OUTER HOUSE, COURT OF SESSION

[2024] CSOH 23

CA144/21

OPINION OF LORD HARROWER

In the cause

IMRAN AHMAD

Pursuer

against

THE LORD ADVOCATE

Defender

Pursuer: Lord Keen of Elie, KC, E Campbell; Pinsent Masons LLP
Defender: Moynihan, KC, M Hamilton; Scottish Government Legal Directorate

29 February 2024

Introduction

[1] The pursuer is a former commercial director of the Rangers Football Club Ltd, formerly known as Sevco Scotland Ltd. The defender is the Lord Advocate, and is responsible for the public prosecution of crime in Scotland. In May 2012, Sevco Scotland Ltd purchased the business and assets of the Rangers Football Club plc out of administration. Following investigation into events surrounding the insolvency of Rangers, the Crown obtained a petition warrant on 2 September 2015 for the pursuer's arrest, along with others, on charges that included conspiring to acquire the business and assets of the Rangers Football Club plc for less than their true market value, contrary to the interests of creditors.

[2] The petition warrant was never executed against the pursuer. Prior to the warrant being sought, he had been living in Dubai. Shortly after it was granted, he left for Pakistan. An indictment containing substantially similar charges to those in the petition required to be deserted in October 2015, as it could not be served on the pursuer. In January 2016, a substitute indictment fell, due to the pursuer's failure to appear. On 21 June 2016, the warrant for the pursuer's arrest was withdrawn. Charges against his alleged co-conspirators were also dropped, with the exception of those against Craig Whyte, who was found not guilty after trial. In February 2018, the Lord Advocate publicly confirmed that the pursuer would not face further proceedings.

[3] In February 2019, the pursuer brought the present action against the Chief Constable of Police Scotland and the Lord Advocate, seeking damages for malicious prosecution. On 12 August 2020, the Lord Advocate wrote to the pursuer's solicitors indicating that the pursuer should not have been prosecuted, and advising that damages would be paid and an apology issued. On 1 October 2020, the Lord Advocate formally admitted liability to make reparation for any loss, injury and damage sustained by the pursuer as a direct and natural result of the prosecution, beginning on 2 September 2015, when the pursuer was placed on petition, until 21 June 2016, when the charges were dropped. On 7 June 2021, the Lord Advocate issued a public apology to the pursuer. Meanwhile, the pursuer's action, having settled extra-judicially insofar as directed at the Chief Constable, proceeded solely against the Lord Advocate, on the commercial roll to which it had been transferred. After sundry procedure, the case called before me at a proof before answer at which the sole issues were causation and quantum.

Evidence

[4] As is usual in commercial proofs, evidence in chief was given predominantly by witness statement. In this case, for many of the witnesses, both initial and supplementary statements were lodged, cross-referenced to two bundles of productions consisting of almost 9,000 pages. The pursuer's counsel called the following as witnesses to fact, some of whom gave evidence remotely by means of the Webex platform: the pursuer himself, Michael ("Mike") Moran, Karol Sikora, Michael von Bertele, Mahdi Al Fardan, Charles Green, Michael Schmidt (remotely), Gordon Baltzer (remotely), John Wisbey (remotely), and Graham Herring (remotely). In addition, parties agreed that the statements of the following witnesses could be taken as their evidence without the need for them to be called: Muhammed Zeeshan Sialvi, Sanjeev Verma, Stephen Best, Joss Burrell Alcraft, Michael Shinya, and Sin Mo ("Stephen") Koo. The Lord Advocate called Nicholas Naylor, Malcolm Murray, and Martin Walton.

[5] Stuart Andrews and Simon Cuerden were called as skilled witnesses for the pursuer. Mr Andrews was an experienced broker who, at the time of writing his report, was employed by finnCap Group PLC, a company of which he was a director. By the end of 2022, he had become a managing director of Zeus Capital Ltd. Mr Cuerden was a chartered accountant, employed by Deloitte Forensic within the firm Deloitte LLP. Costas Constantinou was called as a skilled witness for the Lord Advocate. He was a managing director of Teneo UK, specialising in the valuation of companies for litigation and commercial purposes.

[6] At a pre-proof hearing, I heard submissions on notes of objections lodged by each party to the expert evidence proposed to be relied on by the other. The pursuer objected

to the admissibility of parts of the evidence of Mr Constantinou, on the basis that he lacked the appropriate expertise, failed to provide proper reasoning, and strayed beyond giving opinion evidence into matters of fact. I accepted Lord Keen's invitation to reserve judgment on his objection until after the evidence was heard. The objection having been insisted upon, I now repel it. Having considered Mr Constantinou's report and heard him in evidence, I considered that he had sufficient expertise to assist the court in relation to the issues that were before it. It is true that his report contained statements of fact, as well as inferences from matters of fact. However, I was satisfied, particularly having heard him give evidence, that he understood the difference between fact and opinion, and had highlighted appropriately areas where his opinion depended on a determination of factual matters by the court. Insofar as there may have been anything of substance in the pursuer's objections, it went to weight rather than admissibility.

[7] The Lord Advocate objected to the evidence of Mr Andrews as proceeding on the basis of a less than candid account given by the pursuer of the circumstances in which he left a stockbroking firm called Allenby Capital Ltd. He also objected to it on the basis that Mr Andrews had a conflict of interest, now that he was employed by Zeus Capital Ltd, a company that had employed the pursuer, and which had allegedly failed to respond to information requests relating to the pursuer's employment with that firm. At the pre-proof hearing, I repelled the Lord Advocate's note of objections. As we shall see, the circumstances of the pursuer's departure from Allenby Capital Ltd did become an important feature of the case. However, I was not in a position to make any sort of assessment of the pursuer's evidence at that stage. The question of conflict of interest, insofar as relevant, went to weight rather than admissibility.

[8] The three experts produced a lengthy but helpful joint note identifying areas in which they agreed and disagreed. They gave their evidence concurrently, with the usual advantages and disadvantages associated with the evidential "hot tub". While Mr Andrews provided the benefit of his considerable practical experience as a broker, Mr Constantinou offered a more carefully researched perspective. I was able to draw upon the evidence of all the experts in different degrees and in different respects, as noted in what follows. I have also noted my reservations regarding the credibility or reliability of particular witnesses or with particular aspects of their evidence. Subject to those reservations, I was content that the witnesses were generally reliable and doing their best to assist the court.

Outline

[9] The pursuer is 54 years old. For about 15 years, until 2011, he was a corporate finance broker. Between 1996 and 2005, he worked at ARM Corporate Finance Ltd, and then, between 2005 and 2009, at HB Corporate Ltd, where he became managing director. In September 2008, he led a management buyout of that firm, and in August 2009 HB Corporate Ltd was renamed Allenby Capital Ltd ("Allenby"). Allenby is a nominated adviser ("NOMAD"). NOMADs advise companies on their responsibilities in relation to their admission to and ongoing participation in the alternative investment market ("AIM"). AIM is a sub-market of the London Stock Exchange enabling small and medium-sized companies to attract investment. The pursuer remained at Allenby until August 2011. The true circumstances surrounding his departure from that firm only became apparent during the course of the proof. They are described in the next section.

[10] In April 2012, following the expiry of a period during which the pursuer was contractually unable to compete with Allenby, he joined Zeus Capital Ltd ("Zeus"). While at Zeus the pursuer began working with Charles Green on an opportunity to become involved with Rangers, which had entered administration earlier that year. Mr Green was an experienced businessman, some 20 years the pursuer's senior. He had been a professional footballer in his youth and once held the post of Chief Executive Officer at Sheffield United. While still at Allenby, the pursuer had had occasional dealings with Mr Green. Their involvement with Rangers marked the beginning of a much closer business relationship, which the pursuer described as a partnership, albeit one in which the pursuer played a junior role. Mr Green described him as his "bag carrier".

[11] In May 2012, the pursuer and Charles Green set up Sevco Scotland Ltd, which bought the business and assets of the Rangers Football Club plc. As stated, Sevco Scotland Ltd changed its name to the Rangers Football Club Ltd, and it is by that name, for convenience, that I will refer to the company regardless of the period of time under discussion. In June 2012, the pursuer became the commercial director of the Rangers Football Club Ltd on a salary of £350,000 per annum and a bonus of 5% on commercial contracts negotiated by the pursuer. Charles Green also became a director. At the same time, at the invitation of the pursuer and Mr Green, Malcolm Murray became chairman of the Rangers Football Club Ltd. On 19 December 2012, the Rangers Football Club Ltd became a subsidiary of the Rangers International Football Club plc, which had recently been incorporated. The Rangers International Football Club plc was listed on AIM, raising approximately £22.2 million. Charles Green, but not the pursuer, became a director of the Rangers International Football Club plc. Meanwhile, the pursuer had left Zeus, though only

in October 2012, notwithstanding his contractual obligation to devote the whole of his time, attention and skill to his duties to his new employer.

[12] Clearly, these bald statements of fact, much of which was agreed, do not disclose the precise circumstances surrounding the pursuer's involvement with Rangers, something which was not directly the subject matter of this proof. Rather, the evidence was more particularly focussed on the pursuer's relationship with the club's former owner, Craig Whyte. Craig Whyte had become a somewhat controversial figure, certainly by the time the club had been put into administration. Malcolm Murray's evidence was that, as a condition of taking up his appointment, he had required, and been given, an assurance from the pursuer that he had had no discussions with Mr Whyte. However, in an article published on 4 April 2013 in *The Sun*, Charles Green was reported as having "sensationally admitted shafting Craig Whyte to buy Rangers". In the same article, the pursuer was reported to have "sweet-talk[ed] Whyte to ensure the deal for [the] fallen giants went through". The pursuer gave evidence of having made a payment of £200,000 to the administrators of the Rangers Football Club plc in order to guarantee "exclusivity" in negotiations. In return for putting down the £200,000 deposit, the pursuer's evidence was that Craig Whyte had agreed to pay him £500,000. However, in the result, Mr Whyte only paid £137,500 of that amount, which the pursuer directed to be paid into his mother's bank account in order to keep Mr Whyte's involvement "[below] the parapet". Cross-examined over his dealings with Mr Whyte, the pursuer claimed that anyone wishing to acquire Rangers would have been required to "deal with the devil", and that Mr Murray would have been aware of that.

[13] Shortly after the publication of *The Sun* article in April 2013, Mr Green resigned from his role at Rangers, and the pursuer was sacked as commercial director. On 15 April 2013, the board of the Rangers International Football Club plc announced that it was commissioning an investigation into allegations made by Craig Whyte concerning the pursuer and Charles Green. The findings of that investigation were published on 25 April 2014, and were highly critical of the financial management of Rangers during the period in which the pursuer was the club's commercial director and occupied a senior position in the management team.

[14] Between the pursuer's leaving Rangers in May 2013 and the end of the tax year to 5 April 2015, the pursuer received no income, although I should record that he did receive the following payments during this period. The first related to a commercial action raised by the pursuer in the Court of Session in which he claimed that Rangers had failed to make bonus payments to him. This claim was disputed but ultimately settled in September 2014, when the pursuer accepted a global sum (inclusive of legal expenses) of £250,000. The sum included in the pursuer's tax return for the year to 5 April 2014, net of legal expenses but before tax, was £64,417.08. The second payment related to the sale of shares in the Rangers International Football Club plc. Although Mr Green's evidence had been that the £200,000 deposit put down by the pursuer in return for preferred bidder status was "non-returnable", it was a matter of agreement that £178,000 was repaid on 15 August 2012, with the remaining £22,000 being converted into 2.2 million ordinary shares in the Rangers International Football Club plc. It was further agreed that the pursuer received payments totalling £901,999 in 2013 for the sale of his shares, and also that he failed to disclose these

in his tax return for the year to 5 April 2014, even though capital gains tax of 25% would ordinarily have become payable on these receipts.

[15] Although not in receipt of income during this period, the pursuer had not been "bone idle", as the pursuer himself put it. Charles Green had had a history of involvement as a businessman in the healthcare sector. In 1999, he had founded a company called Medical Solutions plc, where he came into contact with Professor Karol Sikora, the oncologist. While still at Rangers, Charles Green and the pursuer began to discuss the development of proton therapy centres for cancer treatment in the UK and elsewhere. In due course, the partnership between the pursuer and Charles Green was expanded to include a business associate of Mr Green's called Paul Fraser. According to the pursuer, the three of them reached a verbal agreement to work together to raise funds for the purpose of developing proton centres and to split any profits equally among them.

[16] In a separate development, the pursuer, Charles Green and Professor Sikora had proposed to set up a quite different cancer therapy business with a company called Cancer Partners International Ltd. A letter of engagement had been entered into on 15 January 2014 between Cancer Partners International Ltd and a company called Albans Capital Ltd, a company that had been incorporated by the pursuer in 2011, but which was in fact dormant and had never traded. In terms of that letter of engagement, Albans Capital Ltd was to provide Cancer Partners International Ltd with corporate financial advice with a view to raising £100 million of funds prior to any initial public offering ("IPO"), and then achieving IPO on the AIM within 24 months. Albans Capital Ltd was to receive a total maximum success fee equivalent to 5% commission on all funds raised, whether directly or indirectly, prior to the IPO, and 30% of sums paid to the broker upon successful completion of the IPO.

[17] Ultimately, on 4 February 2015 ("World Cancer Day"), a new company, Proton Partners International Ltd ("Proton"), was set up in order to develop the proposed business in proton therapy centres. The letter of engagement with Cancer International Ltd included a clause allowing for the possibility that Albans Capital Ltd might provide corporate finance advice to "any other company Karol Sikora [was] involved with as a director, adviser or consultant to develop Proton Cancer Therapy". This allowed the pursuer and Charles Green to use the letter of engagement with Cancer International Ltd to "paper up" the new business with Proton, and on 5 January 2015, the letter of engagement was assigned to Proton. The letter of engagement was never actually regarded as suitable for the new business and was intended only to be a temporary arrangement. As a matter of fact, however, no new letter of engagement was entered into.

