THE FACULTY OF ADVOCATES DISCIPLINARY RULES 2015
(REF: 2019/04)

Report of the Investigating Committee
in the matter of the Complaint by
Steven Elliot
regarding
Andrew Smith QC

1. By an interim decision dated 30 April 2021 of the Complaints Committee ("the interim decision" and "the Committee", respectively) established under the Faculty of Advocates Disciplinary Rules 2015 ("the 2015 Rules"), a remit was made to an Investigating Committee ("the IC") to investigate and report back to the Committee, in terms of rule 18b of the 2015 Rules. The evidential issues to be investigated by the IC were set out in the interim decision.

2. The initial composition of the IC required revision, due to one member taking up a position outwith Faculty. The IC which investigated comprised Una Doherty KC, Lorraine Glancy KC, Eoghainn Maclean Advocate and Prof. Gerard Hastings Lay Member. The IC convened on 6 October 2021 in order to discuss its remit. In accordance with rule 20a of the 2015 Rules, letters dated 18 October 2021 were issued to the Complainer and to the Member asking for a written response within 21 days clarifying the unresolved factual matters raised by the Committee in the interim decision (see the IC's documents bundle in this first complaint (ref: 2019/14), at its electronic page numbers 308 to 309 (*sic* "Bundle 1 eps308-309")). A response was received from the Complainer dated 8 November 2021 with supporting documents (Bundle 1 ep310). A response was received from the Member's legal representative, CMS, in a letter dated 8 November 2021 with supporting documents (Bundle 1 ep466). The IC reconvened on 6 December 2021 to consider the responses and decide on further investigations. The investigations undertaken by the IC are listed below. By an interim decision dated 24 February 2022 of the Committee, a remit was made to the IC to investigate and report back to the Committee in respect of another complaint under ref: 2019/14. The IC were directed to consider the two matters remitted to it

contemporaneously. The IC met again on 7 April 2022 and 8 June 2022 to consider the outcome of investigations and decide on further investigations. Arrangements were made to conduct interviews of the Member and the Complainer in August 2022. The IC liaised over the proposed questioning to be undertaken at the interviews. The IC liaised and met on several occasions after the interviews, to discuss preparation of reports and their finalisation: meetings took place on 16 August 2022, 7 December 2022, 11 January 2023, 1 February 2023 and 20 February 2023.

3. In accordance with rule 20b of the 2015 Rules, the IC undertook investigations. Letters were issued to a number of parties as listed below, with specific questions seeking clarification of evidential issues raised by the Committee.

    - Letter to Elias Paourou (Bundle 1 ep506). Mr Paourou responded by email of 25 January 2022 (Bundle 1 ep508).
    - Letter to Sarah Bell (Bundle 1 ep510). Ms Bell responded by email of 1 April 2022 (Bundle 1 ep512).
    - Letter to Clyde & Co (Bundle 1 ep514). Clyde & Co responded by email of 24 March 2022 (Bundle 1 ep516).
    - Letter to David Grier (Bundle 1 ep519). No response.
    - Letter to David Smith (see the IC's documents bundle in the second complaint (ref: 2021/01) at its electronic page number 165 (*sic "*Bundle 2 ep165"). Mr Smith responded by email of 20 June 2022 (Bundle 2 ep171).

4. In November 2021, with the assistance of the Advocates' Library staff the IC obtained from the SCTS a copy of interlocutors in the action CA109/13 (Bundle 1 eps521-550). The IC was unable to obtain a copy of interlocutors in the action CA200/15 additional to those already within the papers. In May 2022 and January 2023, the IC examined and obtained extracts of particular public registers to which it had been referred by the Complainer and Member, as explained at §74, below (Bundle 1 eps518-650).

5. By email of 24 March 2022 to the Dean's Secretariat, Kevin Farrell and Steven Worbey advised that they did not consent to the Member or Clyde & Co disclosing details of the case or the Member's conduct, and that they would ensure that the Member was aware of that (Bundle 1 ep518). By email of 10 June 2022 to the Dean's Secretariat,

the Member asked if his former clients had consented to waive any right to privilege as he could not breach their rights without their consent, and if what he discussed at interview would be confidential to the IC (Bundle 1 ep551). On behalf of the IC, the Dean's Secretariat responded by email of 30 June 2022, explaining the position of Mr Farrell and Mr Worbey as intimated to the Dean's Secretariat, and that discussions at interview may form part of the IC's report to the Committee, which report will be copied to the Complainer and the Member in terms of rule 23 of the 2015 Rules (Bundle 1 ep552). In response to a further email from the Member on 30 June 2022, by email of 15 July 2022 the IC suggested that others including Faculty Office-Bearers might be able to assist the Member in relation to his concerns (Bundle 1 ep554 & ep557).

6. The IC conducted interviews via the online platform Zoom. The interview of the Complainer took place on 4 August 2022. To save time at his interview, the IC wrote, by letter dated 10 August 2022, to the Member about detailed issues in relation to trade marks raised at paragraphs [54], [56] and [58] of the interim decision (Bundle 1 eps559-562). By letter on the same date, CMS responded on the Member's behalf (Bundle 1 eps563-580). The interview of the Member took place on 11 August 2022, in the presence of the Member's solicitor. The Complainer provided 'Post-interview follow up submissions' with supporting documents on 5 August 2022 (Bundle 2 eps172-272).

7. In preparation of this report, the IC is mindful of the standard of proof in terms of Rule 69 of the 2015 Rules, which provides that the Member shall be given the benefit of any reasonable doubt. The report addresses the factual issues identified in the Committee's interim decision and makes findings of fact where necessary.

Interim decision paragraph [31]

8. The Committee asked for investigation of the correct order of events in relation to the timing of the Complainer's bankruptcy and the liquidation, compared to the timing of the expenses award and the interim award of damages in the action CA109/13. There is no dispute that the liquidation of Bender Social Networks Ltd ("BSNL") commenced on 26 January 2015 and the Complainer's bankruptcy order was made on his petition on 29 January 2015.

9. The interlocutors in the action CA109/13 demonstrate the following events on the dates noted (Bundle 1 ep521):

18.2.14	Finding and decerniture for expenses occasioned by the debate.
26.2.14	Proof before Answer allowed, to take place on 11.11.14.
2.4.14	Restriction in the scope of the Proof before Answer.
20.10.14	By Order fixed for 23.10.14 on the grounds that defences had been withdrawn and the Complainer's agents had withdrawn from acting.
23.10.14	Decree by default in terms of part 1 of conclusion 1 of the summons, ordaining the Complainer to produce an accounting of intromissions in and receipts obtained in respect of "Bender" and "Brenda"; decerniture for expenses of the cause.
5.11.14	Pursuers' Note of Objections No. 32 of process, ordaining the Auditor to state by Minute within 14 days the reasons for his decision in relation to items in the account of expenses to which objection is taken.
24.11.14	Taxed account of expenses £28,274.66 extracted, includes interest on the taxed expenses from 20.10.14 until payment.
28.1.15	Pursuers' Minute of Amendment No. 38 of process received into procees with Answers to be lodged within 14 days, consideration of the remainder of the motion continued until 30.1.15.
30.1.15	No order made, the Court having heard from the Member for the pursuers and from the Complainer personally.
5.3.15	By Order, no appearance for the Complainer. Appointed the Complainer's trustee in bankruptcy to sist himself as a party or intimate that he does not intend to do so; continued consideration of pursuers' motion until 12.3.15
12.3.15	Pursuers' Minute of Amendment No. 41 of process received and the record amended in terms thereof. Declarator of partnership and decree for interim payment £168,947.84. Pursuers' motion in respect of the seventh conclusion as amended refused *in hoc statu*.

10. The IC have not seen any interlocutor disposing of the Pursuers' Note of Objections No. 32 of process. In his submission dated 8 November 2021, the Complainer stated that the expenses for the debate were downgraded by the Auditor to £28,274.66 on 5

December 2014 but two days later an appeal was submitted by the pursuers; that at an unknown date in 2015, after his bankruptcy, the final amount due was decided upon (Bundle 1 ep310). The IC have not been able to ascertain the factual position any more clearly than disclosed by the interlocutors noted above. At interview, the Complainer was referred to the above interlocutors and did not dispute them. His position was that he did not actually receive a demand for payment until after his bankruptcy. He accepted at interview that the decree for expenses remained unpaid even when the sum due was finalised, which according to him was in 2015.

11. In CMS' submission of 8 November 2021 at its paginated page number 4 (*sic "*pp4"), it was acknowledged that the Member's statement, which accompanied CMS' letter of 9 September 2020, 'erroneously suggested' that the Complainer's bankruptcy and the liquidation of BSNL came after the award for the interim payment was made (Bundle 1 ep469). CMS stated that the Member corrected this and apologised for this unintentional error. At interview, the Member confirmed this. When asked about the Note of Objections, the Member suspected that this just fell away after the Complainer became bankrupt.

12. **Therefore, the clarification sought by the Committee over timings has now been obtained. There is no dispute now between the parties that: (a) there was an award of expenses against the Complainer in the action CA109/13 prior to the Complainers' bankruptcy and the liquidation of BSNL; and (b) decree for interim payment in the action CA109/13 was granted after the Complainer's bankruptcy and the liquidation of BSNL. These facts have been proved.**

13. In addition, in CMS' submission of 8 November 2021, at pp4, it was suggested that prior to the Complainer's petition for bankruptcy and putting BSNL into liquidation, he would have been aware of the outstanding award of expenses against him and that the pursuers were seeking a substantial payment from him, and that would have been a factor in his decision to seek bankruptcy (Bundle 1 ep469). When asked about this at interview, the Complainer said that the decree for expenses was not a factor in his decision but, given the claim in the summons for £5million, he thought there was no viable way forward so this was a factor in his decision to seek bankruptcy. **The IC therefore finds proved that the ongoing action CA109/13 was a factor in the Complainer's decision to seek bankruptcy.**

Interim decision paragraph [33]: The court appearance on 12 March 2015

14. The Committee asked for further enquiry in order to gain a proper understanding of the information and motions before Lord Tyre on 12 March 2015, including the terms of the note for the pursuers no. 43 of process and the minute of amendment no.41 together with the unamended pleadings. The Committee considered this relevant to the question of whether the Member's appearance on 18 May 2018 is accurately characterised by the Member as "a purely formal matter'.

15. The Complainer provided a copy of the minute of amendment no. 41 and the amended Record in the action CA109/13, Steven Worbey and Kevin Farrell against Steven Elliot (Bundle 1 ep310- response 8.11.21, Appendix ("Appd.") B eps338 & 345). Although the unamended Record is not available, the font on the amended Record makes clear where the pleadings were amended by the minute of amendment. The Complainer also provided a copy of the pursuers' motion and the defender's written objection to the motion (Bundle 1 ep310- response 8.11.21 Appd. A ep322 & Appd. B ep336). The note for the pursuers no. 43 was not produced to the IC. At interview, the Member was asked about this note. He advised that he would try to find it and ask for permission for it to be released to the IC. At the time of writing this report, this note no. 43 has not been produced.

16. In his response of 8 November 2021, the Complainer acknowledged that when he submitted an objection to the pursuers' motion, he was without legal representation or locus due to bankruptcy (Bundle 1 ep312). At interview, he agreed that this was the position. He agreed that the pursuers' motion was continued from 5 March 2015 to 12 March 2015, to allow his trustee in bankruptcy, Mr Paourou, to sist himself as a party if he wished to do so, as demonstrated by the court's interlocutor of 5 March 2015 (Bundle 1, ep521 at ep543). He agreed that Mr Paourou did not do so, and as a result the motion proceeded as unopposed on 12 March 2015.

17. The Member explained that the pursuers' minute of amendment included the introduction of conclusions for interdict and interim interdict and for declarator of partnership, and the motion sought declarator and an interim payment (Bundle 1 ep466- CMS' response 8.11.21 at pp7, ep472). At interview, the Member explained that earlier

procedure had included a debate when it was argued for the Complainer that the court did not have jurisdiction. Lord Tyre decided that the pursuers did have jurisdiction and awarded expenses against the Complainer (Bundle 1 ep527- interlocutor dated 18.2.14). Prior to the motion with the minute of amendment in March 2015, defences had been withdrawn and the Complainer's solicitors Brodies had withdrawn from acting (Bundle 1 ep534 – interlocutor dated 20.10.14). The Complainer had been made bankrupt. The motion was intimated to the Complainer, and then after the continuation the motion was intimated to the Complainer's trustee.

18. At the hearing on 12 March 2015, when the Complainer was not represented, Lord Tyre found and declared that the pursuers and the Complainer were partners of the partnership formed for the use and exploitation of the "Bender" and "Brenda" apps, and found the pursuers entitled to an interim payment of £168,947.84 for sums due. Lord Tyre refused *in hoc statu* the motion for declarator in terms of conclusion 7, that the "Bender" and "Brenda" apps and their associated intellectual property were property of the partnership within the meaning of s20(1) of the Partnership Act 1890 (Bundle 1 ep545- interlocutor dated 12.3.15).

