

**INDEPENDENT NEWS AND MEDIA PLC**

**Inspection**

**pursuant to**

**Section 748, Companies Act 2014**

**REPORT**

**by**

**SEAN GILLANE SC and RICHARD FLECK CBE**

**VOLUME 3**

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## CHAPTER 10 – COMMUNICATIONS BETWEEN MR BUCKLEY AND THIRD PARTIES

### 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*

*(f) whether the Chairman, in March 2016, August 2016, September 2016, November 2016, December 2016, January 2017 or at any other time, unlawfully disclosed to any third parties (including but not limited to Denis O’Brien and James Morrissey) “inside information” within the meaning of the European Union (Market Abuse) Regulations, 2016 and/or Regulation (EU) No/596/2014 of the European Parliament and the Council of 16 April 2014 on market abuse (together, the “Market Abuse Regulations”), to include:*

*(i) The facts and circumstances concerning any such disclosures; and*

*(ii) The response of the Board to being made aware of the same.*

*(g) whether the Chairman, between June and November 2016 or at other time, disclosed to third parties (including but not limited to Denis O’Brien, Dominic Shorthouse and Dermot Hayes) information that was or is confidential to the Company (including but not limited to legal advice received by the Company), to include:*

*(i) The facts and circumstances concerning any such disclosures; and*

*(ii) The response of the Board to being made aware of the same.*

and

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

*(iii) The Market Abuse Regulations.’*

2. In this Chapter, we have addressed the matters arising in relation to these two paragraphs under the following headings:
  - B. The regime governing the disclosure of Inside Information.
  - C. INM's policies and procedures concerning the communication of inside and confidential information.
  - D. The Evidence given by Mr Buckley, the INM Directors, Mr Harrison and Mr O'Brien.
  - E. The Expert Evidence given by Mr Fetti, Mr Aylard and Mr Dobbie.
  - F. The Parties' submissions.
  - G. Our Conclusions.
3. In the course of our Investigation, we prepared a schedule setting out those instances where when it appeared to us that communications to third parties might contain information that was (i) confidential to INM and/or (ii) "*inside information*", as defined by the Market Abuse Regulations. Those communications are set out in the table at the end of this Chapter. Collectively those communications are referred to as the "*communications*".

**B. The regime governing the disclosure of Inside Information.**

4. The legal and regulatory regime governing the disclosure of inside information depends upon when a particular communication occurred:
  - Communications occurring **prior to** 3 July 2016 are governed by the Market Abuse Directive (Directive 2003/6/EC), the Implementing Directive (Directive 2003/124/EC) and the Irish Regulations implementing the Market Abuse Directive (SI 342 of 2005); and
  - Communications occurring **after** 3 July 2016 are governed by the Market Abuse Regulation (Regulation EU/596/2014) and the Irish Regulations implementing the Market Abuse Regulation (SI 349 of 2016).
5. It is also necessary to have regard to the regulations issued by the stock exchanges where INM was listed – namely the London Stock Exchange and the Irish Stock Exchange.
6. The relevant legislation and regulation addressed:
  - The definition of ‘inside information’
  - The obligation of issuers to determine whether information constitutes ‘Inside Information’ and, if so, to disclose that information as soon as possible;
  - The circumstances in which the disclosure of inside information may be delayed;
  - The requirement to create and maintain an insider list;
  - The obligation to notify the Irish Stock Exchange and the Financial Conduct Authority in the event that disclosure of inside information is to be delayed; and
  - The requirement to ensure that an announcement containing inside information includes a statement that it contains inside information.

(i) **The legislative and regulatory regime prior to 3 July 2016**

(a) The European regime

7. The European legislation comprised The Market Abuse Directive – 2003/6/EC and The Market Abuse Implementing Directive – 2003/124/EC.
8. Recitals (12) and (15) of the Market Abuse Directive identify the purpose of the Directive and the meaning of inside information:

Recital (12):

*“Market abuse consists of insider dealing and market manipulation. The objective of legislation against insider dealing is the same as that of legislation against market manipulation: to ensure the integrity of Community financial markets and to enhance investor confidence in those markets.....”*

Recital (15):

*“Insider dealing and market manipulation prevent full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets.”*

9. Article 1(1) of the Directive provided that:

*“Inside information” shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.”*

10. Article 2 provides for Member States to prohibit persons in possession of inside information from:

*“using that information by acquiring or disposing of ... for his own account or for the account of a third party, either directly or indirectly, financial instruments to which that information relates.”*

The persons falling within the prohibition are identified in the second paragraph of Article 2 and include a person having access to the information through the exercise of his employment, profession or duties.

11. Article 3 provides for Member States to prohibit a person falling within the Article 2 prohibition from disclosing inside information to any other person:

*“unless such disclosure is made in the normal course of the exercise of his employment, profession or duties....”*

12. In furtherance of the intention of the Market Abuse Directive 2003/6/EC, the European Commission issued:

- Commission Directive 2003/124/EC – dealing with the definition and public disclosure of inside information and the definition of market manipulation;
- Commission Directive 2003/125/EC – dealing with fair presentation of investment recommendations and disclosure of conflicts of interest;
- Commission Regulation 2273/2003 – dealing with exemptions for buy-back programmes and stabilisation of financial instruments; and
- Commission Directive 2004/72/EC – dealing with a number of other matters including the drawing up of lists of insiders.

13. Recitals (1), (2), (3) and (5) to Commission Directive – 2003/124/EC explain the need for guidance and implementing measures in relation to the provisions of the Market Abuse Directive.

Recital (1):

*“Reasonable investors base their investment decisions on information already available to them, that is to say, on ex ante available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the ex ante available information. Such an assessment has to take into consideration the anticipated impact of the information in the light of the totality of the related issuer’s activity, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument related thereto in the given circumstances.”*

Recital (2):

*‘Ex post information may be used to check the presumption that the ex ante information was price sensitive, but should not be used to take action against someone who drew reasonable conclusions from ex ante information available to him*

Recital (3):

*“Legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of financial instruments...”*

Recital (5):

*“In order to protect the legitimate interests of issuers, it should be permissible, in closely defined specific circumstances, to delay public disclosure of inside information. However, the protection of investors*

*requires that in such cases the information be kept confidential in order to prevent insider dealing.”*

14. Article 1 makes further provision about the meaning of “*inside information*”.

Under Article 1(1), information is deemed to be of a precise nature if, it satisfies the following two limbs:

*“it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to do so;*

and

*“is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments.”*

Article 1(2) explains that, for the purposes of applying Article 1(1) of the Market Abuse Directive:

*“information which, if it were made public would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments”*

shall mean:

*“information a reasonable investor would be likely to use as part of the basis of his investment decisions”.*

15. It should also be noted that the Committee of European Securities Regulators (“CESR”) issued three sets of guidance and information on the common operation of the Market Abuse Directive – CESR/04-505b<sup>1</sup>, CESR/06-562b<sup>2</sup>, and CESR/09-219<sup>3</sup>.

(b) The Irish Regime

16. In Ireland, the Market Abuse (Directive 2003/6/EC) Regulations 2005 (SI 342 of 2005) were issued pursuant to section 30, Investment Funds, Companies and Miscellaneous Provisions Act 2005 to give effect to the 2003 Market Abuse Directive (2003/6/EC).

17. Regulation 2(1) provides that:

*“information of a precise nature” means information that indicates (i) a set of circumstances which exists or may reasonably be expected to come into existence, or (ii) an event which has occurred or may reasonably be expected to occur, and is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event, as the case may be, on the prices of financial instruments”.*

18. Regulation 2(1) further provides that:

*“information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments” means information that a reasonable investor would be likely to use as part of the basis of the investor’s investment decisions.”*

This is often referred to as “*The Reasonable Investor Test*”.

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<sup>1</sup> CESR/04-505b guidance on accepted market practices in relation to market manipulation; what CESR members consider constitutes market manipulation; and reporting suspicious transactions (and a common format).

<sup>2</sup> CESR/06-562b provided guidance on what constitutes ‘Inside Information’ under the Market Abuse Directive; when there are legitimate reasons to delay the publication of Inside Information; when information relating to a client’s pending orders constitute Inside Information; and insider lists.

<sup>3</sup> CESR/09-219 provided guidance on insider lists; suspicious transaction reports; stabilisation and buy back programmes; and the two-fold notion of inside information.

19. Regulation 5(2) made it an offence to disclose inside information:

*“unless such disclosure is made in the normal course of the exercise of the ... person’s employment, profession or duties.”*

20. Regulation 10 (10) and (11) set out the circumstances in which selective disclosure is permitted:

*“(10) Subject to paragraph (11), where the issuer, or a person acting on the issuer's behalf or for the issuer's account, discloses any inside information to any third party in the normal exercise of the issuer's or person's employment, profession or duties, the issuer or person, as the case may be, shall make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure and without delay in the case of a non-intentional disclosure.*

*(11) Paragraph (10) does not apply where the third party receiving the inside information is a person under an obligation of confidentiality.”*

21. Regulation 11 requires an issuer to draw up and maintain a list of those working for it who have access to inside information. Those working for the issuer included those acting on behalf of the issuer (including employees) or for the account of the issuer (such as advisors and other agents). The obligation to maintain insider lists did not extend to shareholders or other third parties.
22. In February 2012, the Central Bank of Ireland issued Market Abuse Rules under section 34 of the Investment Funds, Companies and Miscellaneous Provisions Act, 2005. Those Rules included the following:

#### 5.0.3 – Guidance regarding Selective Disclosure

*“Where an issuer under its own responsibility avails of the provisions of Regulation 10(7) [of SI 342 of 2005] to delay the public disclosure of inside information to avoid prejudicing its legitimate interests, the issuer may selectively disclose the information to persons owing it a duty of confidentiality.*

*Such selective disclosure may be made to another person if it is in the normal course of the exercise of his employment, profession or duties but must not be made to any person simply because they owe the issuer a duty of confidentiality.”*

#### 5.0.4 – Example of Selective Disclosure

*“An issuer contemplating a major transaction which requires shareholder support or which could significantly impact its lending arrangements or credit-rating may selectively disclose details of the proposed transaction to major shareholders, its lenders and/or credit-rating agency provided that the recipients are bound by a duty of confidentiality. An issuer may, depending on the circumstances, be justified in disclosing inside information to certain categories of recipient in addition to those employees of the issuer who require information to perform their functions. The relevant categories of recipient include:*

- (a) the issuer’s advisers and advisers of any other persons involved or who may be involved in the matter in question;*
- (b) persons with whom the issuer is negotiating, or intends to negotiate, any commercial, financial or investment transaction ... ;*
- ...*
- (e) major shareholders of the issuer*
- ...”*

#### Rule 5.3 – Identifying Inside Information – Reasonable Investor Test

*“In determining the likely price significance of information, the issuer is required to assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decision and would therefore be likely to have a significant impact on the price of the issuer’s financial instruments or related derivative financial instruments (the reasonable investor test).*

*In conducting the reasonable investor test, the issuer is required:*

- (a) To take into account that the significance of the information in question will vary widely from issuer to issuer depending on a number of factors such as the issuer's size, recent developments and market sentiment about the issuer, and the sector in which it operates; and*
- (b) To assume that a reasonable investor will make investment decisions relating to the relevant financial instruments or related derivative financial instruments to maximize his economic self-interest.*

*In undertaking such assessment, the issuer is required to take into consideration the anticipated impact of the information in light of the totality of the issuer's activities, the reliability of the source of information and any other market variables likely to affect the related financial instrument or derivative financial instrument in the given circumstances.”*

**(ii) The legislative and regulatory regime after 3 July 2016**

*(a) The European regime*

- 23. The European legislation comprised *The Market Abuse Regulation – 596/2014* and the *Commission Implementing Regulation – 2016/1055*.
- 24. The Market Abuse Regulation – EU 596/2014 did not change the definition of “*Inside Information*”.
- 25. However, the interpretation of “*information of a precise nature*” and of “*information which, if it were made public would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments*” – both of which had been contained in the Implementing Directive – were incorporated into the Market Abuse Regulation.

26. In considering the approach to be taken to the Reasonable Investor Test it is also relevant to have regard to Recitals 14 and 15 of the Market Abuse Regulation, which state:

Recital 14:

*“Reasonable investors base their investment decisions on information already available to them, that is to say, on ex ante available information. Therefore, the question whether, in making an investment decision, a reasonable investor would be likely to take into account a particular piece of information should be appraised on the basis of the ex-ante available information. Such an assessment has to take into consideration the anticipated impact of the information in light of the totality of the related issuer’s activity, the reliability of the source of information and any other market variables likely to affect the financial instruments, ... in the given circumstances.”*

Recital 15:

*“Ex post information can be used to check the presumption that the ex-ante information was price sensitive, but should not be used to take action against persons who drew reasonable conclusions from ex ante information available to them.”*

27. Article 10 (1) of the Market Abuse Regulation provided that disclosure of inside information would not be unlawful provided that such “*disclosure is made in the normal exercise of an employment, a profession or duties.*”
28. The circumstances in which disclosure in the normal course of employment might occur was further considered in Article 17 (8):

*“Where an issuer ... discloses any inside information to any third party in the normal course of the exercise of an employment, profession or duties as referred to in Article 10(1), they must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure, and promptly in the case of a non-intentional disclosure. This paragraph shall not apply if the person receiving the information owes a duty of confidentiality,*

*regardless of whether such duty is based on law, on regulations, on articles of association, or on a contract.”*

The exception contained in the last sentence of this Article is the basis on which selective disclosure is possible.

29. Article 2 (1) of the Commission Implementing Regulation EU 2016/1055 provided that:

*“Issuers ... shall disclose inside information using technical means that ensure:*

*...*

*(b) inside information is communicated, directly or through a third party, to the media which are reasonably relied upon by the public to ensure its effective dissemination. That communication shall be transmitted using electronic means that ensure that the completeness, integrity and confidentiality of the information is maintained during the transmission, and it shall clearly identify:*

*(i) that the information communicated is inside information;*

*...*

*(iv) the subject matter of the inside information;*

*(v) the date and time of the communication to the media.*

*(b) The Irish Regime*

30. Similarly, so far as is relevant to this Inspection, the European Union (Market Abuse) Regulations 2016 replicated the provisions of the Market Abuse (Directive 2003/6/EC) Regulations 2005.

(c) The UK regulatory regime

31. The Financial Conduct Authority ('FCA') issued rules and guidance that are relevant to UK issuers obligations in relation to the Market Abuse regime and issuers' obligations in relation to Inside Information:

- The FCA Handbook contains the Disclosure Guidance and Transparency Rules ('DTR') which address the Reasonable Investor test and Selective Disclosure of inside information.
- FCA guidance has been issued in relation to the assessment of whether Periodic Financial Information (such as annual financial statements) and related announcements contain inside information.

32. In relation to the Reasonable Investor test,

- DTR 2.2.4G states that:

*“In determining whether information would be likely to have a significant effect on the price of financial instruments, an issuer should be mindful that there is no figure (percentage change or otherwise) that can be set for any issuer when determining what constitutes a significant effect on the price of the financial instruments as this will vary from issuer to issuer.”*

- DTR 2.2.5G states that:

*“An issuer may wish to take account of the following factors when considering whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions:*

*(1) the significance of the information in question will vary widely from issuer to issuer, depending on a variety of factors such as the issuer's size, recent developments and the market sentiment about the issuer and the sector in which it operates; and*

(2) *the likelihood that a reasonable investor will make investment decisions relating to the relevant financial instrument to maximise his economic self-interest.”*

- DTR 2.2.6G states that:

*“It is not possible to prescribe how the reasonable investor test will apply in all possible situations. Any assessment may need to take into consideration the anticipated impact of the information in light of the totality of the issuer's activities, the reliability of the source of the information and other market variables likely to affect the relevant financial instrument in the given circumstances. However, information which is likely to be considered relevant to a reasonable investor's decision includes information which affects:*

- (1) *the assets and liabilities of the issuer;*
- (2) *the performance, or the expectation of the performance, of the issuer's business;*
- (3) *the financial condition of the issuer;*
- (4) *the course of the issuer's business;*
- (5) *major new developments in the business of the issuer; or*
- (6) *information previously disclosed to the market.”*

33. In relation to Selective Disclosure (sometimes referred to as ‘wall-crossing’),

- DTR 2.5.7G states that:

*“Selective disclosure cannot be made to any person simply because they owe the issuer a duty of confidentiality. For example, an issuer contemplating a major transaction which requires shareholder support or which could significantly impact its lending arrangements or credit-rating may selectively disclose details of the proposed transaction to major shareholders, its lenders and/or*

*credit-rating agency as long as the recipients are bound by a duty of confidentiality. An issuer may, depending on the circumstances, be justified in disclosing inside information to certain categories of recipient in addition to those employees of the issuer who require the information to perform their functions. The categories of recipient may include, but are not limited to, the following:*

- (a) the issuer's advisers and advisers of any other persons involved in the matter in question;*
- (b) persons with whom the issuer is negotiating, or intends to negotiate, any commercial financial or investment transaction (including prospective underwriters or placees of the financial instruments of the issuer);*
- (c) employee representatives or trade unions acting on their behalf;*

Or

- (d) any government department, the Bank of England, the Competition Commission or any other statutory or regulatory body or authority;*
- (e) major shareholders of the issuer;*
- (f) the issuer's lenders; and*
- (g) credit-rating agencies.”*

34. The FCA guidance note on Periodic Financial information stated that issuers should not regard the information in periodic financial statements as “*always*” or “*never*” constituting inside information. It said that issuers should start from the assumption that information relating to financial results could constitute inside information and that issuers would need to decide whether their financial results contained inside information and, if so, whether it is possible to delay disclosure of such information.

35. There are differing views as to the circumstances in which financial results constitute inside information and, if so, when that information must be disclosed. Factors to be considered include:
- Whether the financial results include information which is materially different to market expectations. If they do, it is likely that the company should make a trading statement as soon as possible to update the market rather than wait for the full results to be released at the scheduled time.
  - Whether there has been a change in how the issuer's financial targets will be achieved.
  - Whether any other part of the announcement, such as the narrative part of the announcement (e.g. an update as to strategy, profit expectations, synergies, or board changes), contains inside information.
36. The UK Listing Authority issued a guidance note on assessing and handling inside information (UKLA/TN 521.3) that emphasises that it is not acceptable to justify non-disclosure by off-setting positive and negative news.

(iii) **Judicial or Regulatory Consideration of the Market Abuse regime**

(a) *The European Court of Justice*

37. The European Court of Justice has considered the Market Abuse regime on a number of occasions that are relevant to the issues in this Investigation.
38. In *Grongaard and Bang*<sup>4</sup> the Court held that:

*“In order to limit the number of persons capable of taking advantage of such information by disposing of or acquiring the transferable securities concerned thereby, Article 3 of Directive 89/592 also lays down, for the persons listed in Article 2 of that directive, a prohibition on disclosing inside information to third parties.*

*That prohibition is not, however, absolute.*

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<sup>4</sup> ECLI:EU:C:2005:708.

*Under Article 3(a) of Directive 89/592, the prohibition of disclosing inside information does not apply to its disclosure by a person in the normal course of the exercise of his employment, profession or duties.*

*Even if that rule, having regard to the terms used, is capable of covering very different situations, it must, as an exception to a general prohibition and in the light of the objective pursued by Directive 89/592, be interpreted strictly.”*

39. The Court also held that:

*“As regards the scope of the exception under Article 3(a) of Directive 89/592, it must be observed that, by requiring that the disclosure of inside information must take place in the normal course of a person’s exercise of his employment, profession or duties, that exception requires a close link between that disclosure and the exercise of that employment, that profession or those duties in order to justify such disclosure.*

*The scope of the latter condition must be determined by taking into consideration the objectives pursued by Directive 89/592.*

*The second to the fifth recitals in the preamble to Directive 89/592 state that it is intended to ensure the proper functioning of the secondary market in transferable securities and to protect investors’ confidence, which depends, in particular, on their being placed on an equal footing and protected against the improper use of inside information.*

*In the light of those objectives, and having regard to the fact that Article 3(a) of Directive 89/592 is an exception which must be interpreted strictly, the disclosure of such information is justified only if it is strictly necessary for the exercise of an employment, profession or duties and complies with the principle of proportionality.*

*In the case of successive disclosures, each disclosure must satisfy those requirements in order to come within the exception under Article 3(a) of Directive 89/592.*

*Where it is necessary to appraise the need for a disclosure of inside information, it is appropriate, also, to take into consideration the fact that each additional*

*disclosure is liable to increase the risk of that information being exploited for a purpose contrary to Directive 89/592.”*

40. In *Markus Gelzl v Daimler AG*<sup>5</sup>, the ECJ addressed the position where a protracted process might involve intermediate steps and held that:
- Intermediate steps in a protracted process could constitute precise information and that this interpretation applied to intermediate steps which have already come into existence or already occurred and to intermediate steps which may reasonably be expected to come into existence or occur.
  - The phrase “*a set of circumstances which exists or may reasonably be expected to do so*” refers to future circumstances or events which, it appears, from an overall assessment at the time, that there is a ‘realistic prospect’ that they will come into existence or occur.
  - In order to categorise information about intermediate steps as precise, it is necessary to establish that the information is specific enough to draw a conclusion as to the possible effect of the set of circumstances or the event in question on the price of the particular financial instruments.
41. In *Jean Michel Lafonta v Autorite des Marches Financiers*<sup>6</sup>, the ECJ concluded that for information to be precise, it is not necessary for that information to be such that it is possible to determine the direction of movement in the price of the relevant instrument. It is sufficient that there is a real prospect that there will be movement in the price in any direction. This decision departed from the reasoning in the decision in *Hannam v FCA* (see below) which required movement in a known direction.
- (b) *The UK Upper Tribunal*
42. In the UK the Market Abuse regime was considered in *Hannam v The Financial Conduct Authority FS/2012/0013* (‘Hannam’).

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<sup>5</sup> ECLI:EU:C:2012:397.

<sup>6</sup> ECLI:EU:C:2015:162.

43. The Hannam Tribunal addressed a number of the key provisions of the Market Abuse regime:

(a) In relation to the Reasonable Investor Test, it said that:

*“.....the litmus test is whether a reasonable investor would be likely to take the information (we add: information which, of course, must be capable of having an effect on price) into account in deciding what to do. It is not enough for a reasonable investor simply to read the information and ignore it. The information has to be sufficiently material that it may have an effect on his decisions. That is the sort of information which must be made public in a transparent market and which must not be disclosed to a limited group of people without good reason.”*

(b) Regarding the interpretation of “precise”, it concluded:

*“As to the requirements for information to be specific enough to enable a conclusion to be drawn as to possible effect on price, and in particular what the word “possible” means: the information must indicate the direction of movement in the price which would or might occur if the information were made public. The information does not need to indicate the extent to which the price would or might be affected.”*

(c) In relation to the term “likely”, it said that:

*“The word “likely” is to be read as meaning that there is a “real prospect” of the information having a significant effect on price (which in turn means having a more than de minimis effect).”*

(d) In relation to the term “significant”, it said that:

*“Our view is that a “significant” effect is one which is to be contrasted with an insignificant, in the sense of trivial, effect. What is, or is not, trivial will depend on the particular circumstances of the case: for instance, a 1p rise in a share worth £10 may be regarded as a trivial but a 1p rise in a share worth 2p would not. There is, we accept, a certain inherent uncertainty in this approach but it provides a sensible way of reaching the essence of what is significant.”*

44. In its decision, the Hannam Tribunal considered an earlier decision – *Massey v FSA [2011] UKUT 49 (TCC)* (‘Massey’) – which had considered the interaction between:

- Article 1 (1) of the Market Abuse Directive – which establishes the requirement that inside information “*be likely to have a significant effect on the price*” of the shares concerned; and
- Article 1 (2) of Commission Directive 2003/14/EC which provides that:

*“information which ... would be likely to have a significant effect on the price shall mean information a reasonable investor would be likely to use as part of the basis of his investment decision.”*

45. The Massey Tribunal held that provided information was “*of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions*”, it was irrelevant whether that information was “*likely to have a significant effect on the price*”.

46. However, the Hannam Tribunal rejected that approach having regard to the legislative requirement that the information must be such that, if it were made public, it “*would be likely to have a significant effect on price*”. It held that the “*reasonable investor*” test was to be viewed as providing a definition of what would be “*likely to have a significant effect on price*” and noted that the reasonable investor is an investor who would take into account information which would be likely to have a significant effect on price.

(c) *The Irish Supreme Court*

47. In *Fyffes v DCC Plc, S & L Investments Limited, James Flavin and Lotus Green Limited [2009] 2 IR 417*, the Supreme Court, in considering section 108 of the Companies Act 1990 (since repealed) held that:

*“Part V of that Act implements the State's obligations under Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing. The purpose of the Directive is to provide assurance to investors that they are placed on equal footing and that they will be protected against improper use of inside information, thus obviating the undermining of confidence in, and the smooth running of, the market. Member States were required to prohibit the*

*misuse of inside information by those involved in the management of companies. They were not required to provide the type of civil remedy contained in Part V, though they were permitted to adopt more stringent measures than those required.*

...

*The Act does not use a definition of "inside information." It is obvious, however, that section 108 must be interpreted in the light of the Directive and so as to be in conformity with it - the principle of conforming interpretation. It is clear - indeed it was common case - that the expression, "likely materially to affect the price of those securities," in the section must have the same meaning as "likely to have a significant effect on the price of..." securities in the Directive. The term, in fact used throughout the trial and the appeal was "price sensitive information."*

...

*The section contains no reference to a reasonable investor. It appears to envisage a simple question: what is likely to have been the effect of the availability of the information on the price of the shares?"*

Further, the Court observed:

*"The section lays down a single test. That is whether the information alleged to be price sensitive would, if it were generally available, be likely materially to affect the price of those securities. The price is the price on the market. The market is comprised of many investors, wise and unwise, reasonable and unreasonable... In the result, I believe that the learned trial judge was mistaken in superimposing a test based on the reasonable investor on the single statutory test: would the price have been materially affected."*

The Court went on to emphasise the importance of context.

(d) Relevant Enforcement Decisions

48. In the FCA Final Notice in relation to Sir Christopher Gent (5 August 2022), the FCA considered the circumstances in which selective disclosure of inside information had occurred.
49. In the Summary of Reasons for its decision, it said that:

*‘On 10 October 2018, Sir Christopher, in his capacity as Chairman, disclosed inside information, concerning an expected RNS announcement relating to the revision of ConvaTec’s financial guidance and the retirement of ConvaTec’s CEO, otherwise than in the normal exercise of his employment, profession or duties. The disclosures were made to a senior individual at one of ConvaTec’s major shareholders [Company A], and then shortly afterwards to a senior individual at another of ConvaTec’s major shareholders [Company B].*

*Sir Christopher’s actions amount to unlawful disclosure of inside information under Article 10 and in breach of Article 14 of EU MAR and that he therefore committed market abuse.*

*The [FCA] considers that Sir Christopher acted negligently in disclosing the information. Having received relevant training on EU MAR, and based on his own considerable experience and position, Sir Christopher should have realised that the information he disclosed constituted, or may have constituted, inside information and that it was not in the normal exercise of his employment, profession or duties selectively to disclose it. Sir Christopher failed properly to apply his mind to the specific question of what information, if any, he might properly disclose, as well as when, in what manner and to whom, and he failed to obtain clear, formal advice regarding this question, before making the disclosures.*

*The Authority considers that Sir Christopher acted negligently notwithstanding the following matters. At the time of the disclosures, ConvaTec had not yet formally classified the information regarding the expected revision to the financial guidance and the expected retirement of the CEO as inside information, and Sir Christopher had been informed that the view of ConvaTec’s brokers was that ConvaTec needed to obtain more information in relation to the guidance revision and should not make an announcement until*

*it had sufficiently precise information. In addition, a board-level ConvaTec executive and one of ConvaTec's brokers were informed by Sir Christopher that he was intending to call, and/or had called, the major shareholders. Further, ConvaTec had a relationship agreement with one of the major shareholders which imposed confidentiality and no-dealing obligations on the major shareholder, and Sir Christopher imposed such obligations himself on the senior individuals to whom he made the disclosures.*

*The Authority considers that Sir Christopher's conduct was serious because the unlawful disclosure of inside information undermines investor confidence in the integrity of financial markets.'*

The FCA imposed a financial penalty on Sir Christopher for unlawful disclosure of inside information.

50. In its detailed analysis,

- the FCA summarised the evidence given by Sir Christopher when interviewed:

*'Sir Christopher said that he imposed an obligation of confidentiality, and no-dealing, on [the individuals he spoke to]. Sir Christopher explained that the main purpose of the conversations, so far as he was concerned, was to say, following the CEO indicating that he was minded to retire, "that the person that they had invested in, in leading the business, was most likely not going to be leading it in the future". In addition, he did not want to "surprise shareholders of scale with announcements" given the intention of Company B (to build a more significant shareholding in ConvaTec) and the actual size of the investment with Companies A and C. He said he believed that he was acting as Chairman in the best interests of ConvaTec and that it would be in the interests of the Company that these investors:*

*"received the information about the departure of [the CEO] and didn't get it from a press release on the day.'*

- And concluded:

*‘... Sir Christopher’s disclosures to Individual A and Individual B were made otherwise than in the normal exercise of his employment, profession or duties in his role as Chairman of ConvaTec for the following reasons:*

- (a) the disclosures were not reasonable and it was not necessary for them to be made in order for Sir Christopher to perform his proper functions, nor was it a proportionate way for him to discharge his duties as Chairman. In these circumstances, the imposition of confidentiality and no-dealing requirements could not make the disclosures part of Sir Christopher’s normal exercise of his employment, profession or duties;*
- (b) Sir Christopher’s explanation that he did not want to “surprise shareholders of scale with announcements” was not a good reason for making the disclosures. Although the Authority accepts that engagement and the fostering of good relations with shareholders formed part of Sir Christopher’s duties as Chairman, the Authority considers that disclosing inside information for this reason is not consistent with the objectives of EU MAR, which seeks to prevent “unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information and, consequently, the undermining of the integrity of financial markets and investor confidence”;*
- (c) although Recital 19 to EU MAR provides that discussions of a general nature regarding the business and market developments are permissible between shareholders and management concerning an issuer, Sir Christopher’s disclosures of inside information were outside the scope of that type of discussion;*
- (d) there is no evidence that it was necessary for Sir Christopher to consult with Individuals A and B. Further, in respect of the disclosure to Individual A, it was not reasonable, and it was*

*not necessary in order to perform his proper functions, for Sir Christopher to consult Individual A, in circumstances where ConvaTec's Board included a non-executive director of Company A (being someone other than Individual A) to whom Sir Christopher could have disclosed the information and consulted if necessary. In any event, Sir Christopher's objective, or primary objective, was not to consult Individuals A and B, but rather to forewarn them of events that he believed would soon take place;*

- (e) in respect of his disclosure to Individual B, Company B was a materially smaller shareholder in ConvaTec than Companies A and C, yet Sir Christopher did not seek to make similar disclosures to several larger shareholders, notwithstanding his explanation that he did not want to "surprise shareholders of scale". Sir Christopher's disclosure to Individual B was particularly inappropriate in circumstances where Sir Christopher was aware of Company B's active intention to build a more significant shareholding in ConvaTec;*
- (f) there were more appropriate means by which Sir Christopher could have acknowledged, and ensured, the ongoing support of Companies A, B and C. For example, other major shareholders were given access to the Company's senior management team in calls held immediately after the RNS announcements; and*
- (g) there was no good reason for the timing of the disclosures, which took place at least two working days before Sir Christopher believed any announcement would be released. Making the disclosures at that time was also contrary to the procedures followed by ConvaTec where discussions with shareholders were proposed prior to the release of an RNS announcement, which was to hold such discussions after the RNS announcement had been approved, the evening before the announcement, after the markets had closed. ConvaTec informed the Authority that shareholders are told that it is proposed that inside information be shared with them, which*

*will be released the next morning, and that it believes this process has only ever been followed with shareholders with whom it has had relationship agreements in place.*

51. This decision contains a detailed analysis of when selective disclosure (or ‘wall-crossing’) is appropriate and reinforces the spirit and intention of DTR 2.2.7G.
52. As a result, prior to selective disclosure to third parties, steps should be taken to ensure that:
  - There is a justifiable purpose for the disclosure to the proposed recipients;
  - The recipient must be aware that the information is or may be inside information and that disclosure or misuse of that information may constitute an offence under the Market abuse regime;
  - The recipient has consented to disclosure to him/her; and
  - The recipient has entered into a confidentiality undertaking with the company in relation to the inside information.
53. An example of where there is a justifiable purpose would be where information is disclosed to a major shareholder about a forthcoming Class 1 acquisition or disposal in order to sound out its support, or not, ahead of the vote on the proposed transaction, provided the shareholder accepts and is subject to confidentiality restrictions.
54. This type of situation should be differentiated from the situation where a shareholder is merely being informed. Disclosing information to a major shareholder simply to forewarn them of an event that has or is about to take place, ahead of notifying the market, is not, in principle, a legitimate reason for such selective disclosure.
55. It is also noteworthy that the Hannam Tribunal, in addition to concluding that the disclosure had not been for a proper purpose, concluded that the disclosure did not meet the test of being made in the normal course of employment, profession or duties because of the manner in which the disclosure took place – without a proper assessment of whether it involved a disclosure of inside information, with no market abuse warnings or confidentiality restrictions.

C. INM's policies and procedures concerning the communication of inside and confidential information

56. Before turning to the evidence and submissions we received, it is appropriate to set out the policies and procedures that INM had in place in relation to the communication of inside and confidential information.
57. In this regard we were assisted by a statement provided by Mr Doorly, who was INM's Company Secretary from December 2013 until October 2017 (when he became INM's CEO).
58. Mr Doorly told us that, as Company Secretary, his responsibilities included:
- Coordinating board and committee meetings;
  - Circulating board papers in advance;
  - Ensuring that Board decisions and instructions were properly recorded and communicated;
  - Ensuring that INM complied with relevant statutory and regulatory requirements;
  - Executing documentation on behalf of INM when required; and
  - Annual Returns.

He attended most board and committee meetings and prepared minutes shortly afterwards.

59. The market abuse regime first came into force in 2005, before Mr Doorly became Company Secretary. His predecessor, Andrew Donagher, had responsibility for overseeing INM's handling of inside information and routinely took advice from its financial and legal advisers as to the proper handling of inside information. The Board was also advised as to its responsibilities by McCann FitzGerald.
60. In 2011, INM commissioned Davy and McCann FitzGerald to prepare a "*Policy on Use and Disclosure of Inside Information*". The purpose of this document, which was

adopted, was to provide guidance to directors, officers and employees of INM and assist them in recognising inside information.

61. Among other things, the policy notes that *“Directors have overall responsibility for the identification, control and dissemination of Inside Information”*, and that its intent was to *“ensure that the Company and Relevant Persons comply with [...] regulatory requirements”* as prescribed under the Market Abuse Directive, Market Abuse Regulations and the Market Abuse Rules.

62. At paragraph 4.1, the policy made it clear that the disclosure of inside information was prohibited, and stated:

*“Any Director, officer or employee of the Company shall be prohibited from disclosing Inside Information to anyone other than a person whose position (that is, in the normal course of the exercise by the recipient person of their employment, profession or duties) requires them to know the Inside Information, and who is subject to this Policy or who is under an obligation of confidentiality to the Company. Selective disclosure of Inside Information must not be made to any person simply because that person owes the Company a duty of confidentiality.”*

63. The policy noted that directors or employees of INM were prohibited from disclosing inside information to anyone other than a person whose position required them to know the inside information, or who was under an obligation of confidentiality to the Company. The policy noted that there might be a justification for certain categories of persons to receive inside information (including, amongst others, major shareholders), provided in each case that the person receiving the information was bound by a duty of confidentiality. The Compliance Officer was required to maintain a list of persons receiving inside information.

64. Following his appointment as Company Secretary in August 2016, and given the complexity of the issues involved, Mr Doorly took advice from INM’s financial and legal advisers as to the proper handling of inside information, and the Board continued to be advised of its responsibilities in this respect.

65. For example, in November 2015, McCann FitzGerald presented to the Board and provided a detailed document to the company – the *Continuing Duties and Responsibilities of Directors* – which contained details of the duties owed by

directors, the position of nominee directors and their roles vis a vis their nominating shareholders, the treatment of shareholders, ESMA guidance in relation to what might constitute inside information and guidance in relation to the circumstances in which such information might be shared with third parties.

66. When the new Market Abuse regime came into effect in summer 2016, McCann FitzGerald provided detailed advice to INM on the implications and requirements of that new regime. In response to the requirements under the new regime, INM then put in place:
- insider lists;
  - a dealing procedures manual;
  - a share dealing code;
  - a share dealing policy;
  - a memorandum on inside information to be signed by persons discharging managerial responsibilities (PDMR) under the policy; and
  - a Disclosures Committee comprising the CEO, CFO and Company Secretary.
67. In June 2016, McCann FitzGerald provided a manual entitled *"Procedures, systems and controls for compliance with disclosure obligations under the Irish Listing Rules and the Market Abuse Regulation"* ('the INM Manual'). This document set out for directors the key internal procedures, systems and controls for the handling of inside information.
68. As Company Secretary, in accordance with the Market Abuse requirements, Mr Doorly maintained two Insider Lists. Those requirements did not require external third parties other than advisers to INM to be listed in these Insider Lists.
69. The INM Manual set out in detail the principles relating to inside information and how it should be dealt with in order to ensure compliance with the Market Abuse regime. INM's procedures included a mechanism for the appropriate and authorised sharing of inside information with third parties.

70. In deciding on its policy for the sharing of inside information with third parties, INM had the option of:

- (1) putting in place a Board authority for individual directors or officers to share inside information with specified third parties on the basis that the specified third parties would be insiders and agree not to misuse the information and hold it confidential,

or

- (2) expressly providing that inside information should only be shared with third parties following assessment on a case by case basis.

INM opted for the second option and established specific procedures to be followed (INM Manual, Part 2, Section 8) which set out:

- The company's obligation to assess and record whether any information to be disclosed contained inside information;
- The procedure to be followed to obtain the recipient's consent to receive the information.

The procedure provided that no disclosure of inside information could be made without involving the Company Secretary.

71. Mr Doorly told us that decisions in relation to disclosure or delaying disclosure of inside information arose very infrequently and, to the extent that such issues did arise, they were dealt with in accordance with the terms of the INM Manual, discussed at Board level and relevant advice was obtained from financial, legal and public relations advisors.

72. The Manual set out examples of circumstances in which the Company might make selective disclosure(s) of inside information, which included:

- "(a) *communicating with major shareholders, lenders and/or credit-rating agencies ahead of a major transaction which requires shareholder support*

*or which could significantly impact the Company's lending arrangements or credit-rating;*

- (b) communicating information to investors, prior to the announcement of a transaction, in order to gauge the interest of investors in a possible transaction or conducting discussions with investors about the terms of a potential transaction, including its potential size or pricing; and*
- (c) contacting key investors in order to obtain financial commitments from them to participate in a debt issuance or equity offering".*

73. The Manual provided that *"selective disclosure can only be made following a decision of the Disclosure Committee and strictly following the procedures set out in Part 4 of the Manual"*. The procedure for the selective disclosure of information included (1) an assessment of information prior to making a selective disclosure; (2) obtaining the consent of the proposed recipient; and (3) notifying the recipient when the information had ceased to be inside information.
74. The Disclosure Committee met only once, on 16 January 2017, to consider whether INM was under an obligation to make an announcement regarding the ODCE investigation. However, it is clear that consideration of whether communications contained inside information must have taken place on other occasions on an ad hoc basis.
75. INM's policies and procedures to ensure compliance with the Market Abuse regime also included:
- Dealing Procedures Manual – to be followed by the Company Secretary when considering applications by directors and employees for permission to deal in INM shares;
  - Share Dealing Code – which set out the share dealing clearance procedures to be followed by directors and employees; and
  - Share Dealing Policy – which explained the prohibitions imposed by the Market Abuse regime on the misuse of inside information.

76. In addition, each Director was provided with a Memorandum on Inside Information (the “Memorandum”) which drew his or her attention to the specific requirements of the Market Abuse regime, including the treatment of inside information, and the obligations on directors to comply with the company's policy on confidential information.
77. Each Director, having considered the Memorandum, was required to return a signed copy to the Company Secretary. Mr Doorly told us that he sent a copy of the Memorandum to, and received a signed copy of the Memorandum from, each of the Directors, including from Mr Buckley. Although the Memorandum signed by Mr Buckley is undated, Mr Doorly told us that Mr Buckley returned his copy of the Memorandum shortly after it was sent to him on 24 August 2016.
78. The Disclosures Committee was established following the introduction of the new Market Abuse regime in summer 2016 and its Terms of Reference explained that its purpose was to identify inside information and ensure that it was treated in accordance with legal requirements and Company policy.
79. The Memorandum signed by each director provided as follows:

*"You are under a duty of confidentiality in respect of any confidential information you receive (whether about the Company or a third party) and you must not use or disclose such information (including to your family, friends and business acquaintances) without due authorisation. We (or others) may take action against you if you breach this duty of confidence, including seeking an injunction to prevent the disclosure of any confidential information or damages for any losses suffered."*

'Due authorisation' meant the authority of the Board communicated through the Company Secretary.

80. The Group-Wide Dealing Policy provided:

*"You must not disclose any confidential information about the Group (including any inside information) except where you are required to do so as part of your employment or duties. This means that you should not share the Group's confidential information with family, friends or business acquaintances."*

81. In signing the memorandum, Mr Buckley undertook to comply with an obligation to inform and obtain approval from the Company Secretary prior to disclosing any confidential information.
82. Mr Doorly told us that, although the INM Board could put in place specific arrangements with a specified third party for the sharing of information, he was not aware that any such arrangements were put in place whilst he was Company Secretary.
83. So far as he could recollect, there was no expectation that any specific shareholder should have any special arrangement for receiving confidential or inside information – indeed, the general culture at Board was that shareholders should not generally get special treatment. As a result, when dealing with Mr O'Brien and other third parties, directors had to give specific consideration to whether the information should be shared and obtain the necessary authority before doing so.
84. There were certain occasions where the Board was aware that Mr Buckley intended to communicate confidential or inside information to Mr O'Brien and he did so with the Board's approval, such as with regard to the pension restructuring, which was highly sensitive and INM needed to know whether Mr O'Brien would support the planned actions. On that occasion, the communication was with Mr Hayes, financial adviser to Mr O'Brien. It was fully understood on that occasion that the major shareholder was to be consulted and that was in line with Part 2, Section 8 of the INM Manual.
85. Nominee directors had the same obligations as independent directors with regard to inside and confidential information but could have regard to the interests of their nominating shareholders, so long as those interests were not inconsistent with the interests of the company.
86. Mr Doorly noted that the FCA/ESMA guidance published in November 2015 suggested that the chairman of a plc should discuss governance and strategy with a major shareholder. However, whilst a chairman might be in regular contact with a major shareholder, given the importance of support for the direction of the company and strategy, this would not extend to the sharing of confidential or inside information without approval.

87. Mr Doorly told us that he did not include Mr O'Brien in the Insider lists as there was no requirement to include third parties unless they were advisors to the Company – which Mr O'Brien was not. However, the INM Manual provided for the maintenance of detailed records of selective disclosure of inside information and the Memorandum provided for the provision of that information to Mr Doorly.

D. The evidence given by Mr Buckley, the INM Directors, Mr Harrison and Mr O'Brien.

88. In the course of the ODCE proceedings and this Investigation, it became apparent that Mr Buckley had passed information regarding the affairs of INM to a number of people and, in particular, Mr O'Brien in advance of such information being available to INM's other shareholders and the market more generally.
89. The information communicated by Mr Buckley fell into the following categories:
- (a) INM's announcements of its financial results – both full year and half year – and related statements in advance of the general publication of such information.
  - (b) Information regarding the proposed capital reduction by INM.
  - (c) Information regarding discussions relating to INM's defined benefit pension funds.
  - (d) Information regarding the ODCE's request for records relating to INM's proposed acquisition of Newstalk.
  - (e) INM's proposed sale of its shareholding in APN.
  - (f) INM's sales performance in July/August 2016.
90. In order to provide the relevant parties with an opportunity to give evidence as to whether the individual communications contained information confidential to INM and/or was "*inside information*", we provided Mr Buckley, the INM Directors and Mr Harrison with a schedule setting out each communication and asked them, in relation to each communication:
- (a) whether the communication included information confidential to INM;
  - (b) whether the communication included inside information as defined in the Market Abuse Regulations; and

- (c) where they concluded that a communication did not contain information confidential to INM and/or “*inside information*”, their reasons for that conclusion.

91. In addition, we asked a further question relevant to the circumstances of the particular individual(s).

- (a) Where he had sent communicated with individuals other than Mr O’Brien, we asked Mr Buckley the basis on which he considered it appropriate to do so.
- (b) We asked each of the INM Directors and Mr Harrison whether he/she was aware that:
  - the communication had occurred; or
  - the information contained in the communication had been provided to the recipient (e.g. Mr O’Brien)

92. We specifically stated that the information provided in response would be regarded as a continuation of the individual’s sworn evidence provided pursuant to sections 753 and 756 of the Act. We also confirmed that, on giving further evidence, an individual would be able to provide additional evidence and answer any questions his/her Counsel might consider necessary to ensure that we received all evidence considered relevant to these issues.

**(i) Mr Buckley’s evidence**

93. Mr Buckley provided a detailed response to our questions. In the letter enclosing his response, A&L Goodbody wrote:

*“Given the time that has elapsed since these communications were sent or conversations took place, [Mr Buckley] is unable to precisely recall his state of mind at the time he sent each of the individual communications in question and whether he considered them to have contained confidential or inside information at the time. When he regards the communications today, he is of the view that all of them, apart from A20, B9 and B10, contained confidential information. However, for the reasons stated in the attached appendix, and*

*with only one exception relating to Ms Gaffney, Mr Buckley only shared confidential information with Mr O'Brien (who he at all times assumed was an INM insider and who was always treated on that basis) or with individuals he regarded as proxies or agents for Mr O'Brien and in whom he placed the strictest trust and confidence."*

Subsequently, when asked to address communications C1, C3, C4, C7, C8 and C10, Mr Buckley said that in his view, those communications did not contain information confidential to INM.

94. As regards whether the communications contained inside information, A&L Goodbody told us that:

*"This is not [Mr Buckley's] area of professional expertise and that he is not in a position to assess the price sensitivity of any of the relevant communications. As such, [he] is not in a knowledgeable enough position to opine on whether any of the communications fell within the definition of inside information as contained in the applicable market abuse legislation."*

95. The Appendix to A&L Goodbody's letter included comments on each of the communications setting out, where appropriate, the circumstances in which the communication was made. In many instances, Mr Buckley referred back to a previous explanation. The following summarises Mr Buckley's evidence.

