the principal motivations of Mr Pitt and Mr Preston in making their respective disclosures was to protect their personal positions and that they shared their respective notes before making their disclosures.'

167. The INM Directors contended that, in addition to the statutory and fiduciary duties that Mr Pitt owed as a director of INM (which are considered in Chapter 5), Mr Pitt owed a number of duties in his role as Chief Executive Officer of INM, namely:

- To prevent fraud by ensuring a sound system of internal control had been designed and implemented;
- To report any actual or suspected instance of fraud to the Board;
- In accordance with the INM Risk management policy, to identify risk, assess it, respond, control activities and report to the Board; and
- In relation to the annual accounts of INM, to confirm whether the statements in the accounts were true and to validate the statements in the accounts with regard to corporate governance, risk management and internal control.

168. The INM Directors submitted that Mr Pitt's:

'... decision to escalate matters [by way of protected disclosure] created a highly unprecedented and sensitive situation for the Company and imposed considerable challenges to the Board, the NEDs and the senior management team in relation to the running of the company and the handling of the

allegations made by Mr Pitt against Mr Buckley. Mr Pitt's evidence as to why he proceeded by way of a protected disclosure is consistent only with him having as a primary concern his employment position at that point in time.'

169. Nevertheless, in response to Mr Pitt's disclosure, Mr Kennedy proposed the involvement of an external person to meet with Mr Pitt to establish the facts – which, the INM Directors submitted, was an entirely reasonable and appropriate suggestion – a proposal which Mr Pitt rejected.

170. Mr Kennedy:

- Thought that the suggestion that INM might end up paying over the odds for Newstalk due to pressure from Mr Buckley did not make sense;
- Was surprised at Mr Pitt raising concerns in relation to the APN transaction after such a long period of time; and
- Had never been aware of remarks which could be interpreted as attempts to favour the interests of certain shareholders.

He was nevertheless:

'... clear that it was essential that the specific issues being raised were clear so that they could be properly looked into as a matter of urgency, and he kept an open mind on them as matters progressed, being very mindful of the need to protect the Company's interests, to be fair to both individuals and to ensure that the Pitt Disclosure was properly considered.'

171. Mr Kennedy, therefore, asked Mr Pitt to meet with him and Mr Barton of McCann FitzGerald:

'to formalise his disclosure, including getting precise details of the events relied upon and to give Mr Pitt an opportunity to provide any further information or documents concerning the relevant matters. Mr Kennedy stated, "So far as the information which is troubling you may involve suspicion or allegation or wrongdoing on the part of a person connected with the Company, the Company takes the matter extremely seriously and it will be followed up promptly and, where necessary, investigated in accordance with a clearly defined process." Mr

Kennedy also told Mr Pitt that as he was advised that any process should be independent and confidential, he considered that it should not be brought to the Board at least until the initial phase of the process had been completed.'

How the Board responded to the Pitt Disclosure

172. The INM Directors submitted that:

'In considering how the Board responded to the Pitt Disclosure the applicable legal framework is important. Each of the NEDs owed duties as directors of the company to INM and its shareholders under the Companies Act 2014 and at common law. They had obligations to act in good faith and in the interests of the company. The NEDs were acutely aware of these obligations. It is submitted having regard to the evidence there can be no doubt but that the NEDs acted at all times in accordance with their duties as directors. Mr Pitt was also a director of the company and he owed the same duties to act in good faith and in the interests of the company.'

There was no legislative prescription in the PDA as to how a plc should deal with a protected disclosure. The NEDs treated the disclosure as a protected disclosure at the time (though as noted above it is submitted as a matter of law it did not meet the definition) and in that context were cognisant of the PDA. It was at the time a novel piece of legislation. The handling of the protected disclosure clearly did not contravene the PDA.'

173. The INM Directors emphasised that:

'INM was faced with an urgent, unprecedented situation following the Pitt Disclosure. It was unprecedented to have the CEO of a listed company making very serious allegations of dishonesty and potential fraud against a chairman. This presented significant risks to the company, its employees and its share price. There was no available blueprint for dealing with a disclosure made at that level in a listed company.'

Separately, but just as concerning for the company, Mr Pitt and Mr Buckley's working relationship had broken down, with Mr Pitt refusing to attend 1-to-1 meetings with Mr Buckley, leaving no one to run the business, and there was a significant risk of litigation.'

174. The INM Board met on 21 November 2016 and appointed a Sub-Committee to consider the issues arising from Mr Pitt's disclosure.

175. Mr Pitt criticised the fact that eleven days had elapsed between when he made his protected disclosure and that meeting. The INM Directors submitted that:

'that is an entirely unjustified criticism. As explained above, Mr Kennedy reacted reasonably and appropriately in the steps he took immediately following the disclosure on 11 November 2016 and then on 16 November 2016.'

The Sub-Committee's consideration of Mr Pitt's disclosure

176. The Sub-Committee's first step was to consider whether Mr Kennedy was conflicted, and so should not be a member of the Sub-Committee. It concluded that he was not conflicted.

177. The Sub-Committee met twice – on 22 and 23 November 2016. At the first meeting, it concluded that:

'the matters raised comprised one core issue (around discussions concerning a transaction that was under contemplation) and two subsidiary issues (one relating to a suggested fee associated with a transaction in 2015...) and perhaps also a general complaint in the nature of bullying, although it was noted that any such complaint can be dealt with through the ordinary grievance procedure.'

178. The members of the Sub-Committee were cross-examined extensively in relation to the meeting on 23 November 2016, the themes of such cross-examination being:

- *that they did not properly understand and consider the seriousness of the issues Mr Pitt had raised;*
- *that they had incorrectly, or inappropriately, had regard to their assessment of Mr Pitt's credibility and/or motivation and/or the context against which he had made the disclosure; and*
- *that it was inappropriate for them to have at the end of the meeting moved to discuss the termination of Mr Pitt's position as CEO.*

179. The INM Directors rejected these criticisms and explained the careful approach that the Sub-Committee had taken. In support, they relied on the following:

- The Sub-Committee decided not to interview Mr Pitt on the basis that the facts were not in dispute – other than a stark difference in the accounts of what Mr Buckley had said to Mr Pitt.

Although the Independent Reviewers concluded that in adopting that approach, Mr Pitt was not afforded adequate fair procedures, the INM Directors asserted that that decision was taken in good faith and in difficult circumstances. They asserted that any unfairness to Mr Pitt arising from the failure to interview him was cured by the subsequent Independent Review.

- Having noted that there was no suggestion that the acquisition of Newstalk would have been an unsuitable transaction, that Davy had been retained to provide independent advice, and that a request for an indicative offer had been correctly resisted, the Sub-Committee focussed on the fact that by late October 2016, there remained a significant gap on price and a call would have to have been made about whether the negotiations were going further.

In the Sub-Committee's view, it was understandable that Mr Buckley would try to bottom out how far the Company might go by reference to Mr Pitt's assessment and the Davy advice to judge whether there was a genuine prospect of doing the deal or not.

- The Sub-Committee had noted:

‘that at the heart of the issue was Mr Pitt’s assertion that Mr Buckley at this point had pressurised him to move his recommendation from €18 million which Mr Pitt had indicated was his maximum valuation of the asset subject to significant due diligence to the IBI valuation. The clarification from Mr Pitt to the attendance note of the meeting with Mr Kennedy and Mr Barton in McCann FitzGerald on 16 November 2016 made it clear that his assertion was that Mr Buckley pressurised him to move his own valuation to the IBI €26.8

million figure. The Committee noted that Mr Buckley vehemently denied making that request.'

- The Sub-Committee noted its own limitations. It was not engaged in a detailed forensic exercise. It did not have the power to cross-examine. In those circumstances it took the view it was appropriate and reasonable to consider the probability of each version of events. In doing so:

'the fundamental difficulty it had with Mr Pitt's assertion about the Newstalk matter was that it was obvious that if any such plan as alleged by Mr Pitt had existed on the part of Mr Buckley to inflate the price of Newstalk, it could not possibly have worked. This deeply impacted the Committee's view of the credibility of Mr Pitt's account. If the transaction were to progress it would have to be considered and approved by the M&A Committee, the board and shareholders. Davy had provided an independent expert valuation and had not moved it significantly. On Mr Pitt's own account, Davy were adamant that their valuation would not change. The M&A Committee and the Board would in the normal way place a heavy reliance on an independent expert valuation commissioned by the company itself. Any management valuation which was inexplicably at odds with the Davy valuation would have been discounted. The Committee also noted that, as the particular transaction required shareholder approval, there would have to be a circular to shareholders providing detailed disclosure and information provided on valuation matters including a fair and reasonable report from Davy. The Committee took the view Mr Pitt's account was based on a mistaken premise, namely that more significance might be attached to his own valuation than would in reality have been the case and a lack of appreciation of the control procedures that would apply. The Committee formed the view that there was simply no incentive for a person as experienced as Mr Buckley to behave in the manner alleged in the circumstances and that it would have been illogical for him to have done so. In particular, the Committee concluded that in the context and the circumstances, Mr Buckley's account of the sequence of events was considered by the Committee to be more credible and more likely.'

○ While other issues including APN were considered, it was reasonable for the Sub-Committee to have as its primary focus the allegations concerning Newstalk, as that was the focus of Mr Pitt’s disclosure.

○ The Sub-Committee’s consideration of the correct issues:

- The Sub-Committee had addressed an allegation that Mr Buckley *‘was effectively involved in fraudulent intent’* – and had not focussed solely on whether INM had suffered actual harm.

This was evidenced by Dr O’Hagan’s explanation that the issue:

‘eventually came down to one man’s word against another man’s word and how we interpreted those two opinions’.

and that from his perspective the nub of the allegations did not ring true to him and the evidence did not appear to bear out what was being alleged.