[18] The pursuer was a founding member of Proton, along with Charles Green, Paul Fraser, Karol Sikora, who became its Chief Medical Officer, and Mike Moran. Mr Moran had had a long career in the British Army, had set up a business dealing with defence and private security, and more recently had been the project manager for the construction of a trauma centre. He was introduced to the others by Paul Fraser. The intention had been for Mr Green to become Proton's chief executive officer and for the pursuer to become its investor relations director. However, in November 2014 criminal proceedings had begun against the former administrators of Rangers. There were rumours going about that Charles Green was to be arrested, or even that he had already been arrested, in relation to his involvement with the club. In January 2015, Mr Green agreed to be interviewed by Sky television, in order to "set the record straight", as Mr Moran put it in evidence. However, the combination of rumour and broadcast had consequences

not just for Mr Green, but for his business partner, the pursuer, and their continuing involvement in the business of Proton. As Martin Walton, chief executive officer of the Wales Life Sciences Investment Fund, one of the investors in Proton, put it, "[Charles Green and the pursuer] acted together on the Rangers deal and …they were treated as being a unit in the rumours".

[19] The most immediate consequence of the Sky interview, again as Mr Moran put it, was that "all the meetings [with potential investors] fell away". Even among those who had already signed a placing letter for the subscription of shares, there was at least one, Dr Mahdi Al Fardan, who was deterred from investing as a result of the rumours and the Sky broadcast. By February 2015, it was impossible for either Charles Green or the pursuer to have been on the board, as it was originally intended that they should, or be publicly associated with Proton. They could not attend meetings with investors. Mike Moran, rather than Charles Green, became Proton's chief executive officer. The pursuer could not be its investor relations director. They could not appear "on paper", though they remained involved in the background.

[20] The rumours also had consequences for what could appear on the share register. A Dubai company set up by Charles Green, called Albans Partners General Trading LLC, held 3 million founder shares on behalf of the pursuer, Charles Green and Paul Fraser, in accordance with the three-way split they had agreed. However, since any potential investor carrying out due diligence in relation to Proton would likely have discovered the connection between Albans Partners General Trading LLC and Mr Green, it was necessary to transfer the founder shares to an entity with no connection to Rangers, but which would continue to hold them for the benefit of the pursuer, Charles Green and Paul Fraser. Accordingly,

on 3 June 2015, the 3 million shares held by Albans Partners General Trading LLC were transferred to Fannigan Holdings Ltd, a Cypriot company, which was Paul Fraser's family trust. In addition, and for similar reasons, Albans Capital Ltd assigned the benefit of its rights under the fundraising agreement with Proton to Fannigan Holdings Ltd.

[21] As the fund-raising developed, not all of the investors were prepared to pay 5% commission, as envisaged by the letter of engagement. Woodford Investor Management LLP ("Woodford") stated that their policy was not to accept broker's fees in excess of 3%. On 19 May 2015, the pursuer, on behalf of Albans Capital Ltd, agreed to reduce its entitlement to commissions under the fundraising agreement, so far as the funds raised from Woodford were concerned, to 3%. Further, a sub-commission agreement was entered into between "Albans Partners LLC" (which the pursuer accepted meant Albans Partners General Trading LLC) and Arthurian Life Sciences Ltd dated 1 April 2015, in terms of which the latter would be paid 3% plus VAT (where applicable) of the amount invested by the Wales Life Sciences Investment Fund LP in Proton. A further sub-commission agreement was entered into with W H Ireland Ltd in terms of which Albans Partners General Trading LLC would pay away 2.5% plus VAT on funds invested by David Ross, Standard Life, JP Morgan and Brian Kingham. In the end, only Arthurian introduced any equity capital into Proton.

[22] On or around 9 September 2015, shortly after the warrant was taken out for his arrest, the pursuer left Dubai for Pakistan. This led to a falling out between the pursuer and Charles Green, who considered that he had been abandoned by the pursuer, so much so that he would "never work with him again". Ultimately, in 2018, the pursuer, Mr Green, Proton and Albans General Trading LLC (a new company formed by Mr Green after the

prosecution began) entered into a settlement agreement in which the pursuer agreed to give up his entitlement to "any shares" in Proton in return for a payment of £750,000. The pursuer arranged for this payment to be mandated to his wife.

[23] Between 21 July 2015 and 22 February 2016, the pursuer was paid £631,000 in commission payments from Fannigan Holdings Ltd. In March 2017, while Mike Moran was issued with 3,138,937 growth shares in Proton, no growth shares were issued to the pursuer or Charles Green. In total, therefore, the pursuer was paid £1,381,000 in respect of his involvement in Proton. Proton eventually floated as "Rutherford Health plc" on the NEX Exchange (now known as the Aquis Stock Exchange) in February 2019. At IPO, Proton achieved a share price of £2.25. Woodford agreed to subscribe for an initial 10 million shares upon admission at £2 per share. Ultimately, Proton/Rutherford Health plc was not a success, and the company was wound up on 15 June 2022.

[24] The pursuer claimed that, as a result of the prosecution, he had suffered loss and damage. He had incurred fees and outlays to solicitors and counsel in the sum of £22,722. Prior to the prosecution, he had acquired substantial experience in merchant banking and stock-broking, such that, by 1997 he was a "qualified executive" for NOMAD purposes (only a firm or company can acquire NOMAD status, and in order to do so it must retain at least four qualifying executives). As a result of the prosecution, he had suffered irreparable reputational damage in the global business community. He had also lost the opportunity to participate in numerous business opportunities. In relation to Proton, he had lost the opportunity to earn commission. He had lost the opportunity to take up the position of investor relations director on a salary of £100,000 plus bonuses and pension contributions. But for the prosecution he would not have sold his founder shares to Mr Green and would

have been issued with growth shares. He would have sold all his Proton shares as soon as Proton floated. At the point of IPO, Proton shares achieved a price of £2.24 per share. He would have used the money earned from Proton as seed capital to invest in further growth companies. He would have held concurrent salaried directorships. He had no plans to retire so long as he remained healthy. The total sum sought by the pursuer in compensation from the Lord Advocate was £60 million. The Lord Advocate contended that, with the exception of his legal expenses incurred in connection with the prosecution, as well as a relatively small sum in solatium, the pursuer was not entitled to any compensation.

[25] Having sketched out that background, I now need to explore the critical issues in the case in more detail.

Departure from Allenby

[26] The pursuer's explanation for his leaving Allenby was an important part of his case, not least because it set the scene for the transition in his career from being a broker, employed by a NOMAD, towards becoming an independent "venture capitalist entrepreneur". This was a term that Mr Andrews felt the need to invent, apparently in the absence of any accepted description of the pursuer's activities, post Rangers. Be that as it may, in his first witness statement, dated 27 April 2022, the pursuer sought to explain his departure as follows:

> "By 2011, I could see the cost base was going to increase, due to an increase in regulatory requirements. My end-game was always to represent myself, and I wanted to be the principal in deals. To get this journey started, I sold Allenby back to its employees with Adam Wilson's agreement. (Adam held 10% of Allenby). Adam was based in Dubai at this time and had asked if I'd like to go out and join him."

Unfortunately, this explanation was false, as the pursuer was constrained during the course of the proof to admit. That admission, as well as the circumstances in which it was required to be made, have had a significant bearing on my assessment of the pursuer's credibility and reliability. As I come on to explain, they also provided the basis for a submission by the Lord Advocate that I should dismiss the pursuer's entire claim in respect of financial loss, other than for the costs incurred in defending the prosecution. In this section, therefore, in addition to setting out the true reasons for the pursuer's departure from Allenby, I need to set out in some detail the circumstances giving rise to the pursuer's belated concession that he had begun his evidence, in April 2022, by giving a false account to the court.

[27] I note firstly that the pursuer further embellished the above explanation for leaving Allenby with the following additional reasons provided to the pursuer's expert, Mr Andrew, and appended to his report as part of the pursuer's CV:

> "HB Markets [plc, the parent company of HB Corporate Ltd] had previously agreed to sell their 50% interest (held by way of an option) to me but unfortunately changed their minds hence I decided to sell my 50% stake as I believe HB having a shareholding in Allenby is detrimental to shareholder value."

This statement was a false, or at best incomplete, account of the pursuer's reasons for selling his shareholding, as will become evident from what follows.

[28] On 5 December 2022, the Lord Advocate lodged the witness statement of Malcom Murray, in which he stated:

> "When [my appointment as Chairman of Rangers] was announced I was bombarded by ex[-]colleagues and employers of Mr Ahmad who said unanimously he was not fit and proper and not approved by the Financial Conduct Authority ['FCA']. This accelerated as we approached flotation when Cenkos Securities plc said Mr Ahmad would not be acceptable as a plc director. This was unnerving but I was persuaded to stay on the basis we appointed other fit directors."

The lodging of this statement, in particular the comment regarding the absence of FCA approval, provided the pursuer with an opportunity candidly to explain to the court the circumstances surrounding his departure from Allenby. Instead, however, in a supplementary witness statement dated 19 December 2022, he stated the following:

> "…[Malcolm Murray] states that he was 'bombarded' by my ex-colleagues and employers who advised that I was 'not fit and proper and not approved by the Financial Conduct Authority'. This cannot be correct. I have never been refused approval by the FCA. My approval lapsed after my departure from Allenby and then was no longer required. It wasn't revoked. After Allenby I was out of the market for 9 months because of a non-compete requirement agreed on my exit… . When I started at Zeus, I applied to get approved again. However, Rangers came along and I wouldn't need authorisation so I withdrew the application."

[29] At this point, it is necessary to record that, prior to the proof, various enquiries and attempts had been made on behalf of the Lord Advocate to ascertain the position with regard to Mr Ahmad's FCA approval and the circumstances surrounding his departure from Allenby. These included a motion for commission and diligence for the recovery of documents falling within the first two calls of a specification numbered 51 of process. This motion was opposed by the pursuer, but granted by the court. Thereafter, following the issuing of a letter of request to the High Court in London, the specification was served on the FCA. By email dated 3 February 2023, the FCA confirmed that they held documents falling within the terms of the specification, but that they would be delivering them to this court in a sealed confidential envelope, since the FCA were prohibited from disclosing them by virtue of section 348 of the Financial Services and Markets Act 2000 ("FSMA"). Nevertheless, in an effort to assist the court, the FCA made certain disclosures which they considered were not covered by section 348, FSMA.

[30] In summary, these disclosures were that the pursuer had made an application for approval to hold a controlled function while at Zeus, but that the application had been

withdrawn after it had been referred to the FCA's "non-routine" team for review. Between 3 May 2012 and 25 April 2013, the FCA had engaged in correspondence with Zeus, requesting information in relation to the pursuer in order to determine the application. The list of correspondence provided by the FCA identified 23 separate items within that time period. The application having been withdrawn, no determination of Mr Ahmad's honesty, integrity and reputation to hold a controlled function was made. However, the FCA confirmed that a full assessment would require to be made should any future application from the pursuer be received.

[31] I should also record that, by the same note of objections lodged in advance of the proof, in which the Lord Advocate objected to the admissibility of Mr Andrews' evidence, the Lord Advocate also objected to the admissibility of "the totality of the pursuer's evidence on loss of earnings". By restricting access, on the ground of confidentiality, to documents known to be held by Allenby, the FCA and Zeus, the pursuer was lacking in candour, in breach of the best evidence rule, and had failed to allow the expert witnesses properly to discharge their duties. At the pre-proof hearing, I repelled that objection, which, as with the Lord Advocate's objection to Mr Andrews' evidence, appeared to me at that stage to go to weight rather than admissibility.

[32] Shortly before the first day of the proof, the pursuer sought to lodge, in a seventh inventory of productions, six documents disclosed by Allenby to his agents. The documents included a compromise agreement entered into between the pursuer and Allenby on 2 August 2011. I have already noted one aspect of that agreement, the non-compete clause, which had at the outset been referred to by the pursuer in his evidence. However, this was

the first time that the full contents of that agreement had been placed before the court. Paragraph B of the agreement stated as follows:

> "The Company informally raised with [the pursuer] potential allegations of wrongdoing and required [the pursuer] to stay away from the offices and changed the locks to the Company's premises preventing [the pursuer] from attending work."

At the start of the first day of the proof, Mr Moynihan, senior counsel for the Lord Advocate, explained that it was his understanding that the six documents did not represent the totality of relevant documents held by Allenby, but that certain FCA permissions were being sought to disclose the rest. As a result, although he clearly wished the documents to be admitted into evidence, and indeed had been seeking to recover them for some time, given their lateness he required to reserve his position regarding any issues that might be raised by these or any further Allenby-related documents. The proof proceeded under reservation of any question of relevancy and competency arising from the evidence sought to be adduced by the pursuer in or on the basis of the documents in the seventh inventory.

[33] In his evidence in chief, the pursuer sought to characterise paragraph B of the compromise agreement as "a slight over-reaction". He explained himself as follows:

> "What you had have [sic] there is a situation where one 9.99 per cent shareholder had been paid sub-commissions of £250,000, and another shareholder of 9.99 per cent wanted dividends and they felt that they were being treated unfairly, not understanding that sub-commissions are a fact of life in our business. HB Markets is a stockbroker. They don't really engage in any corporate activity, and they don't understand how the corporate finance world works".

[34] This evidence was repeated in cross. The pursuer dismissed the whole episode as a "shareholder squabble". Asked if he had disclosed the squabble to the FCA's predecessor, the Financial Services Authority ("FSA") in his application dated 18 April 2012, while at Zeus, for approval to carry out controlled functions, he said that he did not believe it was required, as it was something that had occurred in the ordinary course of business.