- In relation to communications sent to Mr O'Brien, Mr Buckley told us:

*'I sent the cited correspondence relating to INM to Mr O'Brien out of courtesy and in order to keep him informed about developments at the company. As stated before, I always assumed that Mr O'Brien was an insider and therefore did not actively consider issues such as confidentiality or inside information when communicating with Mr O'Brien about INM matters. I believed that I could trust Mr O'Brien to keep any information provided to him strictly confidential and he knew and understood that information was shared with him on that basis.'*

- In relation to communications sent to Mr Shorthouse regarding proposed acquisitions, Mr Buckley told us:

*'I copied Mr Shorthouse ... as he was Mr O'Brien's investment adviser. Occasionally, and only when I considered it appropriate in relation to the subject matter being discussed. I sent or copied emails relevant to Mr O'Brien to Mr Shorthouse. I viewed Mr Shorthouse as being an agent for or an extension of Mr O'Brien; I trusted him with sensitive information. I have no doubt that he knew and understood that any information I shared with him was on a strictly confidential basis and I was confident that anything I shared with him would not be disseminated any further.'*

- In relation to an email he sent to Ms Gaffney through whom he was seeking information about the likely reaction of the board of a company INM was considering trying to acquire, Mr Buckley told us:

*'I do not doubt that Ms Gaffney understood that I shared this information with her on a strictly confidential basis.'*

- In relation to an email he sent to Mr Hayes, Mr Buckley told us:

*'As a person well known to me and to INM and as an employee of Island Capital (Mr O'Brien's company), I viewed Mr Hayes as a trusted adviser as well as an agent for Mr O'Brien. I therefore considered that I could share such information in confidence and that he understood that he was receiving it on that basis.'*

- In relation to communications with Mr Shorthouse relating to Mr Pitt's protected disclosure, Mr Buckley told us that:

*'[he] did not view Mr Pitt's disclosure as a protected disclosure at the time and had not received legal advice about it. Nobody told me that I could not speak to anyone about Mr Pitt's complaint or the fact that he had made one. I recall Mr Kennedy informing me that Mr Pitt had consented to Mr Kennedy telling me about his complaints. As it centred heavily around the Newstalk negotiations,*

*and as Mr Shorthouse was the main counterparty on the Communicorp side, I updated him with the relevant information.'*

He also told us that he forwarded the exchange to Mr Shorthouse because he was:

*'... the person who had brought Newstalk and was central to the whole Newstalk discussions, okay, and because Mr Pitt made a complaint to us in relation to Newstalk I think it was appropriate for me to tell Mr Shorthouse'*

- In relation to an email to Mr O'Brien and Ms Sinead Walsh regarding a media statement relating to negotiations between INM and the Trustees of INM's defined benefit pension schemes, Mr Buckley told us:

*'I had wanted a statement to be issued regarding the pensions issue following the INM EGM. However, this did not happen. One week later, it was agreed by INM that such a statement should be issued. At that point the company had already taken a lot of criticism in the press in relation to the pension issue and much of it targeted at Mr O'Brien personally rather than the company.'*

- In relation to communications relating to the proposed sale of INM's shareholding in APN, Mr Buckley told us:

*'I believe any discussion I had with Mr Hayes at the time would have been appropriate in view of the contemplated block sale and his role in facilitating that.'*

96. Mr Buckley summarised his position in relation to his communication of alleged confidential and/or inside information to Mr O'Brien as follows:

*'As regards the alleged disclosure of inside information, I have previously made my position on this clear on a number of occasions: I always assumed Mr O'Brien to be an insider and always treated him on that basis. I believed that I could trust Mr O'Brien to keep any information provided to him strictly confidential and that he knew and understood that information was shared with him on that basis. Where the communications at issue were made to other*

*individuals, such as Mr Shorthouse, they were made to individuals who I considered agents of Mr O'Brien and in whom both myself and Mr O'Brien placed the strictest trust and confidence.*

*In so far as the communications at issue in this module contained information confidential to INM, I reject any suggestion that I disclosed such information unlawfully or that I used confidential information for my own benefit or that of any third party in breach of my duty as Chairman and director, nor has any such allegation been put to me. I acted at all times in the best interests of INM.*

*The role of chairman of any company, and in particular of public listed company, is one which necessarily involves handling and sharing confidential information. It would not be possible to do business, or to progress or pursue the interests of the company, without doing so — for example, in exploring potential opportunities. The communications at issue were in the normal and proper exercise of my role as Chairman and director of INM. In my view it would have been impossible for me to perform my role without sharing such communications.*

*It is important to note that I was a nominee director appointed by Mr O'Brien as INM's major shareholder. By its nature, this role required a degree of interaction with Mr O'Brien and his agents / proxies and, for example, as demonstrated by communication [C4], it was understood within INM's senior management and Board that on certain occasions I would, properly, reflect Mr O'Brien's views on certain issues, subject, of course, to my overriding duty to act in the interests of the company. In this regard, I would also draw the Inspectors' attention to the evidence of Mr Doorly in his witness statement of 31 July 2020 (para 14.4) where he stated:*

*"There were certain occasions where the Board was aware that Mr Buckley intended to communicate confidential or inside information to Mr O'Brien and he did so with the Board's approval, such as with regard to the pension restructuring which was highly sensitive and the company needed to know whether Mr O'Brien would support the planned actions. It was fully understood on that occasion that the major shareholder was to be consulted and that was in line with Part 2, Section 8 of the Manual".*

*In addition, the communications must also be considered in light of the fact that Mr O'Brien was not only the major shareholder, but a shareholder very supportive of INM and who was particularly involved in INM's affairs. My communications with him were always conducted in the best interests of INM.*

- *Mr O'Brien was involved in the negotiations with INM's banks in 2013 that led to the write-off of a large portion of INM's debt;*
- *Mr O'Brien underwrote the rights issue which INM was required to complete as a condition of the debt write-off by the banks in the amount of €25m and ultimately invested €17.5m, which encouraged other shareholders to participate in the rights issue;*
- *When Mr Crowley (then-CEO of INM) and I oversaw a sales process for INM South Africa in 2013, Mr O'Brien supported INM to ensure that the sale proceeded and travelled to South Africa to meet with the ultimate buyer of the company;*
- *When APN carried out a rights issue in early 2014 in which INM was unable to participate and which diluted INM's shareholding to 18.6%, Mr O'Brien in effect took up INM's allocation and increased his shareholding to 12.8%, thereby maintaining a significant 'INM block' of shares in APN i.e. the combination of INM's shareholding and that of Mr O'Brien; and*
- *When Mr O'Brien decided to sell Newstalk, he afforded INM a period of exclusivity over the course of September and October 2016 before looking at a wider sales process.*

*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.”*

(ii) **The INM Directors' evidence**

97. Each of the INM Directors provided a written statement in which they addressed three issues:

- (a) Whether the communications included information confidential to INM;
- (b) When they became aware that Mr Buckley had provided information to Mr O'Brien (and others on his behalf); and
- (c) The actions taken by the Board (or the Special Committee) on learning of the communications between Mr Buckley and Mr O'Brien.

(a) Whether the communications included information confidential to INM

98. The INM Directors confirmed that, subject to the exceptions set out below, the communications contained information that was confidential to INM.

99. All the INM Directors agreed that communications numbered B9, B10, C1, C3, C4, C7, C8 and C10 did not contain confidential information.

100. In addition, the following INM Directors identified communications which did not, in their view, contain confidential information:

- Mr Connolly                      A6 and A30
- Mr Marshall                        A6
- Mr Doorly                          A6 and B6
- Mr T. Buckley                      B1, B6 and B11

(b) When they became aware that Mr Buckley had provided information to Mr O'Brien (and others on his behalf)

101. In their witness statements, the INM Directors set out the circumstances in which they became aware that Mr Buckley had been providing information to Mr O'Brien.

102. Dr O'Hagan, Mr T. Buckley, Ms Mullane and Mr Doorly told us that:
- They had no contemporaneous knowledge that Mr Buckley was providing information to Mr O'Brien;
  - They first became aware that Mr Buckley had been sharing information with Mr O'Brien in February 2017, when McCann FitzGerald reported that Mr Buckley had shared with Mr O'Brien a draft of an announcement to be made by INM relating to the dispute with Mr Pitt;
  - They became aware of further information sharing when the ODCE served Mr Drennan's affidavit in support of the appointment of Inspectors (which included reference to the 22 communications that Mr Drennan had identified as possible breaches of market abuse legislation or improper disclosure of other confidential Company information); and
  - They became aware of the remaining instances of information in the course of the Inspection.
103. Mr Kennedy told us that, with the exception of the information provided to the Special Committee in February 2017, he was not aware of the nature and extent of the information being shared by Mr Buckley with Mr O'Brien until the commencement of the Inspection in November 2018.
104. Mr Marshall told us that, in his case, he was not aware that Mr Buckley was sharing information with Mr O'Brien until the commencement of the Inspection in November 2018.
105. Mr Connolly told us that he had no contemporaneous knowledge of the communications between Mr Buckley and Mr O'Brien, save for communications numbered A5, A6, A30 and B37. His evidence in relation to the communications he was aware of was as follows:
- *A5 – Mr Buckley's email dated 26 July 2016 addressed to Mr Shorthouse and Mr Connolly.*

As the email was marked "*Private & Confidential*," he was comfortable that it would be understood by all parties that the information was to be

treated as confidential. He knew Mr Shorthouse to be a very experienced investor who would treat the information on a strictly confidential basis.

On this basis, he understood why Mr Buckley would have considered that he could seek Mr Shorthouse's expertise as Mr O'Brien's investment advisor, acting in the best interests of INM and in accordance with Company policy.

- *A6 – Mr Buckley's email dated 27 July 2016 to Mr Shorthouse and Mr Connolly forwarding an email from Giles Worthington to Mr Pitt.*

Although Mr Connolly did not recall receiving this email, he told us that it was an example of a typical email that he would expect a CEO or CFO to receive in the ordinary course of business, or indeed to be received directly by the Chair and/or Senior Independent Director and he assumed that Mr Buckley forwarded it to Mr Shorthouse in light of his expertise and that any information shared by Mr Buckley was shared in accordance with Company policy.

- *A30 – An email chain dated 12 December 2016 between Mr Buckley and Mr O'Brien, copied to Mr Shorthouse and Mr Connolly attaching a statement regarding INM's defined pension schemes.*

The statement had been released and so the information was no longer confidential to INM.

- *B5 – Meeting between Mr Connolly and Mr Hayes to discuss the proposed sale of INM's shareholding in APN.*

The meeting took place to enable Mr Connolly to discuss with Mr Hayes the proposed sale of INM's shareholding in APN and secure the necessary consent from Mr O'Brien so that planning for that sale could go ahead.

In such circumstances, Mr Connolly considered the discussion to be appropriate and uncontroversial.

(c) The actions taken by the Board (or the Special Committee) on learning of the communications between Mr Buckley and Mr O'Brien.

106. In relation to the Board's response on becoming aware of the information sharing between Mr Buckley and Mr O'Brien, Dr O'Hagan told us:

- (a) The Special Committee first became aware on 15 February 2017 of information sharing between Mr Buckley and Mr O'Brien (in relation to the dispute with Mr Pitt). The issue was identified by McCann FitzGerald who brought it to the attention of the Special Committee. However, as the Special Committee was not at that stage advised that there had been a clear cut breach of regulatory requirements in respect of the communications discussed and in light of the ongoing Independent Review, it concluded that it was not in INM's interest to take further steps in respect of the matter at that time and that the position would be revisited when the Independent Review was complete.
- (b) Following receipt of the Independent Review Report, this issue was returned to the Board with other issues for further consideration, which, in an on-going process, resulted in the Independent Reviewers' recommendations being actioned, a change in composition of the Board and Mr Buckley's departure.
- (c) At all times the Board and the Special Committee were sensitive to advance and protect the interests of INM and all its stakeholders by resolving these issues in a manner which balanced the rights and interests of INM and Mr Buckley (and while still at INM, Mr Pitt) and was sensitive to avoiding a damaging dispute and litigation.
- (d) On 24 March 2017, INM wrote to Mr Buckley in light of the information which had emerged in the course of the ODCE process generally and how matters were developing to request that he comply with the ODCE statutory requirements.
- (e) On 31 March 2017, the ODCE served a requirement seeking evidence of all communications between the directors of INM and Denis O'Brien.

- (f) INM wrote to the ODCE on 6 April 2017 to explain that the actions of Mr Buckley were not reflective of deficiencies in the corporate governance regime at INM and that any matter relating to the communications issue should therefore more appropriately be addressed directly to Mr Buckley. During this period, the Special Committee actively encouraged Mr Buckley to engage with the ODCE process and it wrote to Mr Buckley again on 10 May 2017 to request his compliance with the ODCE's statutory requirements.
- (g) The Special Committee met with the ODCE on 24 April 2017 to discuss their statutory requests regarding communications with Mr O'Brien and informed the ODCE of the steps INM had taken to ensure the independence of the Board including that:
- (i) It had engaged Deloitte to carry out a review of the independence of each of the non-executive directors on the Board in line with the requirements of the UK Corporate Governance Code; and
  - (ii) Following the Deloitte review and in order to ensure adequate Board independence, the Board and various sub-committees were reconstituted.
- (h) INM wrote to the ODCE on 28 April 2017 explaining that it was not practical for it to provide the ODCE with communications between Mr Buckley and Mr O'Brien as any such communications were not within the possession or control of the Company. It also said that INM did not accept that breaches by the Chairman of his duties to the Company equated to unlawful conduct by the Company, or necessarily to a failure in its corporate governance structures and, in particular, it noted that "*communications between a chairman and major shareholder may be appropriate and consistent with good corporate governance*". At the time, INM was aware only of the single instance of information sharing between Mr Buckley and Mr O'Brien.
- (i) INM wrote to the ODCE again on 10 May 2015 stating that it would await the outcome of the Independent Review before drawing conclusions as regards the conduct of Mr Buckley and noting that Mr Buckley might wish to make arguments regarding the appropriateness of his

communication with Mr O'Brien and the basis on which it occurred, having regard to his role as a nominee director.

- (j) Mr Buckley then agreed to liaise with the ODCE directly in respect of any relevant documentation that he held in relation to their requirements. INM was not provided with the documentation produced by Mr Buckley in response to the ODCE's requirements.
- (k) In the period following completion of the Independent Review, INM and the Special Committee dealt with a wide range of matters including implementation of the Independent Reviewers' recommendations and the ongoing management of the ODCE statutory requirements. The non-executive directors were also involved in managing the breakdown in relations between the CEO/CFO and the Chairman.
- (l) Against that background the non-executive directors continued to engage with Mr Buckley which culminated in the announcement on 19 January 2018 that Mr Buckley had decided to step down from the Board on completion of the Company's EGM on 1 March 2018.
- (m) The Board received Mr Drennan's affidavit on 23 March 2018, which identified 22 communications as examples of market abuse or the sharing of confidential or inside information. This was the first time that he had seen any of the specific communications.
- (n) The Board met the following day, on Saturday, 24 March 2018, to consider the way forward.
- (o) The Board had already engaged Deloitte in April 2018 to conduct an independent Board Effectiveness Review in respect of corporate governance standards in INM. In light of the evidence of the communications identified in Mr Drennan's affidavit, INM asked Deloitte to expand the scope of that review.
- (p) Deloitte's report found that INM's existing policies and procedures captured "*all key regulatory requirements with respect to identifying and communicating inside information*" and set out ten recommendations in relation to the Company's policies and procedures.

- (q) The Board resolved to adopt all ten recommendations made by Deloitte.
- (r) INM issued proceedings against Mr Buckley on 30 May 2018 claiming a range of reliefs, including damages for breach of fiduciary duty. Those proceedings were stayed with the INM's consent pending the outcome of the Inspection.
- (s) In correspondence with McCann FitzGerald, acting for INM, A&G Goodbody, on behalf of Mr Buckley, disputed the characterisation of these matters, including the suggestion that he was not co-operating with the ODCE.

107. In conclusion, Dr O'Hagan said:

*'I am of the view that the Board at all times acted reasonably and with the appropriate level of due care, skill and diligence expected in accordance with the duties owed to the Company. I also note that the situation facing the Board during this period was unprecedented and it was navigating a number of highly sensitive and challenging governance matters, including the Communications issue (when it came to its attention), which I believe it did with careful consideration and diligence in the interests of the Company.'*

This view was shared by all the other Directors.

108. Dr O'Hagan also addressed the approach taken by INM to the provision of information to its two major shareholders – Mr O'Brien and Mr Desmond.

109. Dr O'Hagan told us that:

*'They weren't treated in any other, any different way to any other shareholders in relation to communications or briefings or as you would do with any institutional shareholder. The responsibility for the communication between a nominee, that is down to them. And one would expect once you walk into the board, as a director of the board your responsibilities are those, as a director of a public company.'*

110. Dr O'Hagan also said that, in his view,

*'it is expected that in the ordinary course of business nominee directors share information with their nominating shareholder, but that that is done in a manner consistent with their fiduciary duties and legal and regulatory requirements. As a Board, we were particularly conscious of the importance of controlling inside information and we therefore expected, having regard to the Company policies and procedures that were in place in respect of the treatment of confidential and inside information, that any communication of Company information from Mr Buckley to Mr O'Brien was done in accordance with Mr Buckley's legal and regulatory duties.'*

**(iii) Mr Harrison's evidence**

111. In response to the questions raised in our letter dated 23 March 2020, Mr Harrison provided a Statement setting out some general observations together with a table in which he addressed the individual communications.

112. In his Statement, Mr Harrison made the following general points:

- (i) He did not have access to the records and documentation of INM and so his responses were necessarily limited to his recollection.
- (ii) So far as he could recollect, he was first made aware that Mr Buckley might have shared confidential board documents with Mr O'Brien by McCann FitzGerald in or around January/February 2017 at a meeting of the Special Committee. Although he could have had access to and reviewed the documents handed over as part of INM's engagement with the ODCE, he did not do so at the time.
- (iii) On becoming aware of the communications between Mr Buckley and Mr O'Brien, the Special Committee and the Board took legal advice. He said that he was not in a position to waive INM's claim to privilege in respect of such advice.
- (iv) He first learned of the full content/nature of Mr Buckley's messages when the ODCE made its application for the appointment of inspectors.

However, he only saw Mr Drennan's affidavit and the communications referred to in May/June 2019, prior to giving evidence to us.

- (v) As a non-independent director, he was not eligible to be a member of the Corporate Governance Committee (whose remit included INM's obligations under the Code and the Market Abuse regime) or the Audit Committee.
- (vi) He had no knowledge of who was or was not recorded as an insider or the process within INM for managing "*inside information*". In his view the list of insiders mentioned by Mr Doorly '*could not possibly be considered comprehensive in nature*'.
- (vii) Whilst the association between Mr Buckley and Mr O'Brien was well known, and Mr O'Brien was a related party in many guises as well as being the major shareholder in INM, that would not provide any justification for preferential treatment of Mr O'Brien by the Company – and he was not aware of any such preference by the Company.
- (viii) He did not have sufficient information and so was not best placed to express an opinion on whether a specific communication included inside information as defined in the Market Abuse Regulations.

113. In responding to the specific questions that we asked, Mr Harrison told us that he had no contemporaneous knowledge that any of the communications had taken place. He thought that he became aware that certain of the communications had taken place from Mr Drennan's affidavit in the ODCE proceedings – and the others he had become aware in the course of our Investigation.

114. In commenting on the individual communications, Mr Harrison:

- (a) Told us that '*... the Company's results were obviously confidential and were such that they would be considered "inside information" before being released through the appropriate public announcement*'.
- (b) Drew attention to the fact that a number of the communications were sent after the markets had closed in circumstances where the public

announcement of INM's results was to occur early the next morning, before the markets opened.

- (c) Identified a number of communications which, in his view, contained information confidential to INM.

(iv) Mr O'Brien's evidence

115. In his evidence to us, Mr O'Brien told us that, in relation to the receipt of confidential information from INM, he regarded himself as an "insider":

Mr O'Brien: *Again, I always deem myself to be an insider. Absolutely.*

Mr Gillane: *That's what I was going to ask. I suppose that's the large question. Can you just explain that? You deemed yourself to be an insider?*

Mr O'Brien: *I got advice going back many years from William Fry, the late Owen O'Connell, about this because I didn't want to be in any breach of company law and said to him, you know, if INM talk to me about certain things as their most significant shareholder, am I deemed to be an insider because I don't want to be - if there's such a term - an outsider. So he gave me advice and said you should treat yourself as an insider and you need to be careful if you're giving confidential information that you do not breach confidentiality.*

Mr Gillane: *And did Mr Buckley understand you to be an insider and that that was your understanding as well?*

Mr O'Brien: *Yes.*

Mr Gillane: *And was that something widely known at board level?*

Mr O'Brien: *Yes.*

Mr Gillane: *Was there an Insider list do you know or...*

Mr O'Brien: *I'm sure they had an insider list with -- normally in a transaction you'd have an insider list.*

Mr Gillane: *Certainly on individual transactions and I think you were specifically noted as an insider on the APN transaction, but you regarded yourself as an insider for the purposes of the receipt of –*

Mr O'Brien: *From 2009 onwards because we were trying to help restructure the business locally, and then that moved all the way through to 2013 where there was a second restructuring. And then I was involved in the sale of the two businesses including APN. Every step of the way I always treated myself and I was very careful not to talk to -- you know, people if people asked me how is INM going I kind of shut up shop.”*

116. When he was cross-examined on behalf of Mr Pitt, Mr O'Brien reiterated his view that he was treated as an insider and therefore behaved as an insider – keeping confidential any information received by him from INM.

**E. The Expert Evidence given by Mr Fettin, Mr Aylard and Mr Dobbie.**

117. We received expert evidence from Mr Umit Fettin, Mr Roger Aylard and Mr Scott Dobbie. All three provided written evidence by way of expert report. Mr Fettin and Mr Aylard also gave oral evidence.

118. Prior to giving oral evidence, Mr Fettin and Mr Aylard discussed their respective views, following which they produced a joint report. That joint report summarised their views on the approach to be adopted when determining whether information was inside information and their respective conclusions on the eight communications which they both considered. The joint report also identified areas of disagreement.

**(i) Mr Fettin**

119. We instructed Mr Fettin of Movus Consulting to provide us with a report on whether the communications in the schedule at the end of this Chapter could be regarded as containing ‘Inside Information’ under the Market Abuse Regulations.

120. Mr Fettin has over 25 years’ experience, predominantly focusing on governance, risk and compliance within the financial services sector. That included being part of a team undertaking a forensic investigation in relation to a complex market abuse case for the Financial Conduct Authority.

121. Mr Fettin provided us with two reports – the first dated 20 December 2021; the second dated 15 March 2023.

**(a) Report dated 20 December 2021**

122. In his report dated 20 December 2021, Mr Fettin set out the legislative framework applicable at the date the communications occurred. In particular, he noted that:

(i) the definition of Inside Information has four key characteristics:

- Information of a precise nature;
- Information that has not been made public;

- Information that relates directly or indirectly to one or more issuers or to one or more financial instruments; and
  - Information which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.
- (ii) information is deemed to be ‘of a precise nature’ if:
- It indicates a set of circumstances that exists, or which may reasonably be expected to come into existence or an event which has occurred or which may reasonably be expected to occur; and
  - It is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instrument or related derivative financial instrument.
- (iii) information would be ‘likely to have a significant effect on price’ if it is information that a reasonable investor would be likely to use as part of the basis for his/her investment decisions – the Reasonable Investor test.

123. Mr Fettin then provided a detailed analysis of each of the communications in the Schedule that:

- (a) set out the relevant facts as disclosed by the individual communication; and
- (b) considered whether the communication contained inside information. In doing so, he considered whether the information (i) was of a precise nature, (ii) had not been made public, (iii) related to an issue or a financial instrument, and (iv) was likely to significantly affect price using the Reasonable Investor test.

124. Of the 56 communications that he analysed, Mr Fettin concluded that the following 22 communications did contain inside information:

No.	Date	Information communicated	To whom disclosed
A1	3 March 2016	INM's press release announcing INM's results for the financial year to 31 December 2015.	Mr O'Brien
A8	25 August 2016	INM's half year results to 30 June 2016.	Mr O'Brien
A9	25 August 2016	Davy research note in relation to INM's half year results to 30 June 2016.	Mr O'Brien
A12	28 October 2016	Davy valuation of Newstalk.	Mr Shorthouse
A13	9 November 2016	EGM circular in relation to proposed capital restructuring of €1.1bn of losses.	Mr O'Brien
A16	12 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure.	Mr Shorthouse
A17	12 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure.	Mr Shorthouse
A18	14 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure.	Mr Shorthouse
A19	14 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure.	Mr Shorthouse
A22	25 November 2016	Mr Buckley's submission to the INM Sub-Committee considering Mr Pitt's protected disclosure and related materials.	Mr O'Brien
A23	27 November 2016	Proposed Stock Exchange statement relating to the dispute between Mr Pitt and Mr Buckley (approved by the INM Board but subsequently withdrawn) and the legal advice given to the INM Board.	Mr O'Brien
A24	27 November 2016	Mr Pitt's communication setting out his objections to the proposed Stock Exchange statement.	Mr O'Brien

No.	Date	Information communicated	To whom disclosed
A26	27 November 2016	Email exchange disclosing that Mr Buckley was in favour of releasing the proposed Stock Exchange statement.	Mr O'Brien
A29	12 December 2016	Drafts of a statement relating to INM's interaction with the trustees of INM's defined benefit pension schemes.	Mr O'Brien
A30	12 December 2016	Statement by INM relating to its interaction with the trustees of INM's defined benefit pension schemes.	Mr O'Brien
A32	20 March 2017	Preliminary Announcement of INM's results for the financial year to 31 December 2016 which included disclosure of ODCE enquiries and the commencement of the Independent Review.	Mr O'Brien
B4	Early 2015	Discussion of sale of INM and Baycliffe's shareholdings in APN.	Mr O'Brien
B5	February/March 2015	Discussion of a block sale of INM and Baycliffe's shareholdings in APN.	Mr O'Brien and Mr Hayes
B12	11 November 2016	Disclosure of serious issue between Mr Buckley and Mr Pitt.	Mr O'Brien
B13	11 November 2016	Disclosure of a complaint made by Mr Pitt.	Mr Shorthouse
C6	15 August 2016	Information about INM sales in July and August 2016.	Mr Shorthouse
C9	9 December 2016	Mr Buckley's draft submission to the INM Sub-Committee considering Mr Preston's protected disclosure.	Mr O'Brien

125. Mr Fettin concluded that the disclosure of the Davy valuation of Newstalk (A12) was made in the normal course of the exercise of Mr Buckley's employment and professional duties and was, therefore, a legitimate disclosure.

126. Mr Fettin concluded that the remaining 34 communications did not contain inside information.

(b) Report dated 15 March 2023

127. Following consideration of Mr Fettin's first report, Mr Buckley produced further documentation that he considered relevant to conclusions that Mr Fettin had reached in relation to three communications. We asked Mr Fettin to review that documentation and his conclusions on the communications to which it related.
128. Having done so, Mr Fettin produced a further report. In his further report, in light of the additional material provided, Mr Fettin concluded that communications A29 and A30 did not contain inside information as the relevant information was already in the public domain prior to the communications sent to Mr O'Brien.
129. Mr Fettin did not revise his conclusions in relation to the other communications he was asked to reconsider – A1, A8, A13, B4 and B5.
130. As a consequence, Mr Fettin concluded that 19 communications contained inside information.

(c) Mr Fettin's evidence

131. When Mr Fettin gave evidence, his conclusions were challenged on the grounds that, in contrast with Mr Aylard (instructed on behalf of Mr Buckley):
- (i) He had not worked in the capital markets sector and, in particular, he had no experience of valuing securities. His experience at the FCA had been as part of a team, not as its leader;
  - (ii) He had not analysed INM or the market for its shares to determine what factors, if any, were likely to affect its share price;
  - (iii) He had not made an assessment of the likely behaviour of the reasonable investor on the basis of an appraisal of all of the 'ex ante' information;
  - (iv) He had not appreciated, and therefore not taken into account, the lack of liquidity in INM shares with the consequential volatility in INM's share price;

- (v) He had failed to have regard to:
  - the views of professional stockbrokers whose professional task is to analyse securities and the latest information in relation to those securities and whose analysis was a reasonable proxy for the reasonable investor; and
  - actual movement in the INM share price when the information in question had been released to the market.
- (vi) He had failed to recognise that if INM's results were in line with expectations, such results were unlikely to have an effect on its share price;
- (vii) He had failed to apply the statutory test as interpreted in *Hannam v Financial Conduct Authority* – namely that, to be 'inside information', the information communicated must be likely to have a significant effect on the price of the security concerned; and
- (viii) His approach had been to assess the significance of the information disclosed – as opposed to whether that information was likely to have a significant effect on the INM price – and that, in doing so, he had applied the wrong test with the consequence that his conclusions were based on a flawed analysis.

132. Mr Fettin was also challenged on the grounds that:

- (i) He had had regard to inappropriate sources – such as media reports;
- (ii) He had wrongly asserted that a confidentiality agreement (or equivalent) was required before inside information could be selectively disclosed to interested parties (also known as 'wall-crossing'); and
- (iii) He had failed to record the reports he referred to and so could not be examined on that aspect of his evidence.

133. Mr Fettin rejected these criticisms of his evidence.

- (a) He maintained that his approach of assessing the significance of the information disclosed – by determining whether it was *‘not insignificant’* or *‘not trivial’* – was appropriate.
- (b) In his view, if the information was significant, it was likely to be used by the reasonable investor and, therefore, potentially have an effect on the issuer’s share price.
- (c) In relation to whether the information concerned would have a significant effect on the issuer’s share price, he relied on the absence of any authority establishing a minimum threshold or de minimis change in the price of the security.
- (d) He summarised his position in the following way:

*‘The basis that I used when considering the reasonable investor test is whether the information would be of a kind that the reasonable investor would find to be relevant to or used as part of their decision-making – investment decision-making process.’*

134. He expressly confirmed that, in preparing his report and assessing the communications referred to, he had had regard to all four factors required for a communication to be inside information.

**(ii) Mr Aylard**

135. Mr Aylard, who was instructed by Mr Buckley, graduated from Cambridge University with a degree in Mathematics, Statistics and Operational Research, and then worked in the oil industry for 10 years. Thereafter, he had a long career in broking and investment banking:

- From 1986 to 1992, Mr Aylard worked as a research analyst at Smith New Court, Chase Securities and Warburg Securities covering the Oil Exploration and Production sector providing long-term advice to institutional investors and short-term trading advice to in-house dealers.

- In 1992, Mr Aylard became a Director in Corporate Broking at NatWest Wood Mackenzie advising clients on stock market issues including disclosure of price sensitive information and mergers and acquisitions. He became head of Corporate Broking in 1997.
- In 2005, he moved to become Head of UK Investment Banking at Deutsche Bank, responsible for overall coverage of UK clients for the bank. He also chaired internal disciplinary appeals for Deutsche Bank in the UK.

He retired in 2007 and has been the Senior Independent Director for a quoted company, acted as a consultant to several companies and provided expert evidence in relation to 16 cases regarding insider dealing/disclosure of information.

(a) Report dated 28 April 2023

136. Mr Aylard provided an expert witness report on 28 April 2023. In that report, Mr Aylard considered whether eight particular communications contained inside information. The eight communications are those numbered A1, A8, A9, A13, A32, B4, B5 and C6. He did not express any view on the remaining 11 communications that Mr Fetti had concluded contained inside information.

137. Before considering the individual communications, Mr Aylard provided an overview of the legislative regime and then assessed the factors affecting the market for INM's shares.

138. In his report, Mr Aylard:

- (a) Noted that there was sufficient analyst and press coverage for shareholders and potential shareholders of INM to be able to see and understand any information made publicly available.
- (b) Took the view that it was reasonable to expect that any news provided to the market would have been reflected in the INM share price promptly. He therefore considered it important, when assessing whether information was likely to have a significant effect on INM's share price,

*“... to analyse the minute-by-minute share price movements (the “intra-day movements”) as well as the daily movements. If the share price did not react promptly to a piece of news, then it was not likely that the news was price sensitive.”*

- (c) Noted that Davy, INM’s corporate broker, had described INM as *“the cheapest stock in Ireland”* and that the shares were *“trading at a c.30% discount to Johnston Press in the UK”*. The Davy price target was 30.6c (a 96% premium to the share price at that time).

Against that background, he concluded that *“something specific, apart from valuation, was holding back the INM share price and deterring new investors.”*

- (d) Concluded, having regard to the challenges facing the sector, the availability of finance to fund acquisitions and the shareholdings held by Mr O’Brien and Mr Desmond, that INM was:

*“a company with controlling shareholders that has prioritised acquisitions over dividends and the possible scale of the acquisitions (over 50% of market capitalisation) was such that the expected success or failure of any acquisitions was arguably the most significant factor in the share price outlook.”*

He noted that Goodbody said

*“... before either (i) the declaration of a dividend or (ii) increased visibility is obtained over the acquisition strategy, we see little potential for a catalyst for the stock.”*

A Davy research note dated 26th August 2016 made essentially the same point.

- (e) Concluded that news items that might have been price sensitive for a more normal company would have had little or no effect on the INM share price.

139. Mr Aylard analysed the INM share price over the period from March 2014 until the end of March 2017. He noted that:

- (a) On 95% of the 782 trading days analysed, the change in closing share price from one day to the next was in the range of – 4.2% to +5.1%. On 24% of the days analysed, the closing price was unchanged from the previous day.
- (b) The analysis revealed considerable intra-day volatility. On 14% of the 190 days (27 days) where the closing price was unchanged from the previous day, the difference between the intra-day high and low was over 5%. On two of those days, the difference was over 10%.

He attributed this level of volatility to a lack of liquidity in the shares and consequent difficulty in buyers finding willing sellers and vice-versa.

140. Mr Aylard considered, and explicitly disagreed with, the approach taken by Mr Fettin when considering whether information disclosed was likely to have a significant effect on the INM share price.

141. Against that background, Mr Aylard then considered whether the following eight communications contained inside information.

*Communication A1*

142. On 3 March 2016, Mr Buckley sent Mr O'Brien an email attaching INM's 2015 full year results in advance of release to the market the following morning.

143. Mr Aylard noted that the key information contained in the results was that:

- The financial results for 2015 showed essentially flat revenues, a 29.4% increase in pre-tax profit and reduced debt.
- There was no dividend.
- The Outlook paragraph states *“In 2016, INM anticipates a full year performance in line with expectations.”*

- The CEO said *“The indications for 2016 suggest that the existing challenging market conditions will continue in the coming year.”*

144. He noted that market commentary was as follows:

- Davy noted that cash generation was good and that *“2015 earnings...are slightly ahead of forecasts”*. Adjusted EPS was 2.4 cents compared to Davy’s forecast of 2.6 cents.

Davy also noted that they *“expect the stock to react positively”*.

- Goodbody described the results as *“overall a very solid performance”* and reiterated their HOLD recommendation.
- The first Bloomberg headline was *“INM Sees 2016 FY performance in Line with Expectations”*.

145. Mr Aylard characterised Davy’s expectation that the stock would react positively as wishful thinking driven by Davy’s high price target and its relationship with INM.

146. The share price on 3 March 2016 closed at 17 cents and the opening price at 8.00 on 4 March 2016 was also 17 cents. On 4 March the share price fell initially to a low of 16.5 cents at around 10.00 before rising to close at 17.7 cents.

147. Mr Aylard concluded, having regard to his assessment of the market for INM shares, that:

- News, good or bad, concerning past profitability that did not affect the outlook or likely out-turn for the current year was generally not likely to have a significant effect on a company’s share price.
- These financial results were not likely to have a significant effect on INM’s share price and hence the communication was not inside information.

In his view, the intra-day share price movements supported that conclusion.

Communication A8

148. On 25 August 2016, Mr Buckley sent Mr O'Brien an email attaching INM's 2016 H1 year results in advance of release to the market the following morning.

149. Mr Aylard noted that the key information contained in the results was that:

- The financial results showed 2.7% growth in revenue, 22.5% growth in pre-tax profits and strong cash flow.
- There was no dividend.
- The CEO said *"While the outlook for H2 continues to be challenging, particularly in print advertising, the Group will continue to deal with those challenges pro-actively."*
- The outlook statement said *"...H2 looking increasingly uncertain. Despite these challenges the Board remains confident that its strategy should enable continued progress and deliver a full year performance within the current range of expectations"*

150. He noted that market commentary was as follows:

- The Davy research headline was *"H1 Results in line; strong cash generation continues"*.

Davy also commented *"While the operational performance of the group should not be ignored, it is hard to look beyond the staggering cash balance of the group .... As we noted in our preview, capital allocation is crucial, and management's ability to create value from this cash pile will determine the future trajectory of the group"*.

- Goodbody noted that *"Headline numbers slightly ahead of forecasts"*. The note also said *"While the valuation ..... is undemanding, uncertainty over capital deployment maintains our cautious view"*.
- Bloomberg headlines reported the financial results, and also said *"2H looking increasingly uncertain after referendum result"*, *"INM says 2H*

*outlook challenging” and “INM confident to deliver FY within current range of views”.*

151. The share price on 25 August 2016 closed at 14 cents and the opening price at 8.00 on 26 August 2016 was 14.3 cents – a rise of 2.1%. During the day the share price traded between 13.8 cents and 14.3 cents before closing at 14 cents.
152. Mr Aylard noted that the Board minutes for the meeting on 24 August 2016 state that:

*“The Board discussed and approved INM’s procedures, systems and controls for compliance with disclosure obligations under the Irish Listing Rules and the Market Abuse Regulation; INM’s Disclosure Committee’s terms of reference; The various memoranda on inside information .....”.*

He concluded that:

*“In [his] opinion, it would be surprising if the Board had failed to identify inside information on the day it approved new procedures concerning the rules requiring any inside information to be “clearly identified”.*

153. Mr Aylard concluded, having regard to his assessment of the market for INM shares, that:
- News, good or bad, concerning past profitability that did not affect the outlook or likely out-turn for the current year was generally not likely to have a significant effect on a company’s share price.
  - These financial results were not likely to have a significant effect on INM’s share price and hence the communication was not inside information.

In his view, the intra-day share price movements supported that conclusion.

#### Communication A9

154. On 25 August 2016, Mr Buckley sent Mr O’Brien an email attaching a draft of the Davy research note on INM’s 2016 H1 year results in advance of publication the following morning.

155. Mr Aylard concluded that the key information contained in the Davy note was essentially the same as that contained in the actual results announcement.
156. Therefore, Mr Aylard concluded that the information contained in the Davy research note would not have been likely to have a significant effect on the INM share price and hence the communication was not inside information.

Communication A13

157. On 9 November 2016, Mr Buckley sent an email to Mr O'Brien forwarding an email from Mr Preston in relation to a capital restructuring announcement that was planned for the following morning. The Circular to shareholders was attached to the email.
158. Mr Preston's email and Circular showed that:
- INM would be asking shareholders to approve a capital reduction and cancellation of authorised deferred shares. High Court approval of the capital reduction would be sought as soon as shareholder approval was granted.
  - The capital reduction involved using a surplus of called up share capital to offset retained losses on the balance sheet. This is an accounting exercise that was described in the Circular to shareholders as *"There will be no change in the number of Ordinary Shares in issue ..... will not involve any distribution or repayment of capital or share premium.....and will not affect the underlying net assets of the company"*.
  - The retained losses arose as the Company had *"recognised a significant level of impairment to the carrying value of its international media assets"*.
  - The capital reduction was possible because the Company was *"satisfied that the accumulated deficit is permanent and is not expected to be recovered."*
  - The net effect was, whilst leaving the total equity on the balance sheet unchanged, to reduce accumulated retained losses to zero.

159. An important consequence of the capital reduction was that dividends and/or share buybacks could be pursued out of future profits. However, there was no reference in the Circular to dividends or the ability to pay dividends.

160. Mr Aylard noted that market commentary was as follows:

- The Davy research headline was *“Proposed capital reduction; enhances capital allocation options”* and said *“This represents the final phase of the recapitalisation and financial restructuring process that began in 2013”* and *“If approved this will strengthen the INM balance sheet and open up the possibility to pay a dividend on future profit post the restructuring”*.
- Goodbody was reported on Bloomberg as saying that *“although not mentioned in the statement, capital reduction would facilitate dividend payments and/or a shareholder return”* and *“although management has noted a strong preference for acquisitions, cash return would be in shareholders’ interests”*.

161. Mr Aylard noted that:

- Mr Preston advised Mr Buckley on 3 November 2016 that, with advice from Davy, he was taking steps to bring Mr O’Brien and Mr Desmond *“‘over the wall’.....to update them on the changes to the Pension Plans and on the Capital Restructure”*
- Mr Preston spoke to Mr Hayes on 8 November 2016 and advised him of the proposed Capital Reduction on a *“wall-crossing”* basis. Mr Preston sent Mr Hayes an email recording that conversation. In doing so, he referred to the Capital Reduction proposal as being *“deemed market-sensitive”*.
- Mr Buckley was aware that these steps were being taken, having received copies of certain of the emails.

162. The INM share price closed at 12.2 cents on 7 November and declined over the next 2 days to close at 11.6 cents on 9 November. On 10 November the share price opened at 12.5 cents (a rise of 7.8%) and traded between 12.1 and 12.6 cents before closing at 12.3 cents.

163. Mr Aylard noted that RNS announcement did not contain a statement that the announcement contained inside information as required by Commission Directive EU 2016/1055.

164. Mr Aylard concluded that:

- The cancellation of the deferred shares was not price sensitive as these shares were unissued.
- The capital reduction was an accounting exercise that re-arranged the balance sheet but had no effect on the net assets.
- The one significant item, from a shareholder perspective, was that dividends became technically payable out of future profits but, significantly, this was not mentioned in the announcement or the Circular. If there had been any intention to move towards dividend payments it would have been at least noted as an option.
- The capital reduction was the next logical and expected step in the restructuring process that began in 2013.

165. Mr Aylard concluded that the information contained in the email and Circular would not have been likely to have a significant effect on the INM share price and hence the communication was not inside information.

166. Mr Aylard noted that:

- the Company did not include in its RNS announcement a statement that the announcement contained inside information (despite earlier concern that the information was market sensitive). He expressed the view that *“[i]t is possible that the wall crossings were undertaken as a prudent precaution.”*
- The movement of the INM share price on the morning of the 10 November 2016 (an increase of 7.8% on opening) was greater than he would have predicted. Consequently, he reviewed his analysis carefully. Having done so, he did not change his opinion because it was *“possible*

*that the share price rise on opening represent[ed] a degree of bounce back to the level 2 days before”.*

Communication A32

167. On 20 March 2017, Mr Buckley sent Mr O’Brien an email attaching INM’s 2016 preliminary full year results, with a comment saying “*please note also paragraph 21*”, in advance of release to the market the following morning.

168. Mr Aylard noted that the key information contained in the results was that:

- The financial results showed essentially flat revenues, 11.8% growth in pre-tax profit and increased cash.
- There was no dividend.
- The outlook statement said “*The media industry continues to face challenging times with declining publishing advertising and circulation revenues, and the current slowdown in digital display advertising. However, despite these ongoing challenges, the Group anticipates an EBIT performance in 2017 within market expectations and continued cash generation.*”

169. In the announcement (on page 5) (and also in note 21 to the full accounts), there was a section entitled “*Subsequent Events*”. This said that:

*“The Company is complying with a requirement from the Office of the Director of Corporate Enforcement (“ODCE”) to produce records in relation to the possible acquisition by the Company of Newstalk and related matters...”*

This was the first public disclosure of the involvement of the ODCE. There was, however, no reference to this being in response to a protected disclosure.

170. He noted that market commentary was as follows:

- The Davy research headline was “*Full year results 7% ahead of expectations as strong cost discipline is maintained; 2017 outlook in line with market expectations*”.

He noted, however, that the figures in the “*key financials*” table in that research report show actual PBT was only 4% ahead of Davy’s forecast.

Davy also said

*“Our view on the stock remains unchanged; we believe that the business is being well managed and has good scope in the near term to continue to generate healthy levels of cash. What will be key to shareholder value is how well this capital is deployed to secure the group’s long-term future”.*

Davy reported the reference to the ODCE factually and without comment.

- The Goodbody research headline was “*FY16 results ahead but outlook still subdued.*”

Goodbody also said

*“Operating profit of €40.2m, 6% ahead of our forecast of €38.7m. However, it is worth noting that 2016 contained an extra week for which our forecasts did not adjust” and “Despite the beat versus our forecasts, we expect to reduce our FY17 operating forecast by c.€1m”.*

Goodbody concluded

*“However, we continue to have concerns around the acquisition strategy and would need to see some sort of regular shareholder distribution before turning positive”.*

The Goodbody research note made no reference to the statement concerning the ODCE.

- The Merrion morning comment had a headline saying:

*“Earnings beat expectations due to good cost control”* and said that *“We feel this [distressed valuation] is unjustified and continue to rate the stock a ‘Buy’”*.

Merrion noted that:

*“The Irish Times reported last year that INM’s CEO and Chairman disagreed on the valuation of Newstalk with the CEO looking to make a lower bid for the radio station”* but made no reference to the statement concerning the ODCE.

- Bloomberg initial headlines were:

*“INM FY sales rise 0.7%”*

*“INM FY pre-tax profits rise 12%”*

*“INM circulation revenue fell 5.2%”*

*“INM sees 2017 EBIT performance within market expectations”*

171. Press commentary was as follows:

- The Irish Times initial online comment was *“Media Group says it is complying with ODCE request as it announces 12% rise in profits”*.
- The Sunday Business Post headlines were *“INM co-operating with corporate watchdog over failed Newstalk takeover”* and *“The media group reported a near 12 per cent increase in profits for 2016 to €41.8 million”*.

172. The possibility that the ODCE letter was inside Information and might trigger a disclosure obligation was considered internally by INM.

- The Disclosure Committee met on 16 January 2017 to discuss *“whether or not the ODCE letter constituted Inside Information”*. It concluded *“that no immediate obligation arises”*. The position as at that time had not changed materially by the time of this results announcement.

- On 17 January 2017 the Board resolved to set up a Special Committee to exercise its powers in relation to the Independent Review and the ODCE enquiry and that any possible disclosure obligations relating thereto should be handled by the new committee rather than by the standing Disclosure Committee.

At that Board meeting it was also noted that:

*“Having noted the advice received from McCann FitzGerald, it was resolved that there were robust grounds to conclude that the issue by the ODCE to the Company of the letter of 11 January 2017 requiring the production of books and records did not give rise to an immediate disclosure obligation under the EU Market Abuse Regulation as not constituting inside information or, if the information were considered to be inside information, on the basis that the Company is permitted by the Market Abuse Regulation to delay disclosure of that information”.*

- On 20 March 2017, the Special Committee met and, having taken external legal and financial advice, concluded that:

*“the company is obliged to announce the fact of the ODCE request and of the independent review with the Company’s announcement of final results on Tuesday, 21st March 2017 and that it would not be justifiable to delay disclosure of these material matters when the Company is expressly providing a general update to the market of material developments and that failure to disclose would be liable to mislead”.*

Against this background, Mr Aylard concluded that the Directors did not consider that the results announcement included inside information. Consistent with that view, the results announcement did not have a statement saying that it contained inside information (as required by EU2016/1055).

173. The INM share price closed at 11 cents on 20 March 2017 and opened at 11.5 cents on the 21 March 2017 – up 4.5%. The intraday share price chart shows that the price oscillated between 11.4 and 11.9 during the morning and closed at 12 cents.

174. Mr Aylard concluded, having regard to his assessment of the market for INM shares, that:

- News, good or bad, concerning past profitability that did not affect the outlook or likely out-turn for the current year was generally not likely to have a significant effect on a share price.
- These financial results were not likely to have a significant effect on INM's share price and hence the communication was not inside information.

175. Mr Aylard also concluded that the fact that the ODCE had requested information concerning the possible acquisition of Newstalk did not materially alter the position disclosed by the Company on 29 November 2016 which said:

*“The Company.....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”.*

Consequently, in his view, the disclosure was not likely to have a significant effect on INM's share price and hence was not inside information and the analysts' lack of any reaction to this disclosure supported that opinion.

176. Although the movement in the INM share price on 21 March 2017 (an increase of 4.5% on opening and a rise of 9.1% from close to close) was slightly greater than he would have expected, it was not, in his opinion, inconsistent with his conclusion having regard to his assessment of the market for INM shares.