He noted that although Mr Buckley could be very robust and challenging there was never any occasion on which he felt any pressure as a member of the board to favour Mr O’Brien in any way. That personal experience informed his views in terms of how the Board should respond to the disclosure.

- The Sub-Committee had appreciated that it was the fact that improper pressure had been alleged that was important – not whether the alleged improper pressure had succeeded.

In the Sub-Committee’s view, the fact that any attempt to apply improper pressure could not have succeeded, because of the protections in place within INM, was relevant to its assessment of whether it was credible that Mr Buckley would have acted as alleged.

- In circumstances where the Sub-Committee was not able to resolve the conflict in the evidence before them, the Sub-Committee proceeded by assessing the probability of which version was likely correct based on their experience and knowledge of the context. That assessment of the credibility of the allegations was an exercise of judgement, weighing the relative probabilities of the respective accounts of what was said.
- The Sub-Committee was influenced by the fact that these allegations were being raised by Mr Pitt for the first time in his protected disclosure and had not been raised by Mr Pitt with the Board previously, notwithstanding that he was CEO. It was influenced also by the fact that the APN issue related to a transaction that had happened more than a year previously and that Mr Pitt had made no complaint of fraud or allegations of wrongdoing in the intervening period.
- The Sub-Committee recognised that Mr Pitt's motivation in making a disclosure was not relevant to whether that disclosure met the requirements of the PDA.

However, as it was entitled to when considering the information presented by Mr Pitt, the Sub-Committee had had regard to the relevant background (including timeline) against which this information was presented in assessing the credibility and/or truth of the information presented.

180. The INM Directors submitted that a Board has a significant margin of discretion within which to act in accordance with what the directors subjectively consider to be in the best interests of the Company and that the Sub-Committee was doing its best under pressure to deal with an unprecedented situation. They submitted that:

'[i]t is clear from their evidence that they were acutely concerned of the risks to the Company, its employees and shareholders which the fundamental breakdown in relations presented and that their view was they had to make a judgement call based on the information available to them. In their evidence they explained that it was difficult situation for the Company and that the need

from the perspective of the interests of the Company to act decisively and quickly was something of which they were very conscious. There was also in the background the risk that information could leak and cause damage to the Company or that the requirement for a market announcement would be triggered. Media enquiries had been received in relation to an allegation of a dispute between the Chairman and CEO and the Board were being advised in relation to the necessity or otherwise of making an announcement to the market. Thus, the consideration of Mr Pitt's disclosure was taking place against a pressurised background for the Company.'

181. They asserted that:

'[i]t cannot be the case that a company (or its directors) faced with a serious allegation of fraud arising in the form of an alleged statement, which statement is directly contradicted by the accused, is under an obligation to establish an inquiry equipped with powers of cross examination to investigate and resolve that allegation. Clearly an allegation of fraud is one that must be taken seriously. There is no doubt that the Board of INM (and the Committee) recognised that. Given the precarious situation faced by the Company at the time and the need to ensure that the interests of the Company were protected, it was reasonable for the Committee to adopt the approach that it did to the assessment of the conflict.'

182. Against that background, the INM Directors submitted that the approach taken by the Sub-Committee of assessing the likely credibility of the respective accounts was a reasonable one.

183. The INM Directors contended that, in circumstances where:

- the Non-Executive Directors had lost confidence in Mr Pitt and had unanimously concluded that he was not the person to lead the Company forward; and
- there was a genuine concern that there was a possibility of the Company becoming inoperable as a result of the breakdown in relations between Mr Pitt and Mr Buckley.

It was reasonable that the Sub-Committee would discuss the termination of Mr Pitt's employment in circumstances where they were attempting to protect as best they could, the interests of the Company and its shareholders in a very difficult situation and in circumstances where they had decided they were satisfied there was no evidence of wrongdoing.

184. In conclusion, the INM Directors submitted that:

'the Investigation cannot lose sight of the fact that there was a tension faced by the Committee between the urgent need to investigate the allegations and the need to make decisions quickly so as not to leave the company effectively inoperable. Understandably, these concerns weighed heavily. The Committee gave considerable weight to the need to stabilise the company's leadership and prevent damage to INM and to take what Mr Kennedy described as a "pragmatic and commercial" approach to the difficult decisions the Disclosure committee and the board faced. That response was reasonable and understandable given the unprecedented and sensitive situation faced by the Committee members, having regard to the duties they owed to the Company.'

The INM Board meeting on 23 November 2016

185. The INM Directors submitted that the INM Board:

'when faced with a protected disclosure by its CEO against its Chairman alleging potential fraud by the latter in relation to the proposed Newstalk acquisition, was faced with an unprecedented and highly sensitive situation. It imposed considerable challenges to the Board and the NEDs in relation to the running of the company and the handling of a serious whistleblowing allegation.

The [Sub-Committee] and the Board as a whole sought to discharge their duties to INM in good faith, with care and with the benefit of legal advice. They sought to consider the factual allegations made, deal with the matter as expeditiously as possible and treat the key participants fairly. Mr Kennedy, in particular, sought to try and repair a key relationship — that between Chairman and CEO — so as to protect the best interests of the Company. There were a number of unusual circumstances which made their tasks difficult, for example:

(a) *the fact that the Protected Disclosure was made by the CEO.*

- (b) *the failure by the CEO to take any steps prior to making the Protected Disclosure to address the concerns he had in any or any meaningful manner.*
- (c) *the fact that the allegations involved the CEO, the CFO and the Chairman of the company, effectively making the company inoperable at a commercially sensitive time.*

While the process may not have been perfect, viewed in aggregate it is clear that the response of the Board and individual directors as a whole was a reasonable response in fulfilment of their duties as directors and in particular their duty to act in the interests of the Company as a whole.'

Background to the Preston Disclosure

186. The INM Directors submitted that Mr Preston:

- Was under considerable pressure during October and November 2016 due to a heavy workload (INM's pensions restructuring and capital restructure) and from the Chairman's desire to progress the negotiations with Communicorp quickly.
- On learning that Mr Pitt had taken legal advice in relation to Mr Buckley's conduct in relation to the proposed acquisition of Newstalk, became very worried that any steps Mr Pitt might take to draw matters to the attention of the Board might impact his own security of employment.
- Told Mr Kennedy, on 14 November 2016, that he was under pressure from Mr Pitt to make a protected disclosure. Although Mr Preston denies that he told Mr Kennedy that, the INM Directors submitted that Mr Kennedy's evidence should be preferred.
- Approached Mr Kennedy before the meeting at McCann FitzGerald's offices on 16 November 2016 to say that he felt very exposed, that he would like to meet Mr Kennedy after the meeting and that he intended also to make a protected disclosure due to his discomfort. Following the meeting, Mr Preston spoke with Mr Kennedy and Mr Barton and told

them that he was concerned that he should make a protected disclosure. They told Mr Preston that they could not advise him.

- Was informed by Mr Pitt that he had made a disclosure to the ODCE on 18 November 2016 in the course of which he had included Mr Preston so that he would be protected.
- Expressed concern, following the Board meeting on 24 November 2016, that he could be impacted the longer the tense atmosphere between Mr Pitt and the Board continued.
- Met with Dr O'Hagan on 28 November 2016, in the course of which Dr O'Hagan said that he was concerned that Mr Preston might be caught as 'collateral damage' in the ongoing situation. Dr O'Hagan formed the clear impression that Mr Pitt was putting pressure on Mr Preston to make a protected disclosure. However, Dr O'Hagan formed the view that Mr Preston was reluctant to make a protected disclosure and that his motivation was concern about his family and his position.
- Made a verbal disclosure to Dr O'Hagan on 5 December 2016, dealing with what he knew about Newstalk. Dr O'Hagan told the Inspection that his clear impression from this meeting was that Mr Preston:

'was more concerned about his own position than the issues being raised, having been urged to make disclosures by the CEO. This was entirely understandable as he was in a very difficult position and was very stressed about the implications for him and his family if he didn't make disclosures that the CEO had asked him to make.'

Mr Preston told the Inspection that Dr O'Hagan's interpretation was *'probably a fair statement'*.

The Board's response to Mr Preston's Disclosure

187. On 7 December 2016, the INM Board resolved that the Sub-Committee should consider the matters raised by Mr Preston. The Sub-Committee then resolved that Mr Preston's disclosure should be considered in the context of the external

Independent Review that the Board had resolved should consider Mr Pitt's disclosure (see below).

The Independent Review

188. On 24 November 2016, Daniel Spring & Co wrote on behalf of Mr Pitt to say that unless INM engaged an appropriate expert independent of the parties to conduct a full and proper inquiry into Mr Pitt's protected disclosure, Mr Pitt would initiate a complaint in accordance with INM's grievance procedure. On 30 November 2016, Daniel Spring & Co wrote requesting a proper investigation and said that proceedings would be issued in the absence of agreement to that request.
189. On 5 December 2016, McCann FitzGerald advised Daniel Spring & Co that the Non-Executive Directors intended to establish a review of the matters raised by Mr Pitt. That review was approved at an INM Board meeting on 7 December 2016.
190. The Terms of Reference for the Independent Review were shared with Daniel Spring & Co and A&L Goodbody and, in due course, finalised and sent to the relevant parties and to the Independent Reviewers on 23 December 2016.
191. McCann FitzGerald approached a number of Senior Counsel to carry out the Independent Review. Although there were discussions between Mr Buckley and Mr O'Brien about the persons being considered, the INM Directors were not aware that such discussions were taking place. On 14 December 2016, McCann FitzGerald advised Daniel Spring & Co and A&L Goodbody that Mr David Barniville SC and Mr Stephen Kingon FCA had been retained as joint independent reviewers.
192. The Independent Reviewers interviewed and received submissions from Mr Pitt, Mr Preston, Mr Buckley, Mr Kennedy and Mr Murphy. Cross-examination was not provided for.
193. The Independent Reviewers delivered their report on 25 July 2017. They reached similar conclusions to those reached by the Sub-Committee. They could not reach a conclusion as to whether there had been a breach of applicable principles of corporate governance given their inability to resolve the conflict of evidence between Mr Pitt and Mr Preston and Mr Buckley.