However, the pro forma application document, at question 14(a), required the pursuer, as applicant, to answer whether he had ever been requested to resign from any profession, vocation, office or employment. He had answered, No, and confirmed to the court that that answer was correct. He cited the confidentiality of the compromise agreement as a reason for not including more in his CV, despite the fact that clause 4.4 of that agreement excluded the FSA from the duty not to disclose the circumstances surrounding the termination of his employment.

[35] In the afternoon of the second day of the proof, while the pursuer was still being cross-examined, I was advised that thirteen further documents relating to his departure from Allenby had been disclosed, these having been provided by Allenby's solicitors to the pursuer's solicitors after consent had been obtained from the FCA. Mr Moynihan advised the court, after discussing matters with Lord Keen, senior counsel for the pursuer, that he intended to complete his cross-examination of the pursuer without reference to these further documents, and then, if necessary, seek leave to recall the pursuer, once he had had an opportunity to consider them. He also required to take a statement from Mr Nick Naylor, who had been Allenby's finance director at the time of the pursuer's departure, and was now its chief executive. Meanwhile, Lord Keen led the remainder of his witnesses to fact, and closed that part of his case (parties having agreed to split the purely factual witnesses from the opinion evidence).

[36] On the fifth day of the proof, Mr Moynihan led Mr Naylor in evidence. Mr Naylor did not agree that the pursuer's evidence, quoted at paragraph 26 above, was an accurate description of the reasons for his departure from Allenby, since it implied that it was the pursuer's own decision to resign. During an audit meeting held in March 2011, at which

the pursuer was not present, Mr Naylor, as finance director, two other board members, Matt Butlin and Andrew Baker, and a board observer, Stephen Greenwood, expressed significant concerns regarding a payment of £250,000 made to BDL Holdings Ltd in March 2011. Ostensibly, the payment related to a number of transactions introduced by Adam Wilson, who, as explained above, was a 9.99% shareholder in Allenby, and business associate of the pursuer. The payment had not been disclosed to the board or to Mr Naylor as finance secretary. Nor had it been accrued in the company's management accounts. It related to transactions that had not generated material amounts of revenue for Allenby. Mr Naylor raised these concerns with the chairman of Allenby in advance of a board meeting scheduled to take place in June 2011. Following a discussion, Mr Naylor, Mr Butlin, Mr Baker and Mr Greenwood, collectively, asked the pursuer to resign as chief executive of Allenby. The pursuer agreed to do so, and to sell his shareholding to the company, on the basis that they would not commission a forensic accountant to investigate the details of the BDL payment.

[37] In implement of Allenby's regulatory obligations, Mr Naylor wrote to the FSA in July 2011, explaining the reasons for the pursuer's departure. At the end of August 2011, the FSA requested further information. Mr Naylor responded to the FSA's request, as Allenby were obliged to do. It was at that point that he discovered emails from the pursuer to Adam Wilson, owner of BDL, forwarding an invoice for £220,000 from one Almas Shah to BDL in respect of consultancy services. He and Matt Butlin were suspicious of the invoice. They were unaware of any consultancy arrangements between Almas Shah and BDL. They did not even know who Almas Shah was. It was a statutory requirement incumbent on Allenby to respond to the FSA's requests. During the internal review carried out by Allenby

further to the statutory request from the FSA, emails and invoices (including invoices in the name of Almas Shah) were uncovered that suggested that the payment to BDL had been a "shadow dividend". A shadow dividend was a device to allow a dividend to be paid to half of the Allenby shareholders without paying a dividend to the other 50% shareholder, HB Markets. Mr Naylor disclosed the results of Allenby's investigations in further correspondence with the FSA.

[38] Allenby were subsequently advised by their lawyers to notify the matter to the Serious Organised Crime Agency. Allenby became aware, during its investigations, that the pursuer might be offering brokering and advisory services in breach of restrictive covenants. This included a deal described as "Project Rainbow". Allenby were also concerned that the pursuer was providing financial and fundraising advice that would require FSA authorisation. In 2012 Zeus asked Allenby to provide them with what Mr Naylor described as a "regulatory reference" for the pursuer. A regulatory reference was one provided by one regulated firm to another, and would be required to address matters relating to the propriety and integrity of an individual, all as set out in a template. On advice received from the FSA, the reference to Zeus gave no details of the FSA investigation, but did state that FSA investigations into the pursuer were ongoing. Some time later, after the pursuer had left Zeus, Allenby were asked for a regulatory reference from another broker/NOMAD called ZAI (Zimmerman Adams International) who were looking to employ the pursuer. At some point after that, in 2014, the FCA (as the new regulatory authority) asked Mr Naylor and Mr Greenwood a number of further questions relating to the pursuer's departure from Allenby and the information that Allenby had uncovered. Mr Naylor understood the FCA to be assessing an application made by the pursuer to be an approved person.

[39] In the event, on the sixth day of the proof, the inevitable motion to recall the pursuer was made, not by Mr Moynihan, but by Lord Keen, unopposed subject only to his evidence continuing to be heard under reservation. In the course of that evidence, the pursuer confirmed that Almas Shah was his mother. The invoice for £37,000 in her name that bore to be a "consultancy fee" was a fiction. That sum represented a "salary catch-up" due to the pursuer, and which he was mandating to his mother in repayment of a loan. In relation to the invoices for £250,000 from BDL and for £220,000 from his mother, he explained that the chairman of Allenby had told him that he had been awarded a bonus of £220,000. He used Adam Wilson of BDL as what he called a "structure" and "a smart way of not paying tax", both Adam Wilson and his mother being based offshore. The pursuer said he understood that what he did was wrong, which I understood to be an acknowledgement that he had engaged in tax evasion. He made a misleading statement to the auditors about the payment of £250,000. As a result, the accounts of Allenby were false as regards the payment of £220,000. The true reason for his resignation from Allenby was in order to avoid an investigation into the BDL payment. He did not want an investigation because he was apprehensive that someone would "marry up" the various invoices. He believed that in agreeing to resign and to sell his shares, Allenby would "honour the no FCA and [he] could carry on with [his] career".

[40] In answer to the question whether the CV supplied to the FSA was false he said it was a "partial account rather than the full account of the circumstances regarding [his] departure from Allenby". Pressed to answer whether his application for approval to the FSA was misleading, he responded, "It's a job application", almost as if he thought a degree of self-promotion and concealment was to be expected. In this response, as well

as the rather casual manner in which it was delivered, the pursuer betrayed a complete misunderstanding of what was involved in his dealings with the regulatory authorities. At one point he appeared to suggest that he had only become aware that he had made false statements to the FSA after the confidential information had been disclosed and the statements had been "pointed out to [him]". Returning to where all of this began, namely, the explanation given in his first witness statement quoted at paragraph 26 above, he conceded that this was a false account of the circumstances in which he left Allenby.

[41] I would draw the following conclusions. Firstly, I found Mr Naylor an impressive and entirely credible witness. I accepted his evidence in its entirety. Mr Murray's evidence was brief and given in a straightforward manner. His evidence, that when his appointment as chairman of the Rangers International plc was announced, he was told by former colleagues that the pursuer was not a fit and proper person and had not been approved by the FCA, is consistent with the evidence of Mr Naylor. I accepted Mr Murray's evidence in its entirety. The pursuer himself accepted that he gave false evidence in his first witness statement concerning the reasons why he left Allenby. However, he insisted that he had "always been happy to be open and transparent on all of this" and that he had only objected to disclosure of the details of the compromise agreement on the basis of legal advice. It was almost as if, even while making the concession that his first witness statement had contained false statements, he regarded this as an inadvertent and rather minor error that, left to his own devices, he would have taken the earliest opportunity to correct. However, in my view, the very opposite is the case. The pursuer set out to mislead the court on an issue of central importance. He was afforded several opportunities to set the record straight, but chose

instead to persist, even while under oath, with what were, frankly, lies. As a result, I find that the whole of his evidence has been contaminated.

[42] Secondly, I would accept the distinction drawn by Mr Moynihan in his submissions between the dishonest invention of a claim, and the dishonest exaggeration of losses caused by a wrong that was admittedly committed (*Grubb* v *Finlay* 2018 SLT 463, at paragraphs-34-36). Outright dismissal would be justified only in a claim of the former kind. In the case of the dishonest exaggeration of a claim, the pursuer's evidence should only be relied on where corroborated by other unchallenged and acceptable evidence (*Johnstone* v *William Morton Ltd* 2010 SCLR 256, paragraph 38). The pursuer's dishonesty was of the latter kind.

[43] Thirdly, Mr Moynihan maintained his objection to what he referred to as the "relevancy of the pursuer's case", though he said this was "not aimed at excluding the admissions of dishonesty". Rather, his objection to the relevancy was "based on the simple proposition" that the pursuer's evidence, when he was recalled, had "turned the case on its head". As a result there was no proper basis upon which to speculate as to how the evidence would have developed had the pursuer given a true account of his career from the date when the action was commenced. Sustaining the objection, he submitted, should have the result that the pursuer had no relevant case for any financial loss other than the legal costs incurred in defending the prosecution.

[44] With respect to Mr Moynihan, I had understood his initial objection to have been directed to the admissibility of evidence, which I had allowed to be heard under reservation. That evidence, as Mr Moynihan conceded, must now be admitted, not least because it provided the evidential basis upon which the dishonesty of the pursuer was revealed, and

upon which I have found the pursuer to lack credibility as a witness. However, I would agree with Mr Moynihan to this extent. The court's finding as to the pursuer's lack of credibility would not satisfactorily address the prejudice which the pursuer's conduct of the litigation had caused the Lord Advocate to suffer. For example, as Mr Moynihan complained, the pursuer had led all of his factual witnesses before Mr Naylor gave evidence. Although it may have been practicable for Lord Keen to recall the pursuer himself, who had been in attendance throughout the proof, this was hardly an option in respect of the pursuer's other witnesses, many of whom resided abroad and who had all been released from their citations. Mr Moynihan may also have had questions for Adam Wilson. The pursuer had provided a witness statement from Mr Wilson. His name appeared on the parties' witness timetable for the proof. Ultimately, and rather conspicuously, he was not called. Mr Moynihan also complained that it was only as a result of Mr Naylor's evidence that he discovered that ZAI had asked Allenby for a regulatory reference regarding the pursuer at some point prior to April 2014. Mr Constantinou confirmed in his evidence that he would have wished to explore that line of enquiry as one being potentially of relevance to the pursuer's career path. Further, the only prior reference in the evidence that there had been to ZAI was in the agreed evidence of Mr Koo, the executive chairman of UniVision Engineering Ltd ("UVEL"). Mr Koo had been considering whether to invite the pursuer to become a non-executive director or UVEL, in order to assist it with raising funds. However, he was advised against doing so by Richard Morrison of ZAI (UVEL's NOMAD), "due to some trouble that [the pursuer] was in" (which Mr Koo said he later found out was the "malicious prosecution"). "Whether that [was] correct", Mr Moynihan submitted, "or indeed whether this related to the pursuer's FCA difficulties, [was] now a live issue" in the

case. I agree that the pursuer's evidence when recalled, as well as that of Mr Naylor, might have given the Lord Advocate cause to wish to cross-examine Mr Koo rather than simply agreeing that his evidence was contained in his witness statement.

[45] In all of the above examples, the true nature of the problem identified by Mr Moynihan has to do not with the relevancy of the pursuer's case, as he put it, but with the prejudice sustained by the Lord Advocate. And, indeed, prejudice also to the due administration of justice. I am not persuaded that the pursuer should be held, on that basis, to have forfeited the right to a determination of what amounts to the vast bulk of his claim for financial loss. Proportionality, particularly in the context of the pursuer's rights under article 6 ECHR, is a relevant consideration (*Summers* v *Fairclough Homes Ltd* [2012] 1 WLR 2004). I would also refer to certain well-known extra-judicial remarks of Lord Reed, regarding the situation where, as here, the dishonesty of a litigant only becomes apparent to the court in the course of the evidence. Provided the court is able to make a proper assessment, which in this case is one of quantum, then notwithstanding the dishonesty, "it could only be in the most exceptional circumstances that a strike-out would be a proportionate response" ("Lies, damned lies: Abuse of process and the dishonest litigant", 26 October 2012). As Mr Moynihan acknowledged, it would never be appropriate for the court to speculate as to how the evidence might have developed had the pursuer given a true account of his career from the start. What it can do, however, is to consider what weight, if any, should be given to evidence which the Lord Advocate was not afforded a fair opportunity to explore or contest. At any rate, that is what I have done in what follows. That does not mean that the pursuer's dishonesty should necessarily go unpunished. It may be appropriate, following Lord Reed's suggestion in the above lecture, to make an award of

expenses against the pursuer, possibly on an agent and client basis. Contempt of court is another possibility.

The pursuer's reputation following Allenby

[46] Lord Keen conceded that the pursuer's behaviour at Allenby "reflected very poorly on his judgment and conduct at that time". Beyond that, however, he submitted that it had no relevance to the court's assessment of loss. It might have had relevance to any future career in which the pursuer required FCA approval. However, the pursuer had no intention of returning to a role requiring FCA authorisation. With the exception of the FCA, to whom disclosure would have been required to have been made, there was no reason why anyone should have known about the true circumstances surrounding the pursuer's departure from Allenby. These circumstances were subject to confidentiality arrangements as set out in the compromise agreement. When assessing what would have happened but for the prosecution, the court "must proceed on the basis that these matters [the circumstances surrounding the pursuer's departure from Allenby] *were not known publicly*" (emphasis supplied). The Lord Advocate submitted that, as a matter of public policy, the court should not proceed on the hypothesis that "a man like [the pursuer] might have had a successful career by concealing fraud and other acts of dishonesty".

