"Let me take instructions on that": Lawyer performance in a corporate M&A transaction – a case study

by

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ABSTRACT

This paper explores the role of performance in corporate transactions commonly known as mergers and acquisitions, or M&A, through the concept of performativity. It explores the role of ritual in an M&A transaction as a lens through which performance and its impact can be examined. It highlights the author's professional background as a transactions lawyer and develops a case study of a complex, cross-border transaction through file reviews, interviews, and thematic content analysis. The study reveals how rituals in M&A transactions are performative, creating through repetition a shared understanding among legal professionals and clients. It also identifies instances where this ritual breaks down, such as, in this case, disputes over due diligence (the process of disclosing information about the business to be bought) and antitrust issues. In those instances, without the ritual in place, the study reveals that lawyer performance fills the gap. Counterintuitively, the study reveals that this performance is less about individual approach or aptitude – although that does have a role to play – but rather about the ability of the lawyers to work collaboratively, allowing the firm to be 'more than the sum of its parts'. The breach of ritual is also indicated to be part of the ritual, anticipated in each transaction. The study underscores the significance of open communication, the involvement of lawyers of all levels in discussion of process and approach, and the challenges of managing external stakeholders such as clients and overseas lawyers. Overall, the study concludes that successful M&A transactions require a particular kind of performance from the lawyers involved, a combination of technical expertise, effective communication, adaptability, and a collaborative team effort, with reduced emphasis on direct client service.

Key words: Mergers and acquisitions, lawyers, practice, performance, ritual, performativity, teamwork.

Introduction and Background

A. The changing face of practise

'It's no longer enough to be good lawyers,' the senior partner told the assembled fee-earners, 'we need to be full service.' Those of us on the client facing side of corporate law are told by our managing teams (and the legal press[1]) that clients have seen exponential growth in legal needs but, given the socio-economic climate, still want 'more for less'. Despite quality of advice and service remaining as important as cost,[2] with profound changes in the offing clients are increasingly turning to their corporate lawyers for commercial advice on complex matters. Many medium and large corporate firms seek to accommodate these changes by transforming from a business based around legal expertise to a professional-services offering with law at its core; lawyers becoming what Susskind calls the enhanced practitioner (along with other diversified roles).[3]

Much of this anticipated change is forecast to be the result of technological adaptations, permitting greater automation of legal work.[4] That is not the focus of this project. Instead, as the profession looks to expand its reach beyond purely legal advice, it is an apt watershed – on the threshold of this new age – to consider what role the overall performance of lawyers makes in and to practice. After all, from an epistemological perspective, only through understanding (or increased understanding) of what contributes to the successful operation of the practice of lawyering will the profession be able to develop, reflexively, in the manner felt to be required. A pressure to be advisors on business in addition to law is easy to suggest, but without wholescale up-skilling – something unlikely to be on offer as fee pressures increase – an understanding of how personal presentation impacts on client satisfaction and transaction success must contribute to any successful evolution of legal professionals.[5]

[1] Jonathan Rayner, 'In-house Conference: Inside Stories' (2019) The Law Gazette <https://www.lawgazette.co.uk/in-house/in-house-conference-inside-stories/5070770.article> accessed 30 March 2025.
[2] Steven Rottmann, Andreas Glas and Michael Essig, 'Procurement Process of Professional Services: A Case Study of Legal Services' [2015] 7 International Journal of Information, Business and Management 144.
[3] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (2nd ed, Oxford University Press 2017).
[4] ibid.
[5] Ronit Dinovitzer, Hugh Gunz, Sally Gunz, 'Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice' [2014] 51 American Business Law Journal 661, 709.

Against this background, the focus of this project is the performance of lawyers, specifically – for reasons subsequently discussed – in the field of corporate law and mergers and acquisitions (M&A).

B. The 'difficult' study of lawyers and M&A

It is generally accepted that it is difficult to study lawyers.[6] This is largely because of the difficulties in obtaining access to research participants (firms and individuals) and a professional reticence when it comes to sharing information given the importance of clients' confidentiality.[7] It is also because law firms – local and national – draw their work from the contacts of its lawyers, meaning that there are strong, closed networks which are largely unavailable to the researcher unless the researcher has privileged access of some kind.[8] A more detailed exploration of the implications of such access, in the context of so-called "insider/outsider" status is provided in Chapter 3.[9]

While the study of professional lawyers has been problematised, many of the solutions proposed will be familiar to any professional practitioner. Recognising the importance of confidentiality, being clear about the purpose of the research and educating participants about its use tends to allay concerns – it will, in any event, be crucial to explain that client material will be maintained in the strictest confidence and sensible precautions put in place.[10] Where access to a firm or firms is available (as an employee, client or otherwise), finding and using contacts of your contacts (a "snowball" approach)[11] and thereby making use of those closed networks[12] in order to further the research is an accepted way to enter professional ranks and recruit participants. Dinovitzer et al describe just such a study: "Both the pilot and main study were designed with the assistance of a team of advisors who were either managing partners or senior partners at major firms. This advisory group provided an introduction to managing partners of leading national commercial law firms in four major Canadian commercial centers…Lawyers were assured that their participation

[6] Stewart Macaulay, 'Notes on the Margins of Lawyering, in Three and a Half Minutes' 40 Hofstra Law Review 25.
[7] Geoff Mungham and Philip Thomas, 'Studying Lawyers: Aspects of the Theory, Method and Politics of Social Research' [1981] 8 British Journal of Law and Society 79.
[8] ibid.
[9] See n 287 onwards.
[10] Mungham and Thomas (n 7).
[11] Bernd Marcus, Oliver Weigelt, Jane Hergert, 'The Use of Snowball Sampling for Multi-source Organizational Research: Some Cause for Concern' [2017] 70 Personnel Psychology 635.
[12] Mungham and Thomas (n 7).

would be kept confidential with no other person within or outside their firm knowing whether they participated in the study".[13]

Critics of this approach point out that the risk of inherent bias in terms of diversity (in thought and otherwise) is very high, with participants recruiting in their image.[14] Nevertheless, this may be the only way in which the researcher can reasonably achieve access to the profession and appraisal of this risk and its impact can and should take place in the analysis of results.[15]

If one considers the legal profession as a peculiarly social process – which I do, and which I explore further in Chapter 2 – then using connections between practitioners may, in fact, be a particularly sensitive way to study the profession.[16] Liu sees the advent of globalization as having a major impact on the structure of the profession, because it throws in stark relief negotiations around professional expertise and jurisdiction, in both geography and area of law.[17] This is because, Liu argues, these are interactions between social actors; negotiations involving social structures. The impact of globalisation is that all law firms, at least major ones, become homogenous as the local power networks transform into global relationships and the socio-political background against which different law firms are acting becomes the same.[18] In practice, the jurisdiction of the firm continues to be a matter of considerable relevance as, generally, only firms registered in that jurisdiction are able to practise in that jurisdiction. Nevertheless, in large commercial firms (which is where my focus lies), which are conducting and co-ordinating multi-jurisdictional work, then there is likely to be a move towards homogenisation, where lawyer performance may have disproportionate effects on outcome – of project and reputation – because this would become (or increasingly become) a distinguishing feature between firms.

It is worth noting that this approach is reflected in both practical and theoretical discussions taking place within Law and Society scholarship: the impact of 'global law' on marginalised knowledge and experience (something we will return to with the work of Judith Butler shortly).[19] Globalisation

[13] Dinovitzer, Gunz, Gunz (n 5). See also Hugh Gunz, Sally Gunz, 'Client Capture and the Professional Service Firm' [2008] 45 American Business Law Journal 685.
[14] Marcus, Weigelt, Hergert (n 11).
[15] ibid.
[16] Sida Liu, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' [2013] 38 Law & Social Inquiry 670.
[17] ibid.
[18] Mungham and Thomas (n 7).
[19] Swethaa Ballakrishnen and Sara Dezalay, 'Law, Globalisation and the Shadows of Legal Globalisation'
in Swethaa Ballakrishnen and Sara Dezalay (eds), *Invisible Institutionalisms, Collective Reflections on the Shadows of*

of law – or the academic review of its reality or ambit – inevitably prompts discussions of resistance. At least one prominent example addresses the 'liminal' spaces of local approaches and local knowledge as sites of study for defiance when set against an increasingly homogenised global legal regime (at least, I would argue, in corporate matters).[20]

Such an approach foreshadows, for this thesis, both the potential contribution to be made by the individual or the minority collective i.e. the individual law firm as against the industry in aggregate, and the use of performance studies. Swethaa Ballakrishnen and Sara Dezalay use as a key theoretical framing device for their book on globalisation and law the 'long table' – "a performance / discussion format...to structure conversation as a dinner party where conversation is the 'only course'...anyone sitting at the table is a guest and an active performer."[21] This approach is intended to allow inter-disciplinary work to flourish, as academic ideas are taken out of their natural habit and (re)applied elsewhere; as importantly, with the right people around the 'table', this approach allows lesser known ideas and/or previously unknown influences to surface, be that power dynamics (in this case, client–law firm) or generative contribution (by individual lawyers or collectives).

C. Background and rationale

C.1 My background

My background is as an M&A lawyer in large commercial firms. M&A is the practice of buying and selling corporate entities.[22] In the context of a law firm, the term is used to refer to specialist lawyers who advise in this area on the central corporate aspects of the transaction. For this reason, M&A specialists are sometimes referred to, especially in US literature, as "transaction lawyers."[23] While I deal with my position as a researcher in more detail in Chapter 3, my background is important because (as I say in that chapter), while not providing data, I was and remain an insider: I had access to lawyers and a law firm as a practising solicitor. As a participant

Legal Globalisation (Hart Publishing 2021); see also Lawrence Friedman, 'Coming of Age: Law and Society Enters an Exclusive Club' [2005] 1 Annual Review of Law and Social Science 1.
[20] ibid.
[21] ibid, 7.
[22] Rose Hightower, 'M&A Without a Map: For Daredevils Only!' [2009] 20 The Journal of Corporate Accounting & Finance 59.
[23] Steven Schwarcz, 'Explaining the Value of Transactional Lawyering' [2007] 12 Stanford Journal of Law, Business & Finance 486.

observer / researcher, I need to account for my role in the research. This starts with a description of my background and interests.

I have long been interested in the relationship between the contributions of individual transaction lawyers and the outcomes of transactions they work on. 'Outcome' here is not used to indicate a legal result – there is no objective way to assess that, based as it is on negotiating strength and the risk appetite of the various parties – but rather the success of the transaction as against a paradigm, what one might call its 'flow' or 'smoothness'. Empirical research considering the main contribution(s) by transaction lawyers to that underlying transaction and their clients, found that the only clear correlation between assessment of real additional value (i.e. above and beyond internal capabilities or those of other advisors) and contribution was in regulatory cost reduction.[24] In other words, helping clients to navigate the law. This may sound like a truism, but the point is that despite suggestions about lawyers expanding their remit to include business advisory work and project management, the main service valued by clients remains being guided through legal complexity. This, in turn, indicates that a fundamental part of transactional lawyering will be ensuring that complexity – both in law and process – is limited and, where necessary, explained and agreed.

This thesis therefore explores the intricate processes involved in M&A transactions, with a particular focus on the role of lawyer performance, the ritualistic nature of these transactions, and the concept of performativity in legal practice. By examining a real-world M&A transaction, this research aims to shed light on the interactions between lawyers, the impact of their performance on transaction outcomes, and establish some suggestions for the broader implications for the legal profession (albeit necessarily limited by the single-case study approach taken – described further below).

C.2 Rationale and research objectives

Given the complexity and high stakes involved, the wide scope of the role of lawyers in these transactions is important. Lawyers not only provide 'black letter' legal advice but also play a key role in negotiating terms, conducting due diligence, and ensuring regulatory compliance.

[24] ibid.

I argue that the standardized procedures and practices that lawyers and other professionals follow during these transactions are ritualised. These rituals create a shared understanding among the parties involved, facilitating smoother transactions. However, there are instances where these rituals break down, necessitating lawyer performance to navigate the complexities and unexpected challenges that arise.

C.2.1 Research Objectives

The primary objective of this research is to explore the concept of performance in the context of M&A transactions, using tools from the field of performance studies and the concepts of performativity and critical performativity (using critical theory to actively engage with and transform practice).[25] Specifically, this research seeks to investigate the role of lawyer performance in M&A transactions by:

1. Analysing the ritualistic nature of such a transaction and identifying instances where any such ritual breaks down as a potential site of performance.

2. Examining in light of a single case study the concept of performativity / critical performative work and its application for conceptual change to legal practice in this specific area.

3. Providing practical suggestions for the impact of emerging results on 'real-world' M&A transactions.

C.2.2 Methodology in brief

This research adopted a qualitative approach, focussed on a single case study. The data collection process involved identifying and examining a case study transaction to note where the standard ritual breaks down and lawyer performance emerges. The research utilised a combination of a file review (a systematic review and subjective thematic evaluation of the documentation produced for the case study transaction), semi-structured interviews, and thematic content analysis of the resulting data. Lawyers and other legal professionals (such as legal project

[25] Daniel Beunza and Fabrizio Ferraro, 'Performative Work: Bridging Performativity and Institutional Theory in the Responsible Investment Field' [2018] 40 Organization Studies 515; Bernard Leca and Luciano Barin Cruz, 'Enabling Critical Performativity: The Role of Institutional Context and Critical Performative Work' [2021] 28 Organization 903.

managers) involved in the transaction were interviewed to gain insights into their experiences and perspectives.

Thematic content analysis was used to analyse the data, focusing on key themes such as collaboration, communication, adaptability, and project management. This approach allowed for a deeper understanding of the factors that influence lawyer performance and the link between performance and the success of M&A transactions.

C.2.3 Theoretical Framework

The theoretical framework for this research is grounded in the concept of performativity, particularly as articulated by Judith Butler. Butler's theory of performativity emphasises J.L. Austin's position that speech acts do not merely describe reality but actively constitute it: repeated statements and discourses can and do shape practices and power dynamics.[26] This is ritualisation, something Butler (and Austin before) acknowledges: "…performativity is not a singular act, but a repetition and a ritual, which achieves its effects through its naturalization in the context of a body, understood, in part, as a culturally sustained temporal duration."[27]

The idea of 'sustained duration' is important in Butler's development of performativity, widening it from Austin's speech acts in a specific context and preparing the ground for use of the concept in a multitude of fields (although, granted, that was not the primary concern). Butler sees performativity as bound to social context generally, simultaneously defined by and in contrast to that context: "[u]nderstanding performativity as a renewable action without clear origin or end suggests that speech is finally constrained neither by its specific speaker nor its originating context. Not only defined by social context, such speech is also marked by its capacity to break with context. Thus, performativity has its own social temporality in which it remains enabled precisely by the contexts from which it breaks."[28]

In the context of hate speech, which is Butler's concern here, the argument is that the legal prohibition (in the correct analysis) is directed at the further repetition of prior speech acts – a

[26] John Austin, *How To Do Things With Words* (Harvard University Press 1962); Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).
[27] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999) xv.
[28] Butler (n 26) 41.

continuing action, now divorced from its original context.[29] In other words, the injurious words are not prohibited or penalised because of their impact on a specific target or listener but because of past performance – they are not, therefore, performative in terms of having standalone 'effect' whether on the individual or in the world. Butler makes two pertinent points from this argument: "This ambivalent structure at the heart of performativity implies that, within political discourse, the very terms of insurgency are spawned in part by the powers they oppose..."[30]; however, "[i]f a performative provisionally succeeds…then it is not because an intention successfully governs the action of speech, but only because that action echoes prior actions and accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices. It is not simply that the speech act takes place within a practice, but that the act itself is a ritualized practice. What this means, then, is that a performative "works" to the extent that it draws on and covers over the constitutive conventions by which it is mobilized. In this sense, no term or statement can function performatively without the accumulating and dissimulating historicity of force."[31]

Performativity can therefore be found in the constitutive activity *and* in the absence of or break with or reaction to the contextualising ritual.

This will be explored further in Chapter 1, but for present purposes it is sufficient to note that Butler's performativity has been eagerly adopted in academic enquiry relating to corporate organisations and management theory.[32] In a similar way, I use the concept of performativity to analyse how the actions and interactions of lawyers contribute to the success of transactions. By examining the performative aspects of a specific part of legal practice, this research aims to provide a deeper understanding of the role of lawyer performance in M&A transactions, contributing an understanding of how critical theory can be effectively translated into practice.

[29] ibid.
[30] ibid.
[31] ibid 52.
[32] See n 25.

C.2.4 Significance

This research makes several heuristic contributions to the academic examination of law in practice.

First, it provides an analysis of the role of lawyer performance in M&A transactions, highlighting the importance of the type of interactions between lawyers and with clients in determining the smoothness of a transaction. Second, linked, it offers valuable insights into the ritualistic nature of these transactions and the factors that influence their success or failure. Third, in adopting the concepts of performativity and critical performative work (see Chapter 3), I make suggestions about how M&A transactions might be conducted in the future; by highlighting the importance of collaboration, communication, adaptability, and project management, this research provides actionable insights that may help improve the success of M&A transactions.

C.2.5 Structure

This thesis is structured as follows:

1. Chapter 1: Roles for Performativity and Ritual – This chapter reviews the existing literature on M&A transactions, lawyer performance, ritualistic practices, and performativity. It provides a theoretical foundation for the research and identifies gaps in the existing literature.

2. Chapter 2: A Typical Share Purchase Transaction – This chapter sets out a standard form for a UK share purchase transaction in order to explore the ritual aspect of the process and to contextualise the data analysed in Chapters 4 and 5 and discussed in Chapter 6.

3. Chapter 3: Methodology – This chapter outlines the research design, data collection methods, and analytical techniques used in the study. It also discusses ethical considerations and my insider status.

4. Chapters 4 and 5: Data Analysis (file review and interviews, respectively) – These chapters present the findings of the research, including the key themes identified through thematic content analysis. It provides a detailed analysis of the role of lawyer

performance and the extent to which the ritualistic nature of M&A transactions can be discerned.

5. Chapter 6: Discussion – This chapter discusses the implications of the findings for the legal profession and M&A practice.

6. Conclusion – This summarises the key findings of the research, discusses the limitations of the study, and suggests directions for future research.

Chapter 1: Roles for Performativity and Ritual in Law and M&A

1.1 Recap

In the introduction to this thesis, I provided the rationale for the research and set out in high-level terms the methodology, theoretical approach and significance of the research. This is developed further in Chapter 3. In order to begin to justify the M&A transaction as ritual, identify gaps in the ritual, and understand how lawyer performance may impact both, this Chapter sets the scene by reviewing the development of performance studies and its tools, the development of performativity and its potential use in the context of the study of M&A, and providing reasons for characterising the M&A process as one of ritual.

1.2 The meaning of performance and performativity

1.2.1 Performance studies

The inception of performance studies as a distinct academic field owes much to Richard Schechner who in turn worked closely with the anthropologist Victor Turner.[33] The overarching aims of the performance studies project were and are non-specific, being (deliberately) liminal, a "broad spectrum" enterprise, which could consider the use of performance (whatever that is) in "politics, medicine, religion, popular entertainments, and ordinary face-to-face interactions."[34] Performance is, then, an originating impetus but 'performance studies' in an academic context has developed and adapted exponentially beyond the lay idea of performance in an arts setting.[35]

Critical to the development of the field, sociologist Erving Goffman suggested that performance imbued every facet of life.[36] Every form of interaction involves presenting a particular face or act to the external world (or audience), with Goffman's project concerned with examining "the mundane business of how individuals manage interaction, most specifically...the delicate relationship between how they see themselves and how others may come to see them during

[33] See for example Richard Schechner, *The Future of Ritual: Writings on Culture and Performance* (Routledge 2004); also Fabrizio Deriu, 'Performance Studies Floating Free of Theatre. Richard Schechner and the Rise of an Open Interdisciplinary Field' [2013] 26 Alicante Journal of English Studies 13.
[34] Schechner (n 33) 21.
[35] Henry Bial and Sara Brady (eds), *The Performance Studies Reader* (3rd ed, Routledge 2016).
[36] Erving Goffman, *The Presentation of Self* (Anchor, 1959).

face-to-face encounters."[37] Performance for Goffman "refer[s] to all activity of an individual which occurs during a period marked by [their] continuous presence before a particular set of observers and which has some influence on the observers."[38] Such a performance will consist of what Goffman called "front", the "expressive equipment" used to communicate during the interaction – the standard framework that permits interaction between individuals or, as Goffman later describes, groups.[39] The front of an individual or a group is bespoke as influenced by the presentation of 'self' that the individual or group wishes to convey, but it is grounded in a framework of common purpose which allows the performance to be understood – it is "located in the material plane of text, speech, physical gesture."[40]

The emphasis, however, can (must) change depending on context: "For example, many service occupations offer their clients a performance that is illuminated with dramatic expressions of...competence, integrity, etc." appealing to that shared framework.[41] Jenkins calls this "cognitive integration",[42] or, as the French sociologist Pierre Bourdieu referred to it, "habitus" versus "dispositions".[43] It is the habitus – the shared framework of understanding – that "disposes actors to do certain things, it provides a basis for the generation of practices. Practices are produced in and by the encounter between the habitus and its dispositions, on the one hand, and the constraints, demands and opportunities of the social field…to which the habitus is appropriate…on the other."[44] Practices – or performance – are generated by this interplay. For present purposes, it is pertinent to observe Bourdieu's assessment that this manifests in "new entrants to a profession 'fall[ing] into line with the role...try[ing] to put the group on one's side by declaring one's recognition of the rule of the group and therefore of the group itself'."[45] We will return to this idea, but for now it is sufficient to acknowledge that one should pay close attention to performance and its meaning when considering professional life.

[37] Richard Jenkins, 'Erving Goffman: A Major Theorist of Power?' [2008] 1 Journal of Power 157, 160.
[38] Goffman (n 36) 13.
[39] ibid; see also 47-48 on groups.
[40] Johanna Fawkes, 'Performance and Persona: Goffman and Jung's Approaches to Professional Identity Applied to Public Relations" [2015] 41 Public Relations Review 675, 678.
[41] Goffman (n 36) 16.
[42] n 37 168
[43] Pierre Bourdieu, *Habitus and Field: General Sociology, Volume 2* (1982-1983) (Polity 2023).
[44] Richard Jenkins, *Pierre Bourdieu* (Taylor and Francis, 1992), 48.
[45] Quoted in Fawkes (n 40) 676.

Returning to Goffman, the performance given by an individual or a group in a given situation "involve[d] individuals using their 'expressiveness' to make 'impressions' on their 'audience', with the implication that the audience will constantly seek to decode these expressions."[46] He called this 'impression management'.[47] It is understandable given Goffman's use of the dramatic metaphor that, initially at least, Schechner focussed on the theatre and the interaction between performer and audience. However, as Goffman was using the metaphor to make a wider point – that performance is ubiquitous in human interactions[48] – and as Turner's influence increased, ritual and social drama became as important.[49]

Turner spent a career considering rituals and the way in which they contributed to or dealt with what he called social drama.[50] Social drama derives from a breach of regular norm-governed social relations will result in crisis requiring redressive action and reintegration of the disturbed group or social recognition of the irreparable schism.[51] Breach of these norm-governed relations (or anticipation of a breach) will result in a threshold – a moment 'in between' where society is fractured and the resolution or solution to permit reformation has not yet been found.[52] For Turner, thresholds represented areas of liminality – a period of change which occurs between disruptive or disrupting factors in society which was neither of the past nor the future.[53] These are moments of social drama, where the interaction of social actors reach a fault line and, as interactions are fluid, the structure of society needs repair when there is fracture. It is at these liminal sites that performance contributes to the healing of this fracture.[54] As Deriu states "whether at a social and collective level or at the individual level, Schechner and Turner shared the belief that performances deal with transformation – how people use performances to experiment with, act out and rectify change."[55] For Turner this is redressive – the drama which has caused a schism

[46] Jill Solomon, Aris Solomon, Nathan Joseph, Simon Norton, 'Impression Management, Myth Creation and Fabrication in Private Social and Environmental Reporting: Insights from Erving Goffman' [2013] 38 Accounting, Organizations and Society 195, 197.
[47] Goffman (n 36) 29.
[48] Solomon et al (n 46) 197; see also Frances Chaput Waksler, 'Erving Goffman's Sociology: An Introductory Essay [1989] 12 Human Studies 1.
[49] Deriu (n 33).
[50] Victor Turner, *The Anthropology of Performance* (PAJ Publications 1988).
[51] ibid.
[52] Stephen Bigger, 'Victor Turner, Liminality, and Cultural Performance' [2009] 30 Journal of Beliefs & Values 209.
[53] Turner (n 50).
[54] ibid.
[55] Deriu (n 33) 20.

in society's fabric is transformed, made whole again, by way of some sort of performance-related action.[56]

As we have already seen, Austin, focussing on language, had already introduced a now-canonical distinction between standard speech (a so-called constative speech act) which described something verifiable, and words and phrases that performed an additional function (performative speech acts) i.e. those which had meaning above and beyond their descriptive power.[57] The concept of performativity – in this sense of creating a given state or sense of meaning – would become central to the growing performance studies discipline, providing the way in which performance could implement real-world change and, critical for this thesis, not only constitute interactions between individuals and groups but signpost meaning as well. While for Goffman "a professional man...in the social sphere which encompasses his display of professional competency...will be much concerned to make an effective showing [by way of his performance],"[58] the statements that are intended to mark out that competency to an audience, the 'legalese' if you will, which is intended to have effect over and above the ordinary meaning of the relevant words and phrases, move us from performance to performativity.

1.2.2 Performativity

Austin's work influenced and was adapted by post-structuralist thinkers.[59] Derrida, in particular, argued that Austin's use of "parasitic" to describe pseudo-performatives – such as those on the stage that are not really meant – relied on the impossibility of identifying a distinction between a "normal" speech act and one that is parasitic.[60] Derrida argues that this is undermined in Austin's own work by the fact that performatives are conventional i.e. they take place – must take place – within the tapestry or the ritual that allows them to make sense; the intention behind the statement, which must be understood if the distinction between normal and parasitic performatives is to be

[56] Richard Schechner, 'Selective Inattention: A Traditional Way of Spectating Now Part of the Avant-Garde' [1976] 1 Performing Arts Journal 8, 8.
[57] Austin, n 26; see also Annimie Halsema and Lilian Halsema, 'Jobs that Matter: Butler's "Performativity" in the Dutch Police Force' [2006] 3 Critical Perspectives on International Business 230.
[58] n 36 22.
[59] Wiesław Oleksy, 'Performativity Revisited: J. L. Austin and His Legacy' in Jacek Mianowski, Michaeł Borodo, and Pawel Schreiber (eds), *Memory, Identity and Cognition: Explorations in Culture and Communication. Second Language Learning and Teaching* (Springer 2019).
[60] Austin (n 26) 22; J. Hillis Miller, 'Performativity as Performance Performativity as Speech Act: Derrida's Special Theory of Performativity' [2007] 106 The South Atlantic Quarterly 219, 227.

maintained, cannot travel with such repetition or iteration.[61] As Loxley puts it: “If successful performatives are necessarily citations of a sort, then the derivative is already at work in the original, and the etiolating parasite actually characterises or constitutes the vigorous host.”[62] Intention is by the by – speech acts can be quoted out of context, mis-interpreted and so on.[63]

Despite his criticism, Derrida adopted the idea of performativity albeit in a radically altered state.[64] Austin distinguished between constative speech acts and performative speech acts; Derrida[65] – and subsequently Butler – conflates the two so that "every statement is a performative" (in a way similar to Goffman).[66] For Derrida, performativity is about interaction: in iterative exchanges “[m]y “yes” is a performative countersigning or the validating of a performative command that comes from outside me”, changing the future inexorably.[67] For Butler, performativity is about power: statements about gender and race are performative because neither of those things exist beyond their usage in language, "linguistic acts, such as naming, do not leave reality untouched, but produce reality”.[68]

Butler’s notion has been criticised for failing to recognise that to the extent issues of race, gender and status are demarcated as ‘performance’, this risks belittling marginalisation and inequality (albeit Butler is careful to point out that iterating performances of gender are not ‘chosen’ as such).[69] Nevertheless, this has not prevented Butler's approach from being adopted enthusiastically by social science researchers and used effectively to explore gender in real world scenarios (for example, job allocation in the Dutch police force).[70] The criticism also fails, in my view, to take into proper account the nuances of Butler’s position in attempting to argue outside the constraints – the ritual – of (current) social normativity, emphasising that the repetition of speech, roles, gestures, clothing, body language, specific behaviours (and similar) within that framework support the framework.[71]

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[61] Jacques Derrida, *Limited Inc* (Northwestern University Press 1988); see also Miller (ibid) 230.
[62] James Loxley, *Performativity: The New Critical Idiom* (Routledge 2006), 75.
[63] ibid 89.
[64] Miller (n 60).
[65] ibid.
[66] Halsema and Halsema (n 57) 235.
[67] Miller (n 61) 231.
[68] ibid.
[69] Susan Manning, ‘Performance’ in Bruce Burgett and Glen Hendler (eds), *Keywords for American Cultural Studies* (2nd ed, New York University Press 2014).
[70] Halsema and Halsema (n 57).
[71] See for example on power dynamics: Parisa Shams, *Judith Butler and Subjectivity: The Possibilities and Limits of the Human* (Palgrave Macmillan 2020).