19. **The documents now available, namely the pursuers' minute of amendment no. 41 of process, the pleadings shown as amended by that minute of amendment, along with the pursuers' motion, all assist in setting out the position before Lord Tyre on 12 March 2015 in the action CA109/13. Lord Tyre's interlocutor of 12 March 2015 sets out his decision on the pursuers' motion, and that he was satisfied that there was a partnership between the pursuers and the Complainer. The IC does not require to make specific findings of fact on these issues, given that these documents are now available and it is not disputed that they are what they bear to be.**

Interim decision paragraphs [34] and [35]: Events subsequent to 12 March 2015

20. At [34], the Committee referred to the issue of the Complainer's allegation that, notwithstanding the outcome of the action CA200/15, the Member and his clients continued to assert that there was a partnership. In his response dated 8 November 2021, the Complainer referred to claims made by the pursuers' solicitors after his bankruptcy and prior to his discharge. He acknowledged, however, that these claims

were not made by the Member himself (Bundle 1 ep310, at ep312). At interview, he agreed that he was complaining about the actions of the solicitors but said that he assumed that the Member was part of these actions given his appearance for the pursuers in court.

21. In his response dated 8 November 2021, he also referred to the Member's involvement in filing a petition in the Court of Session on behalf of the partnership, rather than the former or dissolved partnership (Bundle 1 ep310, at ep312). The vouching he produced for this was a motion for expenses in the petition P406/15 dated 18 May 2015 (Bundle 1 ep310- response dated 8.11.21, Appd. R at ep411). He was also critical of the Member's opposition to an application for costs including an additional fee in the action CA200/15. The vouching he produced for this was a copy letter from his solicitors to Clyde & Co complaining about the pursuers' reliance on their pleadings in their grounds of opposition to the motion (Bundle 1 ep310- response 8.11.21, Appd. Z at ep452). At interview, it was put to him that the Inner House of the Court of Session, in its opinion on 29 April 2020 in respect of the Member's appeal against an SLCC determination, said that the Member was entitled to rely on the averments in the pleadings in the context of opposing the motions for expenses and additional fee (see the document in the Committee's full file for the first complaint as at 2 December 2020, starting at its electronic page number 1076, being its paginated page number CC1073 (*sic* "Full File 1 at ep1076 (CC1073)")-Opinion of the Court at [36], ep1092 (CC1089)). He stated that he accepted that the court made this ruling, but still maintained that the Member and others made the claims. At interview, he was referred to his response of 8 November 2021 where he claimed that there were continued claims made by David Grier, David Smith and Gavin Henderson that the pursuers were partners with him, after the decision in the action CA200/15, but he accepted that he had no proof of this (Bundle 1 ep310, at ep313). His position at interview was that the Member had influence on others who did assert that there was a partnership. He did not have documentary evidence of this, other than what he had already produced. In this connection, he referred to a witness statement by Mr Worbey to the UK Intellectual Property Office (the "IPO")(Bundle 1 ep310- response 8.11.21 Appd. S at ep412), as he said the Member had admitted he had helped Mr Worbey write that statement. He also produced a copy of his motion, intimated on 20 April 2018, which sought recall of the declarator of partnership in the interlocutor of 12 March 2015 and recall of the

award of the interim payment of £168,947.81, in action CA109/13 (Bundle 1 ep310- response 8.11.21 Appd. D at ep372), a copy of the pursuers' opposition intimated on 8 May 2018 (Bundle 1 ep310- response 8.11.21 Appd. E at ep374), and a copy of the pursuers' motion intimated on 16 May 2018 that the defender should disclose a UK address or if resident outwith the UK sist a mandatory or consign funds (Bundle 1 ep310- response 8.11.21 Appd. G at ep382).

22. The Member's position was that he had no recollection of making an assertion that there was a partnership notwithstanding the outcome of the CA200/15 action. He also pointed out that there was an extant decree of the existence of partnership in the CA109/13 action. The determination in the CA200/15 action was as to whether there was a partnership under the Partnership Act 1890 (Bundle 1 ep466- CMS' response 8.11.21 at ep475). At interview, the Member was asked about his involvement in the petition P406/15. He believed this was a petition for interdict to stop the Complainer and his cousin Sharon Campbell taking steps to dissipate assets. There was a lot of concern at the time that income from the apps had gone to the Complainer's company or bank account. The Member made reference to the Complainer's cousin having a company in New Zealand called Scampbell Ltd which had paid £80,000 for BSNL assets and operated the apps (Bundle 1 ep46- Complainer's submissions 19.6.20 Appd. C, transcript of Complainer's public examination transcript in English proceedings at eps60-63). The Member stated that the Complainer planned to get the business back. In 2015 the partnership still existed, it had not been dissolved, but the Member did say that the trustee should have been named in the petition rather than the Complainer as the Complainer was bankrupt. The Member was referred to Mr Worbey's statement to the IPO (Bundle 1 ep310- Complainer's response 8.11.21 Appd. S at ep412) on which the Complainer relied as evidence that the Member asserted that the partnership existed after the determination in the CA200/15 action, as the Member had assisted in the preparation of this statement (Bundle 1 ep137- CMS' letter 9.9.20 para 2.7, at ep138). The Member's position at interview was that Mr Worbey accurately recorded the position about the question of partnership, namely that in the second action the court decided that there was not a partnership as defined in the Partnership Act. The Member's position was that he had not influenced anyone to continue to say there was a partnership after the court's decision in the CA200/15 action.

23. **IC concludes that the allegation by the Complainer that the Member and his clients continued to assert that there was a partnership, after the court's decision in the CA200/15 action, has not been proved. The limited evidence produced by the Complainer is insufficient to prove this allegation. Importantly, in addition the Complainer has conceded that he made certain specific allegations against the Member and others without having any proof. That he did do so raises issues about his reliability as a witness.**

24. At [35] of its interim decision, the Committee noted that the substantive motion on 12 March 2015 resulted in an interlocutor that was to the significant advantage of the Member's clients. It was also the subject of hearings before Lord Bannatyne on 18 May and 1 June 2018. The benefit to the pursuers in preventing recall of the interlocutor of 12 March 2015 was relevant to an understanding of the nature of the hearing that took place on 18 May and 1 June 2018. The Committee wished to know the reasons the pursuers sought to oppose the Complainer's motion.

25. The Complainer's position was that his motion was strenuously opposed in the traditional manner but that additional tactics were employed (Bundle 1 ep310- response 8.11.21 at ep313). One example of the additional tactics employed was the pursuers' attempt to postpone his motion, by the pursuers' own motion seeking that he produce a UK address (Bundle 1 ep310- response 8.11.21 Appd. G, at ep382). When this was discussed with him at interview, he was referred to the undertaking he gave as a result of which the pursuers did not require to proceed with their motion at the hearing on 1 June 2018 (Bundle 1 ep310- response 8.11.21 Appd. F, at ep376). He was referred to the Minute of Proceedings of 1 June 2018 in action CA109/13 which referred to the undertaking given by him (Bundle 1 ep548). He accepted that objectively it was reasonable for this undertaking to be requested, to protect the pursuers' position. However, he stated that it was part of a co-ordinated plan to silence him. Another additional tactic employed was said to be that new trustees were rushed in at the last minute to remove locus from him so that he could not raise this motion, and that this was arranged by David Grier a client and friend of the Member, as a favour (Bundle 1 ep310- response 8.11.21 at ep313). At interview, when asked what evidence he had that all of this was done by David Grier as a favour to the Member, his response was that David Grier was on administrative leave at the time, that David Grier was the

Member's client, that the Member had introduced David Grier to the pursuers, that the trustees knew there was no money in his estate, and that no bill was issued for all the work done by Duff & Phelps. The Complainer stated that the Member was the link, that only the Member can explain in detail and that he has not. Another additional tactic employed was said to be that David Grier submitted a letter to Lord Bannatyne and attended Court, to ensure that the judge had an immediate bad impression of the Complainer (Bundle 1 ep310- response 8.11.21 at ep313). The letter by David Grier dated 17 May 2018 is addressed 'To whom it may concern' and its heading refers to the Complainer's bankruptcy proceedings in Brighton County Court. It states that Duff & Phelps are engaged by Mr Steven Worbey and Mr Kevin Farrell who are creditors in the bankruptcy, and that Duff & Phelps had requested consent to be appointed trustees (Full File 1 at ep1362 (CC1359)). At interview, when asked how the Complainer knew what difference if any the letter made to the judge, the Complainer confirmed that he did not know, but stated that it was one part of a multi-pronged attack.

26. The Member's position was that the interlocutor of 12 March 2015 granted declarator of partnership and an interim award. The Complainer's motion heard in May and June 2018 sought to recall the interlocutor. The Complainer's motion was opposed on the basis that he did not have locus given that he was bankrupt, and that the motion was incompetent as it sought to recall the interlocutor of one Lord Ordinary by another Lord Ordinary (Bundle 1 ep466- CMS' response 8.11.21 pp8 at ep473). When asked at interview about what the benefit was to the pursuers in preventing recall, the Member stated that the short answer was that they maintained their position as substantial creditors in the insolvency. If the decree was negated, they would lose their potency as creditors.

27. The interlocutor of 18 May 2018 (Bundle 1 ep546) records that at that hearing Lord Bannatyne heard the Member for the pursuers and the Complainer personally, and continued both motions until 1 June 2018, (a) to allow for new joint trustees of the Complainer to be represented if so advised, (b) for the preliminary matter of the right of the defender to move his motions given the bankruptcy order to be dealt with by the court as a preliminary matter, and (c) for intimation of the interlocutor upon The Insolvency Service. The interlocutor of 1 June 2018 records that on that date Mr Ferguson QC appeared for the pursuers. Counsel for the Complainer's trustees in

bankruptcy appeared and advised that the trustees did not intend to enter the proceedings then withdrew from the hearing. The Complainer appeared personally (Bundle 1 ep547). The Minute of Proceedings of 1 June 2018 records that counsel for the trustees in bankruptcy formally waived any objection in relation to the defender's right to move his motions, and that the Complainer provided an undertaking (Bundle 1 ep548).

28. The Complainer previously advised that he was given locus at the hearing, and after hearing arguments the judge called a half hour recess then returned with his decision (Full File 1 at ep1349 (CC1346)-letter from Complainer to SLCC dated 27.1.19, at ep1351 (CC1348)). At interview, the Complainer agreed that the judge heard his arguments and the arguments of the pursuers' QC, and then made his decision to refuse the Complainer's motion.

29. **The IC considers that the explanation for why the Complainer's motion was opposed is now available and is understandable. The IC accepts this evidence as proof of the reasons for opposition of the Complainer's motion.**

30. The Committee raised the question of whether the Member's appearance on 18 May 2018 is accurately characterised by the Member as "a purely formal matter" (at the end of [33] of interim decision). The description of his appearance on that date as a formal matter was first given by the Member in a written statement by him (Bundle 1 ep137- CMS' letter dated 9.9.20 with Member's statement ep143, at §2.5). The Member thereafter explained that this description had been used because the Complainer's motion was incompetent and required to be formally opposed for that reason. He also stated that the proceedings were to all intents and purposes effectively (if not formally) concluded by that stage. At the hearing on 18 May 2018, Lord Bannatyne continued consideration of the two motions, one for the pursuers and one for the Complainer. Given the Complainer's allegations of conflict against the Member (which were and continue to be disputed by the Member), another Senior Counsel was instructed to represent the pursuers at the continued hearing on 1 June 2018 (Bundle 1 ep466- CMS' response 8.11.21 pp9, at ep474). At interview, the Member confirmed that he described the hearing as a formal matter as he thought it would not go ahead, given that it was incompetent and it had not been properly intimated. He thought it would be continued.

31. **The IC considers that, objectively, the hearing of the Complainer's motion would not usually be described as a formal matter given its terms. However, part of the Member's explanation for describing it as that is that he always expected the hearing to be continued because of the lack of intimation. An uncontested continuation of a motion may well be described as a formal matter.**

Interim decision paragraphs [37]-[40]: Engagement with Duff & Phelps prior to and after hearing on 18 May 2018

Involvement of Sarah Bell

32. In her response of 1 April 2022 to the IC's letter, Ms Sarah Bell stated that Mr Grier suggested to her in April 2018 that she become a joint trustee in the Complainer's bankruptcy. Her appointment was formalised on 17 May 2018. Prior to her formal appointment as joint trustee, she was at a meeting at which the Member was present. At that meeting, the bankruptcy to date was discussed and the potential bankrupt's estate. After 31 May 2018, her contact with the Member was "negligible". Shortly after her appointment, she had a telephone call with the Member when she told him that the joint trustees would appoint independent counsel. Her next contact with the Member was in May 2019, shortly before her commencement of the decision procedure to remove and replace herself and Mr Wiles as joint trustees. She received an email from the Member on 2 May 2019 with the pursuers' contact details, and he was copied into emails to and from the pursuers in relation to the change of trustees (Bundle 1 ep512).

33. In his written statement the Member explained that he was in Duff & Phelps' office for other reasons and was asked to speak with Ms Bell to assist her in discharging her duties as trustee (Bundle 1 ep137- CMS' response of 9.9.20, Appd. at §6.9, ep147). He did not give a date for this discussion. Ms Bell stated it was prior to her (formal) appointment as trustee. The Member's written submission gives no further information as to the date of the Member's discussions with Ms Bell, although an email from the Member to her on 2 May 2019 is produced (Bundle 1 ep285- CMS' submission of 29.1.21, at ep294). When asked again about this by the IC, there was no additional information given about the dates and terms of the Member's discussions with Ms Bell;

he did not know Ms Bell prior to her involvement as the Complainer's trustee (Bundle 1 ep466- CMS' response of 8.11.21 pp6, at ep471).

34. At interview, when it was put to the Member that, according to Ms Bell, he had spoken with her prior to her formal appointment on 17 May 2018, he agreed with that and said the application for her appointment was already in. When asked if he could add to what he had already said about David Grier suggesting that Sarah Bell might be able to consider the case (Bundle 1 at ep137- CMS' submission 9.9.20 Appd. at §6.8, ep147), he said no- she was a partner at Duff & Phelps and David Grier recommended her as she would do the job properly.