194. Having seen the conclusions reached by the Independent Reviewers, Mr Preston told Dr O'Hagan that he wanted to move on and he asked Dr O'Hagan to advise the Board that he, Mr Preston, had told the truth.
195. Subsequently, Mr Preston met Mr T Buckley in a coffee shop. There is a difference in recollection between Mr Preston and Mr Terry Buckley as to what occurred. Mr Preston said that Mr Buckley told him that he had no future in INM. Mr Buckley said he did not tell Mr Preston that but rather he was trying to reach an agreement that would help Mr Preston. Mr Buckley when cross examined on this conversation explained he was acutely aware at the time of the protections which the PDA afforded to a person who made a protected disclosure and having regard to that he simply would not have spoken to Mr Preston in the terms suggested by him. The INM Directors submitted that for the reasons given by Mr Buckley in his evidence, his recollection is more likely to be correct as regards what he said.
196. The INM Board met on 9 August 2017 and resolved that the Independent Review Report be adopted and accepted and determined that its consideration of Mr Pitt's allegations be treated as concluded. In accordance with the Independent Reviewers' recommendation, it mandated McCann FitzGerald to enter into without prejudice discussions with those advising Mr Pitt and Mr Preston to establish whether a resolution to the issues could be found.
197. The INM Directors submitted that:

'to the extent there is any criticism that there was a failure to initiate a sufficiently thorough investigation at the outset that was cured by the establishment of the Independent Review. That review was established at significant cost to the Company and was an appropriate and reasonable response by the Directors in the context of their handling of the disclosures.'

(iii) Mr Pitt

198. Mr Pitt submitted that as the PDA does not set out any particular process which must be followed by an employer on receipt of a protected disclosure,

'proper corporate governance would demand that the making of a protected disclosure by a CEO in relation to the activities of the Chairman would warrant immediate independent investigation of a very thorough nature. What

happened in this case however was the very opposite and there was an immediate attempt to treat Mr Pitt as a wrongdoer to protect not the Company but Mr Buckley. This is evidenced in the way the Sub-Committee dealt with its work, the manner in which Mr Buckley and others interfered with the selection of the independent reviewers and perhaps most egregiously, the manner in which the confidentiality provisions of the Protected Disclosures Act 2014 were breached from the earliest dates. It is quite extraordinary when one reads in particular the evidence of Mr Buckley that his first port of call seems to be to Mr O'Brien even though part of the protected disclosure expressly related to what appeared to Mr Pitt to be inappropriate conduct by Mr Buckley vis-à-vis the interests of Mr O'Brien.'

199. Mr Pitt submitted that:

'there were a number of breaches of the legislation in the manner in which his protected disclosure was dealt with:

- (i) The failure to acknowledge the making of the protected disclosure;*
- (ii) The failure to protect the identity of Mr Pitt as the maker of a protected disclosure;*
- (iii) The failure to take appropriate steps on foot of the matters raised by Mr Pitt, in particular, failing to bring the matter to the attention of the Board in a timely manner;*
- (iv) The immediate discussion of dismissal of Mr Pitt in the course of considering his protected disclosure;*
- (v) The other actions of penalisation including unfair treatment following the making of his protected disclosure;*
- (vi) The failure to afford Mr Pitt fair procedures in considering his protected disclosure;*
- (vii) The multiple failings of the Sub-Committee discussed below;*
- (viii) The issues with the Independent Review discussed further below; and*

(ix) The Company continuing to maintain, during cross-examination before the Inspectors, that Mr Pitt did not make a protected disclosure.'

The matters relied upon by Mr Pitt are summarised below.

The failure to take appropriate steps at the outset

200. Mr Pitt criticised the fact that, when his protected disclosure was initially dealt with:

- Mr Kennedy's initial reaction was to meet with Mr Buckley, before seeking legal advice, to inform him of the allegations, and to agree with him the way forward. Mr Kennedy's priority was to resolve a relationship breakdown between the Chairman and the Chief Executive Officer rather than to deal with the matters raised by Mr Pitt.

When Mr Kennedy was asked, in his position as a director, as Chair of the Sub-Committee, and as Senior Independent Director, which took precedence – the investigation of actions that were targeted at misusing Company funds or the management taking the Company forward and managing the situation with the Chief Executive Officer and the Chairman, he did not directly answer the question and stated, inter alia, that this was a hypothetical question and that he and the Company reacted to a situation as it unfolded.

- Although Mr Pitt requested that Mr Kennedy bring the matter to the attention of the Board on numerous occasions, he delayed in doing so and did not bring the matter to the Board for a period of 10 days.
- Mr Kennedy excused part of that delay on the basis that he was required to first determine whether Mr Pitt had in fact made a protected disclosure notwithstanding that, under the PDA, there is a presumption that a disclosure is a protected disclosure until the contrary is proved.

The change to Mr Pitt's allegation in relation to the role of Island Capital

201. Mr Pitt submitted that the focus on his allegation that Island Capital provided 'no service' in relation to the APN transaction changed materially after it was changed in the McCann FitzGerald attendance note of the meeting on 16 November 2016 to

being that Island Capital added *'no value'* to the transaction. The articulation of his allegation as being that Island Capital added no value was relied upon heavily in rejecting his concerns at the Sub-Committee, the Independent Review and during the Inspection.

The failings by the Sub-Committee

202. Mr Pitt submitted that there were multiple breaches and failings in the manner in which the Sub-Committee treated his protected disclosure:

- (a) The manner in which the allegation of Mr Kennedy having a conflict was dealt with.

Although Mr Kennedy advised the Sub-Committee that the conflict was raised on the basis that he had been involved in certain conversations during the sequence of events which the Sub-Committee had been established to consider, the Sub-Committee concluded that Mr Kennedy was not conflicted as he was not a party or witness to any of the central conversations involving Mr Pitt and Mr Buckley.

However, Mr Kennedy did not advise the Sub-Committee, and so the Sub-Committee was not informed, that he had personal knowledge of the matters raised by Mr Pitt, including that:

- He was one of a very limited number in INM who were aware of the Newstalk negotiations and had had direct conversations with Mr Pitt in relation to his concerns about Newstalk and Mr Pitt's conversations with Mr Buckley.
 - Mr Buckley had sent the email attaching the Island Capital engagement letter to both Mr Pitt and Mr Kennedy, and Mr Pitt had had conversations with Mr Kennedy in relation to the proposed payments.
- (b) The Sub-Committee's immediate consideration of Mr Pitt's motivation for making a protected disclosure.

(c) The failure of the Sub-Committee to provide Mr Pitt with an opportunity to put forward his position.

- At the initial meeting of the Sub-Committee on 22 November 2016, it was decided that Mr Buckley should be invited to attend before the Sub-Committee. Subject to his response, the Sub-Committee would consider whether Mr Pitt would be required to attend before the Committee or provide a written response to any matters raised in the Chairman's response.
- On 23 November 2016, the Sub-Committee gave Mr Buckley an opportunity to address the Sub-Committee, received his statement and answered questions.
- The Sub-Committee did not offer the same opportunity to Mr Pitt, despite having raised the question of whether it should do so.
- The Sub-Committee concluded that:

'While it would not be uncommon to put the Chairman's statement to the CEO for reply, the points actually in issue revolved solely around a small number of unminuted conversations between the CEO and the Chairman in which the CEO alleged that the Chairman had made certain statements and the Chairman denied that he had made. Plainly, the expectation would be that the CEO would refute the denials, and a sequence of refutations and counter-refutations would not seem likely to advance matters'

- Although Mr Barton indicated that the Sub-Committee would be in touch with Mr Pitt to progress matters, Mr Pitt was never called before the Sub-Committee and the Sub-Committee simply reported back to the Board on the following day without contacting Mr Pitt.
- (d) The Sub-Committee's discussion of Mr Pitt's performance with Mr Buckley.

Mr Pitt submitted that the discussion of his performance was outside the Sub-Committee's Terms of Reference.

- (e) The Sub-Committee's failure to interview relevant witnesses or seek additional evidence.

Mr Pitt submitted that, in relying on the personal knowledge of the members of the Sub-Committee, the Sub-Committee failed to adequately investigate the matters he raised.

- (f) The Sub-Committee's detailed consideration of the termination of Mr Pitt's employment.

Mr Pitt submitted that the most egregious and blatant breach of the legislation by the Sub-Committee was the prolonged discussion of and steps taken in relation to the summary termination of Mr Pitt.

- (g) The Sub-Committee's meeting with Mr Buckley at which Mr Buckley was advised of the Sub-Committee's decision before that decision had been reported to the Board.

This meeting had been arranged between Mr Kennedy and Mr Buckley before the Sub-Committee met with Mr Buckley on 23 November 2016. This is evident from the attendance note of that meeting which records that:

'TB said that they might not have a meeting the next day and that they would need to discuss this with LB. JK informed the others that LB would meet them at the offices of McCann FitzGerald at 16:45.'

Mr Pitt contended that this compromised the integrity of the Sub-Committee's handling of Mr Pitt's protected disclosure.

- (h) It is unclear how the final decision of the Sub-Committee was taken.

In circumstances where, by email at 16.34, Mr Barton wrote to Mr Inverarity:

‘It would be of enormous assistance if you could send me any revised version of Mr Buckley’s statement/submission as soon as possible for circulation to the committee as they are anxious to conclude their deliberations this evening if they can.’

and a revised version of Mr Buckley’s statement to the Sub-Committee had not been provided to the Sub-Committee at 17.32, it is unclear when the Sub-Committee reached its final decision and, therefore, how it could have advised Mr Buckley of its decision at 16.45.