[47] Unlike the objection considered in the previous section, which was concerned with the pursuer's dishonesty in giving evidence, this submission by the Lord Advocate does indeed raise a question of relevancy, being akin to a defence of illegality or *ex turpi causa non oritur actio.* However, while it is often said that there is no confidence in iniquity, I am not persuaded that awarding the pursuer compensation for financial loss involves

proceeding upon the hypothesis suggested by the Lord Advocate. The purpose of compensation is to put the pursuer in the position that he would have been in but for the prosecution. The entering into of the non-disclosure obligations in the compromise agreement may well be regarded as a concealment of fraud or other acts of dishonesty. However, the Lord Advocate has not demonstrated either that the pursuer has in fact built a career based on that concealment or that the career which the pursuer claims the prosecution has prevented him from enjoying would necessarily have required any such concealment.

[48] The Lord Advocate referred to the pursuer's misleading application for FSA approval while employed by Zeus, and submitted, under reference to *R* v *Andrewes* [2022] 1 WLR 3878, that excessive remuneration achieved as the fruits of fraud can be confiscated after the fraud has been uncovered. I would accept that, in an application of that kind, it would have been incumbent on the pursuer honestly to state the circumstances of his resignation from Allenby, or at the very least to reply truthfully to the question whether he had ever been asked to resign from his employment. But his application for approval while at Zeus was withdrawn. Admittedly, there is a whole question, to be considered subsequently, of whether the corporate financial advice provided by Albans Capital Ltd pursuant to the letter of engagement with Proton amounted to a regulated activity or regulated activities requiring FCA authorisation under FSMA. But, subject to that matter, the pursuer's claim is not based on having been deprived of the opportunity to pursue a successful career in a role requiring FCA approval. To that extent, therefore, I am in agreement with senior counsel for the pursuer.

[49] However, I would reject that part of the pursuer's submission which would require me to proceed on the basis that the circumstances surrounding the pursuer's departure from Allenby were "not known publicly". Firstly, because of the iniquity defence, it cannot be assumed that whatever rights to confidentiality the pursuer thought he had pursuant to the compromise agreement were anything other than precarious. Secondly, the question of what was and was not a matter of public knowledge is obviously a question of fact. In that regard, Malcolm Murray's evidence was highly relevant. He was being "bombarded" with reports from former colleagues in the City relating to the pursuer's reputation and the fact that he was not approved by the FCA. As I have already mentioned, it is striking that these reports were consistent with Mr Naylor's evidence describing the circumstances surrounding the pursuer's departure from Allenby. Indeed, the pursuer himself seems to have concluded that Allenby must have been the source of the reports reaching Mr Murray since, as soon as he found out about them, he instructed his lawyers to send "cease and desist" letters to his former firm. These letters were met by a denial from Allenby, and it is entirely possible that the pursuer's bad reputation may have come from a source other than those who were privy to the compromise agreement. According to Mr Murray, Cenkos Securities plc ("Cenkos"), who were NOMADs in relation to the flotation of the Rangers International Football Club plc, told him that the pursuer was not a fit and proper person and would not be acceptable as a plc director. I accept, contrary to the pursuer's evidence that he made the decision not to be on the plc board of his own volition, that this was the reason that the pursuer could not take up a position on the board of the Rangers International Football Club plc. Cenkos cropped up in evidence again, in their capacity as potential NOMADs in relation to a proposed AIM listing of Proton. During the critical

period of fundraising, between February and July 2015, the pursuer and Mr Moran had turned up for a meeting with several people from Cenkos. At reception, they were informed that the meeting was cancelled, and told by Cenkos "not to darken [their] door", to use Mr Moran's colourful language.

[50] I conclude that the pursuer's lack of fitness to undertake work in financial services, whatever the source of the information may have been, was already known to a number of individuals in that sector. Further, that knowledge followed the pursuer into the Rangers job, and thence into his post-Rangers career. For these reasons, at least, his reputation was already significantly compromised prior to the prosecution, and would continue to be so compromised, even had the prosecution not occurred.

[51] In reaching that conclusion, I have not ignored the evidence of the pursuer's friends and former colleagues who spoke highly of him at the proof, particularly in their witness statements. However, I was struck by the tendency in these statements to attribute the pursuer's loss of reputation all too uncritically to what the witness would refer to as "the malicious prosecution". Take the example of Stephen Best, a businessman with a particular interest in mining companies for whom the pursuer had raised funds when he was with HB Corporate Ltd. Mr Best claimed that "the malicious prosecution was common knowledge in the City. It was the talk of the town." Now it seems very unlikely that townsfolk, whatever they were talking about, would have used the words "the malicious prosecution". In this statement, as in others, there was more than a hint of the leading question. I had similar difficulties with the evidence of the pursuer's other former colleagues. Mr Wisbey said he would be "happy to work" with the pursuer, but conceded that "many firms don't want any reputational risk at all". Mr Shinya said that, "[p]ersonally, [he] would work with [the

pursuer] again if [they] were swimming in the same pond", but he conceded that reputation is everything, and, "If you cast a stone at someone and it has even the *slightest iota of credibility*, you can severely damage them" (emphasis supplied). While all these witnesses insisted on attributing the pursuer's plight to what they called the "malicious prosecution", it would have been more helpful if they had been asked to consider the extent to which the pursuer's reputation had already been compromised, for example, by his conduct at Allenby, his involvement with Rangers, or the fact that he was associated with others being investigated by the police. These were all live issues in the case which were not directly addressed by the statements to which I have referred, and to which I have therefore given little weight. I have also had to bear in mind the prejudice suffered by the Lord Advocate referred to in the previous section.

The pursuer's involvement with Rangers

[52] Cenkos's role as brokers and NOMADs in relation to the flotation of the Rangers International Football Club plc as well as the proposed AIM flotation of Proton provided a bridge between the pursuer's career prior to and following upon his appointment as commercial director with Rangers. However, there was other evidence that the pursuer's association specifically with Rangers would have had a negative impact on his career.

[53] According to the pursuer, he was fired from Rangers in April 2013 due to "internal politics" within the company. What is of interest in the present dispute is not so much what may have occurred "internally", but what was reported and in the public domain. The pursuer himself referred to the action he raised in this court for unpaid bonuses. He omitted to mention a newspaper report of a preliminary hearing in that dispute in which Rangers

attempted to resist disclosing certain documents for fear that they might be leaked by the pursuer. The report referred to the pursuer as having been dismissed by Rangers from his employment on the basis that he "put material that was confidential and damaging to his employers onto the web". I underline that I am not adjudicating on the correctness of these allegations, which the pursuer denied, merely observing that they had been given publicity.

[54] Of perhaps greater significance was the report published on 25 April 2014, following the independent investigation commissioned by the board of the Rangers International Football Club plc. Of course, the pursuer's sacking as commercial director had already occurred in May 2013. Confronted in cross-examination with the results of the investigation, the pursuer's response was that he could not be responsible for whatever might have happened at Rangers after he left. However, the report covered the 13-month period ending on 30 June 2013. Anyone reading it would be aware that it related to the period during which the pursuer was commercial director. The findings of that investigation were highly critical of the financial management of Rangers during the period of the pursuer's employment at the club. Among the many criticisms levelled at management, the review stated, "The Club's financial position was precarious as it had mismanaged almost all its cash reserves *following administration*" (emphasis supplied).

[55] Mr Constantinou provided evidence of an analysis of media reports relating to the pursuer's involvement with Rangers. These covered the pre-prosecution period between February 2012 and September 2015, when the pursuer was placed on petition, the prosecution period itself between September 2015 and May 2016, when the petition warrant was withdrawn, and the post-prosecution period up until July 2022. He explained which platform he and his colleagues used to conduct the search, as well as the search parameters

deployed. He made a qualitative assessment of the articles identified during these periods according to whether they were "positive", "neutral" or "negative" in relation to the pursuer. In cross-examination, Mr Constantinou was challenged on the basis that he did not carry out the search himself, and had not provided in his report either the search inputs or outputs.

[56] However, Mr Constantinou's report provided the search parameters and the platform used. Details of each article, including its "url" or web address, were included in a separate table appended to his report. To have included the articles themselves would have required appending a further 2,000 pages or so of publicly available information to his report, all in the context of a proof that had already generated thousands of pages of documentation. The search parameters having been provided, I am satisfied that the searches could have been replicated by or on behalf of the pursuer. Had the pursuer wished to present an alternative overall picture of the manner in which his conduct had been covered in the press, no doubt he could have proposed alternative search parameters. He did not. In these circumstances, I am satisfied that there is no substance in the pursuer's criticisms.

[57] Mr Constantinou found that, during the pre-prosecution period, 68.9% of the articles were neutral and 29.2% were negative, while during the prosecution period, 31.6% were negative and 68.4% were neutral. In cross-examination, he was asked whether it followed that the majority of negative articles occurred in the prosecution period rather than the pre-prosecution period. Mr Constantinou patiently identified the statistical fallacy upon which that question was based, namely the assumption that the same number of articles were published during the prosecution period as were published pre-prosecution. On the

contrary, the volume of press coverage pre-prosecution was far greater, with the result that there were in fact 3.5 times as many negative mentions pre-prosecution as there were during the prosecution period.

[58] On the basis of all of the above evidence, I conclude that the pursuer's already compromised reputation was, and would but for the prosecution have continued to have been, damaged still further by publicity regarding the pursuer's association with Rangers.

Rumours and Charles Green's Sky interview

[59] So far I have considered the impact on the pursuer's reputation of events occurring both prior to and following his involvement with Rangers. Included among the latter were those events arising from the pursuer's association with his business partner, Charles Green, the beginning of a police investigation of Mr Green in connection with his involvement with Rangers, and rumours that began to circulate about a potential prosecution of Mr Green, culminating in his Sky interview. In addition to the reputational damage to Charles Green and the pursuer, these events created a risk of commercial damage to any business with which they would become associated.

[60] The clearest evidence in relation to commercial risk came from Martin Walton, manager of the Wales Life Sciences Investment Fund ("WLSIF"). Mr Walton led the due diligence on behalf of both WLSIF and Woodford who, together, contributed 91% of the funding raised by Proton between January and July 2015. Mr Walton was asked to explain an email he had written to Patrick Cannon, Proton's lawyer, on 7 May 2015, in which he stated, "As per prior discussions please DO NOT include Charles or Imran in the email conversation". I have already referred to Mr Walton's evidence that Charles Green and

the pursuer were treated as a unit. "No problem in forwarding stuff to them", the email continued, "but they must be completely removed from company activity or we risk potential investors walking away".

[61] Mr Walton explained that due diligence inevitably involved "looking at the people involved", that is, "the potential chief executive officer, the potential chief operating officer, the clinical officers, and so on". The City of London "revolv[ed] around information, rumour and hearsay", and it was "[at that point when you start to look at the people involved] … that you begin to hear stories about [them]". Mr Walton became aware, as did representatives of Woodford acting quite independently, that there were rumours, "potentially damaging stories", going around about Charles Green and the pursuer. Asked what these rumours were, he replied that there was "potential police investigation into the Rangers deal".

> "[U]ntil such time as this story, these rumours … were resolved, it was viewed as potentially damaging to the company's prospects to have those names [Charles Green and the pursuer] associated with the company".

Had it become clear that Mr Green or the pursuer were not to be prosecuted "or [had] the slate been wiped clean", as Mr Walton put it, then they could have been reinstated.

[62] It was clear that Mr Walton was not necessarily expressing any view on the pursuer's behaviour, or impugning his reputation. His insistence that Proton needed to remove the pursuer and Mr Green from the public face of the company was purely a business decision. The particular sensitivity of the stock market is such that it reacts not just to loss of reputation but to the mere potential for loss of reputation, or to the commercial risk to which a business such as Proton might be exposed if it became associated with someone (who was

associated with someone) who was known to be under investigation and who might be prosecuted.

[63] Mr Walton's evidence on the sensitivity of the City to rumour was echoed by the evidence of others, such as Sanjeev Verma, a contemporary of the pursuer's at Hoodless Brennan and someone who had followed him to Allenby. He referred to the City as a "small place", where news "spreads like wildfire". To similar effect was the evidence of Joss Alcraft, a corporate lawyer who had worked on deals with the pursuer while he was at HB Corporate Ltd. He said that, "Everybody googles anyone they might do business with, and if there are hints of a scandal they will be very reluctant to deal with them." His firm had reached the point where they did not need every client they came across, "so if [they got] a red flag in their checks, [they] may just put it in the 'discard' pile without further investigation". Banks were the same. He knew of someone who had his bank account closed "because of a story in the press that [was] neither here nor there - it [was] easier for the Bank just to close the account".

[64] Mr Alcraft might be understood as offering an extreme view of commercial risk, where the mere "hint of a scandal" or "red flag" may deter a potential investor, client, or employer. This would apply, as he suggested, where the subject of the rumour was just one client among many. In the particular circumstances of Proton, however, where a business relationship had already been formed with Mr Green and the pursuer, Mr Walton's view was that they would have been able to return to Proton once it became clear that they were not to be prosecuted or "the slate [had] been wiped clean". Indeed, his view was that the shareholders would have expected the founders to be "totally involved and delivering on the commitments they made to investors". Clearly, for the period during which

Mr Green and the pursuer were in fact prosecuted, this would not have been possible. But there was nothing in Mr Walton's evidence to suggest that the prosecution itself eliminated the possibility, once the slate had been "wiped clean", of Mr Green and the pursuer returning to their roles in Proton and being actively involved with the company.