Other natural successors to Austin disagree. John Searle, a former student of Austin's and generally regarded as the custodian of his work,[72] has a very different idea of what performativity is to Butler. Butler's performativity is embedded in the abstract and the esoteric idea of gender and how that is performed by language.[73] Searle (as with Austin) is "talking about the language of everyday life".[74] This is a fundamentally divergent approach, but it is relatively clear how it arises.

Searle notes that it is "a terrible mistake to take language for granted because language is the essential constitutive device for creating institutional reality".[75] This sounds as though the argument is being made that every act of language is performative but it is not. Where Butler sees performativity as the imposition of discourse on actors who choose to self-identify within an overarching framework, Searle acknowledges that everyday language constitutes the building blocks of institutional thought. In other words, the uses of everyday language to perform a speech act in favour of a particular item in the world creates and reinforces that thing. But this is much more specialised than for Butler (and arguably Derrida) because performative speech acts are only those which attribute status: "a function that can be performed only in virtue of the fact that there is a recognised status of the object or the person that performs the function".[76] It is deliberate.

This distinction between the general and the specific informs much of the criticism of performativity being given such prominence, suggesting that if it is a fundamental part of the human social experience then such negotiations happen daily, in fact all the time, and should not be selected for special attention other than where there is marked ritual i.e. those who participate in it recognise it as such.[77] Denzin recognises (as Goffman did) that it is intuitively not the case that the "dividing lines between person and character, between performer and actor, between stage and setting, between script and text, and between performance and performativity disappear" – it is just very difficult to describe why that is.[78] It appears to me that this is the

[72] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969).
[73] Scott Lash, 'Performativity or discourse? An interview with John Searle' [2015] 32 Theory, Culture & Society 135.
[74] ibid 136.
[75] ibid 145.
[76] ibid.
[77] John Lewis, *The Anthropology of Cultural Performance* (Palgrave Macmillan 2013); see also Ian Maxwell, 'The Limits of Ritual' (2017) 1 Performance of the Real <https://doi.org/10.21428/b54437e2.350e0b75> accessed 30 March 2025.
[78] Norman Denzin, *Performance Ethnography* (Sage Publications 2011) 25.

ethnographer's project: researchers look to the liminal[79] where there is complexity and the element of performance takes on its greatest role, what Denzin calls "realism writ large".[80] In other words, by attempting to understand competing narratives in an area of uncertainty there is an effort to "represent... the... world accurately, with a high degree of verisimilitude".[81] And this is the very essence of performance as a site of study. [82]

It is not the intention of this thesis to enter into the long-running and well-fought debate about Butler's well-known ideas (or to examine the academic differences between the approach of Austin, Derrida and latterly Searle) – that is beyond its scope. However, as noted above, the ideas have found considerable traction in, among other fields, law.[83] It is therefore appropriate for the idea of performativity to be adopted and applied in the context of M&A. Further, it is sufficient for my project that in major areas of life, especially in law, the ritual is performative in the sense that it has real world consequences ; breaches of structure do not result in a destruction of process but rather adaptation or change.[84] In looking closely at what actually happens in this performative process, I can say something about the reality of practising law.

1.2.3 Performativity and organisational research

The notion of performativity is a contested idea. Yet it clearly has utility to the researcher – indeed, it may be a victim of its own success given its appeal to such a broad swathe of academics. Performativity, as Lynette Hunter sees it, is crucial to the value of performance studies as an interdisciplinary topic.[85] By extension, performativity is *the* interdisciplinary ingredient.

Performativity has been adopted with some enthusiasm in management theory and linked organisational theory, particularly in the critical review of institutions.[86]

[79] Turner (n 50).
[80] Denzin (n 78) 35.
[81] ibid.
[82] Baz Kershaw 'Performance as research: live events and documents' in Tracy Davis (ed), *Cambridge Companion to Performance Studies* (Cambridge University Press 2008).
[83] See n 25.
[84] Deriu (n 33).
[85] Lynette Hunter, 'Being In-between: Performance Studies and Processes for Sustaining Interdisciplinarity' 2 [2015] Cogent Arts & Humanities 1.
[86] Thomas Lawrence, Roy Suddaby and Bernard Leca, 'Introduction: Theorizing and Studying Institutional Work' in Thomas Lawrence, Roy Suddaby and Bernard Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press 2009).

Bernard Leca and Luciano Barin Cruz give the example of the internal (employee-facing) and external (customer/supplier/wider stakeholder facing) statements made around an organisation's Corporate Social Responsibility or, more recently, environment, social and governance (known as ESG) matters.[87] When matters such as these that are, or should be, intrinsically linked to the ethical positioning of an organisation, repeated emphasis on work being done by the organisation and its responsibility can increase commitment to the overall goals, aligning with Butler's idea that a statement can be akin to action, thereby influencing behavior and practices.[88]

Equally, and calling back to Butler's view that gender precedes the notion of sex i.e. gender performativity creates the impression of an originating sex,[89] such statements could be purposed to indicate the organisation is taking an approach to responsible business and the environment it is not; the statement being an effort to make it true. Spicer et al have taken this perspective a step further to suggest that performative statements should be *encouraged* in management techniques as a method of effecting change.[90] Spicer et al termed this approach 'critical performativity': "…we have identified and celebrated the performative intent that lies at the heart of much critical management studies. By acknowledging this performative intent, where concepts, theories and language use create effects (rethinking, other values and priorities, new practices) we hope that critical management studies will be able to overcome its often hypocritical and/or unproductive claims that its' output have no performative intent whatsoever."[91]

There is another reason why performativity is at the heart of this project. Butler, Delaney and Spoelstra have utilised the term 'critical performativity' to categorise the study of ones' own profession or closely linked professionals with a critical eye.[92] Being concerned with the act of performing rather than substantive professional outcomes permits a community of professionals to practice – in the sense of rehearsing and repeating. Not only can they practice, they can experience "not-knowing".[93] That is because it permits collaboration in a true sense – the

[87] ibid; see also Christopher Wickert and Stephan M Schaefer, 'Towards a Progressive Understanding of Performativity in Critical Management Studies' [2015] 68 Human Relations 107.
[88] Leca and Cruz (n 25) 906.
[89] n 27.
[90] André Spicer, Mats Alvesson and Dan Kärreman, 'Critical Performativity: The Unfinished Business of Critical Management Studies' [2009] 62 Human Relations 537.
[91] Ibid 556.
[92] Nick Butler, Helen Delaney and Sverre Spoelstra, 'Risky Business: Reflections on Critical Performativity in Practice' [2018] 25 Organization 428.
[93] Hunter (n 85) 2.

contribution of different ideas to a new whole.[94] In the world of professional legal practice, rather than an individual creating their own norms they are instead inextricably linked to a set of processes which not only dictate their status, but the options available to them.[95] Yet in participating in the process, they must and do contribute individually and collectively – I suggest this is through performance.

Critical performativity has been roundly criticised for, among other things, being based on a misunderstanding of the position taken by Butler; something the authors acknowledge and respond to in a later paper.[96] Adopting performativity as a positive, affirmative activity, betrays the fire of Butler's original thesis that in the context of gender performativity is about recognising power and its subjugation of minorities with a view to stepping outside the prevailing norms: as used in critical performativity it becomes "a very soft politics of benign managerialism rather than a politics of emancipation."[97] Spicer et al in a lengthy response open by saying that in their view such criticism is a "narrow intra-academic question: the correct interpretation of Judith Butler's ideas within a subfield of Management Studies"[98] that a select few academics are interested in.[99] Instead, their point is to use Butler's ideas – or the idea of performativity in some form or another – to engage in practical change.[100] Indeed, institutional theorists wrestle with an approach whereby one "cannot step outside of action as practice – even action which is aimed at changing the institutional order of an organizational field occurs within sets of institutionalized rules,"[101] something with which Butlerian theory may assist.

Again, my ambition in this thesis is not to determine which perspective is correct, although arguably my position is closer to that of Spicer et al given my use of performativity as a lens through which to view practice. Rather, this debate illustrates: (1) the potential use of Butler's ideas in a different academic context; (2) the precedent for doing so in management and organisational studies – those areas where practitioner interests and experience are frequently

[94] Nieke Elbers, Kiliaan van Wees, Arno Akkermans, Pim Cuijpers and David Bruinvels, 'Exploring Lawyer–client Interaction: A Qualitative Study of Positive Lawyer Characteristics' [2012] 5 Psychological Injury and Law 89.
[95] Simonović Alifirević, 'Performance Studies as New Anthropology of Events' [2017] 12 AM Journal of Art and Media Studies 149.
[96] André Spicer, Mats Alvesson and Dan Kärreman, 'Extending Critical Performativity' [2016] 69 Human Relations 225.
[97] Laure Cabantous, Jean Pascal Gond, Nancy Harding, Mark Learmonth, 'Critical Essay: Reconsidering Critical Performativity' [2016] 69 Human Relations 197, 206.
[98] Spicer et al (n 96) 228
[99] ibid.
[100] ibid.
[101] Lawrence et al (n 86) 7; Thomas Lawrence and Roy Suddaby, 'Institutions and Institutional Work' in Stewart Clegg, Cynthia Hardy, Thomas Lawrence and Walter Nord (eds), *Handbook of Organization Studies* (2nd edn, Sage 2006) 220.

studied, moving beyond the political, emancipatory project for the oppressed; and (3) the continuing ambiguity around the concept of performativity, yet its undeniable status in certain areas of the academy as a practical way of looking at professional practice, particularly in the Butlerian sense of repeated statements reinforcing power structures – and therefore organisational structures – for good or ill, and, by identifying such performative statements, challenging that structure.

1.3 Performance and law

1.3.1 Law, ritual and process

The worlds of law and theatre have been well examined in the context of the violence of law and its public display of power.[102] This angle of scholarship concentrates on coercion and the legitimisation of law. Performance studies provides a different lens, looking at the way in which individuals live law. Performance studies can, it is suggested, contribute something meaningful by theatricalising law and asking whether lawyers are "aware and responsive to the world that creates them and…conscious of worlds beyond words".[103]

Ritual has also long been recognised as a building block in the exercise of legal authority and creating and maintaining its legitimacy.[104] This is performative: the precise meaning of words is much less important in legal writing and legal expression than both lawyers and lay actors would consider. Instead, legal words have particular meanings, not obvious from their lay interpretation bringing with them a weight of understanding in the profession (what Pyle calls "super elaborated" words).[105] Such “words (the legal terms and phrases etc.) contain more meaning than suggested by their dictionary definitions” with the consequence that their meaning is both obscured to all but the initiated and at the same time open to debate by those “duly consecrated”.[106] It is a “specialized discourse capable of influencing physical reality through specialized code.”[107] There is a direct parallel with the terminology of religious ritual, where “language is frequently couched

[102] Douglas Klusmeyer, ‘Violence, Law, and Politics: Hannah Arendt and Robert M. Cover in Comparative Perspective’ [2015] 34 Criminal Justice Ethics 312.
[103] Marett Leiboff, ‘Theatricalizing Law’ [2018] 30 Law & Literature 351, 359.
[104] Ransford Pyle, ‘Law, Ritual and Language’ [1984] 8 ALSA F 381; see also Kate Leader, ‘The Trial’s the Thing: Performance and Legitimacy in International Criminal Trials’ [2020] 24 Theoretical Criminology 241.
[105] ibid 382.
[106] Terezie Smejkalova, 'Legal Performance: Translating into Law and Subjectivity in Law' [2017] 22 Tilburg Law Review 62, 66.
[107] ibid 64.

in metaphorical phrases and relies on an understanding of the symbolic connotations of objects in the ritual context to which it makes reference."[108] If we replace the reference to 'metaphorical phrases' with the language specific to the legal system in question and 'objects' with relevant legal principles, we can argue that rather than the substance, it is the act, the performative nature of the words that is a determinative factor in the implications of law in the world.

Sally Falk Moore has argued as a legal anthropologist that the study of law as a generalised method and culture of control is not independent of the "societal context into which [such] projects are introduced."[109] Again, the study of law can be as much about process as content: the "unit of study is not a project to be, but the process of its implementation."[110] The law is practiced not as culmination, but evolution.[111] The inter-relationship of three components (i) regularisation – the acceptance of norms by a society, (ii) situational adjustment – the need to revise those norms and (iii) indeterminacy – the resulting state of continual flux and transformation, means that law is always in a state of change as it is a social process.[112] Moore, influenced by Karl Llewellyn's legal realism is concerned with how law works in practice; its intention or prescription is not as important as its actual impact (or, at least, is only part of the story).[113] The comparison to Turner's social drama is illuminating.

In addition to words and rituals, it is also the act of physically doing law that creates law, separately from its substance. This involves both the legal activities of lawyers and the interjections/contributions of clients as participant observers, interacting with the legal specialists. Smejkalova (amongst others)[114] identifies the trial as "a performance of justice, in that, not unlike a magical ritual or ritual theater, [it] happens beyond a certain kind of barrier and is fully accessible only to those duly consecrated."[115] In a performance studies context, Leiboff gives the example of an audience reacting in silence to a piece of upsetting news where an important part of the interaction between actor and audience is found in the physical response to the subsequent

[108] Wade Wheelock, 'The Problem of Ritual Language: From Information to Situation' [1982] 50 Journal of the American Academy of Religion 49, 56.
[109] Sally Falk Moore, 'Comparison: Possible and impossible' [2005] 34 Annual Review of Anthropology 1, 1.
[110] ibid 8.
[111] Lucy Mair, 'Review: Law as Process by Sally Falk Moore' [1979] 35 RAIN 13.
[112] Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge 1978).
[113] Francis Snyder, 'Review: Law as Process by Sally Falk Moore' [1979] 6 British Journal of Law and Society 135.
[114] n 106; see also Leader (n 104).
[115] Smejkalova (n 106) 62.

prolonged silence.[116] Similarly, for lawyers, she argues that in addition to writing and ethical conduct, the responsibility for acting as a trained lawyer comes through physical responses – the ability to make appropriate responses "…to be an active lawyer".[117] This is performance in its original sense.

1.3.2 Application to the study of the legal profession

I argue that the use of the theoretical contributions of performance studies are well suited to be applied to the legal profession, to consider its normative propositions and to identify where individuality manifests outside of those norms – this being the site of performance. The professional transactional lawyer is both bound by process (and a performative process at that) of the transaction structure – for which see Chapter 2 – and additionally by expectation that they will work within the realm of their practice, which removes individuality on a general scale. This individuality, however, will be resurrected at the point at which the ritual breaks down: the point of liminality and creativity. Performance studies and the linked concept of performativity offers practical and theoretical tools with which to assess creativity and to review that middle ground between audience, participant and actor, a way in which to assess and criticise the M&A ritual and the actions of lawyers when the framework breaks down.

Although it is a novel way to study the profession, it is arguably also peculiarly suited to its demands as it takes into account all viewpoints – client, other lawyers, and the actors themselves. Law and society scholars are at pains to consider law in the real world. As we saw above, (some) academics interested in management, organisational and institutional theory are interested in practical impacts in the real world. Using performance studies theory and the concept of performativity to consider an aspect of legal practice takes seriously an intertwined and symbiotic relationship between society (as distinct from social mores/norms which are about the regulation of society; here we are talking about society as an organism) and the performance of law. This is in the same way that performance studies investigate the ways in which there is an "interdependency" between art and humanity.[118] It permits the study of both creation and outcome

[116] Leiboff (n 103).
[117] ibid 361.
[118] Shannon Jackson, 'What is the "Social" in Social Practice?: Comparing Experiments in Performance' in Tracy Davis (ed), *The Cambridge Companion to Performance Studies* (Cambridge University Press 2008).

in the sense that both the practice of law and the outcomes of legal practice are informed by the social relationships between all participants.

Lawyers have a protected status and (generally) the monopoly on creating legal obligations, meaning the attitudes and discourse of everyday life between clients and lawyers and lawyers themselves will be a practice of subjunctive performance.[119] This is the term Turner used to refer to *potential* when in a liminal state – the 'what might be'.[120] The performance of a lawyer will depend upon the ability to use the quasi-ritual of the transactional process to reach the outcome they think their client wants.[121] In reaching resolution – the conclusion of a transaction – it will be the lawyer(s) who has (have) overcome this threshold most efficiently and creatively who will have 'performed' best.

The increasing use of Artificial Intelligence models in legal work renders this project even more topical. There is an idea, both in academia and practice, that the use of AI will permit unlimited permutations of documents allowing lawyers to concentrate less on legal drafting and more on business strategy and negotiation.[122] This suggests that the performance of the lawyer, not their technical proficiency but rather their contribution to discussion, strategy and negotiation, is valued by participants as this is anticipated to be the remainder after automation has taken place. Thus this discussion is more than theoretical: this is being seen in the market.

1.4 M&A and performance

1.4.1 The nature of M&A

M&A is perhaps uniquely collaborative in an adversarial legal system because it involves two (or more) parties with a common aim but different positions (especially given the principle of *caveat emptor* in English law). Once the process begins, it is led by lawyers based on an agreed and tested legal format; a situation that has been regularised in legal precedent. It requires lawyers to "develop… good working relationships between opposing lawyers in business transactions."[123] Clients value a smoothness of process in a transaction, including guiding them through

[119] Bigger (n 52) 212.
[120] n 50.
[121] Smejkaolva (n 115); Leader (n 104).
[122] MacCauley (n 6); see also Kenneth Adams, 'The New Associate and the Future of Contract Drafting' [2011] New York Law Journal 4.
[123] Scharwz (n 23) 510.

encounters with counterparties, and the distinction between one lawyer and another or one team of lawyers and another will be in their activity in making this happen – their performance.

It is accepted that the duty of a lawyer to communicate with a client is essential to the relationship.[124] In an M&A context it is arguable that communication is the very essence of the role; it is through communication with both client, opposite parties and other lawyers on the 'home team' that value as against other professionals is added. This does not take away from the empirical finding that clients value transaction lawyers guiding them through regulatory hurdles,[125] but simply emphasises that communication of the law and creating a route through it is at the heart of transactional lawyering.

The well-understood plurality of Cover[126] and Bakhtin[127] (the former in law, the latter in life)[128] indicates that – from a theoretical perspective at least – it is no great leap to say that of the many interpretations of how and why a transaction is taking place, the use of ritual to bring together a plurality of interests is fundamental to its success. The importance in such a multi-faceted worldview to corral competing interests and different viewpoints into a template that is accepted by all parties suggests, also that the process as much as the substance is important.[129]

When considering membership of a large commercial law firm there is, of course, a duty of care to individual clients. However, there is also a responsibility to the wider society which endorses (and polices) the lawyers' practice.[130] Indeed, should there be a conflict between those two duties it is expected that as an officer of the court the interests of legal justice prevail over the interest of individual clients.[131] This is seen in the requirements of the Solicitors Regulation Authority.[132] Lawyers are agents of the Court, and they are held to very high ethical standards.

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[124] Douglas Richmond, 'Lawyers' Professional Responsibilities and Liabilities in Negotiations' [2009] 22 Georgetown Journal of Legal Ethics 249.
[125] Mungham and Thomas (n 7).
[126] Robert Cover, 'Nomos and Narrative', [1983] 97 Harvard Law Review 4; see also Ian Ward, 'The English Question, the English Constitution, and the English Mind' [2006] 6 Issues in Legal Scholarship 1539.
[127] Anthony Bradney, ''It's About Power': Law in the Fictional setting of a Quaker Meeting and in the Everyday Reality of 'Buffy the Vampire Slayer'' [2006] 6 Issues in Legal Scholarship (i).
[128] Richard Mullender, 'Two Nomoi and Clash of Narratives: The Story of the United Kingdom and the European Union' [2006] 6 Issues in Legal Scholarship (i).
[129] Bradney (n 127).
[130] Dinovitzer, Gunz, Gunz (n 5).
[131] ibid.
[132] Solicitors' Regulation Authority, *Solicitors' Code of Conduct* (2019) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 30 March 2025. Under Section 1 of the Code of Conduct ("Maintaining trust and acting fairly"), sub-section 1.4 requires that: "You [the solicitor] do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (*including your client*)" – emphasis added.

Nevertheless, providing that a client instruction does not break the law or trigger any other duty to disclose, transaction lawyers have a duty to act in the best interests of their clients and are, inherently, deeply involved in the strategy of a negotiation: they are advising on what can be and is disclosed when and which terms are acceptable in a contract.[133]

1.4.2 Legal 'engineers'

Transaction lawyers are required, in an uncertain world, to advise on different approaches to transaction construction which, in a common law system such as the United Kingdom and the United States, is unsurprising. The natural (in its common sense) constitution of common law means that it is inherently open to interpretation and that is what lawyers do. My experience of being part of a fast-moving corporate team in a large commercial firm is that acting as project managers and strategic foils for clients (someone to discuss wider business points with) is part of the job, which, in turn, suggests that the role of the lawyer in general M&A work is central to its success.

Again, performance studies literature helps elucidate the interaction between interpretation and performance. It is acknowledged that there is a distinction – Hamzehee utilises the terminology of 'forensic speech events', adaptations of expressive texts (commonly but not exclusively poetry and drama) in a "critical and customizable cannibalization of previously created text(s) into something new; often into a new medium."[134] Forensic interpreters are "performance studies practitioners that specifically adapt texts for their bodies and voice"[135] Such an approach positions interpretation as linked to performance, but with a narrowed perspective – a development of the underlying text with its potential for any number of performances to a specific and individual performance in the act of interpretation.

This is mirrored in Smejkaolva's idea of legal translation, which she identifies as a dimension of performance in a Goffmanian sense, which "takes many forms depending on the particular legal

[133] Solicitors' Regulation Authority, *SRA Principles* (2019) <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 30 March 2025. The introduction to the Principles states: "The…Principles comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold. This includes all individuals we authorise to provide legal services..." Principles 1 and 2 require such authorised persons – including solicitors – to act: "in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice...[and] upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons."
[134] Joshua Hamzehee, 'Adaptation Unites Us! A Call for Performance Studies and Forensics Interpretation to Adapt with Each Other' [2023] 43 Text & Performance Quarterly 212, 213-214.
[135] ibid 215.

system in question" and often "resemble[ing] the act of interpreting" by lawyers.[136] The narratives of non-lawyer participants in the legal process must be described in – ' translated into' – legal terms applicable to the system in question order for the system to be applied. This requires interpretation by lawyers, narrowing the number of possible interpretations to a particular essence, the act of translation "requiring the active and creative act of a subject, the translator."[137] This varies by lawyer, influenced, importantly, by client demands, demonstrated in an adversarial system where competing interpretations are put forward.

Another way of looking at the same point is through the type / token distinction, where the originating work is the type – the poem, the composition, the statute – its performance is the token of that type, and the interpretation is the consistent approach to the performance (the token) by an individual or group.[138] There are, therefore, not only distinct ways of approaching a question for a team, but also unique ways of approaching that question – a performance to give based on interpretation of the law/legal position/needs of the client.[139]

This conceptual argument finds further support in the legal literature in the emergent idea of the "transactional engineer."[140] The idea of engineering is helpful because it captures the technical role of the transaction lawyer in constructing the legal model for a deal, shaping it and producing it. Such 'engineering' takes place within a pre-determined set of market-accepted rules and via a suite of precedent documentation (the type) but the transaction will be unique (the token), with bespoke consideration of the application of the rules to client needs by the particular lawyer or lawyers involved (the performance and interpretation). The idea that the performance of a lawyer makes a difference to the outcome of an M&A transaction therefore seems intuitively true.[141]

1.4.3 Performance in M&A and 'Performative M&A'

I argue that an M&A process is a performance in the sense that there is an interpretive role for lawyers in guiding clients through the transaction; it is generally performative in that there is a shared expectation of the token documentation, a formal ritual for progressing the project (the

[136] Smejkaolva (n 106) 65 and 75.
[137] Elina N. Moustaira, 'Narratives of Laws, Narratives of People' in James Nafziger (ed), *Comparative Law and Anthropology: Research Handbooks in Comparative Law series* (Elgar 2017).
[138] Richard Sharpe, 'Type, Token, Interpretation and Performance' [1979] 88 Mind 437.
[139] Richmond (n 124).
[140] Dinovitzer et al (n 5).
[141] Richmond (n 124).

conference call, the all-parties meeting) and a formal ritual for its completion (a completion meeting).[142] For Turner, this is remedying a rupture: the need for one party to transfer property to another without – or with limited – risk of repercussions or loss.[143]

To understand how precisely it is performative, one must consider a pro forma M&A transaction (a task undertaken in Chapter 2). Any real-world transaction will be imperfect against such an 'ideal' transaction; each deal will be unique. The process is based on repetition and precedents – a recognition in itself that the ideal transaction could never exist – and the point at which general performativity gives way to specific performance will be the site where the precedents (norms) break down: for example, a really significant amendment to the documentation is needed (minimal warranties versus a whole suite, for example). As this is a social process, there will be inconsistencies and indeterminacy, however organised the transaction norms.[144]

Let us consider an example. Gulati and Scott examined in some detail and over many years what they termed the "three and a half minute transaction".[145] This is the story of boilerplate language which was included in insurance contracts and, when challenged in court with a particularly unfavourable result to insurers, was nevertheless left in situ in almost all standard precedents. The three minutes is a reference to the time it took to complete a smart version of the contract, one based on inputs to a piece of software without further thought.

The point made by the authors is that even though the clause was little understood and the case law rendered it suspect, it remained used widely. In the context of the current project, this typifies the extremely strong attachment of lawyers (of all strata) to precedent and the unwillingness to move away from something assumed to be agreed by the community; this could be described as subscription to the ritual (Turner) or simply the organised patterns of the social institution (Falk Moore).[146] Either way, it is example of an area where performance, demonstrated by departure from ritual, would be evident to close analysis.

[142] Note that these terms are explored in Chapter 2; see also Sharpe (n 138).
[143] See n 50.
[144] Falk Moore (n 112) 49.
[145] Mitu Gulati and Robert Scott, 'The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design' [2011] 40 Hofstra Law Review 1.
[146] See n 50 and n 109 respectively.

Were another lawyer to have queried this boilerplate, one can imagine the response to have been an initial argument along the lines that the wording should be retained because it is seen as 'standard' by the community before, possibly, an argument about its actual merits. Whichever side was successful, it would be the element of performance which would change the trajectory of the transaction (albeit the case study is used in the literature as an example of boilerplate wording being used, i.e. the ritual being followed, even when it does not make sense). Either way, this is not a discussion about legal merit, the element of performance relates to the interaction between the lawyers to dictate and create an outcome rather than its substance.