This issue is compounded by the conflicting evidence given to the Inspection as to whether the meeting at 16.45 was a further meeting of the Sub-Committee or an ad hoc meeting of directors of INM.

- (i) The Sub-Committee met only twice, over the course of two days, despite the gravity of the allegations.

Mr Pitt submitted that:

- The work carried out by the Sub-Committee was inadequate, both in substance and in terms of the time spent in the consideration of the issues.
 - This was particularly so in circumstances where the Sub-Committee dismissed all allegations of wrongdoing.
 - It did not recommend to the Board, for example, that it did not have adequate resources to investigate the issues raised (as later stated by Mr Kennedy in evidence), but was satisfied after its limited investigation to dismiss Mr Pitt’s concerns in their entirety.
- The evidence establishes that the priority of the Sub-Committee (and indeed of Mr Kennedy from the time of the making of the protected disclosure) was to resolve the issue of

the relationship breakdown between Mr Buckley and Mr Pitt, and not to deal with the serious matters raised by Mr Pitt.

In support of this submission, Mr Pitt relied upon Mr Kennedy's evidence:

'I suppose when we were setting it up with the Board, we kind of put ourselves into a straitjacket saying ... 'there's a job to be done here and the Board want it done ASAP' ... I mean these are people who fly in/fly out, do other things or whatever. They weren't going to be sitting around for six, seven, eight days dealing with something. They were doing a very quick, business-like review to feed back to the Board, "This is how we see it".'

"The Sub-Committee was asked to do a job on behalf of the Board, without any resource.'

'Well I think I said earlier it was just a businessman's review of "well, let's get a bit more information from these two people as to what exactly is going on and what's behind all of this".'

'Well, if you just look at the individuals who were involved, you had businessmen/NEDs meeting, getting whatever information was available to them. We couldn't add anything more other than what our background was. And we didn't have, as I say, any investigative reports coming to us, any forensic reports coming to us or any much more detail. And when you consider what has subsequently been necessary to get a full understanding of all of what was going on, it took months and months and months, with a lot of resource.'

- (j) The Sub-Committee's failure to prepare and approve minutes of its meetings, notwithstanding the explicit requirement to do so in its Terms of Reference.

203. Mr Pitt expressed concern at a number of matters that arose in the course of the discussion at the INM Board meeting held on 23 November 2016 to consider the Sub-Committee's report.

- When Mr Harrison queried whether any evidence regarding Island Capital, Mr Connolly said that he believed there had been an email from Mr Hayes to Mr Preston.
- Mr Kennedy did not address the issue of his independence and the conflict adequately.
- Mr Kennedy reported that the Sub-Committee had concluded that Mr Pitt's disclosure *'did not amount to a PD'*.

204. Mr Pitt also expressed concern that Mr Buckley had received preferential treatment in the course of the establishment of the Independent Review. In that context, he referred to:

- (i) The fact that Mr Buckley was afforded the opportunity to comment on and veto names suggested for appointment as Independent Reviewer;
- (ii) Mr O'Brien's involvement in the appointment of Independent Reviewers;
- (iii) The fact that Mr Buckley had suggested the appointment of a commercial person in addition to a legal person, a suggestion which Mr Byers appears to have accepted;
- (iv) The failure by the Company to afford Mr Pitt any similar opportunity;
- (v) The involvement of Mr Ivan Murphy in the Independent Review and the circumstances by which he offered to attend before the Independent Reviewers;
- (vi) The failure to make provision for cross-examination; and
- (vii) The failure of INM to make available witnesses with relevant evidence, such as Mr Paul Connolly.

205. Mr Pitt submitted that, in breach of section 16(1) of the PDA, Mr Buckley disclosed the fact that Mr Pitt had made a protected disclosure to, and discussed that disclosure with, Mr O'Brien, Mr Shorthouse, Mr Molloy, Mr Michael Walsh, Mr Heneghan and Ms Gaffney. Mr Morrissey and Mr Murphy also became aware of Mr Pitt's protected disclosure.
206. Mr Pitt concluded his submission by requesting the Inspectors to find that:
- (a) He made a protected disclosure within the meaning of the legislation and that having done so he was entitled to all the protections afforded by the PDA.
 - (b) There were several breaches of the PDA adverse to Mr Pitt including a significant breach of the confidential provisions of the legislation together with a near total failure on the part of the Company and its non-executive directors to deal properly or adequately with the matter.
207. Having received copies of the First Submissions filed by other parties, Mr Pitt was permitted to reply to those First Submissions.
208. In his introduction to his Second Submission, Mr Pitt submitted:

The Inspection is not litigation between Mr. Buckley (supported by the Company, its non-executive directors and others) and Mr. Pitt. Although one might think it so when it is recognised that Mr. Pitt (and to a somewhat lesser degree Mr. Preston) was subjected to cross-examination by practically every other interested party. Compare that to the limited amount of cross-examination of Mr. Buckley. It is extraordinary that the non-executive directors thought it appropriate to cross-examine Mr. Pitt and challenge his truthfulness and the legitimacy of his protected disclosure, yet decided not to challenge, by way of cross-examination, Mr. Buckley. Neither did the Company seek to cross-examine Mr. Buckley even though it had commenced litigation against Mr. Buckley in relation to some of the matters the subject of the investigation. Equally it is noteworthy that many of the other witnesses were not cross-examined by Mr. Buckley, the non-executive directors or the Company and much of the cross-examination by Mr. Pitt and/or Mr. Preston was not challenged in many instances by Mr. Buckley or the Company.

Many of the parties, including and in particular Mr. Buckley, the non-executive directors and the Company, have sought to turn the Inspection process into an attack on Mr. Pitt on the basis that they seek to undermine him as the principal witness who has brought to the attention of the authorities very serious matters. They do not like the message, so they have decided to attack the messenger. The Inspectors have however now available to them a wealth of evidence not previously known by Mr. Pitt, the Subcommittee, the Independent Reviewers or the Board of INM.'

(iv) Mr Preston

209. In his First Submission, Mr Preston contended that in its handling of his protected disclosure INM had breached the PDA in the following respects:

Section 12(1)

210. Mr Preston submitted that he was threatened with penalisation in breach of section 12(1) of the PDA on 11 December 2016 and 27/28 July 2017.

11 December 2016

211. Mr Preston submitted that he had every reason to be fearful for his employment with INM in circumstances as was demonstrated when it became known that Mr Buckley and Mr O'Brien had agreed that he should be removed from his employment by reason of having made a Protected Disclosure.

212. The agreement between Mr Buckley and Mr O'Brien is evidenced in the following text exchange that took place on 11 December 2016, 6 days after Mr Preston made his Protected Disclosure.

'Leslie, This storm will pass. I know it is awful for you and Carmel but we need to play the long game. This will put pressure on the two malcontents....Ultimately we have to get them out and pay them.'

'Dear Denis thanks and I agree with your comments.'

213. Mr Preston submitted that:

- This exchange is unambiguous evidence of an agreement between Mr Buckley (the Chairman of INM) and Mr O'Brien (the majority shareholder in INM) that Mr Preston (and Mr Pitt) should be removed from their positions of employment in INM due to the fact that they had made protected disclosures.
- That agreement constitutes an act or omission which exposed Mr Preston to detriment consisting *inter alia* of unfair treatment contrary to section 3(1)(e), and/or the threat of reprisal, contrary to section 3(1)(i) of the PDA.
- Accordingly, that agreement between Mr Buckley and/or INM constituted a threat of penalisation contrary to section 12(1) of the PDA:

'An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure.'

214. Mr Preston submitted that Mr Buckley's wrong doing is compounded by the fact that he gave a demonstrably false and misleading version of events to the Independent Reviewers in relation to this issue at a time when his text exchanges with Mr O'Brien had yet to be disclosed. Specifically, Mr Buckley stated to the Independent Reviewers on 24 February 2017 that:

"I am saddened to read that for some reason the CFO was concerned for his employment. I do not believe that I have treated the CFO any differently throughout this matter, notwithstanding our significantly differing views on it. I refer to my relatively recent praise of his work in respect of the pensions issue. I have never done or said anything which might justify him having concerns for his employment."

27/28 July 2017

215. Mr Preston also submitted that, on 27 July 2017, at a meeting with Mr T Buckley, he was placed under illegitimate pressure and his employment was threatened, contrary to section 12(1) of the PDA.

216. Mr Preston's evidence in support of this allegation was as follows:

I had a meeting with Terry Buckley on 27th, which occurred in the Tossed Salad bar in the IFSC, where Terry pretty much said 'You're going. You can work for six months and then you get your payment in lieu of notice, which is contractual, so six months'. So I was in a place where I was losing my salary in 12 months, which wasn't great with a mortgage and two kids. So I was just like... But part of me just wanted to get out of the process and away from the individuals involved and the board, I was just sick of it. I then had a meeting with Leslie on 28th, so the next day, where he reiterated my contract would be terminated in 12 months. Nothing was ever put in writing, but there was two clear verbal messages. I suspect nothing was put in writing because I asked 'Well, can I have it in writing' and when they wouldn't put it in writing, I knew they knew they were doing something wrong, because they wouldn't put it in writing and they skirted round it. Then I met Jerome Kennedy on, I think, 8th August and again Jerome was 'Don't mention this. Get out of the firing line. Keep your head down and accept anything offered to you'. So that's Leslie, Jerome and Terry had all pretty much said 'Just keep your head down and get out of there'.

217. Mr T Buckley denied having informed Mr Preston that he would be permitted to work with INM for only a further limited period of 6 months. His evidence in relation to the meeting of 27 July 2017 was that he had been sent on behalf of INM to “mediate” with Mr Preston in relation to his employment.