[65] I conclude therefore that the pursuer became a commercial risk, specifically to Proton, as a result of rumours that Charles Green had become the subject of police investigation and might become the subject of prosecution. It crystallised in the minds of investors in Proton, at the latest, by the time of Mr Green's Sky interview. The pursuer's removal from the public face of Proton was therefore a consequence not specifically of the prosecution of the pursuer, but of the rumours, and the commercial risk that the pursuer represented by reason of his association with Mr Green and Rangers. Further, the pursuer's continued exclusion from Proton, after the warrant had been withdrawn, was a consequence of the continuing risk to Proton that he represented to that business until the "slate had been wiped clean". In other words, the commercial risk to Proton would have continued for at least as long as the Lord Advocate had not made a public announcement renouncing prosecution and, on one view, for as long as he had not issued a public apology. I therefore find that the pursuer, both before and after the prosecution, was subject to a continuing risk of prosecution. I further find that the overwhelming likelihood is that, had the pursuer not been prosecuted, he would have continued to have been at risk of prosecution throughout the entire period during which he was in fact prosecuted between September 2015 and May 2016. In that event, the continuing risk of prosecution during that period would have exposed Proton to continuing commercial risk, and required his continued exclusion from active involvement with that company.

[66] I should make it clear, before moving on, that there was no question in these proceedings of the Lord Advocate being responsible for the release of information identifying Mr Green as being under investigation prior to his being charged. Whether or not the rumours or the interview involved any misuse of private information, of the sort considered in *ZXC* v *Bloomberg LP* [2022] AC 1158, has nothing to do with the present action.

The Crown's duty to clear the pursuer?

[67] In his written submissions the pursuer argued that it was necessary to consider not what would have been likely to have happened, but for the prosecution, but "what would have been likely to have happened had the Lord Advocate acted properly, rather than wrongfully". The pursuer's answer to that question was that he "would not have been prosecuted and would have continued to work, resulting in significant earnings and capital gains". Developing his submission, the pursuer argued that the Lord Advocate, acting properly, would have come to the conclusion already in September 2015 that there was no evidence of the pursuer having committed any crime, and would have made a public pronouncement to that effect, confirming that there would be no criminal proceedings against him. In short, not only would the pursuer not have been prosecuted, but the risk of prosecution would have been eliminated, allowing the pursuer to return to Proton in September 2015.

[68] The first problem with this argument is that it is not the pursuer's pleaded case. The pursuer does not sue the Lord Advocate for having acted oppressively by failing to conclude the investigation into the pursuer within any particular period of time. It is true that the pursuer's first plea-in-law was that the Lord Advocate had interfered with his right

to respect for his private and family life. However, this was not insisted on at the proof, and ultimately, in their written submissions, counsel restricted the pursuer's case to his plea-in-law based on "wrongful" prosecution.

[69] The second problem is that, even if it had been plead, the case would have failed. The pursuer correctly states, standing the extent of the Lord Advocate's admission of liability in this case, that as at September 2015 there was insufficient evidence to support a prosecution. The pursuer is also correct in stating, with the benefit of hindsight, that there was never sufficient evidence to prosecute the pursuer. However, it does not follow that, as at September 2015, the Lord Advocate should have known that there would never be sufficient evidence to prosecute the pursuer. Or that he was wrong to keep the case against the pursuer open. In September 2016, the then principal Crown counsel informed counsel for the pursuer that the Crown were at that stage focusing their attention on the remaining live prosecution against Mr Whyte, and that it was not anticipated that a decision would be made in the pursuer's case before March 2017. No criticism of Crown counsel's position was ever suggested in evidence. Even if the pursuer had plead a case against the Lord Advocate that he had somehow failed to act properly, he would have failed to establish that, as at September 2015, the Lord Advocate was in breach of such a duty by failing to clear the pursuer. Indeed, he would have failed to establish that the Lord Advocate was in breach of such a duty by failing to clear the pursuer any earlier than February 2018, when he announced that the pursuer would no longer face any further proceedings.

[70] I would note in passing that the pursuer was able to cite a number of cases in which the Crown had made public pronouncements that there would be no prosecution following investigation. He cited the Glasgow bin lorry case, in which the Lord Advocate made a

public pronouncement, on 28 August 2015, that the driver, Harry Clarke, would not face prosecution, almost 8 months after the collision in George Square, killing six people. The pursuer also cited the case of the near collapse of the Royal Bank of Scotland in 2008, where a public pronouncement that Fred Goodwin would not be prosecuted was made some 8 years after the rights issue in which shareholders had invested £12 billion in the bank. The pursuer also mentioned the Clutha case, where a Crown decision that there would be no criminal proceedings was taken some 4 years after the police helicopter had fallen on the pub, killing ten people. In all of these cases, there were individuals and firms who remained under investigation or at risk of prosecution for many months or, more usually, several years. It is true that the pursuer also cited a case in which the police were able publicly to confirm within a matter of weeks that an MSP would not be facing charges relating to alleged sexual misconduct. But of course such a statement would never amount to a renunciation binding the Crown of the right to bring criminal proceedings (*Huston* v *Buchanan* 1995 SLT 86). In short, the pursuer was unable to cite a single case supporting the duty belatedly contended for by him.

[71] Against that general background, I now turn to the specific heads of loss in the pursuer's claim.

Legal expenses

[72] The pursuer sought reimbursement of expenses incurred in instructing solicitors and counsel to act for him "in respect of the malicious prosecution". He produced four invoices for sums totalling £22,722. However, the first two of these invoices were in the VAT-inclusive sums of £540 and £156. They were dated 29 January 2015 and

27 February 2015 respectively. They related to expenses incurred at least 6 months prior to the prosecution. They did not bear to relate specifically to the prosecution. Therefore no damages are due to the pursuer in respect of these sums. The Lord Advocate conceded that damages were recoverable in respect of the remaining two invoices. These were dated 31 August 2015, shortly before the pursuer was placed on petition, and 10 September 2015. It was further conceded that interest at 8% was due on these sums. The pursuer sought interest from October 2015, which was not opposed. The pursuer is therefore entitled to recover £22,026 in respect of legal expenses incurred as a result of the prosecution, with interest at 8% from 1 October 2015.

Solatium

[73] The pursuer sought an award for solatium of £150,000, 75% of which he submitted should be attributed to the past. Obviously, the awards in previous cases involving detention did not assist, since the pursuer had been at liberty throughout, albeit that he had fled to Pakistan and was unable to travel freely for fear of extradition. But the pursuer submitted that he remained under threat of proceedings from September 2015 to February 2018. Further, the award should include an amount to reflect injury to reputation. In *Turley* v *Unite the Union* [2019] EWHC 3547, a defamation case, the defendant had published an article stating the claimant had joined a trade union fraudulently. An award of £75,000 was made. The pursuer submitted that his case was more serious still.

[74] The Lord Advocate submitted that an award of solatium in the region of £22,500 would be appropriate to reflect the mental distress, humiliation and anxiety caused to the pursuer by reason of the prosecution. That was a figure accepted as appropriate by the

Lord Ordinary in *Grier* v *Lord Advocate (*2022 SLT 199) to cover a similar period during which one of the pursuer's alleged co-conspirators was prosecuted. The Lord Advocate referred to the guidance given by the Court of Appeal in *Thompson* v *Commissioner of Police of the Metropolis* [1998] QB 498. That case held that in malicious prosecution cases, not involving detention, damages should start at £2,000. If the prosecution continued for 2 years, £10,000 would be appropriate. *Thompson* was applied in *Rees* v *Commissioner of Police of the Metropolis* [2019] EWHC 2339, where it was agreed that, adjusting for inflation, the upper end of the bracket for malicious prosecution would be about £20,000. In that case, the period between charge and no evidence being offered was about 3 years. Excluding aggravated damages and exemplary damages, which would be unavailable under Scots law, as well as damages for loss of liberty, which would be inapplicable in the present case, the claimants in *Rees* were awarded £27,000 in damages, which included a small amount for loss of reputation, reduced having regard to their past offending. Defamation cases offered no guidance and, in any event, no award should be made to the pursuer for loss of reputation "because that would be to compensate his lies".

[75] So far as loss of reputation is concerned, I accept the submission that defamation cases offer no assistance. The purpose of damages in a defamation action is to demonstrate to the public that the claimant has vindicated his reputation (*Gleaner Co Ltd* v *Abrahams* [2004] 1 AC 628, paragraphs 55, 56). Awards tend also to be higher where they include an amount to reflect loss of earnings, which in a case such as the present would be compensated, if at all, separately, as special damage. Mr Moynihan did not specify which lies in particular the court would be compensating were it to award damages for injured reputation. It may be that he intended to refer to the lies that the pursuer himself conceded

he had told the court. To ignore these lies, or their impact on his reputation, might be said to be awarding him compensation which is not justified. But that would be to permit a defence of truth or justification, analogous to the law of defamation which Mr Moynihan conceded was of no relevance in this area. He may have intended once again to refer to the lie the pursuer told, while at Zeus, in his application for approval by the FSA, but as I have already said, that application was withdrawn. Finally, he may have been intending to refer to facts that the inclusion of an obligation of confidentiality in the Allenby compromise agreement was intended to conceal. However, I am reluctant to proceed on that basis in the absence of argument, or evidence, as to whether or to what extent any such concealment may have permitted the pursuer to maintain a sound business reputation.

[76] I prefer to proceed on the basis that, in an action of malicious prosecution, at least some award may be appropriate for injury to reputation, as appears to have been acknowledged in *Rees* (*ibid*). The difficulty lies in disentangling the extent to which his reputation would have been damaged by the prosecution from the extent to which it was already substantially compromised as a result of events occurring both prior to and following his involvement with Rangers. A similar difficulty confronted Lord Tyre in *Grier* (*ibid*). He considered that there was a basis in the evidence to suggest that material damage was occasioned to the pursuer by adverse publicity, partly as a result of television broadcasts occurring prior to his detention, arrest and charge (2022 SLT 199, paragraph 152). There was no single, indivisible wrong, but a consecutive series of alleged wrongs, each with their own consequences (*ibid*, paragraph 148). He did not consider that he was provided with a sound evidential basis to quantify the extent to which the pursuer's reputation might have been damaged by pre-detention adverse publicity or either of the alleged wrongs

committed by the actions of the Chief Constable or the prosecution by the Crown. On appeal, the Inner House held that the Lord Ordinary was correct in his analysis that the losses sustained by the pursuer were divisible, and that some of his losses were attributable to the pre-detention publicity (2023 SC 116, paragraph 143). However, difficulties in attribution should not be a reason to award nothing. The court should apply the "conventional broad axe with a blunt blade" (*ibid*, paragraph 144).

[77] In this case, although the pursuer's reputation had already been compromised prior to the prosecution, his reputation is likely to have been injured further by the decision of a trusted prosecutor that there was sufficient evidence to bring his case to trial. That injury would not have been fully mitigated by dropping the case against the pursuer, since, as witnesses such as Mr Wisbey pointed out, it might be thought that the Crown took that decision simply because they did not have enough evidence. However, nor do I accept that the pursuer's reputation would have been irretrievably damaged by the prosecution. Indeed, there is at least an argument that the pursuer might be in a better position, having received an unreserved public apology, than if he had not been prosecuted at all, and the rumours and speculation had been allowed to linger or perhaps fester. On balance, I am prepared to accept that the Lord Advocate's public apology on 7 June 2021 will have largely mitigated whatever damage was done to the pursuer's reputation by the prosecution. Deploying the judicial broad axe, I consider that a total award of £40,000 would be appropriate for solatium. Within that award, I have allowed £25,000 for distress, anxiety and humiliation, and £15,000 for loss of reputation. I would attribute 75% of the award to the past, and award interest on £30,000 at 4% from 2 September 2015 to the date of decree, and at 8% thereafter.

Loss of salary and benefits at Proton

[78] The pursuer claimed for loss of salary and other benefits from his employment with Proton worth £127,000 per annum. The claim was made for the period between September 2015, when the prosecution began, and February 2019. February 2019 was chosen as being the date when Proton floated as Rutherford Health plc. That was the date when the pursuer said he would have "exited" Proton, by which he meant sold his shares, and left his employment.

[79] I address the question of when the pursuer would have sold his shares in a later section. So far as his claim for loss of employment is concerned, for the reasons already given, it was not the prosecution, but the commercial risk that the pursuer presented, from the date of Mr Green's Sky interview at the latest, that caused him to lose his job at Proton as investor relations director. Had he not been prosecuted, that risk would have continued until such time as the Crown renounced prosecution, at the earliest. For the reasons already given, I reject the pursuer's submission that the Lord Advocate should have renounced prosecution in September 2015 or at any date earlier than 28 February 2018, when he publicly announced that the pursuer would not face fresh criminal proceedings. That still leaves the period between February 2018 and February 2019. Notwithstanding Mr Walton's evidence that the pursuer could have returned to Proton had "the slate been wiped clean", there was no evidence that the pursuer was or would have been considered for employment at Proton by this stage. In any event, at some point in 2018, he entered into a settlement agreement to sell his shares in the company. No sum is due in respect of this head of loss.

Loss of commission

[80] Different considerations apply to the pursuer's claim for loss of commission. His claimed entitlement to commission was not based on his role as investor relations director, nor included in any contract of employment with Proton. Rather, the entitlement to commission was derived from the letter of engagement, in terms of which, in the first instance, Albans Capital Ltd, and then Fannigan Holdings Ltd, were entitled to 5% of the funds raised in Proton. The pursuer acknowledged that, so far as any funds managed by Neil Woodford were concerned, the agreed rate of return was reduced to 3%. Further, in terms of the three-way split agreed among the pursuer, Charles Green and Paul Fraser, they would each have been entitled to a one-third share of the profits. I consider later whether the pursuer has provided an adequate evidential basis on which to ascertain whether he has suffered a loss of commission. In the first place, however, I must address a more fundamental argument raised by the Lord Advocate, namely, whether the letter of engagement gave rise to any enforceable right to commission at all.

Enforceability of the letter of engagement

[81] In terms of section 19, FSMA, no person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is an authorised person or an exempt person (the so-called "general prohibition"). It was a matter of agreement that the pursuer was neither an authorised nor an exempt person at any relevant time. The principal issue was whether the pursuer's activities under the letter of engagement with Proton involved carrying on regulated activities in the United Kingdom, contrary to the general prohibition.