*Communications B4 and B5*

177. In early 2015 both INM and Mr O'Brien (via his investment vehicle, Baycliffe) held stakes in Australian company, APN. The combined holding represented 30.8% of APN. This information was publicly available.

178. In 2019, Mr Buckley was interviewed by the Inspectors and also gave a written statement. Extracts from the transcripts and statement comprise Communications B4 and B5. In those extracts, Mr Buckley acknowledged that he had, in early 2015, held discussions with Mr O'Brien and Mr Hayes about selling their holdings in a block at the same time as it would likely result in a better deal for INM. When giving

evidence, Mr Buckley said that he had told Mr O'Brien that "*INM has decided it is going to sale it's [sic] 18.6% shareholding*". Mr Aylard noted that Mr Buckley's statement also implied, albeit without an explicit statement, that INM had decided to sell its shareholding.

179. Mr Aylard noted that:

- The APN holding was a significant investment for INM and the disposal for €115 million enabled INM to repay its entire debt.
- In his view, INM (initially via Mr Buckley) and Baycliffe (initially via Mr O'Brien) were likely to have been in regular contact about the disposal through until the time of announcement of the disposal on 19 March 2015.
- At a Board meeting on 12 March 2015, the potential disposal of INM's holding in APN was discussed and Mr Buckley "*reminded the meeting that the proposed sale was still highly uncertain and that there was no certainty that it would proceed at this time*".
- He was unaware of the details of any wall crossings at any stage in the process.
- In the event, the disposal was made at a price of AUD\$ 0.88 compared to a price of AUD\$ 0.25 in Q1 2013. This represented a discount of 6.4% to the previous day's closing price.

180. When the disposal was announced on 19 March 2015, the shares rose from 17.5 cents at close on the previous day, opened at 19 cents (up 8.6%), traded between 18.6 and 22.1 cents and closed at 19 cents.

181. Mr Aylard noted that:

- It would not have been a surprise for the market to hear that INM had decided to sell its stake in APN bearing in mind the ongoing INM restructuring process and the rise in the APN share price.

- The sale of a stake of this size is not always possible and may require a substantial discount.
182. He, therefore, concluded that the news that INM had decided to sell its stake in APN would not have been likely to have a significant effect on INM's share price and hence was not inside information.
183. The news of the actual sale and excellent price achieved would, however, have been likely to have had a significant effect on INM's share price and hence was inside information. This conclusion is supported by the share price movement on the day of announcement (a rise of 8.6% on opening).
184. As to whether the Mr Buckley's disclosure of INM's decision to sell its shareholding in APN was unlawful, Mr Aylard noted that the Market Abuse Directive (which was in force until 3 July 2016) prohibited disclosure of "*inside information to any other person unless such disclosure is made in the course of the exercise of his employment, profession or duties*".

Whilst acknowledging that he was not an expert on this area of law, Mr Aylard opined that Mr Buckley was acting in the course of his employment and that discrete discussion of strategic issues (often involving potentially price sensitive information) at a very senior level is very much part of the role of the chairman of a public company.

#### Communication C6

185. On 15 August 2016, Mr Buckley sent an email to Mr Shorthouse saying, inter alia, "*INM sales are terrible for July/August*".
186. Mr Aylard stated that in his opinion, Mr Buckley was probably referring to "*Revenue from sale of newspapers and magazines*" as this was the only category of the INM's revenue (which was analysed under five headings in Note 3 to the 2016 accounts) which appears to relate to sales.
187. Such revenue comprised 31% of total revenues for 2015 and 30% for 2016 and any information given on 15 August referring to "July/August" would have been for a maximum of 6 weeks. He therefore concluded that the "*terrible*" sales comment referred to a maximum of only 3.5% of INM's annual turnover.

188. INM's interim results on 26th August 2016 stated:

*"...H2 looking increasingly uncertain. Despite these challenges the Board remains confident that its strategy should enable continued progress and deliver a full year performance within the current range of expectations".*

Mr Aylard therefore concluded that these "terrible" sales figures did not affect the outlook.

189. Mr Aylard concluded, having regard to his assessment of the market for INM shares, that:

- News, good or bad, concerning past profitability that did not affect the outlook or likely out-turn for the current year was generally not likely to have a significant effect on a company's share price.
- The news of the "*terrible sales for July/August*" was not likely to have a significant effect on INM's share price and hence was not inside information.

(b) Mr Aylard's evidence

190. When he gave evidence, Mr Aylard explained that he had reported on eight specific communications selected from the wider group of communications.

191. Mr Aylard confirmed that he and Mr Fettin had agreed that to be inside information, the information communicated would have to:

- (i) Be of a precise nature;
- (ii) Not have been made public;
- (iii) Relate directly or indirectly to one or more financial issuers of financial instruments; and
- (iv) If it were made public, be likely to have a significant effect on the prices of those financial instruments.

They also agreed that to be likely to have a significant effect on price, the information would have to be of a kind that a reasonable investor would be likely to use as part of the basis of their investment decisions.

192. Mr Aylard confirmed that he and Mr Fettin disagreed on whether the information contained in the eight communications was likely to have a significant effect of the INM share price. He attributed this to the fact that Mr Fettin

- *'looked at the significance of the information per se whereas [he] looked at the significance on the share price.'*
- *'Didn't take account of what was already in the market, what the market was expecting.'*
- *'Hadh't addressed the basic question in law, which was the significance on the share price, which [Mr Aylard] did address.'*

193. In relation to the relevance of the actual movement of the share price following publication of the information in question, Mr Aylard told us:

*'Clearly if there's a piece of information that you're trying to decide was it price sensitive, if after publication of that information the share price went up 20%, you would have a strong case for saying, well, there must be something driving that share price, and that information was more likely to be price sensitive. But it doesn't alter the fact that you have to make the judgement from the point of view of those people on the ground at the time prior to the information becoming public. And sometimes the price moves in a way that might not always appear completely rational with hindsight and you just have to try and put yourself in the position to make that judgement ahead of time.'*

194. Mr Aylard reiterated his view that the INM share price was only likely to be driven by two things – INM's use of the cash it was generating, whether in paying dividends or making acquisitions; and the inherent volatility due to the lack of liquidity.

195. Mr Aylard was asked about his conclusions in relation to certain communications considered in his report.

○ Communication A13

When asked to explain his conclusion that the communication did not contain inside information notwithstanding that INM, on advice from Davy, had implemented 'wall-crossing' procedures and the significance of the Davy and Goodbody market commentary, Mr Aylard told us:

*'... in terms of the wall crossing, in my experience working in the industry, you have to veer on - err on the side of caution. And, therefore, it's quite - it's not unusual for a wall crossing to be done as part of, if you like, best practice. And what's odd is that the company, having chosen to wall cross, then didn't put a disclosure on the statement saying that it was price sensitive information. And, also, and I apologise for not putting this in my report, but they also sent the document off to the printers. Well, you don't send a document off to the printers if it's price sensitive. You have an obligation if it's price sensitive to declare it as soon as it's agreed, and they waited a week while the document was at the printers. So a lot of what the company did was not consistent with the wall crossing. And given that I viewed the information as not price sensitive, I've reported that as I found it.'*

He went on to say:

*'I don't think there was anything particularly unusual in the commentary. Davy, you have to bear in mind, had a target share price of double the company's share price and double the Goodbody target share price and were very much the company's cheerleaders and brokers. So every event is turned into a positive. And Goodbody, possibly, the alternative. But, from my perspective, the capital reduction was - it's an accounting exercise. It doesn't actually change - the value of the company doesn't change. Nothing changes. You have a technical ability to pay dividends that wasn't there before. But if you have no intention of paying a dividend, nothing actually changes.'*

○ Communication A32

When asked whether his assessment would have been different if the announcement had referred to the fact that the ODCE enquiries were in response to a protected disclosure, Mr Aylard said that:

Mr Aylard: *Potentially. I haven't - there was - I appreciate the protected disclosure issue was - I don't know whether it was debated at the same time, but it was an issue that hadn't been disclosed. I'd have to think. Off the top of my head... It's clearly an issue at the time when I wrote this that I thought was potentially significant.*

Mr Gillane: *Yeah, and I don't want to put you on the spot in that sense. It's just that, by virtue of that reference where you say there was no reference to it, I thought its absence was of significance in terms of your assessment?*

Mr Aylard: *Yes, I think it was - I certainly thought it was worth mentioning in as much as there was sufficient information has been generated about this, that then I thought it was significant that that was not, for whatever reason, wasn't disclosed.*

Mr Gillane: *Can I infer then that if protected disclosure had been referred to, that would have made a difference in terms of your assessment?*

Mr Aylard: *I would have to - if you want me to go away and think and come back with an opinion on that - but it certainly was a potential factor.*

...

Mr Gillane: *And can I just ask you just to look at that and just to help us in respect of this particular communication in that when you go back to the November 2016 communication, that announcement, which I think had inside information on its face ... referred to what was*

*described as an internal matter and it appeared in terms of that communication that the internal matter had been resolved and I think the phrase used was "no issue arose" or something of that nature?*

*Was it not - and just think about this - significant that this communication then in March of 2017 involved a reference to an external regulatory agency that had a specific statutory function in relation to companies, and that it referred to the proposed acquisition and also, quote-unquote, "related matters". And, just to finish it out, clearly, whatever that issue was, it wasn't resolved. Was that not a fairly significant difference between the 2016 position and the 2017 position?*

*Mr Aylard: I didn't see it as that. I saw that the questions had been raised about a - I think it was described as a dispute on valuation. On the face of it, I don't think a regulatory body looking into things like this is - it didn't strike me in itself as announced as being anything more than - saying tidying up loose ends is not right - they were looking into it, but it didn't suggest anything that I could see on the face of it that was potentially adverse. And the fact that the brokers simply ignored it suggested it wasn't significant in the share price context.*

*Mr Gillane: All right. I mean, I'm not, I suppose, questioning the question of whether it's adverse or not, but just whether it's a substantial change from the 2016 position. I mean, you've seen the Disclosure Committee minutes in relation to their ultimate conclusion eventually that the market would be misled if that information wasn't released, isn't that right?*

*Mr Aylard: They did, indeed, conclude that, but on the version that I saw, there was no suggestion that that was because it was inside information.*

Mr Gillane: *There's certainly nothing explicit in relation to that, but you've seen that Disclosure Committee discussion and ultimate conclusion?*

Mr Aylard: *Yeah.*

...

Mr Gillane: *In relation to the market ignoring it, I think the Davy note certainly has a fair chunk referring to it in its note, doesn't it? It doesn't editorialise – I'm not suggesting it does but...*

Mr Aylard: *It repeats a statement of fact. It doesn't say this is good news/bad news/what might happen as a result of it. It just mention it.*

Mr Gillane: *And, again, I'm just asking this to put it to you – could a reasonable view be reached different from yours in that respect that we now have – instead of an announcement, that there's an internal issue that's being resolved and we now have a situation where we have information that a statutory agency is involved – there are quote-unquote "other matters" and it doesn't appear to be resolved?*

Mr Aylard: *I didn't read it that way, and I don't think the market did.'*

○ Communications B4 and B5

When asked to explain his assessment that, because INM's shareholding in APN was widely known, the market wouldn't have been surprised at a decision by INM to sell given APN's performance and INM's restructuring, Mr Aylard said:

Mr Aylard: *To me, the big question was not the decision to sell. It was achieving it because the uncertainty concerning a sale of a stake like that is quite significant. And,*

*therefore, as I said, I don't think it would have been a surprise that the Board had decided to sell, but I do think that the actual sale itself – (1) to have got it sold, and (2) to have got it sold at a good price was the potentially – was the price sensitive information, the actual...*

*Mr Gillane: So you're saying the actual Board decision to sell wasn't itself a significant piece of information in that context, having regard to the test....*

*Mr Aylard: Correct, I don't believe that would have had a significant effect on the share price. I think the reasonable investor would have worked out that that was pretty well inevitable and, therefore, it wouldn't have changed the actual Board decision with all the uncertainty surrounding actually implementing that decision.'*

Mr Aylard was also asked whether disclosure of the intended sale might adversely affect APN's share price and therefore, indirectly, adversely affect INM's share price.

*Mr Gillane: In relation to your reference there to APN – and I know at one point in your report you say that the APN share price movement isn't a relevant consideration. Obviously, INM had a shareholding in APN and would I be right in saying that APN share price movement in that context, at least indirectly, would be something that would affect the INM share price? It was a substantial enough holding.*

*Mr Aylard: Yes.*

*Mr Gillane: You agree with that, okay. And would that be something also that a reasonable investor would take into account?*

*Mr Aylard: The question is whether it would have moved the...*

*Mr Gillane: I mean having regard to the size of the holding?*

Mr Aylard: *Yeah, if the company had – it's not the decision that would have moved the APN share price; it was the leaking. If the decision had leaked, that would then have impacted the APN share price. I'm just trying to think through the sequencing. The actual...*

Mr Gillane: *Well, in terms of – sorry, I don't want to interrupt your train of thought...*

Mr Aylard: *Yeah, I know, I'm just...*

Mr Gillane: *I mean, in terms of the relationships, you have INM with its shareholding in APN?*

Mr Aylard: *Yeah.*

Mr Gillane: *You have Mr O'Brien with his shareholding in INM and APN. And the communication involves Mr O'Brien being told of a decision by the Board to sell its shareholding in APN. And I'm just asking about whether the potential movement in APN share price would be something the reasonable investor would take into account in that context?*

Mr Aylard: *I think that's possibly true. I'd have to – it's second order, but it is... There's no evidence that the INM share price in any way tracked the APN share price. So I would have to think quite hard as to whether there would be a significant movement. There would be a – I'd have to do the sums, but I think it might be a – it's an interesting point and I'm not sure I'm quite on the scale in terms of you've got to look at the percentage move in the APN share price and then the knock-through into the INM.*

196. Mr Aylard was asked about his view that INM's shares would only react to information about actual or prospective acquisitions or an announcement about a future dividend policy:

Mr Fleck: *So the question that I'm trying to very inelegantly get across is what sort of things might have that effect on INM, given its character as a company, the nature of the company, the business it was in and so forth? Would it be, for example, that the – I'll get the names wrong because this isn't my territory, if I can put it that way, so I'll get the Commission name wrong – but the Commission that's responsible for media suddenly decides to start an investigation, is that something that would be likely to affect the stock? What other – and I'm seeking to try to understand what else would have a trigger to that effect. I'm not trying to relate this to the issues in the matter; I'm trying to relate this to understand what changes the dynamics.*

Mr Aylard: *It would have to be pretty big because, as I say, certainly towards the end of the period when the company had such a big cash pile, but the...*

Mr Fleck: *So it's not going to go bust is...*

Mr Aylard: *Yeah, it's not going to go bust. But it's more if you've got a company that's sitting there with – I think it was almost half of its market capitalisation sitting in cash – and you're worried that the management is going to go and blow it on a vanity acquisition – and that was the sort of thing that was holding the share price back – it would have needed quite a big hit to the fundamentals of the business to make a change. Because certainly if you believe the Davy view of the world, the shares were ridiculously cheap and they could afford to take a hit. They would still be cheap. But the risk was all to do with the cash and what they were going to do with it.*

Mr Fleck: *So if I just follow that through – because I follow that – but if I follow that just a little bit further, acknowledging your point that there might be concern about the quality of the*

*acquisition strategy, if there was circumstances that impacted confidence in the leadership governance company – its integrity, whatever it happens to be – would that be something that would impact an illiquid share price in those circumstances?*

*Mr Aylard: I think a management dispute is always a difficult situation because you don't know what that will do to the strategy. And this comes in this sort of category of – which Hannam felt that if you can't tell which way the share price is going to go, it's not price sensitive, and the later case suggested it could still be. I have to say I have more sympathy with the Hannam view in that if you can't tell what a piece of news is going to do to the share price, you certainly wouldn't go dealing on that basis.*

*...  
But, yes, clearly, if the future strategy – and if you put it, perhaps, more in dividend policy, if you were going to have a situation that gave a likely chance of a change of management and the new management might decide to start paying a dividend, then obviously you'd have to say that that was something that a reasonable investor would take into account.*

*Mr Fleck: And if that turned on the integrity of people concerned, that presumably – a media organisation would also, as we have seen in News International and others – News Corp and others – that actually also has great significance to such an organisation. Looking back at the hacking of phones in England, for example, that was devastating for News Corporation?*

*Mr Aylard: Yes.*

**(iii) Mr Dobbie**

197. Mr Dobbie, who was instructed on behalf of Mr Connolly, has held senior executive management roles in stockbroking and investment banking and has been a non-executive Director/Chairman of a wide range of companies. He was a Director of the

UK Securities and Futures Authority, a Commissioner of the Jersey Financial Authority, and a member of the FSA's Regulatory Decisions Committee.

198. In his written statement, Mr Dobbie considered Communication B5. He said:

*'Discussions of the sort described in Communication [B5] are common in the Investment Banking business. They might be described as 'soundings' where potential participants in a transaction or their agents, can test, informally, and on a wholly confidential basis, whether there is sufficient common ground to meet the cost and effort of more structured planning and possible formal negotiation. Typically, they would be used by the initiator to explore, away from the public's gaze, whether the proposal has the broad support of the party or parties whose support or influence is critical to it. These discussions are generally held at senior level between parties who know and trust each other, and the outcome is heavily restricted. The lack of formality is their strength. They are always held on conditions of strict confidentiality, and generally would not take place unless such confidentiality existed. The situation described in Communication [B5] is typical and in my opinion is an almost perfect example of the need and value of informal discussions of this sort. The proposed sale by INM of APN was felt likely to yield a better price if done jointly with Mr O'Brien's holding in APN. This preliminary informal discussion was held between the two principals and their close advisors to see whether Mr O'Brien was inclined to support INM's proposal. If there was no support then INM would probably determine that the timing was inappropriate, and could turn attention to other matters and avoid further costs on this one. It was implicit that the discussions were confidential. I have to say that, in my experience as a practitioner, discussions of this sort have never been surrounded by the formality suggested by Mr Fettin. The procedures which he defines would in my view would be appropriate if a wider group of people became involved in taking a transaction to a further stage. In short, Communication [B5] was a discussion at high level involving principals and was conducted in a manner and at a level of confidence which is fully in line with long historic market practice and which has recently, as I describe in the next paragraph, been enshrined in more formal Regulation and Guidance.'*

199. Mr Dobbie then described the Market Abuse regime that existed in 2015, when the conversations referred to in Communication B5 took place:

*‘The Market Abuse Regulations state that any inside information disclosed to a third party must be simultaneously placed in the public domain. These Regulations stipulate a number of exceptions where selective disclosure is permitted: one of these is where the recipient of the information owes a duty of confidentiality (Regulation 10(10) and 10(11)). I would argue that participants in ‘soundings’ enter such discussions with a clear agreement, often implicit, that such a duty exists certainly in respect both of the content, and of the existence of the discussion. I therefore believe that the situation described in Communication [B5] meets at least one of the criteria for situations in which the Regulations do not apply. This view is reinforced by subsequent Guidance on these Regulations, issued by the Central Bank of Ireland. This states (Regulation 5.0.4) that an issuer may in certain circumstances be justified in disclosing insider Information to (B) ‘any persons with whom the issuer is negotiating or intends to negotiate any commercial, financial or investment transaction’ – a situation which clearly applies to Communication [B5].’*

200. He concluded:

*‘On the basis of the above analysis, I conclude that the matters discussed in Communication [B5] constitute disclosures consistent with or permitted by the Market Abuse Rules.’*

**F. The Parties' submissions.**

201. We received written submissions on behalf of Mr Buckley, the INM Directors and INM, and Mr O'Brien.

**(ii) Mr Buckley**

202. Mr Buckley's Submission contained the following Executive Summary:

- “1. It is accepted that the communications identified were sent and received as described by the senders and recipients identified.*
- 2. In the Director's application to have the Inspectors appointed, he set out various communications which he identified as potentially representing inside information and/or confidential information and which warranted investigation. This set of communications has been further expanded by the Inspectors. The Inspectors now have the benefit of evidence (both transcripts and witness statements), as well as the expert evidence from Messrs Fettin, Aylard and Dobbie.*
- 3. No allegation has ever been made that the provision of any of the alleged inside information led to any dealing or attempted dealing in shares in INM or any related securities.*
- 4. No allegation has ever been made that the disclosure of confidential information was done in breach of Mr Buckley's duties to INM or was done for any purpose other than in the interests of INM.*
- 5. Nonetheless, any suggestion that Mr Buckley unlawfully disclosed inside information or confidential information represents a serious allegation against him.*
- 6. In relation to the question of inside information, Mr Buckley's primary submission is that Mr Fettin is simply not qualified to express the views he has expressed on what does or does not constitute inside information and his evidence should be rejected entirely.*

7. *Alternatively, Mr Buckley submits that, even if Mr Fettin is deemed sufficiently qualified in order that his opinion may be safely relied on, Mr Fettin has erroneously applied the applicable legal test. As a result, it is submitted, there is no admissible expert evidence available to the Inspectors on the question of price sensitivity capable of supporting a finding that any of the communications identified contained inside information.*
8. *On the issue of confidential information, while it is accepted that Mr Buckley disclosed confidential information in most, but not all, of the communications at issue, he did so always in accordance with his fiduciary duties to INM. Nowhere is it suggested by any of the directors or former directors that any disclosure of confidential information by Mr Buckley was adverse to INM's interests. It appears that the height of the case that can be made against Mr Buckley is that in disclosing such information he did not comply with Company policy. However, on a closer analysis, and for the reasons set out below, this case is not supported by the evidence.*
9. *These submissions are structured in three parts:*
  - (i) *Part 1 – submissions on whether any of the communications amount to inside information;*
  - (iii) *Part 2 – if any of the communications amounted to inside information, submissions on whether Mr Buckley has a defence to such disclosures; and*
  - (iv) *Part 3 – confidential information – submissions on whether any of the communications show that Mr Buckley, in releasing such information, was in breach of his duties to INM or was acting in breach of Company policy.”*

(a) Whether any of the communications amount to inside information

203. Mr Buckley submitted that the 56 communications divided into three groups.

1. 37 communications which Mr Fettin concluded did not contain inside information;

2. 8 communications in relation to which Mr Fettin and Mr Aylard reached conflicting conclusions; and
3. 11 communications which Mr Fettin concluded did contain inside information, but where there is no contrary expert view.

204. We confirmed that we did not require any further submissions in relation to the communications falling within category 1 – communications which Mr Fettin concluded did not contain inside information – although those communications remained relevant to certain matters referred to us – namely the provision of confidential information to Mr O’Brien and the INM Directors’ response on learning of such communications.

205. In relation to the communications falling within categories 2 and 3, Mr Buckley submitted that Mr Fettin’s evidence could not be relied upon because he had neither the experience or qualifications to give expert evidence on whether particular communications contained inside information.

206. As a consequence, in relation to the communications within category 2, Mr Buckley submitted that Mr Aylard’s evidence and views should be preferred.

207. In relation to the communications within category 3, Mr Buckley submitted that in the absence of admissible expert evidence, there was no basis on which to conclude that any of the communications contained inside information. Alternatively, if such communications did contain inside information, he submitted that those communications with Mr O’Brien were not unlawful if the disclosure was:

- Made in the normal exercise of an employment, a profession, or duties;
- Made for the purposes of journalism or other form of expression in the media; or
- Justified having regard to the freedom of the press and/or freedom of expression.

208. Mr Buckley submitted that whether information constituted inside information is a matter requiring expert evidence because the statutory test requires consideration of whether the relevant information is precise (specific enough to enable conclusions to

be drawn on the effect on share prices) and likely to have a significant effect on the price of the relevant shares. That assessment is to be made through the eyes of a reasonable investor.

209. In support of this proposition, Mr Buckley relied on paragraph 295 and 296 of the judgment of the Supreme Court in *Fyffes v DCC* [2009] 2 IR 417

*“The reasonable man while useful in determining whether or not conduct is properly described as being negligent is less than helpful here. In the present case the trial judge used the phrase “the reasonable investor” as an indication that the test to be applied for the purposes of s. 108(1) of the Companies Act 1990 is an objective test. Yet even the reasonable man test for negligence involves in its application a subjective element in that it still remains a function of the judge to determine what the reasonable man would have foreseen: see Glasgow Corporation v. Muir [1943] A.C. 448 per Lord MacMillan at p. 457. The judge may be well fitted to identify the conduct to be expected of the reasonable man but may not be fitted by knowledge or experience to fulfil the same function in relation to the reasonable investor. The difficulty was expressed by Bramwell L.J. in Manchester, Sheffield and Lincolnshire Railway Co. v. Brown (1883) 8 App. Cas. 703, as follows at p. 716: –*

*“... Here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just or reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business.”*

210. The Supreme Court went on to describe the Court’s functions as being:

*“... to determine whether that information, if it were generally available, would be likely to materially affect the price of the shares having regard to the total mix of information available in the market. The evidence which would normally be available to the court, and which was available in this case, is the evidence of experts and the evidence of actual market movements upon some or all of the not generally available information becoming available.”*

211. Mr Buckley submitted that, in order to be considered an expert, a person called as an expert witness should have sufficient experience in relation to the matter to be considered an expert on the relevant subject matter.

212. As Mr Fettin had not worked in capital markets or trading securities, and had no experience of analysing, valuing financial instruments or assessing whether a security was correctly priced, Mr Buckley contended that he did not have the experience to provide an informed view on whether the information in question would be likely to have a significant effect on the price of financial instruments (INM's shares) on the basis of the information available to the market. This is because, Mr Buckley contended, a market analysis is a fundamental prerequisite to forming a view on whether certain information would have a significant effect on the share price based on the reasonable investor test.
213. Mr Buckley also submitted that the closest Mr Fettin came to having any experience in relation inside information and market abuse was an investigation undertaken for the FCA in the UK – Project Tabernula – where Mr Fettin was a member of a team of investigators, which sifted through vast amounts of information in order to identify anything that could be of concern. It was clear from Mr Fettin's evidence that his role in this regard appears to have been in relation to identifying matters that he felt constituted inside information and these were then taken to the legal teams and the barristers to consider. In summary, he had a sifting or filtering, rather than a decisive, role.
214. Mr Buckley further contended that Mr Fettin incorrectly interpreted the statutory test because he:
- Misunderstood the 'Reasonable Investor Test';
  - Focussed on the 'significance' of the information being communicated rather than the likely impact of that information on the share price; and
  - Did not consider the extent to which the share price might move in light of the information being communicated.

Mr Fettin's approach and evidence was also criticised because it was not, in Mr Buckley's view, based on a clear methodology and analysis which a court or tribunal can assess and test.

215. For these reasons, Mr Buckley contended that:

*“Mr Fettin's analysis can, and should, be rejected in limine.”*

with the consequence that:

*“... there is no admissible expert evidence available to the Inspectors on the question of price sensitivity capable of supporting a finding that any of the communications identified contained inside information.”*

216. In the event that Mr Fettin is qualified to provide expert evidence and that evidence is admitted, Mr Buckley submitted that Mr Aylard’s evidence should be preferred given:

- His qualifications and experience;
- He carried out a detailed and reasoned analysis of the factors affecting INM’s share price; and
- Applied the statutory test correctly when determining whether information was or was not ‘inside information’ – namely whether that information was likely to have a significant effect on INM’s share price;

217. As to whether any of the communications included inside information, Mr Buckley summarised his position as follows:

*“In light of the foregoing, Mr Buckley’s primary submission is that Mr Fettin is simply not qualified to express the views he has expressed on what does or does not constitute inside information. On that basis, his evidence should be rejected entirely. As a result, there is no admissible expert evidence available to the Inspectors on the question of price sensitivity capable of supporting a finding that any of the communications identified contained inside information.*

*Secondly, Mr Buckley submits that, even if Mr Fettin’s qualifications and experience were accepted to qualify him to give such evidence, Mr Fettin has applied the test in a way which has been shown to be incorrect and which represents an incorrect interpretation of the law. Again, for this reason, his evidence should be rejected entirely and, as a result, there is no admissible expert evidence available to the Inspectors on the question of price sensitivity capable of supporting a finding that any of the Communications identified contained inside information.*

*Finally, and strictly in the alternative and without prejudice to the foregoing, if the Inspectors accept Mr Fettin's qualifications and accept also that they can safely rely on his evidence (notwithstanding the fundamental flaws in his approach), significantly less, if any, weight ought to be placed on Mr Fettin's evidence compared to Mr Aylard's when their respective qualifications, experiences and approaches are compared.*

(b) If any of the communications amounted to inside information, whether Mr Buckley has a defence to such disclosures

218. Without prejudice to the submission that there is no expert evidence which could properly be relied upon, and if any of Mr Fettin's positive findings are accepted, Mr Buckley relied a number of defences arising out of the context in which the communications took place.

219. Of the eleven communications, ten related to Mr Pitt's complaint against Mr Buckley and one related to Mr Preston's protected disclosure.

220. Mr Buckley submitted that these communications should be seen in context, namely:

- The INM Board had lost confidence in Mr Pitt;
- His shock at the allegations made by Mr Pitt against a background where he had supported Mr Pitt throughout his time at INM;
- Given the nature of his relationship with Mr O'Brien, it was;

*"... 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."*

- His intention was to keep Mr O'Brien up to speed with the issues occurring and informed in case of press enquiries or speculation;
- He regarded Mr O'Brien as an 'insider' who had provided a very high level of personal assistance to INM over a number of years (not just as the majority shareholder) and who would help INM in any way possible;

- Mr O'Brien regarded himself as an 'insider' and had taken advice on the implications of his position; and
- The INM Board's knowledge or assumption that there was a line of communication between Mr Buckley and Mr O'Brien in relation to INM matters.

221. In that context, Mr Buckley submitted that, if any of the eleven communications contained inside information, those communications would not have involved the unlawful communication of inside information if the disclosure:

- was made in the normal exercise of an employment, a profession, or duties;
- was for the purposes of journalism or other form of expression in the media; or
- was justified having regard to the freedom of the press and/or freedom of expression.

222. Drawing on a number of cases considered by the Court of Justice of the European Union, Mr Buckley contended that:

*“proportionality and necessity are relevant principles in the context of limited disclosures of “inside information”. Importantly, it appears to have been part of the Court’s consideration, based on the foregoing, that the intentions of the discloser are relevant to the analysis of their conduct and vis-à-vis the legislative purpose of the MAR.”*

223. Mr Buckley submitted that:

- *“The purpose of the MAR has been defined in relatively clear terms: it seeks to ensure the integrity of financial markets by prohibiting market abuse and to enhance investor confidence in those markets by placing investors on an equal footing and by protecting investors against the improper use of inside information. The prohibition on disclosure of inside information should be construed in light of that purpose and should not extend to disclosures going beyond that purpose. Mr Buckley’s*

*disclosure did not infringe that legislative intent, and there is clear evidence of Mr Buckley's true purpose, and therefore his conduct should not be deemed to have been captured by the prohibition."*

- *"The recitals [to the Regulation] require that the law in this area be applied with due regard to the presumption of innocence, the right to a fair trial, and the right of defence as set out in the Charter of Fundamental Rights."*
- *"The recitals to the relevant legislation require that the law in this area be applied with due regard to the presumption of innocence, the right to a fair trial, and the right of defence. Therefore, in light of the context in which the communications were made and to whom they were made and their clear purpose, it is respectfully submitted that the MAR has no application to the [eleven disclosures relating to the allegations made by Mr Pitt and Mr Preston]. The prohibition on disclosure must be interpreted in a way that respects Mr Buckley's rights. As Mr Buckley's disclosures were an exercise by him of his rights, they were not captured by the prohibition."*
- *"If Mr Buckley were to be prohibited by the MAR from discussing, in a very limited circle of persons with whom he shared a long-standing confidential relationship, the fact, terms and consequences of extremely serious allegations made against him personally, he would be deprived of the freedom to express himself within that limited circle for the purpose of protecting and vindicating his good name. It cannot be forgotten that the allegations made by Mr Pitt did not only affect the affairs of the Company. They affected Mr Buckley's personal and business reputation in the most profound way. Of course, as a director and Chairman of the company, Mr Buckley had obligations to the Company; but he was also possessed of personal rights as a person the subject of extremely serious allegations with an entitlement to take steps to protect himself, including by discussing and seeking advice from a limited close circle of trusted confidants."*
- *Any interpretation of the MAR which would prohibit such a closely confined and confidential exercise of the freedom of expression would be*

*contrary to the express provisions set out above and to the fundamental rights of Mr Buckley.*

224. Although he acknowledged that the findings of Inspectors appointed under the Act can be used in civil proceedings, Mr Buckley contended that no finding should be made which amounts to a finding that he committed a criminal offence within the meaning of SI 349/2016 or the European Regulation. In support of this contention, Mr Buckley relied on Article 38(1) of the Constitution, which provides that “*No person shall be tried on any criminal charge save in due course of law*”.

(c) Confidential Information – whether any of the communications show that Mr Buckley, in releasing such information, was in breach of his duties to INM or was acting in breach of Company policy.

225. In the course of the Inspection, Mr Buckley accepted that 47 of the 56 communications contained information that was confidential to INM – see the Schedule of Communications at the end of this Chapter. Subsequently, in the course of his submissions in relation to his communications with Mr O’Brien, Mr Buckley suggested that a further five communications (A6, A30, B1, B6 and B11) did not contain confidential information.

226. Mr Buckley provided information to Mr O’Brien that was confidential to INM in circumstances where he believed that he could trust Mr O’Brien to keep any information provided to him strictly confidential and Mr O’Brien knew that information was shared with him on that basis.

227. Mr Buckley submitted that:

- As a fiduciary of INM he was required him to act at all times in good faith and in the best interests of the INM.
- The test is subjective: if the directors genuinely believe that what they are doing is in the interests of the company as a whole, the court will not interfere with their decisions even though they might appear objectively to be detrimental to the company. In this context, he noted the decision in *Re Gresham Life Assurance Soc [1872 LR 8 Ch. 446, 449]* where the Court held that a court will be unlikely to accept that the directors'

opinion was genuinely held if there are no possible reasonable grounds for it.

- His duty as a fiduciary of INM clearly encompassed a duty of confidentiality to INM – namely a duty not to use confidential information for his purposes (or for anyone else’s) and the disclosure of confidential information should only be used for the company’s benefit.

228. Notwithstanding that case law and commentary suggest that confidential information may only be used for the company’s benefit, Mr Buckley submitted that, in the context of this Inspection, the question is whether the disclosure of confidential information by Mr Buckley was *bona fide* and for a proper purpose.

229. Mr Buckley submitted that there was no evidence whatever that he was engaged in any improper purpose in any of the communications. He had given evidence that the role of Chairman necessarily involved the handling and sharing of confidential information and that the purpose in doing so was in the proper exercise of his role as Chairman and director of INM and that it would not have been possible to perform his role without sharing such communications.

230. Mr Buckley noted that nowhere has it been suggested that what he did was improper or against the interests of INM and no such allegation has ever been put to him.

231. Mr Buckley also noted that:

- Having been nominated by Mr O’Brien, he was entitled to take Mr O’Brien interests into account provided his decisions as a director were what he genuinely believed to be in the interests of INM; and
- The INM Board knew or assumed that there was a line of communication between Mr Buckley and Mr O’Brien in relation to INM matters and raised no objection to it.

232. As regards the suggestion that the disclosure of confidential information breached INM's policies, Mr Buckley acknowledged that he signed the Memorandum in August 2016 under which he became:

*“... under a duty of confidentiality in respect of any confidential information [he received] (whether about the Company or a third party) and [that he] must not use or disclose such information (including to [his] family, friends and business acquaintances) without due authorisation.”*

233. In evidence, Mr Doorly stated that ‘due authorisation’ required Mr Buckley to obtain his prior agreement before disclosing confidential information. Mr Buckley disputed that evidence and submitted that Mr Doorly’s evidence reflected a personal view, rather than being based on the Memorandum or, indeed, on any other source. He noted that Mr Doorly appeared to be relying on the provisions in relation to inside information – rather than confidential information.

234. Mr Buckley concluded that:

- Mr Doorly’s statement that confidential information could not be shared without the Board’s prior approval (or, indeed, his own) is not reflected in any written policy.
- While a number of the Directors’ statements on the issue state that policies were in place and their expectation was that same would be followed by Mr Buckley, nowhere is it identified what procedure ought to have been followed before confidential information was released. The issues of confidential information only appear to have been addressed in written policies from the time INM implemented the Market Abuse Regulation in August 2016.
- Any suggestion that Board level approval would have been required flies in the face of the normal fiduciary duty of confidentiality (which clearly provides for disclosure where same is in the company’s interests).
- From an operational perspective, it is difficult to see how a large PLC could have been efficiently or effectively run if every time a director wished to disclose something during the course of a conversation or negotiation which was confidential when, for example, negotiating a

contract or sounding out potential investment opportunities, he or she required Board approval or personal approval from the company secretary.

235. Mr Buckley submitted that:

- There is no evidence that he acted improperly in disclosing INM's information.
- When he disclosed confidential information, he did so in accordance with his fiduciary duty of confidentiality to INM.
- None of the directors or former Directors have suggested that any disclosure of confidential information by Mr Buckley was adverse to INM's interests.

**(ii) The INM Directors**

236. So far as concerned the INM Directors, the sole issue arising from the Terms of Reference relevant to the communications between Mr Buckley and Mr O'Brien (and others) is the INM Board's response upon becoming aware of those communications.

237. Other than Mr Connolly, none of the Directors had any contemporaneous knowledge of any of the communications. Mr Connolly was aware of four communications – A5, A6, A30 and B5. Mr Fettin expressed the view that the last communication – B5 – included inside information.

238. In these circumstances, the INM Directors submitted that:

- the disclosure by Mr Connolly of information relating to INM's proposed sale of its shareholding in APN (communication B5) did not constitute disclosure of inside information and/or did not constitute unlawful disclosure of inside information.
- The report and evidence of Mr Fettin ought to be disregarded by the Inspectors in circumstances where it is clear (i) Mr Fettin did not have the necessary expertise to provide an expert opinion as to whether inside information was unlawfully disclosed and (ii) it is clear that the approach

adopted by him in analysing the communications was premised on a fundamental misinterpretation of the legal framework.

- The Board's response upon becoming aware of communications between Mr Buckley and Mr O'Brien was reasonable, appropriate and fully in accordance with their duties as directors.

(a) The disclosure by Mr Connolly

239. The INM Directors submitted that the disclosure by Mr Connolly of information about INM's proposed sale of its shareholding in APN (communication No. B5) did not constitute unlawful disclosure of inside information.

240. In support of that submission, the INM Directors relied on the following:

- Mr Connolly was INM's 'point person' with respect to its stake in APN;
- It was essential to know if Mr O'Brien would support the sale of INM's shareholding in APN, given the size of his shareholding in INM, because his support (and that of IIU – being 45% in aggregate) would be necessary to ensure the feasibility of the deal;
- In order to establish whether Mr O'Brien would support the sale, INM would have to disclose information about the proposed sale of its shareholding in APN to Mr O'Brien (or his agent Mr Hayes) on a selective disclosure basis ahead of that information being announced to the market; and
- Mr Hayes understood the information was being shared with him on a strictly confidential basis. There was no requirement under the 2005 MAR Regulations that this obligation of confidentiality be documented.

(b) The report and evidence of Mr Fettin

241. Based on Mr Fettin's evidence, in the course of which he accepted that the basis of his analysis was to treat all non-trivial information as significant and equated that with information likely to have a significant effect on price, the INM Directors' submitted that Mr Fettin had made the same mistake as the tribunal in *Massey* by

treating all non-trivial information as significant and equating that with information likely to have a significant effect on price.

242. The INM Directors submitted that Mr Aylard's opinion – namely that the news that INM had decided to sell its stake in APN would not have been likely to have a significant effect on INM's share price and hence was not inside information – should be preferred as he had applied the test approved in *Hannam* and had carried out the basic securities analysis of understanding market expectation, identifying what was already in the market, and identifying the pricing history.

243. The INM Directors concluded that:

*“having regard to (i) the lack of relevant and necessary expertise on the part of Mr Fettin and (ii) the fundamental error underlying his entire analysis as to the test for likely significant effect on price, and taking account of the principles identified by the Court of Appeal (Collins J.) in Duffy v McGee [2022] IECA 254 (in particular at paragraphs 14 – 19) concerning factors affecting admissibility and reliability of expert evidence, the Inspectors cannot and ought not have regard to or take into account Mr Fettin's opinions on whether inside information was disclosed.”*

244. The INM Directors further contended that even if the information disclosed by Mr Connolly was inside information, contrary to their prior submission, it was lawful for Mr Connolly in fulfilment of his duties as a director to disclose that information to Mr Hayes, in circumstances where both understood the entirely confidential nature of the disclosure.

245. In support of that contention, the INM Directors relied on:

- the matters set out in paragraph 240 above.
- Mr Connolly's evidence that both he and Mr Hayes recognised and accepted that their conversation, including the possibility of Baycliffe selling its shares in APN together with the INM shares in order to obtain a better price for each seller, was confidential.
- Mr Dobbie's evidence that such discussions were common in investment banking and might be described as informal 'soundings' where potential

participants can test, informally, and on a wholly confidential basis, whether there is sufficient common ground to meet the cost and effort of more structured planning and possible formal negotiation. He stated that the lack of formality is their strength and concluded that Mr Connolly's communications regarding INM's proposed sale of its shareholding in APN

*“was discussion at high level involving principals and was conducted in a manner and at a level of confidence which is fully in line with long historic market practice”.*

Mr Dobbie, in support of his opinion, referred to the Regulation 10 (10) and (11) of SI 342/2005 and to Regulation 5.0.4 of the Guidance issued by the Central Bank of Ireland.

246. Although Mr Fettin concluded that the information in Communications A5, A6 and A30 did not constitute inside information, the INM Directors summarised Mr Connolly's evidence setting out the nature of the information provided and the circumstances in which those communications took place.

(c) The Board's response upon becoming aware of the communications between Mr Buckley and Mr O'Brien (and others).

247. The INM Directors submitted that:

*“The sharing of confidential information or inside information by a director (whether a nominee director or otherwise) is not necessarily prohibited or unlawful. A company might for example, determine that the sharing of confidential information is in the interests of the company. The Market Abuse Regulations (and the 2005 MAR Regulations) permit a company to make selective disclosure of inside information to persons. A nominee director might well therefore have communications with a shareholder or his representatives without infringing any legal or regulatory obligations and in the context of considering any response of the Board, that is an important consideration.*

*INM had specific policies in place regarding the sharing of inside information ... The Directors were made aware of those policies, and... the [Directors] reasonably assumed that Mr Buckley would adhere to such legal and regulatory*

*requirements and company policies in the context of any sharing of information with Mr O'Brien (or other third parties)."*

248. They explained that they would have been aware and would have expected that, in light of Mr Buckley's role as a nominee director on behalf of Mr O'Brien, certain information relating to INM's business was shared by Mr Buckley with Mr O'Brien in the ordinary course of business. However they also assumed that Mr Buckley in updating Mr O'Brien on company matters, would have acted at all times in accordance with his duties to the Company and complied with the Company's policies and procedures in respect of inside/confidential information, including those contained in the Memorandum on Inside Information provided to him on 24 August 2016 and signed by him.
249. They also explained that it was not until Mr Drennan's affidavit was served on 23 March 2018 that they had any idea of the extent of the information being shared. Mr Kennedy and Mr Marshall, who had completed their terms on 1 August 2017 and 1 March 2018 respectively, only learned of the extent of information sharing in the course of the Inspection.
250. The Directors relied on the actions taken by the Special Committee and the Board between 15 February 2017, when members of the Board first learned of certain communications between Mr Buckley and Mr O'Brien concerning the ongoing dispute between Mr Buckley and Mr Pitt and the draft market announcement, and 14 June 2018 when the Board approved and resolved to implement the ten recommendations contained in Deloitte's report in relation to INM's policies and procedures in relation to inside information.
251. In all the circumstances, the INM Directors submitted that the Board's response on learning of the communications between Mr Buckley and Mr O'Brien was reasonable and in accordance with their duties as directors.

(iii) INM

252. INM adopted the submissions made by the INM Directors including, in particular, that:

- Mr Fettin's reports and evidence were flawed and unreliable due to:
  - his erroneous approach to the assessment of whether information was likely to have a significant effect on INM's share price, and
  - his lack of experience in trading or valuing securities,

and should not be relied upon having regard to the principles identified in *Duffy v McGee [2022] IECA 254*.

- Mr Aylard's report and evidence should be preferred to that of Mr Fettin in respect of the communications that both considered.
- Communication B5 did not contain inside information. Alternatively, the disclosure of the information was lawful having regard to Mr Connolly's duties as a director.
- The Board's response, on becoming aware of the communications between Mr Buckley and Mr O'Brien was reasonable and appropriate and in accordance with its legal duties and responsibilities.

253. INM noted that each of the Directors has:

- confirmed (save for Mr Connolly in respect of Communications A5, A6, A30, and B05) that they had no contemporaneous knowledge of the 56 communications addressed by Mr Fettin.
- explained that they would generally have considered the communications under investigation to have contained information which was confidential to the Company (with some varying exceptions throughout).

- explained that, while they would have had some general awareness that Mr Buckley would share certain Company information with Mr O'Brien given that he was Mr O'Brien's nominee on the Board, they would have expected that, in sharing such information with Mr O'Brien, Mr Buckley would have acted in compliance with the INM's established policies and procedures in respect of inside and confidential information.

254. INM submitted that it had, with the advice and assistance of its lawyers, taken all reasonable steps to put in place adequate safeguards to protect against the unlawful or inappropriate sharing of inside and confidential information and further that the Company was entitled to rely on the legal and fiduciary duties owed to it by its directors to comply with its policies and procedures in that regard. In support of that submission, INM referred to the policies and procedures described above.

255. INM emphasised that it did not view or treat Mr O'Brien as an 'insider' with privileged access to INM's information and that it did not give Mr Buckley authority to treat Mr O'Brien that way.

256. INM contended that the Directors were fully entitled to rely on Mr Buckley's fiduciary duties as a director and as Chairman of the Board of the Company to support their expectation that Mr Buckley would comply with the Company's policies and procedures in that regard.

257. INM submitted that the Board's response on becoming aware of the communications, was both reasonable and appropriate.

**(iv) Mr O'Brien**

258. In his submission, Mr O'Brien emphasised that, as the communications contained INM's information, he did not comment on whether that information was confidential to INM or constituted inside information. He also submitted that Mr Fettin had applied an incorrect legal test for determining whether that information constituted inside information.

259. He emphasised that he and the persons connected with him who received communications from Mr Buckley were only recipients of that information and that there is no suggestion that they have misused the information provided or done anything unlawful.

260. Mr O'Brien maintained that:

- Where Mr Buckley had been nominated to the INM Board, there was nothing unusual or surprising in Mr Buckley providing information to him.
- He had been advised to consider himself to be imputed with the knowledge of his nominees on the Board of INM and that he had, therefore, treated himself as an insider.
- The information was passed to him confidentially.
- The information was passed to him in furtherance of INM's interests or in the context of the dispute with Mr Pitt, which concerned him personally or involved allegations that directly concerned Mr O'Brien.

261. Mr O'Brien acknowledged that there is no constitutional prohibition on tribunals reporting upon whether certain acts have been committed, even if those acts might amount to a criminal offence and that that principle must apply to Reports by Inspectors appointed under the Companies Acts. However, as the question of whether a person has committed a breach of the criminal law is a matter exclusively for the Courts if a prosecution is initiated, it would be constitutionally objectionable for Inspectors to be required to report on whether there had been a breach of the criminal law. He contended that this concern is particularly relevant where reports by Companies Act Inspectors are admissible in civil proceedings.