35. The Complainer produced an email dated 31 May 2018 from Ms Bell to him, which answered questions in relation to her connection to David Grier and confirmed that she had had communications with the Member (Bundle 1 ep310- response 8.11.21 Appd. P, at ep408). The Complainer did not produce other evidence in relation to the Member's contact with Ms Bell.

36. **The IC finds that Ms Bell was first involved in the Complainer's bankruptcy in April 2018 although was not formally appointed as trustee until 17 May 2018. She met with the Member prior to her formal appointment as trustee on 17 May 2018, and at that meeting the background facts of the bankruptcy and the potential estate were discussed. The Member attended that meeting as he was asked to do so. There was limited contact between Ms Bell and the Member thereafter, as described by Ms Bell in her letter of 1 April 2022. The IC considers that this answers the Committee's questions at [37] of its interim decision as to the extent and nature of the Member's contact with Ms Bell.**

Complaint against Sarah Bell

37. The Committee asked for Sarah Bell's reasons for demitting office as trustee to be investigated ([40] of its interim decision). Sarah Bell explained that it had become clear that the Complainer's "concerns about our appointment could not be allayed", so a decision procedure was convened by which on 20 June 2019 another trustee was appointed (Bundle 1 ep512- response 1 April 2022, §6). Ms Bell also stated "I and my

staff have spent an inordinate amount of time dealing with Mr Elliot and spurious complaints to various bodies (that were not upheld)" (Bundle 1 ep512).

38. The Complainer's position was that he was not told that Ms Bell demitted office because of his complaint (Bundle 1 ep310- response 8.11.21 at ep314). At interview, he confirmed that he made complaints to the Insolvency Practice Association ("the IPA") against Sarah Bell, against Duff & Phelps, and against David Grier. He claimed that she had taken on the role of trustee inappropriately at the request of an important person within the organisation, and that David Grier now owned assets which had belonged to him. There were conflicts of interest. None of his complaints were upheld.

39. At interview, the Member was asked if he could explain more about Ms Bell demitting office due to a complaint against her by the Complainer (Bundle 1 at ep137- CMS' submission 9.9.20, Appd. at §6.10, ep148). He was unable to say when this happened or the nature of the complaint.

40. **In response to the Committee's question at [40] of its interim decision, the IC finds that Ms Bell demitted office as trustee as a result of the Complainer's attitude towards her appointment as trustee. She remained as trustee until a new trustee was appointed on 20 June 2019. The Complainer made complaints to the IPA about Ms Bell, Duff & Phelps and David Grier. None of these complaints were upheld.**

Involvement of David Grier

41. The Complainer's position was that Sarah Bell and her fellow trustee Benjamin Wiles of Duff & Phelps took on the role as trustees as a favour to David Grier (Bundle 1 ep310- response 8.11.21 at ep311). At interview, when it was suggested to him that possibly they took on this role because David Grier was a managing partner and asked them to, he disagreed. He maintained that they did this as a favour to David Grier. At interview, he also said that David Grier had stated in another court action that he was on administrative leave at that time (Bundle 1 ep651- Opinion [2022] CSOH 2 David Grier's actions, at [157] ep729, it is recorded as a matter not in dispute that he has been on administrative leave since December 2015). The Complainer had previously brought

this to the attention of the IC by email to the Dean's Secretariat of 10.2.22 (Bundle 1 ep505). Despite this, the letter dated 17 May 2018 submitted to court was on Duff & Phelps' headed paper (Full File 1 at ep1362 (CC1359)).

42. In the Member's statement (Bundle 1 ep137- CMS' response 9.9.20 Appd. at §6.6 and §6.7, ep147) he explained that Mr Paourou was the Complainer's first trustee in bankruptcy, but Mr Chadwick succeeded him as trustee. There were concerns as to Mr Chadwick's conduct of the bankruptcy, in particular relating to his failure to seek to recover funds due to the estate. When Mr Chadwick demitted office, Mr Worbey and Mr Farrell remained creditors in the estate.

43. The Member provided further information as to David Grier's involvement (Bundle 1 ep466- CMS' response 8.11.21 at pp5, ep470), in addition to what he said about this previously (Bundle 1 ep137- CMS' response 29.1.21 Appd. at ep147). At interview, he confirmed that David Grier was a friend of his. He did not recall when he first mentioned to David Grier the pursuers' involvement with the Complainer, but thought it was probably several months before the appointment of Sarah Bell as trustee. He agreed that he probably was the link between the pursuers, Mr Worbey and Mr Farrell, and David Grier, and that David Grier became involved as a favour to him. David Grier was helping clients of his. In response to the Complainer's suggestion that new trustees were rushed into place in May 2018 as a favour to him, the Member said this was not done as a favour to him, but to assist Mr Worbey and Mr Farrell who had become clients of Duff & Phelps. In relation to David Grier's involvement while on administrative leave from Duff & Phelps, he said it depends on what is meant by the term administrative leave. He explained that they (ie those charged in relation to Rangers Football Club plc) were all put on gardening leave when charged. David Grier continued to be paid by Duff & Phelps but was not given any work to do. He still worked on projects through Duff & Phelps. He was able to give time to this project.

44. In relation to the letter from Duff & Phelps dated 17 May 2018 which was produced to Lord Bannatyne, the Member explained that he did not recall seeing it or its provenance (Bundle 1 ep466- CMS' response 8.11.21 Appd. at pp6, ep471). At interview, he confirmed that he did not know how the letter came to be produced. He had no part in its preparation. David Grier was instructed by the pursuers, Mr Worbey and Mr Farrell,

at that time. He guessed that David Grier decided to write it. David Grier was in court on 18 May 2018 as he happened to be in the court building. He was not there on 1 June 2018.

45. David Grier has not responded to the IC's letter asking for clarification of his involvement, including his letter of 17 May 2018. That letter is addressed "To whom it may concern", is dated 17 May 2018 and is headed "Steven Elliot in bankruptcy ("Mr Elliot") In the County Court at Brighton 36 of 2015" (Full File 1 at ep1362 (CC1359)). The letter explains that Duff & Phelps were instructed by Mr Worbey and Mr Farrell, creditors in the bankruptcy, and that Duff & Phelps had requested that the Official Receiver consent to their appointment as trustee.

46. **The IC finds that the Member told David Grier about Mr Worbey's and Mr Farrell's case after Mr Chadwick demitted office as trustee. He similarly told Mr Worbey and Mr Farrell about David Grier's interest in their case. He introduced them to each other. David Grier of Duff & Phelps was then instructed by Mr Worbey and Mr Farrell. This resulted in David Grier's suggestion to Sarah Bell in April 2018 that she become a trustee in the Complainer's bankruptcy. In relation to the Committee's question at [39] of its interim decision, the IC is unable to determine on the information available how and why David Grier's letter came to be produced to court on 18 May 2018, but note that David Grier was present at the court hearing on 18 May 2018.**

Interim decision paragraph [42]

47. At [42], the Committee sought confirmation of the capacity in, and instructions and basis on, which the Member appeared at the public examination of the Complainer in his bankruptcy on 31 July 2015, the identity of his instructing solicitors, the timing of their merger with Clyde & Co and when they eventually ceased acting for Mr Worbey and Mr Farrell.

48. The transcript of the public examination records that the Member appeared as counsel, along with his junior, Andrew Davis, barrister, on behalf of Mr Worbey and Mr Farrell as creditors of the Complainer and did so on the instructions of Simpson & Marwick

solicitors. It also records that only the Member addressed the court and examined the Complainer but contains no indication of the presence of instructing solicitors (Bundle 1 ep27- Complainer's response 19.6.20, Appd. C: transcript of public examination of Complainer before the deputy district judge of Brighton County Court on 31.7.15, at eps46, 47 & 49).

49. On the Member's behalf, it was said that he did so in his capacity as a barrister in England and Wales and on the instructions of Clyde & Co (Bundle 1 ep137- response 9.9.20, at ep138 §2.6; Bundle 1 ep285- response 29.1.21, Appd. 1 at ep291). At interview, the Member confirmed that that was, indeed, the capacity and basis on which he appeared with Mr Davis and conducted the examination on behalf of Mr Worbey and Mr Farrell, who were there. He confirmed that he appeared without an instructing solicitor being present, as is competent there, but had done so on the basis for formal written instructions having been provided via the clerks of his chambers from either Simpson & Marwick or Clyde & Co, depending on when their merger became effective, the exact date of which he did not recall. He could not recall when Clyde & Co eventually ceased acting for Mr Worbey and Mr Farrell and whether that was on or about 24 August 2020 (Interview 11.8.22). In their written response, Clyde & Co confirmed that the merger between them and Simpson & Marwick became effective on 1 October 2015 (Bundle 1 ep516).

50. The Complainer's position was that the Member appeared at and conducted the public examination, along with a junior barrister, on behalf of Mr Worbey and Mr Farrell, who were also present. They all arrived and left together as a team. No instructing solicitor was present and he recalled no mention of there being one. He was aware of the occurrence of the merger between Simpson & Marwick and Clyde & Co around that time, though not the precise date. The same individual solicitors, Gavin Henderson and Marco Rinaldi continued to handle the case for them. Clyde & Co had confirmed by e-mail to him on 24 August 2020 that they had ceased acting for Mr Worbey and Mr Farrell (Bundle 1 ep310- response 8.11.21 at ep314; Interview 4.8.22; Bundle 2 ep172- submissions 5.8.22 & e-mail 24.8.20 at eps174-175).

51. **The IC finds that: (a) the Member appeared and conducted the public examination, on behalf of Mr Worbey and Mr Farrell, as a barrister in England**

and Wales, accompanied by his junior Andrew Davis, barrister, on the instructions of Simpson & Marwick, solicitors, but without a solicitor of that firm being required or present; (b) the later merger between that firm and Clyde & Co took effect on 1 October 2015; and (c) by 24 August 2020, Clyde & Co had ceased acting for Mr Worbey and Mr Farrell.

Interim decision paragraphs [48] and [49]

52. At [48] and [49], the Committee sought enquiry to establish the occurrence, nature and subject matter of the conference calls, about the Bender and Brenda apps and trade marks, between the Member and Mr Paourou, the liquidator of BSNL, on Friday 30 January 2015, Monday 2 February 2015 and any other dates, and whether they took place with the instructing solicitors, Simpson & Marwick, and or any other attendees. It also sought clarification of the nature of the Member's involvement standing his use of the first-person plural in discussing the topic in his e-mail, on Saturday 31 January 2015, to the liquidator.

Hearing 30 January 2015

53. For the hearing on 30 January 2015, in the action CA109/13, the interlocutor records only that, the court having heard the Member on behalf of Mr Worbey and Mr Farrell and the Complainer personally, it made no order. Simpson & Marwick's contemporaneous file note of that hearing indicates that it started at 10.00, when also in attendance were Mr Worbey and Mr Farrell, their Scottish junior counsel, Grant Markie, their English junior counsel, Mr Davis, and their solicitor, Mr Rinaldi of Simpson & Marwick; that Lord Tyre was addressed on further procedure and the pursuers' motion for interim payment, in connection with which he allowed an adjournment at about 10.25 am; that during the adjournment the Complainer produced a certificate of his bankruptcy; that, when the case called again at 10.35am, he informed the court that he had been declared bankrupt, that BSNL was also then in liquidation, that the Bender and Brenda apps had been removed from app stores, could no longer be purchased and all the related contracts had been stopped; that the Complainer confirmed that he had no objection to providing information in relation to his bankruptcy and the liquidation and that the income from the apps had been significant;

that the Member emphasised that every day the apps were down would be commercially damaging and submitted that the Complainer should be ordered to provide details for the apps to enable someone else to get them up and running again; that, in answer, the Complainer confirmed that all the details and contracts for the apps and their platforms were with BSNL and he was not in a position to get the apps back up; that he then provided, in open court, the details of the liquidator, Mr Paourou, following which the hearing the concluded without order, sometime before lunch (Bundle 1 ep521- interlocutor 30.1.15 at ep541; Bundle 1 ep310- Complainer's response 8.11.21, Appd. U at eps434-437).

54. The file note coheres with the essentials of the Member's and Complainer's accounts of the hearing as far they went (Member: Bundle 1 ep137- response 9.9.20, Appd. at §6.2 ep146; Bundle 1 ep285- response 29.1.21, Appd. 1 at ep290; Interview 11.8.22; Complainer: Interview 4.8.22; Bundle 2 ep172- submissions 5.8.22 at §2).

Call 30 January 2015

55. In relation to the call on 30 January 2015, the Member's position was that it took place immediately following the hearing, on the instruction, and in the presence of, an instructing solicitor from Simpson & Marwick. At interview, he thought that would have been Mr Henderson, notwithstanding that it appears that Mr Rinaldi was the solicitor present at the hearing (see §53, above); that in the call he sought to confirm the Complainer's bankruptcy, BSNL's liquidation, Mr Paourou's appointment as liquidator and contact details; that he explained that he was counsel for Mr Worbey and Mr Farrell in the CA109/13 action for the pursuit by them, as ex business partners of the Complainer, of monies due to them from the exploitation of the Bender and Brenda apps and trade marks which, as partnership property, had been wrongly transferred by the Complainer to BSNL, and that Mr Worbey and Mr Farrell had an interest in those assets and were creditors of BSNL in respect thereof. The Member did not think that he explained, in that call, all the points he set out in more detail afterwards in his e-mail at 14.54 (§§57-58, below; Bundle 1 ep137- response 9.9.20, Appd. at §6.3 ep147; Bundle 1 ep466- response 8.11.21, Appd. at pp12, ep477; Interview 11.8.22).