218. When asked what issue existed in relation to Mr Preston's future, Mr T Buckley replied:

I just think - at the time I just think he needed clarity about it. You know, I was thinking he was under the stage was he going to leave and, you know all I was doing was trying to help him, and I was saying "if I was you, and you're thinking of leaving", or that was - "don't leave now. Put some water between the report. You've have a long career ahead of you.'

He suggested that the basis for his alleged attempt to mediate derives from the report of the Independent Reviewers dated 24 July 2017.

219. Mr Preston submitted that this explanation was not credible for three reasons:

- He had not intimated any desire to leave and no representative of INM had suggested that he had. There was, therefore, no basis for the suggestion that Mr Preston would have wished to enter into an agreement for his employment to be terminated or otherwise limited.
- The INM Board did not consider the Independent Review Report until 9 August 2017. He submitted that it is not credible that Mr T Buckley sought to mediate with Mr Preston before the Report had been considered by the INM Board.
- The Independent Review Report recommended mediation *‘to restore relations among those concerned’* – not to terminate the employment of any employee.

220. Mr Preston noted that when Mr Buckley was asked about the meeting with Mr Preston on 28 July 2017, Mr Buckley did not deny telling Mr Preston that he would have to leave INM – he said that he did not recall the meeting.

221. Mr Preston submitted these threats to Mr Preston’s employment by two Company directors in the aftermath of the report of the Independent Reviewers were plainly linked to his protected disclosure and constituted threats of penalisation contrary to section 12(1) of the PDA.

Section 16(1)

222. Mr Preston submitted that his identity as a person by whom a protected disclosure had been made was disclosed in breach of section 16 of the PDA:

- On 9 December 2016, when Mr Buckley sent an email to Mr O’Brien to which was attached a draft response to Mr Preston’s protected disclosure; and
- On 11 December 2016, in the text exchange referred to in paragraph 212 above.

D. Our Conclusions

223. Mr Pitt made his disclosure to Mr Kennedy on 11 November 2016. Mr Preston made his disclosure to Dr O'Hagan on 5 December 2016.
224. The two disclosures were handled differently. INM established a Sub-Committee of the Board to consider Mr Pitt's disclosure and, following complaints about the procedure adopted by the Sub-Committee, appointed Independent Reviewers to consider the issues raised by Mr Pitt in his disclosure. After Mr Preston made his disclosure, the Sub-Committee appointed to consider his disclosure concluded that Mr Preston's disclosure should also be considered by the Independent Reviewers.
225. As we have been appointed to investigate and report on the response of the INM directors to the disclosures by Mr Pitt and Mr Preston, we have focussed on the period between when Mr Pitt first made his disclosure – 11 November 2016 – and the decision to establish an independent review to consider Mr Pitt's disclosure on 7 December 2016.
226. As a consequence, our Investigation has not extended to the conduct or findings of the Independent Review. To the extent that our findings differ from those of the Independent Reviewers, that is because we received evidence that was not available to them. Such additional evidence was available to us because:
- (a) The matters that we have been appointed to investigate and report on extend beyond those that were the subject of the Independent Review; and
 - (b) Our statutory powers have given us:
 - access to significant additional documentary evidence,
 - the ability to interview many more witnesses and
 - to do so on oath.

In the course of our Investigation, we have not become aware of any reason to question the conduct of the Independent Review.

227. In Chapter 5, we considered certain legal issues that were raised in the course of this Investigation and concluded that the PDA applied to the disclosures by Mr Pitt and Mr Preston (Chapter 5, paragraph 117 to 146).

228. In reaching our conclusions, we recognise that the disclosures by Mr Pitt, in particular, and Mr Preston created very unusual challenges:

- INM was facing significant commercial issues.
- These were compounded by the breakdown in relations between the Chairman and the Chief Executive.
- There was very little experience of the PDA and little relevant jurisprudence.
- The issues raised by the disclosures were complex and the investigative powers available to INM were limited.

229. Against that background, and having considered the evidence and the submissions we have received, our findings are set out below under the following headings:

- (i) Did the Directors of INM treat Mr Pitt's disclosure as being a disclosure to which the PDA applied?
- (ii) Was it appropriate for Mr Kennedy to act as Chairman and a member of the Sub-Committee appointed to consider Mr Pitt's disclosure?
- (iii) Did the Sub-Committee carry out a proper investigation into the matters raised by Mr Pitt's disclosure?
- (iv) Did the INM Board give proper consideration to the issues raised by Mr Pitt in his disclosure and, if not, why not?
- (v) Did INM comply with section 12(1) and 16(1) of the PDA following the disclosures made by Mr Pitt and Mr Preston?

Did the Directors of INM treat Mr Pitt's disclosure as being a disclosure to which the Protected Disclosures Act 2014 applied?

230. The INM Directors submitted that the Sub-Committee focussed on whether there was evidence of wrong-doing by Mr Buckley. They maintained that neither the Sub-Committee or the INM Board reached a conclusion on whether Mr Pitt's disclosure was a protected disclosure under the PDA. In support of that submission, the INM Directors relied on the formal minutes of both the Sub-Committee and the INM Board which, they asserted, were "*evidence of the proceedings*" at those meetings if signed by the chairperson (section 166(3) of the Act).
231. However, the minutes of the meetings of the Sub-Committee and the INM Board are silent as to whether Mr Pitt's disclosure was a protected disclosure under the PDA and, as will be apparent from Section B above, there was extensive discussion during the Sub-Committee's consideration of Mr Pitt's disclosure and at the INM Board meeting on 23 November 2016, in the course of which a number of directors of INM made conflicting and contradictory statements about the status of Mr Pitt's disclosure.
232. Mr Kennedy's initial evidence to us was unequivocal – he told us that he proceeded on the basis that Mr Pitt's disclosure was a protected disclosure:

'There was no doubt in my mind that this was a protected disclosure situation. There's legal argument as to what fully meets the requirements of the legislation in relation to protected disclosure. That's the only two streams there were. But in terms of what I was dealing with a protected disclosure situation, absolutely, and no doubt about that. And in going to the Board and preparing for that, that's what we were - so we were having to prepare on that basis.'

'I spent a week going through all the possibilities with a legal firm and knew just how significant and challenging dealing with protected disclosure was so there was no way I was going to go to the board meeting and suggest any form of termination or firing or breach of contract. So I can't relate to any of that, it just doesn't make sense to me.'

233. However, many of the comments attributed to members of the Sub-Committee in the notes of its meetings on 22 November 2016 and 23 November 2016 suggest otherwise.

234. Throughout those attendance notes, there are three recurring themes:

- (a) Mr Pitt's disclosure was not governed by the PDA because there was no substance to Mr Pitt's allegations of wrong-doing by Mr Buckley.
- (b) Mr Pitt's disclosure evidenced a breakdown in relations between Mr Buckley and Mr Pitt, the two most senior officers and directors of INM which threatened the effective management of INM;
- (c) Against the backcloth of the discussion amongst the non-executive directors that took place on 19 October 2016, the logical course was to discuss the termination of Mr Pitt's employment.

235. Based on the attendance notes of those meeting, Mr Kennedy made comments that were inconsistent with his assertion that he was treating Mr Pitt's disclosure as a protected disclosure.

236. The attendance note of the Board meeting on 23 November 2016 records that the Sub-Committee concluded that Mr Pitt's disclosure

'did not amount to a [protected disclosure]'

and that Mr Kennedy had specifically asked the Board to

'accept the [Sub-Committee's] conclusion that the allegations did not qualify as a [protected disclosure].'

237. This conclusion was then repeated by Mr Buckley in a text message to Mr O'Brien on 24 November 2016 (07:03).

238. Mr Byers is recorded in the attendance note as saying:

'it had been the conclusion of the [Sub-Committee] that there had been no evidence of wrongdoing for the purposes of the Act, that this had been reported to the Board and that the Board had approved the finding'

239. Against this background, we have formed the view that the Directors proceeded on the basis that Mr Pitt's disclosure did not qualify for protection under the PDA

primarily because there was no substance to Mr Pitt's allegations of wrong-doing by Mr Buckley.

240. In reaching this conclusion, we also note that:

- At no time did McCann FitzGerald, while contesting the substance of what Mr Pitt was alleging, advise Daniel Spring & Co that, in the Directors' view, Mr Pitt's disclosure did not, and/or could not, constitute a protected disclosure under the PDA; and
- We have not had access to the legal advice on the application of the PDA given to INM, including the legal advice given to the Sub-Committee at its meetings, and at the INM Board meeting on 23 November 2016.

241. In our view, the approach taken by the Sub-Committee – namely that whether Mr Pitt's disclosure fell within the PDA depended on whether there was substance to the allegations of wrongdoing by Mr Buckley – involved an incorrect approach to the legislation.

Was it appropriate for Mr Kennedy to act as Chairman and a member of the Sub-Committee appointed to consider Mr Pitt's disclosure?

242. On 19 November 2016, Daniel Spring & Co advised McCann FitzGerald that, in their view, Mr Kennedy should not participate in the consideration of Mr Pitt's disclosure because he was one of only four people who knew of the transaction which was the subject of the disclosure.

243. On 21 November 2016, the INM Board established the Sub-Committee to consider Mr Pitt's disclosure. The members of the Sub-Committee were Mr Kennedy, Dr O'Hagan, Mr T. Buckley and Mr Marshall.

244. When the Sub-Committee met on 22 November 2016, the first matter it considered was whether Mr Kennedy was conflicted. The Sub-Committee considered this issue on the basis that it was to Mr Kennedy that Mr Pitt had made his disclosure. Mr Kennedy did not advise the Sub-Committee of his involvement in the events that Mr Pitt was raising in his disclosure and the Sub-Committee did not consider the possibility that Mr Kennedy might have some involvement through his membership of the Azur Committee and the M&A Committee.