## G. Our Conclusions.

### (i) Introduction

262. In this Section we set out our conclusions on the matters identified in the Order arising from the communications between Mr Buckley and Mr O'Brien (and others on his behalf) under the following headings:

- Did Mr Buckley pass 'inside information' to Mr O'Brien?
- Did Mr Buckley pass confidential information to Mr O'Brien?
- Mr O'Brien's position.
- The INM Board's response on becoming aware of the communications between Mr Buckley and Mr O'Brien.

### (ii) Did Mr Buckley pass 'inside information' to Mr O'Brien?

263. As can be seen from the analysis in Section B, the legislation and regulation established to address market abuse, including the disclosure of inside information, is complex and the approach to its application is technical.

264. The criteria to be met if information is to be categorised as inside information is not in dispute. To be inside information for the purposes of the market abuse legislation and regulation, the information must:

- Be of a precise nature;
- Not have been made public;
- Relate directly or indirectly to one or more issuers or to one or more financial instruments; and
- Be information which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments.

265. Of the 56 communications under consideration, Mr Fettin concluded that 37 did not contain inside information because the information failed to meet one or more of the elements in the definition. No-one has questioned that analysis.

266. There is no dispute that the remaining 19 communications met the first three elements in the definition. However, there is a dispute as to whether those communications met the fourth element – namely that the information, if it were made public, would be likely to have a significant effect on INM’s share price.

267. Mr Buckley contends that we should reject Mr Fettin’s conclusion that those 19 communications contained inside information because:

- Mr Fettin is not qualified to give expert evidence and so his evidence should be rejected entirely.
- In the alternative, if we conclude that Mr Fettin is qualified to give expert evidence, he has misinterpreted the statutory test and, therefore, his evidence should be rejected in its entirety.

As a result, he contended, there is no admissible expert evidence available on which to conclude that any of the communications contained inside information.

268. In the event we conclude that there is admissible expert evidence, Mr Buckley contends that we should:

- prefer Mr Aylard’s evidence in relation to the eight communications on which he gave expert evidence; and
- conclude that the communication of the information in the remaining eleven communications was not unlawful because the disclosure:
  - was made in the normal exercise of an employment, a profession, or duties;
  - was for the purposes of journalism or other form of expression in the media; or

- was justified having regard to the freedom of the press and/or freedom of expression.

269. Each of these submissions is considered below.

(a) *The absence of any admissible expert evidence on which to conclude that any of the communications contained inside information*

270. This proposition is based on two submissions – first, that Mr Fettin does not have the qualifications or experience to give expert evidence on the matters in issue and, secondly, that Mr Fettin applied the wrong test when assessing the information communicated and his evidence should therefore be rejected.

271. Mr Fettin’s qualifications and experience are summarised in paragraph 120. He has substantial experience of risk and compliance in the financial services sector, a sector where consideration of potential and actual market abuse is a key requirement. Additionally, he has had the benefit of being part of a forensic team working on a complex market abuse case with the Financial Conduct Authority, the authority charged with investigating and identifying instances of market abuse.

272. The contention that Mr Fettin does not have the necessary experience to give expert evidence was based on the fact that he has not worked in capital markets, has not traded securities, and has no experience of analysing and valuing securities. It was also contended that Mr Fettin’s experience in relation to inside information and market abuse was limited to sifting information and was non-decisive. Mr Buckley, the INM Directors and INM all contend that experience in these areas is essential to be able to give expert evidence on whether the information disclosed to Mr O’Brien, if it were made public, would be likely to have a significant effect on INM’s share price.

273. It was also asserted that, in assessing whether the fourth element of the definition is met, Mr Fettin applied the wrong test. In his reports and in his evidence, it was asserted that Mr Fettin assessed the significance of the information being communicated per se and did not assess the significance of that information by reference to its likely effect on INM’s share price.

274. For these reasons, it was asserted that Mr Fettin’s evidence should be rejected in its entirety and therefore there is no admissible evidence to support a finding that any of the communications contained inside information.
275. We do not accept the submission that the entirety of Mr Fettin’s evidence is inadmissible or cannot be relied upon at all.
276. The role of an expert witness is to provide objective, unbiased testimony to assist a court, arbitrator, or inspector to reach determinations from established facts. Both Mr Fettin and Mr Aylard confirmed that they understood that to be their role.
277. In Condron v ACC Bank plc [2012] IEHC 395, Charleton J. said:

*“Experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which long study and experience has equipped them so that, armed with that analysis and the elements of arriving there, the court may be enabled to take a different view to their opinion.”*

278. In Karen Millen Fashions Ltd v Dunnes Stores [2014] IESC 23, O’Donnell J. in the Supreme Court said:

*“For my own part, I can see how it is at least convenient to permit experts to give evidence in general as to their conclusions, so long as it is very clearly understood that what is important are the reasons leading the expert to that conclusion rather than the fact of the conclusion itself.”*

279. In Emerald Meats Ltd v Minister for Agriculture [2012] IESC 48, O’Donnell J. said:

*“In theory, expert witnesses owe a duty to the court to provide their own independent assessment. It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the court’s determination. If this process functions properly, there should not be wide and unbridgeable gaps between the views of experts. Where there are differences, those should be capable of identification along with the relevant considerations so that the particular issue or issues which require judicial*

*determination should be capable of ready exposition. Ideally, all of this should occur outside a courtroom and well in advance of the trial.”*

280. In DPP v Abdi [2004] IECCA 47, Hardiman J. said:

*“The role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision. Where there is a conflict of expert evidence it is to be resolved by the jury or by the judge, if sitting without a jury, having regard to the onus of proof and the standard of proof applicable in the particular circumstance.”*

281. In James Elliott Construction v Irish Asphalt Ltd [2011] IEHC 269, Charleton J. quoted, with approval, from Lord Cooper’s judgment in Davie v Magistrates of Edinburgh [1953] S.C. 34:

*“Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court – S.S. Bogota v. S.S. Alconda [1923] S.C. 526. Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury.”*

He also referred to the judgment of Finlay C.J. in Best V Wellcome Foundation Ltd [1993] 3 I.R. 421, where he said:

*“I am satisfied that it is not possible for either a judge of trial or for an appellate court to take upon itself the role of a determining scientific authority resolving disputes between distinguished scientists in any particular line of technical expertise. The function which a court can and must perform in the trial of a case in order to achieve a just result is to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of this kind.”*

And then concluded:

*“Every judge has to attempt to apply common sense and logic to the views of an expert as well as attempting a shrewd assessment as to reliability. I adopt as useful the statement by Stewart-Smyth L.J. in Loveday v. Renton [1989] 1 Med. L.R. 117 as follows:-*

*“The mere expression of opinion or belief by a witness, however eminent... does not suffice. The Court has to evaluate on the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witnesses' opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence... there is one further aspect of a witness's evidence that is often important; that is his demeanour in the witness box. As in most cases where the court is evaluating expert evidence, I have placed less weight on this factor in reaching my assessment. But is not wholly unimportant; and in particularly in those instances where criticisms have been made of a witness, on the grounds of bias or lack of independence, which in my view are not justified, the witnesses' demeanour has been a factor which I have taken into account”.*

282. Kenneally v De Puy International [2017] 2 IR 487 was a case which was largely about the objectivity of an expert where it was alleged that he had a financial interest in the outcome of other proceedings against the defendant.

The High Court refused to exclude the evidence, and adopted the considerations governing the admissibility of expert evidence from Kennedy v Cordia [2016] UKSC 6 which were (i) whether the proposed expert evidence would assist the court in its

task; (ii) whether the witness had the necessary knowledge and experience; (iii) whether the witness was impartial in his or her presentation and assessment of the evidence and (iv) whether there was a reliable body of knowledge or experience to underpin the expert's evidence.

Barton J. also held that admitting the evidence does not prejudice the outcome after cross examination has taken place. He followed AG (Ruddy) v Kenny (1960) 94 ILTR 185 in relation to the general rule that a witness may not give evidence of their opinion and that expert evidence when admitted is to assist the court in finding and drawing inferences of fact.

283. DPP v RK [2023] IESC 36 was a criminal case involving an allegation of infection of women with HIV by the accused. Against a complicated evidential background during the trial, the defence got leave from the trial Judge to call a Professor of evolutionary genetics. The trial Judge limited what the Professor could say about trial requirements in another jurisdiction.

The Supreme Court held that “*expert witnesses should, in principle, give opinion evidence only on matters within their area of expertise*” and in the specific context went on to say that:

*“Accordingly, the trial judge was correct in refusing to permit Professor Leigh Brown to give evidence of his understanding of the legal requirements for prosecutions in other jurisdictions. That would have been a particularly relevant consideration in relation to the criminal law of Scotland is in question, since, as I understand it, that law has a broader requirement for corroboration than ours. However, in my view he was perfectly entitled to give evidence of his involvement in and experience of trials in those jurisdictions.”*

284. We were also referred to R v Sally Clark (No 2) 2003 EWCA 1020 which was a criminal case involving a prosecution for cot death. By way of background the case came on for appeal in circumstances where new evidence – which had not been disclosed to the defence or included in a post mortem report by the pathologist (which was completely inconsistent with accepted practice) – emerged suggesting the possibility of death by natural causes.

A Professor Meadow was asked about some statistical information as to the occurrence of two cot deaths within the same family. That statistical information

was about to be published in a report of a government funded multi-disciplinary research team, the Confidential Enquiry into Sudden Death in Infancy ("*CESDI*") entitled "*Sudden Unexpected Deaths in Infancy*" to which the Professor was then writing a preface. He said that the chance of two cot deaths in a family in these circumstances was once every hundred years. A table of probabilities from the report were put before the jury but none of the significant caveats about the statistics that were available were put before them. A phrase had also been used equating the chances of such deaths occurring was equivalent to '*backing four 80 to 1 winners of the Grand National in successive years.*'

The Court of Appeal pointed out that they heard little argument about the statistics and that the nature of the statistic risked lumping the 2 deaths together. The Court held that this evidence should not have been before the jury and the conviction was quashed.

285. We have also considered *Bailey v Commissioner of AGS 2017 IECA 220* where the Court of Appeal considered a number of different aspects of opinion/expert evidence. The witnesses included 2 former DPPs and a professional officer.

In upholding a trial ruling refusing to allow a former DPP read an email where he expressed an opinion on what he called a fundamentally flawed investigation, the Court said:

*"The overall picture that emerges is that the evidence of the various professional witnesses gave rise to debate about the extent to which they could be permitted to express opinions on the issues that arose in the case. The trial judge took a strict approach to the issue and certainly he was fully entitled to do that and, indeed, probably was bound to do so.*

*"Much the same could be said of the opinion evidence which the plaintiff had proposed to tender here. It amounted to saying that in the respective opinions of three (admittedly very distinguished) professional witnesses the prosecution case against Mr Bailey was a poor one. But this is precisely the type of opinion evidence which, as the Supreme Court made clear in Mannix, cannot be tendered by either party."*

The Court went on to consider an issue where the plaintiff sought to tender as an expert witness, Mr Robert Quick, who was a former Assistant Commissioner of

London's Metropolitan Police Service. Mr Quick's evidence was heard by way of voir dire in its entirety before being ruled out by the trial judge. “*Mr Quick possessed extensive experience in the investigation of serious and organised crime, counter-terrorism and counter-corruption. He certainly had enormous experience qua senior police officer.*” However, he accepted that he knew nothing about Irish decisions in relation to police standard practice in 1996/97 and said he was not an expert on Irish law, including on the admissibility of statements.

The Court of Appeal said:

*“The purpose of Mr Quick's evidence was, it seems, to allow him to give his expert view, by reference to approved police practice, of the correct manner of giving and taking statements and of handling witnesses and informants. The difficulty, however, is that while Mr Quick is plainly a distinguished former police officer, he simply was not aware of the relevant law or standards applicable in Ireland at the time in question in 1996-1997. On that basis his proposed evidence as to standard police practice did not meet the threshold of an expert witness. As such, the evidence was inadmissible insofar as it was not probative of any material fact.”*

Therefore, the foundation for expert evidence was not laid.

286. Finally, we considered the case of *McManus v the Medical Council [2012] IEHC 350* which was originally a disciplinary proceeding, brought on the criminal standard of proof, which concerned an allegation of an altered medical record. In that case the Fitness to Practice Committee rejected their own legal assessor's recommendation that a directed verdict be given. The Court in expressing the view that it could not understand why any expert evidence was needed in relation to an altered medical record decided the case on a fair procedures basis where the Applicant was given no advance notice of a decision to substitute the view of a witness (Professor Casey), who was also the complainant, for the opinion of its own expert in circumstances where Professor Casey had been cross examined on an entirely different basis.
287. In this Investigation, we have the benefit of Mr Aylard's report and evidence in addition to Mr Fettin's reports and evidence.

288. In our view, and having regard to the matters covered in the reports by Mr Fettin and Mr Aylard:

- Mr Fettin has experience of advising on and investigating potential market abuse. Mr Aylard has capital market experience.

We, therefore, have the benefit of the expertise and experience said to be required to give expert evidence on whether information is or is not inside information.

- Mr Fettin carried out a detailed analysis of each communication to determine whether the four elements of the definition of inside information were satisfied. Mr Aylard accepted Mr Fettin's conclusions in respect of the first three elements of the definition. However, they adopted different approaches to the fourth element of that definition and reached different conclusions as to whether the information would, if made public, have had a significant effect on INM's share price.

We, therefore, have available to us expert evidence in relation to the alternative approaches to the fourth element of the definition and can, having regard to our conclusion on which is the correct approach to take, assess that evidence for the purposes of this report.

- In relation to the eleven communications on which Mr Aylard did not provide a report, all of which relate to Mr Pitt and Mr Preston's dispute with Mr Buckley, we had the opportunity to ask him about the factors that would be significant to potential investors where there are disputes at Board and/or senior management level.

289. We have carefully considered the submissions made on behalf of Mr Buckley, the INM Directors, INM and Mr O'Brien.

290. We note that:

- All parties accepted Mr Fettin's assessment where he concluded that a communication did not contain inside information;

- In relation to the remaining communications, no party disputed Mr Fettin's assessment that each communication satisfied the first three elements of the definition of inside information – namely that the information (i) was of a precise nature, (ii) had not been made public, and (iii) related to an issuer of a financial instrument; and
- Whilst agreeing on the statutory test in relation to the fourth element of the definition of inside information – namely whether the particular information was likely to have a significant effect on INM's share price – Mr Fettin and Mr Aylard adopted different methodologies.

291. We have concluded that:

- Mr Fettin lacked the qualifications and experience necessary to assess whether particular information was likely to have a significant effect on INM's share price.
- As between the two methodologies, Mr Aylard's approach correctly met the statutory test (and Mr Fettin's did not).

292. Accordingly, in the conclusions that follow:

- No reliance has been placed on conclusions reached by Mr Fettin in relation to whether the fourth element of the definition has been satisfied; and
- No reliance has been placed on any conclusions reached by Mr Fettin as to whether disclosure of inside information was unlawful.

293. However, Mr Aylard did have the experience necessary to assess whether particular information was likely to have a significant effect on INM's share price and he provided the reasoning for his conclusions. Therefore, with the benefit of those reasons, we have been able to evaluate the evidence available and form our own views, as we are required to do, in relation to the issues we have to determine.

(b) We should prefer Mr Aylard's evidence in relation to the eight communications on which he gave expert evidence

294. Mr Aylard expressed opinions on eight communications – each of which he concluded did not contain inside information.
295. Having had the benefit of his evidence, our conclusions on those eight communications are as follows:

Communications A1, A8, and A9

296. In these three communications, Mr Buckley sent to Mr O'Brien:
- A copy of INM's full year financial results to 31 December 2015;
  - A copy of INM's results for the six months ending 30 June 2016; and
  - a research note to be issued by Davy relating to those half year results.

In each case, Mr O'Brien received the information in advance of its release to the market the following morning.

297. Mr Aylard concluded that those communications did not contain inside information, primarily, because the results were in line with market expectations and therefore would not have been likely to have a significant effect on INM's share price – as proved to be the case.
298. The factors to be considered include whether the financial results included information which was materially different to market expectations, whether there was a change in how INM's financial targets would be achieved, and whether any other part of the announcement or the notes to the accounts contained inside information.
299. In our view, because the financial results were in line with market expectations and did not include any material indicating a change in INM's strategy or how it would be implemented, we agree with Mr Aylard's opinion that these three communications did not contain information that would have been likely to have a significant effect on INM's share price and so did not contain inside information.

Communication A13

300. In this instance, Mr Buckley forwarded to Mr O'Brien an email he had received from Mr Preston to which was attached a copy of the Circular to be sent to shareholders.
301. Mr Aylard concluded that the cancellation of the deferred shares (which had not been issued) or the capital reduction (which involved accounting entries to re-arrange the balance sheet, but which would not affect INM's net assets) would not have been likely to have a significant effect on INM's share price.
302. In his view, the significance of the restructuring lay in the fact that it would enable INM to pay dividends out of future profits – but INM made no mention of a future dividend policy. In his view, the fact that the Circular did not mention that possibility implied that there would be no change in INM's dividend policy.
303. However, although the announcement did not refer to the potential to pay dividends in the future, the fact that INM would be able to pay dividends was referred to by Davy and Goodbody in their market commentaries.
304. Mr Aylard noted that Mr Buckley was aware that Mr Preston had taken steps to advise Mr O'Brien (through Mr Hayes) and Mr Desmond of the proposals and, when doing so, on the advice of Davy, had proceeded on the basis that the proposals were market sensitive and adopted the selective disclosure procedure ("wall crossing" approach) which included advising the recipient that the information was price sensitive and obtaining a commitment that the information would be kept confidential. Mr Aylard expressed the view that the wall-crossing approach was undertaken as a prudent precaution.
305. Mr Aylard's view that the wall-crossing approach was undertaken as a prudent precaution is supported by:
- The fact that the Disclosure Committee does not appear to have been convened, and

- The absence of any statement on the face of the announcement or the circular that those documents contained inside information,

notwithstanding that new post-MAR policies had been adopted by INM less than three months earlier.

306. Mr Aylard also noted that INM's share price rose by 7.8% on the day of the announcement (from 11.6 cents to 12.5 cents). Mr Aylard acknowledged that this was a greater price increase than he would have expected but he speculated that the price increase simply reflected a bounce back to the price two days earlier.

307. Having considered the evidence of Mr Aylard and the submissions made on behalf of Mr Buckley:

- We do not accept that the market would have concluded that INM's dividend policy was unchanged simply because INM did not mention in its announcement or in its Circular to shareholders that, following the restructuring, INM would have the option of paying dividends out of future profits.

That is because the market would have been aware that both Davy and Goodbody gave prominence to the possibility of dividends being paid. In Davy's case, its commentary focussed on that possibility in its headline. Goodbody, whilst acknowledging INM's preference for acquisitions, highlighted that payment of dividends would be in shareholders' interests.

- We accept Mr Aylard's evidence that, although the rise in INM's share price was greater than he had expected, that increase was attributable to a bounce back to the level two days earlier.
- We have noted Mr Aylard's view that the wall-crossing approach taken by Mr Preston, on Davy's advice, when advising Mr Hayes (on behalf of Mr O'Brien) and IIU of the proposed capital restructuring was "*a prudent precaution*" – as opposed to being based on a considered conclusion that the communication did in fact include inside information.

- We have noted that the Disclosure Committee did not meet and the announcement and Circular did not contain a statement that such documents contained inside information.

308. In those circumstances, we have concluded that the cancellation of the deferred shares and the capital reduction would not have been likely to have a significant effect on INM's share capital for the reasons given by Mr Aylard and that, therefore, communication A13 did not contain inside information.

#### Communication A32

309. Mr Buckley sent Mr O'Brien a copy of INM's 2016 preliminary full year results in advance of their release to the market the following day.

310. There are two aspects of this communication which might be characterised as inside information:

- The communication of INM's preliminary full year results in advance of its general publication; and
- The announcement that:
  - The ODCE had served a requirement requiring production by INM of its records in relation to the possible acquisition of Newstalk and other matters; and
  - INM, itself, had established a confidential, independent review conducted by senior counsel and an independent corporate governance expert to examine and enquire into matters concerning the possible acquisition of Newstalk and related matters and report to the Board.

#### INM's 2016 full year preliminary results

311. Mr Aylard reviewed the market commentary following the release of the preliminary full year results, all of which was positive. The outlook for 2017 was, the Company said, in line with market expectations. INM's share price rose the following day, but

not to the extent that would suggest that the preliminary announcement of the 2016 results and the Company's outlook for 2017 was out of line with market expectations.

312. For these reasons, Mr Aylard did not consider that INM's preliminary results for 2016 contained inside information. We agree with his conclusion.

Disclosure of the independent review and the ODCE information request

313. Mr Aylard also concluded that the disclosure that the ODCE had requested information concerning the proposed acquisition of Newstalk did not materially alter the position disclosed in INM's announcement on 29 November 2016. He therefore concluded that the disclosure of the ODCE information request would not have been likely to have a significant effect on INM's share price and hence was not inside information. He did not comment on the fact that INM had commissioned an independent review.

314. Mr Aylard gave evidence in relation to the views he expressed:

*Mr Gillane: Can I ask you then in relation to Communication 32, which has two aspects to it and you've dealt with in terms in relation to the financial results aspect - this is the communication that also has the reference to the ODCE. Do you have that in front of you there?*

*Mr Aylard: Yes.*

*Mr Gillane: And in relation to that, I think at paragraph 70 of your report, you say:*

*"This was the first public disclosure of the involvement of the ODCE. There was, however, no reference to this being in response to a protected disclosure."*

*Can you explain that?*

*Mr Aylard: I think it's a statement of fact. I'm not sure what you want me to explain.*

Mr Gillane: *Well, I suppose, if it had made a reference to a protected disclosure, would that have made a difference, in your assessment?*

Mr Aylard: *Potentially. I haven't - there was - I appreciate the protected disclosure issue was - I don't know whether it was debated at the same time, but it was an issue that hadn't been disclosed. I'd have to think. Off the top of my head... It's clearly an issue at the time when I wrote this that I thought was potentially significant.*

Mr Gillane: *Yeah, and I don't want to put you on the spot in that sense. It's just that, by virtue of that reference where you say there was no reference to it, I thought its absence was of significance in terms of your assessment?*

Mr Aylard: *Yes, I think it was - I certainly thought it was worth mentioning in as much as there was sufficient information has been generated about this, that then I thought it was significant that that was not, for whatever reason, wasn't disclosed.*

Mr Gillane: *Can I infer then that if protected disclosure had been referred to, that would have made a difference in terms of your assessment?*

Mr Aylard: *I would have to - if you want me to go away and think and come back with an opinion on that - but it certainly was a potential factor.*

Mr Gillane: *And leaving that aspect of it aside just for the moment, in terms of this, this refers back to, I think, the announcement on the 29th of November 2016, isn't that right?*

Mr Aylard: *Yes.*

Mr Gillane: *And you were looking at this in respect of whether the position had altered, isn't that right?*

Mr Aylard: Yes.

Mr Gillane: *And did you conclude that the position hadn't significantly altered, is that...?*

Mr Aylard: Correct.

Mr Gillane: *All right. And can I just ask you just to look at that and just to help us in respect of this particular communication in that when you go back to the November 2016 communication, that announcement, which I think had inside information on its face -*

Mr Aylard: Yes.

Mr Gillane: *- referred to what was described as an internal matter and it appeared in terms of that communication that the internal matter had been resolved and I think the phrase used was "no issue arose" or something of that nature?*

Mr Aylard: *[Witness nods].*

Mr Gillane: *Was it not - and just think about this - significant that this communication then in March of 2017 involved a reference to an external regulatory agency that had a specific statutory function in relation to companies, and that it referred to the proposed acquisition and also, quote-unquote, "related matters". And, just to finish it out, clearly, whatever that issue was, it wasn't resolved. Was that not a fairly significant difference between the 2016 position and the 2017 position?*

Mr Aylard: *I didn't see it as that. I saw that the questions had been raised about a - I think it was described as a dispute on valuation. On the face of it, I don't think a regulatory body looking into things like this is - it didn't strike me in itself as announced as being anything more than - saying tidying up loose ends is not right - they were looking into it, but it didn't suggest anything that I could see on the face of it that was potentially adverse.*

*And the fact that the brokers simply ignored it suggested it wasn't significant in the share price context.*

Mr Gillane: *All right. I mean, I'm not, I suppose, questioning the question of whether it's adverse or not, but just whether it's a substantial change from the 2016 position. I mean, you've seen the Disclosure Committee minutes in relation to their ultimate conclusion eventually that the market would be misled if that information wasn't released, isn't that right?*

Mr Aylard: *They did, indeed, conclude that, but on the version that I saw, there was no suggestion that that was because it was inside information.*

Mr Gillane: *There's certainly nothing explicit in relation to that, but you've seen that Disclosure Committee discussion and ultimate conclusion?*

Mr Aylard: *Yeah.*

Mr Gillane: *In relation to the market ignoring it, I think the Davy note certainly has a fair chunk referring to it in its note, doesn't it? It doesn't editorialise - I'm not suggesting it does but...*

Mr Aylard: *It repeats a statement of fact. It doesn't say this is good news/bad news/what might happen as a result of it. It just mention it.*

Mr Gillane: *And, again, I'm just asking this to put it to you - could a reasonable view be reached different from yours in that respect that we now have - instead of an announcement, that there's an internal issue that's being resolved and we now have a situation where we have information that a statutory agency is involved - there are quote-unquote "other matters" and it doesn't appear to be resolved?*

Mr Aylard: *I didn't read it that way, and I don't think the market did.*

315. Recital 14 of the Market Abuse Regulation establishes that reasonable investors base their investment decisions on information already available to them, that is to say on ex ante available information. Therefore, we have to consider whether the information contained in the preliminary announcement, when contrasted with the information in INM's announcement on 29 November 2016, and considered in light of the totality of INM's activity and any other market variables available to prospective investors, would be likely to have a significant effect on INM's share price.
316. The announcement on 29 November 2016, which carried the warning "*This announcement contains inside information*", stated 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." [Emphasis added]*

317. A reasonable investor reviewing that announcement would conclude that the issue that had arisen between Mr Buckley and Mr Pitt related, in all probability, to the price of the proposed acquisition of Newstalk and, most importantly, that, following an internal review, there were no grounds for concern and the issue was now closed.
318. The statement issued by INM on 21 March 2017 stated that:

*"The Company is complying with a requirement from the Office of the Director of Corporate Enforcement ("ODCE") to produce records in relation to the possible acquisition by the Company of Newstalk and related matters that were the subject of the Company's announcement on 28 November 2016. The Company is taking all necessary steps to meet the ODCE's request.*

*A requirement from the ODCE to produce books and records is a procedural matter that does not involve any conclusion that there has been a breach of law by the Company or its officers.*

*The Company established in December 2016, before being contacted by the ODCE, a formal independent review to examine and inquire into matters concerning the possible acquisition of Newstalk and related matters. Discussions on the possible acquisition ended at a preliminary stage and the acquisition was never considered by the Board. The confidential, independent review is being carried out on behalf of the Board by senior counsel and a senior independent governance expert who have been mandated to report to the Board.”*

The announcement did not include a statement that it contained inside information.

319. The same investor, looking at the statement made by INM and Note 21 to the preliminary announcement would note that:

- Far from being closed, the situation had now escalated so as to cause:
  - the INM Board to commission an Independent Review into the issues arising from the proposed acquisition of Newstalk, and
  - the ODCE to exercise its powers to call for INM’s records relating to that acquisition.
- The issues extended beyond the terms of the proposed acquisition because:
  - the Independent Review was being conducted by a senior counsel and a corporate governance expert, whose skills would not be required to consider the terms of a proposed acquisition, and
  - the ODCE’s remit included improving the compliance with the requirements of the Companies Acts and bringing to account those who disregard the law.

320. Given these material differences between the November 2016 announcement and the March 2017 Statement, we do not accept Mr Aylard’s conclusion that the March 2017 Statement did not significantly alter the position disclosed in INM’s announcement on 29 November 2016.

321. INM's contemporaneous consideration of its disclosure obligations is also relevant when considering whether the March 2017 statement contained inside information.
322. On 17 January 2017, the INM Board established the Special Committee and delegated to it consideration of whether evolving circumstances in relation to the independent review and/or the ODCE process gave rise to inside information and disclosure obligations under the Market Abuse Regulation.
323. The Special Committee considered, with the benefit of legal advice, whether an announcement of developments since the November 2016 Statement was required or appropriate at meetings held on 6 March, 15 March and 20 March 2017.
324. The minutes of the Special Committee meeting on 20 March 2017, record that:

*“Having taken external legal and financial advice, the Special Committee concluded that the Company is obliged to announce the fact of the ODCE request and of the independent review with the Company’s announcement of final results on Tuesday, 21 March 2017 and that **it would not be justifiable to delay disclosure of these material matters** when the Company is expressly providing a general update to the market of material developments and **that failure to disclose would be liable to mislead**”.*[Emphasis added]

325. Although we have rejected Mr Aylard’s conclusion that the March 2017 Statement did not significantly alter the position disclosed in INM’s announcement on 29 November 2016, we agree with Mr Aylard’s conclusion that the announcement did not contain information that was likely to have a significant effect on INM’s share price.
326. In reaching this conclusion, we have attached importance to the contemporaneous evidence, which included that:
- The Special Committee considered the need to make an announcement at its meetings on 6 March and 15 March 2017 and concluded, with the benefit of legal advice, that no announcement was required at that stage; and
  - When the 21 March 2017 Statement was issued, it did not include a statement that it included inside information.

327. In these circumstances we accept that communication A32 did not include information that was likely to have a significant effect on INM's share price and, therefore, did not contain inside information.

Communications B4 and B5

328. Communications B4 (by Mr Buckley to Mr O'Brien in January 2015) and B5 (by Mr Connolly to Mr Hayes and Mr O'Brien) related to the proposed sale of INM's shareholding in APN and the possibility of a combined sale of INM and Baycliffe's holdings in APN in order to optimise the price realised.

Whether the communications contained inside information

329. Mr Aylard concluded that the news that INM had decided to sell its shareholding in APN would not have been a surprise in view of the ongoing restructuring process and the rise in APN's share price. However, as the sale of a stake of this size is not always possible and may require a substantial discount, he concluded that such news would not have been likely to have a significant effect on INM's share price.

330. Mr Aylard acknowledged that he hadn't considered the effect on INM's share price if APN's share price had been adversely affected because it had become known that INM had decided to sell its shareholding in APN:

*Mr Gillane: Can I ask you then also in relation to [B4] and [B5], the communications - they are linked thematically, at least - in relation to APN. And I think you say, and correct me if my summary of what you're saying is in any way wrong or misleading, that the fact of the shareholding, INM's shareholding in APN was widely known and that the market wouldn't have been surprised at a decision to sell given the APN performance and also INM restructuring - that those are the significant factors in relation to your assessment here, is that right?*

*Mr Aylard: Yes, I could add a few more because I was actually looking at this last night, looking back through my notes, and I think it's relevant that the company continued to have, despite protestations that post the restructuring that the debt levels*

were under control, there are brokers' reports suggesting that the debt levels were still very high. The company had very significant constraints on its debt, which is detailed in the 2013 Annual Report. So you've got a company that is hamstrung with debt, with a big asset where the share price has moved up significantly. It was, to me, very obvious that it would be sold at some point in time.

Mr Gillane: *And you're saying that that's a sentiment that can be detected, that INM was going to divest itself of...?*

Mr Aylard: *I think the reasonable investor would absolutely have ...*

Mr Gillane: *Eventually. Or at some point?*

Mr Aylard: *At some point, yes.*

Mr Gillane: *Can I ask you just to then help us with the specific communication here, which wasn't a sort of communication to the effect, "Look, INM will divest at some point", but was a communication where it said that Mr Buckley was saying that INM or the Board has decided to sell - that the actual decision had been made?*

Mr Aylard: *To me, the big question was not the decision to sell. It was achieving it because the uncertainty concerning a sale of a stake like that is quite significant. And, therefore, as I said, I don't think it would have been a surprise that the Board had decided to sell, but I do think that the actual sale itself - (1) to have got it sold, and (2) to have got it sold at a good price was the potentially - was the price sensitive information, the actual...*

Mr Gillane: *So you're saying the actual Board decision to sell wasn't itself a significant piece of information in that context, having regard to the test...*

Mr Aylard: *Correct, I don't believe that would have had a significant effect on the share price. I think the reasonable investor would have worked out that that was pretty well inevitable and, therefore, it wouldn't have changed the actual Board decision with all the uncertainty surrounding actually implementing that decision.*

Mr Gillane: *Were you aware of a sensitivity on the INM side in relation to any information leaking out in relation to the sale of the APN shares?*

Mr Aylard: *As a company owning a stake like that, you would be absolutely paranoid about it leaking out because of the effect it might have on the APN share price and, hence, your ability to achieve a decent price.*

Mr Gillane: *And I think Mr Connolly has told us - if he hasn't used the phrase "paranoia", he's come close to it - that there was an extreme sensitivity in relation to...*

Mr Aylard: *Inevitably, yes.*

Mr Gillane: *...in relation to that at the time. In relation to your reference there to APN - and I know at one point in your report you say that the APN share price movement isn't a relevant consideration. Obviously, INM had a shareholding in APN and would I be right in saying that APN share price movement in that context, at least indirectly, would be something that would affect the INM share price? It was a substantial enough holding.*

Mr Aylard: *Yes.*

Mr Gillane: *You agree with that, okay. And would that be something also that a reasonable investor would take into account?*

Mr Aylard: *The question is whether it would have moved the...*

Mr Gillane: *I mean having regard to the size of the holding?*

Mr Aylard: *Yeah, if the company had - it's not the decision that would have moved the APN share price; it was the leaking. If the decision had leaked, that would then have impacted the APN share price. I'm just trying to think through the sequencing. The actual...*

Mr Gillane: *Well, in terms of - sorry, I don't want to interrupt your train of thought...*

Mr Aylard: *Yeah, I know, I'm just...*

Mr Gillane: *I mean, in terms of the relationships, you have INM with its shareholding in APN?*

Mr Aylard: *Yeah.*

Mr Gillane: *You have Mr O'Brien with his shareholding in INM and APN. And the communication involves Mr O'Brien being told of a decision by the Board to sell its shareholding in APN. And I'm just asking about whether the potential movement in APN share price would be something the reasonable investor would take into account in that context?*

Mr Aylard: *I think that's possibly true. I'd have to - it's second order, but it is... There's no evidence that the INM share price in any way tracked the APN share price. So I would have to think quite hard as to whether there would be a significant movement. There would be a - I'd have to do the sums, but I think it might be a - it's an interesting point and I'm not sure I'm quite on the scale in terms of you've got to look at the percentage move in the APN share price and then the knock-through into the INM.*

331. In the course of our Investigation, we have received evidence of the importance that INM attached to keep confidential its intention to sell its shareholding because it was aware that, if that decision became public, the APN share price would adversely

affected and that in turn would have adversely affected the price achievable by INM. Mr Connolly, who represented INM in the negotiations to sell INM's shareholding, was explicit in emphasising the importance of confidentiality – to the extent of advising against instructing professional advisers until the last moment.

332. Given the sensitivity surrounding knowledge of INM's intention to dispose of its shareholding in APN, combined with the potential significant effect on INM's share price, the information provided to Mr O'Brien by Mr Buckley in January 2015 and by Mr Connolly to Mr Hayes in February 2015 regarding INM's potential sale of its shareholding in APN was, in our view, likely to have a significant effect on INM's share price and, therefore, did include inside information.

Whether the disclosure of the information to Mr O'Brien was permissible

333. Mr Buckley and Mr Connolly have submitted that if the information provided to Mr O'Brien and Mr Hayes was inside information, they were entitled to discuss both aspects – first, INM's decision to sell its holding and, secondly, the possibility of a combined sale of INM and Baycliffe's holdings – with Mr O'Brien and Mr Hayes (who was advising Mr O'Brien) because, in undertaking those discussions, they were acting in the course of their employment – Mr Buckley as Chairman of INM and Mr Connolly as the director responsible for negotiating the sale of INM's shareholding in APN.
334. Mr Connolly told us that he discussed the possible sale of INM's holding in APN with Mr O'Brien and Mr Hayes because he wanted to establish whether:
- Mr O'Brien would be willing to support the sale of INM's shareholding in APN and provide an irrevocable undertaking to vote in support of any necessary resolution approving that sale, and
  - Mr O'Brien and Mr Hayes would support a block sale of Baycliffe and INM's shareholdings in APN, which Credit Suisse had advised would be beneficial as it would remove any market uncertainty that might arise if Baycliffe was to retain its shareholding in APN.

335. We received evidence that all those involved – Mr O’Brien, Mr Hayes, Mr Buckley and Mr O’Brien – recognised and accepted the confidentiality of those discussions and that the maintenance of confidentiality over the proposed sale:

*“was absolutely paramount for all parties as any leak would risk the viability of the transaction and the price that might be secured”.*

336. Mr Dobbie, on Mr Connolly’s behalf, told us that the manner in which this discussion took place was:

*“typical and in [his] opinion an almost perfect example of the need and value of informal discussion of this sort.”*

337. He said that discussions of this sort are common in investment banking and might be described as informal “*soundings*” where potential participants can test, informally, and on a wholly confidential basis, whether there is sufficient common ground to meet the cost and effort of more structured planning and possible formal negotiation. He also explained they are typically held at a senior level between parties who know and trust each other.

338. Regulation 10 (10) and (11) of the Irish Market Abuse Regulations provided:—

*“(10) Subject to paragraph (n), where the issuer, or a person acting on the issuer's behalf or for the issuer's account, discloses any inside information to any third party in the normal exercise of the issuer's or person's employment, profession or duties, the issuer or person, as the case may be, shall make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure and without delay in the case of a non-intentional disclosure.*

*(11) Paragraph (10) does not apply where the third party receiving the inside information is a person under an obligation of confidentiality.”*

That is reinforced in the Market Abuse Rules issued by the Central Bank of Ireland 2012 (see 5.0.3 – Guidance regarding Selective Disclosure).

339. Regulation 10 (11) of the Irish Market Abuse Regulations required there to be an obligation of confidentiality – but it did not require the obligation of confidentiality

to be established or evidenced in any particular manner. Nor did it exclude an implied duty or more informal discussions so long as they were effective to establish the “*obligation*” of confidentiality;

340. Communications B4 and B5 clearly took place between experienced corporate financiers and market participants who immediately, by reference to the nature of the information and their professions and occupations, understood that the information was confidential – regardless of whether it amounted to ‘inside information’ within the strict meaning of the law.

341. The duty of confidentiality in respect of information imparted in such circumstances, in the absence of any contractual confidentiality agreement or commitment, was established in *Coco v AN Clark (Engineers) Ltd [1968] FSR 415*.

342. We have received extensive evidence that:

- Mr O’Brien, having taken legal advice on becoming INM’s largest shareholder and having the right to nominate directors of INM, considered himself to be under a duty of confidentiality in respect of information about INM’s affairs received from, amongst others, Mr Buckley.
- Mr Hayes, acting as he was as Mr O’Brien’s agent, would receive any information about INM’s affairs on the same, confidential basis.
- Mr Buckley regarded Mr O’Brien as an insider in relation the information relating to the affairs of INM and believed that Mr O’Brien would treat any such information received from him as confidential.
- Mr Connolly was satisfied that Mr O’Brien and Mr Hayes, as experienced market participants with whom he had worked extensively in the past, would treat the information as confidential.

343. In these circumstances, we are satisfied that Mr Connolly disclosed the relevant information to Mr Hayes and Mr O’Brien in the normal course of the exercise of his employment, profession or duties, and that Mr Hayes and Mr O’Brien were under an implied duty of confidentiality in relation to that information. We are therefore satisfied that the requirements for selective disclosure of inside information relating

to the proposed sale of INM's shareholding in APN by Mr Buckley and Mr Connolly to Mr O'Brien and Mr Hayes were satisfied.

Communication C6

344. On 15 August 2016, Mr Buckley sent an email to Mr Shorthouse saying that INM's sales in July and August 2016 were "terrible".
345. Given that the email was sent after only two weeks in August, Mr Aylard noted that the sales in question could only have been for a period of six weeks. He also noted that INM's interim results announced on 26 August 2016 expressed confidence that INM's full year performance would be within the current range of market expectations.
346. Given that INM expected its full year results to be within the range of market expectations, Mr Aylard concluded that the information sent to Mr Shorthouse would not have been likely to affect INM's share price and therefore was not inside information.
347. We agree with Mr Aylard's conclusion.

Overall conclusion on the eight communications considered by Mr Aylard

348. We accept Mr Aylard's evidence that the eight communications which he considered did not include information that was likely to have a significant effect on INM's share price and, therefore, did not contain inside information.

(c) We should conclude that the communication of the information in the remaining eleven communications was not unlawful because the disclosure:

- was made in the normal exercise of an employment, a profession, or duties;
- was for the purposes of journalism or other form of expression in the media; or
- was justified having regard to the freedom of the press and/or freedom of expression.

349. Mr Fettin expressed the view that eleven communications, all of which contained information relating to the protected disclosures made by Mr Pitt and Mr Preston, contained inside information. Although he was aware of Mr Fettin’s conclusions in relation to those communications, Mr Aylard did not address those communications in his report or in his evidence.

350. The eleven communications fall into three categories:

- Six communications – A16, A17, A18, A19, B12 and B13 – occurred on 11, 12 and 14 November 2016 and advised the respective recipients, Mr O’Brien and Mr Shorthouse, that a serious issue between Mr Buckley and Mr Pitt had led to a protected disclosure being made by Mr Pitt.

As the emails to Mr Shorthouse on 14 November were exact duplicates of those sent to him on 12 November, we have disregarded the emails resent to Mr Shorthouse on 14 November 2016.

- Two communications – A22 and C9 – involved the provision to Mr O’Brien of Mr Buckley’s statements to the Sub-Committee considering Mr Pitt and Mr Preston’s protected disclosures. Mr Buckley’s statements set out his responses to the allegations made in those protected disclosures; and
- Three communications – A23, A24 and A26 – to Mr O’Brien related to the dispute between the INM Board and Mr Pitt in relation to a draft announcement to be made by INM following press speculation about a dispute between Mr Buckley and Mr Pitt and included the provision of legally privileged advice given by McCann FitzGerald to the INM Board.

351. In his evidence, Mr Aylard accepted that the fact that Mr Pitt had made a protected disclosure was “*clearly an issue at the time [he] wrote [his report] that [he] thought was potentially significant*”. He also told us that:

*“a management dispute is always a difficult situation because you don’t know what it will do to strategy*

...

*But, yes, clearly, if the future strategy – and if you put it, perhaps, more in dividend policy, if you were going to have a situation that gave a likely chance*

*of a change in management and the new management might start paying a dividend, then obviously you'd have to say that that was something that a reasonable investor would take into account."*

He also agreed that if the dispute related to the integrity of the people concerned that would have great significance to the organisation, particularly if it was a media company.

352. When asked whether there are types of information which are so inherently significant that you could reach a conclusion that it is likely to have a significant effect on share price without any great in depth analysis of the history of the share price itself, Mr Aylard told us:

*"No, I don't think you can generalise on that. I think, in this particular case, this is a very good example of where the share price was – any movement in the share price was – or potential movement was linked into a couple of specific factors, and things that would have been relevant to other companies simply weren't."*

353. The nine communications included the following information about the dispute between Mr Pitt and Mr Buckley:

B12 11 November 2016	Telephone conversation between Buckley and O'Brien advising O'Brien  <i>"of a serious development emerging between Mr Pitt and himself"</i>
B13 11 November 2016	Telephone conversation between Buckley and Shorthouse advising Shorthouse that Pitt had made a complaint about Buckley arising out of the proposed acquisition of Newstalk
A16 12 November 2016	Buckley to Shorthouse forwarding email from Pitt to Kennedy  <i>"I made a disclosure today 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."</i>
A17 12 November 2016	Buckley to Shorthouse forwarding email from Kennedy to Pitt  <i>"During our discussion yesterday you said that your relationship with the Chairman had broken down and this adds to the complexity of the situation."</i>

<p>A22</p> <p>25 November 2016</p>	<p>Email from Buckley to O'Brien</p> <p><i>"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.</i></p> <p><i>As you are aware Donal Spring has sent a note saying that they are going make a protected disclosure to the ODCE and we have replied."</i></p> <p>The attached 4 page presentation set out Mr Buckley's response to the matters raised by Mr Pitt in his disclosure to Mr Kennedy. It included a detailed description of the proposed acquisition of Newstalk, including the valuations discussed.</p>
<p>A23</p> <p>27 November 2016</p>	<p>Buckley to O'Brien forwarding an email from Heneghan to INM Board</p> <p><i>"We have also fielded questions from several journalists over the weekend and there are very likely to be further media questions. The attached draft statement has been put together with the Chairman, with non-executive director input and with the objective of responding to the speculation and to meet INM's obligations to the stock market."</i></p> <p>And commenting</p> <p><i>"Pitt sent a strong reply back to the meeting at 3pm and the majority view of the Board was that we should not send the statement at this stage as it would most probably lead to litigation but we are now preparing an email back to Pitt."</i></p>
<p>A24</p> <p>27 November 2016</p>	<p>Email from Buckley to O'Brien to which was attached Pitt's email to Heneghan in relation to the draft statement</p> <p><i>"This statement is completely misleading. It asserts that there is a disagreement between me and the Board which needs to be brought to the attention of the Stock Exchange.</i></p> <p><i>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.</i></p> <p><i>The Board purported to have these investigated by a Committee which regretfully failed completely to deal with the substance of the issues raised and their effects. Making this misleading public statement at this time will operate to my further detriment and will mislead the Stock Exchange and our shareholders as to the true state of affairs within the Board and Company Management."</i></p>
<p>A26</p> <p>27 November 2016</p>	<p>Email from Buckley to O'Brien forwarding legal advice given by David Byers (McCann FitzGerald) to the INM Board</p>

C9 9 December 2016	Email from Buckley to O'Brien forwarding an email from Duncan Inverarity (A&L Goodbody) to which was attached a 7 page draft Submission by Buckley to the INM Sub-Committee responding to Mr Preston's protected disclosure to Dr O'Hagan.

354. Having regard to:

- the views expressed by Mr Aylard;
- the extensive confidential information (and legal advice given to INM) which was provided by Mr Buckley to Mr O'Brien about the matters raised by Mr Pitt and Mr Preston in their protected disclosures;
- the breakdown in relations between the Chairman of INM and its CEO and CFO; and
- the adverse consequences that occur when disputes between senior management leak,

we are satisfied that the information contained in the eleven communications would, if published, have been likely to have had a significant effect on INM's share price and therefore constituted inside information.

355. Mr Buckley submitted that these communications were disclosed to Mr O'Brien as a trusted friend and advisor in circumstances where serious allegations had been made against him and were not unlawful because they:

- were made in the normal exercise of an employment, a profession, or duties;
- for the purposes of journalism or other form of expression in the media; or
- were justified having regard to the freedom of the press and/or freedom of expression.

356. In his submissions in support of the proposition that the communications were not unlawful, Mr Buckley contended that:

- The purpose of the market abuse legislation and regulation was to ensure the integrity of the financial markets and protect investors against the improper use of inside information.
- From the evidence he has given as to the purpose of his communications with Mr O'Brien and Mr Shorthouse, it is clear that the communications did not infringe that legislative intent.
- Recital (77) of the Market Abuse Regulation stated that that Regulation should be interpreted and applied in accordance with the rights and principles recognised in the Charter of Fundamental Rights of the European Union and, in particular that account should be taken of the rules governing the freedom of the press and the freedom of expression in other media and the rules or codes governing the journalist profession.
- He should not be prohibited by the Regulation from discussing, in a very limited circle of persons with whom he shared a long-standing commercial relationship, the fact, terms and consequences of very serious allegations made against him personally.