If so, submitted the Lord Advocate, then the agreement was unenforceable by reason of section 26, FSMA. However, section 26 provides only that the agreement is unenforceable "against the other party", and at the end of this section I consider what implications that qualification has for the Lord Advocate's argument.

[82] Section 22, FSMA, so far as relevant, provides that an activity is a regulated activity if it is an activity of a specified kind which is carried on by way of business and relates to an investment of a specified kind. The specified kinds of activities and investments are to be found in the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 ("the RAO"). Article 25 RAO, so far as relevant, specifies the following kinds of activity:

> "(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or otherwise underwrite a particular investment which is –
>
> (a) a security…
>
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a) … (whether as principal or agent)…"

Security is defined as including any shares or stock in the share capital of any body corporate (articles 3, 76, RAO). Articles 26 to 36 set out a list of exclusions from one or other of both of articles 25(1) and 25(2). Article 26 excludes from article 25(1) "arrangements which do not or would not bring about the transaction to which the arrangements relate".

[83] In *Re The Inertia Partnership LLP* [2007] EWHC 539 (Ch), [2007] Bus LR 879 (at paragraph 39), Jonathan Crow KC, sitting as a deputy judge of the High Court, gave the following broad interpretation to article 25:

> "The critical words in article 25 are these: 'making arrangements for another person … to buy, sell [or] subscribe for' shares. The exception under article 26 applies to 'arrangements which do not or would not bring about the transaction to which the arrangements relate'. In my judgment, the correct analysis of these provisions is as follows: (1) the word 'arrangements' is, depending on the context, capable of

> having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights; (2) in articles 25 and 26 , the word 'arrangements' is used in contradistinction to the word 'transaction'; (3) in article 26 , the word 'transaction' is plainly a reference to the purchase, sale etc of shares contemplated by article 25; (4) as such, a person may make 'arrangements' within article 25 even if his actions do not involve or facilitate the execution of each step necessary for entering into and completing the transaction (ie the purchase, sale etc of the shares); (5) the availability of the exception in article 26 is essentially a question of fact: as a matter of causation, did the arrangements bring about the transaction (i e the purchase, sale etc of the shares)?"

In that case, three UK companies wished to raise capital and were introduced to an intermediary, Porterland, by The Inertia Partnership LLP ("TIP"). In the case of one such company, Vivadi, the court held that TIP had merely introduced it to Porterland, without that introduction necessarily resulting in anything further happening between Vivadi and Porterland, and without TIP retaining any power to direct what might happen following the introduction. A bare introduction of this sort, the court held, would not amount to "making arrangements" for the purpose of article 25(1). In relation to a second company, Plasma, however, TIP had entered into an express agreement pursuant to which it provided administration services designed to facilitate the sale of Plasma's shares. Rejecting an argument that TIP had merely provided the necessary paperwork in relation to contracts that had already been concluded between broker and consumer over the telephone, the court held that, even were that the case, the contracts would not have been brought about without TIP's administrative services, which were therefore sufficient to amount to "making arrangements". The situation was even clearer in relation to the third company, Police 5, where there were no pre-existing contracts, and where TIP's administrative services included sending out application forms, collecting the cheques, and making payment. The court's reference to whether or not the contracts would have been "brought about" without TIP's activities suggests that it had article 25(1) in mind, since these words appear in

article 26, which provide an exclusion only from article 25(1) and not article 25(2). I discuss this further below under reference to the Court of Appeal decision in *Financial Conduct Authority* v *Avacade (in liquidation)* [2021] Bus LR 1810.

[84] In *Watersheds Ltd* v *DaCosta* [2010] Bus LR 1, Watersheds were engaged to provide financial advice in connection with the raising of finance for the defendant's company. The contract stipulated a minimum fee of about £59,000, but otherwise the fee payable was a percentage of the funds raised. Only a bank loan of £250,000 was secured before the company went into administration. Watersheds sued for the minimum fee. One issue was whether the contract was unenforceable because Watersheds was not FCA-authorised. The court held that the work undertaken by Watersheds amounted to more than a bare introduction to a third party. Watersheds was required to use its experience and expertise to assist the company to ensure that all necessary material was provided to investors in the most attractive form so as to assist or promote a successful outcome to any meeting. Nevertheless, the court held that the terms of engagement contemplated Watersheds,

> "at most trying to effect introductions and to assist the company in meeting potential investors in order that the company could try to reach agreement with those potential investors as to a transaction. … Watersheds were not able in any real sense to influence whether or not an investment was made in the company" (paragraph 64).

The court concluded that Watersheds were not undertaking activity which was of a kind specified by article 25(1). In any event, even if Watersheds' activities amounted to making arrangements falling within article 25(1), the court held that they did not in fact bring about the transactions to which they related, with the result that the article 26 exclusion applied.

[85] The court in *Watersheds* accepted that the inclusion of the words "with a view" in article 25(2) made it wider in scope than article 25(1). However, under reference to the FSA's

Perimeter Guidance Manual, PERG 2.7.7B G, it considered that the purpose of article 25(2) was to regulate the provision by a third party of facilities with a view to the conclusion "by others" of transactions through the use of these facilities. As a result, article 25(2) would only be applicable where the facilities were capable of being accessed by both parties to a potential transaction rather than just one of them. The guidance mentioned by way of illustration the activities of exchanges, clearing houses and service companies. The court held that, were it not for the emphasis in the guidance on the provision of facilities for use by others, it would have held that article 25(2) applied to Watersheds' activities. If it were wrong in that regard, the court further held that the exclusion in article 27 would apply. Article 27 provides that a person does not carry on an activity regulated by article 25(2) "merely by providing means by which one party to a transaction (or a potential transaction) is able to communicate with other such parties".

[86] The FCA has since reflected on and updated its guidance in the light of the *Watersheds* decision. In the updated version, it has pointed out that, had it been intended that the activity of introducing should be excluded altogether from the scope of article 25(2), then it would not have been necessary in article 33 expressly to exclude certain arrangements for making introductions from its scope. The FCA therefore remains of the view that article 25(2) includes certain types of arrangements for making introductions.

[87] The relationship between articles 25 and 26 was explored further in the following passage by Popplewell, LJ in *Financial Conduct Authority* v *Avacade (in liquidation)* [2021] Bus LR 1810 (paragraph 48), in a judgment with which Jackson, LJ and Sir Geoffrey Vos, MR agreed:

> "Article 26 excludes from the operation of article 25(1) arrangements which do not or would not bring about the transactions to which the arrangements relate.

> The words 'would not' make clear that even article 25(1) is not concerned only with arrangements which successfully result in a relevant transaction; a person may contravene article 25(1) by making arrangements 'for' such a transaction which does not in fact take place. Nevertheless article 26 introduces an actual or notional test of causation ('bring about') in relation to arrangements for the purposes of article 25(1). In *Adams* [2021] Bus LR 1568 the court held that the degree of causal potency required was that for arrangements to 'bring about' a transaction they must play a role of significance but need not involve a direct connection (see para 97). Importantly, however, article 26 is expressly confined by its terms to article 25(1) and other articles; it does not apply to article 25(2), as this court confirmed in *SimplySure* at para 26. There is no need to introduce any test of causation into 25(2) by reference to the language of the inapplicable article 26 because by using the words 'with a view to', article 25(2) makes clear that it is concerned with the purpose of the arrangements. An intended purpose, an end in view, must be that a relevant transaction take place, but the arrangements do not need to bring it about by way of an actual or notional test of causation. These are wide words which suggest that all that is necessary is that a relevant transaction is part of the purpose of making the arrangements. A person may have a relevant transaction as an end in view where the arrangements do no more than create or facilitate a situation which provides the opportunity for it to take place. That may be an intended result notwithstanding that the arranger is powerless to ensure that it takes place or even influence the decision which leads to it taking place. You cannot make the proverbial horse drink, but taking it to water involves making arrangements with a view to it drinking."

Both *The Inertia Partnership LLP* and *Watersheds* must now be read in the light of the Court of Appeal's decision in *Avacade*. In particular, *Avacade* confirms that the distinction in the earlier cases between being a mere introducer, on the one hand, and having some influence over whether or not the transaction takes place, on the other, is relevant only to article 25(1) and the question of whether the actual or notional test of causation is satisfied. Provided that the purpose of the activity, including that of introducing, is to create or facilitate a situation which provides the opportunity for a transaction to take place, then article 25(2) may be satisfied, even though the arranger is powerless to ensure it takes place or has no influence over whether it does or not. The activities described in *Watersheds* of "assist[ing] the company in meeting potential investors in order that the company could try to reach agreement with those potential investors" would now be regarded as falling within the

scope of article 25(2). In particular, the fact that a company such as Watersheds were not able "in any real sense to influence whether or not an investment was made in the company" would not mean that article 25(2) does not apply.

[88] Article 64 of the RAO provides that agreeing to carry on a specified kind of activity is itself a specified kind of activity. This has the result that entering into the letter of engagement would amount to a regulated activity, where the activities to be carried out pursuant to the letter of engagement themselves amount to regulated activities. Turning therefore to the terms of the letter of engagement, the services to be supplied by Albans Capital Ltd are described in clause 1.1 as the provision of "corporate financial advice", and in clause 2.2 as,

> "assist[ing] in all aspects of organising Pre IPO funding and an IPO including considering appropriate brokers and other professional advisers, making necessary introductions, negotiating fees, supporting you through all aspects of the detailed project work, reviewing the draft reports produced by our reporting accountants, guiding you through the various work streams of the Pre IPO and IPO process, commenting on drafts of the Admission Document, and assisting in other issues that will inevitably arise as the project develops over a four or five month period".

It is significant that the agreed activities included but went considerably further than "making necessary introductions". Subject to the question of any exclusions, to be discussed presently, it is in my view obvious that the activities to be carried out pursuant to the letter of engagement would play a sufficiently significant causal role in bringing about investment in Proton such as to amount to regulated activities of the kind specified in article 25(1). They were also arrangements "with a view" to investment in Proton, in the sense covered by article 25(2). They were arrangements to create or facilitate a situation which would provide the opportunity for such investment to take place. The pursuer relied heavily on clause 2.6(e) of the letter of engagement which purported to exclude responsibility for

"any service that require[d] FCA regulation". However, the question is whether, objectively considered, the services to be supplied pursuant to the letter of engagement amount to regulated activities. At best, parties' statement that the services do not amount to regulated activities may be of assistance in interpreting the intended scope of the agreement, but it cannot be conclusive. Parties may not contract out of FSMA.

[89] The above interpretation of the letter of engagement is consistent with the evidence of what services were in fact provided pursuant to the letter of engagement. The pursuer's own witness statement described his role as "to help prepare the financial information; prepare the Power Point presentation; and to approach stockbrokers, institutional investors and private investors". In court, he tended to describe his role variously as one of "project manager" or "financial engineer". He denied that he met private investors, and described himself as a mere introducer. However, he met Dr Al Fardan, and he had email discussions with solicitors about changes to the shareholders' agreement, including discussions about anti-dilution clauses and the number of directors. Mr Moran described the pursuer's role as setting up communications with potential investors, with a view to giving them the initial brief. He worked closely with Mr Moran in preparing the information memorandum. He would take Mr Moran through the details of that memorandum, checking the financial documents that they had, and making sure that Mr Moran was prepared for meetings with investors. Mr Moran also confirmed that the pursuer attended a number of meetings with investors, at least at the start of the process, presumably up until the Sky interview, and the taking of the decision that he could no longer represent Proton. The pursuer played a critical role in drafting the placing letters by which investors undertook irrevocably to acquire shares in Proton. Karol Sikora spoke to the pursuer's role in assisting him in making

presentations and in "putting together the investment package" for Proton. Dr Al Fardan confirmed that the pursuer was the main negotiator and persuaded him to sign a placing letter. Quite apart from article 25, this on its own may amount to the regulated activity of advising on investments for the purposes of article 53.

[90] The general prohibition is territorially limited and only applies to the carrying on of regulated activities in the United Kingdom. In *Financial Services Authority* v *Bayshore Nominees Ltd* [2009] EWHC 285 (Ch), it was held that advising by telephone from abroad was carried on "either at both the adviser's location and the investor's location or exclusively at the investor's location". Although in this case, Fannigan Holdings Ltd was a Cypriot company, it was merely assigned the benefit of the rights of Albans Capital Ltd under the letter of engagement. Albans Capital Ltd retained the contractual obligation to carry on the services specified in the letter of engagement, and it was a company registered in the United Kingdom. In any event, the fundraising was for Proton, a company also registered in the United Kingdom, where at least some of its actual and prospective investors were located. Accordingly, the territorial requirement is satisfied.

[91] I turn now to consider potential exclusions. The pursuer submitted that, insofar as the court accepted that Albans Capital Ltd was "making arrangements" for the purposes of article 25 RAO, then the arrangements were of a kind that were excluded by articles 28 and 33.

[92] Article 28 excludes arrangements for transactions, or with a view to transactions, which the person making the arrangements "enters or is to enter as principal or as agent for some other person". The pursuer submitted that he was a founder of Proton, and would have continued to be the investor relations director at Proton. An employment contract had

been prepared for him. He would therefore have been acting as an employee and founder of Proton. Any arrangements he made were made in that capacity and therefore fell within the article 28 exclusion. I reject that argument. In the first place, the pursuer was not a shareholder in Proton. The shares were held by Albans Partners General Trading LLC and, from 3 June 2015, by Fannigan Holdings Ltd. Secondly, and more importantly, the pursuer makes the mistake of assuming that the arrangements were made by him as an employee and founder of Proton. They were not. The letter of engagement, in respect of which an entitlement to commission is claimed, provided that the arranger would be Albans Capital Ltd. Although Albans Capital Ltd appears to have assigned the benefit of its rights under the letter of engagement to Fannigan Holdings Ltd, it did not substitute Fannigan Holdings Ltd for Albans Capital Ltd as the contracted provider of corporate financial advice. The pursuer pointed out that no one suggested that he had been required to be an authorised person while helping to raise finance at Rangers, notwithstanding the "similarity in his role at Proton". However, this argument ignores the fact that his entitlement to a percentage of funds raised at Rangers was a condition of his contract of employment, such that it might properly be said in that case that he was making arrangements as an agent for his employer.