245. In principle, there could be no objection to Mr Kennedy being a member of the Sub-Committee on the grounds that he was the person to whom Mr Pitt had thought that he should make his disclosure. Nor was there any reason why Mr Kennedy should not have been involved as a member of the Sub-Committee in investigating matters of which he had relevant knowledge.
246. However, it was incumbent on Mr Kennedy to ensure that the Sub-Committee was aware that he had knowledge of, and had participated in, a number of the events and conversations raised by Mr Pitt. Armed with that knowledge, the Sub-Committee could have considered, on an informed basis, whether it would be appropriate for Mr Kennedy to continue to be a member of the Sub-Committee and to chair its proceedings.
247. In our view, Mr Kennedy should have advised the Sub-Committee of the following matters:
- (a) His knowledge of the Island Capital draft engagement letter and the proposed payment to Island Capital;
 - (b) The fact that Mr Pitt had reported to Mr Kennedy conversations he had had with Mr Buckley when, according to Mr Pitt, Mr Buckley had spoken of his wish to give priority to the interests of particular shareholders, rather than to the interests of INM shareholders generally;
 - (c) His knowledge of the proposed acquisition of Newstalk and of the concerns that Mr Pitt and Mr Preston had at the price being sought by Communicorp – which they regarded as unrealistically high;
 - (d) His knowledge that INM’s independent financial advisers thought that an appropriate valuation of Newstalk was less than 50% of the price being sought by Communicorp; and
 - (e) That both Mr Pitt and Mr Preston had contacted him on a number of occasions to express their concern that Mr Buckley was putting pressure on them to adopt a more positive approach to the proposed acquisition, to pursue the discussions with Communicorp more speedily and to be more open-minded about the price that might be paid.

248. In our view, as a result of Mr Kennedy's failure to advise the Sub-Committee of these potentially relevant matters, the Sub-Committee did not have available to it all the relevant information when considering Mr Kennedy's membership of the Sub-Committee and, most importantly, when considering the issues raised by Mr Pitt's protected disclosure.

Did the Sub-Committee carry out a proper investigation into the matters raised by Mr Pitt's disclosure?

249. At a meeting of the INM Board on 21 November 2016, a Sub-Committee was established to:

- *'to consider an issue that has been raised by the CEO concerning the Chairman and to examine what actions should be taken to deal with the matter;*
- *to take such steps as it considers necessary to clarify the matters at issue including by inviting written comment from, or interviewing, interested parties or otherwise as it may determine; and*
- *with legal advice, to make recommendations to the Board on the issue.'*

The members of the Sub-Committee were Mr Kennedy, Dr O'Hagan, Mr T. Buckley and Mr Marshall.

250. In Chapter 5, paragraphs 156 to 179 , we considered the duties of directors and highlighted that:

- Directors are required to act in good faith and in what the director considers to be in the interests of the company as a whole.
- While consideration of whether a director's decision was in the best interests of the company does not involve an objective review after the fact, it is appropriate to consider whether the decision was based on reasonable grounds so as to be an honest decision made in the best interests of the company as a whole.

- When considering whether a director has exercised due skill, care and diligence, it is relevant to consider whether a director took appropriate steps to ensure that all relevant and available information is obtained.
- If a director fails to obtain all relevant and available information, depending on the circumstances, he may not have acted in good faith. Further, any decision made is unlikely to have been made in the interests of the company as a whole.

251. The INM Directors contended that we should have regard to the following matters when considering the approach taken by the INM Board and the Sub-Committee:

- The absence of any objective or prescribed process as to how a protected disclosure made by the CEO against a Chairman ought to be handled or investigated;
- The immediate and entirely appropriate conduct of the INM Directors once they became aware that Mr Pitt was raising a protected disclosure;
- The distinction to be drawn between an error of judgement and a breach of directors' duties; and
- The weight to be given to the fact that any deficiencies in the Sub-Committee process were cured by the Independent Review.

252. These matters are considered below. However, whilst acknowledging the novelty of the legislation, experienced directors should be fully aware of the importance of understanding the facts and matters giving rise to an allegation of misconduct in order to establish whether such wrongdoing has occurred. That is especially so in circumstances where a complaint has been made by a CEO of a company against its Chairman.

253. Against that background, it is necessary to consider the approach taken by the Sub-Committee and the steps it took to obtain all relevant and available information and, if not, whether the conclusions it reached and the recommendations it made were soundly based and in the best interests of the company as a whole.

The Approach taken by the Sub-Committee and the steps it took to obtain all relevant and available information

254. The sequence of events leading up to the Board meeting on 21 November 2016 at which the Sub-Committee was established and its terms of reference approved are set out in paragraphs 23 to 49 above.

255. In evaluating Mr Pitt's disclosure, the Sub-Committee:

- (a) Reviewed the revised attendance note of the meeting that took place between Mr Pitt and Mr Kennedy at the offices of McCann FitzGerald on 16 November 2016 at which Mr Pitt formalised the matters he had raised with Mr Kennedy on 11 November 2016;
- (b) Provided Mr Buckley with a copy of the amended attendance note of the meeting on 16 November 2016 and invited him to respond to the matters raised by Mr Pitt;
- (c) Received from Mr Buckley a written statement responding to the matters raised by Mr Pitt; and
- (d) Had a meeting with Mr Buckley and his legal advisers in the course of which they had the opportunity to ask questions and raise matters with him.

256. The Sub-Committee did not:

- (a) Interview Mr Pitt;
- (b) Ask Mr Pitt to provide evidence to substantiate the matters raised by him in his disclosure;
- (c) Provide Mr Pitt with Mr Buckley's statement or advise him of the matters raised by Mr Buckley in response to Mr Pitt's disclosure;
- (d) Give Mr Pitt the opportunity to respond to the matters raised by Mr Buckley; and

- (e) Speak to any other individuals with potentially relevant knowledge – including, in particular, Mr Preston, Mr Connolly or Mr Kennedy.

257. In considering the matters raised by Mr Pitt in his disclosure, the Sub-Committee questioned Mr Pitt’s credibility on the grounds that he had not raised the matters that he was concerned about with an appropriate person at the appropriate time.

258. On 22 November 2016, the Sub-Committee reached conclusions on two of the principal matters raised by Mr Pitt – APN and editorial interference – on the basis of their own knowledge or understanding of the relevant events.

259. In relation to the proposed payment to Island Capital following the sale of INM’s shareholding in APN, the Sub-Committee dismissed the possibility of any actual or potential wrongdoing on the basis that:

- The allegation that Island Capital had “*added no value*” to INM was wrong, and that the request for payment was a proper request for services rendered.
- No monies were, in fact, paid by INM to Island Capital.

260. However, the Sub-Committee’s conclusions – (i) that the allegation that Island Capital had “*added no value*” to INM was wrong, and (ii) that the request for payment was a proper request for services rendered – were unsound because:

- Mr Pitt’s concern was that Island Capital had not been engaged by INM and had not provided services to INM:
 - The articulation of Mr Pitt’s concern as being that Island Capital had ‘*added no value*’ arose for the first time in the course of converting Mr Barton’s manuscript notes of the meeting at McCann FitzGerald’s offices on 16 November 2016 into the typed attendance note used as the basis for the Sub-Committee’s consideration of Mr Pitt’s disclosure.
 - In his manuscript note made in the course of the meeting on 16 November 2016, Mr Barton recorded Mr Pitt as having said “*Island Capital provided no service*”. The typed attendance

note recorded this statement as *“However, Island Capital added no value in relation to the transaction”*.

In fact, Mr Pitt expressed the same concern in his meeting with the ODCE on 18 November 2016, in his interviews with the Independent Reviewers and in evidence to us.

- No-one present at the meeting of the Sub-Committee had information about the role played by Island Capital.
 - Dr O’Hagan was not present at the meeting on 22 November 2016.
 - Mr T. Buckley and Mr Marshall acknowledged that they had no knowledge of the roles undertaken by the various parties in the APN transaction.
 - Consequently, the conclusion could only have been reached on the basis of information provided by Mr Kennedy.

However, Mr Kennedy told us that when he gave evidence to the Independent Review (which took place several months after the Sub-Committee met), any knowledge he had was entirely second-hand and had been obtained incidentally:

Mr Rogers: If it be the case that Mr. Paul Connolly did not give evidence to the Reviewers, and if it be the case that you consulted Mr. Paul Connolly in respect of the INM transaction and the work done by Island Capital, did you do that? Did you consult him?

Mr Kennedy: At that - in relation to the independent reviewers?

Mr Rogers: Yes.

Mr Kennedy: *The answer is, no.*

Mr Rogers: *I see. So how did you know anything about what Island Capital did?*

Mr Kennedy: *Because there would have been general discussion, you know, around the water cooler, or a coffee, or whatever, that type of information. Might I also say...(INTERJECTION).*

Mr Rogers: *Sorry, Mr. Kennedy, how did you know what Island Capital did? I find it difficult to understand how you would find yourself giving evidence about what Island Capital did by relying on what happened at the water cooler. Can you be more specific about where you got the information upon which the reviewers relied?*

Mr Kennedy: *Because obviously general discussion would have taken place at the time of the completion of various meetings we were at, various groupings of either directors, or some directors or whatever. So there was a lot of, a lot of discussion and conversation going on generally at the time.*

Mr Rogers: *But Mr. Connolly was the only person who was in Sydney, isn't that correct? And he was the only person who could give reliable information about what Island did, isn't that correct?*

Mr Kennedy: *He was the only person who could give first-hand information.*

Mr Rogers: Yeah.

Mr Kennedy: Well, either him or Dermot Hayes. Obviously there were two of them down there.

Mr Rogers: Did you discuss it with Dermot Hayes?