He maintained that the prohibition of such a closely and confined confidential exercise of the freedom of expression would be contrary to his fundamental rights.

357. In order to assess this submission, it is necessary to consider the explanations given by Mr Buckley in evidence to us.

- Mr Buckley told us that he sent the communications to Mr O'Brien:

*“out of courtesy and in order to keep him informed about developments at the company. As stated before, I always assumed that Mr O'Brien was an insider and therefore did not actively consider issues such as confidentiality or inside information when communicating with Mr O'Brien about INM matters. I believed I could trust Mr O'Brien to keep any information provided to him*

*strictly confidential and he knew and understood that information was shared with him on that basis.”*

- Mr Buckley told us that he informed Mr Shorthouse of Mr Pitt’s protected disclosure because it:

*‘centred heavily around the Newstalk negotiations, and as Mr Shorthouse was the main counterparty on the Communicorp side, I updated him with the relevant information.’*

He also told us that he forwarded the exchange to Mr Shorthouse because he was:

*‘... the person who had brought Newstalk and was central to the whole Newstalk discussions, okay, and because Mr Pitt made a complaint to us in relation to Newstalk I think it was appropriate for me to tell Mr Shorthouse’*

358. These explanations are not consistent with the proposition that the communications were made in the normal exercise of an employment, a profession, or duties, for the purposes of journalism or other form of expression in the media, or were justified having regard to the freedom of the press and/or freedom of expression.

359. It is noteworthy that in *A v Autorite des Marches Financiers (15 March 2002)* the European Court of Justice held that Article 21 has a restricted application even if the person concerned is a journalist:

*“In the light of the foregoing, the answer to the second question is that Article 21 of Regulation No 596/2014 must be interpreted as meaning that the disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of a press article authored by him or her reporting a market rumour is made ‘for the purpose of journalism’, within the meaning of that provision, where that disclosure is **necessary** (emphasis added) for the purpose of carrying out a journalistic activity, which includes investigative work in preparation for publication.”*

360. Having regard to the language of the Regulation and the decision of the European Court of Justice, we do not consider that Recital (77), which recognises the rights

and principles in the Charter of Fundamental Rights of the European Union for, inter alia, the benefit of journalism and other forms of media, provided justification for the disclosure of inside information by Mr Buckley to Mr O'Brien and Mr Shorthouse.

361. If a person having inside information wishes to discuss that information with a select group, as Mr Buckley contends should be possible, that person could do so if the disclosure is made in the normal exercise of an employment, a profession or duty. As Mr Buckley submits, the issues directly affected INM and, as Chairman, Mr Buckley had a responsibility to assist INM to resolve or otherwise address the dispute with Mr Pitt and its implications to INM. It would also be possible to have such discussions in the context of preparing a response to a legal, regulatory or administrative proceeding.
362. However, as is evident from his own evidence, Mr Buckley's communications with Mr O'Brien and Mr Shorthouse were not made for these purposes. In his evidence, he made it clear that he provided information to Mr O'Brien and Mr Shorthouse in order that they were aware of the position and how it was developing.
363. For these reasons, we reject Mr Buckley's contention that his communication of inside information to Mr O'Brien and Mr Shorthouse in relation to Mr Pitt and Mr Preston's protected disclosures was justified for the reasons set out above.

(d) Overall conclusion

364. For the reasons set out above, we have concluded that:
- Nine communications relating to the protected disclosures made by Mr Pitt and Mr Preston sent by Mr Buckley to Mr O'Brien and/or Mr Shorthouse did contain inside information;
  - Eight communications considered by Mr Aylard did not contain inside information; and
  - Two communications should be disregarded as they duplicated communications that had already been sent.

These are identified in the following table.

No.	Date	Information communicated	To whom disclosed	Inside Information Y/N
A1	3 March 2016	INM's press release announcing INM's results for the financial year to 31 December 2015	Mr O'Brien	N
A8	25 August 2016	INM's half year results to 30 June 2016	Mr O'Brien	N
A9	25 August 2016	Davy research note in relation to INM's half year results to 30 June 2016	Mr O'Brien	N
A13	9 November 2016	Email from Ryan Preston to Mr Buckley in relation to the Capital Restructuring of INM.	Mr O'Brien	N
A16	12 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure	Mr Shorthouse	Y
A17	12 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure	Mr Shorthouse	Y
A18	14 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure	Mr Shorthouse	Disregarded (Duplicative of A16)
A19	14 November 2016	Email exchange between Mr Pitt and Mr Kennedy relating to Mr Pitt's protected disclosure	Mr Shorthouse	Disregarded (Duplicative of A17)
A22	25 November 2016	Mr Buckley's submission to the INM Sub-Committee considering Mr Pitt's protected disclosure and related materials	Mr O'Brien	Y
A23	27 November 2016	Proposed Stock Exchange statement relating to the dispute between Mr Pitt and Mr Buckley (approved by the	Mr O'Brien	Y

No.	Date	Information communicated	To whom disclosed	Inside Information Y/N
		INM Board but subsequently withdrawn) and the legal advice given to the INM Board		
A24	27 November 2016	Mr Pitt's communication setting out his objections to the proposed Stock Exchange statement	Mr O'Brien	Y
A26	27 November 2016	Email exchange disclosing that Mr Buckley was in favour of releasing the proposed Stock Exchange statement	Mr O'Brien	Y
A32	20 March 2017	Preliminary Announcement of INM's results for the financial year to 31 December 2016 which included disclosure of ODCE enquiries and the commencement of the Independent Review	Mr O'Brien	N
B4	Early 2015	Discussion of sale of INM and Baycliffe's shareholdings in APN	Mr O'Brien	N
B5	February/March 2015	Discussion of a block sale of INM and Baycliffe's shareholdings in APN	Mr O'Brien and Mr Hayes	N
B12	11 November 2016	Disclosure of serious issue between Mr Buckley and Mr Pitt	Mr O'Brien	Y
B13	11 November 2016	Disclosure of a complaint made by Mr Pitt	Mr Shorthouse	Y
C6	15 August 2016	Information about INM sales in July and August 2016	Mr Shorthouse	N
C9	9 December 2016	Mr Buckley's draft submission to the INM Sub-Committee considering Mr Preston's protected disclosure	Mr O'Brien	Y

(iii) **Did Mr Buckley pass confidential information to Mr O'Brien?**

365. Mr Buckley initially accepted that 47 of the 56 communications contained information that was confidential to INM. He later submitted that five of those communications did not contain confidential information. We accept that those five communications did not contain confidential information and so we have proceeded on the basis that 42 of the communications contained confidential information.

366. Mr Buckley acknowledged, and we accept, that:

- He disclosed information to Mr O'Brien in the belief that Mr O'Brien was an insider and would keep any information confidential.
- The confidential information was not disclosed by Mr Buckley for an improper purpose.
- In August 2016, Mr Buckley signed a memorandum under which he agreed "*not to use or disclose [confidential] information ... without due authorisation*". Although that memorandum did not state how such authorisation could be obtained, it did state that if further information was required, Mr Buckley should contact Mr Doorly.
- He did not, on any occasion, obtain authority to communicate with Mr O'Brien (nor did he approach Mr Doorly for guidance).
- He did not "*consider issues such as confidentiality or inside information when communicating with Mr O'Brien about INM matters*".

367. Against that background, it is clear that Mr Buckley's disclosure of confidential information to Mr O'Brien after August 2016 was not in compliance with the Company's policies and, in particular, the terms of the Memorandum that he signed.

(iv) **Mr O'Brien's position**

368. Mr O'Brien acknowledged that he received communications that included information that was confidential to INM. He expressed no view on whether any of such communications included inside information.

369. However, he told us, and we accept, that he had received advice, the essence of which was that he should treat himself as an insider and be careful if he was given confidential information to ensure that he did not breach that confidentiality.

370. We not received any evidence or suggestion that Mr O'Brien took any steps that involved a breach of the confidentiality of the information contained in the communications that he received. We are therefore satisfied that Mr O'Brien did not misuse the information contained in such communications.

(v) **The INM Board's response on becoming aware of the communications between Mr Buckley and Mr O'Brien**

371. Before considering the INM Board's response on becoming aware of the communications between Mr Buckley and Mr O'Brien, we should record that, in our view, INM had in place appropriate policies in relation to the handling of inside information and the dissemination of confidential information.

372. Having taken steps to ensure that directors were aware of those policies (e.g. by requiring each to sign a copy of the Memorandum described in paragraphs 76 and 77 above), INM was entitled to rely on the legal and fiduciary duties owed to it by its directors to comply with its policies and procedures.

373. In relation to the communications between Mr Buckley and Mr O'Brien, three issues arise:

- (a) When did the Directors of INM first become aware of the communications between Mr Buckley and Mr O'Brien?
- (b) Did the Directors take appropriate steps in February 2017 to understand the nature and extent of the communications between Mr Buckley and Mr O'Brien?
- (c) Were the steps taken by the Directors in March 2018 on becoming aware of the communications between Mr Buckley and Mr O'Brien appropriate?

Each of these issues is considered below.

(a) When did the Directors of INM first become aware of the communications between Mr Buckley and Mr O'Brien?

374. The evidence relating to the Directors' knowledge of Mr Buckley's communications with Mr O'Brien is, on occasions, contradictory.

375. Other than Mr Connolly, each of the Directors has provided a sworn statement:

- Confirming that they had no contemporaneous knowledge of the communications between Mr Buckley and O'Brien.
- Stating when they first learned of the communications between Mr Buckley and Mr O'Brien. The occasions when they became aware of those communications varied between February 2017, when they received or were informed of the information contained in the evidence in support of the ODCE's application or in the course of this Investigation.

376. Mr Connolly had contemporaneous knowledge of four of the communications – A5, A6, A30 and B5. He did not have contemporaneous knowledge of the other communications.

377. Mr Buckley has contended that the Directors were aware that there was "*a line of communication*" between Mr Buckley and Mr O'Brien and, in support, relied upon the evidence of Dr O'Hagan, Mr T. Buckley, and Mr Connolly – each of whom recognised that, given Mr Buckley's role as a nominee director on behalf of Mr O'Brien, certain information relating to INM business would be shared by Mr Buckley with Mr O'Brien in the ordinary course of business:

- Dr O'Hagan told us:

*"it is expected that in the ordinary course of business nominee directors share information with their nominating shareholder, but that that is done in a manner consistent with their fiduciary duties and legal and regulatory requirements. As a Board, we were particularly conscious of the importance of controlling inside information and we therefore expected, having regard to the*

*Company policies and procedures that were in place in respect of the treatment of confidential and inside information, that any communication of Company information from Mr Buckley to Mr O'Brien was done in accordance with Mr Buckley's legal and regulatory duties."*

- Mr T. Buckley told us:

*"I would have been aware and would have, in light of Mr Buckley's role as a nominee director on behalf of Mr O'Brien, certain information relating to INM business was shared by Mr Buckley with Mr O'Brien in the ordinary course of business, however I would also have presumed that Mr Buckley, in updating Mr O'Brien and company matters, would've acted at all times in accordance with his duties to the company and complied with the companies policies and procedures in respect of inside/confidential information."*

- Mr Connolly told us:

*"The Board would have expected that Mr Buckley would share certain Company information with Mr O'Brien, based on his position as Mr O'Brien's nominee on the Board. As referenced above, the Company had policies and procedures in place regarding the treatment of confidential and inside information and I would have at all times assumed that Mr Buckley observed his duties and obligations to the Company and the Company policies, in respect of any information communicated to Mr O'Brien."*

378. It is noteworthy that each Director emphasised Mr Buckley's obligation to only disclose information to Mr O'Brien in accordance INM's policies and procedures regarding confidential and inside information and, therefore, his legal and regulatory responsibilities.

379. We accept that:

- The Directors (other than Mr Connolly) were not aware of the specific communications or information relating to INM shared by Mr Buckley

with Mr O'Brien that came to light in the course of the ODCE inquiries;  
and

- Mr Connolly was aware of four of the communications, but not of the others.

380. We also accept that the Directors were aware in broad terms that Mr Buckley provided information about INM to Mr O'Brien – and that it would be unrealistic to have expected otherwise, given the close personal and extensive business relationships between the two and that Mr Buckley had been appointed by, and was a nominee director representing the interests of Mr O'Brien.

(b) *Did the Directors take appropriate steps in February 2017 to understand the nature and extent of the communications between Mr Buckley and Mr O'Brien?*

381. The individual directors first learned that Mr Buckley had sent confidential information to Mr O'Brien in the following circumstances:

- At the meeting of the Special Committee on 15 February 2017, Mr T. Buckley, Mr Kennedy, Dr O'Hagan and Mr Doorly became aware that, in identifying documents responsive to the ODCE's requirement, McCann FitzGerald had become aware of communications between Mr Buckley and Mr O'Brien relating to the dispute with Mr Pitt;
- On receipt of the ODCE application for the appointment of Inspectors on 23 March 2018, all the Directors (other than Mr Kennedy and Mr Marshall) became aware of the more extensive sharing of information between Mr Buckley and Mr O'Brien;
- Mr Kennedy became aware of the more extensive sharing of information in the course of this Inspection; and
- Mr Marshall had no knowledge that information was being shared prior to this Inspection.

382. The minutes of the Special Committee meeting on 15 February 2017 recorded this disclosure and the subsequent discussion in the following manner:

*“5.1 It was noted that the hard copy materials that had been made available by the Chairman as part of the ODCE disclosure process indicate that certain confidential company material had been shared by the Chairman with a shareholder. The Special Committee received the following advice.”*

[INM claimed legal privilege in respect of the advice given and that part of the minutes was redacted].

*“5.5 The matter was carefully discussed. IT WAS RESOLVED after due deliberation that the Company should not, pending the outcome of the independent review, reach a concluded view with respect to the Chairman but that the matter should be considered further by the Special Committee in the light of the outcome of the independent review.*

*5.6 IT WAS RESOLVED that there be a further review of the ODCE materials for matters of concern to that Company and that any such material be made available to the members of the Special Committee.”*

383. On 31 March 2017, the ODCE served a requirement seeking production by INM of all communications between directors of INM and Mr O’Brien. On 6 April 2017, INM advised the ODCE that questions relating to Mr Buckley’s communications with Mr O’Brien should be addressed to Mr Buckley. On 28 April 2017, INM explained that it was not practical for it to produce such communications as they were not within its possession or control.

384. On 26 May 2017, McCann FitzGerald advised the Special Committee that:

*“the ODCE was now in direct contact with A&L Goodbody for Mr Buckley in relation to a request for records and had issued a formal notification ... for the production of all books or documents during the period from 1 January 2016 to 31 March 2017 relating to communications between Mr Buckley and Mr Denis O’Brien pertaining to the affairs of the Company”.*

385. It is relevant to note that INM was not provided with the documentation produced to the ODCE by Mr Buckley. The only instance of information sharing that the Special Committee was aware of was that reported to it on 15 February 2017.

386. The Special Committee could have asked:

- To review the documents produced to the ODCE by Mr Buckley pursuant to the ODCE request to ensure that it was aware of the nature and extent of confidential Company material provided by Mr Buckley to Mr O'Brien; and
- Mr Buckley to explain the circumstances in which such material was provided to Mr O'Brien, including the basis on which he considered that it was appropriate to do so.

387. Following receipt of such information, INM would have been able to assess the extent and implications of the sharing by Mr Buckley of confidential, and potentially inside, information with Mr O'Brien and consider what further steps, if any, it should take.

388. However, we recognise that between February and August 2017, the Special Committee had complex issues to address arising from the ODCE inquiries, many of which required the cooperation of Mr Buckley. The Special Committee had to decide, therefore, whether to enquire into the disclosure by Mr Buckley of confidential information to Mr O'Brien.

389. The Special Committee decided not to take any steps in relation to the disclosure of information to Mr Buckley pending the outcome of the Independent Review because

- It had no reason to believe that the disclosure by Mr Buckley of confidential information to Mr O'Brien had had any adverse consequences to INM, and

- It recognised that there were, and were likely to continue to be, issues arising from the ODCE's investigation in relation to which it required Mr Buckley's cooperation.

390. Against this background, we have concluded that the approach of the Special Committee was within the bounds of what was reasonable.

391. The Report of the Independent Reviewers was delivered to the Special Committee on 24 July 2017.

392. The Special Committee met on 25 and 26 July and on 2, 9, 14 and 15 August 2017 to consider the conclusions from the Independent Review and further requests for information by the ODCE in relation to the Data Interrogation.

393. The INM Directors submitted that in the period following completion of the Independent Review, they were required to deal with a wide range of matters including implementation of the Independent Reviewers' recommendations and ongoing management of the ODCE statutory requirements, whilst also managing the breakdown in relations between the CEO, the CFO and the Chairman.

394. In carefully managing these matters, we accept that the Directors acted in what they considered to be the best interests of the Company in circumstances where they were navigating an exceptional and complex situation.

(c) Were the steps taken by the Directors in March 2018 on becoming aware of the communications between Mr Buckley and Mr O'Brien appropriate?

395. The Directors have told us that they received Mr Drennan's affidavit in the ODCE proceedings, which identified 22 communications as examples of market abuse or the sharing of confidential or inside information, on 23 March 2018. This was the first time that the Directors had seen any of those communications.

396. The INM Board met on 24 March 2018 to consider the way forward. Amongst other matters, the INM Board asked Deloitte to expand the Independent Effectiveness Review it had been commissioned to undertake to include the implications of the information in Mr Drennan's affidavit.

397. Deloitte’s report found that INM’s existing policies and procedures captured “*all key regulatory requirements with respect to identifying and communicating inside information*” and set out ten recommendations in relation to INM’s policies and procedures, all of which were implemented.
398. Mr Buckley had resigned as Chairman and Director of INM on 1 March 2018.
399. INM issued proceedings against Mr Buckley on 30 May 2018 seeking a range of reliefs, including damages for breach of fiduciary duty. Those proceedings were stayed by consent pending the outcome of the Inspection. That remains the position.
400. In our view, the steps taken by the INM Board following receipt of Mr Drennan’s affidavit – namely to commission a review of INM’s policies and procedures and implement the recommendations received – were appropriate.

COMMUNICATIONS BETWEEN MR BUCKLEY AND THIRD PARTIES

A. Communications between Mr Buckley and third parties relating to the affairs of INM.

No.	Date	Communication
A1	3 March 2016 17.28	@ Email – Mr Buckley to Mr O'Brien  <i>'Dear Denis</i>  <i>A Sub Committee of the board has just had a conference call approving the announcement of the full year results for last year (i.e. ending 31st Dec 2015)</i>  <i>The results will become public at 7.00am tomorrow morning.</i>  <i>It is the first time in 8 years that INM has been able to announce group revenue growth albeit only 0.8%</i>  ...  <i>I must say a lot of credit goes to Robert and his Management Team.</i>  <i>Kind regards</i>  <i>Leslie'</i>
A2	1 June 2016 18.20	@ Email – Mr Buckley to Mr O'Brien  <i>'Dear Denis</i>  <i>Please see AGM statement being issues (sic) at 7am in the morning</i>  <i>Hope all goes well with the Commission and Ericsson tomorrow</i>  <i>Kind regards</i>  <i>Leslie'</i>
A3	9 June 2016 07.46	@ Email – Mr Buckley to Mr O'Brien and Mr Shorthouse  <i>'Dear Denis</i>  <i>I'm enclosing a brief summary of [INM's] proposed purchase of Celtic Media whom we briefly discussed sometime ago.</i>

CEA

No.	Date	Communication
		<p><i>As you can see we have been in discussion with them for some time trying to get the best deal possible. I have also met the current owner and I believe we could work well with him.</i></p> <p><i>As you can see this would fit very well from a geographical aspect with our own regionals.</i></p> <p><i>Denis I'm happy to discuss at any stage and will also keep you updated during the [due diligence] process.</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
A4	1 July 2016 15.59	<p>@ Email – Mr Buckley to Ms Gaffney</p> <p><i>'Private &amp; Confidential FYI'</i></p> <p>Forwarded with that email was the following email from Mr Pitt entitled <i>'Easons Menzies'</i></p> <p><i>'Dear Leslie,</i></p> <p><i>I just wanted to let you know that I met with Conor Whelan this morning.</i></p> <p><i>I can update you on Friday (I believe we are due to meet) but the top line would be the following.</i></p> <ul style="list-style-type: none"> <li>• <i>Conor was representing Easons as partner in the EMD joint venture, he was not speaking for the operation itself nor Menzies their partner in that.</i></li> <li>• <i>Easons see long term decline in the sector and do not see the diversification alternative that we have implemented in Newsread.</i></li> <li>• <i>They would still favour an operational solution or some kind of extended joint venture (EMD and Newsread to join together) rather than an acquisition scenario.</i></li> </ul> <p><i>I fed back to Conor that INM is very committed to Newsread/distribution and that as a publisher it is also strategically important as a route to market. I</i></p>

No.	Date	Communication
		<p><i>also said that in INM I can see difficulties being in a JV where we do not have control of both operations and strategy.</i></p> <p><i>I asked him to convey to Menzies that we would discuss an acquisition. Failing that, we should have one last look at having closer operational ways of running business (sharing platforms, vans and facilities).</i></p> <p><i>Conor will revert.</i></p> <p><i>Best regards</i></p> <p><i>Robert'</i></p>
A5	26 July 2016 @11.39	<p>Email – Mr Buckley to Mr Shorthouse and Mr Connolly</p> <p><i>'FYI'</i></p> <p>Attached to that email was the following email from Preston to Mr Buckley dated 25 July 2016</p> <p><i>'Dear Leslie</i></p> <p><i>The indicative offer we have made Johnson Press is £8.1m based on a multiple of x2.5 times and EBITDA of £3.3m. The non-binding offer letter clearly states that a multiple of x2.5 is fair based on the challenges the industry faces and the ongoing challenges faced by the NI economy.</i></p> <p><i>Regards</i></p> <p><i>Ryan Preston</i></p>
A6	27 July 2016 @ 15.40	<p>Email – Mr Buckley to Mr Connolly and Mr Shorthouse</p> <p><i>'Paul/Dominic</i></p> <p><i>Please see below and let's discuss tomorrow</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p> <p>Forwarded with this email was an email to Mr Pitt from Giles Worthington (Smith &amp; Williamson), a holder of 14m INM shares, raising concerns about <i>'very peculiar selling activity'</i>. He concludes</p>

No.	Date	Communication
		<p><i>'I would welcome the opportunity to discuss your views of the share price currently and any knowledge you [have] of other shareholders intentions towards INM? I fell it is a very undervalued situation at the moment, please feel free to phone or email me as to when you might be free to discuss.'</i></p>
A7	4 August 2016 @ 17.23	<p>Email – Mr Buckley's PA to Mr O'Brien</p> <p><i>'Dear Denis</i></p> <p><i>Further to our recent discussion in relation to INM's acquisition of Celtic Media Group. Please see update attached.</i></p> <p><i>When we last spoke the purchase price was €4.1m and as a result of Brexit we have been able to take another €300k off the price bringing it to €3.8m.</i></p> <p><i>This is not an acquisition that will save the day, but it will certainly slow the rate at which the "iceberg" melts and consequently I recommend the purchase.</i></p> <p><i>Denis, if you have any queries please do not hesitate to give me a call.</i></p> <p><i>Hope all else is well.</i></p> <p><i>Kind personal regards</i></p> <p><i>Leslie"</i></p>
A8	25 August 2016 @ 16.38	<p>Email – Mr Buckley's PA to Mr O'Brien</p> <p><i>'Dear Denis</i></p> <p>...</p> <p><i>Unfortunately I just got back from Dublin last night having had an INM Board meeting yesterday. I'm forwarding you a copy of the Press Release for our H1 Results (Private &amp; Confidential) which will be released at 7.00am tomorrow morning.</i></p> <p>...</p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>

No.	Date	Communication
A9	25 August 2016 @ 20.59	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>'Dear Denis</i></p> <p><i>Please see Davy note below</i></p> <p><i>It will be interesting to see whether the share price improves as a result</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p> <p>Forwarded with this email was the following email from Mr Preston to which was attached the Davy note:</p> <p><i>Dear All,</i></p> <p><i>Please see a preview of the Davy note due for release tomorrow morning.'</i></p>
A10	1 September 2016 @10.28	<p>Email – Mr Buckley's PA to Mr O'Brien</p> <p><i>'Dear Denis</i></p> <p><i>Please see press release that will issued (sic) hopefully tomorrow in relation to our acquisition of Celtic Media which we previously discussed</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
A11	4 October 2016 @ 19.47	<p>Email – Mr Buckley to Mr Hayes</p> <p><i>'Hi Dermot</i></p> <p><i>Please see below and maybe we can have a chat tomorrow.</i></p> <p><i>Kind regards</i></p> <p><i>Leslie</i></p>

No.	Date	Communication
		Attached to that email was an email from Mr Pitt to Mr Buckley that included an extract from legal advice received by INM from Ms Helen Kelly concerning the likelihood of INM receiving CCPC approval for a particular transaction.
A12	28 October 2016 @ 03.08	<p>Email – Mr Buckley to Mr Shorthouse</p> <p><i>'Dear Dominic</i></p> <p><i>Please see response from Davy and please call me in the morning</i></p> <p><i>Kind a Regards (sic)</i></p> <p><i>Leslie'</i></p> <p>Attached to that email was an analysis prepared by Davy of the valuation document prepared by IBI for Communicorp.</p>
A13	9 November 2016 @18.20	<p>Email – Mr Buckley's PA to Mr O'Brien</p> <p><i>'Dear Denis</i></p> <p><i>Please see copy of an email from Ryan Preston in relation to the Capital Restructuring of INM. An RNS will be made at 7.00am tomorrow morning giving notice of an EGM on December 5th next. However, I did want you to know in advance. A breakdown of the €1.1bn is included and shows how readily funds were being used and lost in the past.</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
A14	12 November 2016 @ 10.07	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>'FYI</i></p> <p><i>Leslie'</i></p> <p>Forwarded with this email was the following email from Mr Heneghan to Mr Buckley sent on the same day at 09.36</p> <p><i>'Dear Leslie</i></p> <p><i>Note the attached article on the acquisition of CMG in the Irish Times this morning.</i></p>

No.	Date	Communication
		<p><i>The information, following Eoghan's call with the Minister which happened yesterday afternoon, is that based on advice from his officials, he will pass it to the Broadcasting Commission of Ireland for review, because of the overall ownership of print and broadcast titles by DOB. To be treated as highly confidential, as the Minister has not been officially informed yet of the CCPC decision.</i></p> <p><i>Kind regards</i></p> <p><i>Nigel'</i></p>
A15	12 November 2016 @17.47	<p>Text – Mr Buckley to Mr Shorthouse</p> <p><i>'Hi Dominic thanks for your VM. Im meeting the mediator at 12 noon on Monday and I will give you a buzz after that. He is playing a very nasty game. Hope you are having a good weekend Leslie.'</i></p>
A16	12 November 2016 @ 15.57	<p>Email – Mr Buckley to Mr Shorthouse</p> <p><i>'FYI Leslie'</i></p> <p>To that email to Mr Shorthouse was attached Mr Pitt's email to Mr Kennedy dated 11 November 2016, entitled <i>'Discussion today'</i> which stated, inter alia:</p> <p><i>'I made a disclosure today 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.'</i></p>
A17	12 November 2016 @ 15.58	<p>Email – Mr Buckley to Mr Shorthouse</p> <p><i>'FYI Leslie'</i></p> <p>To that email to Mr Shorthouse was attached Mr Kennedy's email to Mr Pitt dated 12 November 2016, entitled <i>'RP disclosures'</i></p>
A18	14 November 2016 @ 20.59	<p>Email – Mr Buckley to Mr Shorthouse</p> <p><i>'FYI Leslie'</i></p>

No.	Date	Communication
		<p>To that email to Mr Shorthouse was attached Mr Pitt's email to Mr Kennedy dated 11 November 2016, entitled <i>'Discussion today'</i> which stated, inter alia:</p> <p><i>'I made a disclosure today 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.'</i></p>
A19	14 November 2016 @ 21.00	<p>Email – Mr Buckley to Mr Shorthouse</p> <p><i>'FYI Leslie'</i></p> <p>To that email to Mr Shorthouse was attached Mr Kennedy's email to Mr Pitt dated 12 November 2016, entitled <i>'RP disclosures'</i></p>
A20	16 November 2016 @ 19.30	<p>Text exchange – Mr Buckley and Mr O'Brien</p> <p><i>'Hi Denis Jerome not responding to text or VM so presume meeting still in progress!! Leslie'</i></p> <p><i>'Got your message thanks. Talk in am.'</i></p>
A21	24 November 2016 @ 07.03	<p>Text – Mr Buckley to Mr O'Brien</p> <p><i>'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 Mr Pitt responds I'm on way to City West for normal INM Board meeting and will ring later Leslie'</i></p>
A22	25 November 2016 @ 17.21	<p>Email – Mr Buckley's PA to Mr O'Brien</p> <p><i>'Dear Denis'</i></p> <p>...</p> <p><i>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.</i></p> <p><i>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.</i></p> <p><i>Please see copy of both emails attached.</i></p>

No.	Date	Communication
		<p><i>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 the Chief Executive of INM</i></p> <p><i>Kind regards</i></p> <p><i>Leslie</i></p> <p>Attached to that email were the following:</p> <p>1. An email dated 24 November 2016 from McCann FitzGerald to Mr Buckley</p> <p><i>'Dear Chairman,</i></p> <p><i>I attach a copy of a letter from Donal Spring (solicitor for Mr Pitt) sent to all other board members but not you. You might note what he says about making a protected disclosure to ODCE: ODCE would have to keep that confidential and might contact you at some point to obtain a response. We will draft a response to go early tomorrow saying the company stands over its handling of Mr Pitt's statement and dealing with his claim to be entitled to raise a grievance about it.</i></p> <p><i>Kind regards</i></p> <p><i>Sean Barton'</i></p> <p>2. An email dated 25 November 2016 from McCann FitzGerald to INM's Board (excluding Mr Pitt and Mr Buckley).</p> <p><i>'Dear Board members</i></p> <p><i>Please see attached letter just sent to Daniel Spring &amp; Co in response to theirs of last night to the directors of INM</i></p> <p><i>Yours sincerely</i></p> <p><i>Sean Barton'</i></p> <p>3. An email dated 25 November from Mr Heneghan to Mr Buckley setting out a series of queries that had been received from the Irish Times.</p>

No.	Date	Communication
A23	27 November 2016 @ 15.53	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>Dear Denis</i></p> <p><i>Please see draft statement which the Non Execs approved at a conference call meeting this morning</i></p> <p><i>However the legal advise (sic) was that [redacted]. Mr Pitt sent back a strong reply back to the Board (pls see next email) which was then discussed on a conference call at 3pm and the majority view of the Board was that we should not send the statement at this stage as it would most probably lead to litigation but we are now preparing an email back to Mr Pitt.</i></p> <p>...</p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
A24	27 November 2016 @15.54	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>'FYI</i> <i>Leslie'</i></p> <p>To that email to Mr O'Brien was attached an email exchange including Mr Pitt's response to the statement that the Non-Executive Directors of INM proposed to issue.</p>
A25	27 November 2016 @ 17.35	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>'FYI</i> <i>Leslie'</i></p> <p>Attached to that email was an email sent by McCann FitzGerald to INM's Board of Directors (other than Mr Pitt):</p> <p>[Email redacted]</p>
A26	27 November 2016 @ 16.57	<p>Email exchange between Mr Buckley and Mr O'Brien</p> <p><i>'Leslie</i></p>

No.	Date	Communication
		<p><i>Robert is trying to ratchet up pressure on board. The Board had to make its own decision and cannot be influenced by his constant attacks on the process the Board has set up under Jerome Mr Kennedy.</i></p> <p><i>Warm regards</i></p> <p><i>Denis'</i></p> <p><i>'Denis</i></p> <p><i>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.</i></p> <p><i>Denis at this difficult time I need and believe I have the unanimous support of the Board.</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
A27	28 November 2016 @ 19.50	<p>Email – Mr Buckley's PA to Mr O'Brien</p> <p><i>'Dear Denis</i></p> <p><i>I have just finished another Conference Call Board Meeting resulting from Questions being asked by Mark Paul of the Irish Times (see attached).</i></p> <p><i>The board, having been advised by David Byers of McCann FitzGerald, [Redacted].</i></p> <p><i>The board agreed with the contents of the statement (below). It is clear that strong leaking is taking place to Mark Paul and we have no idea what other information he has.</i></p> <p><i>Denis, this is also being released to the Stock Exchange at 7.00 am tomorrow morning.</i></p> <p><i>I am also sending a copy of this statement to James Morrissey.</i></p> <p><i>Kind regards</i></p> <p><i>Leslie</i></p> <p>Forwarded with that email was an earlier email from Mr Heneghan and the text of the INM Statement</p>
A28	8/9 December 2016	Text exchange between Mr Buckley and Mr O'Brien

No.	Date	Communication
		This exchange related to the suitability of certain individuals who were being considered for appointment to undertake the Independent Review.
A29	12 December 2016 @ 15.25	<p>Email – Mr Buckley’s PA to Mr O'Brien and Ms Sinead Walsh</p> <p><i>Dear Denis</i></p> <p><i>Please see copy of statement that we intend issuing this evening.</i></p> <p><i>It is as robust as legally we can make it and `Celine feels very strongly that we shouldn't mention the Irish Times as she feels strongly that their terms may be more attractive to pensioners than ours and we don't want get into that debate.</i></p> <p>...</p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p> <p>Attached to that email was a copy of an INM statement to be issued later that evening regarding the company’s interaction with the trustees of INM’s defined benefit pension schemes.</p>
A30	12 December 2016 @ 19.40	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>Dear Denis</i></p> <p><i>Please see statement that we have just issued incorporating your suggestions. Thanks for your assistance on this.</i></p> <p><i>It is with (sic) the time as I believe we have a good robust statement (sic)</i></p> <p><i>Hope all going well with Digicel</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
A31	12 January 2017 @ 19.36	Text – Mr Buckley to Mr O'Brien

No.	Date	Communication
		<p><i>'Denis it was cleared by the competition authority and normally on that basis the Minister would just sign. This is the first time that having been approved by competition authority that it is referred to BAI</i></p> <p><i>I think O'Keefe is the type of guy that won't be pushed around hopefully</i></p> <p><i>This delays our take over to May</i></p> <p><i>Regards</i></p> <p><i>Leslie'</i></p>
A32	20 March 2017 @ 19.40	<p>Email – Mr Buckley to Mr O'Brien</p> <p><i>'Dear Denis,</i></p> <p><i>Please see copy of preliminary results to be released in the morning</i></p> <p><i>Please note also paragraph 21</i></p> <p><i>...</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p> <p>Attached to this email was an email from Doorly, then INM's Company Secretary, to the INM directors enclosing the Preliminary Announcement that had been approved that day.</p> <p>The Preliminary Announcement disclosed, in paragraph 21, that</p> <ul style="list-style-type: none"> <li>(i) INM was complying with a requirement from the ODCE for production of documents relating to the possible acquisition of Newstalk by INM and related matters; and</li> <li>(ii) INM had established an independent review into these matters prior to receipt of the ODCE requirement.</li> </ul>

**B. Evidence of conversations that Mr Buckley had had with Mr O'Brien (and persons associated with Mr O'Brien) that related to the affairs of INM.**

No.	Date	Communication
B1	February 2014	Mr Buckley said that he told Mr O'Brien that INM had decided that not take up its entitlement under the APN Rights Issue. (Mr Buckley – 21 March 2019 @ p.13-14)
B2	October 2014	Mr Buckley said that he told Mr O'Brien that INM was having issues in relation to the Simon McAleese contract and mentioned that he was getting Mr Mizak to look into it. (Mr Buckley – 17 April 2019 @ p.61-62)
B3	Unspecified	Mr Buckley said that he told Mr O'Brien that TDS were doing work in Cardiff at the end of 2014/into 2015. (Mr Buckley – 17 April 2019 @ p.66-68)
B4	Early 2015	Mr Buckley said that he discussed with Mr O'Brien the possible sale of INM and Baycliffe's shares in APN. (Mr Buckley – Background Statement §15 and Mr Buckley – 21 March 2019 @ p.20-21)
B5	February/March 2015	Mr Buckley said that discussions took place between Mr Buckley, Mr O'Brien, Mr Hayes and Mr Connolly about the possibility of a block sale of INM and Baycliffe's shares in APN. (Mr Buckley – 21 March 2019 @ p.35-36)
B6	19 March 2015 @ 08.48 to 08.53	Text exchange between Mr Buckley and Mr O'Brien  <i>'Leslie don't mention Cosi deal to anybody thanks Denis'</i>  <i>'Denis mentioned it to Jerome and Robert yesterday so to get their buy in but was not specific We in INM need to handle it very carefully Leslie'</i>  <i>'OK let's talk later thanks'</i>
B7	January 2016	Mr Buckley said that he discussed the TDS invoice with Mr O'Brien (Mr Buckley – 17 April 2019 @ p.66-69)
B8	Autumn 2016	Mr Shorthouse described being in touch with Mr Buckley <i>'... pretty much every day at this point on most Digicel stuff. I am sure, but I can't give you specifics, that we would have talked about price and the fact that the deal didn't look very likely ...'</i> (Mr Shorthouse – 5 July 2019 @ p.34-35)

No.	Date	Communication
B9	28 September 2016 @ 15.34	Text – Mr Buckley to Mr Shorthouse asking him to call following a meeting with Mr Pitt about the possible Newstalk transaction.
B10	11 October 2016 @ 12.03	Text – Mr Buckley to Mr Shorthouse asking him to call following a meeting with Mr Pitt about the possible Newstalk transaction.
B11	21 October 2016	Mr Buckley said that discussions took place between Mr Buckley, Mr O'Brien and Mr Shorthouse in New York (Mr Buckley – 21 February 2019 @ p.36)
B12	11 November 2016	Mr Buckley said that he telephoned Mr O'Brien to advise Mr O'Brien that a serious issue had arisen between Mr Pitt and himself. (Mr Buckley – 13 June 2019 @ p.13-16)
B13	11 November 2016	Mr Buckley said that he telephoned Mr Shorthouse to advise Mr Shorthouse that Mr Pitt had made a complaint. (Mr Buckley – 13 June 2019 @ p.16-18).
B14	11 December 2016 @ 14.15	Text – Mr Buckley to Mr O'Brien in relation to his intention to forward to Mr O'Brien a revised statement regarding INM's pension fund.

### C. Other Communications

No.	Date	Communication
C1	2 June 2016 @ 06.37	Email – Mr Buckley to Mr O'Brien and Mr Shorthouse  <i>'FYI Leslie'</i>  Attached to that email was an email from Mr Preston to Mr Buckley and Mr Pitt forwarding a research note by Davy
C2	30 June 2016 @ 13.28	Email – Mr Buckley to Mr O'Brien  <i>'Dear Denis</i>  ...  <i>I am forwarding an email below which gives you a view of smaller shareholders in INM – nothing too surprising but interesting to see what Farrington had to say about distribution !</i>

No.	Date	Communication
		<p><i>Kind regards</i></p> <p><i>Leslie'</i></p> <p>Attached to that email was an email from Mr Pitt to Mr Preston, Mr Buckley and Mr Kennedy entitled 'Amsterdam Investor Meetings'</p>
C3	1 July 2016 @ 16.59	<p>Email – Mr Buckley to Mr O'Brien – reporting on discussions with Colm Delves that included a <i>'potential fibre and submarine cable Acquisitions for INM'</i>.</p>
C4	27 - 29 July 2016	<p>Email exchange – Mr Pitt, Mr Buckley and Mr Kennedy – following up on views expressed re INM's current share price and market communication</p>
C5	29 July 2016 @ 15.34	<p>Email – Mr Buckley to Mr Hayes</p> <p><i>'Dear Dermot</i></p> <p><i>Please see attached emails in relation to INM's current share price.</i></p> <p><i>I have informed Robert Pitt that both Paul and myself probably reflect fully Denis's position and this matter will be on the board agenda for our next board meeting scheduled to take place on Wednesday, 24<sup>th</sup> August.</i></p> <p><i>If you wish to further discuss please do not hesitate to contact me.</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
C6	15 August 2016 @ 12.15	<p>Email exchange – Mr Buckley and Mr Shorthouse</p> <p><i>'Dominic</i></p> <p>...</p> <p><i>... INM sales are terrible for July/August</i></p> <p><i>Kind regards</i></p> <p><i>Leslie'</i></p>
C7	29 August 2016 @ 12.36	<p>Email exchange – Mr Pitt, Mr O'Brien and Mr Buckley – relating to an introduction by Mr O'Brien</p>

No.	Date	Communication
C8	30 September 2016 @ 17.53	Email exchange – Mr Pitt, Mr O’Brien and Mr Buckley – relating to a possible business relationship with Magnet Networks on the introduction of Mr O’Brien
C9	9 December 2016 @ 01.30	Email exchange – Mr Buckley to Mr O’Brien enclosing an email from A&L Goodbody to Mr Buckley to which was attached a draft Submission to the INM Sub-Committee responding to Mr Preston’s protected disclosure.
C10	24 March 2017 @ 20.08	<p>Email – Mr Buckley to Mr O’Brien</p> <p><i>‘Dear Denis</i></p> <p><i>Just to let you know the Irish Times have got the news that a second executive is under Protective Notice but not yet published the name</i></p> <p><i>Kind regards</i></p> <p><i>Leslie’</i></p> <p>Attached to that email was an online report by the Irish Times forwarded to Mr Buckley by Mr Heneghan</p>

## CHAPTER 11 – CRITICISMS OF MR PITT AND MR PRESTON

### **A. Introduction**

1. The matters we have been appointed to investigate are set out in the terms of reference contained in the Order dated 6 September 2018 (see Appendix 1). They focus on the conduct of:
  - Mr Buckley (in relation to the sale of INM’s shareholding in APN, the Data Interrogation, the proposed acquisition of Newstalk, and the provision of confidential information to Mr O’Brien); and
  - The Directors of INM (in relation to INM’s handling of the protected disclosures made by Mr Pitt and Mr Preston).

We have addressed those matters in Chapters 6 to 10 of this Report.

2. The Order does not require us to report on Mr Pitt and Mr Preston’s approach and conduct in making their protected disclosures or in giving evidence in support of those disclosures.
3. However, a significant amount of the time taken in cross-examination and in submissions by Mr Buckley and the INM Directors in the course of this Investigation has been concerned with:
  - (i) Mr Pitt and Mr Preston’s motivation in making their protected disclosures;
  - (ii) Whether Mr Pitt and Mr Preston colluded in making their protected disclosures;
  - (iii) Whether the allegations made by Mr Pitt and Mr Preston were fabricated; and
  - (iv) Challenges to the integrity of Mr Pitt and Mr Preston and the weight to be given to their evidence.

4. Following the completion of cross-examination we received the Parties' First Submissions. These included the following submissions which set out the essence of the criticisms made of the conduct of Mr Pitt and Mr Preston in making their protected disclosures.

Mr Buckley's submissions

5. Mr Buckley summarised his position in relation to Mr Pitt's protected disclosure in the following terms:

*'There appears to be a substantial basis for the proposition that Mr Pitt had a particular sensitivity, and even a preoccupation, with regard to Mr O'Brien's involvement in the Company and a perception that Mr O'Brien was, or could be seen to be, favoured.'*

*'... this theme of Mr Pitt's is consistently and repeatedly reflected through the reporting of different conversations. Many of his accounts of conversations have a slant to further this theme, but they are invariably recalled differently by either the other persons present or the persons to whom the conversations have been reported. Mr Pitt has made significant concessions in his evidence, going so far as to withdraw many of the serious allegations he originally made against Mr Buckley. It must be noted, however, that many of these concessions have been made only when confronted with substantial evidence suggesting the original allegations could not be correct. This feature of the evidence presents a real obstacle to reaching any conclusion adverse to Mr Buckley based on the evidence of Mr Pitt. Rather than his concessions being indicative of an honest account, it is submitted that they demonstrate precisely the opposite. Mr Pitt is a witness who is willing not just to give a false account of events and conversations for the purpose of doing damage to the reputation of Mr Buckley, but to persist in such falsehoods unless and until objective and independent evidence establishes the truth. He simply cannot be relied on where any conflict, unresolved by such independent and objective evidence, remains.'*

*'The process of further investigation, and in particular of cross-examination, permitted by the appointment of Inspectors by the High Court, has progressively and repeatedly undermined the allegations against Mr Buckley, to the extent that in important respects they have effectively been withdrawn and,*

*insofar as they have not, they are contradicted by substantial independent, objective evidence.'*

*'Leslie Buckley, a man with an impressive record of success in business in general, and at INM in particular, and an unblemished reputation, has suffered the tarnishing of that well-earned reputation by the publication of a litany of outrageous allegations of fraud or attempted fraud by a disaffected employee of INM – an employee who had always been supported, encouraged, even championed by Mr Buckley, but who chose to fabricate, exaggerate or invent those allegations as part of his exit strategy from a company in which his employment was effectively at an end because of his own personal and professional failings.'*

6. Mr Buckley raised the following concerns about Mr Preston's evidence in relation to his protected disclosure:

*'It was only at the eleventh hour, when it emerged that there must be further documentation, that detailed correspondence showing Mr Pitt's pervasive influence over Mr Preston was provided to the Inspectors. At the end of Mr Preston's evidence on 18 October 2021, he was asked to consider overnight the sources upon which he relied to produce his protected disclosure. The following morning (19 October 2021) Mr Preston volunteered that he had actually conducted a search of his emails overnight to try to understand how it was that he had those paragraphs (which were copied and pasted) and that he had found an email from Mr Pitt to Mr Preston on 22 November 2016 which had the draft McCann Fitzgerald note of Mr Pitt's protected disclosure (including Mr Pitt's revisions) on it and that he also had an email from Mr Pitt on 17 October 2016 with some of Mr Pitt's notes on it.'*

*'Mr Preston's evidence proceeded again in substance on 22 October 2021. In light of the documents produced, Mr Preston accepted that his evidence that he had not ever been given any notes or other documents to assist him in preparing his protected disclosure was incorrect.'*

*'The Inspectors will have to consider Mr Preston's evidence and his credibility in relation to his protected disclosure. Clearly his position is fundamentally undermined in circumstances where he presented his protected disclosure as independent when it was nothing of the sort. He has repeatedly sought to*

*downplay and minimise the extent to which Mr Pitt pressurised him into making a protected disclosure and it is submitted that Mr Kennedy's evidence (that Mr Preston was under pressure to make a protected disclosure) and, indeed, that of Messrs O'Hagan and Terry Buckley ought to be preferred.'*

*'It is submitted that the Inspectors might come to the view that Mr Preston is a witness who has been very significantly influenced by Mr Pitt. This is not just to be found in the copying of documents, but also at a human level where Mr Pitt was endeavouring to recruit Mr Preston to his cause – despite Mr Preston's reluctance. Furthermore, Mr Preston records in his own notes that he may not be in a position to go along with everything Mr Pitt was saying and, when asked about the events themselves, Mr Preston gave an account that departs from Mr Pitt's – an account which can be considered independent of Mr Buckley and one which largely now supports Mr Buckley's own evidence (see submissions below). He also recorded his reluctance to go along with everything Mr Pitt was saying in his notes at the time.'*

#### The INM Directors' submissions

7. The INM Directors were also critical of Mr Pitt and summarised their position as follows:

*'The [Directors] 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.'*

8. Unsurprisingly, both Mr Pitt and Mr Preston took issue with these criticisms of their conduct, credibility and integrity.