In M&A the breach between the parties, while collaborative in this context rather than adversarial, still requires some sort of performative redress and that is found in the ritual or the transaction.[147] Schechner avers that assessment of performative behaviour can be useful not just in the arts but in any arena where "the various and complex relationships among players – as spectators, performers, authors, and directors" can be addressed, "pictured as a rectangle, a performance "quadrilogue"" which permits study of interactions of those participants.[148] This is the essence of this project. M&A lawyers work in small teams but interact with many other lawyers and are responsible for client contact. Considering the various interactions between lawyers and between those lawyers and the clients gives a data set of interactions for study where performance *must* – it is hypothesised – emerge from the underlying ritual upon which all parties are agreed. The performance will be established in the indeterminacy (Turner's 'liminal spaces'): observations of where particular actors are perceived to have played some unusual role in the transaction or where a novel point means that the underlying ritual has fallen away.[149] This begs the question: how might performance be systematically assessed?

1.5 Assessing performance

1.5.1 Why?

Assessing performance and performance-related qualitative work remains difficult, whichever field is under consideration.[150] Cho and Trent argue that performance pedagogy is enhanced by

[147] Donald Korobkin, 'Bankruptcy Law, Ritual, and Performance' [2003] 103 Columbia Law Review 2124.
[148] Schechner (n 34) 21.
[149] n 50.
[150] Jeasik Cho and Allen Trent, 'Validity Criteria for Performance-related Qualitative Work: Toward a Reflexive, Evaluative, and Coconstructive Framework for Performance in/as Qualitative Inquiry' [2009] 15 Qualitative Inquiry 1013.

carrying out reflexive assessment and this position contributes fundamentally to the understanding of this project – its ultimate purpose is to empower clients and participant lawyers to understand, and if necessary change, the trajectory of their transaction based on early interactions.

For Cho and Trent, performance is a "heuristic tool useful for making cultural meaning explicit in diverse contexts…" and the use of performance as a way of understanding the world is growing in acceptance and this is particularly true in professional worlds.[151] Performance drives change.[152] Again, as with the discussion of organisational/institutional theory, it matters because it is active: it has effect in the world and changes the way individuals think and act.[153] As a heuristic tool, it can also be teleological. Close assessment of M&A social interactions can be used to explore, on a small scale, how performance plays a role in M&A work, and also point to elements of performance in M&A that seem to accomplish certain results separate from cause (i.e. intention to perform).

1.5.2 How?

Cho and Trent propose a useful three stage test, pre-, during and post- performance.[154]

The first stage they call textual rehearsal. Most directly related to theatrical performance, this is the translation of the lived experience of the scholar to presentation to fellow academics, the experience acting as “rehearsal”. In the current project, this could be seen in the practice of the lawyer dealing with “home team” lawyers and clients, before presentation to or engagement with the opposition.

The second stage is the actual performance. This is communication of substance to an audience. It is the “embodied transition from texts…to actual performance” and assessment of quality should "take into account two interdependent critical considerations: a degree of improvisation and a degree of artistic or aesthetic quality".[155] In moving away from ritual – the “text” of a transaction in these terms, found literally in the precedent documentation that provides the base of the

[151] ibid 1014.
[152] Denzin (n 78).
[153] Cho and Trent (n 150).
[154] ibid.
[155] ibid 1016; see also Nigel Denzin, ‘Performance texts’ in William Tierney and Yvonna Lincoln (eds), *Representation and the Text: Re-framing and the Narrative Voice* (University of New York Press 1997).

negotiation – assessments about performance can be made using judgement on improvisation and artistic quality. In the context of this thesis, the analogy is that these qualities (improvisation and artistry) are found in the extent to which lawyers fall back on their general experience of their area of specialism, using that experience to demonstrate an ability to problem-solve in the face of novel (or, at least, unexpected or unusual) points. Note, however, that this requires from the researcher an understanding of the ritual in order to assess the quality of the 'improvisation'. This is discussed further in Chapter 3.

It is easy to anticipate the criticism that asking lawyers to comment on the actions and performance of other lawyers will be ultimately futile – they will be unable to objectively recognise performance because they are too close to the lawyer and/or the matter involved. Yet this is not a fatal flaw. Both the internal ratification of professional life and the need for lawyers to be able to recognise ethical lapses in their colleagues, show that the ability of lawyers to assess other lawyers and their ethical standards is regularly honed, as a cornerstone of the profession.[156] It has also been argued that the essence of expert performance is found in the ability to understand the concerns of the community of fellow professionals – having a social fluency in the language of that community, accepted as "right" by a group.[157] 'Community' in this sense is the sphere within which the professional is expert. For example, the ability of lawyers to understand the discourse of law's various subfields without being trained in that field suggests expertise.[158]

The final stage of assessment is post performance, whereby the researcher interacts with the audience to understand the effect of the performance both on the audience and on the performer in a reflexive encounter. In this project, this would take the form of a series of interviews with participants after the effect, focusing on areas of interest that have been generated from the file where it is argued that the ritual has broken down. Such a site of breakdown would be analogous to that moment for Schechner that separates art from religion – where the "creative and/or subversive function of ritual…spills over its usually well-defined boundaries".[159]

[156] Richard Painter, 'Ethics and Government Lawyering in Current Times' [2019] 47 Hofstra Law Review 965.
[157] Harry Collins and Robert Evans, *Rethinking Expertise* (University of Chicago Press 2009).
[158] ibid.
[159] Schechner (n 34) 258.

Performance, then, can be assessed in a three-stage process which, at each stage, considers in narrative form the positioning of those participating in the research. Note that this framework informs the methodology set out in Chapter 3; the test is not adopted directly.

1.6 Research questions

It follows from the argument set out above that my proposed sites of research are as follows:

1. To explore a model M&A transaction in ritual terms – or, put another way, to what extent are there ritualistic elements of the M&A transaction in practice?
2. In analysing a real-world transaction, in contrast to that model, do sites of rupture appear – areas where that ritual breaks down?
3. In those areas of rupture, can the performance of individual lawyers be discerned, informed by the three-step method of analysis described by Cho and Trent using narratives (in a non-technical sense) provided by lawyers and clients involved in the research?[160]
4. If so, what do such narratives indicate about the role of performance in M&A transactions?
5. How far is it possible to extrapolate such indications to the wider practice of law?

[160] n 150.

Chapter 2: A Typical Share Purchase Transaction

2.1 Introduction

In this chapter, I set out the stages of a generic share purchase transaction. By design borne of necessity, this section does not attempt to capture the unlimited variation that will inherently be part of any project which involves multiple parties and a plethora of commercial needs. What it does attempt to do is record and place in context the broad intention and outcomes of the process – in other words, to identify the ritual.

A 'transaction' in this context refers to a transfer of legal rights in real property in a corporate setting between two parties. This may be the transfer of the legal assets of a company (or other legal entity) or its shares. Sales by auction, involving multiple parties at early stages, or other parties including banks or third-party sales (e.g. to allay merger control concerns) are not addressed. It is assumed that the parties wish to sell/buy shares in a pre-existing and trading company (the 'target') as the most common form of corporate transaction.

This chapter also assumes both the buyer and the seller are corporate entities. This is just to permit consistent use of terminology – selling shareholders, in particular, may very well be one or more individuals.

2.2 Early negotiation

2.2.1 Instigation

A transaction may be instigated in a number of ways. A seller may have been approached directly by a potential buyer; a corporate finance house may be engaged in order to arrange a sale; a business might choose to exit a particular area and to sell a trading division to a trade buyer. [161] However a sale begins, discussions between representatives of the principals – the two main

[161] Respectively (and by way of example): *Triumph Controls - UK Ltd & Anor v Primus International Holding Company & Ors* [2019] EWHC 565 (TCC), [2019] All ER (D) 92; Transcend Corporate Limited: "Whether you are considering a sale, management buyout, or acquisition we have the experience to help you surmount the inevitable obstacles and barriers as they arise, and ultimately reach your objective": 'With you every step of the way' <https://transcendcorporate.com/> accessed 30 March 2025; and the Facebook-WhatsApp case study in Donald DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* (Elsevier Science & Technology 2015) 166.

parties, seller and buyer – are likely to be fairly well progressed before the involvement of lawyers.[162] Corporate finance specialists are more likely to be involved at an earlier stage in order to help prepare the business (or part of it) for sale and/or to establish an asking price having applied appropriate financial models to management figures.[163]

As with any commercial contract, the buyer and the seller will have an idea about what they want to achieve: what it is they wish to sell/buy, its value and a timetable in which to complete that transfer of rights and, potentially, obligations. They will establish the tentative boundaries of a position along with some generally accepted key points: price, scope of what is being sold/purchased, any absolute red lines.

Depending on that scope there will also be a discussion about structuring. The main options are either a share sale, where the shares in a corporate entity are transferred to a buyer,[164] or the sale of particular assets, such as plant and machinery, IP, money in the bank.[165] The former ensures that the business is transferred cleanly and completely, but as the obligations of the entity travel with it (such as any debts) there is a risk that the shares are ultimately worthless. The latter dispenses with this risk as only the assets identified in the sale agreement will transfer to a buyer, but the documentation is necessarily more complicated and there is a separate risk that an item of importance is not included in the property and rights being transferred.[166]

There are, of course, subtleties. Assets may be moved into a newly formed company (often referred to as a special purpose vehicle or 'SPV') the shares of which are then transferred, a hybrid which seeks to eliminate both of the high-level risks mentioned above.[167] As noted at the beginning of this chapter, it is assumed that the parties wish to sell/buy shares in a pre-existing and trading company as the most common form of corporate transaction.

At this stage the parties are ready to approach their respective lawyers.

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[162] *Triumph Controls* (n161).
[163] See Transcend (n 161) – "*considering* a sale".
[164] *Triumph Controls* (n 161).
[165] Vojislav Maksimovic and Gordon Phillips, 'The Market for Corporate Assets: Who Engages in Mergers and Asset Sales and Are There Efficiency Gains?' [2001] 56 *The Journal of Finance* 2019.
[166] Gregory Klamrzynski and Cari Grieb, 'Fundamentals of Middle-market Acquisition Financing' [2015] 132 The Banking Law Journal 92, 93.
[167] ibid.

2.2.2 Letter of intent

Often, although by no means always, the parties seek to confirm a common understanding of the key terms of a proposed transaction by agreeing a short document referred to interchangeably as 'a letter of intent', 'heads of terms' or 'a memorandum of understanding'. Such a document is intended to be a summary of the transaction, identifying the target company i.e. the company in which shares are to be transferred, the price to be paid, an indicative timetable and arrangements for access to company information before any documentation is signed (referred to as "due diligence" – see further below).[168]

At this stage it will be the transaction lawyers who are most likely to be approached. Transaction (or corporate) lawyers carry out M&A and will be approached either directly by a client or through another contact in the organisation in order to advise holistically on the sale and purchase. A fee will need to be agreed; an engagement letter will be sent setting out the terms of the client instruction and a provisional outline of what is expected of the deal.

The letter of intent is designed to provide a starting point for drafting (and therefore can be usefully drafted by lawyers, although occasionally it is written in lay terms where signed before the lawyers are instructed) and to represent common ground on the commercial terms provisionally agreed. It is not – and is not intended to be – legally binding, although parts of the document may be. The parties may have agreed that there will be a fixed period of exclusive negotiation and there is likely to be a confidentiality obligation (if a separate non-disclosure agreement is not already in place) both of which will be stated to be legally enforceable.[169] However, the arrangements set out in the majority of the document are moral obligations only, unable to be legally binding because of the rule against enforcing "agreements to agree".[170] It is a starting point for negotiations, no more.

This is because at this stage in the process the buyer is not in full possession of the facts. The buyer will have been given access to material from the seller, but much of this will be produced

[168] *Triumph Controls* (n 161) para. 61: "On 26 November 2012 Triumph signed a letter of intent, granting it exclusivity until 1 January 2013 to allow it to carry out due diligence and pursue acquisition of the Primus companies."
[169] ibid.
[170] *Walford and others v Miles and another* [1992] 1 All ER 453.

to encourage the sale. Once a letter of intent, confidentiality and exclusivity have been agreed, the buyer will want access to the inner workings of the business so that it can assess, for itself, whether the transaction makes sense.

In the context of ritual, one would expect the letter of intent in a standard transaction to follow a well-trodden path. Although the specifics of price and timeline may change, the mechanism, including its non-legally binding status, is generally well understood (and tested).[171] Moving away from this ritual would occur where for example a detailed restructuring of the business was to take place in advance of the sale. This would be atypical (although it regularly occurs) and the buyer might wish to address it in the letter of intent in order to agree what the restructured business would look like (and, later, to ensure this is correct via warranties in the share purchase agreement – see section 2.5). Drafting something much more detailed in the letter of intent would be a diversion from the ritual that dictates this to be a document setting out key principles, subject to contract.[172] Such a 'negotiation before negotiation' is a good example of an action that the parties consider advantageous, but simply risks confusion – the terms will not be settled until a binding agreement is finalised.

2.3 Due Diligence Process

In UK law the principle of *caveat emptor* – buyer beware – applies and so it is paramount for the buyer to have a very clear idea about the business it is buying.[173] What are its contractual obligations over the short, medium and long term? How many people does it employ and on what terms? What is its working capital position? Is there any outstanding or anticipated litigation?[174] Once a letter of intent is signed, in order for the matter to progress then the buyer will need access to this information. This needs to be handled delicately: antitrust law prevents sharing of sensitive pricing information between competitors,[175] the General Data Protection Regulation as adopted by the UK means that personal information needs to be redacted, and any savvy seller will be

[171] *Global Asset Capital, Inc and another v Aabar Block S.A.R.L. and others* [2017] EWCA Civ 37, [2017] 4 WLR 163.
[172] ibid.
[173] Adam Chaffer, 'High Court Clarifies Whether Warranties are Representation in Share Purchase Agreements' [2017] 38 Company Lawyer 290.
[174] Peter Howson, *Due Diligence: The Critical Stage in Mergers and Acquisitions* (Taylor & Francis Group 2003).
[175] 'How to Manage Competitively Sensitive Information' (25 September 2014) <https://www.gov.uk/government/publications/limiting-risk-in-relation-to-competitors-information> accessed 30 March 2025.

reticent about sharing too much too early.[176] As it is throughout the process, this means a balancing of competing interests.

Information is usually provided by way of a secure website, a password protected deal-dedicated site where management on the sell side can upload documents and the deal team on the buy side can review.[177] This has the benefit that sensitive material can be isolated and restricted. Service providers – accountants, lawyers, regulatory specialists, IT – will be instructed to review documents in their area(s) of expertise and write a due diligence report.[178] Current practice is for this to be 'exceptions only', where only oddities or problematic issues are reported.

Due diligence will run concurrently with negotiation of the commercial terms of the transaction and the documentation which will record those terms, informing both.[179] Under a traditional timetable the due diligence process will finish well in advance of the documentation – it is intended to give the buyer a thorough understanding of the business rather than enable it to understand every facet. That understanding of all material parts of the business will be confirmed in the share purchase agreement, the main document which will record the agreed terms of sale.[180]

This is a highly ritualistic process. A buyer will send an extensive list of questions (tens of pages). Advisers will have a standard form precedent, a set of questions which is varied (generally in a very limited way) from transaction to transaction that will be provided to a seller – via their lawyers – addressing every area of the business.[181] It will be agreed how the seller will respond; the usual form is by populating a data site with pertinent documents, as described above.[182] The seller will then respond to the questionnaire in as much detail as it wishes. Where details are sparse, the buyer will ask a series of follow up questions. This back and forth continues until the buyer decides it has enough information or the seller loses patience. The ritual is ingrained, but the end point is ill-defined and may be a site of performance.

[176] Information Commissioner's Office, 'Guide to the UK General Data Protection Regulation (UK GDPR)' <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/> accessed 30 March 2025. See also the Data Protection Act 2018.
[177] Howson (n 174) 24.
[178] ibid 178 (for example).
[179] ibid 71.
[180] *Triumph Controls* (n 161).
[181] Jeffrey Berkman, *Due Diligence and the Business Transaction: Getting a Deal Done* (Apress 2013).
[182] n 177.

2.4 Specialist lawyers

One aspect of a modern M&A transaction is the compartmentalisation of the legal review of the different aspects of a business.[183] In a large law firm, input will be required from various different teams who will contribute to the legal due diligence report and the share purchase agreement. For example, an employment team will consider and report on the terms of employment that are used for each category of employment contract issued by the target company and the implications of any changes that might be proposed by the incoming operator.

The role of transaction lawyers, aside from advising on the corporate aspects of a transaction, is one of project management. They will liaise with the specialist teams and clients and 'hold the pen' on the share purchase agreement. This involves significant relationship management. It will mean ensuring that deadlines are communicated (and subsequently adhered to) and, with so many people involved, that information does not fall through the gaps.

Specialists may also be involved in drafting some of the peripheral documentation. A common example, staying with employment terms and conditions, is that incoming executives often require new service agreements / employment contracts. These will form part of the "ancillary" documents that are signed along with the share purchase agreement.

Instruction of specialists is a ritualised process. Those lawyers are familiar with working on corporate transactions. They will expect an instruction – detail on the transaction, the client and what is required of them – and will respond in a standard way. What is interesting is that for the specialist lawyer much of the underlying transaction is irrelevant and as they concentrate on their particular area; the transaction lawyer may need to emphasize to the specialist that, on this occasion, standard reporting may not work because, for example, the workforce is a key asset (such as in a small consultancy, where the 'talent' is crucial). Such an interaction would be an example of moving outside of the ritual and managing that working relationship might be a meaningful site of performance.

[183] Stéphane Teasdale, 'The Importance of Legal Due Diligence in International Transactions' [2017] 49(12) Franchising World 40.

2.5 Share purchase agreement

In a share purchase arrangement the share purchase agreement ('SPA') will be the central document. It will identify the parties (as mentioned above, this may change throughout the process if a purchase vehicle is used) and the purchase price, including any adjustments to be made. It will then, in near exhaustive detail, attempt to establish the present and future relationship between the parties.

It is the buyer that traditionally prepares a first draft of the document; iterations are then shared between buyer and seller until an agreed position is reached. This is ritualised and sometimes tactical: documents will be returned at difficult times ("the 5pm drop" on a Friday evening), and every effort is likely to be made to ensure that documents are returned as quickly as possible so that the onus is always on the other side to respond. Arguably these rather cheap tricks are so embedded in the nature of "turning" documents that they would be unremarkable to those in practice. Yet this is also a site of interest – the distinction between the substance of the document (which one might characterise as the "constative" offering) and the tactical delivery, designed to put pressure on the opposing side (the "performative" offering) – as Jones and Kimbrough argue, it is the convention that signals the performance.[184] Or, as Wheelock puts it in the context of ritual "the information content of the ritual message has usually been already mastered by the participants. The "message" of the ritual is less an idea to be taught and more a reality to be repeatedly experienced."[185]

2.5.1 Structure

A typical structure of an English law governed SPA will see the document divided into clauses with schedules (appendices) picking up matters which are considered better dealt with in more detail outside of the main flow of the document.

[184] Andrew Jones and Steven Kimbrough, 'The Normative Aspect of Signalling and the Distinction Between Performative and Constative' [2008] 6 Journal of Applied Logic 218, 222.
[185] n 108 66.

Non-exhaustively this might include, in typical chronological order:[186]

- The document will usually begin with three very important elements: definitions, allowing the reader to understand and interpret the document; a clause agreeing the sale and purchase of the shares; and a formal statement of the price (known as the consideration) or how it is to be determined, and any adjustments to it. Adjustments are required because, agreed price aside, there will be movements in the underlying assets of the target company up until the point at which ownership changes hands.[187]

  The most common mechanism for dealing with this is a net assets adjustment based on a set of completion accounts. Completion accounts – usually consisting of a simple balance sheet to the point of completion of the transaction – are drawn up after the sale by the new owner (the seller having the chance to object) identifying assets and liabilities. One is set off against another, and a balancing payment against an anticipated total net assets position – i.e. to reflect what has been built into the pricing model – is made to buyer or seller as appropriate.[188]

- The middle section of the SPA deals with the business as it is at the point of completion of the transaction. Warranties will be given about all aspects of the business as at the time of signing, the site of heavy negotiation. Indemnities will be given for any identified serious issues, the site of resistance and commercial debate (particularly around conduct of and control over such claims).[189]

  Warranties are factual statements about the nature of the business (positive or negative) which the buyer can rely on to bring a contractual action for breach if they turn out not to be true, although any such action will be limited by the terms of the contract and the need

[186] Structure is described based on the author's 15 years of professional experience. References are given only for key points.
[187] Grant Thornton LLP, 'Completion mechanisms: Determining the Final Equity Value in Transactions' ICAEW Corporate Finance Faculty (2016) <https://www.icaew.com/-/media/corporate/files/technical/corporate-finance/guidelines/icaew-completion-mechanisms-v2.ashx?la=en> accessed 30 March 2025.
[188] ibid.
[189] Belinda Doshi and Sarah Thomson, 'Warranties and Indemnities in Contracts: Protecting and Exploiting IP' [2007] 2(6) Journal of Intellectual Property Law & Practice 377.

to show a diminution of value of the shares in order to claim a loss.[190] In other words, the value of the business as a whole must have been impacted sufficiently that the shares are worth less. The amount a buyer can claim for breach is also usually capped.

The value of warranties is as much informational as protective – a seller may seek to delete a warranty that states that "All company cars have been regularly maintained" on the basis that there are none; a buyer might then include a revised warranty stating that 'There are no company cars' in order to reassure itself that this is the correct position (note that this is not an attempt to recreate the wording of a warranty).

Warranties are generally given about most aspects of the target company and the business: its trading position, its employees, its pension provision, its property position, its intellectual property ownership and so on. As this is an information-seeking tool then, as above, these could be negative statements. Much of the negotiation of the SPA will revolve around the scope of the warranties and whether they are given as a bald statement of fact or whether they are qualified, most commonly to actual knowledge i.e. "So far as the Seller is aware, there are no company cars." In such a situation the people whose knowledge is in question are likely to be identified either broadly, by job description perhaps (on the buy side position), or narrowly, even by names of individuals (on the sell side).

Crucially, warranties will be qualified by the disclosure letter, discussed further below.

Another form of protection that the buyer can ask for is indemnification on a specific point. Indemnities are vehemently resisted because they are undertakings to compensate the buyer for loss on a pound for pound basis (or whatever currency is being used) relating to a specific issue – much more akin to insurance. Indemnities are used to address particular problems that have emerged during the due diligence process. A buyer might have discovered that an environmental requirement has been breached and require an

[190] Chaffer (n 173) 290-291.

indemnity (i.e. a right to be reimbursed) against any future fines.[191]

The buyer may also be asked to provide warranties. These will be very limited, addressing things such as capacity of the buying entity to enter into the completion documents. If a new entity is being created to make the purchase, a parent company guarantee may be required: a seller is likely to be concerned about the lack of financial resources of an SPV incorporated for the purpose.

- The final section of the SPA (pre-schedules) is referred to as "boilerplate" material. This consists of standardised, functional provisions which deal with operation of the contractual relationship. It will typically include a notices provision, which sets out the address and addressee to which formal communications under the contract should be sent; a clause dealing with consents if either party wish to make an announcement about the transaction (and confidentiality generally); and a governing law clause which states which jurisdiction's law is used in interpreting the contract.[192]

- The SPA will also include a tax covenant (sometimes a separate document referred to as a tax deed) whereby, broadly, the seller undertakes to be responsible for tax matters relating to the period before completion of the transaction and to provide recompense to a buyer on an indemnity basis with a quid pro quo for post-completion tax incurred.

If there is a period of time between signing the contract and its completion – in the same way that there is a gap between exchange and completion on the purchase of a house – additional clauses will appear in the SPA dealing with that gap. This might occur because there are certain procedural steps that need to take place before completion e.g. a regulatory consent needs to be received. There is a risk to both parties in having an interregnum: a buyer will want reassurance that, now it is committed to the purchase, the business will continue to be run in the same way as it has been (i.e. on the same basis on which the price was calculated) with no material decisions being made or liabilities incurred (a right to walk away may even be included in certain

[191] Doshi and Thomson (n 189).
[192] Gulati and Scott (n 145).

circumstances); a seller will want reassurance that it has the freedom to continue to run the business, even though in a caretaker role, and that there is as much certainty as possible that the deal will complete.

To deal with this risk a number of approaches are taken. The seller will usually undertake to run the business in the way it has always been run, within established parameters, and both parties will be required to meet any conditions precedent – conditions for completion of the contract – by achieving those regulatory consents (to continue the example). The buyer may also demand the opportunity to terminate the contract and not proceed to completion if certain identified events or major unidentified events with a material impact on the business occur. Finally, the seller may be asked to repeat the warranties at completion – in other words, the business is said once again to be materially in line with those statements.

Of course, this is likely to be a heavily negotiated area of the agreement; a seller will want to know that the sale is as definite as possible at the point of exchange.

2.5.2 Limitations

Where warranties are given (and in some cases indemnities and other undertakings) the seller will want to limit – or at the very least crystallise – its liability to the buyer going forward. After all, the seller is at risk of legal action seeking to recoup some or all of the proceeds of sale if it turns out that it is in breach i.e. a warranty (a formalised statement of fact) has been given that turns out to be untrue, causing loss. It will do this by seeking to cap liabilities in various ways.

There is usually a threshold for a claim to count at all (e.g. a claim with value of less than £1,000 will disappear - known as a de minimis threshold). A claim with a value above that will count (in the broadest sense), but it is usual that a buyer will still not be able to bring an action unless and until the value of that claim and others hits a second threshold – known as “the basket”. This might be, for example, £10,000. There is usually an ultimate cap – perhaps in the present example it would be £1,000,000 (a very crude ‘rule of thumb’ ratio between the thresholds being 0.1 : 1 : 100) – which is the aggregate total for which the seller is at risk. This will vary extensively between transactions: in some, the cap will be the full amount of the price paid whereas in others it will be

lower than that, depending on relative bargaining power and supply and demand considerations. It is also possible to insure against warranty claims and so a large liability may, as far as the seller is concerned, be reduced to a much lower level, say a £20,000 premium for several hundred thousand pounds of warranty cover.

Regardless of the levels of liability exposure, there are other procedural requirements that a buyer will need to comply with in order to make a claim under the SPA. All of the necessary detail will be included in the SPA itself. A buyer will need to give notice to the right person at the seller within a prescribed timeframe following discovery of the circumstances that might give rise to a claim. There will also be provision for what happens when claims are disputed, often requiring deferral to an independent lawyer to mediate.

At heart, the document seeks to balance the needs of buyer and seller. The buyer seeks to limit its risk by ensuring it has recourse against the seller, given that it has no other protection beyond that which it establishes for itself in the SPA (short of fraud). The seller wants, as closely as possible, a clean break; to take the sale price and move on. In an ideal transaction these needs would be perfectly balanced, but in reality the provisions of an SPA will favour one party over another – as any negotiation does – depending on relative bargaining power and the situation overall.

2.6 Disclosure letter

A disclosure letter is a letter provided by the seller addressed to the buyer at the point at which the warranties are given in favour of the buyer (at exchange, possibly repeated at completion). This is the seller's opportunity to qualify the warranties. For example, the warranty that 'All company cars are serviced on a monthly basis' might have a disclosure entry against it in the disclosure letter that 'Vehicle with registration number X has never been serviced because it is only a year old.'

The idea of the letter is that when read in conjunction with the suite of warranties, a sensible picture emerges. It allows the seller to give a generalised statement about the state of the business knowing that where there are exceptions to that statement they are able to be disclosed

and therefore that state of affairs cannot count as a breach of warranty going forward.

In addition to specific disclosures i.e. those made against particular warranties, a disclosure letter will also include a set of general disclosures. These are items that are deemed disclosed to the buyer by the seller by virtue of their public availability or the ability of the buyer to satisfy itself of a particular issue otherwise than through the seller or through information already provided by the seller. This might include searches of public registers, information provided in the data site and replies to enquiries from the buyer.