[93] The pursuer relied separately on the exclusion in article 33 of arrangements under which clients will be introduced to an authorised or exempt person, where,

> "the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate".

He submitted that any arrangements made by the pursuer involved authorised brokers who would exercise discretion in relation to investments. Arthurian Life Sciences were authorised persons acting for Proton and they dealt with authorised persons such as

Neil Woodford and his advisers. However, the fundamental difficulty with this argument is that the article 33 exclusion, so far as relevant, only excludes the arrangements to which it applies from article 25(2), and not article 25(1). I have already held that the services provided by Albans Capital Ltd went beyond the making of bare introductions, and included the making of arrangements which brought about or would have brought about the transactions to which the arrangements related.

[94] Article 29 excludes arrangements:

> "made by a person ('A') who is not an authorised person for or with a view to a transaction which is or is to be entered into by a person ('the client') with or through an authorised person if-
> (a) the transaction is or is to be entered into on advice to the client by an authorised person, or
> (b) it is clear, in all the circumstances, that the client, in his capacity as an [investor…], is not seeking and has not sought advice from A as to the merits of the client's entering into the transaction (or, if he has sought such advice, A has declined to give it but has recommended that the client seek such advice from an authorised person)."

The article 29 exclusion applies to both articles 25(1) and (2). However, it is itself subject to an exclusion contained in article 29(2), namely, where "A receives from any person other than the client any pecuniary reward or other advantage, for which he does not account to the client, arising out of his making the arrangements".

[95] The pursuer did not make any express reference to article 29, but for the sake of completeness, I should record that I agreed with the Lord Advocate that the exclusion provided for in that article does not apply. Albans Capital Ltd was to receive commission from Proton for which it would not account to investors. The Lord Advocate appeared troubled by the assignation to Fannigan Holdings Ltd, since it would appear that ultimately the commission was received by the latter company and not by the person making the arrangements. Ultimately, Mr Moynihan thought this should not matter, since Albans

Capital Ltd had agreed to carry on a regulated activity and the fact that that company "did not complete the work" should not retrospectively excuse the absence of the necessary FCA authorisation or approval. As it happens, I am not persuaded that it was correct to have conceded that Albans Capital Ltd did not complete the work. It was only the benefit of the letter of engagement that was assigned to Fannigan Holdings Ltd, such that Albans Capital Ltd remained the person contractually obliged to provide the services for Proton that amounted to carrying on regulated activities. In the result, however, I agree with the Lord Advocate, since all that has happened is that Albans Capital Ltd has mandated its commission to a third party. Even if that means that Albans Capital cannot be said to have "received" a pecuniary reward, which may be doubted, it has certainly received another "advantage", since it has ensured that a third party received the commission, one that obscured the identities of those beneficially entitled to it.

[96] I would conclude that the services provided by Albans Capital Ltd pursuant to the letter of engagement were regulated activities under at least article 25(1), and probably also article 25(2), and that there may also have been an element of advising caught by article 53. In addition, therefore, the entering into of the letter of engagement was itself a regulated activity under article 64. I now consider whether it follows that the letter of engagement, and therefore the right to commissions, was unenforceable, as the Lord Advocate contended.

[97] A person who carries on a regulated activity in the United Kingdom, and who is neither authorised nor exempt, contravenes the general prohibition and is guilty of a criminal offence under section 23, FSMA. Section 26, FSMA, provides that "an agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable *against the other party*" (emphasis supplied). I would

accept the Lord Advocate's submission that the letter of engagement was an agreement covered by section 26. However, I do not accept the submission that it is thereby unenforceable. At most, it is unenforceable against Proton. The general prohibition corresponds to, the now repealed, section 3 of the Financial Services Act 1986. In *Lloyd* v *Popely* [2000] 1 BCLC 19, the Court of Appeal held that breach of section 3 did not render the agreement either illegal or void but merely unenforceable as provided for by that Act. When considering what would have happened, had the pursuer not been prosecuted, it would be wrong simply to dismiss the pursuer's claim outright on the basis that he had no enforceable right to any commission. Rather, it is necessary to ask whether there was a "real or substantial chance as opposed to a speculative one" that Proton would have paid commission notwithstanding that the letter of engagement could not have been enforced against it by Fannigan Holdings Ltd and, ultimately, the pursuer (*Allied Maples* v *Simmons & Simmons* [1995] 1 WLR 1602, 1614C-D, 1618H; *Perry* v *Raleys Solicitors* [2020] AC 352; *PCP Partners LLP* v *Barclays Bank PLC* [2021] EWHC 307 (Comm), paragraph 533). If the pursuer succeeds in establishing that there was a real or substantial chance that Proton would not have avoided paying commission, then the evaluation of that chance must be considered as part of the assessment of quantum of damage (*Allied Maples* v *Simmons & Simmons*, *ibid*).

Loss of the chance to earn commission

[98] It did not appear to be in dispute that the pursuer was entitled to one third of whatever Albans Capital Ltd/Fannigan Holdings Ltd were entitled to receive under the letter of engagement. But what was that entitlement? Mr Moynihan pointed out that the pursuer accepted in evidence that the letter of engagement, drafted as it had been with

a view to a wholly different project involving Cancer International Ltd, was only ever intended to be a temporary arrangement. It was used to "paper up" the new business with Proton. As a matter of fact, no new letter of engagement was ever entered into. Quite what the terms of that new letter of engagement might have been, or whether indeed any new letter of engagement would have been entered into, must be a matter of some uncertainty, particularly since it was not explored further in evidence. Mr Moynihan accepted that the pursuer appeared to have been paid commission on the first phase of fundraising which brought in about £58 million by June or July 2015. However, he doubted whether Proton "would have been agreeable, even if permitted by existing investors such as Woodford, to pay additional commission beyond that paid for the first phase". He submitted that the pursuer had "failed to prove" that there was a soundly based contractual entitlement to commission "beyond what was actually paid to him" (the agreed £631,000). I am not persuaded by this argument. The letter of engagement may have been intended to be provisional. But it nevertheless applied for so long as it was not replaced.

[99] The next question is, What did the letter of engagement mean? Clause 1.1 referred to Albans Capital Ltd providing corporate finance advice "in relation to up to a pre IPO £100m fund raise". However, clause 3.1 provided, "Our fee for this assignment will be a total maximum success fee equivalent to 5% of all funds raised directly and indirectly in relation to Pre IPO placing commissions". Mr Moynihan referred to the figure of £100 million as a "cap", however the word "cap" is nowhere used in the letter of engagement. The closest one gets to the notion of a cap is in the reference to a "maximum success fee". The agreement is not that 5% commission would necessarily become payable. It was an agreement that no more than 5% would become payable. The 5% maximum success fee is

then said to be applicable to "all funds raised" pre-IPO. It does not say it will be applicable only to the first £100 million of funds raised. Clause 1.1 is obviously poorly drafted, where it states that Albans Capital Ltd will provide advice "in relation to up to" a pre-IPO fund raise of £100 million. But in my view it should be understood as an undertaking by Albans Capital Ltd of what they would seek to deliver in terms of funds raised pre-IPO, not as a ceiling on the amount of funds in relation to which commission would be payable. In my view, therefore, the letter of engagement would have entitled the assignee, Fannigan Holdings Ltd, to charge commission on all funds raised pre-IPO up to a maximum of 5%.

[100] Mr Andrews' calculation of the funds upon which commission would have been paid, but for the prosecution, began with the observation that Proton's financial statements for the year ended February 2019 showed share capital and premium of £158 million. As it happens, the experts appear to have agreed that £167.5 million was raised. Mr Andrews acknowledged that, as further investors were sought, there would have been more focus on the fees and it would become more difficult to claim commission. As a result, he did not consider that the maximum success fee of 5% stipulated in the letter of engagement could be sustained beyond the initial pre-IPO fund-raising of £58 million. Overall, he decided to reflect this in his report, not by reducing the rate of commission, but by lowering the amount of funds to £118 million upon which the rate of 5% should be applied. Mr Cuerden refined this approach by retaining the figure of £118 million, as the multiplicand to which the commission rate would be applied, but adjusting the commission rate from 5% to 3% on £20 million of that amount, representing the Woodford funds, and applying the 5% rate to the balance of £98 million. Mr Cuerden then deducted £700,000 paid to Arthurian for its role in fund-raising, and divided the net profits by three to arrive at the pursuer's third share.

He then deducted the sum of £631,000 which it had been agreed the pursuer had already received in commission to arrive at a figure for loss of commission.

[101] In line with my interpretation of the engagement letter, I consider it is appropriate to start with the figure of £167.5 million of funds raised. The pursuer has already earned £631,000 commission on the first £58 million. His claim is one for the loss of the chance of earning further commission. Mr Andrews' approach, as I understood it, was to discount the multiplicand to which the rate of commission should be applied on the basis that, as a generality, it would be more difficult, as fund-raising continued, to persuade investors to pay commission, or at least commission at 5%. Such an approach is unobjectionable in principle, and I acknowledge that the figure of £118 million represents a substantial reduction from the total sum of funds raised. However, in my view, further substantial discounts are necessary to reflect a number of other uncertainties.

[102] I have already mentioned in the previous section the uncertainty caused by the fact that the letter of engagement would be unenforceable against Proton. This is a factor to be considered when asking what, if anything, Proton would be prepared to pay by way of additional commission, even if permitted to do so by existing investors such as Woodford, beyond that already paid for the first phase of funding in June/July 2015. To these uncertainties must be added the pursuer's reduced role in fundraising after the first phase. By that stage, he had already been required to work in the background. He could not take up the role that had been envisaged for him of investor relations director in Proton. Mr Moran's evidence was that the pursuer, though he attended meetings at the start of the fund-raising, could not attend thereafter. While the contractual right to commission belonged to Fannigan Holdings Ltd, in reality whether they had earned that right, or

whether the pursuer had earned his one-third share, would depend on the pursuer being in a position to perform the role that had been envisaged for him. In order to take account of all of these uncertainties I would discount the sum upon which commission is payable to the first £100 million of funds raised.

[103] While, therefore, I do not agree with the Lord Advocate or with Mr Constantinou that the letter of engagement imposed a cap on the funds that would attract commission, ultimately I agree that £100 million represents an appropriate starting point for the calculation. Mr Constantinou looked at the first £100 million actually raised and calculated the appropriate commission payable according to whether they were Woodford related funds, on which commission at 3% was payable, or other funds where 5% would be applied. This resulted in a total gross figure of £3,919,000 commission on the first £100 million of funds raised. He then deducted sub-commission fees and expenses, working on the assumption that fees and expenses would have been incurred in the same proportions as they were in fact incurred by Fannigan Holdings Ltd on sums actually received from Proton. I preferred this approach to that of Mr Cuerden since it appeared to me to be more firmly rooted than was Mr Cuerden's abstract calculation in the empirical evidence of what had actually been paid by Fannigan Holdings Ltd. On that basis, Mr Constantinou arrived at a deduction of 35%, consisting of 26.4% for sub-commissions and 8.6% for the expenses of both Fannigan Holdings Ltd and Albans Partners General Trading LLC. Applying that deduction produced a figure of £2,550,000, being the net commission that would have been received on the first £100 million of funds raised. Dividing by three to arrive at the pursuer's share gives a figure of £850,000. From this figure, £631,000 requires to be further deducted, being the amount already paid to the pursuer. That produces a figure of £219,000

for loss of commission. A final deduction may be required to take account of tax payable on that sum, depending on whether the pursuer would have been resident for tax purposes in the UK or in Dubai. I address that question in a later section.

[104] Interest is also due. The calculation is not straightforward since the evidence shows that the commission payments that have been made, totalling £631,000, were made in a series of four unequal amounts between July 2015 and February 2016. In all probability, additional commission would have been payable in further instalments. Appendix 18 to Mr Constantinou's report showed that £100 million of funds were raised by the end of January 2017. I did not understand that to be in dispute. It would be reasonable to assume that the remaining commission to which the pursuer is entitled would have been payable in further tranches over the course of the year to the end of February 2017. In order to reflect that, I would award interest on £219,000, or such other sum as may be appropriate to take account of tax, at the rate of 4% from 1 March 2016 until the end of February 2017, and at the judicial rate of 8% thereafter.

Founder and growth shares

[105] It is not in dispute that the pursuer at one point held the beneficial interest in 1 million founder shares, that is, his one-third share of the 3 million shares transferred from Albans Partners General Trading LLC to Fannigan Holdings Ltd on 3 June 2015. Nor is it in dispute that the pursuer was never issued with growth shares. It is agreed that Mike Moran was issued with 3,138,937 growth shares in Proton in about March 2017. The pursuer claims that, but for the prosecution, he would also have been issued with 3,138,937 growth shares. There were some contradictions in the evidence about that. The pursuer claimed that he had

received a draft contract of employment in which he was to receive "roughly" 3.1 million growth shares. However, Mr Moran doubted whether that would have been a term in anyone's contract of employment. Ultimately, however, the Lord Advocate appeared to accept that there was at one point a "prospect" that the pursuer would also have received 3,138,937 growth shares. Whether or not that prospect of receiving growth shares would ever have been realised must be doubtful, given that the pursuer had already prior to the prosecution been excluded from fully participating in the growth of the company by reason of the risk that he might at some point face prosecution. I have already found that, had he not been prosecuted, that risk would have remained.