*Mr Pitt's submissions*

9. In his Second Submission, Mr Pitt responded to Mr Buckley's submission challenging his honesty and credibility:

*'In his submissions, Mr. Buckley has engaged in such a serious and unwarranted attack on Mr. Pitt's credibility that it cannot be left completely unanswered.'*

*'As stated above, insofar as Mr. Pitt does not refer to any individual aspect of the investigation or any individual point made in Mr. Buckley's submissions, that is not to be taken as acquiescence on his part in relation to those matters. However for the sake of clarity, each and every attack on Mr. Pitt's credibility is rejected in the strongest terms.'*

*'It is submitted that Mr. Buckley has engaged in an unfounded and outrageous attack on Mr. Pitt's honesty and credibility in his submissions. He has alleged that Mr. Pitt "deliberately misled the Inspectors". It is submitted that the extreme language and assertions used by Mr. Buckley in making this attack are unsupported by the evidence.'*

10. Mr Pitt noted that Mr Buckley had:

*'mischaracterised the nature of Mr. Pitt's evidence throughout his submissions. He relies on selective, self-serving pieces which do not give full regard to the entirety of the evidence before the Inspectors, and in some instances are factually incorrect.'*

He submitted that a full response to each mischaracterisation would require hundreds of pages of submissions and, therefore, that he did not propose to answer or explain each instance in his submission.

11. Mr Pitt addressed what he regarded as Mr Buckley's overarching contention:

*'The core allegation which must be responded to is that Mr. Buckley alleges that in order to remain in his position as chief executive officer, or to obtain a favourable package in leaving the Company, Mr. Pitt chose to make false and fabricated allegations against Mr. Buckley by way of a protected disclosure. It is submitted that this is an offensive and farfetched allegation, which is unsupported by the evidence. Mr. Pitt made the protected disclosures in good faith, to protect the Company and its shareholders. It is submitted that he has given extensive evidence on this issue. It is further submitted that the information which has subsequently emerged since the protected disclosures were made tends to support Mr. Pitt's original concerns.'*

*'It is submitted that Mr. Pitt had very little to gain in making his protected disclosure. In fact, it ultimately transpired that the Company had very little regard to any of the protections of the Protected Disclosures Act 2014, and that there were multiple breaches of the legislation.'*

*'It is submitted that Mr. Buckley's allegation that Mr. Pitt "fabricated, exaggerated or invented" the matters raised in his protected disclosures as part of a supposed exit strategy is entirely unsupported by the evidence and is wholly without merit.'*

#### Mr Preston's submissions

12. Mr Preston submitted that:

*'As a witness in this Investigation, Mr Preston's primary role is to assist the Inspectors in their work, rather than advocate for a particular outcome to the Investigation. Mr Preston has no agenda or ulterior motive. His concern has been to tell the truth to the best of his ability, irrespective of the result. In that context Mr Preston has never professed to claim a perfect knowledge, or a complete recollection, of the events under investigation. Where his recollection has been incomplete, or even wrong, Mr Preston has been willing, and indeed anxious, to correct his evidence.'*

*Mr Buckley has not adopted such an approach. On the contrary, it is apparent that a key part of Mr Buckley's strategy in dealing with the Protected Disclosure*

*has been to malign and denigrate Mr Preston. During this Investigation Mr Buckley has sought repeatedly to impugn Mr Preston's honesty and his motivation in making the Protected Disclosure.*

*It is submitted that these criticisms of Mr Preston's probity are factually groundless and legally misconceived. The ill-considered attacks made on Mr Preston's integrity are, in truth, symptomatic of the poor judgment demonstrated by Mr Buckley throughout his involvement in the proposed Newstalk transaction. Now, when called to account for his actions in this process, Mr Buckley has responded by intensifying his unjustified attacks upon Mr Preston. When seen in their true context the allegations made against Mr Preston are a regrettable attempt to blacken a whistle-blower's reputation in retaliation for having expressed his bona fide concerns.'*

13. Against this background, we have concluded that this Report would be incomplete if it did not address the criticisms made by Mr Buckley and the INM Directors. We do so under the following headings:

- The appropriateness of making a protected disclosure:
  - (a) Whether Mr Pitt was in breach of his duty to INM in failing to report the issues concerning him to the INM Board, to Committees of the Board or to members of the Board.
  - (b) Whether a protected disclosure was the appropriate way for a Chief Executive Officer to bring matters of concern to the attention of the INM Board.
- Mr Pitt and Mr Preston's motivation when making protected disclosures.
- Did Mr Pitt pressurise Mr Preston to support the allegations against Mr Buckley and/or did they collude when making their protected disclosures thereby undermining the independence, and therefore the reliability, of their disclosures?
- Analysis of the basis for the key allegations made by Mr Pitt to determine whether those allegations made by Mr Pitt were fabricated, exaggerated or invented.

**B. The appropriateness of making a protected disclosure**

14. Section 228 of the Act sets out in codified form the eight principal duties owed by a director. It provides that a director shall:

- (a) act in good faith in what the director believes to be in the interests of the company;*
- (b) act honestly and responsibly in relation to the conduct of the affairs of the company;*
- (c) act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;*
- (d) not use the company's property, information or opportunities for his or her own or anyone else's benefit;*
- (e) not agree to restrict the director's power to exercise an independent judgment;*
- (f) avoid any conflict between the director's duties to the company and the director's other (including personal) interests;*
- (g) exercise care, skill and diligence; and*
- (h) have regard to the interests of the company's members.*

Section 227 (1) of the Act provides that the duties owed by a director are owed to the company (and the company alone).

15. One element of the duty to act in good faith in the interests of the company (section 228(a) of the Act) is the fiduciary duty of disclosure which arises when directors become aware of actual or threatened activity which damages the interests of the company.

16. The INM Directors submitted that:

*'[i]f Mr Pitt as a director and CEO believed there was threat of fraud on the Company and a risk to the Company's interests, either as a result of the APN transaction or subsequently at the time of Newstalk, then he had a duty to disclose such matters to the Board, and to do so in express terms through a full report to the Board. He owed the same duty in respect of his knowledge of the removal of data. He chose not to disclose that to the Board, even at the time of his 2016 protected disclosure.*

*These duties were owed separately to the contractual duties which Mr Pitt in any event owed as CEO of the Company, and which were explored with him through cross examination. Having regard to the duties owed by Mr Pitt, it was reasonable that the NEDs would have expected Mr Pitt to have raised his concerns with the Board, rather than doing so by way of a protected disclosure.'*

17. On this basis, they submitted that:

*'... both Mr Buckley and Mr Pitt as directors also owed duties to the Company to act at all times in good faith and in what they believed to be in the interests of INM and to act honestly and responsibly and in accordance with all due skill care and diligence.'*

18. The INM Directors relied upon the following matters that Mr Pitt failed to report to the Board, but which he subsequently included in his protected disclosures, in support of their submission that Mr Pitt was in breach of his duties as an INM director.

APN

19. In relation to the proposed engagement of Island Capital, the INM Directors submitted that:

*'Mr Pitt when questioned about his failure to report his concerns relating to APN sought to emphasise (i) that as he saw it he had stopped the suspected fraud and (ii) that he considered that he had informed the Board of his suspicions via conversations with Mr Kennedy. He agreed however that he had never said to*

*Mr Kennedy that he believed the Chairman had done something dishonest or that Mr Kennedy should raise a concern with the Board.'*

They concluded:

*'The evidence demonstrates that Mr Pitt did not at that stage (or ever) report a concern of an attempted fraud on the Company, or report such a concern to Mr Kennedy in lieu of a report to the Board, or seek advice from Mr Kennedy as to how to deal with such a concern, or ask Mr Kennedy to take any steps on foot of such a concern. The suggestion therefore by Mr Pitt that his failure to fulfil his duties is explicable by reference to any conversation with Mr Kennedy is simply not supported on the evidence or as a matter of law.'*

#### Data Interrogation

20. In relation to the Data Interrogation, the INM Directors noted that Mr Pitt was:
- Aware of the work carried out by Mr Mizak in October 2014 following his conversation with Mr Wilde on Talbot Street in June 2015; and
  - On further notice of the work carried out by Mr Mizak in December 2015 following receipt of the TDS invoice, when Mr Preston forwarded the TDS invoice to Mr Pitt by email on 21 December 2015.

21. They contended that:

*'[t]here is no legitimate explanation for why Mr Pitt withheld his knowledge of the data interrogation from INM and the Board. When he became aware of it in 2015, he owed duties to INM to investigate and as appropriate report to the Board and ensure compliance by the Company with its data protection obligations. No adequate explanation was given by him under cross examination as to why he did not disclose it to INM at the time of his [protected disclosures] in 2016. Nor was any adequate explanation given as to why he or his solicitors did not, when engaging on the Independent Review terms of reference, suggest this was an issue that needed to be investigated.'*

They noted that, for reasons which have never been adequately explained, he chose not to make any report of this knowledge until his disclosure to the ODCE in 2017, notwithstanding that:

*In this regard, considerable concern was expressed in correspondence sent by Mr Pitt's solicitors to INM in August 2017. On 14 August 2017, Mr Pitt's solicitors noted "our client is concerned that these tapes contain a considerable amount of personal data relating to employees and others and in the circumstances there is a real risk that a very serious breach of the Data Protection Acts has occurred and that same should be forthwith reported to the Office of the Data Protection Commissioner". Further concern was expressed in a letter dated 15 August 2017 where Mr Pitt asserted that a Board meeting must be convened to urgently consider the matter and determine the steps that are required to be taken in the interests of the company including "the Board must be advised straight away what data was removed, where it was sent to, where that data is now stored and for what purpose it was removed...". All of these concerns were expressed by Mr Pitt in August 2017 notwithstanding the fact that Mr Pitt had himself knowledge of the data interrogation as early as 2015.'*

22. INM noted that:

*'Mr Pitt has accepted in evidence to the Inspectors 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 the Company at that time.'*

It commented that it:

*'does not understand why Mr Pitt waited over two years, until August 2017 to raise the issue of the 2014 Data Interrogation, in circumstances where he became aware of it in June/July 2015 following his conversation with Mr Wilde, and subsequently was put on further notice in December 2015 following receipt of the TDS invoice.'*

Newstalk

23. The INM Directors were equally critical of Mr Pitt's decision to make a protected disclosure in relation to the issues that arose in the course of the proposed acquisition of Newstalk.

*'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.'*

24. INM noted that, on 29 March 2019, it commenced proceedings against Mr Pitt arising out of his acts and/or omissions relating to the 2015 data interrogation for breach of duty (including statutory duty) and sought an indemnity in respect of any loss and/or damage and/or costs incurred by the Company arising from any breach of duty by Mr Pitt.

*Our conclusions*

25. The assertion that Mr Pitt was in breach of his duty as a director of INM in failing to report his concerns to the INM Board or, in the alternative, to the Senior Independent Director, Mr Kennedy, raises a number of questions:

- Was Mr Pitt precluded from relying on the PDA?
- Was Mr Pitt obligated to report his concerns to the INM Board or to the Senior Independent Director, rather than make a protected disclosure?
- Did Mr Pitt breach his duty to disclose matters that did or could damage the interests of the Company when he became aware of them?

26. For the reasons set out in Chapter 5, there is, in our view, no basis for the proposition that persons to whom the PDA applies are subject to the limitations suggested. In particular,

- The PDA does not contain provisions limiting the application of the Act to individuals holding particular positions, for example, in a company.
- The PDA does not contain a provision requiring an individual to exercise such other rights, or observe such other obligations as he may have, before making a protected disclosure under the PDA.

27. Whilst it would have been practical for Mr Pitt to raise his concerns with INM's Senior Independent Director, Mr Kennedy, we do not agree that the opportunity to inform Mr Kennedy of his concerns overrode the right to make a protected disclosure under the PDA. In this context, we note that when Mr Pitt made his disclosure to Mr Kennedy on 11 November 2016, and at all times thereafter, he was anxious to ensure that the Board was made aware at the earliest opportunity of the concerns he had raised.

28. For these reasons, therefore, we reject the INM Directors' contention that Mr Pitt was not entitled to make a disclosure under the PDA or breached his duties as a director by making such a disclosure.
29. The INM Directors also contended that Mr Pitt owed INM a duty to act in good faith in the interests of the Company and that that duty included the fiduciary duty of disclosure which arises when directors become aware of actual or threatened activity which does or could damage the interests of the Company.
30. The INM Directors alleged that Mr Pitt breached that duty of disclosure by failing to disclose the following matters to the INM Board when he became aware of them:
  - His concern that the proposed payment to Island Capital represented a fraudulent attempt to benefit Mr O'Brien to the detriment of INM's shareholders generally;
  - His understanding that the removal and search of INM's data by third parties had not been undertaken for the benefit of INM.
31. In Chapter 6, paragraph 260 we concluded that Mr Pitt did not have a concern that the proposed payment to Island Capital was a fraudulent attempt to benefit Mr O'Brien in March 2015 or at any time before late October/early November 2016. It follows, therefore, that he was not under a duty to report that concern to the INM Board prior to late October/early November 2016. The appropriateness of the disclosure he made in November 2016 and the evidence he gave in relation to that disclosure are considered in paragraphs 83 to 104 below.
32. In circumstances where:
  - Mr Wilde described the circumstances in which INM's data was searched and then transferred to TDS but was unclear as to for whom the search was undertaken and for what purpose; and
  - The search had been authorised by Mr Buckley in his capacity as Executive Chairman of INM,

any disclosure that Mr Pitt might have made would have required him to express concerns about a search authorised by Mr Buckley without any supporting evidence

to support those concerns. Whilst receipt of the invoice from TDS in December 2015 confirmed that the search had been carried out by a third party, it did not provide information about for whom the search was undertaken or for what purpose.

33. For these reasons, Mr Pitt was not, in our view, under a duty to report the removal and search of INM's data to the INM Board.

C. Mr Pitt and Mr Preston's motivation when making protected disclosures.

Mr Pitt's motivation in making a protected disclosure

34. Section 5(7) of the PDA expressly provides that:

*'The motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.'*

Whilst a particular motivation cannot affect whether a disclosure qualifies as a protected disclosure, that does not mean that the question of motivation is always irrelevant when assessing accuracy or credibility.

35. Both Mr Buckley and the INM Directors contended that Mr Pitt made his protected disclosure because:

- He was aware that the INM Directors had lost confidence in him, no longer thought he was the appropriate person to be Chief Executive in the next phase of INM's development, and had decided that he should leave.
- He wanted to protect himself from being let go.

In other words, his protected disclosure was motivated by self-preservation.

36. Mr Buckley went further and asserted that Mr Pitt:

*'...chose to fabricate, exaggerate or invent those allegations as part of his exit strategy from a company in which his employment was effectively at an end because of his own personal and professional failings.'*

37. In support of this assertion, Mr Buckley submitted that Mr Pitt's exit strategy commenced in March 2015, following the extension of his probation period. In support of that submission, Mr Buckley relied on:

- Emails that Mr Pitt sent to himself in which he recorded meetings and conversations relating to various matters including those that featured in his protected disclosure. Those emails were not shared with those

involved and, in the course of this Inspection, the matters recorded in those emails was disputed; and

- The evidence of Ms Mullane and Mr Harrison to the effect that Mr Pitt's attitude changed from being "*defensive*" to "*offensive*".
38. In his Second Submission, Mr Pitt contended that there was no basis for alleging that he made his protected disclosure out of self-interest. He asserted that he made his protected disclosure in good faith, with the best of intentions, to protect INM and its shareholders and that he did so at great personal cost.
39. Before considering these contentions, it is necessary to summarise the events that had occurred between August and November 2016 leading up to when Mr Pitt made his first protected disclosure.
- (i) Between July 2016 and September 2016 Mr Pitt was considering leaving his role as CEO of INM and suggested to Mr Buckley that INM might wish to look for a new CEO. Mr Pitt also spoke to Mr Kennedy about this during September 2016, in the course of which Mr Pitt confirmed that he had no issue with Mr Buckley. After a number of weeks, he decided to commit to his role at INM.
  - (ii) At the INM Board meeting that took place on 19 October 2016, Mr Pitt's presentation was badly received. The Board had real concerns about the commercial logic of the suggested strategy and the poor quality of the presentation.
  - (iii) Immediately after the meeting had ended, a further meeting took place attended only by the non-executive Directors, all of whom were asked for their views on Mr Pitt's suitability to continue as Chief Executive Officer.

A consensus view emerged that, although he had the financial management skills required when he was appointed, he did not have the skills to lead the diversification and growth then required to position INM for the future.

It was agreed that Mr Buckley and Mr Kennedy should speak to Mr Pitt with a view to Mr Pitt leaving on amicable terms.

*‘We left it with the Chairman and the Senior Independent Director to progress the action and the only outstanding item was to call to discuss the matter with Paul Connolly, but the rest of the Board were unanimous in our view that Robert Pitt needed to exit the business.’*

40. It is, therefore, correct that all the non-executive Directors, including Mr Buckley, had lost confidence in him, no longer thought he was the appropriate person to be Chief Executive in the next phase of INM’s development, and had decided that he should leave.
41. Mr Buckley and the INM Directors contended that Mr Pitt could reasonably have suspected or even been aware of the decision reached by the non-executive Directors because:
  - He was aware of the unsatisfactory nature of the Board meeting and that his performance was under critical appraisal.
  - The meeting of the non-executive Directors took much longer than such meetings usually took and he would have suspected that the meeting of the non-executive Directors related to his future with INM.
42. Mr Pitt rejected the suggestion that the room in which the non-executive Directors were meeting was not sound-proof. Whilst acknowledging that the Board meeting had not gone well in a number of respects, Mr Pitt denied being able to overhear the non-executive Directors’ discussion or suspecting that he was to be asked to leave INM.
43. In early November 2016, Mr Pitt sought legal advice. Based on the individuals that he approached, who were leading employment law specialists, Mr Buckley and the INM Directors contended that he was seeking employment law advice and saw an opportunity to protect himself and optimise his compensation on leaving INM.
44. Mr Pitt maintained that the legal advice he sought in early November related to his responsibilities as a director in circumstances where he was concerned that the affairs of INM might have been, or might be, conducted in breach of the Act.

45. In support of that position, Mr Pitt relied on the issues he sought advice on from a UK Barrister (who had been a colleague of his at PwC) which related to his obligations under the Act if the affairs of INM were not being managed in the best interests of all shareholders. He also contacted Mr Byers and told him that he needed legal advice on a matter relating to his duties as a director.
46. We received conflicting evidence and submissions about the conversations between Mr Pitt and Mr Kennedy leading up to the meeting on 11 November 2016.
- Mr Kennedy's evidence was that Mr Pitt had asked to meet with him on the Friday and that he (Mr Kennedy) told Mr Pitt that he would have difficulty with the Friday and asked for the following week. He said that Mr Pitt nevertheless asked him to make himself available on the Friday and Mr Kennedy agreed to do so.
  - Mr Buckley contended that Mr Pitt must have suspected that he intended to start the discussion regarding Mr Pitt's exit from INM at the meeting that had been scheduled for that day.
  - Mr Kennedy's evidence was also that Mr Pitt was anxious to make it clear he was making a protected disclosure and he wanted Mr Kennedy to cancel the meeting Mr Pitt was due to have with Mr Buckley that afternoon.
  - Mr Pitt maintained that, as Mr Buckley had described the meeting as a one-to-one regular meeting at which a number of operational matters needed to be discussed, he did not press Mr Kennedy to cancel the meeting with Mr Buckley out of concern that the Board's lack of confidence in him might crystallise before his protected disclosure was considered.
47. Having considered the totality of the evidence of Mr Pitt, Mr Preston, Mr Buckley, Mr Kennedy, Mr Marshall, Dr O'Hagan and Mr T. Buckley, we have concluded that Mr Pitt:
- Did not overhear the non-executive Directors' discussion on 19 October 2016;

- Was unaware that he was about to be asked to leave INM because of the support Mr Buckley and Mr Kennedy had given him in the conversations that took place in September 2016 and because he was actively involved in the proposed acquisition of Newstalk; and
- Sought advice in relation to his obligations under the Act if, as he thought, the affairs of INM were not being managed in the best interests of all shareholders; that being the advice he sought from his colleague at PwC.

*Mr Preston's motivation in making a protected disclosure*

48. The circumstances in which Mr Preston made his protected disclosure including, in particular, the role of Mr Pitt, and Mr Preston's motivation in making his protected disclosure, was the subject of extensive cross-examination.
49. Mr Preston told us that he was under considerable professional and personal pressure. Therefore, on learning that Mr Pitt had taken legal advice in relation to Mr Buckley's conduct in the course of the proposed acquisition of Newstalk, he wanted to take his time and consider the potential implications of Mr Pitt's proposed course of action. Having done so, he became very worried that steps Mr Pitt might take to draw matters to the attention of the Board might impact his own security of employment. He, therefore, contacted two firms of solicitors on 9 November 2016 in order to obtain employment law advice. Mr Preston told us:

*"I was looking after myself by getting legal advice in case I was dismissed out of anything Robert did."*

50. As the situation developed following Mr Pitt's meeting with Mr Kennedy on 11 November, Mr Preston expressed his concerns about his own position to Mr Kennedy on 14 November 2016, to Mr Kennedy and Mr Barton on 16 November 2016 and to Mr Kennedy again following a tense Board meeting on 24 November 2016. On each occasion, the basis for Mr Preston's concern was a fear that he could be adversely impacted as a consequence of the issues Mr Pitt was raising.
51. When Mr Pitt met with the ODCE on 18 November 2016, in response to questioning from the ODCE, he had said that he believed Mr Preston would be prepared to go on record to back up the disclosures he had made to the extent that he was in a position

to do so. On 2 December 2016, the ODCE wrote to Daniel Spring & Co asking Mr Preston to:

*‘provide ... information regarding, inter alia, issues associated with INM’s consideration of a possible acquisition of Newstalk radio’.*

52. Mr Preston told us that he wasn’t keen to meet with the ODCE. However, given the involvement of the ODCE, he concluded that he should meet them. When he made his protected disclosure, his greater concern:

*‘was to let people know what I knew. Nobody had asked me during this whole period what I had experienced, what meetings I had been in, what I had seen etc.’*

53. Mr Preston concluded that he should ensure that the Board was aware, before the ODCE, of the information he could provide in relation to the issues raised by Mr Pitt.

*‘I wanted the Board to know before I told the ODCE. That was my point. I didn’t want the ODCE to know before the Board.’*

54. On 30 November 2016, Daniel Spring & Co notified INM of Mr Preston’s wish to make a protected disclosure. Having, at the Company’s request, deferred making his protected disclosure until after the upcoming Annual General Meeting, Mr Preston made an oral protected disclosure to Dr O’Hagan on 5 December 2016. The following day, Mr Preston provided his speaking note, which he confirmed was no different to what he had said.

### Our conclusions

55. We have concluded that Mr Pitt:
- Made his protected disclosures to Mr Kennedy, on behalf of INM, and subsequently to the ODCE, because he was concerned that INM’s affairs were not being managed in the interests of all shareholders.
  - Expected that the issues raised by him would be thoroughly investigated, given the seriousness of the matters raised.

- Expected the investigation to uphold his concerns and, therefore, that he would continue as CEO of INM.
- Did not, therefore, make his protected disclosures to protect his position as a director and CEO of INM or optimise the financial compensation he would receive on leaving INM.

56. We have concluded that Mr Preston:

- Had a legitimate concern to ensure that his personal position was not adversely affected as a consequence of the issues being raised by Mr Pitt and that concern did not affect the integrity of his disclosure.
- Acted bona fide in concluding that he should ensure the Board was aware of the information he could provide in relation to the issues raised by Mr Pitt before he met with the ODCE.
- Decided to proceed by making a protected disclosure as that achieved both his objectives.

D. Did Mr Pitt pressurise Mr Preston to support the allegations against Mr Buckley and/or did they collude when making their protected disclosures thereby undermining the independence, and therefore the reliability, of their disclosures?

57. Throughout the consideration of Mr Pitt's protected disclosure by the Sub-Committee, the Independent Review and the investigations by the ODCE, Mr Preston maintained that his protected disclosure was made independently of Mr Pitt and that his protected disclosure was not affected by having heard what Mr Pitt had said at the meeting at McCann FitzGerald's offices on 16 November 2016.

58. That position was maintained by both Mr Pitt and Mr Preston from the outset of our Investigation.

59. However, in the course of Mr Preston's cross-examination on behalf of Mr Buckley on 18 October 2021, the notes Mr Preston had prepared on 4 December 2016 in anticipation of his protected disclosure the following day were contrasted with documents that had been prepared by Mr Pitt (including emails he had sent to himself). It was put to Mr Preston that, as his notes used language identical to that appearing in Mr Pitt's disclosure and/or supporting notes, he must have had access to Mr Pitt's notes and/or been working with Mr Pitt. Mr Preston repeatedly denied that that was the case. At the end of his evidence on 18 October 2021, he was asked to consider overnight the sources upon which he relied to produce his protected disclosure.

60. At the outset of the following day's cross-examination, Mr Preston advised us:

*'So I haven't spoken to my legal team about this obviously, but I went through all my notes last night to try and understand where the duplication of the paragraphs you showed me yesterday, and in fact I did have a copy of that report on 22<sup>nd</sup> November from Robert and I had, on 17 October, an email of some of Robert's notes.'*

In light of the discovery of those two documents, Mr Preston acknowledged that his previous evidence was wrong and that he must have used those documents when preparing his notes in anticipation of his protected disclosure.

61. In the course of establishing the circumstances in which Mr Preston had the two documents produced by him, it transpired that Mr Preston's personal email account

had not been reviewed when INM responded to the ODCE's first document production requirement. Mr Preston had told McCann FitzGerald on 15 February 2017, that any relevant documents were either on his Company email account or privileged.

62. Mr Preston's personal email account was then reviewed and some 400 pages were disclosed, of which the vast majority were from Mr Preston's Company email account and had been disclosed by INM. However, some 15 documents that were relevant to the matters being considered in this Inspection had not been disclosed prior to the completion of this review. Following a review of those documents, Mr Buckley contended that it was apparent that other documents provided by Mr Pitt to Mr Preston had not been found and/or disclosed.
63. In cross-examination on behalf of Mr Buckley and the INM Directors, and in light of the additional disclosure made by Mr Preston, it became clear that the backcloth to Mr Preston's protected disclosure was as follows:

- (i) On 10 November 2016, Mr Preston received multiple calls from Mr Pitt. In an email to himself the next day, Mr Preston noted that he had had a:

*"... telephone call with Robert where he advised me that he was going to speak with Jerome the following morning to confirm that he believed that the Companies Act had been broken. He asked if I wanted to be a co-accuser clearly stating there was no pressure and that I would be protected for 5 years."*

Mr Preston told us that he wanted to take his time and consider the potential implications of Mr Pitt's proposed course of action.

- (ii) Mr Pitt met Mr Preston on the morning of 11 November and advised him to get his notes, to contact Mr Spring, that Mr Spring would represent him and that either INM or he (Mr Pitt) would pay Mr Preston's legal costs.
- (iii) Mr Preston had reservations about making a protected disclosure.
- On 14 November 2016, he had a conversation with Mr Kennedy and, although there is a dispute as to exactly what Mr Preston said, it is clear that he was concerned that the situation that was

developing had the potential to affect his own position.

- On 16 November 2016, he approached Mr Kennedy just before the meeting to discuss Mr Pitt’s protected disclosure 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. After that meeting ended, Mr Preston spoke with Mr Kennedy and Mr Barton and told them he was concerned that he should also make a protected disclosure. Mr Preston said he would tell the truth in any investigation. Mr Barton and Mr Kennedy said they could not advise Mr Preston.
- Dr O’Hagan told us that that Mr Preston had told him that Mr Pitt “*urged him to make disclosures*” and said that Mr Preston’s concern for his own position was

*“entirely understandable as he was in a very difficult position and was stressed about the implications for him and his family if he didn’t make disclosure that the CEO had asked him to make.”*

Mr Preston accepted that this was a fair and accurate account of what he said to Mr O’Hagan.

- (iv) Mr Preston’s decision to make a protected disclosure was influenced by becoming drawn into the consideration of Mr Pitt’s protected disclosure – in particular,
  - Through his attendance as a notetaker at the meeting on 16 November 2016 at McCann FitzGerald’s offices; and
  - Because, on 2 December 2016, the ODCE wrote to Daniel Spring & Co asking Mr Preston to provide information in relation to, inter alia, INM’s proposed acquisition of Newstalk.

This request arose out of Mr Pitt’s protected disclosure to the ODCE on 18 November 2016, in the course of which, in response to questioning from the ODCE, Mr Pitt had said that he believed Mr

Preston would be prepared to go on record to back up the disclosures to the extent that he is in a position to do so.

64. Mr Buckley and the INM Directors contended that these events adversely impacted the reliability of the protected disclosures made by Mr Pitt and Mr Preston and their evidence.

Mr Buckley's submissions

65. Mr Buckley submitted that:

*'... the manner in which the disclosures were made by Messrs Pitt and Preston, and the evidence leading up to the disclosures, are of some importance to Mr Buckley and impact significantly on both the motivation for making the protected disclosures as well as the weight that ought to be attached to the content of the protected disclosures themselves.*

*While Mr Pitt originally said that he did not discuss the idea that Mr Preston might make a protected disclosure with Mr Preston, Mr Pitt now accepts not only that he did have these discussions with Mr Preston but that he requested Mr Preston to make a protected disclosure and offered to pay for his legal fees in doing so.*

*Similarly, while Mr Preston originally presented himself as having made his protected disclosure on his own, without the influence of Mr Pitt, it is now clear that he did so with very substantial influence from Mr Pitt – going so far as to copy and paste Mr Pitt's self-sent email notes and the text of the revised attendance note of Mr Pitt's protected disclosure into the note of his own protected disclosure.*

*The evidence shows that Mr Preston was reluctant to get involved in Mr Pitt's preoccupation with matters relating to Mr O'Brien. Not only that, he was reluctant to make a protected disclosure. He ultimately did so after Mr Pitt made Mr Preston believe that, because he was mentioned by Mr Pitt to the ODCE, he was already included in the protected disclosure.*

*Mr Pitt expressed the view that, when coming forward with accusations, it was better to have two voices rather than one and that it was better that he was not*

*the only person raising these issues. His pursuit of this objective, and the manner in which he pursued it, had the practical impact of placing pressure on Mr Preston in such a way as to ultimately undermine the independence, and therefore the reliability, of the disclosures made by both Messrs Pitt and Preston.'*

66. Mr Buckley also criticised Mr Pitt for being less than candid when he made his protected disclosure to the ODCE:

*'... there appears to have been a conscious decision by Mr Pitt to omit the thread relating to his conspiratorial engagement with Mr Preston in exactly the same way as he chose to omit to make reference to or to disclose any document relating to his urging Mr Preston to make a protected disclosure, offering to pay his legal fees, directing Mr Preston to engage Daniel Spring & Co or directing Mr Preston to start taking notes.'*

67. Mr Buckley concluded by saying:

*'It is submitted that Mr Pitt deliberately misled the Inspectors on this issue with the clear motive of representing Mr Preston's position to be entirely independent of his when it is clear that it was not. In fact, there is now substantial evidence not only that Mr Pitt discussed Mr Preston's protected disclosure with him, but also that he applied pressure on him to act as his "co-accuser".'*

#### The INM Directors' submissions

68. The INM Directors submitted that:

*'... the credibility of Mr Preston's disclosure is undermined by the evidence which emerged under cross examination of the manner in which he approached the protected disclosure and of his interaction with Mr Pitt in advance of Mr Pitt's disclosure, and by Mr Preston's failure to disclose that to the Inspection. That applies equally to the credibility of Mr Pitt in circumstances where he also did not disclose at any earlier stage the fact that he had encouraged or invited Mr Preston to make a disclosure on 10/11 November or the fact that he had indicated that he or the company would pay Mr Preston's legal fees.'*

Mr Preston's submissions

69. Mr Preston contended that the production of the documents in the course of cross-examination arose out of an unintentional failure to identify a particular source of documents in the course of discovery – and was not part of a dishonest conspiracy in conjunction with Mr Pitt to the detriment of Mr Buckley.
70. In support of this contention, Mr Preston relied on the following:
- His full cooperation with the discovery exercise undertaken by INM in response to the ODCE statutory request for production of documents.
  - His investigation on the evening of 18 October 2021 and subsequent production of documents was undertaken entirely on his own initiative (which is unlikely to have been the approach he would have taken if he had deliberately withheld the documents).
  - The transparent manner in which he had reported the discovery of the documents that had not been disclosed.
  - His acceptance, without hesitation, that his earlier evidence had been in error.
  - The absence of any evidence to suggest that he had knowingly failed to disclose information to the Inspection.
  - The absence of any allegation of dishonesty against Mr Preston by INM or any of its directors (other than Mr Buckley).
  - The fact that the document he provided following his protected disclosure to Dr O'Hagan was the speaking note that he had used – and was not a document that had been prepared to be submitted as a written protected disclosure.
  - The speaking note distinguished those matters in respect of which Mr Preston had no direct knowledge – the summaries of the meetings on 20 October 2016, 21 October 2016 and 28 October 2016, when he was not

present – by being in italicised text and stating “*RP told me*” or “*RP advised me*”.

- Against that background, and given his clear acknowledgement that that material was hearsay when interviewed by the Independent Reviewers, Mr Preston submitted that there was no credible basis on which to contend that a false or misleading impression of those three meetings was created by the speaking note.
- And, of central relevance to the challenge to his integrity, not a single element of Mr Preston’s note of the meeting on 28 September 2016 is disputed by Mr Buckley.

### Our Conclusions

71. Having considered the evidence and the submissions we have received, we are satisfied that:

- Mr Pitt wanted Mr Preston to make a protected disclosure and encouraged him to do so:
  - In his conversations with Mr Preston on 10 and 11 November 2016;
  - By introducing him to Daniel Spring & Co;
  - By offering to pay his legal costs (if not recovered from INM); and
  - By telling Mr Preston that he had included Mr Preston in his protected disclosure to the ODCE and that Mr Preston would, therefore, be protected.
- Mr Pitt took steps to ensure that Mr Preston was aware of the facts and matters that he had raised in his protected disclosure by:
  - Providing, on 17 October 2016, copies of his notes of meetings related to the proposed acquisition of Newstalk;

- Arranging for Mr Preston to attend, as a notetaker, the meeting with Mr Kennedy and Mr Barton at the offices of McCann FitzGerald on 16 November 2016; and
- Providing, on 22 November 2016, a copy of the McCann FitzGerald attendance note as revised by him.

72. As a consequence, we have concluded that:

- Whilst the cooperation between Mr Pitt and Mr Preston was unsurprising, given their joint involvement in the events related to the proposed acquisition of Newstalk, it was inappropriate and misleading not to disclose such cooperation from the outset.
- In representing to us that their positions were entirely independent, when they were not, Mr Pitt and Mr Preston misled us. They also took the same position in their engagement with the ODCE.
- It was unsatisfactory, and unfair to Mr Buckley (and other parties to the Investigation), that it only emerged in the course of cross-examination that a failure to disclose material documents had occurred.
- However, having regard to the manner in which the failure to disclose documents emerged, Mr Preston did not withhold documents deliberately.
- Mr Preston did not intend to mislead us in asserting that he acted independently in making his disclosure.
- The interaction between Mr Pitt and Mr Preston did not affect the substance of their disclosures so as to undermine the integrity or credibility of their individual disclosures.

73. In that regard, it is significant that Mr Preston recorded, in his own contemporaneous notes, that he might not be in a position to go along with everything Mr Pitt was saying and, when asked about the events themselves, Mr Preston gave an account that departed in some instances from that of Mr Pitt.

E. Analysis of the basis for the key allegations made by Mr Pitt to determine whether those allegations made by Mr Pitt were fabricated, exaggerated or invented.

*Introduction*

74. In the course of cross-examination, there was a comprehensive challenge to the integrity with which Mr Pitt and Mr Preston approached the making of their protected disclosures. These challenges were based on significant conflicts in the evidence given by the principal witnesses to this Investigation.
75. These conflicts arose, in part, because this Investigation is the fourth time these events have been the subject of scrutiny. They were considered by the Sub-Committee appointed by the INM Board to consider Mr Pitt's protected disclosure. They were considered by the Independent Reviewers. They were the subject of the ODCE investigations. As a result,
- The key events have been the subject of numerous attendance notes (or equivalent), written statements, transcripts of interviews and other memoranda.
  - Because, unsurprisingly, differences have occurred in the way events have been described, apparent changes in evidence have resulted in criticisms being levelled at the integrity of the witness concerned.
  - Witnesses acquire information after the event which, combined with the passage of time, can result in witnesses being uncertain about what they knew at the time.
76. They also arose because Mr Pitt had sent emails to himself recording events that had occurred or conversations that had taken place. He maintained that those emails were the means by which he kept notes of such events and conversations. Mr Buckley maintained that those emails were part of a deliberate campaign and were an attempt by Mr Pitt to fabricate evidence to support his baseless allegations against him. In particular, Mr Buckley challenged those emails on the basis that:
- Mr Pitt began sending emails to himself immediately after Mr Buckley had extended Mr Pitt's probation period – 23 March 2015;

- They were selective and did not record the entirety of the conversation;
  - They were inaccurate and recorded events that had not occurred and statements that had not been made; and
  - They recorded conclusions from the conversation that were unjustified.
77. We adopted the approach set out in Chapter 5, paragraphs 64 to 69 in relation to the evidential weight to be placed on the emails sent by Mr Pitt to himself.
78. In our view, such emails were of assistance:
- In establishing the chronology of events;
  - Where the parties agreed that the emails recorded events or conversations that had taken place; and
  - In identifying the principal areas of dispute.
79. Where the matters recorded in such emails were disputed, we have reached our conclusions based on our evaluation of all the evidence available, including the oral evidence given and the demeanour of the witnesses when doing so. We have not placed reliance on the fact that a matter was recorded in an email in a particular manner.
80. In this section, we have focussed on the evidence given by the principal witnesses in relation to those statements and allegations which had the greatest impact in terms of the reaction of the ODCE, the decision to appoint Inspectors and on the course of this Investigation, namely:
- In relation to the sale of INM's shareholding in APN, the allegation that the proposed payment of a fee to Island Capital constituted a fraudulent attempt to benefit Mr O'Brien to the detriment of shareholders generally.
  - In relation to the Data Interrogation, the assertion that Mr Wilde had told Mr Pitt that the search of INM's data on the instruction of Mr Buckley was for the benefit of third parties (and that Mr Buckley had told Mr Wilde not to discuss that search with Mr Pitt).

- In relation to the proposed acquisition of Newstalk, the assertion that, in the course of discussing the valuation of Newstalk, Mr Buckley had said that:
  - Mr O'Brien had saved INM and deserved to be rewarded;
  - Davy could be influenced by management's approach to the assumptions on which the valuations were based; and
  - He wanted to do the deal at the valuation proposed by IBI.

### Our Approach

81. To assess the criticisms made by Mr Buckley and the INM Directors in relation to these issues,
- We first summarise the key elements of Mr Pitt's protected disclosure and the evidence he gave in support to the Sub-Committee, the Independent Review, the ODCE and to this Investigation.
  - We then summarise the submissions that we have received criticising those elements of Mr Pitt's protected disclosure and the evidence he gave in support – and, where available, Mr Pitt or Mr Preston's responses to those criticisms.
82. Having done so, we set out our conclusions in relation to the criticisms made of the protected disclosures made by Mr Pitt and Mr Preston and their evidence in support.

### The Sale of INM's shareholding in APN

(a) Mr Pitt's protected disclosure and evidence in support

83. In his email to himself dated 11 November 2016 recording his protected disclosure to Mr Kennedy, Mr Pitt noted:

*I proceeded to inform Jerome of the reasons for the Formal Declaration*

*The issue of the APN transaction where there had been another attempt to, I believe, influence a transaction which would have resulted in funds being dissipated unfairly to the advantage of others, although in that instance the action had not been so aggressive'*

84. Mr Barton's attendance note of the meeting between Mr Kennedy and Mr Pitt on 16 November 2016 recorded Mr Pitt's concerns in relation to the proposed payment of a fee to Island Capital in the following terms:

*'Robert added that he wanted to add another piece of context about this. This related to when INM disposed of its shareholding in APN, shortly after Robert had joined the company. On the day the transaction was to complete, 18 March 2015, Jerome and Robert got a mail from Leslie Buckley asking them to insert a fee structure for Island Capital of 0.9%. **However, Island Capital added no value in relation to the transaction.** During the period before completion, advice was obtained from Davy and McCann FitzGerald that if this kind of arrangement was included, it would have to be disclosed, because it was with a connected party. On receipt of this advice, the additional term was pulled. Robert said that he knew that thereafter he would have to be very vigilant indeed about how INM would execute its corporate agenda. Leslie Buckley believes that certain shareholders should be treated more favourably, i.e. Denis O'Brien and Dermot Desmond. Until this Newstalk thing surfaced, Robert felt that he had this issue under control. However, he now feels that he cannot control this alone. There was a sense that the other people in the discussions were looking at him as if to say "you know you have to do this deal". [Emphasis added]*

85. Mr Barton's manuscript notes, taken during the meeting, recorded Mr Pitt as saying:

*'Context*

*When we disposed of our APN shareholding, on the day of the t/a, 18 March 2015, JK and I got a mail from LB asking us to insert a fee structure for Island Capital of 0.9%. **Island Capital provided no service.**' [Emphasis added]*

The significance of the change from '*Island Capital provided no service*' to '*However, Island Capital added no value in relation to the transaction*' (emphasis added) has been considered in Chapter 9, paragraphs 260 and 261 above.

86. On 18 November 2016, Mr Pitt met with the ODCE. The ODCE note of that meeting recorded Mr Pitt's concern in relation to the proposed payment to Island Capital as follows:

*'The first item related to the sale of INM's interests in the Australian media business APN which were sold for c.€120m in early, 2015. At the time the transaction was closing, RP received an email from LB, copied to JK, which enclosed a letter/email from Mr Dermot Hayes of Island Capital seeking a success fee of about €3m in respect of the transaction, c0.95%. RP felt that LB wanted this fee paid but **as Island Capital played no part in the sale process on behalf of INM**, he objected and sought professional advice on the matter. When it emerged that the transaction would have to be disclosed to the market as a connected party transaction, the request was withdrawn. Island Capital was described as being the private investment vehicle of Denis O'Brien.'* [Emphasis added]

87. When interviewed by the Independent Reviewers, Mr Pitt expressed his concerns in the following way:

*'I then engaged with the Chairman about where this had come from and why this was happening. **I explained to Leslie Buckley that there was no services to justify the Island Capital fee.** I also explained to him that the payment of three other persons would have to be disclosed to the market in addition to the Island Capital payment. Leslie Buckley agreed to withdraw the fee for all the parties concerned, as he accepted they had not acted on INM's behalf.'* [Emphasis added]

88. In giving evidence to us, Mr Pitt told us:

*'I said to [Mr Buckley] **there is no services provided on this** and it was agreed that the fees would be withdrawn, okay.'* [Emphasis added]

and he described the proposal that Island Capital should be paid a fee for representing INM in the sale of its shareholding in APN as:

*'an opportunistic attempt to get some value for a shareholder at the expense of other shareholders. When it was clear that there would be a spotlight on it and*

*how much detail would be in the circular, they knew they would not be able to stand up for that okay.'*

89. When cross-examined, Mr Pitt conceded that he could not be sure about what words were actually used. While he was clear that he was resistant to the proposed payments, he agreed that he may not have said expressly that “*no work was done*” but may have said “*I believe no work was done*” Mr Pitt also agreed that he was mistaken to say that Mr Buckley agreed to withdraw the fees on that basis.
90. Mr Pitt also described the email from Mr Buckley to himself and Mr Kennedy to which the draft engagement letter was attached, as an ‘*instruction*’ by Mr Buckley and contended that the timing of that email was designed to put him in the position where, given the imminence of the requirement to announce the transaction, he had no option but to agree to the proposed payment to Island Capital.
91. On 23 March 2015, Mr Pitt attended a meeting with Mr Buckley, Ms Mullane and Ms Doyle in the course of which his probation period was extended by three months. Subsequently, in the course of his interview with the Independent Reviewers, Mr Pitt asserted that that extension of his probation was linked to the stance he had taken in relation to the proposed payments to Island Capital, Mr Cosgrove, Mr Harris and Mr Connolly. Mr Pitt maintained that assertion throughout the course of this Investigation.

(b) Mr Buckley’s submissions

92. Mr Buckley argued that Mr Pitt ‘s allegation that the proposed payment to Island Capital was an attempted fraud was unjustified because:
  - Island Capital had added value and so there was no justification for alleging that he had sought to benefit one shareholder, Mr O’Brien, at the expense of other shareholders.
  - He had not given an instruction to Mr Pitt to agree to the terms of the draft engagement letter and the proposed fee. By forwarding Mr Hayes’ email to Mr Pitt and Mr Kennedy, he had acted as a ‘*letter box*’ and, in this context, he relied on Mr Hayes’ statement in his email to Mr Buckley – ‘*Happy to discuss if required*’.

- The delay in forwarding Mr Hayes' email to Mr Pitt and Mr Kennedy was due to an unfortunate oversight on his part. He had not deliberately delayed forwarding the email to increase the prospect of the fee being approved without proper consideration.

93. Mr Buckley said that he and Mr Pitt discussed the proposed payments to Island Capital, Mr Cosgrove, Mr Harris and Mr Connolly on 23 March 2015, following receipt of advice from Davy and McCann FitzGerald. Mr Buckley denied that Mr Pitt told him that no work was done by Island Capital for INM. He also denied that he had agreed to the withdrawal of the proposed fees.

94. Mr Buckley criticised Mr Pitt for categorising:

*'... the attempt to secure the Success Fee as an attempted fraud.'*

He asserted that:

*'There is overwhelming evidence for the case that Mr Pitt harboured no such view at the time and only first adopted this position nearly two years after the fact.'*

95. In support of this contention, Mr Buckley relied on:

- Mr Pitt's failure to take any action in relation to the alleged fraud at the time – March/April 2015;
- Mr Pitt's failure to make any enquiries of Mr Connolly, the person working alongside Mr Hayes in Australia, as to the role of, or contribution made by Island Capital;
- The absence of any allegation of an attempted fraud in Mr Pitt's contemporaneous notes;
- Mr Pitt's failure to mention that a fraud had been attempted in his discussions with Mr Kennedy and Mr Harrison;
- Mr Pitt's willingness to contemplate retaining Island Capital for future transactions; and

- Mr Preston's evidence that he had no recollection of Mr Pitt being surprised to receive the draft engagement letter.
96. Mr Buckley rejected the suggestion that the payment of a fee to Island Capital was not pursued because of concerns that the arrangements would need to be disclosed in INM's announcements and Class 1 Circular. He asserted that everyone involved – Mr O'Brien, Mr Hayes, and he – was well aware that any payment by INM to Island Capital would have to be disclosed (as had been the case where Island Capital had provided services to other entities associated with Mr O'Brien).
97. Mr Buckley rejected any suggestion that the motivation for the extension of Mr Pitt's probation period was Mr Pitt's resistance to the proposed payments to Island Capital, Mr Cosgrove, Mr Harris and Mr Connolly. In rejecting Mr Pitt's assertion, Mr Buckley explained that:
- The chairman of Click&Go, a company in which INM held a substantial shareholding, had expressed serious concerns at the manner in which Mr Pitt had approached a meeting, such that he questioned the future of the relationship;
  - The editor-in-chief of Independent Newspapers had reported difficulties that he was encountering in his dealings with Mr Pitt, including an inappropriate exchange that Mr Pitt had characterised as a joke; and
  - Various directors had questioned Mr Pitt's inter-personal style and his approach to engagement with them.