56. In his written response, Mr Paourou's account of the occurrence and nature of that call was consistent with the Member's, though he did not think there was anyone else on that call other than the Member (Bundle 1 ep508). The Complainer's position was that the Member's, and Simpson & Marwick's, file notes for the meeting should be recovered and, effectively, that an inference adverse to the Member should be drawn from their failure to provide them. At interview, he accepted that, not having been on that call, he did not know the nature of what was discussed or whether the solicitors or anyone else had also been on it (Bundle 1 ep296- response 8.2.20 at ep298; Bundle 1 ep310- response 8.11.21 at ep314; Interview 4.8.11).

E-mails 30 & 31 January 2015

57. The e-mails, on 30 January 2015, from the Member to the liquidator at 14.54 and the reply from the latter to the former at 17.03 and the e-mail, on 31 January 2015, from the former to the latter at 13.19, show that: (a) there was a phone conversation between them, at least, on 30 January 2015 sometime after the hearing and before 14.54; (b) that, having been unable to contact the Complainer, Mr Paourou had, sometime after 17.03 on the same day, left a voice message for the Member saying as much and confirming that BSNL appeared to be the registered owner of three trade marks for the Bender and Brenda apps; and (c) the Member proposed a conference call with the Mr Paourou on 2 February 2015 at 3pm. The Member's e-mail on 30 January 2015 was copied to: Mr Rinaldi of Simpson & Marwick, Mr Worbey's and Mr Farrell's solicitors, to Mr Markie and Mr Davis, their Scottish and English junior counsel, respectively, and to Mr Worbey. His e-mail on 31 January 2015 was copied to Mr Rinaldi and Mr Henderson of Simpson & Marwick and to other counsel, Mr Markie and Mr Davis (Bundle 1 eps496-499; Full File 1 ep1365 (CC1362)).

58. In his e-mail on 30 January 2015 to the liquidator, after their call, the Member explained in more detail that he was acting on behalf of Mr Worbey and Farrell as clients; that the background was the CA109/13 action for recovery of sums appropriated by the Complainer from the exploitation of the Bender and Brenda apps and their trade marks, which was partnership property and had been wrongly transferred by him to BSNL; that the immediate problem was that the apps and supporting websites had been taken down, so that they were no longer operative and could no longer be purchased; that they

were capable of generating significant income and it was commercially imperative to restore the apps to service and sales as soon as possible; that, if the liquidator was able to obtain from the Complainer and provide specified technical information in relation to the apps, websites and platforms on which they were sold and operated, his clients could with expert assistance so restore the apps, in which event they would remit the funds generated to the liquidator meantime, pending resolution of their claims in due course. In setting out that proposal, the Member employed the first-person plural at a number of points. In the penultimate paragraph, the Member explained in more detail the legal basis of Mr Worbey's and Mr Farrell's claims as creditors of BSNL. In the context of the e-mail as a whole and the fact it was overtly copied to solicitors, counsel and client as explained at §57, above, it appears clear that the Member was communicating all that on behalf of Mr Worbey and Mr Farrell as his clients, as was reflected in the tenor of the liquidator's e-mail reply at 17.03 (Bundle 1 eps496-499).

59. In his e-mail on 31 January 2015 to the liquidator, the Member discussed further the matters mentioned in his e-mail to him the day prior. He also explained that it appeared, on information, that the Complainer had removed substantial sums from BSNL prior to its liquidation. He discussed further the proposal to restore the apps to service and sales with the liquidator's cooperation as an interim measure. He agreed with Mr Pauorou's suggestion, in his e-mail reply at 17.03 the day prior, that he be appointed the Complainer's trustee in bankruptcy. He further explained the legal basis of Mr Worbey's and Mr Farrell's claims as creditors of BSNL. Again, at a number of points, including in discussing the proposal, the Member employed the first-person plural (Full File 1 at ep1365 (CC1362)). Likewise, in the context of this e-mail as a whole and the fact it was overtly copied to solicitors and counsel, as explained at §57, above, and against the background of the communications between the Member and liquidator the day prior, it appears clear that the Member was nonetheless communicating all that on behalf of Mr Worbey and Mr Farrell as his clients.

60. The Member's position was that, where he had used "we" in the e-mails, he had been referring to himself and the other lawyers as the legal team acting on behalf of Mr Worbey and Mr Farrell and had not, in any sense, been referring to him or them on their own behalf. That all that was obvious from the context and surrounding circumstances (Bundle 1 ep137- response 9.9.20, Appd. §6.5 at ep147; Bundle 1 ep466- response

8.11.21, Appd. at pps11-12, eps476-477; Interview 11.8.22). That was consistent with Mr Worbey's and Mr Farrell's own position that all the Member was doing, in correspondence with the liquidator at that time, he was doing on their behalf and not his own (Bundle 1 ep167- joint statement by Mr Worbey and Mr Farrell at §3). At interview, the Complainer accepted that the e-mails had been copied as explained at §57, above (Interview 4.8.22).

Call 2 February 2015

61. The Member's position was that conference calls with the liquidator at about that time took place on the instruction of Simpson & Warwick on behalf of the Mr Worbey and Mr Farrell and in the presence of one their instructing solicitors. At interview, the Member indicated that he could not remember this conference call, notwithstanding the proposal for at it at the end of his e-mail on 31 January 2015 (see §57, above; Bundle 1 ep466- response 8.11.21, Appd. at pp12, ep477).

62. In his written response, Mr Paourou confirmed that a further call did take place on about 2 February 2015 with the Member, a software developer and, he thought, an instructing solicitor. He confirmed that the Member discussed at length the restoration of the apps to service and sales, the acquisition of the trade marks for the apps, and the suspicion that sums had been removed from BSNL prior to liquidation (Bundle 1 ep508). At interview, the Complainer's position in relation to this call was the same as that in relation to the call on 30 January 2015 (see §56, above).

Other calls

63. The Member confirmed that he had no further conference or other calls or communications with the liquidator. In particular, he had no contact with him in relation to the bidding process for the trade marks, which occurred in late 2017 (Bundle 1 ep137- response 9.9.20, Appd. at §6.13, ep148; Interview: 11.8.22). Mr Paourou's written response confirmed that (Bundle 1 ep508). The Complainer's position was not inconsistent with that (Bundle 1 ep27- response 19.6.20 at ep33, 2nd paragraph).

File notes

64. In their written response Clyde & Co, as the successor to Simpson & Marwick, declined to provide, or indicate whether they had, any file notes, witness details or other evidence in relation any calls or other communications between the Member and the liquidator on 30 January 2015, 2 February 2015 or any further dates. They did so in light of Mr Worbey's and Mr Farrell's written refusals of consent to any such disclosure (Bundle 1 eps514-518).

65. **Accordingly, on the evidence gathered, the IC finds that: (a) the Member had a conference call with the liquidator of BSNL on 30 January 2015 on the instruction of Simpson & Marwick solicitors on behalf of Mr Worbey and Mr Farrell and in the presence of a solicitor from Simpson & Marwick, likely to have been either Mr Henderson or Mr Rinaldi; (b) the likely nature of the call was as described at §55, above; (c) the Member had a conference call with the liquidator on about 2 February 2015 on the instruction of Simpson & Marwick solicitors on behalf of Mr Worbey and Mr Farrell and in the presence of a solicitor from Simpson & Marwick, likely to have been either Mr Henderson or Mr Rinaldi standing their prior and subsequent involvement; (d) the likely nature of the call was as described at §62, above; (e) the Member had no further calls or communications with the liquidator; and (f) the nature of the Member's involvement in his communications with the liquidator, between 30 January 2015 and 2 February 2015, was that they were all conducted, actually and ostensibly, as counsel on behalf of Mr Worbey and Farrell as his clients, notwithstanding his use of the first person plural at points in his e-mails on 30 and 31 January 2015.**

Interim decision paragraphs [54] and [56]

Issues

66. At [54], the Committee sought clarification of the arrangement between Mr Worbey and Mr Farrell and Edgeburn Properties Ltd ("EPL") regarding the ownership of the registered trade marks for the Bender and Brenda apps; and, in particular: (a) whether the trade marks acquired by EPL were duplicates of the "original trade marks" for those

apps; (b) the inter-relationship between: (i) the trade marks acquired by EPL for which applications were filled in December 2017; and (ii) the trade marks for which applications where filed on behalf of Mr Worbey and Mr Farrell in March 2018; (c) the purpose of the applications to the IPO which the Member admits he was involved with; and (d) the relevance of those applications to the eventual ownership of the Bender and Brenda trade marks by: (i) EPL; and (ii) Mr Worbey and Mr Farrell.

67. At [56], the Committee sought enquiry to establish: (a) what trade marks for the apps were then in the proprietorship of: (i) EPL and (ii) Mr Worbey and Mr Farrell; and (b) how that was achieved over the period 2017 to 2020, taken as the end of that year. That was sought in order to provide a proper understanding of the differences in the ownership of the trade marks for which applications were filed: (a) in the name of EPL in December 2017, and (b) on behalf of Mr Worbey and Mr Farrell in March 2018.

68. Accordingly, the matters for enquiry at [56] would clarify, and were prior to, the particular issues at [54].

Law

69. Each registered trade mark, in the UK Register of Trade Marks administered by Trade Mark Registry at the IPO ("the TM register"), is a property right obtained by the registration of the mark under the Trade Marks Act 1994 ("TMA94") in relation to which the proprietor has the rights and remedies provided under the Act. A registered trade mark is incorporeal moveable property in Scotland and personal property elsewhere in the UK (sections 2(1) and 22 of the TMA94).

70. A trade mark must be registered for specified goods or services or classes of them, within a prescribed system of classification, that maybe restricted to specified goods or services within an identified class (sections 32-34). It is deemed to have been registered from the date, or last date, on which the application and all documents required for its later acceptance for registration were filed with the registrar ("the filing date"; sections 33 and 40(3)). Registration is granted for 10 years, after which it expires and is then removed from the TM register, unless timeously renewed for a further such period, subject to fees (sections 40-43).

71. The proprietor of a registered trade mark has exclusive rights in it, which are infringed by the use of the mark in proscribed ways without his consent. Infringement occurs on, *inter alia,* use in the course of trade of a sign that is, at least, similar to the trade mark in relation to goods or services which are, at least, similar to those for which the mark is registered, with a resulting likelihood of confusion on the part of the public (sections 9-11).

72. Accordingly, once registered, each trade mark is a separate item of property while it remains on the TM register. Its value, however, depends on its priority from its filing date, or any valid claim to other priority or seniority in relation to it, and its liability to being declared invalid, revoked or rectified or to other challenge to its registration by reason of an earlier competing trade mark, other earlier right or superseding ground recognised under the Act. In particular, it may be declared invalid if it was registered in breach of any of the absolute or relative grounds on which its registration ought originally to have been refused. Such grounds include that the trade mark was by its nature to deceive the public, or that its registration was sought in bad faith or that it was, at least, similar to an earlier trade mark registered in relation to goods or services which were, at least, similar to those for which this later mark was registered, with a resulting likelihood of confusion on the part of the public (sections 3-6, 46-47 & 64).

73. A registered trade mark can be assigned, absolutely or in security, and its use may be licensed, exclusively or otherwise. To be effective against third parties, such transactions have to be registered against the mark in the TM register (sections 24, 25 & 28-31).

Table

74. In relation to these issues, both the Member and Complainer in their responses referred the Committee and the IC to the contents of public registers, including the TM register, the register of European Union trade marks ("EUTM register") and the Companies register (together "the registers"). From the contents of the registers and parties' responses, conclusions can be drawn, as summarised in the table at §75 below ("the TM table"), about the existence, nature and ownership, to the end of 2020, of all the trade marks for the Bender and Brenda apps. The conclusions are explained further in

relation to each trade mark at §§76-93, below. They are not in dispute, save to the limited extent mentioned (Registers: Bundle 1 eps581-613- extracts TM register; Bundle 1 eps614-625- extracts EUTM register; Bundle 1 eps626-650- extracts Companies register; Member: Bundle 1 ep137- response 9.9.20, Appd. §§4.1-6 eps145-146; Bundle 1 ep285- response 29.1.21 at ep288 & Appd. 2 at ep293; Bundle 1 ep466- response 8.11.21, Appd. at §§54-56, eps478-481; Bundle 1 ep563- response 10.8.22 §§1-2 ep563; the document in the Committee's full file for the second complaint as at 20 December 2021, at its electronic page number 28, being its paginated page number CC0024 (*sic* "Full File 2 at ep28 (CC0024)")- Application by Complainer to IPO, dated 18.8.11; Full File 1 at eps162-258 (CC0159-0255)- Transcript IPO appeal before Appointed Person on 18.2.20; Interview 11.8.22; Complainer: Bundle 1 ep216- response 30.9.20 at §§4.1-4.5 eps231-233 & §6.13 p239; Bundle 1 ep310- response 8.11.21 at eps315-316, Appd. I at eps389-390, Appd. S at eps412-431; Interview 4.8.22; Bundle 2 ep172- submissions 5.8.22, Appd. B executed settlement agreements dated 19.8.20 eps176-237).