The extent of this general disclosure is always a site of heavy negotiation: a seller will want this to be as wide as possible; the buyer will want it narrowed and will certainly be very wary of agreeing to general disclosure of searches it has not or cannot make or bulk disclosures of information made to it. In the latter instance, in particular, there is a risk that something important will be hidden (deliberately or inadvertently) in the mass of information provided during the due diligence process.

Again, this is ritualised. The negotiation of the warranties takes place against a background of possible disclosure. The seller must commit senior, knowledgeable personnel to read the agreed (or near final) warranties and comment on where they are not accurate. That team of people must then sit with the lawyers and discuss those issues. Any major issues disclosed in such a letter, sent in draft form in tandem with iterations of the SPA, will find their way into the SPA as an indemnity or further warranties. The final letter, in and of itself, provides only minor protection for a seller and limited interest for a buyer: the real comfort is in the process of disclosure. The information finding exercise concluded, the letter should dovetail with protections in the SPA.

2.7 Ancillary documents

Supporting the SPA will be a suite of documents known as ancillary documents. These will vary from transaction to transaction, but generally include documents appointing new officers of a company (on the buy side) and resigning those leaving (on the sell side), board minutes dealing with the formalities of the sale, documents from banks discharging mortgages and other debts, new service / employment contracts for incoming management and settlement agreements for

those leaving, and transfers of intellectual property. The most important document is a stock transfer form as this is the single page document which evidences the transfer of shares from seller to buyer.[193]

These documents are typically short in form but they are important. These documents create the framework within which the central agreement set out in the SPA is acknowledged and takes effect. They tend to be in a standard (or at least very similar form from law firm to law firm) and are extremely ritualistic in that they are delegated to junior team members (as simple documents) and are often overlooked but are nevertheless crucial to the deal. There is something totemic about them.

2.8 Finalising the transaction

2.8.1 Signing

Once the SPA is agreed, the transaction can move to exchange of contracts (colloquially referred to as 'signing'). Depending on whether there are intermediate steps to be completed before the whole transaction can finish – such as a regulatory consent – the process will move on to immediate exchange of contracts and completion (i.e. it all takes place at once) or to exchange followed by completion once those intermediate steps have taken place. Such intermediate steps are referred to as conditions precedent (or CPs), being those conditions that need to be satisfied before the transaction proceeds to completion.[194]

At the point of exchange both parties are legally bound by the terms of the SPA and the only right to withdraw is as set out in that document – they have signed the agreement, it is dated and they have thereby indicated their willingness, and intention, to be bound.[195] As discussed above, this is why there are distinct rights and protections for both parties set out during the period between exchange and completion which might last anything from a couple of days to several months depending on the reason for the break. The SPA will contain a mechanism setting out when and

[193] Section 770 Companies Act 2006; section 1 Stock Transfer Act 1963.
[194] Francis Dawson, 'Essential Terms and Condition Precedent' [2017] 133 Law Quarterly Review 183.
[195] *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 3 All ER 1.

how to discern a date for completion.

If there is a split exchange and completion, signing of the SPA will take place and professional life will go on – nothing changes substantially in the business. It will be at completion that the final stages of transfer occur.

2.8.2 Completion

At completion of a transaction all documents are signed, physical items – such as the company's seal (if it has one), its registers and bank cards – are delivered to the buyer and outgoing officers resign as new ones are appointed.

Completions traditionally took place physically, with representatives of the parties, lawyers, banks (and their lawyers), corporate finance teams and any other participant coming together in a room to sign documents, shake hands and perhaps have a glass of champagne. In recent years electronic completions have become much more common. An electronic completion will take place by email exchange of scanned copies of signed documents followed by an all-parties call to establish that everyone is happy with what has been circulated and to agree that completion can take place. Originals of signed documents will be sent to the buyer's solicitor for copies to be subsequently circulated (known as a 'bible' – see below).

In light of a report by the Law Commission and the Covid-19 pandemic, the use of electronic signatures is becoming more common.[196] Lawyers have been reluctant to accept a wholly electronic signature – by way of the insertion of a digital representation of a signature or by clicking some form of acceptance, as consumers will be familiar with from credit card applications and other banking terms and conditions – preferring instead a 'wet-ink' signature on a document at some point in the process, even if that will only be shared by email. Through programmes such as DocuSign, where signatories consent to 'signing' remotely and in a set order, this is one aspect of completing a transaction that is changing rapidly.[197]

[196] Law Commission, *Electronic Execution of Documents* (3 September 2019) <https://assets.publishing.service.gov.uk/media/5f466016e90e07298ea3c838/Electronic-Execution-Report.pdf> accessed 30 March 2025.
[197] See <www.docusign.co.uk> accessed 30 March 2025.

Most importantly, at this point monies will be released to the seller; indeed, the seller's solicitor may already be in funds, held to the order of the buyer's solicitor only to be transferred once all parties agree that the transaction has completed.

2.8.3 Post-completion

Following completion, the transaction is finished. The target company shares will have been contractually transferred to the buyer and monies will have been released to the seller. However, the job of the transaction lawyer continues.

Strictly speaking, the shares will not have been transferred to the buyer unless and until the company's register of members (its list of shareholders) has been updated.[198] This will be legally determinative. Occasionally this takes place on completion, but technically it should not take place until stamp duty has been paid on those shares. This involves, rather archaically, writing to HMRC enclosing the stock transfer form and a cheque for the relevant amount. HMRC will mark the document with stamps adding up to the amount paid and will return the document. It is at that stage that the register of members can be properly updated.[199]

The buyer, now in control of the business, will normally put in place a 100-day plan, sometimes drawn up in conjunction with the transaction lawyers. This plan will address any items discovered during the due diligence process which need to be or could helpfully be changed.[200]

It will be the buyer's solicitor which will be in receipt of all of the original documents sent by the various parties. These will be copied, indexed and sent to all parties (usually on a USB stick) as a record of the transaction. This is called a 'bible' because it contains all the information about the transaction. Notifications will also be sent to various interested people, as appropriate – HMRC, customers, suppliers, regulators.

Internally, many teams of lawyers will sit down and discuss how the transaction has gone in terms of smoothness, lessons learned, and outstanding actions. This is a relatively new procedure in

[198] Section 127 Companies Act 2006.
[199] Section 17 Stamp Act 1891; section 770 Companies Act 2006.
[200] Rita Zinn, 'The First 100 Days: A Blueprint for M&A Integration Success' (22 August 2023) Pioneer Management Consulting <https://www.pioneermanagementconsulting.com/insights/the-first-100-days-a-blueprint-for-ma-integration-success> accessed 30 March 2025.

the subject firm, but it is helpful. It comes directly from current management theory, specifically the idea that high performance teams discuss in a no-fault environment how those teams can constantly learn from the way in which they work. Identifying and acting on areas for improvement creates – or is intended to create – a culture of improvement.[201]

At the end of the transaction the file is billed and closed. A client care letter may be sent, noting important deadlines in the SPA, although this is now not done as a matter of course because of the risk that reliance is placed on the letter rather than the underlying legal document and the possibility that a mistake may be made in producing the summary.

2.9 Conclusion

This high-level review supports the idea that the negotiation and agreement of a share purchase agreement is highly ritualised. The arguments for and against certain positions are well established and much comes down to bargaining power rather than innovative lawyering. Indeed, innovation may cause concern and delay given how well-established the process is. It is the ritual of the process that acts to reassure the parties and, ultimately, effect the desired transfer. To that end transactional lawyers often see themselves as working with the other side to a transaction; while a client's needs are paramount, the transaction as a whole is seen in collaborative terms – how can agreement be reached?[202] That is not to say that it is without risk, quite the opposite. So frequently do M&A transactions result in follow up litigation that there have been suggestions transactional lawyers should also specialise in disputes work.[203]

However, where unusual issues arise and the ritual breaks down so that an unpredicted or atypical position is or must be taken, there *will* be room to consider how individual lawyers deal with this non-linear moment without the benefit of the ritual. In many ways it is likely that such moments will self-identify i.e. there will be expressions from participants in the file reviewed about how unusual something is. It is there that performance will be seen.

[201] Peter Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (Random House 2006); Teresa Rebelo, Paulo Lourenço and Isabel Dimas, 'The Journey of Team Learning Since "The Fifth Discipline"' [2020] 27 The Learning Organization 42.
[202] Forrest Alogna and William Savitt, 'The Versatile M&A Lawyer: Bridging the Gap Between Courtroom and Boardroom' [2017] 72 Business Lawyer 719, 723.
[203] ibid.

Chapter 3: Methodology

3.1 Introduction and research questions

By way of reminder, M&A is the practice of buying and selling corporate entities.[204] In the context of a law firm, the term is used to refer to specialist lawyers who advise in this area on the central corporate aspects of the transaction. For this reason, M&A specialists are sometimes referred to, especially in US literature, as "transaction lawyers."[205]

3.1.1 Recap: Chapter 1 and performativity

In Chapter 1 of this dissertation, I set out the context and setting for my research, a large legal firm with adjunct professional services businesses. I outlined my professional status and experience, and described a corporate transaction in the UK, exploring it as a site of research. I described such a transaction in ritual terms, which I justified using an ethnographic perspective. That discussion demonstrated that, just as no ritual would be perfect and no transaction identical to another, some 'other' element was required to complete the process observed in the world. I proposed lawyer performance (individual or collective) as that element. In exploring the well-established links between performance and law, I used performance theory to consider why performance is well suited to fulfil that proposed role and how performance could be assessed in the professional context of the transaction lawyer.

Throughout this discussion the concept of performativity was interwoven, informing both the characterisation of a legal transaction as ritual and the hypothesis that performance fills in the gaps. Although performativity was found to be a nebulous, multi-dimensional concept, as a theoretical lens it permits an interpretation of why the M&A transaction exists, what it is trying to achieve – maintaining the fabric of society by way of a performance imbued with meaning beyond substance – *and* a justification for its treatment as ritual.[206] I argued that the concept of performativity also usefully describes the residual action where the ritual breaks down. This is on

[204] Hightower (n 22).
[205] Schwarcz (n 23).
[206] Turner (n 50).

the basis that a professional setting inextricably links participants to a set of processes which dictate their status and the options available to them – the team and the ritual – rather than providing autonomy to create individual norms.[207]

I further argued that on top of providing a descriptive mechanism, performativity contributed an analytical function. Performative behaviour where identified in complex relationships such as those of professional corporate lawyers, can be used to study the interactions of those performers.[208] The performance will be established in the indeterminacy: in observations of where particular actors are perceived by other actors – including myself, as a participant observer (developed further later in this Chapter) – to have played some unusual role.

Finally, I used the discussion of ritual, performance and performativity to generate a framework within which discussion of the data captured in accordance with this Chapter can take place.

3.1.2 Recap: Chapter 2 and an M&A Model

In Chapter 2, I set out a model of a basic M&A transaction with the intention of identifying and describing the ritual in its base terms. I acknowledged that, as with a formal model (a status I do not claim), additional variables could be added which would result in different outcomes.[209] I noted that the purpose of the model in the form created was to formulate the basic building blocks of a transaction in order that, as described in Chapter 1, I could identify where the ritual breaks down. This is where, I suggested, lawyer performance will be discovered by mapping a real-world transaction on to the model. I described how the model was informed by my professional experience but was supported by a doctrinal analysis which demonstrated its general acceptance in practice and by authority.

[207] Alifirević (n 95).
[208] Schechner (n 34).
[209] Peter Lorentzen, M Taylor Fravel and Jack Paine, 'Qualitative Investigation of Theoretical models: The Value of Process Tracing' [2017] 29 Journal of Theoretical Politics 467.

3.1.3 Research questions

As explained at the end of Chapter 1, this line of enquiry resulted in the following set of research questions. For completeness, I include a set of sub-questions which informed those main questions and which are answered in the literature or the analysis and discussion of accumulated data.

1) **Is it possible to describe a UK law governed share sale and purchase ('M&A transaction') in ritual terms?**
    a) What is meant by 'ritual' in this context?
    b) How have legal activities and processes been described in ritual terms?
    c) What does a model M&A transaction look like?
    d) Can such a transaction be described in ritual terms? Why could it be of use to do so?

This was answered in Chapter 1.

2) **In comparing a real-world M&A transaction to the model established, what are the differences i.e. where does the ritual break down?**
    a) What – in descriptive terms – bridges the gap?

This was answered in Chapter 2.

3) **Where the ritual breaks down, does the performance of individual lawyers emerge?**
    a) What does 'performance' mean?
    b) Does 'performance' bridge the gap?
    c) If arguable, how can it be assessed?
    d) Is there 'performance' / 'performativity' threaded throughout the practice of law?
    e) How is it different here?

This is the subject of Chapters 4 and 5.

4) **What are the implications for wider legal professional practice (if any)?**
    a) What are the difficulties with / how far can the conclusions of a small study be

extrapolated to wider practice?

b) What are suggestions for continuing the research against such a background?

This is the subject of Chapter 6.

3.2 Personal and Conceptual Background

3.2.1 Legal Practice and M&A

Legal practice is a strange mixture of strict market practice and the individual demands of clients. On one hand, the diktat of precedent and statute determine the way in which transactions (indeed, most legal events) proceed. On the other, as civil law jurisdictions have discovered, there is no single codex of material that will cover every issue in the real world. In the common law system, law has evolved to be flexible; it is a truism that the answer to a common law legal question (at least in practice) is likely to be 'yes, we will be able to find a way in contradistinction to what Carney has termed the completest 'yes' or 'no' of a civil jurisdiction.[210]

This malleability of the UK's common law system is of passing interest because commercially sensitive clients want their risk managed with all certainty possible. Certainty, in this sense and context, can include indeterminate outcomes – it may be that a client wishes a commercial arrangement to be deliberately opaque so that should the arrangement (not) work out as expected, there remains the possibility of debate about what was agreed, as part of a strategic positioning. That does not preclude certainty; the client will wish to understand that this position of uncertainty is, itself, reflected in the documents.[211] So, by way of example, a purchaser who has agreed some form of earn-out (a process whereby selling shareholders who remain working in a business post sale can increase their sale consideration by meeting or exceeding agreed targets), may be happy to allow sections relating to the earn-out thresholds or process to remain ambiguous, leaving open the possibility of future negotiation. The role of the advising lawyer would be to explain that position.

[210] Gerard Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' [2015] 36 Statute Law Review 46.
[211] Rebecca Hollander-Blumoff and Matthew T. Bodie, 'The Market as Negotation' [2021] 96 Notre Dame Law Review 1257.

As we have seen, no system or ritual can be perfect and these areas of 'grey' – and whether or not the outcomes are perceived to be satisfactory to actors – will come down to interactions between those participants whether within or without the ritual. Niemi-Kiesilainen et al describe this in the following terms: "people construct their own and each others' identities through their everyday encounters with other people…understanding of legal practices should not be sought (solely) in social structures but in the interactive processes that…take place between people in court rooms, police stations and various legal texts."[212] This can be extended to a corporate transaction relatively easily. The result of the analysis will not contribute to the literature on the content of the corporate law in question, but instead would be a comment on the interaction between people, between practitioners and consumers. If that is true, then in the context of power dynamics the performance element becomes crucial for the success of the transaction.

Tracing the structure of an M&A transaction – in other words the underlying ritual – is relatively simple in the abstract but of course this will not capture the subtleties of a real-world deal process. Similar work has been done by Yates and Hinchliffe on private equity deal structuring in the UK.[213] Their approach was to begin with a sketch of a simple transaction structure, to describe the main 'players', the instruments (i.e. the documents) and then to analyse what those documents are used for.[214] They then took a more complicated example and described in more detail how the simple version of the transaction could be refined. They then considered some common issues regularly faced in deal structuring – scenarios where familiar issues tended to arise.

This approach is suitable for the present project for two reasons: understanding a vanilla transaction in detail allows for the ritual to become apparent, and identifying (by way of exegesis of standard forms, layered with experience) the areas of commonly encountered conflict will help to identify possible sites where the ritual does or may break down and therefore where the performance will begin. To do this, I required access to documentation, both in the sense of

[212] Johanna Niemi-Kiesilainen, Paivi Honkatukia, Minna Ruuskanen, 'Legal Texts as Discourses' in Åsa Gunnarsson, Eva-Maria Svensson, Margaret Davies, *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Routledge 2007).
[213] Geoff Yates and Mike Hinchcliffe, *A Practical Guide to Private Equity Transactions* (Cambridge University Press 2010).
[214] ibid.

transaction paperwork and ‘texts’ in the wider sense of data from performance: observations and interviews.[215]

3.2.2 My background

As I discussed at section C.1 of this thesis, my professional background is as an M&A lawyer in large commercial firms. Despite suggestions about lawyers expanding their remit to include business advisory work and project management, the main service valued by clients remains being guided through legal complexity.[216] This, in turn, indicates that a fundamental part of transactional lawyering will be ensuring that complexity – both in law and process – is limited and, where necessary, explained and agreed – which suggests some level of performance.

Why am I particularly interested in transaction lawyering? Partly as a result of my professional status – it is where my professional experience comes from and I therefore have relatively unrestricted access to research material and participants – and partly the result of a deep interest in the way in which precedent and market practice influences the behaviour of practitioners. As described in Chapter 2, the model M&A transaction, reduced to its base parts, can be interpreted in ritual terms. This ritual is in place in order to deal with a schism in society – the need to bring together a buyer and seller of, in this case, a company. The ritual provides a conceptual bridge between owners, dictating the position before and after (and, indeed, where there is a split between exchange of contracts and completion of the transaction, in between). What happens, however, where the ritual, intended to cover all eventualities, breaks down? And break down it must. The UK's common law position means that certainty can never be achieved.

I discuss in more detail my positioning as a researcher in the following section.

[215] Hightower (n 22).
[216] ibid.

3.3 Research design

3.3.1 Research paradigm

My 'worldview'[217] in undertaking this project was one of interpretive constructivism.[218] Many labels could be – and are – given to this perspective; I use it to subscribe to a view that the law is socially constructed and its practice is inherently social: a community of shared understanding. Performativity, however examined, is similarly a communitarian project – being concerned with the process, the act of performing, rather than substance, creating a forum within which a community may practice or resisting wider community pressure – whether that is through performativity as a cross-academy interest or as a facet of legal practice.[219]

By exploring the community of legal practice from the perspective of performativity, using interdisciplinary techniques from performance studies, the intention is to "construct knowledge socially as a result of [my]… personal experiences of the real life within the natural settings investigated."[220] I was interested in the phenomena of performance in the M&A transaction, given the possibility of it taking ritual form, and I proceeded hermeneutically: rather than testing a hypothesis in a positivist sense, instead allowing the data to suggest themes and outcomes. The focus was on participants' perception of the phenomenon.[221] The exercise in interpretation was mine.

As a practising lawyer with over 15 years of experience in mergers and acquisitions work, a participant observer approach seemed a natural position to take both in practical and epistemological terms. As a participant observer it is understood that my professional viewpoint has validity, although there is an impact on the research that must be acknowledged when I come to discuss experience by way of interviewing my colleagues. They will react to me in a particular way and may decide to share information with me that they would not otherwise do. Equally, they

[217] David Morgan, 'Paradigms Lost and Pragmatism Regained: Methodological Implications of Combining Qualitative and Quantitative Methods' [2007] 1 Journal of Mixed Methods Research 48. Note that some of the references contained in this section of Chapter 3 were used in my Master of Education with The Open University. The content is completely re-written.
[218] Philip Adu, *A Step-by-Step Guide to Qualitative Data Coding* (Routledge 2019).
[219] Hunter (n 85) 3.
[220] Charles Kivunja and Ahmed Bawa, 'Understanding and Applying Research Paradigms in Educational Contexts' [2017] 6 International Journal of Higher Education 26, 33; see also Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage 2005).
[221] Adu (n 218).

may not want to engage so openly with me given that I am working in their field and in their office and they may see the research as an attempt to critically engage with their individual performance as a professional.[222]

I too, then, was a participant. While not providing data, I was and am an insider.[223] I had access to lawyers and a law firm as a practising solicitor. My access to potentially sensitive client-related files is, at the very least, made much easier because of my status as a fellow professional in the same area of practice. As a participant observer / researcher, I needed to account for my role in the research. Yet my insider status was not simply a matter to be accounted for, but a fundamental part of my research worldview: a shared understanding of the professional community I was studying meant that I was able to respond to nuances other, unfamiliar, researchers may struggle to identify or miss altogether.

As an observer, there is a need to be cautious in drawing wider conclusions.[224] Equally, the act of observing is both the task of the researcher (and the skill) and the area where the biography of the researcher will have implications for the outcomes of the research.[225] In ethnography generally, the idea of being explicit about one's biography – one's positioning – means to acknowledge those aspects of personhood that make up the whole of their identity.[226] I acknowledge that there are other facets of each researcher's background which has bearing on their approach to the research – including, for example, class and gender;[227] however, in this project, the key attribute of which I needed to be cognisant was my role as a solicitor and a colleague at the firm.

This brought with it risks, primarily from my closeness to the subject, what Christina Chavez refers to as “over-identification or over-reliance on status obscur[ing] researcher role or goal of research”

[222] Barbara Kawulich, 'Participant Observation as a Data Collection Method' [2005] 6 Forum: Qualitative Social Research 43.
[223]Barbara Probst, 'Both/and: Researcher as Participant in Qualitative Inquiry" [2016] 16 Qualitative Research Journal.
[224] Gail Zieman, ‘Participant Observation’ in Sheri Klein (ed), *Action Research Methods* (Palgrave Macmillan 2012).
[225] Wayne Fife, ‘Participant-Observation as a Research Method’ in Wayne Fife (ed), *Doing Fieldwork* (Palgrave Macmillan 2005).
[226] Hanin Bukamal, ‘Deconstructing Insider–Outsider Researcher Positionality’ [2022] 49 British Journal of Special Education 327.
[227] ibid. 328.

leading to “selective reporting.”[228] For example, although I take a constructivist approach, my view of M&A as a ritualised process emerged from my practice, it preceded the research and, if asked in the interviews, I was open about this viewpoint. This carried a double risk: that I would lose my objectivity in asking questions and actively listening to answers (hearing what I expected to hear and/or a risk that I was ‘leading the witness’) and, separately but linked, that a “stigma” would attach to the research in respect of the wider academic community, given the insider positionality.[229]

Yet, the insider status, one description of which is a shared set of attributes with the community that is at the centre of the study, has specific benefits in a constructivist endeavour.[230] In this project, a large number of the “assets” of insider-ship identified by Chavez applied: “a nuanced perspective for observation [and] interpretation; an equalized relationship between researcher and participants; expediency of rapport building; immediate legitimacy in the field...; expediency of access...; insight into the linguistic...principles of participants; and...identification of unusual and unfamiliar occurrences”.[231] It would not have been possible to gain the deep access to the legal file and its participants without being a colleague; I would not have received the frank responses I did without being an equal, leading to easy rapport through shared language. I would not have been in a position to identify unusual aspects where, in my terms, the ritual broke down, without the shared frame of reference. As a colleague, I had “credibility”.[232]

I subscribe to the view, set out persuasively by Sonya Corbin Dwyer and Jennifer Buckle that “the core ingredient is not [the fact of an] insider or outsider status but an ability to be open, authentic, honest, deeply interested in the experience of one’s research participants, and committed to accurately and adequately representing their experience.”[233] I do not subscribe to the view that it is necessary to be impartial and not to share my thoughts and experiences with the interviewees

[228] Christina Chavez, 'Conceptualizing from the Inside: Advantages, Complications, and Demands on Insider Positionality' [2008] 13 The Qualitative Report 474, 479.
[229] Sonya Corbin Dwyer and Jennifer Buckle, ‘The Space Between: On Being an Insider-Outsider in Qualitative Research’ [2009] 8 International Journal of Qualitative Methods 54, 58.
[230] Bukamal (n 226); Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (Sage 2013).
[231] n 228 479.
[232] Danielle Berkovic Darshini Ayton, Andrew Briggs, and Ilana Ackerman, ‘The View From the Inside: Positionality and Insider Research’ [2020] 19 International Journal of Qualitative Methods 1, 1.
[233] n 229 59.

or in the research.[234] The outcomes are, as I discuss below in the context of the choice to use thematic analysis, informed by exactly those thoughts and experiences.

To return to the theme of performance which drives this thesis, "[t]he methods of acting and preparation for an actor...serve as an analogy for how a researcher prepares...[T]he preparation includes a recognition of remaining in a liminal space somewhere between the self and the researcher…[where] the meaning is shaped by the interaction."[235] This can be extended to the interaction between interviewer and interviewee, where some level of mutual understanding inspires – both ideas and "knowledge construction."[236] In reflecting on how I approached the interviews – recognising explicitly that I was part of the community (both of lawyers generally and of those in the firm specifically), inviting open and honest discussion on a project where responses would not be shared more widely within the firm, and deliberately engaging in conversation rather than simply posing questions – I consider the results of the interviews to be representative of the subjective understanding of the participants.[237] This aligns with my interpretivist constructionist worldview.

This position is brought together in the influential summary provided by Kivunja and Bawa (emphasis and numbering added), which informed the practical research design –

> "*The assumption of a **[1] subjectivist epistemology** means that the researcher makes meaning of their data through their own thinking and cognitive processing of data informed by their **[1] interactions with participants**. There is the understanding that the researcher will construct knowledge socially as a result of his or her personal experiences of the real life within the natural settings investigated…There is the assumption that the researcher and their subjects are engaged in interactive processes in which they intermingle, dialogue, question, listen, read, write and record research data. The assumption of a **[2] relativist ontology** means that you believe that the situation studied has multiple realities, and that those realities can be explored and meaning made of them or reconstructed through human **[2] interactions between the researcher and the subjects** of the research, and among the research participants...In assuming a **[3] naturalist methodology** the researcher utilises data gathered through **interviews, discourses…and reflective sessions**, with the researcher acting as a participant observer. A **[4] balanced axiology** assumes that the outcome of the research will reflect the values of the researcher, trying to present a **[4] balanced report** of the findings.*"[238]

[234] Berkovic et al. (n 232).
[235] Christopher Collins and Carrie Stockton, 'The Theater of Qualitative Research: The Role of the Researcher/Actor' [2022] 21 International Journal of Qualitative Methods 1, 4.
[236] Noémi Rongits, 'Researcher-Participant Relationship: Strategic Dances in Research Encounters' [2024] 7 Human Arenas 576, 592.
[237] Muhammad Naeem, Wilson Ozuem, Kerry Howell, and Silvia Ranfagni, 'A Step-by-Step Process of Thematic Analysis to Develop a Conceptual Model in Qualitative Research' [2023] 22 International Journal of Qualitative Methods 1, 2.
[238] Kivunja and Bawa (n 220).

I subsequently structured my method using that framework –

- finding meaning through interactions with participants (via interviews);
- being conscious of multiple perspectives or 'realities' (via a research journal);
- data gathered through interviews, discourses…and reflective sessions (each of the above); and
- providing to the best of my ability a balanced report of findings (Chapter 6).

3.3.2 High-level Method

Access to my subjects and areas of study was facilitated as I work at the firm where I carried out the research. My research questions are based on assessment of the outcomes of practice requiring, first, a description of what is perceived to have occurred. The natural way to explore such phenomenon is to take a qualitative approach: reviewing the available documents, speaking to actors and, as a participant observer / researcher, reflect on my own involvement.[239] I subscribe to the view that the purpose of qualitative research is not (necessarily) "to uncover…generalities in the social world but rather to understand how social actors make sense of their everyday reality… [in] … narrative accounts of context–bound practices,"[240] something that fits well with the lens of performativity.

I had access to the communications between lawyers and clients on any matter relating to the transaction, all of which are saved to a central email file along with accompanying documentation. I also had access to the lawyers who were involved in the transaction and the opportunity to sit down with them and ask them questions. Against that background, I created a primary dataset generated from: (i) a review of the chosen files, (ii) interviews with legal participants and (iii) my own reflections on the process.[241] This triangulation allowed me to compile a dataset which looked at the issue from several sides.

[239] David Deggs and Frank Hernandez, 'Enhancing the Value of Qualitative Field Notes Through Purposeful Reflection' [2018] 23 The Qualitative Report 2552.
[240] Butler et al (n 92) 434.
[241] ibid.