As a result, Mr Buckley consulted Ms Doyle, INM's head of HR, and then met with Mr Pitt, together with Ms Mullane and Ms Doyle and extended Mr Pitt's probation period by three months.

98. In rejecting Mr Pitt's assertion that that extension was in reaction to his resistance to the payments to Island Capital, Mr Cosgrove, Mr Harris and Mr Connolly, Mr Buckley noted that:
- The text exchange by which Mr Buckley agreed that the payments should not be pursued occurred after the meeting at which Mr Pitt's probation

was extended, and so could not have been the motivation asserted by Mr Pitt; and

- In an email to himself dated 23 March 2015 recording the meeting at which his probation was extended, Mr Pitt recorded that to date he had experienced Mr Buckley as a very fair person and made no mention of the suggestion that the extension was motivated by his resistance to such payments. That suggestion was first made in the course of the Independent Review.

(c) The INM Directors' submissions

99. The INM Directors submitted that the evidence demonstrated that, when he received Mr Hayes' email and the draft engagement letter, Mr Pitt did not take an immediate view that Island Capital had done no work; his position was that he was unaware that Island Capital had been engaged.

They concluded that the position on the evidence as at 19 March is that:

- (a) Neither Mr Pitt nor Mr Preston had any knowledge of whether work had been done by Island Capital in Australia.*
- (b) Mr Pitt's immediate reaction to the draft engagement letter was that he simply did not know whether Island Capital were engaged or whether there was a justification for the proposed fees.*
- (c) Mr Pitt spoke to Mr Kennedy on 18 March to see if he knew they were engaged and to ascertain if Mr Kennedy agreed with his view that he should seek advice on disclosure requirements for the payment to Island Capital.*
- (d) Mr Pitt and Mr Preston decided to provide for fees of €3m for Island Capital and the individuals prior to the market announcement at 7 a.m. on 19 March.*

...

- (h) *Neither Mr Pitt nor Mr Preston contacted Mr Connolly, Mr Hayes or any other person who had knowledge of what work had been done in Australia to ascertain whether Island Capital had done work to justify the fees.*
- (i) *Mr Pitt and Mr Preston did contact Eugénée Mulhern in Davy but the focus of their question to her was whether they could make a provision and subsequently alter it without misleading the market in the announcement.*
- (j) *Mr Pitt did not speak to Mr Buckley about the fees until after the market announcement. In that conversation Mr Pitt did not say he believed Island Capital had provided no services to INM. On Mr Pitt's own account the communication was much more nuanced and more along the lines that Mr Pitt did not have visibility as to what work was done and he would need more detail. Mr Buckley's evidence was he assumed Mr Pitt would take whatever steps he thought necessary to discuss with Mr Hayes and/or negotiate.'*

(d) *Island Capital's submissions*

100. In its submissions, Island Capital addressed Mr Pitt's allegations, which it summarised as follows:

- '(1) That Island Capital added no value in relation to the transaction;*
- (2) That the draft engagement letter was presented only on the day that the transaction was due to complete; and*
- (3) When it became apparent that the proposed fee would have to be disclosed, it was "pulled".'*

101. In its submission, it concluded:

*'It was clear on the Island Capital side that Mr O'Brien had agreed with Mr Buckley to a block sale with INM, and that Mr Hayes should travel to Australia to work with Mr Connolly in managing the transaction on behalf of INM and Baycliffe. A draft engagement letter was prepared and sent to Mr Buckley on that basis. Mr Hayes was at all times working with Mr Connolly on the basis of*

*a block sale and dealing both with Baycliffe issues and issues that pertained to INM, which impacted timing and execution risk of the transaction. The transaction was a major success and INM benefitted significantly from Island Capital's involvement in completing the transaction (not least because it never paid any corporate finance fee in respect of it).*

*Turning to the serious allegation advanced by Mr Pitt that the charging of a fee by Island Capital was an attempt to reward INM's major shareholder at the expense of INM and its other shareholders, it is respectfully submitted that this allegation (which was first raised some 20 months after the APN transaction), is tantamount to an allegation of attempted fraud.*

*A combination of the speed at which events moved, Mr Pitt's lack of experience and lack of understanding of the overall transaction including what Mr Hayes and Mr Connolly were actually doing, together with a delay in communication between Mr Buckley and Mr Pitt, contributed to the dispute in relation to payment of any fee to Island Capital, which has subsequently been unfairly categorised as an attempt at fraud on the part of Island Capital. If having received the email and draft engagement letter, Mr Pitt had sought to discuss the transaction with any of the parties more directly involved (Mr Hayes Mr Connolly or Mr Buckley), he could have properly understood Island Capital's role and resolved the proposal to pay a fee one way or another. It is clear that the decision on the part of Island Capital not to pursue the fee had nothing whatsoever to do with the fact that it was disclosable.*

*Mr O'Brien has been portrayed as the intended beneficiary of a fraudulent attempt to extract a fee that was not warranted. Island Capital has been portrayed as a party who sought to implement it by endeavouring to charge a fee when it did no work. Yet, Mr Pitt's counsel did not put these contentions to Mr O'Brien under cross-examination and Mr Pitt did not choose to cross-examine Mr Hayes at all. That notwithstanding, Mr Pitt's allegations found their way into public expression through a judgment of the President of the High Court, which attracted huge publicity and on foot of a process in respect of which neither Mr O'Brien nor Island Capital had any opportunity to participate. All of that originated from Mr Pitt's allegations, which he never once checked or queried or paused to consider fully. In doing so, Mr Pitt has displayed a complete indifference to and disregard for the reputation of others.*

*In all the circumstances, the issue surrounding the Island Capital draft engagement letter was at its height a communications or corporate governance failure, but was certainly not an attempt at fraud. Island Capital behaved entirely properly at all times and it is respectfully submitted that the Independent Reviewers' findings on this issue were correct.'*

(e) Our conclusions

102. In our view:

- The absence of any explanation of the background to or the approach by Island Capital, together with the late presentation of the draft engagement letter and the fact that Island Capital had not been engaged by INM and had not acted for INM, resulted in Mr Pitt questioning the appropriateness of the payment.
- Initially, Mr Pitt and Mr Preston's focus was on whether any payment to Island Capital (and the proposed payments to Mr Cosgrove, Mr Harris and Mr Connolly) would be disclosable.
- The advice received from Davy and McCann FitzGerald highlighted the practical sensitivities involved under the UK and Irish Listing Rules and, potentially, under the applicable Australian regulations.
- Mr Pitt discussed the proposed payments with Mr Buckley. That discussion resulted in Mr Buckley's decision not to proceed with the payments.

103. We are satisfied that:

- In March 2015, Mr Pitt thought that it would be inappropriate to pay a substantial fee to Island Capital for services that, as far as he was aware, it had not provided.
- At that time, Mr Pitt had not formed the view that the proposed payment represented a fraudulent attempt to benefit Mr O'Brien to the detriment of shareholders generally.

- Subsequently, Mr Pitt became increasingly sensitive to Mr Buckley's perceived focus on the significance of Mr O'Brien's interest in INM in subsequent conversations and in the course of the Newstalk negotiations.
- When he was advised in late October/early November 2016 that if INM overpaid to acquire Newstalk in order to benefit Mr O'Brien he might be involved in defrauding INM and its shareholders, he concluded that the proposed payment to Island Capital might also be characterised as an attempt to defraud INM.

104. We accept Mr Buckley's explanation of the circumstances in which, and the reasons why, he extended Mr Pitt's probation period by three months and reject Mr Pitt's assertion that Mr Buckley extended his probation period in reaction to his resistance to the payments to Island Capital, Mr Cosgrove, Mr Harris and Mr Connolly.

### *The Data Interrogation*

105. A number of parties, in particular Mr Buckley and the INM Directors, were very critical of the information Mr Pitt relied upon when he made his protected disclosure to the ODCE in August 2017 and the evidence he gave in relation to his conversation with Mr Wilde in June 2015. Mr Pitt was extensively cross-examined on these matters.

#### *(a) Mr Pitt's protected disclosure and evidence in support*

106. Mr Pitt did not refer to the Data Interrogation in the course of his protected disclosures to INM and the ODCE in November 2016.

107. The first occasion when Mr Pitt raised his concerns in relation to the Data Interrogation was when he was interviewed by the Independent Reviewers on 27 January 2017:

*'Just a by the by on this then. I did get information from Gerry Wilde, IT director, near the start of our joining the business and there is a bit of confusion whether this happened in October of 2014 or December of 2014. The Chairman had rung him and asked him to facilitate the copying of emails and removal of tapes with all those emails on them for interrogation by a third party contract. It came to me in two ways: Gerry owned up to me about it, but we also received*

*a bill for the work done from a company based in the Isle of Man. When I discussed that bill with the Chairman and then with another person linked to them who does security, that bill was withdrawn and not paid by INM.*

*I was informed that the work was done to allow parties outside INM interrogate emails and look at the correspondence of people who used to work in the business. So again, I was finding things which made [me] be just alert, made me just very careful going forward.'*

Mr Pitt provided a copy of the TDS invoice to the Independent Reviewers.

108. The Independent Reviewers concluded that the issue did not fall within their Terms of Reference and therefore did not consider it further.
109. On 10 August 2017, the day after the INM Board had decided that the Report by the Independent Reviewers should be accepted and the matters raised in Mr Pitt and Mr Preston's protected disclosures considered closed, Mr Pitt met with the ODCE and made a second protected disclosure.
110. The ODCE note of that meeting recorded that:

*'It was asserted by Mr Spring that details of an invoice issued to INM by TDS UK Ltd had been supplied to the Reviewers but had been ignored by them. In response, clarification was sought by the ODCE as to whether that issue might [be] one of those referred to by the Reviewers in their report as falling outside the scope of their terms of reference as opposed to having been ignored by them and it was accepted that this might be the case. The issue related to an invoice that had been submitted by email to Ryan Preston on 18 December 2015 from a company called Trusted Data Solutions UK Limited. The email was sent by Kathy Richard (TDS) and cc'd to Robert Breen (a director of TDS). The invoice was in the amount of some €46k incl. VAT. The invoice indicated that it related to work done in October 2014 on site in INM and also covered costs of shipping back-up tapes to the UK (possibly Isle of Man).*

*Ryan Preston sent the email on to Gerry Wilde and Ronan McCarthy in INM's IT Department asking them to certify it for payment. They advised him to speak to Mr Pitt. Mr Pitt reported that shortly after he joined INM, Mr Wilde told him that Leslie Buckley had directed him (Mr Wilde) to facilitate Mr Derek*

*Mizak and TDSUK with access to INM's IT systems, including emails of former directors. Mr Wilde advised him that tapes from INM Data Servers were removed, taken to the UK, possibly the Isle of Man where they could be loaded up onto a system which would allow them to be interrogated. The relevant tapes were subsequently returned to INM. He was told by Mr Buckley not to disclose this to Mr Pitt. After Mr Preston spoke to him, Mr Pitt contacted Mr Buckley who told him to speak with John Henry, whom he understood was an IT advisor to Digicel.*

*Mr Pitt confirmed that the invoice was never paid by INM and that, as far as he was aware, TDS did not have a contract with the company. He also confirmed that he was not aware of any follow up with INM on the invoice by TDS.*

*Mr Pitt noted that when he switched to use of his personal email account for recording notes of events, he did so in the knowledge that the company had a track record of reviewing ex-directors' emails. He had referred to this in his PDA to the ODCE and had given a copy of the invoice and relevant emails to Grant Thornton in the context of the ODCE production orders so the ODCE should have copies of these documents. He also noted that he had informed the Independent Reviewers of his concerns in relation to this matter in one of his interviews with them. Mr Spring noted that this issue had not been highlighted too strongly by [Mr Pitt] previously because he was primarily focussed on his concerns regarding Newstalk. Having had sight of some of the ODCE correspondence with the company, they felt it was important to highlight the issue now.'*

111. On 11 August 2017, the ODCE issued statutory requirements to a number of parties, including Mr Pitt.
112. In his response to the ODCE statutory requirement in relation to the interrogation of INM's data, Mr Pitt stated that:

*'The only information I have in this regard is the following. In May 2015, Gerry Wilde, IT Director for INM, informed me that he was very worried and concerned about something. He was so concerned by the matter that he asked if we could discuss by having a walk outside on Talbot Street rather than in his offices (I understood he meant for security reasons).*

*We both went out onto Talbot Street and during an approximately 10min walk, he informed me that in 2014 (he said sometime between October to December, although I note the invoice attached says October) when I was already in my role as CEO, he had been contacted by Leslie Buckley, the INM Chairman. According to Gerry Wilde, the Chairman instructed him that the matter to be discussed between them was not to be shared with me, the CEO. Mr Wilde said that the Chairman then proceeded to instruct him to facilitate access to INM's servers for a third party company, who he did not name. Mr Wilde did name a person called Derek Mizak as having been involved in this work.*

...

*I have no knowledge of any terms of reference for the work described. The only detail I have of what that may have been was that Gerry Wilde said to me during our walk that the purpose of the work was to come into INM, remove large indiscriminate quantities of data (particularly emails and records) which would be reconstituted elsewhere. The data was then to be examined. Mr Wilde said that he had been told (if I recall correctly by Derek Mizak) that specifically the data of interest was regarding former directors, employees and possibly legal advisors. The director Gerry Wilde named was Gavin O'Reilly (former CEO), Karl Brophy (Director of Corporate Affairs) was the employee and I believe Simon McAleese was the legal person referred to. Mr Wilde further said that he believed the intent was to find information on them that would benefit a third party.*

*The information relayed to me by Mr Wilde was shocking if it was true. If what Mr Wilde was saying was accurate, it was serious. Unfortunately he was telling me in confidence and I had no other corroborating evidence.*

...

*Mr Wilde was very clear to me that he had only allowed these events to happen because he was under severe pressure having been directed by Leslie Buckley, the Chairman.*

...

*Gerry Wilde said to me that the tapes were then to be taken to a different location (I seem to recall Isle of Man being mentioned, but am not sure). At that location, the tapes would be reconstituted onto a server disc and activated into a searchable and interactive data bank ... Once that was done, the tapes were to be returned.*

...

*As I understood from Gerry Wilde, the order to allow access to INM's IT systems came directly from Leslie Buckley and was done by telephone, although I believe Mr Wilde stated that he also went in person to the Chairman's office (which is not located in the INM premises) to discuss the matter. I believe Gerry Wilde may have had more than one interaction with the Chairman on these matters but he is in a better position to confirm. The actual physical access was facilitated by Mr Wilde, together with Ronan McCarthy (Deputy IT Director), as conveyed to me by Mr Wilde. He also said that access was done in such a manner that the rest of the IT team and occupants of the building would not be aware of it. My understanding is that the access was granted to employees of TDSUK and also Derek Mizak.*

113. In relation to the TDS invoice, in his response to the ODCE statutory requirement, Mr Pitt stated that:

*I believe the invoice has been settled but not by INM. Following receipt of the ODCE request, I believe Ryan Preston (INM CFO) through Stephen Harton (Group Financial Controller) conducted further enquiries in relation to the receipt and/or payment of the invoice. The relevant accounts are outsourced to South Western Service (SWS) and I attach herewith copy documents received from SWS on 14 August 2017 which show that the invoice was actually discharged by a company called Blaydon Limited. I do not believe that company is in any way associated with INM.*

*I know from emails the invoice was sent unsolicited by email to the CFO on the 18/12/15, who then engaged directly with both Gerry Wilde and Ronan McCarthy on the matter. Mr Wilde also replied by email of the same day "This invoice is not for INM". (see attached). I believe they explained to him the details of the matter. There were two concerns for the CFO, as I recall. Firstly that there was no PO nor contract for the work, so it had not been budgeted*

*and would impact the financial performance. Secondly, when he spoke to both and understood the nature of the work, he made known to me his concerns about how this had come to pass. I informed Ryan Preston that I would deal with the matter and that INM should not pay the invoice.*

*I contacted Leslie Buckley by phone to discuss the matter with him. I informed him that we had received the invoice and what it described. The Chairman seemed surprised that the invoice was known to me and that I had knowledge of the matter at all. Very quickly, he asked me to contact a person named John Henry who he said would resolve the matter. I said I would do so, but before finishing the call I made it very clear that there was an issue regarding the nature of the work and that we had no clarity of what it led to, plus the amount of the invoice which was quite substantial.*

*I did not have a contact number for John Henry, so I contacted the Chairman's PA who gave it to me. I rang John Henry and explained the matter to him. He seemed to understand the detail of the situation and said he would look after it. I specifically relayed to him that I saw no reason for INM to be incurring this cost. Mr Henry did not ask me to send him the invoice nor ask for further details.*

...

*I then informed the CFO I had dealt with the invoice.'*

114. In their report, Deloitte recorded Mr Pitt as saying that during the discussion on Talbot Street, Mr Wilde had stated the review was being completed for the benefit of a third party or people working for a third party and that he believed the intent was to find information on the ex-directors, employees and legal advisors that would benefit a third party.

115. In relation to the conversation with Mr Wilde, Mr Pitt told us:

*'So we went outside and up to Talbot Street and walked up and down Talbot Street, this is the street where the INM offices are located. Gerry proceeded to tell me about some experience he had already with this Mr Derek Mizak person...he proceeds to tell me then, I took this as he was kind of telling me to watch out, that Mr Buckley had, with these other people, looked at the emails*

*of some ex-management, and he named some people. I got the impression this was a marking my card kind of conversation...Gerry told me Mr Mizak has already done some work in INM. He said for Leslie Buckley, he didn't say for the company, he said for Leslie Buckley. He mentioned the names also of Mr John Henry and he said these guys work for Denis O'Brien. He said they came in and had access to data and that they took the data away specifically he said to look at the historic e-mails of three people, Gavin O'Reilly, Karl Brophy and Simon McAleese.'*

116. In relation to the TDS invoice, Mr Pitt told us that he:

*'went down to Gerry Wilde and said what is this about. He said this about the matter that I told you about in June...I said to him – so there is a few agendas with this. First of all we didn't have a budget to pay for it so we were all trying to bring our yearly numbers in so there was no way we were going to pay and sweep it under the thing. Secondly it was for work which had never been documented or instructed on behalf of INM. There was no output from the work either, no report to come back to say this is what we found... Thirdly the way the Chairman had done it I thought was improper and so I said to Gerry this is something which we cannot pay, this is not something which INM has benefitted from. You can see Mr. Wilde has written back that this is not an invoice for INM so at the time he obviously believed it wasn't.'*

And that:

*'I rang the Chairman to tell the Chairman that I had received this invoice, so this was a telephone conversation. My recollection of this is I had said to him that I have received an invoice from a company called TDS UK who I believe did work for Derek Mizak in October at the time when work was carried out that I didn't know anything about at the time. I said I have no sight of what that work was. I said this is not something which was done for INM and can you explain. He got very vague and flustered on the phone which wouldn't have been like him... he referred me to John Henry... Then I rang him [John Henry] and I said I am ringing you because I have spoken to Mr. Buckley, I am the CEO of INM, introduced myself. I said I have this invoice here, this is something which we know nothing about here, we don't know what the work was, we are not paying it. He said to me send it, I don't know how we got him the invoice. We didn't send the invoice. I am fairly sure on this, that we did not send him*

*the invoice. He said I will look after it and get back to you and didn't. That was actually at the time the last I heard of it.'*

(b) Mr Wilde's evidence

117. As the Data Interrogation was not a matter considered by the Sub-Committee or by the Independent Review, the first occasion when Mr Wilde gave evidence was in response to the statutory requirements issued by the ODCE to INM and then to Mr Wilde individually. He then gave evidence to this Investigation.

118. In response to Statutory Requirements issued by the ODCE, Mr Wilde provided the following responses:

16 August 2017

Response to Statutory Request dated 11 August 2017

*Q2. Full details of the precise nature of the services provided, including:*

*v. the purpose/objective of the work undertaken and the services provided*

A2 My understanding of the purpose/objective of the work undertaken and services provided from a discussion with the Chairman, Leslie Buckley, was to find if there were any records or emails on the tapes on INM's systems which related to details of a contract that needed to be looked into.

*Q4. Full details of the date(s) upon which the [TDS] invoice was settled by INM or, if the invoice was not settled:*

*i the reason(s) why it was not so settled;*

I became aware of the existence of the invoice when Ryan Preston (CFO) sent an email to me and Ronan McCarthy (Deputy IT Director) on 18 December 2015 attaching the invoice and asking us to confirm if it was for IT. I confirmed that it was not for INM IT and I spoke to Ryan Preston and Robert Pitt following this and explained that I believed it concerned the services provided by Derek Mizak in late 2014. They said that [they] would take it up with Leslie Buckley, Chairman of INM.

Q5. *Full details of precisely how INM benefited from the services provided, as enumerated on the face of the [TDS] invoice:*

A5 *Whilst I have an understanding of the purpose of the services as set out above, I am not aware of how INM benefited from the services provided, as enumerated on the invoice.*

24 August 2017

Response to Statutory Request dated 18 August 2017

Q3.2 *Explanations and assistance required regarding email communications with Mr Ryan Preston concerning approval for payment of the invoice*

*At paragraph number 4(i) of your responses dated 16 August, 2017, you state that:*

*"I became aware of the existence of the invoice when Ryan Preston (CFO) sent an email to me and Ronan McCarthy (Deputy IT Director) on 18 December 2015 attaching the invoice and asking us to confirm if it was for IT. I confirmed that it was not for INM IT and I spoke to Ryan Preston and Robert Pitt following this and explained that I believed it concerned the services provided by Derek Mizak in late 2014. They said that [they] would take it up with Leslie Buckley, Chairman of INM."*

*The foregoing response is, however, not entirely accurate in that what you actually said in your email of 18 December, 2015 to Mr. Preston was "This invoice is not for INM", which is quite different to what is stated at paragraph 4(i) of your responses, i.e. that it (i.e. the invoice) was not for INM IT.*

*In the context of the foregoing, I require the following explanations:*

*i the reason(s) as to why your response provided to this Office on 16 August, 2017 is not consistent with the contents of your email of 18 December, 2015 to Mr Preston;*

A. *I agree, this is not as per my email to Ryan Preston. It was only after it was highlighted, that I re-reviewed the email response to Ryan and*

discovered the error you highlighted. However, from my perspective this invoice would not have been for INM IT and I also did not believe it was for INM. Regarding INM IT, I would not have budgeted for this sort of engagement in my normal IT budgets. I budget on a yearly basis (before the start of each financial year) for all contracts and services for the normal day to day running of the INM IT systems and services from the normal day to day running of the INM IT systems and services.

I also would not have the authority to approve invoices for goods and services that fell outside the budgeted services unless I had approval from my senior management.

Regarding my view that it would not have been for INM also see my further responses below.

- ii. having regard to your responses of 16 August, 2017 as summarised above and, in particular, your almost complete lack of knowledge of the nature of the services that had been provided by TDS UK to INM, the basis upon which you were able to state with certainty and without qualification on 18 December, 2015 that the invoice was "*not for INM*"

I didn't engage the services of TDS UK on behalf of INM. As I did not engage TDS UK's services, I didn't supply them with Terms of Reference, PO Order or contract. I therefore believed the invoice was not for INM on that basis and that the invoice should have been for Mr Mizak as I believe he initiated the services of TDS UK and he (Mr Mizak) in turn should have invoiced INM along with and itemising whatever other services he supplied. This would be normal practice for any company engaging services on INM's behalf.

1. You are required to advise as to whether, at some point following his appointment as Chief Executive Officer of INM, you had a conversation with Mr. Robert Pitt in which you communicated to him that:
  - i Mr. Leslie Buckley, Chairman, INM, had directed you to facilitate access to INM's IT systems, including email; and
  - ii you had been instructed by Mr. Buckley not to disclose to Mr. Pitt the fact that such access had been granted.
  
- A. My responses to both parts of this question (1 (i) and (ii)) are set out below.

...

I recollect asking him on the call whether I should discuss the matter with Mr Pitt as I had had some conversations with Mr Pitt about my role and responsibilities whilst he was still in the Czech Republic and my recollection is that Mr Buckley said there was no need, or words to that effect, as Mr Pitt would have a lot to do when he arrived officially to take up his position as CEO. My impression was that Mr Buckley thought that it wasn't necessary to bother him with this as he would be very busy with other matters. I do not believe it was Mr Buckley's intention that I was never to tell Mr Pitt, more so that I didn't need to discuss it with him at that time for the reasons he gave me. If Mr Buckley had expressly instructed me not to tell anyone about such a matter I would have taken that as a confidential instruction from Mr Buckley (as he was the Chairman) and I would have respected that confidentiality.

...

I do recall having a conversation with Mr Pitt about Mr Buckley's request although given the time that has passed I can only recount what was said from my recollection. I cannot recall the exact date of this conversation but I think it could have been sometime in the Summer of 2015, possibly May.

2. If such a conversation took place, you are required to provide the following:

i details of when the conversation took place;

Please see my response to 1 above.

ii. details of where the conversation took place;

I recall having the conversation with Mr Pitt on Talbot Street, which is where our office is located. To the best of my recollection, when I mentioned to Mr Pitt that I wanted to speak *to* him about something confidential he asked would I be happier if we walked up Talbot Street while we talked.

iii a full account of the content of that conversation.

Whilst I cannot recall the precise details of the entire conversation with Mr Pitt I do recall filling him in on Mr Mizak's earlier exercise and explaining that I had been concerned about the tapes going offsite. I think I also explained that I had been given assurances that everything was fine by Mr Mizak and that the data would be secure.

Mr Pitt asked me if I had anything in writing from Mr Buckley about the investigation. I explained, as I was asked to assist in the exercise by Mr Buckley, I believed as Mr Buckley was the Chairman and that Mr Buckley had sanctioned the exercise I thought it was ok. I do recall telling Mr Pitt that I asked Mr Buckley if I should inform Mr Pitt at the time about the investigation and Mr Buckley said no. However, I cannot recall whether I also told Mr Pitt the reasons (which are set out at 1 above) why Mr Buckley thought I didn't need to discuss it with him.

119. When, he gave evidence to us, Mr Wilde has asked whether he had said to Mr Pitt that the review was to benefit some third party, Mr Wilde told us:

*'No, I don't remember that ... I don't remember saying that at all.*

...

*I don't know where that came from'*

120. In view of the conflict between his evidence and that of Mr Pitt, we asked Mr Wilde whether he might have referred to the involvement of third parties:

Mr Gillane: *Can I ask you also then in relation to this phrase which has come up previously and you've dealt with in a number of different contexts, but I just want to see whether we can bring some clarity to it, this suggestion, and I think it is a suggestion that emanates from Mr. Pitt, that you had, in your description of what went on to him, suggested that the task was to find information that would benefit a third party?*

Mr Wilde: *Again, I'm totally at a loss with that. I don't know what that means.*

Mr Gillane: *All right. And can I ask you, and maybe it's implicit in what you've said, you've said previously that you don't recall making such a statement and that it doesn't fit with your understanding of what was going on at the time?*

Mr Wilde: *It doesn't.*

Mr Gillane: *Is it that you don't recall it or are you firmer on that? Do you say you didn't say such a thing?*

Mr Wilde: *Ehm, oh, yeah, I didn't say such a thing.*

Mr Gillane: *And it wouldn't have accorded with your understanding at the time?*

Mr Wilde: *No.*

Mr Gillane: *You did say previously, and just if you can just help us with this, that you might have said something to the effect that some of the individuals involved provided services to a third party?*

Mr Wilde: *Ehm, I could possibly have said that.*

Mr Gillane: *All right.*

Mr Wilde: *I can't recall.*

Mr Gillane: *You can't recall that but you think you might have said that?*

Mr Wilde: *I could have said it, yeah. Yeah*

Mr Gillane: *Or that you might have said something to the effect that third parties were involved. Do you recall saying something like that? For example, Mr. Mizak, or TDS or...?*

Mr Wilde: *Oh, at the time on the walk, I suppose if - I honestly don't know, to be honest with you.*

Mr Gillane: *All right.*

Mr Wilde: *Because I don't know - Mr. Gillane, I'm not quite sure of the question, as such, and what you're trying to ask me.*

Mr Gillane: *I'm just trying to see whether you have a firm recollection of...?*

Mr Wilde: *No, it's been a long time.*

121. In relation to whether Mr Wilde should inform Mr Pitt of the steps being taken, Mr Wilde confirmed that he understood that Mr Buckley was not telling him that Mr Pitt was never to be told, but rather that he was not to be bothered at that time.

(c) Mr Buckley's submissions

122. Mr Buckley focussed on Mr Pitt's recollection of his conversation with Mr Wilde and, in particular, that Mr Wilde had said that the Data Interrogation had been undertaken for the benefit of a third party. He submitted:

*'Much has been made of the fact that Mr Pitt repeatedly claimed that Mr Wilde told him that the exercise had been undertaken to "benefit a third party". It should be noted that Mr Pitt gave this account, almost to the word, to Deloitte, the Data Protection Commissioner and the ODCE.*

*When Mr Pitt was asked by the Inspectors whether there might have been a justifiable reason for the search, he said "I was not sure okay that there was a nefarious reason to this. What I was clear to Gerry Wilde and what I told him is the manner in which it was done was unacceptable."*

*When Mr Pitt was asked about this issue by the Inspectors – that the project was done to benefit a third party – Mr Pitt's narrative shifted, focusing not on the issue of on whose behalf the project was undertaken but the procedures which were followed:*

*"That Leslie just wanted to get this information for himself. It could have been for the benefit of INM, it might not have been for the benefit of INM. The Chairman does have power over the CEO. He is my line manager. I can't automatically challenge him on every single thing so maybe there was something else he was doing, maybe not."*

*When cross-examined Mr Pitt admitted that "I don't think he used the word 'for the benefit'".*

*It needs no further comment other than to say that Mr Pitt was prepared to tell Deloitte and two statutory regulators, in unambiguous terms, that Mr Wilde said that the data search was to "benefit a third party" and then resiled from this position in cross-examination (presumably in the knowledge that Mr Wilde had denied ever saying such a thing). This is resonant also of Mr Pitt's original allegation that Mr Wilde "was very clear to me that he had only allowed these events to happen because he was under severe pressure having been directed by Leslie Buckley, the Chairman."*

*While Mr Pitt's position has evolved, Mr Wilde has remained consistent. Mr Wilde denied making the statement (that the project was to benefit a third party) to Deloitte and he denied it to the Inspectors – querying what third party could have benefitted. Mr Wilde has remained clear that "It was my understanding that Mr Mizak was being engaged by Mr Buckley on behalf of INM to assist the company in the investigation for the contract". He has also expressly denied that he ever referred to Mr Mizak and Mr Henry as "Denis O'Brien's guys", an allegation made by Mr Pitt. It must be noted that Mr Pitt appears to have significant difficulty remembering what was said in this conversation with Mr Wilde – "I'm really having a big problem now with remembering properly" and that "I cannot remember the exact words that were definitely said". It is submitted that Mr Wilde's evidence in this regard should be preferred, that Mr Wilde said neither that the project was to benefit a third party nor anything about Mr O'Brien, because Mr Wilde's evidence is consistent and clear whereas Mr Pitt's is the opposite.*

*As set out above, Mr Pitt's allegation, that Mr Wilde had been told that the investigation had been undertaken to benefit a third party, was repeatedly made almost word for word by Mr Pitt to Deloitte and two statutory regulators. The Inspectors are invited to consider that the seriousness of this allegation, and the ease of its withdrawal, impact in the most fundamental way Mr Pitt's credibility and provides very considerable support for a suggestion put to Mr Pitt that he was a person who made allegations "with callous indifference for the reputations of others'.*

123. Mr Buckley concluded:

*'It appears to have been central to the Director's application that Mr Pitt had stated that Mr Wilde told Mr Pitt that he (Mr Wilde) believed that the purpose of the Data Interrogation "was to find information on them that would benefit a third party." This explosive allegation, which featured prominently in the Director's grounding affidavit and understandably so, was reported by Mr Pitt to Deloitte and two statutory regulators in unambiguous terms.*

*That it has now been withdrawn in cross-examination before the Inspectors leads inevitably to serious concerns about Mr Pitt's consistency and credibility (and also his willingness to make incredibly serious allegations without any thought for their consequences). Critically, this important piece of evidence*

*grounding the concerns that arose on the Data Interrogation, and which both motivated the Director in applying for the appointment of Inspectors and, in turn, the High Court in making such appointment, has been shown to be untrue.*

*Also of some importance to the Director was Mr Pitt's statement that Mr Wilde had been "asked by the Chairman not to disclose this information to Mr Pitt", suggesting a clandestine operation. In fact, Mr Wilde has made clear to the ODCE and the Inspectors, and it is not in dispute, that the reason given by Mr Buckley for not telling Mr Pitt was not that he was never to be told, but that he was not to be bothered with the matter at that time.*

*Further to these purported statements of Mr Wilde, the Director's concerns that the whole Data Interrogation exercise was carried out for an ulterior or third-party purpose appears to have been exacerbated by Mr Wilde's reaction to the TDS invoice that "This invoice is not for INM". Mr McCarthy has made clear that when Mr Preston queried the invoice, the IT Department was of the view that it should not be coming out of the IT Department's budget and that Mr Wilde responded saying that this is not an IT cost. Mr Wilde confirmed this in his evidence, which is consistent also with his account to the ODCE. The Inspectors now have an account from Messrs Buckley and O'Brien which, it is submitted, provides a substantial response and explanation of the payment of the TDS Invoice and the DMZ IT invoice by Island Capital/Blaydon and, in light of Mr Buckley's evidence of a strained relationship between himself and Mr Pitt, an understandable one.'*

(d) Mr Pitt's submissions

124. Mr Pitt, in his Second Submission, submitted that Mr Buckley mischaracterised the evidence he relied upon in to support the proposition that:

*'Mr Wilde's evidence in this regard should be preferred, that Mr Wilde said neither that the project was to benefit a third party nor anything about Mr O'Brien, because Mr Wilde's evidence is consistent and clear whereas Mr Pitt's is the opposite.'*

125. Mr Pitt addressed each of the points raised by Mr Buckley in support of his allegation that Mr Pitt had resiled from his position that Mr Wilde had told him that the Data Interrogation had been undertaken to *'benefit a third party'*.

- (a) He submitted that Mr Buckley mischaracterised his evidence in saying that:

*"[w]hen Mr Pitt was asked about this issue by the Inspectors – that the project was done to benefit a third party – Mr Pitt's narrative shifted, focusing not on the issue of on whose behalf the project was undertaken but the procedures which were followed:*

*"That Leslie just wanted to get this information for himself. It could have been for the benefit of INM, it might not have been for the benefit of INM. The Chairman does have power over the CEO. He is my line manager. I can't automatically challenge him on every single thing so maybe there was something else he was doing, maybe not."*

Rather than being asked about *'the issue of on whose behalf the project was undertaken'* (as asserted by Mr Buckley), Mr Pitt had been asked whether Mr Wilde knew why Mr Buckley had instructed Mr Wilde not to tell Mr Pitt about the Data Interrogation – *'Did you have any view then about why it is he would have been instructed not to tell you?'*

- (b) He submitted that in asserting that,

*'When cross-examined Mr Pitt admitted that "I don't think he used the word 'for the benefit"'*.

and

*It needs no further comment other than to say that Mr Pitt was prepared to tell Deloitte and two statutory regulators, in unambiguous terms, that Mr Wilde said that the data search was to "benefit a third party" and then resiled from this position in cross-*

*examination (presumably in the knowledge that Mr Wilde had denied ever saying such a thing).'*

Mr Buckley had selected one sentence from a lengthy passage of cross-examination that suited Mr Buckley's submission.

Mr Pitt submitted that that evidence should be read in the context of that cross-examination in the course of which he was clear that Mr Wilde told him that the work was not done for INM and was therefore done for the benefit of someone else. Mr Pitt submitted that he fairly and honestly stated that he wanted to be careful in his evidence given the remove in time at which he was answering those questions. He then referred to the following excerpts from that cross-examination to support his submission

Mr Pitt: *I don't know if he - I don't think he used the word 'for the benefit'. I think this was done for - again, I realise that, you know, there has been a comparison of two texts on this, so I'm trying to remember what actually was said, rather than a text which was said and, to be honest, Mr. Staines, I'm trying very hard to remember either of them at the moment because my head is...*

[...]

Mr. Staines: *I don't want to trespass over the territory that Mr. Gallagher has already trespassed in terms of what you did with the information. Okay. That has been dealt with very, very significantly. But what I again just want to press you on is, if you're saying that he explicitly said it was done for Denis...*

Mr Pitt: *I - Mr. Staines, I'm - this - or I'm not too sure 'this wasn't for us' or I can't remember. I really, I really am sorry. I'm really - I'm in danger of thinking I remember something, rather than really remember it at this stage, yeah, okay, and I think it was something along the lines 'this wasn't for us' or 'this wasn't for INM' or 'this was for Denis' - I'm really sorry, I would be - I...*

Mr. Staines: *Would you agree with me that there's a fairly huge distinction between the two things: 'this was done for Denis' and 'this wasn't for us'?*

Mr Pitt: *Yes. Well, there's a distinction in terms of the specificity of who it was for, okay, but they're both saying that they're not for INM. Yeah. Okay. They're both saying that this was not for the benefit of the Company. One, I suppose, is a bit more specific about who Mr. Wilde might have thought it was for, if he said those words, yeah, which I think he did. But I am really - I - I'm trying - I have been honest with all my evidence, and I'm still being honest today that I cannot at this stage - I really would be - it wouldn't be fair of me to be saying I'm very definite unless I can see what I said previously, but that's...*

...

Mr. Staines: *So just to continue on this theme just a little bit in terms of the distinction between the two things, as in 'this was done for Denis' or 'this was not for INM'*

Mr Pitt: *Yeah. Or he might have said - excuse me - he might have said 'this wasn't for us'. Okay*

Mr. Staines: *Wasn't for us. Yeah,*

Mr Pitt: *Maybe. Maybe, yeah.*

...

Mr. Staines: *Does that help you at all, what I've shown you*

Mr Pitt: *Yes, it does help me. Yeah. So based on this, I think I said that he could have said that these guys work for Denis - something like 'these guys work for Denis but the work is not for us'. Something like that. I think I said*

something like that earlier, Mr. Staines. Yeah. But he said - he definitely said something like 'the work is not for us', rather - remember we were discussing about it's for us, not for us, or for - with Denis O'Brien - well, then it looks more likely that he said 'it's not for us'. Okay

Mr. Staines: *But what I'm suggesting to you is that it's highly unlikely he said that this work was being done for Denis or was - 'they're Denis O'Brien's guys' or anything like that, because if he had done that it would have been very memorable, no?*

Mr Pitt: *Well, I think I did say that he told me that these were Denis's guys, and I think I've been consistent - sorry, Mr. O'Brien's guys. Excuse me. Mr. O'Brien's people, okay. I said at the start of this part of our conversation that he told me about Mr. Mizak, he told me about Mr. Henry. He didn't refer to a company or a legal entity, he referred to 'these guys', and he said that they were in that world and then that the work was not for us, yeah. **So I would be, I would be quite adamant about that. Yeah, okay.***

...

Mr. Staines: *All right. And then what about the 'not for INM' or 'not for the benefit of INM', or benefit of a third party?*

Mr Pitt: **That was explained to me by Mr. Wilde, Mr. Staines. I'm sure that that was something which was explained to me. Okay. As sure as I can be. As sure as I can be, Mr. Staines, with the recollection I have after such a time. Okay.**  
(Emphasis added in Mr Pitt's submission)

Mr Pitt submitted that he did not change his position. At most, he very fairly conceded that at that stage, six years after the conversation occurred, he could not confirm the precise language used by Mr Wilde on that day. Mr Pitt has not, as alleged by Mr Buckley, withdrawn any

“*allegation*”. He continues to assert that Mr Wilde informed him that Mr Mizak was carrying out an exercise in INM, that was not for the Company. This is also in line with Mr Pitt’s evidence when he was cross-examined on behalf of the non-executive directors:-

Mr Pitt: *Because it was the - the way it was described to me by Mr. Wilde, it was an action which was being taken, not because of - for the benefits the Company - but for the benefits of somebody outside the Company.*

*Okay. So you were being told as CEO that action was taken in relation to INM data, not for the benefit of INM but for the benefit of somebody outside the Company. That’s what you were told?*

Mr Pitt: *That’s what I understood. Yeah.”*

In the light of this analysis of his evidence, Mr Pitt submitted that Mr Buckley’s submission:

*‘That it has now been withdrawn in cross-examination before the Inspectors leads inevitably to serious concerns about Mr Pitt’s consistency and credibility (and also his willingness to make incredibly serious allegations without any thought for their consequences). Critically, this important piece of evidence grounding the concerns that arose on the Data Interrogation, and which both motivated the Director in applying for the appointment of Inspectors and, in turn, the High Court in making such appointment, has been shown to be untrue.’*

was therefore unfounded and without merit.

126. Mr Pitt also addressed Mr Buckley’s contention that:

*‘Mr Wilde’s evidence in this regard should be preferred, that Mr Wilde said neither that the project was to benefit a third party nor anything about Mr O’Brien, because Mr Wilde’s evidence is consistent and clear whereas Mr Pitt’s is the opposite.’*

127. Mr Pitt relied on the information provide by Mr Wilde to Deloitte – to the effect that some of the individuals involved in the review also provided services to a third party – and to Mr Wilde’s subsequent evidence (see paragraph 118 above).
128. Mr Pitt also relied on the evidence he gave in the course of cross-examination on behalf of INM Directors:

*‘... the way it was described to me by Mr Wilde, it was an action that was being taken, not because of – for the benefits of the Company – but for the benefits of somebody outside the Company.’*

(e) Our conclusions

129. In considering whether Mr Buckley’s criticisms of Mr Pitt’s protected disclosure in relation to the Data Interrogation are justified, it is necessary to determine:

- What Mr Wilde told Mr Pitt in the course of their conversation in Talbot Street in June 2015; and
- Whether the information given by Mr Pitt to the ODCE fairly reflected the information given to him by Mr Wilde and, if not, why not.

130. Having considered the evidence, we have concluded that:

- Neither Mr Wilde nor Mr Pitt was able to be precise about the language used by Mr Wilde in the course of the conversation in June 2015. This was unsurprising given the length of time since the conversation took place – six and a half years – and the repeated questions and suggestions put to each individual had the effect of confusing their recollections of the conversation.
- Mr Wilde primarily focussed on two aspects – briefing Mr Pitt about the exercise Mr Mizak had undertaken in 2014 and reporting his discomfort at the fact that the INM back-up tapes had been off-site.
- Mr Wilde told Mr Pitt that the work on the tapes had been undertaken by third parties. This was an inevitable consequence of explaining Mr Mizak’s relationship with Mr Buckley and the transfer of the back-up

tapes from INM's offices to Wales (or, as Mr Pitt at one stage thought, to the Isle of Man).

- Recognising that there would be circumstances when it would be either necessary or legitimate to search INM's records for emails and other documents (e.g. in the course of litigation), Mr Pitt's initial reaction was to be concerned at the absence of a robust process governing the authorisation of such searches.
- Mr Pitt's understanding from his conversation with Mr Wilde was that the Data Interrogation was not undertaken for INM.
- Whilst he may have mentioned that Mr Mizak and/or Mr Henry did work for Mr Buckley and/or Mr O'Brien, Mr Wilde did not tell Mr Pitt that the Data Interrogation was undertaken for Mr O'Brien.
- Mr Buckley did not instruct Mr Wilde that he was never to discuss with Mr Pitt the work being done on INM's tapes.

131. In our view, Mr Pitt understood Mr Wilde to tell him that the Data Interrogation was undertaken by third parties and Mr Pitt, therefore, concluded that the Data Interrogation was undertaken for the benefit of a third party.

132. Furthermore, Mr Pitt's understanding that the Data Interrogation was not undertaken for the benefit of INM would have been reinforced by Mr Wilde's response to Mr Preston – that the TDS invoice was '*not for INM*'. At the time he made his protected disclosure to the ODCE on 10 August 2017, that response (unqualified by Mr Wilde's response to the ODCE on 24 August 2017) would have been part of the information available to him.

133. In these circumstances, we reject the criticisms of the protected disclosure made by Mr Pitt in relation to the Data Interrogation in August 2017 and of the evidence he has given in support of that disclosure.

### ***The Proposed Acquisition of Newstalk***

134. The event that precipitated Mr Pitt's decision to make a protected disclosure was the improper pressure he perceived to be being applied by Mr Buckley on himself and

Mr Preston to agree to pay an inappropriate price to acquire Newstalk from Communicorp, a company owned by Mr O'Brien.

(a) Mr Pitt's protected disclosure and evidence in support

135. In his email to himself dated 11 November 2016, recording his protected disclosure to Mr Kennedy in relation to the proposed acquisition of Newstalk Mr Pitt noted:

*I told Jerome the following facts:*

- *That after my call with Leslie on the 28/10/16 I had felt under increasing pressure from the Chairman in regards to being forced to influence the transaction and the valuation of [Newstalk] as an asset.*

...

*I proceeded to inform Jerome of the reasons for the Formal Declaration:*

- *the issue of the valuation of [Newstalk] and that on at least three separate occasions I was directly and aggressively asked by [Mr Buckley] to influence it upwards while our advisers, Davy were quite clear about where they saw the range valuation'*

136. At the meeting on 16 November 2016 with Mr Kennedy and Mr Barton, Mr Pitt provided a detailed description of how the discussions with Communicorp had progressed from the initial meeting on 15 September 2016 until the telephone conversation with Mr Buckley on 28 October 2016.

137. In the course of doing so, Mr Pitt set out the exchanges that he had had with Mr Buckley that had led to his decision to make his disclosure. Mr Barton recorded the information provided by Mr Pitt in an attendance note, the relevant parts of which are set out below. That attendance note was reviewed by Mr Pitt and his revisions are included below in blue:

*'There was subsequently a meeting on the INM side at Citywest after the INM Board meeting [on 19 October 2016]. That meeting included Leslie Buckley, Jerome, Ryan Preston and Robert. It was agreed that in the circumstances and in the absence of the matter having been before the INM M&A committee, it would not be possible to make any kind of binding offer. It was considered that*

*synergies would have to be assumed to exclude a merger of the newsrooms for regulatory reasons. If the transaction got through regulatory clearance, behavioural undertakings would be required going forward and breach of these would be a criminal offence, which would create a huge operational risk. Davy's advice on the projected growth figure of 3% was appropriate. There was market research and documents in the public domain which suggested that 3% was the current figure and a good projected figure; also, the fact that there would be the kind of new entrant, in the market would create a competition dynamic which suggested the growth would be at that kind of level. It also appeared that the synergies should be more to the advantage of the buyer rather than the seller. The conclusion was that the value of the company was probably around 14 million.*

*On 20 October 2016, Robert met Leslie Buckley. Leslie said that he was annoyed with “negativity” by Robert and Ryan about the transaction and said that he would not let negativity stand in the way of doing the deal. He indicated that he would “do the deal regardless”. He also said that the possible valuation of €14 million was “insulting to the major shareholder”. He said that the major shareholder was entitled to a reward for bailing out the company and had written a large cheque at the time. Robert responded by saying that he had a duty to all shareholders (including Denis) and was perfectly happy to do the transaction but that it must satisfy appropriate commercial terms. Leslie proceeded to say that he wanted to do this transaction no matter what and would not let negativity by others stand in his way. Robert asked Leslie whether he intended the transaction no matter the conclusion arrived by Davy and management in terms of the commercial valuation and he said he did so intend.*

*Robert was very concerned by the comments made at this meeting. He later spoke to Jerome and informed Jerome of the comments regarding the need to reward the major shareholder. Jerome expressed some concern at what had been said in his meeting with Leslie Buckley and that there seemed to be a very intense desire to [do] the deal.’*

...