75. The TM table, together with this key to the abbreviations and notation used in it, are as follows:

KEY

Abbreviation / notation	Meaning
SE	Steven Elliot
SW	Steven Worbey
KF	Kevin Farrell
BSNL	Bender Social Networks Ltd
EPL	Edgeburn Properties Ltd
TOL	Totally Outsourced Ltd
bnap.cm	benderapp.com
Class	class within the prescribed Nice classification system under Trade Marks Acts
Class 9	goods: including instruments for processing data, downloadable media and computer software.
Class 42	services: including design and development of computer hardware and software.
Class 45	services: including personal and social services to meet the needs of individuals.
d	subject to registered description restricting goods and services within class
seniority	seniority in filing date claimed from earlier registration of related trade mark
5.6.21-asgmt.f	*sic:* full assignment effective on 5.6.21
31.8.11-SE's appln	*sic:* SE's application for rectification effective on 31.8.11

TM TABLE

	Trade Mark ("TM")	Class	Registered Number (all UK00…)	Filing Date	Abbreviation for TM in this report	Owner end 2020	Chain of proprietorship	Status in TM register
1.	Word and image: 	45[d]	002554880	2.8.10	Bender[TM4880/10]	TOL	1."bnap.cm, a partnership" →SE[t/a-bnap.cm-31.8.11-SE's appln] 2. SE[t/a bnap.cm]→BSNL[26.8.14-asgmt.f] 3. BSNL→TOL[30.1.18-asgmt.f] 4. Expiration TM[3.8.20] 5. Removal TM[10.2.21]	Expired and Removed
2.	Word: BENDER	9[d]	002591869	19.8.11	Bender[TM1869/11]	SW+KF	1. SE→BSNL[26.8.14- asgmt.f] 2. BSNL→TOL 30.1.18-asgmt.f 3. TOL→SW+KF[24.6.20-asgmt.f]	Registered
3.	Word: BRENDA	9 [d] 45[d]	002591870	19.8.11	Brenda[TM1870/11]	SW+KF	1. SE→BSNL[26.8.14-asgmt.f] 2. BSNL→TOL [30.1.18-asgmt.f] 3. TOL→SW+KF[24.6.20-asgmt.f]	Registered
4.	Word: BENDER	9[d] 45[d]	003279480	28.12.17	Bender[TM9480/17]	EPL		Registered
5.	Word: BRENDA	9[d] 45[d]	003279484	28.12.17	Brenda[TM9484/17]	EPL		Registered
6.	Word: BENDER	9[d] 42[d] 45[d]	917867713 (re no.2 [seniority])	5.3.18	Bender[TM7713/18]	SW+KF	1.TOL→SW+KF[-20.11.20-asgmt.f]	Registered
7.	Word: BRENDA	9[d] 42[d] 45[d]	917867714 (re no.3 [seniority])	5.3.18	Brenda[TM7714/18]	SW+KF	1.TOL→SW+KF[-20.11.20-asgmt.f]	Registered

Bender$^{TM4880/10}$

76. This was a registered trade mark for an image with the word "Bender" in relation to specified services within class 45, the description of which appears to have comprehended those provided by the Bender app. Its registered description, restricting that class, differs to an extent from those of the other "Bender" trade marks registered for that class. This was one of the "original trade marks", referred to in the papers.

Before 2017

77. Its filing date was 2 August 2010. It was then registered with a domain name "benderapp.com" as its registered proprietor, which had been described as "a partnership" in the original application for registration made by Mr Worbey. It seems likely he made the application on behalf of himself, Mr Farrell and the Complainer. It was incompetent to so register a domain name. Consequently, the registration of Bender$^{TM4880/10}$ was liable to invalidation, rectification or other challenge. On about 31 August 2011, the name of the registered proprietor was changed to "Steven Elliot t/a Benderapp.com". That was done on the Complainer's application, made on the basis that there had been no change of ownership and he had authority to request the change. On about 26 August 2014, Bender$^{TM4880/10}$ was assigned in full by him to BSNL, which then became the registered proprietor.

2017-2020

78. At or about the end of 2017, Mr Paourou, the liquidator of BSNL, auctioned and sold *inter alia,* this registered trade mark to Totally Outsourced Ltd ("TOL"). On about 30 January 2018, it was assigned in full by BSNL to TOL, which thereby became its registered proprietor.

79. In or about 2018, Mr Worbey and Mr Farrell made applications for its rectification, to have each of them and the Complainer registered as joint proprietors as from its filing date, and consequent cancellation of the registered assignments to BSNL and TOL, which applications were opposed by TOL. On 15 August 2019, a hearing officer for the registrar decided that the registration of Bender$^{TM4880/10}$ had always been a nullity

and should be removed from the TM register. At the hearing, on 18 February 2020, of the appeal against that decision ("the trade mark appeal") the appointed person, Mr Geoffrey Hobbs QC, indicated in conclusion that he would, when he came to write, not follow the hearing officer's decision and was inclined to decide that all three of them should have been registered as joint proprietors from the filing date. As a result of parties' subsequent negotiations and settlement, he did not, in the end, have to write and issue his judgement (Full File 1 at eps162-258 (CC0159-0255)-transcript trade mark appeal hearing at: eps164-171 (CC0161-8), eps174-6 (CC0171-3); ep181 (CC0178); eps186-7 (CC0183-4): ep196 (CCO193); eps240-1 (CC0237-8); ep243 (CC0240); ep245 (CC0242); eps256-7 (CC0253-4)).

80. By formal settlement agreement dated 19 June 2020, between TOL, on the one hand, and Mr Worbey and Mr Farrell, on the other ("the TOL settlement agreement"), those parties agreed, *inter alia*, that the trade mark appeal would be withdrawn, the hearing officer's decision would stand, Bender$^{TM4880/10}$ would be expunged from the TM register and those proceedings would otherwise be dismissed with no orders as to costs (Bundle 2 ep172- submissions 5.8.22 Appd. B at eps176-205). In the end, the parties did what they were supposed to under that agreement (Interviews 4.8.22 and 11.8.22). The registration of Bender$^{TM4880/10}$ was allowed to expire on 3 August 2020 and it was removed from the register on 10 August 2021.

Bender$^{TM1869/11}$ & Brenda$^{TM1870/11}$

81. These are registered trade marks for the words "Bender" and "Brenda" in relation to specified goods and services within class 9, and classes 9 and 45, respectively, the descriptions of which appear to comprehend the software and services provided by the Bender and Brenda apps. Their registered descriptions, restricting the respective classes, differ to an extent from each other and those of the other "Bender" and "Brenda" trade marks registered for those classes. These are the other two "original trade marks", referred to in the papers.

Before 2017

82. They both have a filing date of 19 August 2011. They were then registered by the Complainer with him as their register proprietor. On about 26 August 2014, Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$ were both assigned in full by him to BSNL, which then became the registered proprietor of them.

2017-2020

83. At or about the end of 2017, Mr Paourou, the liquidator of BSNL, also auctioned and sold these registered trade marks to TOL. On about 30 January 2018, they were both assigned in full by BSNL to TOL, which thereby became their registered proprietor.

84. In or about 2018, Mr Worbey and Mr Farrell made applications for cancellation of the registrations of these trade marks, which were opposed by TOL, successfully it seems. Nonetheless, the negotiations, which followed the hearing of the trade mark appeal, also led to agreement in relation to these registered trade marks, in terms of the TOL settlement agreement. They also led to agreement with the Complainer, in terms of a formal settlement agreement, likewise dated 19 June 2020, between him, on the one hand, and Mr Worbey and Mr Farrell, on the other ("the Elliot settlement agreement") (Bundle 2 ep172- submissions 5.8.22 Appd. B at eps206-237). Under the TOL settlement agreement, Mr Worbey and Mr Farrell and TOL mutually discharged all claims in relation to, *inter alia*, those applications. TOL agreed to transfer, by assignment, full legal ownership of Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$ to Mr Worbey and Mr Farrell. Further, TOL undertook that, thereafter, it would not challenge the registration of these trade marks, it would not challenge Mr Worbey's or Mr Farrell's use or registration of any "Bender" or "Brenda" trade marks, and it would not use nor apply to register any "Bender" or "Brenda" trade marks for substantially the same goods or services as those for which Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$ were registered. Under the Elliot settlement agreement, the Complainer also gave those undertakings in relation to these registered trade marks. In the end, the respective parties did what they were supposed to under the settlement agreements (Interviews 4.8.22 and 11.8.22). On about 24 June 2020, both of these registered trade marks were

assigned in full by TOL to Mr Worbey and Mr Farrell, who thereby became their joint registered proprietors.

Bender$^{TM9480/17}$ *& Brenda*$^{TM9484/17}$

85. These are registered trade marks for the words "Bender" and "Brenda" in relation to specified goods and services within classes 9 and 45, respectively, the descriptions of which appear to comprehend the software and services provided by the Bender and Brenda apps. Their registered descriptions, restricting the respective classes, differ to an extent from those of the other "Bender" and "Brenda" trade marks registered for those classes.

2017 to 2020

86. Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$ both have a filing date of 28 December 2017. In or about 2018, TOL opposed the applications made by EPL, on behalf of Mr Worbey and Mr Farrell, for their registration. The negotiations, following the trade mark appeal hearing, led to agreement in relation to these registered trade marks as well. Under the TOL settlement agreement, the proceedings following upon TOL's oppositions were to be dismissed with no costs and there was a mutual discharge of all claims arising out of them. Under that and the Elliot settlement agreement, TOL and the Complainer each undertook not to challenge Mr Worbey's or Mr Farrell's use or registration of any "Bender" or "Brenda" trade marks, and not to use nor apply to register any "Bender" or "Brenda" trade marks for substantially the same goods or services as those for which the other trade marks were already registered. Ultimately, the respective parties did what they were supposed to under the settlement agreements. In about July 2020, following withdrawal of TOL's opposition proceedings, these trade marks were finally registered with EPL as their registered proprietor. That was effective from their filing date, 28 December 2017.

87. There having been no assignments or other dealings with these registered trade marks by the end of 2020, EPL then remained their registered proprietor. It appears clear that EPL so registered and held these trade marks as such a proprietor, on behalf of Mr Worbey and Mr Farrell as their beneficial owners (see §§103-110, below).

Bender $^{TM7713/18}$ *& Brenda*$^{TM7714/18}$

88. These are registered trade marks for the words "Bender" and "Brenda" in relation to specified goods and services within classes 9, 42 and 45, the descriptions of which appear to comprehend the software and services provided by the Bender and Brenda apps. Their registered descriptions, restricting the respective classes, differ to an extent from those of the other "Bender" and "Brenda" trade marks registered for classes 9 and 45.

2017-2020

89. Bender $^{TM7713/18}$ and Brenda$^{TM7714/18}$ were originally registered as EU trade marks in the EUTM register maintained by the European Union Intellectual property office ("EUIPO") under EU regulations then effective in the UK (see European Union Trade Mark Regulation 2017/1001 (Parliament and Council) & Part II of TMA 94).

90. They both had a filing date in the EUTM register of 5 March 2018. They were then registered by TOL with it as their registered proprietor. They were so registered as each having a valid claim to seniority respectively derived from the UK registered trade marks Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$, the filing date of both of which was 19 August 2011 and of which TOL was then also the registered proprietor.

91. In 2020, the negotiations, following the trade mark appeal hearing, led also to agreement in relation to these registered EU trade marks. Under the TOL settlement agreement, TOL agreed to transfer, by assignment, full legal ownership of Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ to Mr Worbey and Mr Farrell. Further, TOL undertook that, thereafter, it would not challenge the registration of these of trade marks. That it would not challenge Mr Worbey's or Mr Farrell's use or registration of any "Bender" or "Brenda" trade marks and would not use nor apply to register any "Bender" or "Brenda" trade marks for substantially the same goods or services as those for which Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ were registered. Under the Elliot settlement agreement, the Complainer also gave those undertakings in relation to these registered trade marks. In the result, the parties did what they were supposed to under the settlement agreements. Both of these registered trade marks were assigned in full

by TOL to Mr Worbey and Mr Farrell. On 20 November 2020, they became the registered proprietors of them, on registration of those assignments in the EUTM register.

92. With effect from 31 December 2020, both of these registered EU trade marks were, under statutory provisions made in implement of the Brexit arrangements, automatically registered in the UK. Thenceforth, they were to be treated as having been made in the TM register under the TMA94 as they had existed up to that point in the EUTM register and entries for them were made and maintained in the TM register. Accordingly, Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ were, from then on, registered as "comparable trade marks (EU)" in the TM register, with their original filing date, 5 March 2018, their respective claims to seniority from Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$ and their filing date of 19 August 2011. They also continued to be registered in the EUTM register with that seniority and remain valid in the EU's member states (sections 6(1)(aa) & paras 1, 3, 13 & 30 of Schedule 2A to TMA94, as provided for by Trade Marks (Amendments etc)(EU Exit) Regulations 2019 (SI 2019/269)).

93. There having been no assignments or other dealings with these registered trade marks by the end of 2020, Mr Worbey and Mr Farrell then remained their joint registered proprietors.

Settlements

94. It is common ground that the TOL settlement agreement and the Elliot settlement agreement were negotiated and concluded at the same time and that negotiations were actually conducted between, on one side, David Smith, director and main shareholder in EPL, on behalf of Mr Worbey and Mr Farrell, and, on the other, Amit Ratnaparkhi, director and sole shareholder in TOL, on behalf of TOL and, his friend, the Complainer.