I note that any discussion of 'triangulation' should be made advisedly. It is now well-established that confusion may arise about the nature of such a process – is the comparison using different methods to look at the same problem (to support findings) or is the comparison in fact within a method, such that a viewpoint changes (to create a holistic view)? Both have their drawbacks, but I take the view that this approach is in line with my interpretivist constructivist paradigm, and that any such distinction collapses in favour of the benefits of investigating the phenomenon from different angles and perspectives.[242]

The reflexive element was an important pillar of the research, allowing regular reconsideration and recasting of the research focus and emerging connections. Using a purposeful question approach, as proposed by Deggs and Hernandez, permitted the capture of key perspectives which informed analysis of the dataset.[243] This involved setting, recording and answering questions about all areas of the research in order to rationalise and distil the dynamics of the setting, cultures, subjects and my status as an observer. This allowed me to chart these factors as they changed in relation to one another. For example, considering my role as a member of the group, required both to enter the research space and to engage with and make sense of participants/responses.[244]

Single case study

I decided to adopt a single-case study method, chosen without knowledge of its intricacies, with a view to testing my ideas on a ‘standard’ transaction, in the sense of not being chosen because of unusual features.

Pinar Ozcan et al, in their review of 38 single case studies published in management theory journals, concluded that there were three main reasons for (advantages of) their use: “(1) the case is an unusual phenomenon, (2) the case has not been accessible to researchers before, or (3)

[242] Graham McFee, 'Triangulation in Research: Two Confusions' [1992] 34 Educational Research 215.
[243] n 239.
[244] Deggs and Hernandez (n 239), 2556-2557 (edited extract).

the case can be observed longitudinally."[245] My aim, to study the performance of lawyers, leant itself to all three limbs, with some amendment. The choice to focus on a single matter permitted a longitudinal study (in terms of reviewing interactions along the legal hierarchy and between legal specialist teams). As we saw above, the profession is difficult to study, both in terms of access and finding comparable sites of study.[246] A single case study permitted granular focus on what individual lawyers considered they were doing in that project, and therefore how – and if – performance played a role. It could, perhaps, be positioned as a pilot for a deeper study of the interactions between lawyers on different sides and their respective clients, with a single case study an appropriate place to start because a focal point of the lawyers' efforts is required in order to analyse approach. (I return to this idea of an 'exploratory' approach below.)[247]

While I deliberately chose a 'standard' file i.e. I did not select a file based on its content or for any particular attributes beyond size and access, this was on the hypothesis that there would *always* be unusual phenomenon in the breakdown of the ritual. This did, in fact, emerge in the file chosen. This is an inversion of the clinical case which, by its known exception, tends to reveal something useful about the run-of-the-mill i.e. there is the possibility of wider implications.[248] In picking a general file (albeit a large and important one, to the firm), I was looking for the unusual moment in order to develop some exploratory thoughts about how lawyers interact, considering in close detail the mechanics of those interactions. This supported a modified "case history" approach, whereby a single case is reviewed from different angles – "triangulated" – and described in depth.[249]

Despite speaking to individuals about their involvement in the project, I regarded the approach to be "holistic" rather than an "embedded" single case.[250] An embedded case, made up of many subsets that make up the whole, provides some defence against assertions that the single case

[245] Pinar Ozcan, Suho Han, Melissa E. Graebner, 'Single Cases: The What, Why, and How' in Raza Mir and Sanjay Jain (eds), *The Routledge Companion to Qualitative Research in Organization Studies* (Palgrave Macmillan 2017), pre-edit version: <http://www.pinarozcan.com/wp-content/uploads/2018/07/Ozcan-et-al-Single-Case-Chapter-2017-Pre-edit.pdf> accessed 30 March 2025, 3.
[246] See 'Introduction – B' and n 6-7.
[247] Arya Priya, 'Case Study Methodology of Qualitative Research: Key Attributes and Navigating the Conundrums in Its Application' [2021] 70 Sociological Bulletin 94.
[248] Robert Yin, Case Study Research and Applications: Design and Methods (Sage 2018) 50.
[249] Ozcan et al (n 245) 10 and 16.
[250] Yin (n 248).

study is an outlier because it permits a replicable, comparative element to the research.[251] Research looking at multiple individuals can take this approach.[252] However, my site of study – the "unit of analysis" – is the transaction as a whole, viewed through the lens of ritual, with individual contributions (re)constructing the interactions around points of rupture.[253] This is an interpretive activity based around the complete transaction.

There are compromises to be made with such an approach. A common criticism is that it is not possible to extrapolate more widely from a single case study, undermining its utility.[254] As such, it is not an appropriate base from which to generate theory.[255] What such criticisms mask is the ability of the case study – and the single case study in particular – to generate and test ideas. Such an approach is said to be most effective in the mid-ground between a working hypothesis and a systematic theory.[256] My approach was therefore one of exploration, the purpose of which was "to study a phenomenon with the intention of 'exploring' or identifying fresh research questions which can be used in subsequent research..."[257]

Semi-structured interviews

I used semi-structured interviews with the lawyers involved. In line with my epistemological positioning, this permitted open-ended questioning and engagement with room for the participants to reach their own conclusions as they were invited to speak broadly about the transaction (a role for which semi-structured interviews are "superbly suited").[258] Such an approach is also held to be particularly valuable where the researcher is looking for independent thoughts from the interviewee and the opportunity to follow up.[259] This was important to my research design as (i) I wanted to create rapport with the interviewees to understand their subjective but truly held observations of how the interactions between lawyers had taken place, which involved the to-and-

[251] ibid.
[252] Ozcan et al (n 245)
[253] Priya (n 247) 96; David De Vaus, *Research Design in Social Research* (Sage 2001) 220.
[254] Yin (n 248).
[255] Priya (n 247).
[256] ibid 103 (quoting Robert Merton, *On Theoretical Sociology* (Free Press 1967)).
[257] ibid 96.
[258] William Adams, 'Conducting Semi-Structured Interviews' in Kathryn Newcomer, Harry Hatry and Joseph Wholey (eds), *Handbook of Practical Program Evaluation* (Jossey-Bass 2015) 493.
[259] ibid. 494.

fro of unscripted conversation; and (ii) I anticipated needing to probe for matters outside of the 'ordinary' (and subsequently found I needed to do so).[260] A list of initial questions was used as a departure point for the interviews (see Appendix 3: Interview schedule and initial questions).

Thematic analysis

Finally, I conducted a reflexive thematic content analysis of the emails and documents involved and produced during the project.[261] I did this in two ways – a traditional review and analysis of the document file and an AI-informed triangulation of the interview responses to support my reading of the themes, discussed further below.

Again, in line with my epistemological position, a thematic analysis approach was appropriate. It involves interpretation – in the constructivist sense I have adopted – by the researcher both in identification of the substance of a dataset (what an interviewee meant in a statement, for example, for coding purposes) and establishing the content generated (the themes).[262] The benefit of a thematic approach is that it is "able to capture...diverse...interpretations" of a phenomenon i.e. from multiple perspectives; in this case, the approach taken to, and experience of, an M&A transaction.[263].

Virginia Braun and Victoria Clarke, leaders in the field, point out that thematic analysis is a flexible[264] method not a methodology in and of itself.[265] As such, it is "suited [to use with] both experiential and critical" (including constructionist) data and meanings.[266] The approach to coding is deliberately "organic" developing openly from the researcher's response to the data.[267] They argue, and I agree, that attempts to "demonstrat[e] coding reliability and the avoidance of 'bias' is illogical, incoherent and ultimately meaningless in a qualitative paradigm and in reflexive TA,

[260] Anne Galleta, *Mastering the Semi-Structured Interview and Beyond* (New York University Press 2013).
[261] Virginia Braun and Victoria Clarke, 'One Size Fits All? What Counts as Quality Practice in (Reflexive) Thematic Analysis?' [2021] 18 Qualitative Research in Psychology 328.
[262] Naeem et al (n 237) 2.
[263] Benjamin Sovacool, Marfuga Iskandarova, and Jeremy Hall, 'Industrializing Theories: A Thematic Analysis of Conceptual Frameworks and Typologies for Industrial Sociotechnical Change in a Low-carbon Future' [2023] 97 Energy Research & Social Science Review 1, 4.
[264] See also on 'flexibility' Mostafa Javadi1, Koroush Zarea, 'Understanding Thematic Analysis and its Pitfalls' [2016] 1 Journal of Client Care 34.
[265] n 261.
[266] ibid 331.
[267] ibid.

because meaning and knowledge are understood as situated and contextual, and researcher subjectivity is conceptualised as a resource for knowledge production."[268] Themes – as I use the term in this thesis – are identified using this approach, where the aim is to distil and understand shared understanding of aspects of the M&A transaction, particularly the interaction between lawyers.[269]

Three-pronged approach

This resulted in a three-pronged approach to fieldwork –

1. Review of the file, comparing against the model M&A transaction;
2. Conducting of post-transaction interviews relating to the perceptions of participants in the process; and
3. Thematic coding of the resulting data.

3.4 Data collection methods

3.4.1 Identification of files

UK lawyers in practice will record all information relating to a project (or 'matter') on a single (almost certainly electronic) file in line with their professional duties owed to the Solicitors' Regulation Authority and its basic principles.[270] In the subject firm, as with most, this takes the form of an electronic file held on its maintained servers into which all emails and documents that relate to that client and that matter i.e. the subject of the transaction are filed. Subject to strict regulatory requirements around confidentiality – such as the requirement to limit access to inside information where held – these files are accessible to anyone within the firm.

In the context of private mergers and acquisitions transactions, it is very unlikely that access to the file will be limited, the concept of inside information being one which applies to publicly listed

[268] ibid 333-334.
[269] ibid 341.
[270] <https://www.sra.org.uk/solicitors/standards-regulations/principles/>.

entities. It is possible that for reasons of conflicts (or potential conflicts) of interest an internal barrier is placed around the file which means that only those with centrally approved access (which should only be those working on the matter) are permitted to view the material, but again in the context of a private mergers and acquisitions this is unlikely to be the case because the firm would generally only be acting for one actor, or where more than one, linked parties.

The corporate team consisted of approximately 100 lawyers nationally and 20 support staff. Locally, the team numbered between 20 and 25 over the research period. After seeking and receiving internal approval (see 'Ethical considerations' for further discussion), I held an initial briefing with the key members of my local team in December 2020 on a regular bi-weekly team call. At that meeting, having pre-approved the action with the head of the team, I gave a brief explanation of the research by reference to an infographic created for the purpose (see Appendix 2: Infographic used for internal purposes). The infographic and an informed consent letter was subsequently shared with the whole team, emphasis being placed on the purpose of the research being to look at performance in a general sense; I did not want people to confuse my approach with that of some form of appraisal or review.

The national corporate law team maintains a list of all completed transactions for promotional documents, experience tracking and similar. This spreadsheet, again, open access, was used as the basis for selecting a file to review. In order to ensure that the research had the best chance of eliciting useful input from team members, who rotate and would very quickly be going on to work on another matter, the most recent matter was identified that was over £25 million in value. This amount was chosen to elicit the best chance of displaying the ritual, ruptures occurring, and specialist lawyers being used (although there is no necessary connection between transaction value and complexity, £25 million was significant enough that the firm would dedicate cross-team resources and would, separately, be likely to raise issues of some complexity). I then arranged interviews with the lawyers on the transaction. Once the file had been chosen and the interviews arranged, a review of the file was undertaken. This included review of all emails saved to the file and all documents linked to it.

I then had two options: I could review the file in advance of the participant interview or carry out the interviews blind, not knowing whether there was anything of interest to my project in the relevant file. The latter initially appeared to resist most convincingly the risk of undermining results by leading the participant, however open the questions posed. I decided against that approach because corporate lawyers are both hugely busy and very quickly move on to the next transaction in their day-to-day role. The period for retaining detailed information about how a transaction took place is, based on experience, short and the similarity of the types of issues that arise (inherently, given each transaction is based around the ritual established in Chapters 1 and 2) means it can be hard to recall specifics.

On that basis, I decided to proceed with the review of the file in advance of conducting interviews. This had the twin advantages of allowing me to understand the background and the context of what my interviewees were saying and to prompt them where there were incidents I wanted them to consider that had not emerged organically (and in those circumstances, the questioning received a separate coding treatment and that is reflected in the analysis and discussion).

Given access to each file was open to employees, I could review it at any point. I decided to dedicate an hour each day to go through the file, recording and copying relevant emails and any documents they referred to into a separate file. I then removed all identifying material from documents, copying the substance and an identifying marker into an Excel spreadsheet. All files remained held on the firm's system. At this stage I was not carrying out a formal analysis, but in carrying out the initial data sweep I was making choices about what may be relevant. It may be that a different researcher would have decided that a document should have been included rather than excluded from the project. This initial sift of information was not to capture, necessarily, every possibility of the breakdown of the ritual, but rather to identify indicators of that breakdown as a site of further investigation. This meant that I could work quickly through emails and documents identifying those expressions, indicators or markers (or analogous wording) – compared against my research journal – to create a sample that was taken forward.

3.4.2 Semi-structured interviews

Having a sense of what the transaction was about and having provisionally identified sites where I thought the ritual had broken down, I prepared for semi-structured interviews with the team members involved. These were arranged by email. Each interview was scheduled for an hour, generally lasting 45 minutes (with some variation either way).

Semi-structured interviews are traditionally used in qualitative research as a compromise between eliciting information from an interviewee and providing sufficient space for content to emerge.[271] Such a structure can take various forms, but generally uses open questions prompting answers that are formed by the interviewee rather than the researcher, who can follow up as necessary. I wanted to understand the participant's direct experience of the breakdown of the ritual and the possible impact of performance, if any. An interrupted participant observation technique would allow me to engage with the interviewee, developing the interview into a conversation but, as the need arose, reverting to a listener, reporting on the narrative responses to the open questions of the interview.[272] My questions were open: 'What do you recall about the transaction?', 'How did you feel about the experience?', 'Was there anything / any moment that stood out to you?', 'Tell me about the interaction between the lawyers?'. On a couple of occasions I had to draw out particular incidents as further discussed in the coding section.

Interviews give people the opportunity to tell stories about their lives.[273] Arguably, the interview is both performance and assessment and therefore an element of both the object and outcome of this project. More mundanely, Clark et al provide a useful exemplar of this approach in the context of attitudes to continuing professional development and nursing practice.[274] Clark's team conducted semi-structured interviews with both senior managers and university representatives. The interviews were coded and a template analysis approach was taken, with a number of themes identified. Template analysis when carried out systematically involves careful reading of the underlying data for themes with, depending on the amount of the data, other sub-tiers of that

[271] Uwe Flick, *An Introduction to Qualitative Research* (SAGE Publishing 2009).
[272] Jeff Gold, Richard Thorpe, Jean Woodall and Eugene Sadler-Smith, 'Continuing Professional Development in the Legal Profession: A Practice-based Learning Perspective' [2013] 38 Management Learning 235.
[273] Norman Denzin, 'Reading and Writing Performance' [2003] 3 Qualitative Research 243, 245.
[274] Elizabeth Clark, Jan Draper and Jill Rogers, 'Illuminating the Process: Enhancing the Impact of Continuing Professional Education on Practice' [2014] 35 Nurse Education Today 388.

overarching theme.[275] A definition identified each theme.[276] This approach, dealt with in more detail below, seemed to be a natural fit for my project, informing both discussion of performance and discourse.

The interviews took place in quick succession, depending on participant availability, but were deliberately scheduled so that the responses of each person could be used to inform the interview of the next, a variation of a snowballing technique where the 'snowball' is a new area of discussion as opposed to a new contact.[277]

Arranging the interviews was a relatively easy process given my role in the firm. It required co-ordination of diaries and some flexibility in terms of re-arranging at short notice when other commitments arose. Eighteen interviews eventually took place, of twenty planned, over a six-month period in mid-late 2021. A list of interviewees by role is provided at Appendix 4: Participants.

Most of the interviews took place by video call. In the second quarter of 2021 the UK was still emerging from the Covid-19 pandemic, which made in-person interviews difficult. This approach also allowed much greater flexibility to conduct interviews at times convenient to interviewees, where a face-to-face meeting could have been more complicated to arrange, especially given the circumstances even as restrictions imposed by the pandemic began to lift. Interviews were recorded and transcribed. There is a possibility that such an approach may have resulted in reduced communication as interviewees, perhaps, felt more exposed and the fact of the interview's recording was more evident. This was more than offset by the benefit of the easier access to participants both in terms of scheduling and creating a ready forum for follow-up questions.

Each interview began with confirmation that the interviewee had read, was prepared to sign and

[275] Catherine Cassell, 'Template Analysis' in Richard Thorpe, Robin Holt (eds), *The SAGE Dictionary of Qualitative Management Research* (Sage 2008).
[276] Ansie Minnar, 'Challenges for Successful Planning of Open and Distance Learning (ODL): A Template Analysis' [2013] 14 International Review of Research in Open & Distance Learning 81.
[277] Alistair Geddes, Charlie Parker and Sam Scott, 'When the Snowball Fails to Roll and the Use of 'Horizontal' Networking in Qualitative Social Research' [2018] 21 International Journal of Social Research Methodology 347.

signed the consent form prepared. I was at pains to make clear that what I was interested in was the interaction of lawyers and 'performance' in that sense – although I made every effort to use the word performance in a very limited way so as not to direct the interviewees too much – rather than any one individual's talent in legal practice. Following conclusion of each interview, I thanked the interviewee and noted that they were welcome to a transcript of the interview if they wanted one, although in line with the consent form these would not be provided as a matter of course. However, in the end I decided it was appropriate to share the transcript with each participant. I received no feedback. Using transcription software via MS Teams I then produced a rough draft of the interview before going through it on a line-by-line basis, correcting against the recording until I had a final transcript.

3.4.3 Data collected

Following the conclusion of the data collection programme, three streams of data existed. The data taken from the file review (stream 1), which consisted of emails identified as pertinent, ready for coding (see 'Data Analysis'). An email's relevance was identified by comparing to the model set out in Chapter 2 and against entries created for the purpose in my research journal, which described in outline the type of expression and commentary that would seem to identify a breakdown in the ritual and provided overall commentary on the file (stream 2). For example, statements such as: 'This isn't market practice', 'I haven't seen this before' and similar. Participants in the transaction were then interviewed (stream 3) and their responses compared to streams 1 and 2.

This approach is unashamedly heuristic. Choosing a single file is comparable (if not analogous) to a case study, with its perceived limitations. Although such limited projects can be treated with suspicion in respect of their potential for generalisation throughout the social sciences, I agree with Thomas' cogent argument that the limitation in scope militates against the risks inherent in other forms of qualitative research of being tempted to draw conclusions beyond the scope of the data.[278] In adopting this approach, I am not seeking to create an overarching theory (by induction) but instead "develop[ing]…an explanatory or theoretical idea… from close examination of

[278] Gary Thomas, 'Doing Case Study: Abduction not Induction, Phronesis not Theory' [2010] 16 Qualitative Inquiry 575.

particular cases" (abduction).[279] Generating hypotheses in this way is not only justifiable, but crucial for the academy, the "sine qua non of good social scientific enquiry…[which]… should…make assumptions about people thinking, having beliefs and motives, making choices."[280] This is a work of discovery which, while not leading to a generalised theory, provides a deep empirical review of relationships between M&A practitioners.[281]

3.4.4 Data analysis

Once I had compiled the data, I carried out a thematic content analysis.[282] To do so, I adopted Braun and Clarke's reflexive model.[283] This involved familiarisation with the data (reading and re-reading), coming up with initial codes, searching for themes, reviewing and defining themes and writing up. I carried this out for the data produced from the file review. I then carried those themes over to see if they were reflected in / supported by the interview data. I did this in two ways. Atlas TI, the software I used for coding purposes,[284] had introduced an AI review function. Running this established a number of codes. Many of these could be discounted as they reflected, for example, a single statement rather than a usable code or an overall theme. Usable codes were compiled into themes which were used to 'triangulate' – support – the analysis. To test this further, I uploaded the interview transcripts into Microsoft Copilot – AI software similar to Chat GPT but with additional security – to see if similar themes emerged. They did. Note that for ethical purposes, Copilot is available to me through my work and is deliberately configured to be safe for use of client data, it does not leave the system (I note also that the University makes Copilot available to its researchers).

The intention was to establish how participants in practice perceive breaches in the ritual and whether that demonstrates a link to performance and how. I therefore attended to how (whether) the ritual breakdown and any consequences were described, looking for references to types and

[279] ibid 577.
[280] ibid 579.
[281] ibid.
[282] Cassell (n 275).
[283] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' [2006] 3 Qualitative Research in Psychology 77 (see also n 261); Moira Maguire and Brid Delahunt, 'Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars' [2017] 3 AISHE-J 3351.
[284] Ceryn Evans and Jamie Lewis, 'Analysing Semi-Structured Interviews Using Thematic Analysis: Exploring Voluntary Civic Participation Among Adults' [2018] Sage Research Methods Datasets, <https://methods.sagepub.com/dataset/interviews-thematic-civic-participation> accessed 30 March 2025.

aspects of performance and performativity. As part of this process, and at the instigation of my supervisors, I compiled a 'methodology on a page' bringing the practical and theoretical elements together. This is provided at Appendix 1: Methodology table.

I then aggregated the results and reviewed in the light of the theoretical position described in Chapter 1.

3.5 Limitations to the study

The same elements that make this a successful project from a practical perspective – my access as an insider, my status as a fellow professional, the willingness and ability of participants to speak to me in common terms, and the single case study approach – implies limited use on a generalised or extrapolated basis. A larger scale review with more data and the perspectives of different researchers would be necessary to demonstrate in the positivist sense that the idea of performance can be transposed into all M&A transactions and even in all lawyer interactions.

However, my project is intended to be exploratory and to demonstrate on a small scale the use of ritual terminology is meaningful, the ritual identified breaks down, and in that liminal space something else must feature. My suggestion is that it is performance and this should provide a basis for further research.

3.6 Ethical considerations

Before any external work (i.e. with participants) took place, ethical approval from the University was received. In line with that approval, I developed an informed consent document that set out the background to the project, giving each participant an understanding of what the project involved. It also addressed risks in the following terms: "The risks of this study are minimal. These risks are similar to those you experience when disclosing work-related information to others. You may decline to answer any or all questions and you may terminate your involvement at any time if you choose." It emphasised confidentiality. Interviews clearly cannot be anonymous and there is a risk that any criticism of the firm, its methods or strategy may either be avoided or if such an

opinion is given and confidentiality is breached this could result in difficult conversations with seniors and the interviewee. Alternatively, the interviewee may decide, post-interview, they have been 'too honest' and that regret may have impact on their well-being. Both elements were dealt with in the informed consent document which guaranteed confidentiality – and the reporting of any findings anonymously – and noted that the interviewee could withdraw their participation at any time before submission. In addition, no comments were attributed to an individual by name. All interview data was anonymised for storage – names and identifying features were removed from transcripts.

Although there is no risk of harm here, it remained appropriate to tell interviewees that the underlying material would only be used for the purposes of the assignment and will not be used in a professional context as descriptions of job satisfaction (or not) are foreseeably sensitive.

In addition to formal approval for the research from the University, approval was sought from the head of division and head of team at my law firm.

A final return to insider and outsider status. It is acknowledged that "…the world of decision-making and its administration in large organisations is difficult for the outsider to penetrate…because people are not able to describe how they decide what to do." [285] I am interested in the self-reflexivity of participants. In other words I am interested in how people *think* they make a decision to communicate as much as in how they actually do it; the assessment of their own performance will come from the commentary of their colleagues and clients.

This applied to my own approach to the research. Toombs notes that "…we can only start to value our objectivity in social research after we recognise that much of the research conducted in Western liberal democracies – particularly research that relies upon the consent or support of government bureaucracies – is highly partisan in the first place."[286] As a researcher who is already a member of the group I intend to study, I run the risk of making assumptions, of failing

[285] Galleta (n 260) 448.
[286] Steve Tombs, 'Review of Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency*' [2004] 67 The Modern Law Review 704, 709.

to communicate the aims of the research properly, or missing the obvious through familiarity even while such a status grants me additional access.[287] Recognising, by way of the research journal entries, that this will not, necessarily, pre-empt such failures, it forced me to reflect on my own work and position and in narrating that position, demonstrated alternative positions that could have been taken.

Anthropologists – anthropology being the cradle of the insider/outsider concept – largely agree that "[t]he status of the social researcher as 'outsider' or 'insider' is neither static nor one-dimensional…" and keeping the concepts polarised is overly simplistic.[288] We can, in fact, only ever "occupy the space between" fully outsider and fully insider.[289] Status is fluid; I am simultaneously colleague and researcher, sometimes one, sometimes the other. This means that in reviewing my responses (both those I received from others and my own conclusions), I needed to constantly account for status – whether that is explaining privileged access or in carrying out interviews and understanding responses. Again, I did this by maintaining a research journal and building that into the coding analysis. This is a condition of the research, to be acknowledged rather than to be excised from research design: an impossibility with qualitative research of this form.

3.7 Conclusion

In setting out the methodology for this project, I described my 'worldview' as one of interpretive constructivism, subscribing to a view that the law is socially constructed and its practice is inherently social: a community of shared understanding. Performativity, as my theoretical lens and however examined, is similarly a communitarian project, being concerned with the process, the act of performing, which requires an audience.[290] Returning to Goffman, his "actors are not merely amoral, self-interested role players…[they] want to make a good impression on others...[which] requires a degree of audience co-operation and mutuality."[291] This is why "if our

[287] Beverley Mullings, 'Insider or Outsider? Both or Neither: Some Dilemmas of Interviewing in a Cross Cultural Setting' [1999] 30 GEO Forum 337.
[288] Marlize Rabe, 'Revisiting "Insiders" and "Outsiders" as Social Researchers' [2003] 7 African Sociological Review 149.
[289] ibid 161.
[290] Fawkes (n 40) 679.
[291] Jenkins (n 37) 160.

special interest is the study of impression management...then the team and the team performance may well be the best units to take as the fundamental point of reference."[292]

I described my professional interests and status and justified my approach to interpreting data through my own thinking and cognitive processing of data informed by interactions with participants (paraphrasing Kivunja and Bawa).[293] I briefly justified why it was appropriate to use a single case study model and the modest contribution to practice intended to emerge.

I then set out a three-pronged approach to fieldwork (review of the file, comparing against the model M&A transaction, conducting post-transaction interviews and thematic coding of the resulting data) and set out in detail how I collected underlying data and undertook the coding exercise, in some cases using elements of artificial intelligence. I discussed ethical considerations, including how I approached participants and the informed consent material provided to them before we spoke.

Finally, I discussed (and, where appropriate/possible suggested mitigations for) limitations to the study - my access as an insider, my status as a fellow professional, the willingness and ability of participants to speak to me in common terms, and the single case study approach – noting the project is intended to be exploratory and to demonstrate on a small scale the use of ritual terminology is meaningful, the ritual identified breaks down, and in that liminal space something else must feature. My suggestion is that it is performance, and this should provide a basis for further research (see Chapter 6).

[292] n 36 48.
[293] n 220.

Chapter 4: Data Analysis – File Review

4.1 Recap

In Chapter 1, I set out the background to this project and its purpose: to understand more about the performance of lawyers in the context of the ritual of M&A. In Chapter 2, I set out what an ideal M&A transaction would look like. This provided two benefits: the ability to identify areas where the ritual breaks down, with a view to identifying areas of performance and to permit comment on the ritual as being performative. In Chapter 3, I set out my methodology and methods of data collection. These were divided between a narrative review of the case study file, which I then used as data for reviewing and thematic coding, and the coding exercise of the interview data. The former is analysed in this Chapter; the latter will be analysed in Chapter 5.

4.2 Evidence of ritual

4.2.1 Description and content of the transaction

Examples of aspects of the M&A transaction as ritual emerged immediately, reflected in the initial planning and in the language used (performative in itself, and discussed further below). As an 'auction process', the lawyers understood that this meant providing a data site on which to disclose documentation relevant to the assets being sold, along with competing versions of a share purchase agreement. This was without further explanation.