Mr Kennedy: No

Mr Rogers: So, really, when you went to the reviewers to advise them about what Island Capital did in this transaction, you were actually simply reporting chitchat, isn't that right?

Mr Kennedy: Ehm, I was giving evidence as best I could.

261. The resultant misunderstanding or mischaracterisation of the basis for Mr Pitt's disclosure in relation to APN was compounded by:

- Mr Kennedy's failure to disclose to the Sub-Committee his own knowledge of the existence of the Island Capital draft engagement letter and the circumstances in which it was provided to INM; and
- The Sub-Committee's failure to meet with Mr Pitt and provide him with an opportunity to explain the basis of his concerns and address the Sub-Committee's understanding of the events that occurred.

If Mr Pitt had been interviewed, the Sub-Committee's misunderstandings might have been addressed or removed. Further, had Mr Pitt been asked how matters developed following receipt of the Island Capital draft engagement letter, as would have been logical, the Sub-Committee would, in all probability, have become aware of the proposed payments to Mr Cosgrove and Mr Harris.

262. In relation to the proposed acquisition of Newstalk, the Sub-Committee concluded, following its meeting with Mr Buckley on 23 November 2016, that:

- The proposed acquisition of Newstalk would have made good commercial sense consistent with the Board's strategy;
- The negotiations had been handled properly – by retaining Davy Finance to provide independent financial advice and by refusing to make a non-binding indicative offer without consideration by the M&A Committee and/or the Board.

263. As regards Mr Pitt's allegation that Mr Buckley had pressurised him to make an inflated offer for Newstalk and so benefit Mr O'Brien, the Sub-Committee, having concluded that it did not have the resources or powers to investigate that matter thoroughly, decided that Mr Buckley's explanation was the more credible and, therefore, that there was no substance in Mr Pitt's allegation.

264. Although Mr Pitt was available to be interviewed and the time involved in doing so need not have delayed its report to the Board, the Sub-Committee decided not to interview Mr Pitt or Mr Preston. The reasons for that decision included that:

'...the points actually in issue revolved solely around a small number of unminuted conversations between the CEO and the Chairman in which the CEO alleged that the Chairman had made certain statements and the Chairman denied that he made. Plainly, the expectation would be that the CEO would refute the denials, and a sequence of refutations and counter-refutations would not seem likely to advance matters;

While the [Sub-Committee] could ask other members of the Board or of the management to attend and it was possible that such persons could have useful input, it was unlikely that any such person would have a decisive contribution to make on the matters under consideration and there was also considerable value in not creating unnecessary division in what was plainly a very sensitive matter or creating risk of stress for members of management who would not wish to be forced into an issue involving two very senior officers in which they would be seen to be taking sides.'

265. However, by not interviewing Mr Pitt and Mr Preston, the Sub-Committee denied them the opportunity to:

- Provide further evidence or support for the assertion that improper pressure had been applied by Mr Buckley.
- Address the Sub-Committee's assessment of the credibility of Mr Buckley's explanations.
- Describe their interactions with Mr Kennedy where relevant.

As a result, the Sub-Committee was deprived of the opportunity to assess the full context of the allegations, explore with all parties the issues that gave rise to the misunderstandings that subsequently emerged and consider how the company should be managed going forward.

266. This assessment is, in our view, reflected in Mr Kennedy's evidence when pressed to explain the approach taken by the Sub-Committee. Mr Kennedy told us:

"... we were doing a very fast, quick business-like review to feed back to the Board, "This is how we see it".

He denied that the Sub-Committee had been set up to investigate the allegations made by Mr Pitt against Mr Buckley, saying:

"... it was just a businessman's review of 'well, let's get a bit more information from these two people as to what exactly is going on here and what's behind all this."

267. In their final submissions, the INM Directors stated that:

- *"... the uncontradicted evidence was that the directors were extremely concerned to ensure that the company could continue to operate properly in circumstances where there was a breakdown in the critical relationship between the chief executive and the chairman."*

- *“The members of the Sub-Committee gave unequivocal evidence of their overriding concern for the interests of the Company in the way in which they approached the consideration of the protected disclosure.”*
- *“... the decision by the Sub-Committee to assess and reach conclusions on the concerns raised through a process which gave considerable weight, and in indeed the most weight, to the need to stabilise the Company’s leadership and prevent damage to INM and to take a pragmatic and commercial approach to the difficult decisions, was entirely reasonable given the unprecedented and sensitive situation they and the Company faced. This concern for the Company was entirely appropriate, particularly in circumstances where they were aware no damage had been done to the Company.”*

268. Notwithstanding these submissions, in our view, the Sub-Committee’s consideration of Mr Pitt’s disclosure was fundamentally defective. In reaching that view, we attach particular importance to:

- (a) Mr Kennedy’s failure to disclose his knowledge and involvement in the matters raised by Mr Pitt.
- (b) The Sub-Committee’s rejection of the matters raised by Mr Pitt in circumstances where it had only an attendance note of a meeting at which Mr Pitt had set out the issues he wished to raise and without giving him an opportunity to ensure that the nature of his concerns was correctly understood and to substantiate the basis for those concerns (if he could).
- (c) The failure to give Mr Pitt an opportunity to address the points raised by Mr Buckley when he responded to Mr Pitt’s disclosure, including the opportunity to meet with the Sub-Committee and answer their questions (an opportunity that was afforded to Mr Buckley).
- (d) The Sub-Committee’s reliance, without having interviewed Mr Pitt:
 - on its own knowledge and understanding of Mr Pitt’s concerns in relation to the proposed payment to Island Capital; and

- on its own assessment of the relative credibility of Mr Pitt and Mr Buckley's positions in relation to the issues arising from the proposed acquisition of Newstalk.
- (e) The Sub-Committee's doubting of Mr Pitt's credibility on the misconceived ground that he had failed to raise his concerns with an appropriate director; a misconception that should have been corrected by Mr Kennedy and would have been addressed had the Sub-Committee interviewed Mr Pitt.
- (f) The members of the Sub-Committee's acknowledgement, in their evidence and submissions, that their primary focus was on the breakdown in the relations between CEO and Chairman and the implications of that breakdown for the future management of INM.
269. By treating the breakdown in the relations between the CEO and the Chairman and the implications of that breakdown for the future management of INM as the principal issue to be addressed, the Sub-Committee:
- Failed to give appropriate or proper weight to the matters raised by Mr Pitt;
 - Failed to take the steps necessary to investigate and establish the implications of the matters raised by Mr Pitt;
 - Failed to properly discharge the remit given to it by the INM Board and so did not have a sound and proper basis for the conclusions that it reported to the INM Board; and
 - Reported that there was no evidence of any wrongdoing on the part of Mr Buckley and no matter of concern for the Company with respect to the issues raised by Mr Pitt, when it did not have a sound basis for doing so for the reasons set out above.
270. Those failures cannot be characterised, as asserted by the INM Directors, as an error of judgement arising solely from the failure to interview Mr Pitt. They arise from a failure by the Sub-Committee to discharge its responsibilities as set out in its terms of reference.

271. Consequently, in our view, the conduct of the directors concerned fell below that to be expected of directors of a public limited company in circumstances where very serious allegations had been made by the company's CEO against its Chairman which they had been mandated to investigate.

Did the INM Board give proper consideration to the issues raised by Mr Pitt in his disclosure and, if not, why not?

272. Following the disclosure by Mr Pitt on 11 November 2016, Mr Kennedy advised Mr Buckley of the matters that had been alleged and obtained legal advice. He tried to repair the relationship between Mr Pitt and Mr Buckley, and then met with Mr Pitt to ensure that he was properly aware of Mr Pitt's concerns. He did not, as had been requested by Mr Pitt, advise the other directors of the matters that had been raised by Mr Pitt.

273. As a result, the first occasion when the Directors became aware of the allegations made by Mr Pitt was at the INM Board meeting convened on 21 November 2016 at 18.00. At that meeting, the INM Board established the Sub-Committee and approved its terms of reference.

274. In our view, the INM Board's decision to establish the Sub-Committee and the terms of reference were appropriate – particularly in light of the obligation to “... *clarify the matters at issue...*”.

275. That the Sub-Committee understood that it was intended to report on the matters raised by Mr Pitt is evidenced by its report to the Board and its focus on whether any wrong-doing had occurred.

276. The Sub-Committee reported the conclusions it had reached to the INM Board at its meeting at 18.00 on 23 November 2016, namely that:

‘.., the [Sub-Committee], having carefully reviewed and considered the issues that had been raised, had concluded unanimously that there was no evidence of any wrongdoing on the part of the Chairman and no matter of concern for the Company with respect to the issues raised and accordingly that no further action by the Company in response to the issue as raised was necessary or appropriate.’

The INM Board accepted the report by the Sub-Committee.

277. From the attendance note of the INM Board meeting on 23 November 2016, it is clear that, after Mr Kennedy had explained the steps that the Sub-Committee had taken, two key questions were considered in detail:

- (a) Whether Mr Pitt's disclosure was a protected disclosure for the purposes of the PDA; and
- (b) Whether Mr Pitt's employment should be terminated.

278. Following discussion, the INM Board:

- (a) Accepted the Sub-Committee's conclusion that there was no substance to the allegations made by Mr Pitt;
- (b) Were reassured by the fact that, in any event, no loss or harm was suffered by INM;
- (c) Accepted the Sub-Committee's conclusion that Mr Pitt's disclosure was not governed by the PDA; and
- (d) Reached a consensus that their principal responsibility was to ensure the effective management of INM going forward and, therefore, given the breakdown in trust between the Chairman and the Chief Executive, that Mr Pitt's employment should be terminated.