95. The Member's position is that one of the two primary reasons, that the Complainer and TOL entered the settlement agreements, was that the appointed person had indicated at the hearing that he was likely to decide the trade mark appeal in favour of Mr Worbey and Mr Farrell. That that would have left TOL liable for costs and Mr Worbey and Mr

Farrell as joint owners of the most senior Bender trade mark, the Complainer having been divested on his bankruptcy of his interest as the other joint proprietor of it, which his trustee had never sought to assert. The Member's position was that the other primary reason was that, the Complainer having transferred considerable sums to Mr Ratnaparkhi or TOL just prior to his bankruptcy, the Complainer and he were keen to have Mr Worbey and Mr Farrell withdraw their substantial claims as creditors against the Complainer's bankrupt estate, rendering it significantly less likely that his trustee would pursue Mr Ratnaparkhi or TOL for recovery of those sums. In the result, the Elliot settlement agreement did provide for that (Bundle 1 ep137- response 9.9.20, Appd. at §§4.5-6 eps145-146; "Bundle 2 ep122- response 2.11.21, §3 at ep124-6: Interview 11.8.22).

96. The Complainer's position is that his and TOL's primary reasons for entering the settlement agreements were that the appointed person had indicated that the whole dispute could drag on for years at great expense and that David Smith had supposedly threatened that Mr Worbey and Mr Farrell and their unnamed backers would ensure that the Complainer and TOL would have a terrible lives unless, and until, they gave in (Bundle 1 ep216- response 30.9.20 at §§4.5 ep233 & §6.13 ep239: Interview 4.8.22).

97. Accordingly, it is clear that the pursuit and exigencies of the whole trade mark dispute before the IPO, which proceeded on the rectification, cancellation, and registration applications made for Mr Worbey and Mr Farrell and for EPL, referred to at §§79, 84 & 86 above, directly and materially contributed to TOL and the Complainer entering the settlement agreements in implement of which Mr Worbey and Mr Farrell acquired all the extant registered Bender and Brenda trade marks that they did not already own through EPL (namely: Bender$^{TM1869/11}$, Brenda$^{TM1870/11}$, Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$) and TOL and the Complainer permanently gave up all right, title and interest to the use or registration of any Bender or Brenda trade marks used in exploitation of the Bender and Brenda apps or any others in competition with them.

After 2020

98. By reference to the registers, the Complainer asserts that, on about 15 June 2021, Bender$^{TM1869/11}$, Brenda$^{TM1870/11}$, Bender$^{TM9480/17}$, Brenda$^{TM9484/17}$, Bender$^{TM7713/18}$ and

Brenda[TM7714/18] were all assigned in full to Bender Dating IP Ltd ("BDIPL") by Mr Worbey and Mr Farrell and by EPL, respectively; that from, about 27 October 2021, they were each licensed by BDIPL to Bender Dating Ltd ("BDL"); that, from about that time, the shares in both BDIPL and BDL were owned by the following persons in the following respective proportions: Mr Worbey: 16%; Mr Farrell: 16%; David Smith: 40%; Scott Barron: 16%; Quantum Claims Compensation Specialists Ltd ("QCCSL"): 12%; that, from about that time, the directors of both those companies were: Mr Worbey; Mr Farrell; David Smith (director and shareholder in EPL); Scott Baron; George Clark (director of QCCSL) and Paul Lefevre (director of QCCSL). The contents of the TM register, EUTM register and Companies register reflect those assertions (see Complainer: Bundle 1 p310- response 8.11.21 at eps315-316, Appd. I at p389-390; Interview 4.8.22; Registers: Bundle 1 eps587-613- extracts TM register; Bundle 1 eps614-625- extracts EUTM register; Bundle 1 eps626-639- extracts Companies register).

99. On that basis, the Complainer asserts that, from about October 2021, David Smith, the Member's brother, personally owned 40% of all the registered Bender and Brenda trade marks and the licences of them. The Member's position is, *inter alia,* that that inference is unsustainable. In law, that is correct. BDIPL and BDL, like all companies, are separate legal persons from their shareholders and directors who, by virtue of being such, can have no right of property or other patrimonial interest in any of the company's assets or liabilities (Member: Bundle 2 ep122- response 2.11.21, §5 at ep126; *Macaura v Northern Assurance Co Ltd 1925 AC 619 at 625-627 & 633; Cowan v Jeffrey Associates, 1998 SC 496 at 503B-G*).

100. In any event, all of those changes, in the proprietorship and licencing of the registered Bender and Brenda trade marks, took place significantly after the end of 2020. The matters remitted by the Committee for investigation at [54] and [56] were limited to issues of their ownership and arrangements in relation to it in a period up to 2020, being at latest the end of that year. As the summary issues of complaint before the Committee concern whether the Member had a close personal involvement with Mr Worbey and Mr Farrell and their affairs by, at latest, May 2018, there was good reason to so limit these matters for enquiry. Therefore, the IC considers it unnecessary to make any findings of fact in relation to any changes that may have occurred in 2021 or after.

101. **Accordingly, the IC finds that, in relation to the matters for enquiry at [56], the registered trade marks for the Bender and Brenda apps were, at the end of 2020, in the proprietorship of: (a) Mr Worbey and Mr Farrell, and (b) EPL, as shown in the TM table at §75, above. The IC finds that this was achieved over the period from 2017 to 2020, in respect of each of those trade marks, as shown in the TM table and as explained at §§78-80, §§83-84, §§86-87 & §§89-93, above.**

102. **Consequently, in relation to the matters for enquiry at [54], the IC finds as follows.**

(a) Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$, owned by EPL in that period, were not merely duplicates of Bender$^{TM4880/10}$, Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$, the "original trade marks". They were, so long as they remained on the register, separate items of property with different relative values, as explained at §§69-72, above. Nonetheless, Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$ were for identical trade marked words as Bender$^{TM4880/10}$, Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$ and were registered in respect of apparently similar goods and services as Bender$^{TM4880/10}$, Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$, the respective descriptions of which comprehended the software and services provided by the Bender and Brenda apps, as indicated in the TM table and explained at §§76, 81 & 85, above.

(b) The inter-relationship between: (i) Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$, which were registered and owned by EPL in that period, and (ii) Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$, which were registered by TOL and acquired by Mr Worbey and Mr Farrell in that period, was that they were competing trade marks, being for identical marks in relation to similar good and services, as indicated in the TM table and explained at §§85 & 88, above, with a resulting likelihood of public confusion. Consequently, Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ would have been liable to invalidation or other challenge by the proprietor of Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$, as the earlier trade marks by reason of their respective filing dates, but for the seniority that Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ derived from Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$ and their still earlier filing dates, as explained at §90, above. Accordingly, to Mr Worbey and Mr Farrell in seeking to exploit the Bender and Brenda apps, Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ and Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$

were likely to have greater comparative value than Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$.

(c) The purpose of each of the applications to the IPO, in relations to which the Member accepts he was involved, was as follows: (i) the purposes of the applications for Mr Worbey and Mr Farrell in about 2018, in relation to Bender$^{TM4880/10}$, were for rectification, in order to have each of them and the Complainer registered as joint proprietors as from its filing date, and consequent cancellation of the registered assignments of the trade mark to BSNL and TOL, as explained at §§77-79, above; (ii) the purpose of the applications for Mr Worbey and Mr Farrell in about 2018, in relation to Bender$^{TM1869/11}$ and Brenda$^{TM1870/11}$, was for cancellation of those registered trade marks of which TOL was then the registered proprietor, as explained at §§82-84, above; and (iii) the purpose of the applications for EPL in 2018, in relation to Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$, was for registration of those trade marks, as explained at §86, above, the further purposes of which was that EPL would make them its name but, in reality, on Mr Worbey's and Farrell's behalf in order that, if the applications were opposed by TOL as occurred, they would be protected against an adverse award of costs and, if successful as they eventually were, EPL would hold those trade marks as registered proprietors for Mr Worbey and Mr Farrell as beneficial owners, as explained at §108, below.

(d) The relevance of the above applications, to the eventual ownership of the Bender and Brenda registered trade marks, was that the pursuit and exigencies of the whole trade mark dispute before the IPO, which proceeded on those rectification, cancelation, and registration applications made for Mr Worbey and Mr Farrell and for EPL, directly and materially contributed to TOL and the Complainer entering the settlement agreements in implement of which Mr Worbey and Mr Farrell acquired all the extant registered Bender and Brenda trade marks, which they did not already own through EPL (namely Bender$^{TM1869/11}$, Brenda$^{TM1870/11}$, Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$), and TOL and the Complainer permanently gave up all right, title and interest to the use or registration of any Bender or Brenda trade marks used in

exploitation of the Bender and Brenda apps or any others in competition with them, as explained at §§94-97, above.

Interim decision paragraphs [58]

103. At [58], the Committee sought clarification of how Mr Worbey and Mr Farrell remained the beneficial owners of the trade marks of which EPL was then the nominal proprietor, namely Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$.

104. At the end of 2020, EPL was the registered proprietor of only Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$. Mr Worbey and Mr Farrell were then registered proprietors of all the other extant trade marks: Bender$^{TM1869/11}$, Brenda$^{TM1870/11}$, Bender$^{TM7713/18}$ and Brenda$^{TM7714/18}$ (See TM Table at §75, above).

105. The Complainer's position is that the TM register speaks for itself, and that, as EPL was then the registered proprietors of Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$, it must have owned those trade marks in its own right and not as a trustee or agent (Complainer: Bundle 1 ep216- response 30.9.20 at §4.4 eps232).

106. That is incorrect in law. Where the registered proprietor's ownership of a trade mark is subject to a trust, whether express, implied or constructive, under which it holds title to the mark in trust for the benefit of another, that is not, and cannot be, shown in the TM register. Nonetheless, if the trust is otherwise valid, the rights of the beneficiary under the trust in relation to the trade mark may be enforced according to law (section 26, TMA94).

107. Accordingly, if the purpose or one of the purposes, for which the ownership of Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$ was vested in EPL as trustee, was to hold them meantime and transfer them to Mr Worbey and Mr Farrell or their nominee when called upon by them to do so, then that trust obligation would have been an enforceable right of theirs as beneficiaries, notwithstanding that the trustee, EPL, was registered as the proprietor with no indication of the existence of the trust in the TM register. That may, accurately in the rest of the UK and conventionally here, be referred to as beneficial ownership by Mr Worbey and Mr Farrell, though in the Scots law of trusts there is,

strictly, only one ownership, that of the trustee, against whom the beneficiary has rights in respect of it (*Sharp v Thomson 1995 SC 455 at 475).*

108. The Member's position is that, although the applications in 2018 for registration of Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$ were made by EPL, they were, in reality, on Mr Worbey's and Farrell's behalf in order that, if they were opposed by TOL as occurred, Mr Worbey and Mr Farrell would be protected against an adverse award of costs and, if successful as they eventually were, EPL would hold those trade marks as registered proprietors for Mr Worbey and Mr Farrell as the beneficial owners. That, in the result, was the basis on which Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$ were held in trust by EPL for Mr Worbey and Mr Farrell from their filing date in 2017 and remained so at the end of 2020. That is consistent with Mr Worbey's and Mr Farrell's own position that they owned the apps entirely, that no one else had rights to any of the trade marks and that David Smith had merely helped them, albeit to a great extent.

109. As to the nature and terms of the trust, the Member's position is that, beyond knowing of the trust's existence, he was not privy to the arrangements between EPL, on the one hand, and Mr Worbey and Mr Farrell, on the other, about the ownership and use of Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$, under which the former held them for the latter. In any event, even if the Member had been privy to any of those arrangements, he asserts that they are confidential and he would not consider it appropriate to disclose them. Accordingly, even if he had it, the Member would decline to provide any evidence on this particular issue. He has taken that position in light of Mr Worbey's and Mr Farrell's written refusals of consent to any such disclosure (Member: Bundle 1 ep137- response 9.9.20, Appd. §§4.4 ep145; Bundle 1 ep285- response 29.1.21 at ep288 & Appd. 2 at ep293; Bundle 1 ep466- response 8.11.21, Appd. at §§54-56, eps478-481; Bundle 1 ep563, response 10.8.22 at §3 ep564; Mr Worbey and Mr Farrell: Bundle 1 ep167- joint statement on 9.9.20 at §§4-5; Bundle 1 eps517-518- e-mails dated 5.3.21 & 24.3.22).

110. **The IC finds, in relation to the matter for enquiry at [58], that the registered trade marks Bender$^{TM9480/17}$ and Brenda$^{TM9484/17}$ were, from their filing date on 28 December 2017 to the end of 2020, held by EPL as the registered proprietor in trust for Mr Worbey and Mr Farrell as the beneficial owners of them. The IC also determines that, as it has no evidence on the matter, it can make no findings about the arrangements between EPL, on the one hand, and Mr Worbey and Mr Farrell,**

on the other, regarding the ownership or use of those trade marks or otherwise about the nature or terms of the trust under which the former held them for the latter.

Interim Decision Paragraphs [59] and [60]

111. The Committee asked at [59] for further enquiries to be carried out "to establish the nature of the relationship and dealings between the Member and his brother as Director of EPL, insofar as related to efforts to recover ownership of the trade marks Bender and Brenda. The nature of any advantage, direct or indirect, obtained by EPL or the Member through their involvement with the various applications to the IPO remains unclear. In that regard the nature of the Member's personal involvement, his dealings with David Grier and his brother, require to be further investigated to address the issues remitted to the Committee as to whether or not that involvement compromised the member's actual or apparent independence or gave rise to any conflicts with his professional duties".