A first step having been instructed was to identify first drafts of key documentation from previous deals involving the client and/or similar assets; this was a starting point for future negotiation and to inform the drafting of key transaction documents. Similarly, due diligence material from previous transactions – such as leases, key contracts, structure, pensions material and so on – was to be found and uploaded to the newly created data site for sharing with bidders. Another junior began work on the disclosure letter – the letter that qualified the suite of warranties by identifying exceptions to them – referring to the same letter prepared for the previous transaction. It was noted at that stage that the document would "need to be updated in line with the [share purchase

agreement] and Warranty Deed when available";[294] in other words, once the anticipated documents were produced and tailored to this deal. The senior lawyer (sub-partner) on the transaction took a similar approach "[w]e are in the process of putting together pro forma versions of auction draft documentation (share purchase agreement, warranty deed, tax covenant) that we can adapt to the specifics of the deals as initial bids come in and the more precise shape of the deal is known."

This act was performative. In retrieving those documents, setting in motion the ritualised process of disclosure of corporate information and preparation of the contracts, the team was attempting to demonstrate to the representatives of the client[295] that the project would take place in the way they expected – following a familiar pattern. Indeed, as a sophisticated client, the process was well understood and there was an expectation that matters would proceed in a certain way. For example, the recall and making available of previously provided documentation at the firm's (time) cost rather the client's was anticipated in both the client's opening invitation to pitch and the firm's initial proposition: the client had been at pains to point out that the choice of adviser would involve some assessment and acknowledgement of prior experience of its business.

4.2.2 Shared understanding

This demonstrated immediately that not only the lawyers, but the clients and the other side also understood there to be a pre-existing route to getting this transaction done, echoing the Collins and Evans' community of professionals – in this case lawyers and their clients.[296] The role of lawyers in guiding clients through a transaction is only able to be effected to the extent that there is a shared expectation between the legal professionals of documentation, a formalised process for progressing the project: the agreed time for a conference call, the 'all-parties' meeting when all stakeholders come together to discuss the commercial and legal aspects of the transaction, the exchange and comments on various turns of the document) and a recognised and final

[294] Note that while these are quotations from the file review carried out in 2021, the underlying material was required to remain on my employer's (at the time) servers and so was not downloaded to be referenced.
[295] Hereafter the "client".
[296] n 157.

moment of completion to allow the 'rupture' – the need for one party to transfer property to another without, or with limited, risk of repercussions or loss – to be closed.[297]

The remedy was expected by the sophisticated client to be standardised. As I noted in my review of the file: "The team wanted to press ahead with drafting the standard documents, recognising that much of the substance would be refined as part of the negotiation, but drawing together a seller-friendly starting point. The client resisted this suggestion given that no bids had at this stage been submitted, with the proviso that as soon as there were bidders – even tentative bids – the drafting could proceed quickly. The reaction of the lead lawyer was to note that pausing those workstreams "would have some impact on the overall deliverability of the high-level timetable," which "might be worth a quick discussion." The interaction focussed on timing of deliverables, not the content. While it was acknowledged that the "substance would be refined", the process was understood intuitively from experience.

That the client understood the ritual is an important qualifier to the research. It was a multinational business which had carried out this type of transaction many times before, represented by employees who understood exactly what was required even if the specifics of the transaction were delegated to the experts.

4.3 Breakdown of ritual

The anticipated breakdown of the ritual occurred very specifically in a number of key moments: a dispute over the length of a due diligence questionnaire, the emergence of a major antitrust (competition law) issue, and the structuring of the share purchase agreement (the contract that governed the sale). In none of these instances was a solution provided by an individual lawyer, something that will be discussed further below.

[297] Turner (n 50).

4.3.1 Initial positioning of the firm's role

The firm's positioning indicated an immediate breakdown of ritual. In scoping – setting out the parameters within which it would provide legal advice, including identification of the key documents it would take responsibility for – it was proposed and agreed that the firm would take on a "transaction counsel" role. Transaction counsel as interpreted in this instance involved monitoring of overseas counsel in the different jurisdictions, identifying and putting salient points to them, and coordinating their returning advice. This was a departure from the role the firm would usually play, where on the legal side it would take sole responsibility for advising and drafting documentation (although, the analysis suggested, this does not necessarily equate to "leading" the transaction). Here, by contrast, the role was to be a conduit for questions and answers, delegating some aspects of the work to local external counsel who would be the authority on what could be done in their jurisdiction. Such advice would be incorporated into the share purchase agreement, which the firm was drafting, but it would be acting at a relatively unusual remove.

The implications of such labelling were immediately apparent. The project began in the middle of the pandemic when things were uncertain; ensuring that there was sufficient working capital and cashflow became critical for clients. The invitation to bid therefore came with a more urgent than usual plea to be "competitive."

As the costing developed behind the scenes, certain exclusions were incorporated. Tax advice was excluded and the legal due diligence which was to be limited to one questionnaire sent to local counsel to deal with any local law issues. Co-ordination of the due diligence (the formal research into the affairs of the entities and assets being sold), including management of the process, was to be dealt with by the corporate finance adviser. The cost stage included identifying a true cost, based on hourly rates, and then a suggested cost to send to the client. The lead partner was clear that "the scope and fee is realistic for how much it will cost us and the cost of the overarching project management" but acknowledged the possibility of being undercut by other competitor firms. The important point was to demonstrate that the firm understood the role and

what was involved in the project: “[we] don’t want to risk [the client]...saying – “yes, they say that’s the fee, ***but when they realise what it involves***, they will charge more…”” (emphasis added).

A sophisticated client, the ritual was understood and that understanding was implicitly utilised to put pressure on the fee: the initial request for a quote included reference to please be "competitive". The message came from a senior member of the client on its global rather than national stage. In addition to the competitive element, the initial approach was couched in terms of the relationship: acknowledging the ability of the firm and the team to do the work (reference to experience and understanding the scope of the assets that were to be sold) while talking about ‘doing OK’ in the context of the pandemic. Overall, the message was that it would be good to catch up, *whether or not* the matter progressed. The response from the relationship partner – the senior person at the firm whose responsibility is to maintain contact with and, as the name suggests, develop a personal connection with the client – was similar, identifying with the ‘difficult times’ and the need to ‘deliver value’: the cloth would be cut accordingly.

In these initial stages, the important point was to demonstrate an understanding of what the project involved and make sure that the price was ‘right’. This was the early days of the 2020 pandemic; the business was in real jeopardy without income and the proposed sale was for the purposes of cash-raising. The firm wanted the business for similar reasons, but also because repeat roles on transactions for large clients are the life blood of a large corporate practice. Uncertainties were manifold. Complicated but subtextual interactions around fees required the firm – and the client – to perform a role. Discussions behind the scenes saw the lead partner question other partners not only on how to price but for reports on collective experience: what needed to be borne in mind when taking on such an oversight role? The repeated behaviour which fit expectations – the provision of a competitive quote – was used to establish the intention and promise of the law firm but did not, in fact, reflect the true intention behind the scenes. In Turner’s terms, this was a liminal space where the performance engendered action;[298] for Schechner, the theatre of the everyday.[299] The intra-firm exchanges revealed the performance in

[298] ibid.
[299] n 34.

the proposition: high enough a fee to indicate an understanding of the work involved, but "competitive".

These introductory exchanges were more fundamental to the outcome of the transaction than simply establishing an understanding of price. Into the lacuna of 'what will we do?' negotiated words and phrases established the relationship between client and firm. The firm self-identified its role as that of "transaction counsel" and in so doing set the trajectory and expectations of subsequent performance. While, granted, not as objectively important as the emancipation of oppressed groups that Butler's work was originally designed to assist, understanding this in terms of Butlerian performativity provides a different perspective. By analogy with the politics of the body, where "the essence or identity that [signifying absences] otherwise purport to express are fabrications manufactured and sustained through corporeal signs and other discursive means," the designation colours the entire relationship, setting it against a nominative other – "not" acting as transaction counsel – demonstrating in that language (performatively) an intention to carry out a role above and beyond the simple provision of local legal advice.[300] Both firm and client would now proceed on the basis that certain responsibilities were, without being explicitly stated, excluded.

4.3.2 Client demands

These established roles persisted throughout the transaction, with client demands correlating closely with firm performance. That client pleasing was a major theme of the file review, is perhaps unsurprising: one would expect this from a service industry, after all it is the client who will be paying for the advice received in relation to the transaction. However, this went further than obsequiousness. The dynamic that emerged was that client demands were behind major decisions. Of the major breaks in the ritual where some form of performance was anticipated to fill the gap, all were progressed at the client's behest rather than at the instigation of the lawyers, indicating a reactive rather than leading role in the transaction.

[300] n 27 172-174.

In the context of the due diligence discussion: the client professed to have limited internal resources to help compile the information and queried the extensive set of questions. Instead, a 'light touch approach' was requested. There was a tension here. Should the due diligence not provide the detailed information bidders would expect, or, more likely, miss out something significant, this would inevitably be used as an excuse (perhaps reasonably) by the preferred bidder to seek to reduce the overall price paid for the assets (known as 'price chipping'). The initial price on which the bid was submitted would not reflect the true circumstances - at least, that is the argument that would be made. When the list of questions was provided, the client again immediately responded, requesting the questions should be more general rather than "a relatively long list of questions...it is a little frustrating that we are going around this again." "Pragmatism" was required. This was surprising to the internal team, who had refined a very long list of questions down to quite a long list of questions. Nevertheless, the client's view needed to be respected. The response was carefully weighted, and relatively robust: that, while it was difficult to strike the right balance, the questions had been carefully considered and were not intended to be onerous. But this back and forth continued: when discussing data protection, the lead partner instructed junior lawyers to provide "a one-page description of what the company does with regard to data protection which can then go in the data room rather than require the client to go and find and disclose lots of documentation."

Even where the initiative was taken by the lawyers, the client interposed. The anti-trust point, having been risk assessed by the firm, was put to the other side's lawyers who reserved their position, unwilling to discuss further without instructions from their client. A linked point at issue – how purchase funds were to be dealt with (debt set off against purchase funds, a so-called net-debt position) – was crucial to the success of the transaction. As discussions continued, the client queried whether this was trying to "solve a problem that we may not know is an issue for the buyer." In other words, why not just propose what the client wanted and wait for a response. That was agreed.

One might characterise this as the explicit or conscious role that the firm is playing and that the individuals representing the firm are seeking to uphold; a performance, but one where the

expression of servitude to the client is foregrounded: we need to keep the client happy. The client performs in a similar way: we need to manage our lawyers. The association between the two is found in the call and response generated from the coding, where 21 instances of client demands were set against 23 instances of deemed firm performance.

Although this may ring intuitively true as a report of the workings of a service industry, the reasoning is somewhat unexpected: this does not seem to be service to impress, but service as process.[301] The lawyers do not seek to service the client because they are lawyers in a service industry, but rather because the prevailing legal and business culture dictates that to work in a service industry such as law, and particularly on an M&A transaction, firms and their employees need to respond immediately and positively to clients demands. Every iteration of that behaviour – to use Derrida's phraseology[302] – every transaction, reinforces that relationship as the way in which such transactions work. The expectations of performance by the client and by the lawyers themselves are not the output of the process but rather an ingrained part of it as a result of iterative performance. Taken to its logical conclusion, clients would expect this service even against the lawyers' advice or in the face of best practice – and, indeed, that is something that lawyers in a transactional context (and others) need to be alert to.[303] There is an overriding duty to the court in the UK – it should not be the case that client demands are met without question; but that is the risk.[304]

Indeed, questions such are these are a rich source of debate in the literature. Extensive studies in North America and the UK set in the corporate and/or the professional services sector have investigated the power dynamics between client and firm.[305] Out of this (ongoing) research comes the idea of 'client capture' – the subservience of ethical (or other) best practices to client demands,

[301] I acknowledge the criticism of my examiners that this may not be entirely unexpected and that the concept of power relations is likely to be doing more work (in terms of the client-firm relationship and the internal relationships between lawyers) than I have acknowledged. This is a site for further work. However, as a practitioner, I remain of the view that service as process rather to impress is an unusual outcome, likely to cut across what corporate lawyers *say* they are doing.
[302] Frank Farrell, 'Iterability and Meaning: The Searle-Derrida Debate' [1988] 19 Metaphilosophy 53.
[303] Taya Cohen, Erik Helzer, and Robert Creo, 'Honesty Among Lawyers: Moral Character, Game Framing, and Honest Disclosures in Negotiations' [2022] 38 Negotiation Journal 199.
[304] See n 133.
[305] Ronit Dinovitzer, Hugh Gunz and Sally Gunz, 'The Changing Landscape of Corporate Legal Practice: An Empirical Study of Lawyers in Large Corporate Law Firms' [2015] 93 Canadian Bar Review 343; Malhotra, N, and Morris, T, 'Heterogeneity in Professional Service Firms' [2009] 46 Journal of Management Studies 895; see also Dinovitzer et al (n 5) and Gunz and Gunz (n 13).

either because of direct client instruction or (indirect 'client capture') because of the internal pressures put on lawyers from more senior lawyers, such as relationship partners.[306] Where "clients can control or influence the process of production of a professional service and, therefore, judge how to value and pay for it, the situation is characterized by a high degree of 'client capture'."[307] While examining the influence of power generally on the relationships I have explored herein would provide fruitful next steps, this literature helpfully serves to situate this outcome as interesting: participants appeared to be less concerned about standing out positively to the client and more about demonstrating that the firm is performing cohesively and in line with a notional client's expectations of a such a law firm in terms of size and capability.

Client demands (what one might call client performance), appeared to negate individual lawyer performance. The client required certain approaches and did not regard the performance of individual lawyers in that assessment. In other words, a particular outcome – in terms of cost, approach and deliverables – was required from the firm they had appointed, and the individual lawyers working on the transaction were largely interchangeable. The closest to an individually important figure in the transaction was the client partner whose role at the outset was to build the relationship with the client and who was approached about the transaction in the initial stages (and, as mentioned above, it would be a site of future research to reexamine the material through the lens of (indirect) client capture and the pressure, if any, applied by senior lawyers to act in a certain way for or in respect of the client).[308]

4.4 Conclusion

In this Chapter I reviewed a data set compiled through a narrative review of the case study file. In coding the resulting data I found evidence of the ritual, its performative nature, and the importance of a shared understanding of actors in relation to how the transaction was intended to work (a communitarian experience much like the theatre). The firm's positioning of itself as consultant / co-ordinating lawyers appeared to determine its ongoing role performatively. Where the ritual broke down, evidence of performance was identified to fill that gap, most clearly in

[306] ibid - Dinovitzer et al (2013).
[307] Malhotra and Morris (n 305) 901.
[308] See n 305.

demonstrating initiative and competence to the client. However, the emphasis appeared to be – at least for the client – on collective rather than individual performance.

Chapter 5: Data Analysis – Interviews

I did once try explaining to a hairdresser…saying I do something to do with mergers and they said "Oh murder. That's great. I've got a mate who's got a problem at the moment. Do you think you'd help them out?"[309]

5.1 Recap

As explained in Chapter 3, I conducted 18 interviews, all of whom played a greater or lesser role in the case study transaction. Each interview was scheduled for an hour, generally lasting 45 minutes (with some variation either way). This Chapter describes and analyses the coded responses to the interviews, in each case identifying the emerging theme and providing one or more supporting quotations, both to evidence the theme and to provide narrative structure to the Chapter.

Where appropriate I have highlighted certain statements to facilitate understanding. There is clearly overlap between the extracts from participants and the themes, which serves to buttress the propositions made (despite not being identified on each occasion).

5.2 Themes emerging

5.2.1 Ritual and its role

5.2.1.1 Consistency and Predictability

The consistency of the process (and its repetition) is a hallmark of ritual.[310] Repeated references to the transaction as "typical" and the recognition of a "usual complex transaction" underscored the predictability and structured nature of these processes to the participants. The consistency of the process – helping to manage expectations and providing a framework within which all participants understood how and when to participate – was recognised, unprompted and at all levels.

> "I mean it was your kind of *typical transaction* in terms of, you know, we developed a scope of work for the due diligence. We *obviously* coordinated that due diligence and

[309] Participant 18.
[310] See Falk Moore n 112.

then moved to the transaction documents which involved, yes, your SPA, your warranties, the tax deeds etc…[I]t was your kind of *usual, let's say usual complex transaction, if that makes sense*."[311]

"I'd say, like a *typical transaction* – and I don't even know what's typical anymore[312] – but *how it should work is* we get instruction from the client, whether that's acquisition or sale…[and] I suppose we'd get the heads of terms, then we would scope what our work will look like, and that's normally a partner, senior, associate type role. Uh, so we would, you know, tell the client what we're going to do, what our fee covers, which will often be, you know, drafting and negotiating the SPA and, you know, generally carrying out a due diligence exercise and then all the ancillary matters that that come on transaction, like board minutes and any other ancillary style documents etc"[313]

"…*ordinarily in an M&A, you know, it's pretty standard stuff, you know they got on with the diligence and everyone just gets on with it*…And where we tend to work with corporate team would be where perhaps one of their clients, existing clients, is interested in buying a business and it turns out that that business is about to go through a process, like an accelerated M&A process…"[314]

5.2.1.2 Professional Cohesion and Role Representation

As in Chapter 4, the shared understanding and mutual recognition of the steps involved appeared to foster a sense of professional cohesion. Lawyers and clients alike understand the 'game' and the expected sequence of events, which facilitates interactions and negotiations. There is clearly an element of performing a role for the lawyers, performing not just for the client but to each other.

"…there is definitely a large chunk of process which both sides know, and *both sides know the game* and the lawyers will…sometimes when you're arguing a point lawyers on the other side will just go, "Yes, yes, we understand" and you know that their client has asked them to ask for a point and it's just there as part of a pool of points because you want to give on something else. *So if we were open and honest in the transaction, you'd probably boil it down to two points within about half a day. But you don't because you never know what's going to crop up and you want to, it's a negotiation, you've got to do the best for your client, you know.* And that's what creates some of the kind of toing and froing, but the reality is, the huge reality is that actually, if it was just lawyers doing an M&A transaction without any commercial input, you could probably complete 95% of it before you've even started, before you even know who the buyer and seller are. So there is a lot of process in there, but even though it's negotiated process, you tend to wind up at the same place."[315]

"…the more you do these calls [with more senior people on the other side] then more kind of confident you get in saying "Oh well, actually you know. I also have experience in X, Y, Z types of matters and this is as a matter of market practice, how we would typically do it. And here's my justification as to why I think we should do it

[311] Participant 2.
[312] This was interpreted to be a reference to the Covid pandemic, still in full force at the time of the interview, rather than to fundamental changes in the approach to M&A.
[313] Participant 11.
[314] Participant 10.
[315] Participant 11.

> this way this time." And I think once you develop that vocabulary for just kind of responding to partners who say, "Well, I've been in, you know, in law for longer than you've been alive, my dear" I think it helps."[316]

> "Sometimes, depending on the client, that's when it's still better perceived if you've got a partner with that perceived level of authority. *Even if, you know, all the partner's involvement has been is just a 5 minute call ahead for me to say "This is the brief. This is what you need to say." And so…in front of some clients, not all, some clients will still want that kind of level of authority. Not other clients…they specifically ask for partners not to be involved because they know that, you know, other members of the team who are actually more cost effective can do just as good of a job*..."[317]

The references to 'honesty', 'vocabulary' and 'perceived level of authority' in these comments tend to support the idea that performance is taking place, that the audience – opposing counsel, clients, notional observers – would react to or understand the transaction in a different way were a 'straight-forward' approach taken. Such an approach would stay close to the ritual, work in plain English and focus on collaboration rather than grandstanding.

In respect of the latter, it is interesting to return to Goffman: "It is apparent that if members of a team must co-operate to maintain a given definition of the situation before the audience, they will hardly be in a position to maintain that particular impression before one another. Accomplices in the maintenance of a particular appearance of things, they are forced to define one another as persons 'in the know; as persons before whom a particular front cannot be maintained."[318] This helps to explain – in the context of this thesis – the close link between negotiation and performance, the references to 'home-team' calls and the impact of 'commercial input' (i.e. clients) on the extension of transactions. The impression that needs to be given must be (i) first agreed and (ii) subsequently maintained between those who will be working together or apart to maintain it. As this is a situation being replicated by stakeholders on the other side of the transaction, the view that the performance elements are potentially a hindrance begin to make sense; yet they remain necessary as they are embedded in the ritual.

5.2.1.3 Symbolism and Meaning

The transaction process is imbued with significant professional symbols and terminology (e.g.,

[316] Participant 2.
[317] Participant 2.
[318] n 36 51.

due diligence, SPA, warranties, tax deeds). These standard, repeated elements are not, quite, performative in the Austinian sense of having effect separate from constative meaning.[319] However, they do carry deeper meaning as critical stages in the transaction, echoing how ritual in a wider context marks important life events (birthdays, for example) – and appear to be performative in the Butlerian sense by way of unthinking repetition which is, itself, meaningful.[320]

> "*When you do the training, they are always like "This is how deals go and this is how deals look" and you, I think with experience, learn to recognise the constituent parts but quite quickly in corporate you learn that no deal ever looks exactly like they do out of the textbook.* So there's always something about the deal. Which is, you know you haven't seen it before. Maybe it's you know one of the parties is like in a jurisdiction that you're not familiar with, or in this case it's like "OK, how do we split one SPA into three different jurisdictions?" And then you have to work your way around that. I think, broadly speaking, you know we understand what deals should look like at their simplest, and then they develop, each of them develop their own characteristics, because then some of those factors start to change and get more complex, and then you start to work around them…So I would say at no point is it very comfortable. It's always kind of challenging and you have to adapt to every deal, *but at the same time there is like a…if you understand structurally what deals are supposed to look like, you understand the purpose of the documents. So for me it was very much like, "OK, well, I'm drafting these specific disclosures now. What are specific disclosures meant to achieve?" And you understand, you know the allocation of risk and liability from, you know, within a broader transactional framework.* Then you're like, "OK, I can kind of start to figure out what the aim of this is.""[321]

The terminology – evidenced in this section and throughout – is further performative in the sense of signposting, demonstrating to a client or to other lawyers that the role is understood. Again, this echoes Goffman and his references to competencies and professional 'showings'.[322]

5.2.1.4 Adaptability and Flexibility

The transaction process, though consistent, recognises – and in some senses accommodates by way of anticipation – deviations and unexpected challenges. This flexibility is crucial for navigating the complexities and unique aspects of each transaction.

> "But that, as you say, that process is never…there are timelines, and there's a *process that is always followed, as it were, but every transaction is different and especially from our perspective, whenever when a regulator is involved, the way the regulator approaches are transaction is always slightly different, so everything is always…there's always those hurdles that come up as you go through* where you need to be able to come to a decision as to what happens next and the approach to be taken to get to the end goal, so I think that's right. And I think in terms of whether the lawyer takes the view, I guess, yeah, it depends on I think seniority. It's quite a

[319] n 26.
[320] n 27.
[321] Participant 1.
[322] See n 41 and n 58.

> hierarchical thing, isn't it, law at the end of the day? And I think as you get more senior, [you're] more prepared to give views on something…"[323]
>
> "I kind of feel that you get those moments on every transaction where you're kind of like, oh, this is a bit different. *Let's see how you're going to navigate that, and I almost consider that as that's just standard that you expect transactions to not always go to plan. So when I say this was a typical complex transaction, I'm factoring in the fact that there were deviations from the usual standard route from opening to ending a project*…"[324]

Not only is the process – the ritual – identified (in the references to "standard" and "process being followed"), but its breakdown is anticipated. It is, arguably, what makes the role interesting: the need to "navigate" the unknown. As an aside (at least for present purposes), the reference to seniority and a willingness to 'give a view' suggests the obverse: that being junior you are less likely to give a view. This links back to the commentary on power dynamics that will (or could) inform future work.[325]

5.2.1.5 Cultural Transmission and Learning

Rituals play a role in transmitting cultural knowledge and practices.[326] In the professional context, the transaction process serves as a learning mechanism, where less experienced lawyers learn from more senior colleagues. This hierarchical learning mirrors the way rituals pass down traditions and knowledge through generations. This appeared to have particular implications for the behaviour demonstrated when participating in a transaction.

> "…when you get outside of your ritual – which more and more we will because so much in the world now is less formulaic and change is quicker – you need people to react in a certain way and to answer people in a certain way and deal with people in a certain way and deal with problems. *And you do that through developing that culture* and you know purpose theory is…this is exactly, it's a major part of what being purpose-led is all about."[327]

> "…I think the culture that can surround a deal, some deals descend into being very confrontational, and I think when it gets like that it gets harder to find solutions because people lose trust in each other. *I think when people's approach is more collaborative you do see, you know, solutions being found kinda thing*."[328]

The emphasis on "developing culture" and "collaboration" support the emerging idea that what is important to participants is the collective action and capability. It is working together that provides

[323] Participant 4.
[324] Participant 2.
[325] See 'B Future Work' on page 121.
[326] Falk Moore (n 112); Turner (n 50).
[327] Participant 14.
[328] Participant 6.

"solutions". In the theoretical framework of performance studies discussed above, this indicates it is the socially mediated encounters between the lawyers that influence the way in which a project runs (i.e. whether it becomes "confrontational"). But, again, it is the collective that appears to be important.

5.2.1.6 Summary

The transaction process described can be seen as a professional ritual that provides structure, predictability, and a shared understanding among participants. By recognising the ritualistic elements of the M&A transaction its performativity becomes apparent – the repeated exercise with a pre-determined goal. What is interesting is that the breakdown of the ritual is *anticipated*. It is those moments, in fact, that determine the success and the substance of the transaction ("*there's always those hurdles…"*) and one is never "comfortable", as a professional, until those issues arise and are overcome.

5.2.2 Uncertainty and Complexity

5.2.2.1 Innovation

In the transaction that is the subject of this case study, a structure was used that was "totally outside of normal practice," which naturally introduced uncertainty but also drove innovation.

> "…the first the first reaction was, I think for all of us, we've just never seen anything like this. *So as a lawyer, I think you're always slightly concerned when you see something that's totally outside of normal practice, you know? There's a reason why there is normal practice, tends to be [followed]. But to give them their credit, it was quite innovative.* As a structure, it did deliver for both buyer and seller. It did do the job in a way."[329]

> "[G] iven that this [transaction] involved three [jurisdictions] in which we're not experts at local law at all, you *know, we were more brought on a consultancy [basis], you know, "Have you thought of this…?" type of role rather than leading the strategy. So I don't, yeah, I'm not really sure what the client's view would have been at all. My hope is I suppose they would see us as quite useful. This specific role that we played and saying right, OK, coming up with ideas in what was a very challenging situation,* I mean extremely challenging situation from a competition point of view."[330]

> "…I suppose you could see how in this context if we had taken a different approach, if we'd been really risk averse, if we just said "No, we don't do things like that. We

[329] Participant 8.
[330] Participant 18.

> don't like the sound of that." If we hadn't had the right people to draw on to ask the right questions to understand the risks, we might have just said, "We don't really understand this transaction. It's too risky. You shouldn't do it." So yeah, I guess that probably is right. *And I think that one of the hardest things to do as a lawyer, and as you get more senior, is to sort of be able to take those risks because…there is a certain comfort to ritual process. You get comfortable going through the motions, you know what's coming up 'cause you know the next stage.* You know, "OK, well, we did this on this last transaction. It looked very much like that" or just sort of, you know, basically change the names and [take a] similar approach and I think a lot of transactions are done like that. I think a huge volume…[are] geared up to be like that as well because it's efficient. But it doesn't solve every problem, because some things are just different."[331]

5.2.2.2 High Stakes / Specific Risks

The transaction was a high-stakes transaction for the client and, to some extent given the value and the agreed fee, for the team and the firm. The timing during the height of the pandemic added another layer of uncertainty, as external factors were unpredictable.