[106] What we do know is that in terms of a settlement agreement entered into in 2018 among the pursuer, Mr Green, Proton and Albans General Trading LLC, Mr Green agreed to pay the pursuer £750,000 in full and final settlement of *inter alia* "[the pursuer]'s claim that he is legally and/or beneficially entitled to *any Shares* in [Proton]" (emphasis supplied). It was not in dispute that the pursuer, or rather his mother, received the settlement sum. What is significant in the present context is that the agreement did not state that it was limited to a dispute over the pursuer's entitlement to founder shares. On the face of it, the agreement appears to cover the pursuer's entitlement, legal or beneficial, to shares of any kind. Although the precise date of the settlement agreement was uncertain, it was agreed that it was concluded at some point in 2018. In his evidence, the pursuer stated that, after the "malicious prosecution" he had "written off the shares in [his] mind", and he was "just grateful" to Charles Green that he had given him something back for them. I do not accept the pursuer's evidence in relation to that. In 2018, the pursuer was still in an on-going dispute with Mr Green and, as part of that dispute, the pursuer was continuing to insist on

his entitlement to shares in Proton. Given that growth shares were issued to Mr Moran in March 2017, it seems likely that the pursuer's dispute with Mr Green, in 2018, encompassed both founder and growth shares. I therefore consider it likely on the evidence that the pursuer had been persuaded to accept £750,000 in return for any and all Proton shares to which he was "legally and/or beneficially" entitled. The pursuer has not proved, on a balance of probabilities, that he sold his shares as a result of the prosecution, as distinct from his exclusion from full participation in the company following Mr Green's Sky interview. Having already been paid for his shares, he is not entitled to any compensation.

[107] Even if I am wrong in that conclusion, and that, but for the prosecution, the pursuer would have held or had in interest in a total of 4,138,937 founder and growth shares, the question then becomes, when, if at all, he would have sold them. The pursuer says that he would have sold them no later than February 2019 when the IPO took place. Since this is a question that turns on what the pursuer would have done in order to obtain a benefit, rather than the actions of third party, it is an all or nothing question that has to be decided on a balance of probabilities (*Allied Maples Group, ibid; Hirtenstein* v *Hill Dickinson* [2014] EWHC 2711 (Comm), paragraph 85; *Perry* v *Raleys Solicitors* [2020] AC 352; *PCP Capital Partners LLP* v *Barclays Bank Plc* [2021] EWHC 307 (Comm), paragraphs 533-553). Applying that standard of proof, I am persuaded that the pursuer would not have sold his interest in shares prior to Rutherford Health plc going into liquidation, by which stage the shares would have been worth nothing. There was a suggestion in Mr Moran's evidence that the shares may have retained some residual value, but this was contradicted by the public announcement from the government's Insolvency Service on 13 June 2022 that, due to the

Official Receiver having been appointed liquidator, "there [was] no prospect of a return to shareholders".

[108] The evidence in support of the pursuer's not selling prior to liquidation came from a variety of sources. Firstly, while there had been some sales of shares in 2017/2018, prior to the IPO, after the IPO only 7,199 shares out of a total of 198 million shares changed hands. There was a lack of liquidity in the market for Proton shares. Any sale would have required to have been heavily discounted. Secondly, at the date of the IPO, in February 2019, Proton/Rutherford had a value of about £400 million but with a prospect of being valued at £1 billion. In view of these anticipated rewards, the pursuer would have been unlikely to have sold at a discount. Thirdly, I accept the evidence of Mr Green that "the final intention, with regards to [the pursuer] was for him to hold a non-executive role on the board [of Proton]". The importance of this evidence was that board members were subject to a lock-in preventing them selling their shares for a period of 1 year following IPO. This undermined the pursuer's case that he would have attempted to exit at the IPO stage. In any event, quite apart from the lock-in, there was the evidence of Mr Walton, that shareholders would have expected the founders to be "totally involved and delivering on the commitments they made to investors". Fourthly, the pursuer's exit strategy involved threatening Woodford that he would depress the value of Rutherford shares generally by selling his on the open market. However, the efficacy of this as a strategy was undermined by Mr Andrews, who considered that one would have had to approach other investors first, aggressively discounting the value of the shares, before turning to Woodford "as a last resort". Fifthly, Mr Constantinou pointed out that, in the 5-year period prior to 2021, Proton/Rutherford had achieved a total revenue of just £14.4 million with total losses of over £95 million. Anyone

buying the pursuer's shares would not have been paying money into the company for its benefit, but simply paying it away to the pursuer.

[109] In short, I have held that, pursuant to the settlement agreement, the pursuer sold any interest he had in Proton shares in 2018, for reasons unrelated specifically to the prosecution. If I am wrong in that, I hold that he would have retained or been required to retain any interest that he had in Proton shares until they were worth nothing. No sum is due in respect of this head of loss.

Loss of business opportunity

[110] At this point, it might be appropriate to take stock. The pursuer's career path was determined not by a wish on his part to become a "principal" in deals, as he put it, but by the circumstances in which in 2011 he was forced to leave Allenby. Only a firm or company may be a NOMAD in the AIM market in which the pursuer specialised. In order for a firm or company to be a NOMAD it required to retain at least four qualifying executives. Qualifying executives required FCA approval. The pursuer was unable to obtain FCA approval without disclosing the real reasons for his departure from Allenby, and if he had disclosed the real reasons, he would not have obtained FCA approval.

[111] Unable to work as a qualifying executive, he was effectively cast adrift from the career he had enjoyed for many years as a broker, working for NOMADs in the AIM. The pursuer tried to restart his career at Zeus, but it was inevitable that his application for FCA approval would require to be withdrawn. He may also have tried to restart his career as a broker at ZAI, but this only emerged during the course of the proof and was not further explored. If he had done, it seems likely that the attempt would have met a similar fate.

[112] The pursuer had little alternative but to take the risk of developing a new career as a commercial director at Rangers. However, by this time the reputational baggage he had acquired in the City had followed him to Glasgow. The chairman of Rangers received multiple warnings that he was not a fit and proper person to be a plc director. Within a year he was sacked. An independent business review criticised his management of the club's financial affairs. The pursuer's career post-Rangers became increasingly tied up with that of Mr Green, his business partner. He moved to Dubai, a milieu with which he would have been less familiar than the one he left behind. No sooner had he and Mr Green started to get Proton up and running when there were rumours going about of a potential prosecution, culminating in Mr Green's Sky interview. Quite apart from any damage that may have been done to his reputation, already badly compromised by the circumstances of his departure from Allenby and his involvement at Rangers, the threat of prosecution to his closest business associate meant that he now represented a significant commercial risk to investors. The pursuer could no longer take up employment as investor relations director at Proton, take a seat on the board, hold shares in his own name, or attend meetings with investors.

[113] When, in September 2015, a petition warrant was taken out for his arrest, he fled to Pakistan. His relationship with Mr Green fell apart. Paul Fraser, his other business partner at Proton, has since died. Although Mr Green does appear to have continued working, despite being prosecuted, the pursuer has not been able to restart his career. In my view, the principal reasons for that will have been a combination of his badly compromised reputation post-Allenby and post-Rangers, as well as the commercial risk that the pursuer presented to any investor, employer or business partner at least until February 2018 when it was announced that he would no longer face fresh criminal proceedings.

[114] Both sets of experts developed an array of scenarios with a view to assessing the pursuer's potential career and how it may have been damaged by the prosecution. For Mr Andrews, the options that might potentially have been open to the pursuer were (1) to return to working as a qualified executive, (2) to complete the Proton deal and return to corporate finance, and (3) to continue a career as a "venture capitalist entrepreneur". He considered the first two options unlikely, even before the pursuer's FCA-related difficulties emerged in evidence. The venture capitalist entrepreneur was a term Mr Andrews invented to describe someone who was not following any recognised career path, for whom there was no pay scale, and no typical remuneration, but who had a "certain set of skills" and the "freedom to pursue financial opportunities". Venture capitalist entrepreneurs would typically find other such entrepreneurs with whom they would work closely in formal corporate structures or partnerships or less formal "handshake" agreements.

[115] The assumptions upon which Mr Andrews considered the venture capitalist entrepreneur as a likely option for the pursuer are very far removed from the facts of this case as I have found them to be. To take one significant example, Mr Andrews assumed that the pursuer left Rangers on a "career high", whereas I have concluded that his career was already at that point on a downward trajectory, and that it has continued downwards ever since. While Mr Andrews acknowledged the importance of reputation in the development of any career the pursuer might have had in the financial sector, he took no account of the reputational damage and commercial risk which had already arisen pre-prosecution. He naturally made assumptions, running contrary to my findings, about capital gains likely to have been made from selling Rutherford shares and that could have been re-invested as seed money in new projects. None of this is intended as a criticism of Mr Andrews, since his

opinions were necessarily based on the information he was given, but ultimately I derived little assistance from this aspect of his evidence.

[116] Similar comments may be made in regard to various possible scenarios contemplated by Mr Constantinou. However, there was one scenario considered by Mr Constantinou, though not by Mr Andrews, which may be of some assistance. In that scenario the pursuer developed what he called a "Proton Partners" type career, by which he meant that he pursued "salaried career opportunities with corporates without holding any significant shareholdings in those companies". Mr Constantinou gave as a rationale for that scenario the need to take account of the possibility that the pursuer's reputation had been damaged by a number of factors. These included damage associated with his involvement at Rangers, and the liquidation of Rutherford. Naturally enough, he had not been aware at the time of his report of the pursuer's true reasons for leaving Allenby.

[117] In this scenario, Mr Constantinou assumed that the pursuer would have remained investor relations director at Rutherford until its liquidation in June 2022, and would then have taken up a similar role at one or other of the companies that were considered in evidence as potential business opportunities for the pursuer. One of these was a company called Haslar Developments Ltd, which was Paul Fraser's property development company. There had been discussions in the months prior to the prosecution of the pursuer being appointed to the board, but which fell through after the prosecution began. The pursuer stated that he was due to earn a salary of between £100,000 and £150,000, while Mr Schmidt stated that it might even have been as much as £200,000.

[118] Mr Constantinou's scenario does not quite fit the facts as I have found them to be. In particular, I cannot accept that, but for the prosecution, the pursuer would have continued

to work at Proton, since his exclusion from the public face of that company was attributable not to the prosecution but to the commercial risk that he presented to investors as a result of his association with Mr Green and Rangers. However, it is certainly possible that, but for the prosecution, the pursuer might have been perceived as presenting less of a risk to firms, such as Haslar Developments Ltd, owned by friends and associates, particularly if, as Mr Constantinou's scenario suggests, he did not acquire equity in the firm, or take up a position as director. Such a firm might have had a greater tolerance for risk, and been prepared to accept the reduced level of exposure that the pursuer's taking up such a limited role might present. In addition to the damage to his reputation which I have already referred to as meriting a certain amount of compensation, I consider that a further lump sum award is necessary to compensate the pursuer for whatever additional difficulty the prosecution caused him to suffer in his efforts to secure employment. Mr Moynihan, as I understood him, compared such an award to compensation for "handicap in the labour market", which does capture something of the general idea.

[119] Mr Constantinou stated that a salary of £150,000 that might have been earned at Haslar Developments Ltd would correspond to a net salary of £88,000, after deduction of UK income tax. For the reasons I have given I do not accept that the pursuer's loss of that or any similar business opportunity would have been solely attributable to the prosecution. Again, for the reasons already given, I consider that any such handicap in the labour market would have been largely removed in June 2021 by the Lord Advocate's unreserved public apology. In the next section, I find that the pursuer would have been resident in the UK for tax purposes. Resorting once more to the judicial broad axe, I am prepared to make a lump sum award of £176,000 for loss of business opportunity. This corresponds to 2 years' net

salary at a company such as Haslar Developments Ltd. I will attribute 75% of that sum to the past. Accordingly, interest will run on £132,000 at 4% from 2 September 2015 to the date of decree, and at 8% thereafter.

Residence for tax purposes

[120] The final question to be resolved is whether damages should be calculated gross without deduction for UK tax on the basis that, but for the prosecution, the pursuer would have been permanently resident in Dubai for tax purposes.

[121] The pursuer claims that he moved permanently to Dubai in March 2015 in order to enjoy the tax benefits. However, the evidence of Mr Schmidt was that, until the pursuer left for Pakistan in the autumn of 2015, he interacted with the pursuer regularly. He said that he was aware that the pursuer was "seriously considering" moving to Dubai on a permanent basis. He had brought his family out for a summer to see if they could settle there. In the first joint minute, parties agreed that the pursuer was resident in Pakistan from September 2015 to September 2016, but that period straddles two tax years and does not demonstrate his non-UK residency for tax purposes in either of them. There was also a considerable amount of vacillation in the pursuer's own evidence regarding when he returned to the United Kingdom from Pakistan. Some of his admitted dishonesty relates to tax evasion. Against that background, I do not find it proved that the pursuer had become permanently resident in Dubai for tax purposes.

Disposal

[122] I would summarise the conclusions I have reached on the various heads of damage, as follows.

Head of Loss	**Award (£)**
Legal expenses	22,026
Interest on legal expenses	8% from 1 October 2015
Solatium	40,000
Interest on solatium	4% on 30,000 from 2 September 2015 to date of decree and 8% thereafter
Loss of salary and benefits at Proton	Nil
Loss of commission	219,000 or such other sum as may be appropriate to take account of tax
Interest on loss of commission	4% on 219,000 (or such other sum as may be appropriate to take account of tax) from 1 March 2016 until 1 March 2017 and 8% thereafter
Sale of founder and growth shares	Nil
Loss of business opportunity	176,000
Interest on loss of business opportunity	4% on 132,000 from 2 September 2015 to date of decree and 8% thereafter

[123] At the invitation of parties, I will put the case out by order to discuss the terms of the interlocutor that would be appropriate to give effect to the award that I have indicated I would be prepared to make, taking account of interest and any tax calculations. I will reserve any question of expenses, whilst drawing parties' attention to paragraph 45 of this opinion.