112. At [60] the Committee sought clarification to address "the main question that arises from issues 5 and 10 in the conduct complaint as to the nature and extent of the Member's involvement in his clients' business affairs during the currency of the litigations in the Court of Session. Based on the Member's own admissions in his statement, from 2017 there was a close relationship between his clients and EPL, and, that the Member also had an involvement in that relationship that was associated with recovering ownership of the trade mark. He admits that he assisted his brother in drafting correspondence related to that endeavour and that his contact, David Grier of Duff & Phelps (who had an involvement in CA190/13 as discussed above), made direct contact with the liquidator of BSNL to explore the purchase of the trade marks by EPL. Consequently, there is another cross-over between the litigation CA109/13 and the pursuers' business affairs. The inter-relationship is not restricted solely to the involvement of EPL but also David Grier, as regards the efforts to regain ownership of the trade marks that was the subject-matter of both litigations. The Member also volunteered the information, through his Statement and production of the transcript related to an appeal hearing at the IPO on 18 February 2020, that the purpose of the application for rectification of the TM register was to achieve recovery of the ownership

of the trade marks Bender and Brenda. An outcome that had not been secured through the commercial causes in the Court of Session."

113. The IC considered that the following individuals could potentially assist in connection with this part of the complaint:-

(a) The Complainer. Upon request of the IC, he submitted a response dated 8 November 2021, with accompanying documentation (Bundle 1 ep310) and attended for interview at the request of the IC on 4 August 2022.

(b) The Member. His legal representatives submitted a response dated 8 November 2021 with supporting documentation (Bundle 1 ep466) and he attended for interview at the request of the IC on 11 August 2022.

(c) David Smith, the Member's brother. Mr Smith was written to by email on 10 June 2022 seeking answers to a number of points raised by the IC (see §3, above; Bundle 2 ep165). Mr Smith by email dated 20 June 2022 declined to assist (Bundle 2 ep171).

(d) David Grier. Mr Grier was written to by email on 14 January 2022 seeking answers to a number of points raised by the IC (see §3, above; Bundle 1 ep519). When he failed to respond a follow up email was sent. To date he has not responded to the questions asked of him.

(e) Mr Worbey and Mr Farrell, the Member's former clients. By email on 24 March 2022 Mr Worbey and Mr Farrell declined to provide any assistance to the IC, indicating that they would not answer any questions posed and that they did not wish the Member to disclose their private and privileged information (Bundle 1 ep518).

(f) Mr Worbey and Mr Farrell had previously submitted a joint statement wherein they state that all that has been done by the Member has been done by him in their interests alone and as their friend. They state that the Member's brother David Smith and David Grier also helped. They consider all of them to be friends. They state that the Member, David Smith and Mr Grier helped because of the way they had been treated and not for commercial payment (Bundle 1 ep167).

The Complainer

114. The Complainer in his written response to the IC dated 8 November 2021 made further submissions relating to the nature and extent of the Member's involvement in his client's business dealings. He relied, amongst other things, upon what he saw as the true ownership of the IP and the app business in the hands of David Smith, rather than Mr Worbey and Mr Farrell; the inclusion of the Member and David Grier in the email chain regarding settlement between David Smith, Mr Worbey and Mr Farrell, on the one hand, and Amit Ratnaparkhi and TOL, on the other, relating to the trade mark transfers; the Member's involvement in the drafting of correspondence relating to that settlement and in particular the metadata showing the Member's authorship of the draft settlement agreement subsequently forwarded by David Smith (Bundle 1 ep310 at eps315-317).

115. Whilst the Complainer in his response to the IC objected to the request by the Committee in [68] of their Interim Decision for specification of a clear list of actions by the Member relied upon by the Complainer in support of his allegations of the Member's close personal involvement in the business affairs of Mr Worbey and Mr Farrell, he nonetheless attempted to assist by listing in his response the following matters (Bundle 1 ep310 at eps318-321) :-

(a) The Member informing his brother about Mr Worbey and Mr Farrell from 2014 onwards and assisting his brother in becoming involved in his (that is the Complainer's) business as soon as that was possible as a result of the Complainer's bankruptcy;

(b) By the Member introducing Mr Worbey and Mr Farrell to his brother while still acting for them as counsel;

(c) By the Member introducing Mr Worbey and Mr Farrell to David Grier, his client from another case;

(d) By the development of a friendship between David Smith, David Grier, the Member and Mr Worbey and Mr Farrell, whilst the Member continued to represent them as counsel;

(e) By the Member continuing, after that friendship had developed between them, to represent Mr Worbey and Mr Farrell as counsel until May 2018, then later as an "agent" at the IPO and as a "solicitor" in the settlement negotiations;

(f) By the Member continuing to represent Mr Worbey and Mr Farrell as a friend, as an "agent" and as counsel whilst his brother was making efforts to obtain ownership of assets that used to belong to the Complainer;

(g) By the Member continuing to represent Mr Worbey and Mr Farrell as a friend, as an "agent" and as counsel in full awareness that David Grier had purchased assets, namely web addresses, that had belonged to the Complainer;

(h) That the Member instructed Maxwell Keay QC to represent Mr. Worbey at the trade mark appeal hearing and appeared at the hearing to "instruct" him, in the absence of Mr. Worbey, despite the Member still acting in a professional capacity for them (as "solicitor" in the drafting of the settlement deed);

(i) That the Member wrote the first draft of the settlement deed, yet David Smith's letter stated that the deed would be drafted by their solicitor, leading the Complainer to conclude that the Member was acting as their solicitor;

(j) That the Member acted as solicitor for Mr Worbey and Mr Farrell in the drafting of the deed and for his brother and EPL, when the final settlement deed contained a clause that led to EPL becoming the owner of the trade mark assets;

(k) That the claims of David Smith and the Member that they acted altruistically in respect of Mr Worbey and Mr Farrell are contradicted by the fact that David Smith had become the majority owner of the business and IP and the Member's family has become materially enriched by it;

(l) That the Member displayed an intimate knowledge of the business affairs of Mr Worbey and Mr Farrell by claiming that they were the beneficial owners of the IP related to the Bender app, when for a period of time David Smith was the outright owner of it;

(m) The Member's gloating tone in his letters to the Complainer (in answer to his complaints) all related to the Bender app, indicate an involvement on the part of the Member that is not professional;

(n) That the Member has failed to get his story straight between when he acted professionally and when he acted in a personal capacity, because he was acting as both, flipflopping between the two and all related to their business affairs; and that the Member's involvement led directly to his brother becoming the

majority owner of "their" business is the definition of personal involvement in their business affairs;

(o) That it should have been a simple matter for the Member to back up his original position which was that he acted as counsel but then at the end of the appeal in 2017 stood down from this position, developed a friendship with Mr Worbey and Mr Farrell but from then on in advised them as a friend. His failure to do so was because of his determination to get the apps into the hands of his brother, with the end result being that his brother has become materially enriched as the new majority owner of a business that he had no legitimate interest in, which benefits the Member.

116. At interview, the Complainer relied upon his written submissions outlined above in support of his assertion that the Member continued to accept instructions to represent his clients despite having a close personal relationship with them (Issue 5 of the Summary of Issues of Complaint). He amplified some of those matters in evidence, pointing out that in a witness statement Mr Worbey calls the Member a "dear friend"; that the Member in a response to a complaint (by email dated 3 October 2018 referred to by the Complainer in his complaint to the SLCC (Full File 1 at ep1323 (CC1320)) had discussed how much better the app was "now" than when the Complainer had had it; that he believed that David Smith and David Grier had worked on these matters for years for free; that the Member was central to the network of people who produced the final result, namely ownership of property that had belonged to the Complainer now belonging to Mr Worbey and Mr Farrell, David Grier and David Smith.

117. When asked at interview what evidence he relied on to assert that that the continued instruction of the Member was inappropriate (as per Issue 5 of the Summary of Issues of Complaint), the Complainer again referred to his previous written submissions on this matter. He suggested that the Member going from being Mr Worbey's and Mr Farrell's QC to friend then to QC was inappropriate behaviour. According to the Complainer, the Member had stated that his involvement was altruistic, but then he continued to represent Mr Worbey and Mr Farrell in court (in May 2018). The Complainer considered that the Member's involvement should have been either as QC or as a friend, but not both. He suggested that the Member's brother and sister-in-law

are now majority owners of a product that the Member once argued belonged to his clients, Mr Worbey and Mr Farrell.

118. The Complainer was asked at interview about an appearance in court by the Member (in May 2018), which he considered inappropriate due to the Member's close personal friendship with Mr Worbey and Mr Farrell (Issue 10 of Summary of Issues of Complaint). The Complainer felt "he" (meaning his motion seeking recall of the interlocutor of Lord Tyre of 12 March 2015 granting declarator of partnership) could have gone unopposed at the hearing if the Member had not been involved, and that the result of that hearing was of material benefit to David Smith and Mr Worbey and Mr Farrell. The Member continued to say that he was helping only as a friend before the hearing and afterwards. The Complainer considered that the Member was involved in matters with his brother, as it was shown that he had helped write documents for David Smith, namely the subsequent draft settlement agreement referred to above (at §115).

119. The IC observes, firstly, that the Complainer was, at the time of making the motion in May 2018, an undischarged bankrupt, and the question of whether he would have a locus to make such a motion is one that would be likely to occur to any counsel instructed in the cause; and secondly, that the motion, in seeking to have one Lord Ordinary recall the order of another Lord Ordinary, was incompetent. The IC would expect both of these matters to be drawn to the attention of the Court by any competent counsel instructed in the matter.

120. The Complainer was asked to describe the conflict of interest he claimed in Issue 10 of the Summary of Issues of Complaint, in relation to the Member's acceptance of instructions on 18 May 2018. He confirmed that he thought the Member had a personal interest in the outcome of the proceedings, and he was determined to win because it would profit his family. The fact that the Member's family would profit due to a relationship that he facilitated, was, according to the Complainer, a sign of conflict of interest.

121. The Complainer was asked how he thought the Member's close personal relationship affected the Member's ability to remain impartial. He felt any other senior counsel would have walked away from the case earlier, had they not had a personal interest in

the outcome. The Member was personally involved. The Member, it was claimed by the Complainer, had lost his temper with the Complainer numerous times and had insulted him. The Complainer suggested that the fact that the majority of what the Member argued was his clients' entitlement, is now owned by his brother and friend would confirm that the Member did not remain impartial.

122. The Complainer was asked to say how he felt the personal relationship affected the Member's conduct at the hearing on 18 May 2018, rather than just having the potential to do so. The Complainer could not confirm this, but felt that it had the potential to alter the Member's behaviour at the hearing. He stated that the Member laughed when the Complainer told the court that the business was now owned by the Member's brother, which he thought was unprofessional. The Complainer felt the action would have ended in 2018 (in his favour) were it not for the Member's involvement, which he felt elongated the case, entirely due to the Member and his personal involvement with Mr Worbey and Mr Farrell and his brother.

123. In conclusion, the Complainer explained that he felt that the Member's close personal relationship with Mr Worbey and Mr Farrell caused the action to drag on for years more than it would have, that it felt more than adversarial. The Complainer maintained he always knew that the Member's involvement was personal as the Complainer had a feeling that "things just didn't add up". He later uncovered the relationship between the Member and David Smith.

124. At [65] of the interim decision, reference was made to the Complainer's claimed ability to provide proof of certain of the allegations. At interview, the Complainer confirmed that all the proof he has of his allegations has been submitted.

The Member

125. The Member's legal representatives CMS submitted to the IC by letter a response and supporting documents on 8 November 2021, in which they set out the Member's position whilst expressing their concern that the Committee's lack of specific allegations of breach of the Guide made a meaningful response difficult (Bundle 1 ep466).

126. In his interview with the IC on 11 August 2022, the Member stated that he was introduced to Mr Worbey and Mr Farrell by another senior member of Faculty, who was a mutual friend. The Member then acted for Mr Worbey and Mr Farrell on a speculative basis in their Court of Session actions, for which he has never received any payment. He became friendly with them over the course of the two actions and continues to be their good friend. They are professional musicians and entertainers. He has been to see them perform. They and the Member socialise together. Mr Worbey and Mr Farrell met the Member's parents on a cruise that they also happened to be travelling on, and spent a lot of time with them. This further endeared Mr Worbey and Mr Farrell to the Member. The Member spoke of them with great affection. He indicated that he had no pecuniary interest in their business affairs. He was touched that they would describe him as their "dear friend" and considered them in the same way.

127. At his interview, the Member indicated that he has other friends who he initially encountered as clients, including, but not restricted to, David Grier. David Grier is known to the Member as a client and as a Managing Director of Duff & Phelps, who instruct the Member regularly in his capacity as an English barrister. The Member and David Grier are friends, but the Member did not know David Grier until he was instructed by him.

128. The Member at interview stated that he has lots of clients (not named) with whom he has developed ongoing friendships as a result of acting for them as counsel. The friendship often endures after the case has finished. It is not contrary to the (Faculty) rules to be friendly with clients.

129. At interview, the Member indicated that his brother, David Smith, is a director of the limited company, EPL, and is the retired, former director of a property development company. David Smith has a number of diverse interests and time on his hands to devote to them. He takes an interest in the Member's cases, to the extent that he will attend court hearings in which the Member is instructed.

130. The Member explained that David Smith was told by him about the Court of Session cases involving the Complainer and Mr Worbey and Mr Farrell, and considered that

Mr Worbey and Mr Farrell had been unfairly treated by the Complainer. The Member was unclear when exactly he introduced his brother to Mr Worbey and Mr Farrell, but thought it was after the conclusion of the two Court of Session litigations in 2017 and that it was approximately 4 or 5 months before any application in respect of trade marks was lodged by EPL. (The IC observes that as set out at §86, above, the first such application took place in December 2017, thus it appears that any such introduction may have have taken place in or about July or August 2017.)