> "Obviously it's a big event, high value, but also the client was an important client. As to, uh, the parties involved? It was an important matter…at the time and it was happening in a time where there was a lot of uncertainty to, as you know, the height of the pandemic, a little bit after the height, let's say maybe after March or May."[332]

In the case study, the buyer was a competitor with significant market share, raising competition risks. The need for regulatory clearance in multiple jurisdictions added further complexity. Navigating these risks required careful legal and strategic planning.

> "…it was fairly unusual because the transaction was potentially highly problematic from a competition point of view...And I think the initial feeling was that even though the target business was in a bit of trouble at the time, there could still potentially be competition issues because a demerger was going to lead to a high degree of concentration in certain local markets…filings were going to have to be made in each of those jurisdictions and the deal would have to be conditional on clearance."[333]

> "And the absolute genius of the deal…was we would sell them a non-controlling stake…[with] the shares, *I mean, again, I've never come across this…*into the escrow as well with the apostille. So he held them. And we had to agree that the other 51% would get, we would complete on that either once they got clearance or if they hadn't got clearance by a longstop date they would have to pay for the shares come what may. And it seemed really bizarre to have this long stop date, that if they were blocked by competition laws to actually take control, we would get all the cash, so we had to really think about, again, would that be enforceable? Would they pay up? What on earth, would they do when it got to that day 'cause they couldn't take control of the shares because the competition authorities had said it was illegal? Would we get fined for breaching competition laws for doing it?"[334]

[331] Participant 8.
[332] Participant 3.
[333] Participant 18.
[334] Participant 14.

There is clearly a balance to be struck between following ritual processes and taking risks. While the ritualised process provides predictability, it may not always be suitable for every situation (indeed, cannot be). Senior lawyers need to make strategic decisions, weighing the comfort of established processes against the need to innovate and adapt to challenge. This includes the role the lawyer is playing in the transaction and, critically, interactions between the lawyers (i.e. between specialisms).

> "The deal was being done in a very strange way because…the buyer [was] the main competitor and [had] an enormous market share…. And they were saying to us, "We will buy it and [we] will take…all of the competition risk." And we just knew they were going to have problems and they were saying, "It's not going to be an issue. We're going to get it through. We've got great relationships. We'll negotiate it." *So we had to negotiate a document which we were comfortable would mean that they were obliged to buy it and they would also follow through and pay for it. And again, we needed to be slightly careful, because we're dealing in a foreign jurisdiction we were worried about our ability to enforce. So the structure of the deal was phenomenal*…Each country had a different analysis on the competition risk…there was a huge amount of complexity."[335]

5.2.2.3 Summary

The case study transaction was – entirely incidentally – characterised by significant uncertainty and complexity, stemming from novel structures, high stakes, competition and regulatory risks, foreign jurisdiction challenges, logistical challenges, and the need for strategic decision-making. In those moments where the ritual appeared to fall away, the importance of innovating was emphasised by a number of participants, surely a proxy for performance in the sense of creating novel and occasionally unique responses to issues that, by definition, are bespoke to the lawyers involved and/or the firm.

5.2.3 Communication

5.2.3.1 Client-Lawyer Relationship

There was additional emphasis on the importance of personal connections and trust between clients and their legal advisors, with some expression that the reputation of an individual lawyer and the value they bring is important.

[335] Participant 14.

> "I spoke to [different client] and one of the things we discussed was what she looks for in a legal advisor…The main thing that she was very strong on is the fact that they don't look down on counsel and they just don't treat them like a letter box etc. And then she said *"If I find a lawyer who actually values my work, I will follow him or her…I will not follow the law firm. I'll follow them based on their performance and what value they add. I will not follow the law firm or the establishment or whatever it is. It's just that person who has done a good job. I'll follow them." And that rang so true to me* and I think more emphasis is now not just on the who you know, it's more about who knows you and your reputation as a lawyer."[336]

5.2.3.2 Unified Approach / Open Communication

More telling, in my view, was the near unanimity that in this case there was a particular challenge around integrating with local lawyers and being treated as a single team.[337] The unusual structure of the transaction required detailed analysis and coordination between the firm and local lawyers (those in the 'local' jurisdiction to the transaction assets), highlighting the importance of collaboration and transparency.

Arguably, the weight attached to reporting to the client that the transaction was "unusual" was part of the performance, signposting the difficulty level and foreshadowing any cost implication or, in the worst case, the possibility of things not working. Equally, it was a demonstration (performance) of value: we (the firm) are able to provide a solution *and* we can manage all elements of the transaction from start to finish.

> "It was quite difficult on this job because the *client team wanted to treat us and their local lawyers as if we were just one firm, so they would essentially just want to talk to us and for us to deal with the local lawyers and to be the sort of you know, "This is the advice."* So they wanted us to be the mouthpiece of the advice. So it took us a while to work out how best to work with the [overseas] lawyers, how to get the best out of them…[and] it became quite an unusual transaction in the sense that the structure was very unusual, and that took a lot of analysis and I would say that our role in analysing that structure was more detailed just because normally *[a] transaction structure doesn't need that level of analysis, but it really did and we needed English law specialists like competition lawyers to help ask the right questions of the local competition lawyers*."[338]

> "…[T]he commercial people [at the client] were really good at taking…decisions… They were really good at saying, "OK, I understand all of that. Let's go with it." So it wasn't as though we didn't suggest, we didn't have to suggest, *we just had to be quite open and honest and we were open and honest with them throughout the whole process. Actually, I think that's one thing that they actually appreciated…I think they appreciated that it was unusual*."[339]

[336] Participant 3.
[337] Note that the terms 'local' lawyers and 'overseas' lawyers are used interchangeably to refer to those lawyers practising in the jurisdiction where the sale assets were based and members of another law firm(s) as opposed to the UK-based lawyers at the subject firm.
[338] Participant 8.
[339] ibid.

> "…there was a lot of complexities around dealing with the competition stuff and it was marshalling the overseas lawyers[340] on that and also making sure it worked from our point of view of a satisfactory M&A transaction, so you know, when you're *dealing with overseas lawyers and overseas legal points whilst in an ideal world you just give it to the overseas lawyers and go, "Here we go. Now you do your bits." [But] they have different standards of level of client care or client interaction, and it's partly our job to make that seamless 'cause we'll sell it on a seamless basis, as in, you know, "We're…your lawyers, if there're overseas legal points, we will manage those and make sure that you understand them" and we filter them through rather than just, "Here's a load of overseas lawyers. Deal with these guys now as well."* So I think there are lots of complex, sort of you know, technical competition I think mainly issues…which caused complex drafting, complex legal points and just you know getting to the bottom of timelines and how it affects the transaction overall."[341]

This held true more generally – there was focus on trust and ensuring that all members of the team (in the wider sense of client and professional advisers) were appropriately informed. This did not mean that all aspects of the transaction needed to be communicated to all members working on the transaction in the firm; rather, it was seen as important to ensure that those who were not as close to the day-to-day management of the deal had sufficient depth of information to properly contribute. It is this level of communication that leverages the expertise of different specialists.

> "I think on this deal that I was involved as much as I needed to be…I don't think the client would necessarily have known that I was involved in that way, and I think it was more just quite often just providing a sense check…I wouldn't have said an abundance of caution, I think it was just a kind of sensible discussion…on what was a very big deal…I think in some cases it makes it more likely that we'll [specialist lawyers] be part of the team in the beginning, *because if someone is trying to set up a transaction structure, then we're probably the first people that you would call*…"[342]

> "I've worked with Participant 2 and Participant 14 a little bit before. So they've got a fairly good idea what we need to know. I mean we're sort of a specialist aspect of the firm's offering on the transaction. *So we don't need to know everything about the transaction. Maybe we do need to, we may need to know a little bit more than some other specialists because we are often quite focused on the market in which the transaction effects other parties' activities and markets*. But we don't need to know everything about the sort of pensions aspects of the transaction, employment aspects of the transaction…".[343]

[340] Note (again) that the terms 'overseas' lawyers and 'local' lawyers are used interchangeably to refer to those lawyers practising in the jurisdiction where the sale assets were based and members of another law firm(s) as opposed to the UK-based lawyers at the subject firm.
[341] Participant 11.
[342] Participant 17.
[343] Participant 18.

> "I remember being given quite good background on exactly what was going on… which we often need just because the competition law on the merger control side of things goes into that kind of general background as well, as to when *you're looking at the reasoning behind the transaction. You kind of need to understand those the general backgrounds*."[344]

> "I think over the last 10 or 15 years the penny has dropped for everybody that if *specialists who on involved on the deal get a bit more information on the deal, you're likely to get something that's more helpful in terms of output, so you tend to get a reasonable briefing these days. So I think it's certainly better than it used to be, but again, it varies depending on the deal*. Sometimes you don't need that. Sometimes you do need it and don't get it."[345]

5.2.3.3 Team Performance

Closely linked to communication was the weight given to the (explicit) performance of both internal and client teams. Effective collaboration involved solution-finding and working together to implement solutions which *emerged* from relationship building.

> "Yeah, so we were lucky we were partnering with…[an overseas law firm] who were extremely good. And we just had to go back to first principles…Actually I'll tell you what we did, we did an analysis for about a week. And because we had project management, we actually did an analysis of their operations as well to go, "If we do this, what are the risks?" And we had to break down it down into, "OK, what are the legal risks? What are the operational risks...?"[346]

> "I think the client relationship…to me is very important, and how you perform as a team. *And I think it is performance as a team – and that's the client and internal team and the internal team working well together…And I think there is a dynamic there that you get pushed* and…you would expect to get pushed to give, to come up with a solution. And then you work…with the clients to come up with solution and [often] their lawyers can't come up with a solution…Clients go away and think about it and then come back to you and say, "Oh, OK, what about this?" And then, you know, it's a two-way street effectively…And then it's up to us to be positive and say, "OK, well, let's see if that'll work and we'll, you know, we'll tweak it and it might not be the original solution the clients came up with, but we can, we can play with it." *So, yeah, I think, as you say, when – and it often is the case when we're involved that the usual process is breaking down or not breaking down but, you know, you can't rely on the templates – the human interaction is very important*. And I like to think about this firm that people do get on quite well…most of the time [the corporate team is] excellent to deal with and it's a genuine team effort. It's not just "sit right here specialists, don't get in our way" sort of thing. *There is a genuine team effort here*."[347]

> "I think a lot of lawyers myself included are guilty of wanting to have all the answers and it can be frustrating sometimes when you don't have the answer. But I think it *comes down to relationships as well…There's a theme of trust* – the client will trust

[344] Participant 4.
[345] Participant 6.
[346] Participant 14.
[347] Participant 18.

> that you're going to go away and do the research that you need and come back with a more, you know, thought-through answer."[348]

There was an interesting observation from one of the specialist lawyers who made the distinction between the transaction lawyers who are involved in the commercial negotiations (to a greater or lesser extent), and the specialist lawyers who are more concerned with the legal protections of their respective clients. Here, compromise appeared to be more readily available as the concern was about allocating and closing legal risk, rather than trying to gain an 'edge' for the client.

> "Yeah, I guess it's a bit different in our context because there's, it's like…I dunno whether you're talking to other "technical teams", but I guess a lot of what we do there is at the end of the day there's kind of a right and a wrong answer, *and then [in] a normal approach, often when you talk to your counterpart at another law firm who's on the same page as you, you can normally find a way through a problem if that makes sense. There's less of the kind of, as you say, in an M&A transaction maybe the lawyer's role is more commercial in terms of debating a point on a commercial basis*, rather than when we're involved, it's more guiding, you know, on the M&A side this regulatory thing needs to be satisfied, we need to find a way to do it and then the *parties' interest can be aligned at that point and people [were] more collaboratively to get to the end goal*. And if there is some kind of "creative thinking" it can be a group effort rather than an individual…I just mean both sides of the transaction may be working together to get to the end point, whereas the M&A negotiation stage is potentially more competitive at that point."[349]

5.2.3.4 Summary

There was some sense that, in maintaining the relationship or personal connections with clients would engender loyalty in light of personal performance – seen in 'value' of advice. However, there was more regular reference to the need to act as a single team, the inference being that this is impressive to a client. An observation about the difference between transaction lawyers and specialist lawyers, the latter being more able to compromise as the debates with lawyers on the opposing side were less likely to be about commercial points, indicated that transaction lawyers are more likely to be performing.

[348] Participant 2.
[349] Participant 4.

5.2.4 Teamwork / Collaboration

5.2.4.1 Operational Updates and Client Management

There was emphasis on keeping the client updated on the operational aspects of the transaction, including the "twists and turns of negotiations". This involved regular communication with the client to manage their expectations and address issues arising. The role of soft skills in communication was highlighted, particularly in managing client anxiety and/or frustration. Understanding and pre-empting the client's concerns and addressing them promptly and empathetically was seen as a critical skill.

> "[T]here can be an issue that's blown up that the client didn't foresee, and so that's going to create anxiety for the client, and so I would always want to understand that and potentially have visibility of it so that I could speak to the client about it alongside Participant 14, or you know, if there was a problem because you know the client was frustrated with the team generally, if there was a problem with our delivery then that would come to my door in that role and you know, obviously the costs piece would be part of that. Dealing with the costs. *But it's more sort of the softer skills rather than the hard operational legal skills would be my role on the transaction*."[350]

> "I don't think it's always technical performance. I think sometimes it can be performance in a different…I'm thinking of another *client, another matter now where often what they, what the particular individual just wants is somebody to talk to, a sounding board. They don't really want advice, they just want to sort of kick things around as people say, and I guess you know in some other worlds, some other firms, they wouldn't be interested in doing that because it would be time that they would consider, you know, we can't always bill* it 'cause there's, you know, maybe half an hour here, half an hour there. And [so] it's possible that they wouldn't get that elsewhere, so it's a different kind of performance, perhaps?"[351]

5.2.4.2 Diverse Perspectives and Unified Front

There was a clearly expressed view that bringing in diverse perspectives provided objective analysis. This helped in offering well-rounded solutions to the client, foregrounding team rather than individual performance; however, as we saw in comments by the same participant above, leadership of key individuals was necessary both in terms of progressing the transaction and developing relationships with the client. That said, even when facing the client, it was regarded as crucial to present a unified front. This ensured that the client perceived the firm as cohesive and aligned in its approach.

> "And, I think speaking to it when you haven't been involved in the melee of the negotiation allows this sort of cold and sort of objective analysis, and so that goes

[350] Participant 15.
[351] Participant 8.

> to the *diversity point, you know, adding another person's voice and thoughts to a problem in order to try and bring a different perspective. But then when we're facing the client, joining Participant 14 and Participant 8 on that, and the psychology to my mind changes slightly in that what you are really doing is sort of bringing a bigger weight of the firm to it.* You know, "This is the problem, this is our solution. And yes, we as a much wider team, including the whole relationship piece, think that this is the right approach" and it's to make sure that we're seen as one."[352]

> "…speaking on another deal when we had sort of daily catch ups it was very useful just to check in with people to see that the various sort of parts of a deal or communicating and we're talking to each other and it worked…I think I remember someone saying that the way a lot of American firms operate is that they, it's very corporate-centric and it's, you know, the corporate [solicitor] isn't just a project manager, but they know what's going on with each specialist. I think the purpose behind those catch ups also mimics that and to ensure that that the corporate team had *sort of sight over each element so that we can report back to the client so holistically in one voice as opposed to giving fragmented information and contradictory information, which obviously didn't look good*…"[353]

5.4.2.3 Collaboration with Overseas Counsel

Although this has already been considered as a thread in the 'Communication' theme, a slightly different point can be made about collaboration. Collaboration with local lawyers was critical given the multiple jurisdictions involved. Further, it meant that the UK lawyers found themselves in a different role from their usual legal advisory role, adapting to advise on high-level legal strategy and then refining it with input from local counsel. In this context, there were references to mutual (inter)dependence, where each party contributed their expertise to achieve a common goal.

> "…[W]hat the [overseas] lawyers did, which was incredibly helpful to coming up with a kind of assessment of the situation, was they produced a sort of matrix which sort of had the various risks and sort of said that they were low probability, but you know, kind of [the] consequence was high or you know high probability, but consequence was low and that really helped the client visualise…what they were talking about. *So I really liked that and I thought, "Well, actually it's something that we could, a way of presenting things…we could think about doing."*"[354]

> "*I mean our value add was to collate all the advice into one point, to digest it and then to look at the potential avenues of space to challenge should everything go wrong. We thought potentially one of the ways that they could wriggle out of having to complete was to sort of argue that it was a frustration element…the contract being legally frustrated. So we spoke to our dispute resolution team to put some drafting in the contract to try and address that risk*. [T]here was the antitrust provisions to deal with competition risk. So yes, our feedback was definitely based around an assessment of how we could get - if they wanted commercially to go with this transaction – how could we minimize the risks that it presented? *And we were honest with them that this was not a risk free transaction, there are some areas where there's quite a lot of, uncertainty as to how it would play out*."[355]

[352] Participant 15.
[353] Participant 16.
[354] Participant 8.
[355] ibid.

5.2.4.4 Specialist Integration

Also as discussed under the 'Communication' theme, appropriate engagement by the transaction lawyers with the specialist lawyers, utilising their skills, was acknowledged to be part of successful progression of the transaction and, ultimately, to contribute to the level of client satisfaction. Further observations on this relationship noted the reliance of specialist teams on the transaction lawyers for work. There is therefore a similar interdependence as with the overseas lawyers, driving close collaboration and requiring effective communication to ensure that specialist input is integrated into the broader transaction process. Again, the major theme to emerge was the contribution that acting as one team made to the transaction and the representation to the client.

> "You know, we often work nowadays opposite teams, sometimes we get the situation where the corporate and competition work is split up between different firms and you don't get that same team. That's an example [where] you don't get that same team dynamic. And…I don't think that's the case here. *I think it's very joined up and uh, that can be a completely distinguishing factor because you are working towards a common goal which is, "How can we best deliver this deal for the client?"*"[356]

> "I do think we [tax specialists] have a slightly different relationship with corporate than those other teams do. And I think that's probably both positive and negative. *But I think we…the corporate tax team…[are] pretty much wholly reliant on corporate for our work…we don't have a huge amount of direct instruction, so we are reliant internally. And so I think that makes us particularly receptive to the work.* I also think the nature of tax makes people doing the direct corporate work just a little bit more wary of it than perhaps they are with other work..."[357]

> "I mean, yes, all law firms go out meeting clients, having those conversations, you know, sort of negotiating those prices. But…I don't think it's something that we necessarily reflect on that much. You know it's just what we're doing. And the same from the operational side, we don't sit back and say, "Well, you know, why perhaps are we looping [the intellectual property] in just to cast their eye over something?"…*But if you recharacterise that as, you know, we are demonstrating something…to the client…our wider skill set and then that all gets funnelled through to either Participant 14 or you when you have those conversations in a form of performance...*Clients take risks; clients are commercial entities, they take risks all the time. That's sometimes how they make money by taking risk positions on commercial transactions [and not asking for specialist review]."[358]

The underlined section is important for two reasons. It appears to provide support for Goffman's view that to make the impression they wish to make, actors require audience co-operation i.e. in

[356] Participant 18.
[357] Participant 17.
[358] Participant 15.

this case the client.[359] Further, Goffman suggested that a group impression must be "fostered and sustained by the intimate co-operation of more than one participant, and, moreover, that each member of such a troupe of cast of players may be required to appear in a different light if the team's overall effect is to be satisfactory."[360] The implications of this quotation are that the different roles played by different lawyers and reported to the client are the performance and this is performative as that activity is repeated *without reflection*: it is the habitus, the way a transaction is expected to run.[361]

5.2.4.5 Summary

Understanding and pre-empting the client's concerns and addressing them promptly and empathetically was seen as a critical skill. This was encouraged by bringing in diverse perspectives, contributing to the ability to offer solutions to the client. Although leadership of key individuals was necessary both in terms of progressing the transaction and developing relationships with the client, *collaboration* remained the overarching theme – with the client and specialist and overseas lawyers.

5.2.5 Adaptability and Problem-solving

5.2.5.1 Handling Unusual Transactions

A significant amount of discussion during the interviews was about the unusual elements of the transaction, as proposed by the buyer. The team had to adapt by analysing the implications and, did so by setting up a series of focused calls to address specific issues such as antitrust consent and tax implications – unusual given the ritualised structure described in previous Chapters. This demonstrated the need for flexibility and the ability to manage unique transaction structures as a team.

> "I mean M&A's like any great battle plan in that it doesn't really survive first contact, you know in its purest form. *So your strategy for the transaction it presumably has, you know, will inevitably change on the minute of the first material contact and engagement with the other side, because their views then need to be and their approach needs to be knitted in with it, don't they?* And so that's how we get into this position, where there's inevitably twists and turns and unknowns on every

[359] Jenkins (n 37) 160.
[360] n 36 51.
[361] Bourdieu (n 43).

> transaction. So I guess…There's two elements here, isn't there? …Let's assume that the technical issues that come up, the way that they would be approached would be, you know, there'd be a build up and explanation to me of the sort of the technical issue that's been encountered: background, why it was encountered, when it's come up, the other side's, our approach and you know thoughts about how we might get through it, and then *I'd actively engage with the team* on that and then consider how we approach that…and the potential solution to that with the client."[362]

> "…the idea was that, you know, it was a discussion process with the client and that we sort of identified what the problem could be and we discussed with them potential options for dealing with the problem…It wasn't a "OK, you've got to do this or not do the deal". [But rather] "This is the problem…this is one thing we've done in the past. There's work to get the other side to accept it because it's somewhat extreme, you know. And here are other things we might think about doing"…it's an open discussion of options rather than us dictating…what they had to do and what they couldn't do."[363]

The fluid nature of the problem-solving required was linked to a structured analysis, evidenced by "deep dive" mono-issue phone calls, enhanced by the role of legal project managers. They played a crucial role in organising these calls, summarising the findings, and ensuring that the client was well-informed about the advantages and potential risks of the proposed structure.

> "I spoke to Participant 14 and I said, "*Well, what we could do is just have key calls with the key stake stakeholders and validate that structure." So, and I remember this quite clearly, even though it was a while ago, so we'd have a tax call, and we'd set aside 2 hours to go through tax, we'd have a legal call…We acted very quickly in deciding who we needed to speak to and what we needed to discuss so we could identify the risk of the new deal for the client in terms of the price or whatever or closing*…and then we did that in an organised way."[364]

> "It's more exciting when you're kind of back and forth with the advisory lawyer and ultimately you get to a point where you say, *"Ok, well we'll put this risk to the client and, you know, it's for them to make the decision." Sometimes that's more exciting than saying to the client, "Yes, we can eliminate all risk if we just change the drafting to this*.""[365]

> "And essentially what happened was the buyer was the one who was asking the question saying "Can we do it in this unusual way?"…We had to say, "OK, well, this is the transaction they've proposed, what are the implications of that for you [the client], and how do we analyse it?" And that's the way that we did it. We had project managers involved…who helped to set up a series of calls, an hour long each, I think they were, some of them might have been a bit longer, to go through the main heads of what we perceived to be the issue… So we had one call dedicated to just the antitrust consent process and saying "OK, well let's analyse what this means." And I suppose that's another example where we have to go and…say "What questions do we need to be asking?"…*And essentially, we'd summarise those in a note back to the client and say, "Look, we've been through it, and although there are some odditees to the structure and things that we wouldn't normally see, in short, there are advantages to it as well.""*[366]

[362] Participant 15.
[363] Participant 18.
[364] Participant 13.
[365] Participant 7.
[366] Participant 8.

> "[We] implemented…a 15 minute "stand up" as we call it – to find out what everybody [was] doing…and, I'll be honest, it massively de-stresses me, you know, because you manage everybody's expectations on a transaction and if you know that people are dealing with stuff you relax and you can then also focus on the bits that you're meant to be doing…*And it makes sure that people within the team are given responsibility up to the maximum levels that they can take so that you're maximizing the use of everybody's brain power. And it's amazing how people can step up and do stuff and you go, "Yeah, that's really good. Actually, if I'm honest, that would be better than I could do it'.*"[367]

5.2.5.2 Adapting to Complexity

As the quotation immediately above indicates, interviewees generally indicated that a flatter organisational structure and a willingness to 'find the answer' permitted better handling of increasing complex transactions. This approach, it was submitted, leveraged the collective experience and real-time insights of the entire team, rather than relying solely on the transaction lawyers. Encouraging team members to take initiative and make decisions similarly fostered a more adaptable and responsive team environment and approach.

> "I suppose probably other people you've spoken to [may be] more used to promoting the practice to a greater extent than we are as competition lawyers... But I like to think about us as a competition team in particular, what *I think distinguishes us is that we are genuinely commercial and pragmatic and I think there are, you know, often we come across stuff – this is a good example – that is very difficult. Uh, and yeah, the easiest thing is to say no, it's not possible and we can always find a case that says that, yeah, we shouldn't be doing something. But I do think we're very solutions-focused. I mean, everybody says they are, but I think we genuinely are in terms of we like to say we don't like saying no to a transaction or saying something is difficult.* I think we like to take a very positive view and we are prepared to allow our clients to run a bit of an informed risk sometimes, you know? We give balanced advice and so try and say, "This is a risk. But this is a cogent strategy." And if it all goes wrong, you can still put hand on heart and say it was worth pursuing."[368]

> "…I reckon some of that complexity would never have actually occurred to people in the past but because you've got the ability to dive into different points in much more detail because the Internet exists, you can actually find more information and then people can tell people about issues in a much more open way, you get much more complexity…my point being that the world is much more fast moving and much more complex. *As a result of which the old hierarchies where the person at the top goes, "This is how you do it and I want you to do this, this and this" don't work because their experience of it is probably out-dated and they don't have the context of what's going on at the coalface and therefore they don't have the solution.* They don't know what the problem is so they don't have the right solutions. The answer to that is a flatter structure where you have to use the experience, and I mean not only in age but also actually what's going on in the day at the time and in the moment of everybody within your team, to actually help you solve some of the really complex problems that you have…More than ever in this world, you need to be adaptable and so you're right, *M&A is cookie cutter, but again...They are*

[367] Participant 14.
[368] Participant 18.

> *becoming more individual in the way that things are done, we're coming across issues which are more and more complex*."[369]

5.2.5.3 Balancing Risk and Innovation

Finally, interviewees referenced the need to balance traditional practices and being adaptable to new, potentially risky approaches. Law firms need to be flexible and willing to advise on operational aspects, not just legal ones, to provide comprehensive solutions. This appeared to be entirely performative – a stated recasting of the role of the firm as a different type of adviser which may or may not have evidence behind it. Returning to Butler and their argument that "[i]f the "cause" of desire, gesture, and act can be localized within the "self" of the actor, then the political regulations and disciplinary practices which produce that ostensibly coherent gender are effectively displaced from view,"[370] the focus on the firm developing its offering is misplaced. In fact the firm (along with the individuals within it) is the subject of increasing external – but unknown or unacknowledged – pressures to revise its offering beyond law, despite not necessarily changing its operations in any meaningful way. It is an issue of presentation. Those sources of external pressure are likely to be multiple and complex, but surely go beyond the demands of the market or one would expect a convergence of approach – which the interviewees did not indicate.

> "If all you're doing [it for is] because it's for profit and because you want to basically do exactly how it's previously been done and all the rest of it, you'll get one law firm doing it in one way where they'll step back and go, "Well, we can't do that because we're just not going to pay for that" or you'll get a very technically oriented law firm who goes "Well, I'll advise you on the law, but I can't possibly tell you what your operational guys are doing because I'm too worried about the risk." *So you need to create a law firm that comes across, and you can predict acts in a certain way when those issues happen. And it goes to, I suspect, some issues around you want people who learn quickly. You want them to be adaptable. You want them [to be able] to make decisions quickly.* They want to be confident they can make decisions without asking..."[371]

5.2.5.4 Summary

Faced with a complex transaction, there was consensus that it was a team effort to deal with it. Although there was, undeniably, an individual element to the work – the skills of the specialist lawyer, for example – the key methods utilised were project management team calls, leveraging

[369] Participant 14.
[370] n 27 173-174.
[371] Participant 14.

the collective experience via a non- (or at least more limited) hierarchical structure, and encouraging initiative. The firm as a whole needed to be flexible and willing to advise on operational aspects, not just legal issues, to differentiate itself.