*‘After meeting Pat Claffey, Robert and Ryan had a meeting with Leslie Buckley. This was a normal meeting with a scheduled agenda. Three topics which came*

*up at that meeting led Robert to be quite alarmed and concerned for the position of INM, himself and Ryan.*

*First, as regards the potential Newstalk deal, Leslie Buckley told him that he had discussed the matter with Dominic Shorthouse and Robert would get a new valuation document. Robert said that he had just got it in the meeting with Pat Claffey. Leslie Buckley asked him did he want to do the deal? Robert said yes, but at the right price. Leslie Buckley said that he was very disappointed and did they not get it? Leslie Buckley said that Davy could be influenced by management to write in their valuation what management told them to write. Robert said that his initial valuation had been €10 million to €12 million and that based on information provided, he could get to €17 million but was not comfortable beyond that point. Leslie Buckley asked to know when he would respond and said “you’ve got 24 hours”. **Leslie stated he wanted to [do] the deal at the latest IBI price.***

*The second matter of concern was a discussion about wider business strategies for INM. Robert raised the prospect of disposing of certain print assets so as to be able to move into different technologies. Leslie Buckley rejected this saying “Denis is not a seller” **as he is fearful of how the papers would then treat him and that there would be difficulty around selling such assets because of how people regarded Denis. This was blocking one strategy to protect a certain shareholder.***

*The third item which caused concern was that there was an ongoing process about trying to rationalise the senior management team and reduce costs. This involved Robert, Leslie Buckley and Celine Doyle, the head of HR. As part of this process, there had been a discussion with Dee Forbes, the new CEO of RTE, about the possibility of getting Stephen Rae a job at RTE. This had been considered a prospect but from information which was now going around, it looked like it was not on the cards. Leslie Buckley said that there were “risks with Stephen” and one of the risks was that Stephen could disclose that Leslie Buckley had influenced the editorial. Robert was concerned by this because under BAI, INM is not controlled by Denis O’Brien.’*

***On foot of text I sent, Jerome Kennedy rang me and discussed the issue. I relayed Leslie’s comments on [Newstalk] and how worried I was. I told Jerome he could expect a call from Leslie.***

...

*'On 28 October 2016, Leslie Buckley rang Robert at 8am. Robert missed him but returned the call shortly after. Leslie Buckley said that he was "very disappointed" that the valuation range had not moved up as he had requested. Robert explained the rationale for the changes and the valuation. Leslie Buckley asked Robert would he go to €18 million? Robert said yes but at this price it would have to be subject to significant DD, because of concerns about matters such as the recent resignation and the recent listener figures. Leslie Buckley said that he was disappointed that Robert had not influenced Davy to move closer to the IBI figure. Leslie Buckley asked is "€18million your maximum?" Robert said yes it was the furthest he could go.'*

...

*'At this point, Robert was becoming increasingly more uncomfortable. He felt that even £18 million was far enough away from where the Davy valuation was to give him significant concern about whether he could stand over the transaction being in the best interests of the shareholders as a whole. At this point, he resolved to get separate advice.'*

...

*'He initially contacted David Byers of McCann FitzGerald, but the position was not entirely clear on separate advice. He decided to contact a person to whom he was close who he knew from his time in PwC who is also a barrister. He got clear advice that if he was to buckle to the pressure from the Chairman and agreed to influence Davy to increase the valuation he would be in breach of the Companies Acts by putting forward false valuations. This was regardless of the fact that the transaction would still have to go through approval processes within INM.'*

138. On 18 November 2016, Mr Pitt met with the ODCE. The ODCE note of that meeting recorded Mr Pitt's concern in relation to the proposed acquisition of Newstalk as follows:

*'The 3<sup>rd</sup> issue relates to a proposed acquisition of Newstalk from Communicorp, a company owned by DOB and called the de Valero project. On 7 September, 2016, RP received a phone call from Mr Dominic Shorthouse who he described as a personal adviser to DOB seeking to arrange a meeting to discuss matters of interest to INM and Communicorp. RP described this contact as an unusual occurrence. A meeting was arranged for 15 September, 2016 at Communicorp's office at Grand Canal Quay. It was attended by RP, Dominic Shorthouse, Lucy Gaffney, Gervaise Slowey, CEO, Communicorp and Pat Claffey; Island Capital. At this meeting, Communicorp put forward a proposal that INM would acquire Newstalk. RP indicated that his initial response to this was to the effect that it would have to be thoroughly reviewed and could only be considered if it made commercial sense for INM. He would need to review the proposal from a commercial and regulatory perspective.*

*Communicorp engaged IBI Corporate Finance to advise them. IBI came up with a valuation of Newstalk of a range of €30m - €37m. INM engaged Davys who conducted their own research and valued the business at €10m - 15m. RP noted that this accorded with his own personal estimate of €10m - €12m. He also obtained advice on regulatory and other matters from [Ryan] Preston and Cormac McNulty of the M & A Division. Detailed discussions ensued on the respective valuations which resulted in Davys increasing their estimate to €11m - €16m while IBI came down to €26m.*

*RP reported that LB had put considerable pressure on him to agree to the acquisition at the €30m+ valuation on 3 separate occasions.*

- *On 20 October, 2016, LB indicated that he wanted the deal done and was unhappy about the "negativity" of others to the deal. According to a contemporaneous note prepared by RP, LB claimed that the Davys valuation "was an insult to Denis O'Brien". LB also indicated that he had not discussed the matter with DOB. RP reported this contact to JK, who expressed some concern at the pressure being applied.*

- *On 21 October, 2016, RP met with LB and has a discussion on the valuations. LB noted that DOB had ideas on how INM could maximise value from the deal. RP indicated that he could stretch to €17.5m but no more. LB was still arguing for the €30m+ price to be agreed.*
  
- *On 26 October, 2016, RP met with Pat Claffey, Island Capital, to discuss the valuations. This was followed by a meeting involving LB, [Ryan] Preston CFO and RP to discuss a number of topics. At one stage, it was suggested that some print assets might be sold and LB expressed the view that “DOB was not a seller”. In the course of a discussion on possible cost savings, it was suggested that the terms for the Editor in Chief (Stephen Rae) might be renegotiated. However, LB expressed concern in case the Editor went public with disclosures regarding editorial interference that had taken place in the past. LB also indicated that he spoken about the proposed acquisition to Dominic Shorthouse. Following this meeting, LB was very irate and threatening towards RP and [R]P (CFO) asking them "did they not get it". It was RP's view that LB wanted the transaction to proceed on the basis of the IBI valuation. LB also suggested that their lack of cooperation would have consequences for them. He also indicated that Davys would do as they were told. Following this conversation, RP again contacted Davys and asked them to re-check their valuation and they confirmed that they stood over their work. RP received a text from LB a little later indicating that LB was going to talk to JK about the matter. RP contacted JK and again expressed concern about the actions of LB and about his own personal situation.*
  
- *On 28 October, 2016, RP received a phone call from LB. LB expressed disappointment with documents that RP had sent him, particularly as they included the Davys price range rather than the IBI valuation. He accused RP and BP of trying to sink the transaction. He also expressed disappointment that the documents had also been copied to JK. Some further discussion of the valuation ensued and RP indicated that he would be happy to endorse a price of €18m subject to appropriate due diligence (he noted that he had*

*had some concerns because Garrett Harte, Editor in Chief of Newstalk had resigned the preceding week).*'

139. When interviewed by the Independent Reviewers, Mr Pitt based his evidence on the emails he had sent himself recording the conversations he had had with Mr Buckley.

20 October 2016 – Meeting between Mr Buckley and Mr Pitt.

*'So, the next day, then, is the first of what I would call the key instances which turned this into a very serious matter. ... He asked to speak to me about the day's previous meeting. He expressed annoyance – now, when I say 'annoyance', it was like anger annoyance – with Ryan Preston's perceived negativity towards the transaction. He specifically brought up the 3% versus 8% growth rates and pricing on the 2019 forecast.*

...

*He then proceeded to say that he wanted to do this transaction no matter what and he would not let negativity by others stand in his way. He said he regarded the valuation of up to [14] million as insulting to the major shareholder.*

...

*He also stated the major shareholder, Denis, had saved the company and deserved some reward in return at this time, and if INM were to pay a price which did that, he was eager to do so. So the price then was no longer about what the facts or what the valuation methodology told us. I asked him did he intend for this transaction to happen no matter what the conclusion arrived by management and Davy in terms of the commercials, and he said he does so intend.'*

26 October 2016 – Meeting between Mr Buckley, Mr Pitt and Mr Preston.

*'We were asked by Leslie to discuss the [Newstalk] project, but, as he said, he had discussed with Dominic Shorthouse, the previous evening in New York, the issue and that IBI were preparing a new valuation. [He] confirmed that he had met with Pat [Claffey] and was to discuss the document I had received with Ryan, Cormac and Davy. He asked me whether I still wanted to do the deal. I replied I did but at the right price and I stated that I felt the price of 26.8 million is too high for the asset. Leslie then became very threatening and irate and made the following points in a statement. He said 'I'm very disappointed in both of you'. He asked about the transaction and our attitude to it. He said "do*

*you not get it?’ That was after saying that he wanted to do the transaction and at the latest IBI price.*

...

*I understood that he meant that there would be consequences for myself and Ryan by that statement. He also clearly said that Davy could be influenced by management and they would write whatever we told them to.*

...

*Davy could be influenced by management and that they would write whatever we told them to. I reiterated that the transaction was attractive at the right price and that my initial and completely objective route of action would have been in the region of 10 million. Working with all parties we had managed to see a more positive stretch valuation (positive for [sell] side) of circa 17 million but I did not feel comfortable going beyond that.’*

*‘So coming out of that meeting, okay, this was now the second time where my Chairman had said to me that he wanted to do this deal, he wanted to do this deal at a price that was not based on what the fair valuation of the business was. It was based on a price which he regarded as a reward for our shareholder. He was asking myself and Ryan, and also, by extension, Cormac McNulty to go to Davy and ask Davy to change the valuation of the business. That would have meant that I was engaged in a fraud on INM’*

*28 October 2016 – Telephone conversation between Mr Buckley and Mr Pitt.*

*‘Leslie said that he was very disappointed by the document sent the previous evening as the valuation range had not moved up significantly as he had requested.*

...

*Leslie accused me and Ryan of not wanting to do the deal and trying to sink the transaction. I again reassured Leslie that we both do support the deal which is commercially [attractive] and if terms could be agreed which were fair to INM shareholders.*

...

*I reiterated to Leslie that I was willing to stretch slightly beyond the Davy valuation to show that I believed in the deal and the outlying] valuation of 16.9 which one I had previously discussed. That had been suggested to go to 17.5 and Leslie was now asking me was I willing to go to 18. I replied that I could do, even if it meant some distance between myself and the Davy valuation, and*

*I would use my credibility as a CEO to try and bridge the gap with the M&A Board, the Board and eventually shareholders. ... Leslie reiterated his disappointment that I had not dramatically changed the valuation by influencing Davy to take the IBI position.*

*This was clearly said to me. He said that he wanted Davy to move to the IBI position. It was not towards, because in my protected disclosure I also correct that. It wasn't to move towards something; it was to get to that number.'*

In the course of giving evidence to the Independent Reviewers, Mr Pitt did not discuss the meeting with Mr Buckley that took place on 21 October 2016.

140. Mr Pitt's description of these conversations with Mr Buckley was examined in detail. Mr Pitt's position, having been cross-examined, was as summarised below:

*20 October 2016 – Meeting between Mr Buckley and Mr Pitt.*

In giving evidence, Mr Pitt:

- Confirmed that Mr Buckley expressed annoyance at Mr Preston's negativity.
- Confirmed that management wanted to do the deal on commercial terms that made sense for INM.
- Maintained that when Mr Buckley said he '*wanted to do the deal regardless*', he believed:

*'that Mr Buckley wanted to do the deal regardless of concerns that management had about the value of the business and he wanted to do and he wanted to do is [inaudible] with the price, which would have been the price of the seller. So that's what my definition of 'regardless' is. I don't recall the question was ever put to me about what the subtleties of 'regardless' were, Mr Gillane.*

...

*So, I maintained my position and Mr Buckley wanted this deal regardless and at the price which was not favourable to the INM shareholders but favourable to the seller'*

- Denied that he had mentioned €14 million except in the context of his earlier assessment of the value of Newstalk.
- Maintained that Mr Buckley did say that Mr O'Brien deserved to be rewarded for the support he had given INM and that he told Mr Kennedy that Mr Buckley had said that.

*21 October 2016 – Meeting between Mr Buckley and Mr Pitt.*

Mr Pitt accepted that the account he gave of the meeting on 21 October 2016 was incorrect.

- Contrary to his protected disclosure to INM, the pressure on Mr Preston and him was not building; and
- He did not tell the ODCE that Mr Buckley's approach had mollified since the previous day

*26 October 2016 – Meeting between Mr Buckley, Mr Pitt and Mr Preston.*

Mr Pitt's evidence was that he:

- Acknowledged, at least theoretically, that if Mr Buckley thought that Mr Pitt was reducing the price he had previously told him and had shared with Mr O'Brien, one way for Mr Buckley to express his concern that Mr Pitt was changing his position would be to say "*I'm not going back to Denis on price*". However, he denied that he had suggested that he was changing his position on price.
- Maintained, whilst accepting that Davy could be influenced by management with proper data, that he didn't '*think you can just tell Davy change something*'.

- Maintained that Mr Buckley had said that he wanted to do the deal at the IBI price.

28 October 2016 – Telephone conversation between Mr Buckley and Mr Pitt.

Mr Pitt maintained that Mr Buckley had accused him of trying to sink the transaction.

(b) Mr Buckley's submissions

141. In Chapter 8, we have set out Mr Buckley's submissions in relation to Mr Pitt's concerns at the pressure applied on him and Mr Preston in the course of the negotiations to acquire Newstalk.

142. This Chapter addresses Mr Buckley's criticisms of the protected disclosures made by Mr Pitt and Mr Preston in relation to the proposed acquisition of Newstalk or the evidence given by them in support of their disclosures.

143. In his submissions relating to the proposed acquisition of Newstalk, Mr Buckley:

- In relation to Mr Pitt's discussions with Mr Buckley and Mr Kennedy about his future, invited us *'to conclude ... that [Mr Pitt] is unwilling to speak the plain truth to [the Inspectors] even on oath.'*
- Asserted that *'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.'*
- Described an email that Mr Pitt sent to himself as *'a naked attempt to fabricate a paper trail to support his allegations'*.
- Contended that Mr Pitt gave inconsistent accounts of their meeting on 21 October 2016 and submitted that:

*'What is clear is that Mr Pitt's accounts are themselves wholly contradictory and inconsistent in relation to the meeting on 21 October 2016. That inconsistency calls into serious question his credibility. Mr Kennedy does not have any recollection of Mr Pitt*

*saying what he asserts he relayed to him. Mr Pitt gave an incorrect account to Mr Preston, which served his purposes in encouraging Mr Preston to support him both in making a protected disclosure and in giving an account of improper pressure from Mr Buckley. He gave an incorrect account to Mr Kennedy/the Company when making his protected disclosure on 16 November 2016 as well as to the ODCE for the dual purpose of making a fabricated account of improper pressure seem more credible and, in the latter case, of using the fact of a complaint to that body to bring pressure to bear on the Company.'*

20 October 2016 – Meeting between Mr Buckley and Mr Pitt.

144. Mr Buckley's submissions in relation to the conversation that occurred in the course of this meeting are summarised in Chapter 8, paragraphs 205 to 207.
145. At the centre of the dispute arising from this meeting were the assertions by Mr Pitt that Mr Buckley said that he wanted to acquire Newstalk 'regardless of what Davy was saying' and that 'Mr O'Brien deserved to be rewarded' – both of which Mr Buckley denied saying.
146. Mr Buckley submitted that:

*'... [his] position is the more likely to be true in light of Mr Kennedy's evidence. Mr Kennedy denied that, when the conversation was recounted to him by Mr Pitt, anything was said to the effect that Mr Buckley had told him that Mr O'Brien deserved to be rewarded and that Mr Buckley would never have raised that – Mr Kennedy said that it never came up. He further denied that it was said to him that Mr Buckley wanted to do the deal regardless of what Davy was saying.'*

*'It must be considered 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.'*

*'When it was finally put to Mr Kennedy that he was in fact told about Mr Buckley suggesting a reward for Mr O'Brien, he was absolutely clear – "it was*

*so alien to anything that would have been taking place at the meetings of the company or the sub-committees of the company or whatever.” This response only further supports the proposition that had Mr Kennedy actually heard such an allegation, he would have acted on it. Perhaps more significantly, he could not have failed to recall it.’*

*‘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.’*

21 October 2016 – Meeting between Mr Buckley and Mr Pitt.

147. Mr Buckley summarised his criticism of the evidence that Mr Pitt gave in relation to this meeting as follows:

*‘Mr Pitt’s protected disclosure to the Company purports to record that it was during this meeting that the pressure was starting to get to him. He now says in evidence that this was a mistake and that he thinks that he got the meetings mixed up. While such explanation might be understandable at first blush, there are a number of reasons why it is unlikely that this was an innocent mistake. First, there is no mention in the protected disclosure of the phone call with Mr Kennedy to the effect that Mr Buckley’s position had mollified and which would clearly have shown that his description of the meeting on 21 October 2016 could not be correct. Secondly, the ‘error’ was repeated only two days later when Mr Pitt first met the ODCE and said that Mr Buckley was still arguing for the €30m price to be agreed on this occasion (something which he had never recorded in any of his email notes). Mr Pitt accepts that he did not tell the ODCE that Mr Buckley’s position had mollified on 21 October 2016 (although*

*he later said that he does not know), giving further weight to the proposition that he was giving a deliberately misleading account of the events to the ODCE.'*

*'If there is any doubt about it, the relevant passage of Mr Preston's protected disclosure (which is taken from Mr Pitt's notes) also records that the pressure was building on 21 October 2016 and Mr Preston confirmed in his evidence that Mr Pitt had told him that there was pressure on 21 October 2016 and that the position of Mr Buckley having mollified was never mentioned to him and that he was never aware that Mr Pitt had formed the view that whatever pressure Mr Pitt had perceived had eased at any point during the course of the Newstalk transaction. It should be noted that Mr Pitt disagrees with Mr Preston that he never told him Mr Buckley's position had "mollified".'*

*'It is not possible to reconcile the above with Mr Pitt giving an honest account. What is clear is that Mr Pitt's accounts are themselves wholly contradictory and inconsistent in relation to the meeting on 21 October 2016. That inconsistency calls into serious question his credibility. Mr Kennedy does not have any recollection of Mr Pitt saying what he asserts he relayed to him. Mr Pitt gave an incorrect account to Mr Preston, which served his purposes in encouraging Mr Preston to support him both in making a protected disclosure and in giving an account of improper pressure from Mr Buckley. He gave an incorrect account to Mr Kennedy/the Company when making his protected disclosure on 16 November 2016 as well as to the ODCE for the dual purpose of making a fabricated account of improper pressure seem more credible and, in the latter case, of using the fact of a complaint to that body to bring pressure to bear on the Company.'*

26 October 2016 – Meeting between Mr Buckley, Mr Pitt and Mr Preston.

148. This was the meeting at which Mr Pitt asserted that Mr Buckley said that he wanted to acquire Newstalk at the IBI price (then €26.8 million). Mr Buckley criticised the evidence that Mr Pitt gave in relation to this issue as follows:

*'Mr Buckley's evidence was that he wanted to do the deal (which has never been in dispute) but did not say that he wanted to do the deal at the IBI price. Mr Pitt contests this, saying that Mr Buckley said that he wanted to do the deal at the IBI price. Mr Preston, however, now accepts that, while Mr Buckley said he wanted to do the deal, he did not say "I want to do the deal at the IBI price"*

*and that the words "at the IBI price", which were bracketed in his protected disclosure, related to his understanding of what Mr Buckley meant (which was informed by the fact that Mr Preston did not have all the relevant information) rather than reflecting what Mr Buckley had actually said. This is consistent with Mr Preston's email to himself on 13 November 2016, which records this conversation and omits the words "at the IBI price". When Mr Preston's position in this regard was put to Mr Pitt and he was asked did he agree with Mr Preston on this point, Mr Pitt did not seem at all clear on the matter saying – "I don't think I do." He then said:*

*"I think I clarified with Mr Buckley "do you want to do it at the IBI price?" and he said – I don't know if he said "Yes" or affirmed that back, Mr Guerin. That's what I think, okay."*

*'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."*

*'Mr Pitt's reliability on this issue is cast into further doubt by Mr Kennedy. Mr Pitt told the Independent Reviewers that following the meeting on 26 October 2016, Mr Pitt told Mr Kennedy of Mr Buckley's comments "in detail". Mr Kennedy is clear that what was reported to him was that Mr Buckley wanted to do the deal but not that Mr Buckley was trying to force the price up or that he wanted to do the deal at the IBI price.'*

28 October 2016 – Telephone conversation between Mr Buckley and Mr Pitt.

149. In relation to the telephone call that took place between Mr Buckley and Mr Pitt on 28 October 2016, Mr Buckley summarised the evidence as follows:

- *Mr Buckley accepted that he used words such as “very disappointing” or “very disappointed” and that he was hoping that the gap would be closed between Davy and IBI.*
- *Mr Pitt told him that Davy had reviewed its assumptions, as requested by Mr Buckley, and that this had resulted in a change to the valuation model (with the valuation moving a little upwards).*
- *Mr Pitt and Mr Buckley had a discussion about the rationale for the changes and Mr Pitt accepted that Mr Buckley did not say anything inappropriate in relation to that rationale or the details of it.*
- *Mr Buckley asked Mr Pitt to confirm that €18m was his maximum (subject to due diligence) and that Mr Pitt agreed that it was.*
- *Mr Buckley did not ask Mr Pitt to go over €18m.*
- *Mr Buckley denied accusing Mr Pitt of trying to “sink the transaction”.*

(c) The INM Directors’ submissions

150. The INM Directors addressed the evidence given by Mr Pitt and Mr Preston in relation to the proposed acquisition of Newstalk in the following terms:

*‘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.'*

(d) Communicorp's submissions

151. Communicorp contended that:

*'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.'*

(e) Our conclusions

152. For the reasons set out in Chapter 8, we have concluded that:

- Serious misunderstandings occurred in the course of the conversations referred to above. Mr Buckley contributed to those misunderstandings by not taking Mr Pitt and Mr Preston into his confidence and explaining:
  - 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 – without also explaining why he thought the assumptions being used by management and Davy were incorrect or over-cautious.
  - 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.
    - 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.
  - 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.
  - 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.
- Mr Pitt and Mr Preston bear some responsibility for the misunderstandings that arose because they relied on their interpretation of Mr Buckley's comments – and failed to ensure that that they had done so correctly.

### Overall Conclusion

153. In relation to the challenges to the integrity of Mr Pitt and Mr Preston in making the allegations in their protected disclosures, we have concluded that, whilst certain of the facts or matters relied upon or conclusions reached by them were not correct, that did not occur because those matters were fabricated, exaggerated or invented. We are, therefore, satisfied as to Mr Pitt and Mr Preston's bona fides in the expression of their concerns.

154. We have reached these conclusions having had the opportunity to observe the principal witnesses giving evidence, including under cross-examination. Mr Pitt, for example, was cross-examined for in excess of 45 hours on 13 days spread over 19 weeks.

**THE HIGH COURT**

2018 124 COS

THURSDAY THE 6<sup>TH</sup> DAY OF SEPTEMBER 2018

BEFORE THE PRESIDENT

**IN THE MATTER OF INDEPENDENT NEWS AND MEDIA PLC**

**AND**

**IN THE MATTER OF THE COMPANIES ACT 2014**

**BETWEEN**

**THE DIRECTOR OF CORPORATE ENFORCEMENT**

**APPLICANT**

**AND**

**INDEPENDENT NEWS AND MEDIA PLC**

**RESPONDENT**

Upon Motion of Counsel for the Applicant pursuant to Notice dated the 23<sup>rd</sup> of March 2018 seeking an order pursuant to Section 748 of the Companies Act, 2014 (the “**Act**”) and Order 74B, rule 3(1) of the Rules of the Superior Courts, 1986 (as amended) (“**RSC**”) appointing inspectors to investigate and to report on the affairs of Independent News and Media PLC (“**the Company**”) further directions and costs being listed for hearing before the Court on the 10<sup>th</sup> 11<sup>th</sup> and 12<sup>th</sup> days of July 2018 in the presence of Counsel for the Applicant and Counsel for the Respondent and upon reading the said Notice of Motion and the Grounding Affidavit of Ian Drennan sworn on the 23<sup>rd</sup> of March 2018 and the Second Affidavit of Ian Drennan sworn on the 13<sup>th</sup> of April 2018 and the Affidavit of Dermot B Morahan sworn on the 13<sup>th</sup> of April 2018 and the Replying Affidavit of Dr Leonard O’Hagan sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of Michael Doorly sworn

CEA

**THE HIGH COURT**

on the 16<sup>th</sup> of April 2018 and the Affidavit of Fionnuala Duggan sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of Murdoch MacLennan sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of John Bateson sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of Seamus Taaffe sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of Terence Buckley sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of Catriona Mullane sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of Paul Connolly sworn on the 18<sup>th</sup> of April 2018 and the Affidavit of Jerome Kennedy sworn on the 13<sup>th</sup> of April 2018 and the Affidavit of Gerry Wilde sworn on the 17<sup>th</sup> of April 2018 and the Affidavit of Kim Green sworn on the 16<sup>th</sup> of April 2018 and the Affidavit of David McGill sworn on the 28<sup>th</sup> of May 2018 and the Affidavit of Steven Cornmell sworn on the 5<sup>th</sup> of June 2018 and the Third Affidavit of Ian Drennan sworn on the 28<sup>th</sup> of May 2018 and the Second Affidavit of Dr Leonard O'Hagan sworn on the 15<sup>th</sup> of June 2018 and the Second Affidavit of Murdoch MacLennan sworn on the 15<sup>th</sup> of June 2018 and the Second Affidavit of Kim Green sworn on the 14<sup>th</sup> of June 2018 and the Affidavit of Ronan McCarthy sworn on the 15<sup>th</sup> of June 2018 and the Second Affidavit of Fionnuala Duggan sworn on the 15<sup>th</sup> of June 2018 and the Supplemental Affidavit of Dr Leonard O'Hagan sworn on the 5<sup>th</sup> of July 2018 and the Fourth Affidavit of Ian Drennan sworn on the 22<sup>nd</sup> of June 2018 and the Second Affidavit David McGill sworn on the 22<sup>nd</sup> of June 2018 and the documents and exhibits therein respectively referred to together with the outline written legal submissions on behalf of the Applicant and the Respondent dated the 27<sup>th</sup> of June 2018 and the 5<sup>th</sup> day of July 2018 respectively and the submissions on the proposed terms of reference on behalf of the Applicant and the Respondent dated the 20<sup>th</sup> of July and the 17<sup>th</sup> of July 2018 respectively and on hearing said respective Counsel

The Court was pleased to reserve its judgment herein

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And the matter coming on for judgment on the 4<sup>th</sup> of September 2018 in the presence of said Counsel for the respective parties and judgment being delivered on that day

And the Court being satisfied having considered the evidence presented by the Applicant under subsections (b) (c) (d) (f) (i) (j) of Section 748 (1) of the Companies Act 2014 that there are circumstances present in respect of which all six subsections relied upon by the Applicant are applicable and that the evidence merits the appointment of inspectors to investigate and to report on the affairs of the Company and the Court approving of the Applicant's nominees as inspectors namely Mr. Sean Gillane S.C. and Mr Richard Fleck CBE and the Court approving of the terms of reference as set out in paragraph 2 of the within notice of motion save in respect of sub paragraphs (b) (i) ,(e) (i) and (ii),(i) and (j)

And on the application of Counsel for the Respondent seeking to postpone the making up of the formal order to allow the Respondent to consider the judgment of this Court

And on hearing said Counsel and said Counsel for the Applicant

And the Court being minded to allow time for the consideration of the said judgment and proceeding to list the matter before the Court this day in respect of the order and any cost application and any stay application which may follow

And the matter being listed this day in the presence of Counsel for the Applicant and Counsel for the Respondent

And the Court being informed that the only matter for the Court to consider is an application for the Applicant's costs which said application which is not opposed by the Respondent

**IT IS ORDERED** pursuant to Section 748 of the Companies Act 2014 and Order 75B Rule 3(1) of the Rules of the Superior Courts 1986 (as amended) that Mr.

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Sean Gillane S.C. and Mr Richard Fleck CBE be appointed as Inspectors for the purpose of investigating and reporting 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;
  - (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;
- (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 proposed Newstalk Acquisition;

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- (c) the proposed payment of a fee to Island Capital in March 2015 or thereabouts (the “**Success Fee**”) in connection with the disposal of the Company’s holding in APN News & Media Limited (the “**APN Transaction**”), to include:
- (i) the facts of and circumstances concerning the proposed payment of the Success Fee;
  - (ii) the role played by the Chairman in relation to the proposed payment of the Success Fee;
- (d) consideration of payment of a fee to Paul Connolly, then a Director of the Company, in connection with the APN Transaction;
- (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**”);
- (f) whether the Chairman, in March 2016, August 2016, September 2016, November 2016, December 2016, January 2017 or at any other time, unlawfully disclosed to any third parties (including but not limited to Denis O’Brien and James Morrissey) “inside information” within the meaning of the European Union (Market Abuse) Regulations, 2016 and/or Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (together, the “**Market Abuse Regulations**”), to include:

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- (i) the facts of and circumstances concerning any such disclosures; and
  - (ii) the response of the Board to being made aware of the same;
- (g) whether the Chairman, between June and November 2016 or at other time, disclosed to third parties (including but not limited to Denis O'Brien, Dominic Shorthouse and Dermot Hayes) information that was or is confidential to the Company (including but not limited to legal advice received by the Company), to include:
- (i) the facts of and circumstances concerning any such disclosures; and
  - (ii) the response of the Board to being made aware of the same;
- (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;
- (i) whether, arising out of the foregoing or any other matters identified by the Inspectors, there have been any breaches of:
- (i) the Act;
  - (ii) the Protected Disclosures Act, 2014;
  - (iii) the Data Protection Acts, 1988 and 2003 (as amended);
  - (iv) the Market Abuse Regulations;

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- (v) any regulatory approvals or conditions attached thereto (or any conditions otherwise associated with such approvals) granted to the Company by competent authorities (including, but not limited to, the Minister for Communications, Climate Action and Environment, the Competition and Consumer Protection Commission and the Broadcasting Authority of Ireland); and/or
  - (vi) the common law;
- and, if so, the circumstances relating to such breaches, the provisions involved, the persons in default and the associated evidence;
- (j) whether, arising out of the foregoing or any other matters identified by the Inspectors:
    - (i) the affairs of the Company have been conducted:
      - (I) in an unlawful manner; or
      - (II) in a manner that is unfairly prejudicial to some part of its members;
    - (ii) any actual or proposed act or omission of the Company (including an act or omission on its behalf) was, is or would be unfairly prejudicial to some part of its members;
    - (iii) persons connected with the management of the Company's affairs have, in that connection, been guilty of misfeasance or other misconduct towards the Company or its members; or
    - (iv) the Company's members have not been given all the information relating to its affairs which they might reasonably expect;
  - (k) any related or other matters with the prior approval of the Court, given on consideration of an interim report from the Inspectors.

**AND IT IS ORDERED** that

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1. the appointment of Mr. Sean Gillane S.C. and Richard Fleck CBE as Inspectors be effective as of the 4<sup>th</sup> of September 2018 that being the date of judgment
2. the Inspectors do deliver their interim report to the Court no later than the 12<sup>th</sup> day of April 2019 (being the last day of Hilary Term)
3. the Inspectors do have liberty to apply

**AND IT IS FURTHER ORDERED** that the Applicant do recover as against the Respondent his costs of this Motion and Order to be taxed in default of agreement to include any reserved costs and the costs of written submissions delivered prior to the hearing and the written submissions on the terms of reference delivered post hearing

Angela Brennan

REGISTRAR

Perfected 6 September 2018

Dermot B Morahan  
Solicitor for the Applicant

Mc Cann Fitzgerald  
Solicitor for the Respondent

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**Dramatis Personae/Definitions**

AGM	Annual General Meeting
A&L Goodbody	A&L Goodbody – Irish law firm retained by Mr Buckley
Allan Gray	Allan Gray Australia Pty Limited – shareholder in APN
APN	APN News & Media Limited
APN Transaction	The sale of INM’s shareholding in APN
ARN	Australian Radio Network Pty Limited
Azur Committee	Committee of the INM Board comprising Mr Buckley, Mr Kennedy and Mr Pitt
Baycliffe	Baycliffe Limited – Mr O’Brien’s investment vehicle
Blaydon	Blaydon Limited
Block Trade	The sale of INM and Baycliffe’s shareholdings in APN
Board/INM Board	Board of Directors of INM
CBA	Commonwealth Bank of Australia – APN’s investment adviser
Central Bank	The Central Bank of Ireland
Clear Channel	Clear Channel Communications Inc
Communicorp	Communicorp Group Limited
Cosi deal	Term used by Mr O’Brien to describe proposed payments to Mr Cosgrove and Mr Harris
Credit Suisse	Credit Suisse (Australia) Limited
Daniel Spring & Co	Daniel Spring & Co – Irish law firm retained by Mr Pitt, Mr Preston and Ms Doyle
Davy	Davy Finance
Deloitte	Deloitte & Touche
Directors	The Directors of INM
DMZ IT	DMZ IT Limited
DPC	The Data Protection Commissioner
Dr O’Hagan	Dr Len O’Hagan CBE – Director, INM
Draft Engagement Letter	Draft letter setting out the terms on which Island Capital would represent INM in the proposed sale of its shareholding in APN
Eames	Eames – Irish law firm retained by Mr Mizak, DMZ IT, Mr J Henry, Mr S. Henry, Mr Duggan, Specialist Security Services, Resilient, and Reconnaissance
EGM	Extraordinary General Meeting

Gilbert & Tobin	Gilbert & Tobin – Australian law firm retained by Mr O’Brien/Baycliffe
IBI	Financial advisers to Communicorp
IIU	IIU Nominees Limited – Mr Desmond’s investment vehicle
Independent Review	The Independent Review established by the INM Board
Independent Reviewers	Mr Barniville and Mr S Kingon
INM	Independent News & Media plc (now re-named – Mediahuis Ireland Group Limited)
INM Directors (or NEDs)	Mr T. Buckley, Mr Connolly, Mr Doorly, Mr Kennedy, Mr Marshall, Ms Mullane, Dr O’Hagan
IR Report	The Report by the Independent Reviewers
ISE	Irish Stock Exchange
Island Capital	Island Capital Management Limited
Johnson Winter Slattery (or JWS)	Johnson Winter Slattery – Australian law firm retained by INM
KPMG	KPMG
LSE	London Stock Exchange
MAR	Market Abuse Regulation
McCann FitzGerald	McCann FitzGerald – Irish law firm retained by INM and by the INM Directors
Mediahuis NV	The company that acquired INM
Moriarty Tribunal	Moriarty Tribunal into Payments to Politicians and Other Matters
Mr Barniville	David Barniville SC (as he then was) – Independent Reviewer
Mr Barton	Sean Barton – Partner, McCann FitzGerald
Mr Bateson	John Bateson – Director, IIU
Mr Breen	Robert Breen – TDS Global Holdings Corporation
Mr Brophy	Karl Brophy – Director of Corporate Affairs, INM
Mr Buckley	Leslie Buckley – Chairman, INM
Mr Buggy	Donal Buggy – Chief Financial Officer, INM
Mr Byers	David Byers – Partner, McCann FitzGerald
Mr Carlyle	Declan Carlyle – INM
Mr Chenoweth	Brett Chenoweth – Chief Executive, APN
Mr Claffey	Patrick Claffey – Director, Island Capital
Mr Clark	Christopher Clark – President and Chief Executive Officer, Trusted Data Solutions LLC
Mr Cole	Ron Cole – TDS
Mr Connolly	Paul Connolly – Director, INM
Mr Cooper	Nick Cooper – General Counsel, Cable & Wireless

Mr Cosgrove	Peter Cosgrove – Chairman, APN
Mr Crowley	Vincent Crowley – Chief Executive Officer, INM
Mr Denieffe	Michael Denieffe – INM
Mr Desmond	Dermot Desmond
Mr Donagher	Andrew Donagher (Company Secretary, INM)
Mr Doorly	Company Secretary and Chief Executive Officer, INM
Mr Drennan/the Director	The Director of Corporate Enforcement
Mr Duggan	Keith Duggan – Resilient Defence
Mr Fagan	Brian Fagan – Island Capital
Mr G. O'Reilly	Gavin O'Reilly – Chairman, INM
Mr Godfrey	Tom Godfrey – IBI
Mr Godson	Rory Godson – Chief Executive Officer, Powerscourt
Mr Heffernan	Ger Heffernan – IBI
Mr Harris	Ted Harris – Vice-Chairman, APN
Mr Harrison	David Harrison – Director, INM
Mr Harvey	John Harvey – Director, APN
Mr Haugh	Bob Haugh, Chief Executive, Click&Go
Mr Hayes	Dermot Hayes – Managing Director, Island Capital
Mr Healy SC	Jeremiah Healy SC – Senior Counsel to the Moriarty Tribunal
Mr Heneghan	Nigel Heneghan – public relations adviser to INM
Mr Henry	John Henry – Specialist Security Services
Mr Howard	Jeff Howard – Chief Financial Officer, APN
Mr Hunt	Peter Hunt – Chairman, APN
Mr Inverarity	Duncan Inverarity– Partner, A&L Goodbody
Mr Karpman	Randy Karpman – General Counsel and Vice-President, Trusted Data Solutions LLC
Mr Kennedy	Jerome Kennedy – Director, INM
Mr Kenny	Mark Kenny – Managing Director, FTI Strategic Communications
Mr Kingon	Stephen Kingon CBE, FCA – Independent Reviewer
Mr Knox	John Knox – Director, Credit Suisse
Mr Lochrin	James Lochrin – Island Capital
Mr Luscombe	Kevin Luscombe – Director, APN
Mr Maasland	John Maasland– Director, APN
Mr MacLennan	Murdoch MacLennan – Chairman, INM
Mr Marshall	Allan Marshall – Director, INM
Mr McAleese	Simon McAleese – Partner, Simon McAleese, Solicitors
Mr McAuliffe	Barry McAuliffe – Group Operations Finance Manager, INM

Mr McCarthy	Ronan McCarthy – Deputy IT Director, INM
Mr McGrath	Liam McGrath – Island Capital
Mr Meagher	Paul Meagher – Partner, Meagher, Solicitors
Mr Miller	Michael Miller – Chief Executive, APN
Mr Mizak	Dariusz (Derek) Mizak – DMZ IT
Mr Molloy	Ed Molloy – a Human Resources adviser
Mr Morrissey	James Morrissey – Communications Consultant to Mr O’Brien
Mr Murphy	Ivan Murphy – Davy Finance
Mr Neilan	Mr Jonathan Neilan – Managing Director, FTI Strategic Communications
Mr O’Brien	Denis O’Brien
Mr O’Connor	Brendon O’Connor – Journalist, Sunday Independent
Mr O’Kennedy	Eamonn O’Kennedy – Finance Director, INM
Mr Osborne	James Osborne – Chairman, INM
Mr Pitt	Robert Pitt – Director and Chief Executive Officer, INM
Mr Preston	Ryan Preston – Chief Finance Officer, INM
Mr Rae	Stephen Rae – Editor-in-Chief, Independent Newspapers
Mr Reichel	Damian Reichel – Partner, Johnson Winter Slattery.
Mr S. Henry	Shane Henry – Reconnaissance
Mr Shorthouse	Dominic Shorthouse – investment adviser to Mr O’Brien
Mr Smyth	Sam Smyth – Journalist and broadcaster – Irish Independent
Mr T. Buckley	Terence Buckley – Director, INM
Mr Taaffe	Seamus Taffe – Director, INM
Mr Webb	Joe Webb – Chief Executive Officer, INM
Mr Wilde	Gerald Wilde – IT Director, INM
Ms Conrad	Miranda Conrad – Director, APN
Ms Daly	Maria Daly – Mr L. Buckley’s personal assistant
Ms Doyle	Celine Doyle – HR Director, INM
Ms Duggan	Fionnuala Duggan – Director, INM
Ms Farrell	Lorraine Farrell – Mr Pitt’s personal assistant
Ms Gaffney	Lucy Gaffney – Chairman, Communicorp and Director, INM
Ms Gallagher	Laura Gallagher – Partner, KPMG
Ms Healy	Ann Marie Healy – Head of Group Treasury, INM
Ms Kelly	Helen Kelly – Partner, Mathesons
Ms Kilroy	Jenny Kilroy – FTI Strategic Communications
Ms Mansergh	Harriet Mansergh – FTI Strategic Communications
Ms Mizak	Ela Mizak (Mr Mizak’s wife)

Ms Mulhern	Eugénée Mulhern – Director, Davy.
Ms Mullane	Catriona Mullane – Director, INM
Ms O’Brien	Jacqueline O’Brien – Junior Counsel to the Moriarty Tribunal
Ms Preston	Karen Preston – INM
Ms Scott	Mandy Scott – Mr Gavin O’Reilly’s personal assistant
Ms Sheehan	Maeve Sheehan – Journalist – Sunday Independent
News Corp	News Corporation
Newstalk	News 106 Limited
ODCE	The Office of the Director of Corporate Enforcement Corporate Enforcement Agency
Order	The Order of Mr Justice Peter Kelly dated 6 September 2018
PDA	Protected Disclosures Act, 2014
Peart J.	Mr Justice Peart (now retired)
Phoenix	The Phoenix
Polar	Polar Capital LLP – INM institutional shareholder
Project Azur	The project name for the proposed sale of INM’s shareholding in APN
Project Quantum	Cost saving project undertaken by INM in 2014
Reconnaissance	Reconnaissance Group Limited
Resilient	Resilient Defence Limited
Simon McAleese, Solicitors	Simon McAleese, Solicitors, previously known as McAleese & Co, Solicitors.
Sir Anthony O’Reilly	Sir Anthony O’Reilly
Special Committee	The Sub-Committee of the INM Board established to exercise the Board’s powers in relation to the Independent Review
Specialist Security Services	Specialist Security Services Limited
Sub-Committee	The Sub-Committee of the INM Board appointed to consider Mr Pitt’s disclosure
Success Fee	The fee payable to Island Capital under the draft engagement letter
TDS	Trusted Data Solutions UK Limited
The Act	Companies Act, 2014
TRN	The Radio Network Limited
UKLA	UK Listing Authority
William Fry	William Fry – Irish law firm retained by Mr O’Brien, Baycliffe, Island Capital and Blaydon

**WITNESSES**

**Dates when they gave evidence and on whose behalf they were cross-examined**

**PART A**

**November 2018 to June 2020**

<b>Date</b>	<b>Witness</b>	<b>HC Inspectors</b>	<b>Buckley</b>	<b>Pitt</b>	<b>Preston</b>	<b>INM</b>	<b>INM Directors</b>	<b>O'Brien</b>	<b>Mizak/DMZ</b>
<b>2018</b>									
29 November	Pitt	✓							
20 December	Preston	✓							
<b>2019</b>									
25 January	Pitt	✓							
20 February	Buckley	✓							
21 February	Buckley	✓							
22 February	Murphy	✓							
1 March	French	✓							
5 March	Connolly	✓							
21 March	Buckley	✓							
25 March	Mizak	✓							
25 March	S. Henry	✓							
26 March	J. Henry	✓							

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Date	Witness	HC Inspectors	Buckley	Pitt	Preston	INM	INM Directors	O'Brien	Mizak/DMZ
26 March	Wilde	✓							
20 March	Duggan	✓							
3 April	Mulhern	✓							
16 April	McCarthy	✓							
17 April	Buckley	✓							
1 May	Kennedy	✓							
2 May	Kennedy	✓							
2 May	McNulty	✓							
8 May	Kennedy	✓							
13 June	Buckley	✓							
14 June	O'Hagan	✓							
14 June	T. Buckley	✓							
21 June	Doorly	✓							
27 June	Mullane	✓							
1 July	Doyle	✓							
1 July	Harrison	✓							
5 July	Claffey	✓							
5 July	Kane	✓							
5 July	Shorthouse	✓							
19 July	Gaffney	✓							
22 July	Fagan	✓							
22 July	Hayes	✓							
22 July	Lochrin	✓							
22 July	McGrath	✓							
22 July	Morrissey	✓							
22 July	Slowey	✓							
27 September	O'Brien	✓							

Date	Witness	HC Inspectors	Buckley	Pitt	Preston	INM	INM Directors	O'Brien	Mizak/DMZ
4 October	O'Brien	✓							
25 October	Marshall	✓							
15 November	McAuliffe	✓							
<b>2020</b>									
30 January	McAleese	✓							
1 May	McClellan	✓					✓		
8 May	Denieffe	✓							
26 May	Belinkoff	✓							
26 May	Mahon	✓							
5 June	Webb	✓							

**PART B****September 2021 to July 2023**

Date	Witness	HC Inspectors	Buckley	Pitt	Preston	INM	INM Directors	O'Brien	Mizak/DMZ
2021									
13 September	Murphy			✓			✓	✓	
14 September	Mulhern						✓	✓	
18 September	Pitt						✓		
20 September	Wilde								✓

Date	Witness	HC Inspectors	Buckley	Pitt	Preston	INM	INM Directors	O'Brien	Mizak/DMZ
21 September	McCarthy								✓
22 September	Doyle						✓		
25 September	Pitt						✓		
30 September	J. Henry								✓
30 September	Mizak	✓		✓					
6 October	Preston						✓		
7 October	Preston						✓		
8 October	T. Buckley			✓	✓				
13 October	Marshall			✓					
15 October	Pitt							✓	✓
17 October	Clarke	✓							
18 October	Preston		✓						
19 October	Preston		✓						
21 October	Preston		✓						
22 October	Pitt		✓						
22 October	Preston			✓					
23 October	Pitt		✓						
24 October	Pitt		✓						
25 October	Connolly						✓		
26 October	O'Hagan			✓	✓		✓		
2 November	Kennedy			✓					
3 November	Kennedy			✓					
3 November	Mullane						✓		
4 November	Kennedy			✓					
4 November	Rae	✓							
5 November	Kennedy			✓	✓				
6 November	Pitt		✓						

Date	Witness	HC Inspectors	Buckley	Pitt	Preston	INM	INM Directors	O'Brien	Mizak/DMZ
7 November	Pitt		✓						
10 November	Doorly			✓					
10 November	Pitt		✓						
11 November	Preston		✓					✓	
12 November	Pitt		✓						
16 November	Pitt		✓						
17 November	Pitt		✓						
19 November	Pitt		✓						
23 November	Kennedy			✓					
23 November	Mizak	✓							
24 November	Buckley			✓					
25 November	Buckley			✓					
26 November	Buckley			✓					
26 November	Kennedy			✓					
27 November	Buckley			✓					
30 November	Buckley			✓	✓				✓
16 December	Harrison	✓							
16 December	O'Brien			✓					
<b>2023</b>									
10 May	Pitt	✓							
12 May	Buckley	✓							
19 May	Preston	✓							
24 July	Fettin	✓	✓				✓	✓	
27 July	Aylard	✓	✓					✓	