131. The Member explained that purpose of the introduction was not business related, but, rather, because the Member considered that they would like one another. It was a social meeting and the Member's then spouse and his brother's wife may have been present. Subsequently, the Member's brother developed a friendship with Mr Worbey and Mr Farrell separate from the Member's friendship with Mr Worbey and Mr Farrell. This friendship resulted in David Smith contacting a trade mark agent in Glasgow on their behalf, in an effort to recover property (namely the trade marks referred to above).

132. The Member indicated that he had mentioned Mr Worbey and Mr Farrell to David Grier, who had offered to help. The Member introduced David Grier to Mr Worbey and Mr Farrell after the effective conclusion of the litigations in 2017, although he could not specify exactly when. He believed that they met for the first time in London, but he does not remember whether he was present then. While the Member could not specify exactly when Mr. Grier was introduced to his clients, the IC observes that it must have been at some point before David Grier suggested that Sarah Bell be appointed as the Trustee in Bankruptcy in respect of the Complainer in April 2018.

133. The Member accepted at interview that he was the reason that Mr Worbey and Mr Farrell now know his brother and David Grier. He had introduced them to one another. On being advised that the Complainer considers that the Member has a close personal involvement in the lives of his clients, the Member agreed that he cares about his clients and takes a keen interest in their problems and tries to assist them as he can. He has no financial interest in his clients' business. He confirmed that he was very concerned about Mr Worbey and Mr Farrell and their business. He did not do anything wrong.

134. The Member confirmed that during the 18 May 2018 hearing the Complainer told Lord Bannatyne that David Smith was involved in trying to recover property related to the action. It was after that hearing that the decision was made by Clyde & Co that the Member should not appear as counsel in any further calling of the case. Clyde & Co may only have instructed alternative counsel the night before the hearing on 1 June 2018, but the decision that alternative counsel would be instructed had been taken before then. The Member confirmed that he did attend to see what happened at the hearing as he was in Parliament House that day.

135. The Member was clear at his interview with the IC that he has no interest, pecuniary or otherwise, in EPL or the Bender or Brenda apps. He has received no payment for any work carried out by him in respect of his former clients Mr Worbey and Mr Farrell to date, nor does he expect to receive any from any source. He hopes that, should they ever be in a financial position to do so, Mr Worbey and Mr Farrell would pay the fees of the various junior counsel the Member had assisting him at various stages of the litigation raised on their behalf. He does not know and has no interest in the financial or business arrangements between his brother, Mr. Grier and Mr Worbey and Mr Farrell beyond knowing that all parties appear happy with them. His motivation in introducing the various parties to one another was not financial. He maintains he has never had any involvement in EPL, has never been instructed by his brother in any way, nor has he ever provided his brother or EPL with any formal legal advice, although he has provided informal advice when asked questions. He is not aware of any financial gain for his brother or EPL through the introduction to Mr Worbey and Mr Farrell , and he does not consider it his place to ask or his place to know this. He does not know if David Grier has been financially advantaged by the introduction to Mr Worbey and Mr Farrell. He agreed that probably his brother and David Grier worked for years on the matter without payment as alleged by the Complainer.

136. The Member indicated that following the effective conclusion of the CA109/13 action by the bankruptcy of the Complainer and the subsequent declarator of partnership in 2015 and the conclusion of the CA200/15 action in July 2017, he was not instructed as counsel (in Scotland) in any case involving Mr Worbey and Mr Farrell, nor was he on a retainer from them. He was available to accept instruction from them, but was not

so instructed until for the hearing in May 2018 when the Complainer enrolled his motion.

137. The Member stated that he was aware that there were efforts to recover ownership of the Bender and Brenda trade marks on behalf of Mr Worbey and Mr Farrell by applications to the IPO; but the Member was not involved in those efforts as he considered that this area of the law was extremely specialised and it was not an area in which he specialised. Any assistance that he provided his brother was informal.

138. In response to the allegation that his involvement in the business affairs of his friends compromised his independence in court as alleged by the Complainer, the Member did not accept that he was involved in their business affairs. He did not consider that his independence was affected in any way. He did not accept that this influenced his treatment of the Complainer, but he was determined for his clients and this is his duty, to act fearlessly for his clients..

139. The Member stated that he did not attend the hearing at the IPO, but did attend the trade mark appeal hearing as he happened to be in London and in the area at the time, on other business. He was not instructed at the appeal. He indicated that, as can be seen from the transcript (Full File 1 eps162-258 (CC0159-0255)), the approach of the Appointed Person at the hearing was an interactive one. The Member was aware that by the time of the hearing the Complainer had complained to the SLCC. The Member was unconcerned about this, as he did not expect the Complainer to be present at the hearing and he was not.

140. At interview the Member did not accept that his independence was compromised in any way by any limited assistance that he provided in relation to the trade mark recovery and considered that anything done by him was done informally and as a friend to Mr Worbey and Mr Farrell and not as their counsel, the litigations having concluded by that time.

141. The Member stated that he did not consider that anyone looking objectively at the relationship between him, his brother, David Grier, Mr Worbey and Mr Farrell in relation to the trade marks would consider that the Member's independence was

compromised. No conflict arose in the course of his instruction as counsel for Mr Worbey and Mr Farrell. Had any arisen, the Member would have ceased to act and sought advice from the Dean of Faculty as he would in any situation where a conflict arose.

142. The Member accepted the Complainer's criticism of the tone of the email (Full File 1 at ep1323 (CC1320)) sent by him in response to a complaint by the Complainer, under the explanation that he was by that time irritated by the Complainer's unsubstantiated allegations, made, as far as the Member was concerned, without a shred of evidence. In the same email the Member was not pointing out how much better the apps are now, but rather seeking to spell out the flaws in the Complainer's arguments. His tone was not as a result of being so closely involved in matters that he could not maintain a professional distance, but rather resulted from irritation.

143. The Member disagreed with the suggestion by the Complainer that the "switch" from friend to counsel to friend again was inappropriate. He accepted that his appearance at the hearing of 18 May 2018 resulted in a material benefit (at the subsequent hearing at which he did not appear) to Mr Worbey and Mr Farrell, but did not agree that there was any benefit to his brother from it. He disagreed that he had any personal interest in the outcome of the case because his family would profit from it, as alleged by the Complainer. He maintained that there is no evidence of that.

144. The Member did not accept the Complainer's allegations that he had a personal interest in the outcome as his family profited and this caused a conflict of interest in his representation of Mr Worbey and Mr Farrell. He did not have a personal interest, nor a financial one; and this was an unsubstantiated allegation by the Complainer. There was no conflict of interest. Nor did the Member accept that another advocate without a personal interest in the outcome would have ceased to act at an earlier stage, nor that any ownership by his brother and David Grier of property that formerly belonged to the Complainer would have affected the Member's ability to remain impartial.

145. The Member did not accept that it was his personal involvement with his clients that caused the dispute to go on for years longer than it should have. He countered that the

matter would have been resolved at an earlier stage if the Complainer had owned up to his responsibilities towards Mr Worbey and Mr Farrell.

146. As is noted above, the IC has not benefitted from the co-operation of the Member's brother David Smith, David Grier or Mr Worbey and Mr Farrell. All declined to become actively involved in the IC process, as they were entitled so to do. In particular, Mr Worbey and Mr Farrell declined to grant permission to the Member to discuss their confidential affairs subject to legal privilege with the IC. The Member was advised of this before he attended for interview. He nonetheless answered all questions put to him.

147. The IC notes that the Complainer does not submit that the Member received or receives any direct personal advantage from his involvement with the various applications to the IPO, but rather it is his complaint that the Member indirectly benefits by his brother's association with EPL. The Complainer cannot specify what indirect benefit the Member derives, beyond stating that the Member's brother is "materially enriched" by his ownership of assets previously owned by the Complainer.

148. It seems clear that the Complainer considers that the Member's motivation for his friendship with Mr Worbey and Mr Farrell and the introduction of Mr Worbey and Mr Farrell to his brother and David Grier was financial; albeit he does not allege that that financial motivation was for the Member's own direct personal gain, but rather for the financial gain of his family.

149. The IC accepts as credible and reliable the Member's statement to it that Mr Worbey and Mr Farrell are not the only clients of the Member who have become his friends; and his assertion that he would not use the guise of his professional relationship with a client to form a friendship for personal gain**.**

150. **The IC observes that, in its experience of practice, it is unusual for Members regularly to become friends with former clients. The IC's Lay Member expressed concerns about this matter and suggested that Faculty should consider whether any additional guidance to Members is required on the issue.**

151. **The IC finds as a matter of fact that the Member personally has gained no pecuniary advantage, directly or indirectly, through his involvement with the various applications to the IPO, nor does he expect to do so. The IC accepts the evidence of the Member that his motivation for assisting Mr Worbey and Mr Farrell was not financial; and that his friendship with them is ongoing and unrelated to their ownership or otherwise of any dating apps.**

152. **The extent of any advantage, direct or indirect, obtained by the Member's brother or EPL cannot be ascertained beyond what has been established above at §§74-93, §§101-102 & §§103-110, insofar as transfer and ownership of the trade marks is concerned.**

153. **The IC does not have information available to it, beyond the details of ownership of the trade marks, to provide further clarity as to any advantage obtained by EPL through its involvement with the various applications to the IPO.**

154. **The IC notes that it was hampered in its investigations into these matters by the lack of co-operation from those individuals identified above at §113 (c), (d) & (e). Whilst these individuals were entitled not to co-operate it seems likely that they were in possession of information that would have assisted the IC in its task.**

155. **The IC notes that the Member's former clients Mr Worbey and Mr Farrell appear content with the arrangements in place regarding ownership of the trade marks, and remain on friendly terms with the Member, his brother David Smith and David Grier. The Member's former clients do not seem to consider that any conflict exists between themselves and the Member and his professional duties to them.**

156. **The IC accepts as credible and reliable the evidence of the Member that, had any conflict arisen in the course of his representation of Mr Worbey and Mr Farrell, he would have ceased to act for them and sought advice from the Dean of Faculty**.

157. **The IC notes that, as at the time of the introduction of the Member's brother David Smith to Mr Worbey and Mr Farrell, the CA109/13 action was in abeyance**

following the bankruptcy of the Complainer. The CA200/15 action had concluded on 26 July 2017 with the decision of the Inner House, confirming the decision of Lord Tyre from October 2016 that no partnership existed between the Complainer and Mr Worbey and Mr Farrell.

158. **As the IC finds at §164, below, the effective date for the conclusion of the action CA109/13 was 12 March 2015, following the Complainer's bankruptcy, and for the action CA200/15 was 26 July 2017. The IC finds as a matter of fact that, thereafter, the Member was not on a retainer from Mr Worbey and Mr Farrell after the conclusion of the Court of Session litigations. The Member was not instructed by Mr Worbey and Mr Farrell as counsel in Scotland in any cause at the time of his introduction of Mr Worbey and Mr Farrell to his brother, or to David Grier; nor was he instructed by them as counsel during David Grier's contact with the liquidator of BSNL about the trade marks (which must have taken place before the trade marks were auctioned at the end of 2017) and the various applications to the IPO.**

159. **The Member was subsequently instructed to appear at the opposed hearing on the Complainer's motion in the CA109/13 action on 18 May 2018, dealt with at §§24-31, above and §164, below.**

160. **The IC observes that whilst the Complainer is correct in his repeated references to property that had belonged to him then being owned by Mr Worbey and Mr Farrell, the Complainer appears to ignore that his ownership of that property ended with his bankruptcy and the liquidation of BSNL, unless, that is, the Complainer hoped subsequently to recover that property**.

Interim decision paragraph [64]

161. The Committee wished clarification of the date that should be treated as the effective conclusion of each of the litigations CA109/13 and CA200/15. Certain interlocutors are available as referred to at §§4&9, above. In the action CA109/13, declarator of partnership and an interim payment of £168,947.84 was granted by Lord Tyre on 12 March 2015. This was after the Complainer's bankruptcy. No further steps were taken

in that action until the motions enrolled to be heard on 18 May 2018, which were then continued to be heard on 1 June 2018. The Complainer's motion was refused; the pursuers' motion was not insisted upon given the Complainer's undertaking given and recorded in the Minute of Proceedings. The next and final step in that action was its abandonment, as agreed in the Elliot settlement, referred to at §84, above (Bundle 1 ep550- interlocutor 9.9.20).

162. The second action CA200/15 was raised after the Complainer was declared bankrupt. The Member has described the effective conclusion of the litigations as being when the Inner House issued its decision in this action, and the attendant procedure dealing with expenses (Bundle 1 ep137- CMS submission 9.9.20 Appd. at ep149; Bundle 1 ep466- CMS response 8.11.21 pp18, at ep483). The Inner House decision was dated 26 July 2017 ([2017] CSIH 49]). The final interlocutors in relation to expenses were dated 1 September 2017 (Inner House) and 17 November 2017 ((Full File 1 at eps1380&1373 (CC1377&CC1370).

163. The Member's involvement in the hearing on 18 May 2018 in the CA109/13 action has been referred to above. Prior to that hearing, no steps had been taken in that action for more than three years.

164. **The IC finds that the last substantive step taken to progress action CA109/13 was the court's interlocutor of 12 March 2015, prior to the motions enrolled and dealt with on 18 May and 1 June 2018. Prior to enrolment of those motions, 12 March 2015 could be regarded the effective conclusion of the action, although the final and formal conclusion of the action was not until its abandonment on 9 September 2020. The effective conclusion of action CA200/15 was the court's interlocutor of 26 July 2017, subject to questions of expenses for which there were decernitures on 1 September 2017 and 17 November 2017.**

Una Doherty K.C.

Chair of the Investigating Committee

24 February 2023