279. However, the INM Board was not aware of the fact that the Sub-Committee had done '*a very fast, quick business-like review*' and, as a result,

- The Sub-Committee had only met with Mr Buckley – and had not met with Mr Pitt;
- The Sub-Committee had not given Mr Pitt an opportunity to address the points raised by Mr Buckley;
- Mr Pitt's concerns in relation to the proposed payment to Island Capital had been misunderstood or mischaracterised; and

- The Sub-Committee had reached views on the matters of concern raised by Mr Pitt based, in the case of the proposed payment to Island Capital, on its own knowledge or understanding and, in the case of the proposed acquisition of Newstalk, on their assessment of the relative credibility of Mr Buckley and Mr Pitt, without having met or received evidence from Mr Pitt.

In these circumstances, when it considered Mr Pitt's disclosure on 23 November 2016, the INM Board did not have before it a report that had been developed with the benefit of all relevant and available information and which, as a consequence, should not have been relied upon.

280. However, we accept that those directors who were not members of the Sub-Committee – Mr Harrison, Ms Mullane, and Mr Connolly – had no reason to doubt the integrity of the Sub-Committee's proceedings and, therefore, the conclusions set out in its report in relation to the substance of Mr Pitt's disclosure.
281. So far as Mr Preston's disclosure is concerned, we are satisfied that INM acted properly in referring that disclosure for consideration by the Independent Reviewers.
282. Following its consideration of the Sub-Committee's report on 23 November 2016, Mr Pitt raised objections to the procedures and conclusions of the Sub-Committee and the Board and, on his behalf Daniel Spring & Co sent a letter before action to INM.
283. On 5 December 2016, Mr Preston made a protected disclosure to Dr O'Hagan.
284. On 7 December 2016, the INM Board considered how to respond to the legal action being threatened by Mr Pitt and it decided to establish an Independent Review of the matters raised by Mr Pitt. It also decided that, as Mr Preston's protected disclosure raised the same matters as had been raised by Mr Pitt, the Independent Review should consider the matters raised by Mr Preston.
285. Mr David Barniville and Mr Steven Kingon were appointed to undertake the Independent Review and, following discussions with those involved, the Terms of Reference were finalised.

286. Mr Barniville and Mr Kingon reported on 25 July 2017. The INM Board considered that report at its meeting on 9 August 2017, accepted its conclusions and recommendations.

287. The outcome of the Independent Review was criticised by Mr Pitt and by the ODCE because the terms of reference did not:

- Provide for cross-examination as a result of which the Reviewers were unable to reach any conclusion on the conflicting evidence relating to the proposed acquisition of Newstalk given by Mr Pitt and Mr Preston and Mr Buckley.
- Allow for matters emerging in the course of the Review – such as the Data Interrogation – to be considered.

288. Kelly P., in his judgement appointing us as Inspectors noted that:

“The evidence demonstrates a conflict of testimony between Mr. Pitt and Mr. Preston on the one hand and Mr. Buckley on the other. But no power was given to the independent reviewers to enable them to resolve that conflict. Indeed, in the course of their findings they made that abundantly clear. They said that it was not intended, as they understood their terms of reference, that they would have that power. When they pointed out that limitation on their ability in March 2017, no change to their terms of reference was made. When they delivered their report in July 2017 they said, as they had warned four months earlier, that they could not resolve the conflict between Mr. Pitt and Mr. Buckley as to what happened in relation to Newstalk although they did comment that if what Mr. Pitt alleged was true it was very serious indeed. No resolution of this conflict was possible having regard to the limitations placed on the independent reviewers by their terms of reference.”

“The principal complaint which is made in respect of the independent review is that it was substandard to the task because the reviewers were not furnished with the necessary powers to reach a conclusion on the conflict of testimony between Mr. Buckley and Messrs. Pitt and Preston. The reviewers themselves pointed out that the terms of reference did not permit of such a power being exercised by them. No steps were taken by the board to remedy this. The company contends that such criticism could not amount to affairs of the

company being conducted in a fashion which falls within the ambit of the legislation. If seen in isolation that could perhaps be correct. But such a blinkered view would not be appropriate. This review must be seen in the context in which it was set up. When so viewed, it forms part of the Director's complaint as to the alleged failure of the board of the company to discharge its statutory obligations fully or appropriately.”

289. Although the terms of reference did not provide for cross-examination and consideration of emerging matters, we consider that the INM Board acted appropriately in:

- Establishing the Independent Review:
 - In response to the criticisms by Mr Pitt of the procedures and conclusions of the Sub-Committee,
 - To consider the protected disclosure by Mr Preston.
- Accepting the report by the Independent Reviewers and implementing the recommendation made in it.

290. The INM Directors have contended that, in the same way as any assessment of whether any duties were breached by the directors ought to take account of the conduct of the members immediately preceding the establishment of the Sub-Committee, it must also take account of their conduct immediately following their report to the Board.

291. On that basis, the INM Directors have contended that any failings arising from the manner in which the Sub-Committee investigated Mr Pitt's protected disclosure were cured by the establishment of the Independent Review.

292. We do not agree. The dispute between the senior management of INM and Mr Buckley had escalated – the Sub-Committee's defective process had polarised matters, leading Mr Pitt to threaten litigation and Mr Preston had made a protected disclosure to Dr O'Hagan.

Did INM comply with section 12(1) and 16(1) of the Protected Disclosures Act 2014 following the disclosures made by Mr Pitt and Mr Preston?

293. In Chapter 5, paragraphs 147 to 155, we set out our analysis of the provisions of the provisions of the PDA and the authorities that have considered those provisions.

Section 12(1)

294. In evidence to us, Mr Preston claimed that he had been advised on two occasions that his employment would be terminated in twelve months or less.

He told us that:

- On 27 July 2017, Mr T. Buckley told Mr Preston that he had no future at INM and that he would only remain in INM's employment for six months; and
- On 28 July 2017, Mr Buckley told Mr Preston that his employment with INM would be ending in 12 months' time.

He submitted that such statements constituted penalisation under the PDA.

295. Mr T. Buckley, in response to Mr Preston's submissions, told us that:

- He and Mr Harrison were nominated by the Special Committee to pursue the mediation recommended by the Independent Reviewers and that he had the imprimatur of the Special Committee to meet with Mr Preston as part of that mediation.
- He asserted that his discussion with Mr Preston on 27 July 2017 took place in circumstances where:
 - He understood Mr Preston to be considering leaving INM, and
 - There were concerns at Mr Preston's health and well-being.

296. However, Mr T. Buckley's explanation is not consistent with the contemporaneous minutes of the Special Committee and the INM Board. These show that the recommendations made by the Independent Reviewers were:

- Not considered by the Special Committee following receipt of the Independent Reviewers' Report at its meetings on 24 July, 25 July, 26 July or 2 August 2017.
- Considered for the first time at the INM Board meeting on 9 August 2017 and it was at that meeting that Mr T. Buckley and Mr Harrison were asked to progress discussions with Mr Preston.

Although we accept Mr Preston's evidence of the conversation that took place, in our view the statements made by Mr T. Buckley were not made with the authority of INM, Mr Preston's employer.

297. Mr Buckley, in response to Mr Preston's submission, confirmed that he did have a telephone conversation with Mr Preston on 28 July 2017, in the course of which Mr Preston said that he accepted the outcome of the Independent Review and Mr Buckley said:

'I think people should stand back and think about actions they take and how it affects other people and their families'.

He denied saying that Mr Preston's employment would be ending in twelve months' time.

298. Having considered the evidence, we are not satisfied that the comments made by Mr Buckley in the course of the conversation on 28 July 2017 amounted to a threat to penalise Mr Preston as suggested.

299. For these reasons, we have concluded that Mr Preston's claim to have been penalised on those occasions does not meet the requirements of the PDA.

300. INM and the INM Directors have also contended that these conversations were so far removed in time from when the protected disclosures were made that it cannot be said that the threatened termination was directly attributable to Mr Preston's protected disclosure.

301. For avoidance of doubt, if either conversation had constituted penalisation under the Act, we would have concluded that those conversations were directly attributable to Mr Preston's decision to make a protected disclosure because:
- The July 2017 conversations took place immediately after the Special Committee received the Independent Reviewers' Report; and
 - There was no suggestion that the proposal that Mr Preston's employment would terminate within twelve months or less was connected in any way to his performance as CFO of INM.
302. There was also evidence of conversations in December 2016 and in October 2017 in the course of which Mr Preston's future employment with INM was discussed.
- As Mr Preston only became aware of the text exchange between Mr Buckley and Mr O'Brien in December 2016 in the course of this Investigation, we do not consider that that exchange constituted threatened penalisation as asserted by Mr Preston.
 - Mr Preston has not submitted that the conversations with Mr Buckley and Mr Doorly in October 2017 involved penalisation under the Act.

Section 16(1)

303. Both Mr Pitt and Mr Preston submitted that Mr Buckley breached section 16(1) by disclosing the fact of, and information relating to, the protected disclosures made by Mr Pitt and Mr Preston.
304. Mr Pitt referred to the communications relating to the disclosure by Mr Pitt between Mr Buckley and, amongst others, Mr O'Brien, Mr Shorthouse, Mr Heneghan and Ms Gaffney.
305. Mr Preston referred to the text exchange set out in paragraph 37 above and to the email sent by Mr Buckley to Mr O'Brien on 9 December 2016 to which was attached a draft response to Mr Preston's protected disclosure.

306. Section 16(1) provides that:

“A person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred in the performance of that person’s duties, shall not disclose to another person any information that might identify the person by whom the protected disclosure was made.”

307. Mr Buckley submitted that he was not a person to whom section 16(1) applied as he was not the person to whom the protected disclosures were made (they were made to Mr Kennedy and Dr O’Hagan). Nor were the protected disclosures referred to him in the performance of his duties. They were referred to him as the person who was the subject of the disclosures so that he could respond to those disclosures and take advice as appropriate.

308. In our view, Mr Buckley did not breach section 16(1) of the PDA because he was not a person to whom that section applied.