5.3 Conclusion

Interviews with 18 participants on the case study transaction (approximately 90% of those involved in the project from the firm – excluding overseas lawyers) were thematically coded to reveal five key themes: ritual and its role, uncertainty and complexity, communication, teamwork/collaboration, and adaptability and problem solving.

In respect of ritual, its existence in an M&A transaction was acknowledged in the consistency and predictability of the process, and the shared understanding of what was to be done and how the professionals were to set about the task (subject to unusual elements – the breakdown of the ritual). Participants spoke in terms of symbolism and terminology (e.g., due diligence, SPA, warranties, tax deeds) which did not need further explanation (a shared 'language'); stages of the transaction (as identified in Chapter 2) appearing to be performative in the Butlerian sense by way of unthinking repetition reinforcing approaches to transactions. Of note was that the breakdown of the ritual was *anticipated* and determined success.

In respect of uncertainty and complexity, it was acknowledged that elements of the case study transaction were “totally outside of normal practice,” which also drove innovation. There was a concern about balancing ritual processes and taking risks; senior lawyers in particular needed to make strategic decisions and this included, critically, interactions between the lawyers (i.e. whether to involve members of a specialist team). The importance of innovation where the ritual appeared to fall away, is in my view a proxy for performance.

In respect of communication, participants emphasised the importance of personal connections and trust between clients and their legal advisors, with some expression that the reputation of an individual lawyer and the value they bring is important. However, in this instance, almost all participants mentioned the challenge around integrating with local (overseas) lawyers and

working as a single team (with those lawyers and between those based in the UK). Transparency about what was happening in the transaction and regular communication was the only way that this was possible. The weight attached to communicating to the client that the transaction was “unusual” and/or that all the moving parts were being managed from the UK as "one team" was part of the performance. It signposted the difficulty level and foreshadowed any cost implication or, in the worst case, the possibility of things not working.

Teamwork / collaboration was closely linked to communication. Participants emphasised the need to regularly engage with the client (as seen immediately above); more interesting perhaps was the explicit view that bringing in diverse perspectives provided objective analysis. This helped in offering well-rounded solutions to the client, foregrounding team rather than individual performance.

Finally, in respect of adaptability and problem-solving, participants were clear about the need to adapt by analysing the implications of the unusual structure, indicating the need for flexibility and the ability to manage unique transaction structures (again, the ritual breaking down) as a team. There was a suggestion that the ritual is more fragile than initially proposed.”[372] Ways to manage complexity included use of legal project managers and (unusually) regular communication, but more fundamentally a 'flatter' organisational structure which was intended to leverage the collective experience and real-time insights of the entire team, rather than relying solely on the transaction lawyers. This was a collaborative effort.

[372] n 362.

Chapter 6: Discussion

> "…[J]ust the way people interact with each other. How, you know, if you're working in a team environment, how do people get the best out of each other?...[A]nd generally people deal with each other with respect and listen to what they've got to say. You know, whether that always survives the intensity of a corporate deal depends on how time pressured it is, the personality types of the people involved, and all that kind of thing..."[373]

6.1 Recap

In Chapter 1 of this thesis, I set out the context and setting for my research, a large legal firm with adjunct professional services businesses. I outlined my professional status and experience, and described a corporate transaction in the UK, exploring it as a site of research. I described such a transaction in ritual terms, which I justified using an ethnographic perspective. That discussion demonstrated that, just as no ritual would be perfect and no transaction identical to another, some 'other' element was required to complete the process observed in the world. I proposed lawyer performance (individual or collective) as that element. In exploring the well-established links between performance and law, I used performance theory to consider why performance is well suited to fulfil that proposed role and how performance could be assessed in the professional context of the transaction lawyer.

Throughout this discussion the concept of performativity was interwoven, informing both the characterisation of a legal transaction as ritual and the hypothesis that performance fills in the gaps. Although performativity was found to be a nebulous, multi-dimensional concept, as a theoretical lens it permits an interpretation of what the M&A transaction is trying to achieve – maintaining the fabric of society by way of a performance imbued with meaning beyond substance – and a justification for its treatment as ritual. I argued that performativity also makes it possible to describe performance as the residual action where the ritual breaks down. This is on the basis that a professional setting inextricably links participants to a set of processes which dictate their status and the options available to them – the team and the ritual – rather than providing autonomy to create individual norms. Yet, in participating in such a performative process, they must and do contribute individually; where the ritual breaks down, that individual performance continues, itself

[373] Participant 6.

a type of performativity as individuals react to the wider context of the ritual and the fact of the breakdown in a social context (indeed, a hypothetical site of resistance to the ritual).

I further argued that on top of providing a descriptive mechanism, performativity contributed an analytical function. Performative behaviour where identified in complex relationships such as those of professional corporate lawyers, can be used to study the interactions of those performers. The performance will be established in the indeterminacy: in observations of where particular actors are perceived by other actors – including myself, as a participant observer (developed further later in this Chapter) – to have played some unusual role.

In Chapter 4, I reviewed a data set compiled through a narrative review of the case study file and, in Chapter 5, reported the data resulting from a series of interviews conducted with 18 members of a firm of lawyers who worked on a case study, chosen for temporal utility and otherwise at random, at which I worked. In coding the resulting data I found evidence of the ritual, its performative nature, and the importance of a shared understanding of actors in relation to how the transaction was intended to work (a communitarian experience much like the theatre). The interviews revealed five key themes: ritual and its role, uncertainty and complexity, communication, teamwork/collaboration, and adaptability and problem solving. Detailed analysis of each theme was provided in Chapter 5, but in summary:

- The existence of ritual in an M&A transaction was acknowleged in the consistency and predictability of the process, and the shared understanding of what was to be done and how the professionals were to set about the task; breakdown of the ritual was anticipated and determined success.

- Elements of the case study transaction were “totally outside of normal practice,” which also drove innovation.

- Ritual processes had to be balanced against risks; senior lawyers in particular needed to make strategic decisions including when to bring in specialist teams.

- Personal connections and trust between clients and their legal advisors were seen as important; however, almost all participants mentioned the challenge around integrating with local (overseas) lawyers, and working as a single team (with those lawyers and between those based in the UK).

- Weight attached to communicating to the client that the transaction was “unusual” and/or that all the moving parts being managed by the firm in the UK were acting as "one team" – part of the performance.

- There was an explicit view that bringing in diverse perspectives provided objective analysis. This helped in offering well-rounded solutions to the client, foregrounding team rather than individual performance.

- Adaptability and problem-solving was paramount in managing unique transaction structures (again, the ritual breaking down) as a team. Ways to manage complexity included use of legal project managers and (unusually) regular communication, but more fundamentally a 'flatter' organisational structure leveraged the collective experience and real-time insights of the entire team, rather than relying solely on the transaction lawyers. Although there was, undeniably, an individual element to the work - the skills of the specialist lawyer, for example - the key methods utilised to adapt were utilising collective experience.

6.2 A new understanding of M&A practice?

Against this background, it is possible to discern a different justification for how and why M&A transactions run in the way that they do, providing an explanation for some of the behaviour which emerged in the project, which to the outsider or *uninitiated* may seem strange but is regarded as quite normal to transaction lawyers.[374] Two examples stood out – both already mentioned in passing and both the cause of friction in the transaction.

[374] Ondřej Glogar, ‘The Concept of Legal Language: What Makes Legal Language ‘Legal‘?’ [2023] 36 International Journal of Semiotics and Law 1081; Peter Tiersma, *Legal Language* (The University of Chicago Press 2000).

6.2.1 Examples

The first took place during the already fraught discussion around the scope of the due diligence exercise. A discussion between the client and their lawyers about the capacity of the client to identify and provide pieces of information likely to be required by a bidder for the business to be sold, led to a throw-away but telling internal exchange where a junior member of the legal team asked whether a word copy of a document held in pdf form could be requested. The senior lawyer responded: "we should be asking for the word doc[ument] and not going to ridiculous lengths here."

The second emerged as part of the discussion of how purchase funds were to be dealt with (with debt set off against purchase funds, a so-called net-debt position) and the client queried whether this was trying to "solve a problem that we may not know is an issue for the buyer." In other words, why not just say what our client wants and wait for a response? That was agreed, but the lead lawyer explained that for local law reasons a paper exercise where funds circulate round the group of companies on completion – a typical solution – would not work.

The idea of going to extraordinary lengths to avoid asking a client for information; agonising over whether to ask for word copies of certain documents; preparing for a course of events before your client suggests that the approach is dealing with a phantom problem may seem anathema to those practitioners and observers who search for 'efficiency'. Indeed, the point of embedding a legal project management function into the team was to try to ensure both that the client received a seamless service on time and to budget and that the recovery rate for the firm (a percentage figure taken from amount that is proposed to be billed against time recorded multiplied by standard charge out rates) remained stable and was ultimately, achieved. Why are lawyers behaving in this way?

6.2.3 Impact of the cultural landscape

The firm and its representatives are required to take this approach – overpreparing and at times excessively deferential – not because that gets the job done more efficiently (it manifestly does

not), but because this is the cultural landscape within which the client and the lawyers operate. This is true even if neither acknowledges or understands those preconceptions: in Butler's view of gender, the very concept of gender is a cultural expression of power, with the failure to recognise those at the margins being a deliberate exercise in exclusion; in the context of an M&A transaction the ritualised process and the symbiotic relationship between lawyers (as service providers) and clients act to impose boundaries and to exclude all alternatives.

I accept that Butler sought to challenge cultural norms that run much deeper and have persisted for far longer than approaches to professional labour. Yet taking such an ontological view, considering the observed behaviour, is instructive as it illuminates the underlying pressures on legal professionals. Practitioners will recognise readily the discussion in the staff kitchen that begins 'We don't need to do it this way…' before blame is placed on inefficient processes, poor management, demanding clients, a culture of hard work, an intolerable fear of mistakes and other factors. While all of these factors have a role to play in the way M&A transactions take place – the late hours, the occasionally adversarial tone, the 'unreasonable' demands of clients – a performative analysis gives an opportunity to challenge those accepted norms of behaviour by challenging the idea of service which is so intrinsically linked to the role that it finds its way into the umbrella term of the 'professional services' sector.

In Chapter 1, I discussed the concept of critical performativity: in an institutional context (the framework within which organisational actors operate), this involved acting purposively to enact change against a dominant narrative or, in enabling management actors to influence practice by repetition of statements that act to effect cultural norms.[375] This is both an example of the application of Butler's ideas to institutional / organisational matters,[376] but also an indication that being critical of the framework within which lawyers operate consciously or sub-consciously can tell us something about the nature of practise and – perhaps – indicate how it could be done differently.

[375] Leca and Cruz (n 25); Beunza and Ferraro (n 25); Spicer et al (n 96).
[376] Although I acknowledge criticism that this, in fact, misunderstands Butler's work – see Cabantous et al (n 97).

6.2.3 Dispensing with "service"

The concept of client 'service' and its designation as 'good' or 'bad' can be entirely bypassed, with the focus instead on the cultural emphasis on the ritual. Having established evidence for the ritualised process, the behaviour surrounding the ritual is inherently linked to its progress and process. This repeating behaviour creates the understanding that this is how this work must take place and therefore does take place. Yet performativity is illusion: that the outward performance of a role reveals a deeply held skill or attribute whereas in fact it is a mirage, the performance being accepted by the audience makes it 'true'. For Butler, performative norms are defined by what they are not: it is the repeating mimicry of culturally accepted gender norms that create the understanding that gender is real rather than fiction: "our gendered behaviour seems to be an aspect of a natural or given identity, but that identity is itself a product of the performative process."[377] Viewing an M&A transaction through a performative lens suggests that the behaviours linked to the M&A ritual are not inherent to the practice of corporate law, but rather are reinforced as part of the practice of the ritual.

If this is correct, it is possible to challenge the approach. First, on this analysis the client is no longer interested in receipt of a 'good' or 'bad' service, but rather that the transaction proceeds in accordance with expectations of how a law firm behaves. It is therefore open to reassess what the client actually finds useful, with the implications for practitioners that such a reassessment suggests. Second, the ritual could be revisited. This goes beyond the documentation to the approach taken by the parties. What might change is beyond the scope of this research – the idea is to identify the potential for challenge.

6.3 Individual superstars? No, it takes a village…

6.3.1 Theatre in moments of rupture

Moments of rupture, of break down in the ritual of the M&A process, suggested performance is important but there was very little evidence that in those moments individuals were making

[377] n 27 125.

choices that were of note. Leadership was valued, but decision-making was about the reputation of the team and the firm; action was collective. What developed was choreographed decision-making – engagements behind the scenes that emerged in presentational stages, first to the client, and then in an agreed position to the other side. This is theatre.[378]

This is most clearly seen in the procedural elements of the transaction, although it is equally applicable to its substance. Here we can revisit Cho and Trent's three stage assessment of performance in the context of positioning emails which were common as the negotiations progressed and documents shared. [379]

- Stage 1: The client asked the firm to suggest to the other side that their lawyers move more quickly.

- Stage 2: A conversation took place about how this should be presented.

- Stage 2a: Saw the lawyers discuss internally how to approach this request; activity that could as easily have been a Stage zero i.e. deciding how to approach the client with a question.

- Stage 3: An email was sent directly: "…please could I ask that you share high level feedback on the deal structure as reflected in the [share purchase agreement] earlier than the end of this week, ideally by close of play tomorrow? It is important for any key structural or commercial issues to be raised as soon as possible this week in order for us to meet the timetable that our respective clients would like to work to."

- Stage 3 from the opposite side of the transaction: The response was an unhurried one: they would talk to their client two days later (with Stages 1 and 2 from the opposite side

[378] Goffman (n 36); Turner (n 50).
[379] n 150.

of the transaction inherently following as positioning was established i.e. how best to (tactically, practically) present the response agreed).

These types of interactions indicate the importance of presentation to both clients and lawyers. There is a pre-performance element where the lawyers and clients communicate, deciding what they want to say to the other side; there is a performance element where the lawyers move centre stage and act as messenger; and a post- performance debrief where the points or reactions of the other side are considered.[380] This supports the hypothesised importance of performance. The unexpected result of this analysis is the lack of focus on individual lawyers.

6.3.2 Individual performance?

Before moving on to consider individual performance, or the lack of evidence for it, what is meant by 'firm' as opposed to 'individual' performance? Firm performance is the presentation of a collective firm-wide view to the client, including both conscious and unconscious decisions by the representatives of the firm to present items in a certain way not for their own benefit but to further the interests of the organisation. Individual performance would be behaviour designed to foreground the individual – it may have the effect of promoting the interests of the firm by association (if in an external, world-facing context), but there was an intention or the effect would be to make the individual visible. The transaction was certainly influenced by individual *interests* such as the use of a legal project manager which at the time at which the transaction took place was still relatively unusual, a function of the lead partner being particularly interested in that aspect of practice, having a particular view on efficiencies. This is distinguishable from performance: it was part of the constitution of the team which, while enlarged, was not aimed at individual performance although likely to have contributed to the overall performance of the team.

External instances of individual performance were only identified where firm performance seemed to be at risk. So, for example, the senior partner on the transaction responded to the issue raised by the client around the extent of the due diligence enquiries. It is an unspoken client and lawyer expectation that the appropriate person to respond to that query was the most senior member of the team, despite it being the most junior members of the team who were compiling the

[380] ibid.

questionnaire. As we can now recognise, the ritual that constitutes the transaction has reached a crisis point and, where it drops away, the uncertainty requires a corresponding performance.[381] A response by the senior partner on the transaction is part of the iterative process by which every other successful transaction has proceeded: there was no technical need for the senior partner to provide the explanation (indeed, they were worst placed from an understanding of this procedural part of the assignment, having delegated as is usual practice to the more junior members of the team), rather it was culturally assumed such that the client expected *the firm* to respond in this way. In other words, the role is important, not the person or personality.

Individual performance manifested internally. Negotiations with the client about fees and providing reassurance that the firm had the experience to carry out the project required the contributions and experience of other senior lawyers in the firm in order to assess the theoretical position of the market. Even this morphed into firm performance when provided to the client i.e. the discussion did not involve individuals but a demonstration that the firm collectively understood what the transaction involved given its purported scope in the context of the market.

Similarly, there were markers of more junior members performing to the senior members. Again, this was two-fold. As a result of the pandemic-required 'stay and home' measures in place at the time of the transaction, the team was home-based. As a result, it became possible to have an international team in a way that would not have been established pre-Covid. The junior lawyer running the process was based outside the UK, co-opted on to the transaction by reason of prior familiarity with the client and its previous transactions. The internal exchanges were peppered with "If there is anything else I can help with…"; "I'd be happy to pick that up…". The liminal space between being a lawyer turning their mind to a particular issue and a junior instructed to carry out a piece of work meant that there was a permanent performance, whether to senior lawyers or to the client.[382] Performing the role at a junior level appeared to be similar regardless of audience; something not true, as previously discussed, at senior level.

[381] Turner (n 50).
[382] ibid.

Viewed from this perspective, it appears that performance at an individual level could be said to be important but only to the extent that it furthered what one might call ‘client care’. In other words, the performance will have an impact on how the transaction develops only to the extent that the central element of communication with the client in a particular, culturally accepted, way falls away. In that sense, it is arguable that individual lawyer performance which detracts from that communal approach may actually risk undermining the business model.

6.3.3 It’s a team effort…

Team performance revolved around the impression given to the client. As is so often the case, this is most aptly demonstrated in the administrative elements of the project.

At the outset, it was made clear by the senior partner on the project that time recording (the six-minute increments that the legal world uses to record the work done on any given client file and which is translated into fees) – and therefore fee management – was going to be crucial to the success of the transaction. Carefully parsing the time spent on different administrative aspects of the project demonstrate the approach to the client and the internal expectation of challenge, especially given the starting point of competitive pricing: “can you put your time for the weekly internal calls to ‘project planning’ and time on external project management calls to ‘Regular Calls’. That will help when we come to justify our time in due course.” Similar, was the use of project management techniques such as a Kanban Board and project log of (including risks and actions). Relatively innocuous issues raised about the number and substance of due diligence questions result in different responses internally and externally.

Internally, the team went to considerable lengths to make sure that information requested would be fit for purpose for the future transaction but reduced in length from what one would normally expect as part of the ritual. Externally, the response had an element of euphemism: while it was difficult to strike the right balance, the questions had been carefully considered and were not intended to be onerous – but would be reviewed again. The subtext to the message, that the client’s point was absolutely taken but that the firm through its representative lawyers was aware of it and had anticipated the issue as best it could. The frequent use of euphemism or innocuous

but loaded language, such as "…might be worth a quick discussion"; "…impact on timetable…" was a marker of the delicacy with which client communications were treated. It remained a response *from the firm*.

When a major antitrust (competition) issue arose, it was the firm's specialist competition team which took the lead. So far, as one would expect in a major firm with established capabilities. Yet if one considers this further, the idea behind involving this team – from the transaction lawyers' perspective – was to ensure the lowest level of risk. When the first draft of the share purchase agreement was published, it was caveated on the basis that all competition risk would lie with the buyer: "an area where we can expect some push back from the purchaser as the proposal develops but hopefully this reflects our "best position"". Through the lens of performativity, this is an act – a presentation of a position to the client (credibility through signalling competence and control while flagging that the client should be aware, *as we know you are*, that things may change) and to the other side (this is our position). It is a liminal space where the behaviour may be 'real' or 'cited'. The uncertainty is inherent in negotiation and will only be resolved (to the extent it ever will be) by conclusion of the transaction.

This is suggestive of where individual performance might have a role to play. The breakdown of the ritual has the effect of creating indeterminacy where previously there were rules or norms, being – as we saw above – the cultural expectations of 'how a transaction should run and be run'. Such cultural determinations also involve inconsistency and will change and develop and perhaps even fall away over time; it can only ever be a partial framework.[383] There are two possible avenues to participants in the transaction: to try to 'harden' social rules to limit that indeterminacy and/or to try to exploit the uncertainties.[384] The former might manifest in the lawyer's plea that a position is 'not market', appealing to a rigid framework of cultural norms, deliberately failing to acknowledge that they change over time, that market practice develops. The latter might manifest in the lawyer's assertion that 'this is a point on which practice is developing, but our considered view is that…', seeking to find an advantageous position on a new point. Both positions – and a mixture is entirely possible – would rely on an assertion by an individual that the position reflected

[383] Falk Moore (n 112).
[384] ibid; Turner (n 50).

their professional experience, personalising the assertion. There was no evidence of such posturing in the transaction under review and, although apocryphal stories abound, it is suggested that this would be the exception.

6.4 Towards a performative model

As suggested above, viewing the M&A process through a performative lens suggests that the behaviours linked to the M&A ritual are not inherent to the practice of corporate law, but are reinforced as part of the practice of the ritual. Clients lose sight of the level of service, observing only whether the transaction proceeds in accordance with expectations of how a law firm should behave. Lawyers, on the other hand, frequently and repeatedly concern themselves with presentation to the client.

If the M&A ritual is performative as both a remedy to social drama[385] and a self-perpetuating and self-fulfilling activity (framed within and subject to prevailing cultural expectations),[386] then the question becomes one of actualisation. What is it that the transactional lawyer is seeking to achieve and how best does that support the client and their (the lawyers') working life?

Collaboration and communication do considerable work in progressing ritual as a solution to social drama (see Chapter 5). The liminal space of the schism between not owning and owning a business calls for collaboration.[387] There is an ingrained internalisation of this for transactional lawyers – their role requires not an individual superstar but a collaborative model. In Butler's terms this is forced because the cultural consequences of departure from the ritual are too great.[388] In practical terms, in this instance it was not appropriate for the transaction lawyers to agree issues around competition law compliance that was, within the strictures of the prevailing legal culture, a matter for specialists. To do so would leave them exposed professionally to the client. Even the competition lawyers opining on the structure only gave advice caveated that they were not dealing with local law. Local lawyers provided caveats that they were not involved in the overarching transaction. Although stated in negative terms this is nevertheless a collaborative effort, brought

[385] ibid.
[386] Butler (n 27); Spicer et al (n 90).
[387] Turner (n 50).
[388] Butler (n 26 and n 27).

about in as much as responsibility is restricted by cultural norms of community of legal professional advisers (at least, in the Western legal world).

The outcome of this reappraisal is not that the substance of transactional M&A work would change, but its practice. Unnecessary and inefficient concerns about presentation can be dispensed with for the lawyers. Understanding that the ritual is a collaborative enterprise where the client is concerned at a macro level with the firm rather than individuals may make day-to-day transactional practice more tolerable. Further, understanding that the techniques employed – long working hours, turning documents late at night to unreasonable timescales, agonising behind the scenes about client assessment of progress and whether or not to 'bother' the client with minutiae – are cultural norms that contribute to an assessment of how a law firm 'should' perform may be of assistance in recalibrating the approach of the profession. Rather than lawyers being at the mercy of clients requesting 'progress', it hints at a rebalance.

Conclusion and Future Work

A Conclusion

As a result of this case study I submit it is possible to characterise an M&A transaction as a ritual, repeated in order to satisfy a social need – the transfer of property. This was confirmed as a shared understanding by the interview participants, evidenced in the way in which participants spoke about the case study being a 'standard deal' and about expected outcomes. Unexpectedly, many participants indicated that ruptures in the ritual – areas where the accepted performance breaks down – were anticipated. It was at these points of hard decision-making that performance and performativity come to the fore.

The ritual itself is performative in a Butlerian sense as demonstrated in Chapters 2 and 4: the essence of a transaction is set out in advance; the way in which it is structured is anticipated and that enables the opposing lawyers and interested parties (buyer and seller) to start the process. When the ritual breaks down it is performance of individuals and individual teams that fills the gap – not only does it, but it *must* fill the gap as breakdown of the ritual appears to be *part* of the ritual. The ritual cannot be all-encompassing because no two transactions can ever be exactly the same. Nevertheless, lawyers working within this framework seem to be trapped within it.

At the end of Chapter 5, I argued that a performative view of a transaction permitted recognition that much of the ritual is not inherent to the practice of law but emerges from the performance of transaction lawyers and their clients. I suggested that this may enable a reassessment of how such transactions should take place. To that position, I add two things.

First, that critical performativity – the idea that a teleological use of performative activity can be used to make real-world change – has a role to play. Changing the statements made about the way in which M&A transactions take place is a way (the only way?) to challenge the prevailing norms, being the accepted culture that has developed around how M&A transactions (at least in the UK) are done.

Second, my hypothesis was that with breakdown of the ritual individual performance would become critical. By this, I mean the skills knowledge and attitude of the individual lawyer in whatever part of the ritual they are performing – generally this will be a senior lawyer as the individual with the client relationship. It turns out that this is not the case although it does appear that, if only in the stated beliefs of the lawyers interviewed, this is regarded as an important part of leadership. What came across much more strongly in the analysis was the importance of collaboration and teamwork in carrying on the ritual in its breakdown (or rather, given what I have concluded above, in the absence of structure that is built into the ritual). For example, in this instance getting the transaction to run more smoothly was built around interactions between specialist teams and the transaction lawyers. This furthered the interests of the client because it permitted a wide breadth of knowledge and a solutions-based approach.

What this means for individual lawyers is that the practise of law may be better served by the creation and maintenance of collaborative internal working relationships, as much as internal or external individual performance. As in any field there will be 'stars' who are considered to have a particular talent or aptitude whether in understanding the law, dealing with clients, or dealing with internal teams. Yet the overall message from the participants was that while individual performance had a role, it was one that sat in the context of a collaborative environment. It is that collaboration that is generative and perhaps critical for differentiating one firm from another, creating a 'smooth' transaction.

Such a conclusion may appear vague and excessively focussed on practitioners, but the implications for practice could be significant. For example, might it be possible to collapse the client-advisor distinction and create a transaction steering group, bringing together commercial, legal and operational input into one decision-making process? This would not be easy – practical issues around responsibility, professional liability, and conflicts of interest would all militate against such an approach. Yet, through the lens of performativity, if the M&A ritual is decoupled from legal outcomes and identified as convention, the community of stakeholders – market participants, oversight bodies, legislators – could make different choices. As legal practice faces

changes to its fundamental model from the rise of artificial intelligence-enabled technologies, making efforts to look beyond its cultural norms is apposite, even necessary.

B Future Work

A brief final word on how this research could be further developed.

Carrying out the research on a larger scale, considering different transactions, would provide a more comprehensive data set. This could be done using the themes established and/or with the participant base extended to include lawyers on both sides and, potentially, clients. This must include analysis in the context of power relations.[389]

This would be a much larger project, perhaps over a number of years, and one that would need significant ethical approval particularly where the clients are concerned. They would, I anticipate, need to be advised of the intention behind the project, assured of confidentiality, and to understand, quite reasonably, the benefit to them.

Benefit is likely to be seen in the creation of best practice guidelines for carrying out transactions. I am not aware that anything similar exists and there is still in the profession excessive regard for seniority and an expectation that senior people are able to perform in a particular manner simply because they have been promoted to a certain level.

[389] See n 305 onwards.

Appendices

Appendix 1: Methodology table

Overall positioning	Interpretative constructivist paradigm with a view to conducting a transcendental phenomenological analysis.			
Research Question	**1.**	**2.**	**3.**	**4.**
	Is it possible to describe a UK law governed share sale and purchase ('M&A transaction') in ritual terms?	**In comparing a real-world M&A transaction to the model established, what are the differences i.e. where does the ritual break?**	**Where the ritual breaks down, does the performance of individual lawyers emerge?**	**What are the implications for wider legal professional practice (if any)?**
Background Literature Review Questions	(a) What is meant by 'ritual'? (b) How have legal activities and processes been described in ritual terms? (c) What does a model M&A transaction look like? (d) Can such a transaction be described in ritual terms? Why could it be of use to do so?	What – in descriptive terms – bridges the gap?	(a) What does 'performance' mean? (b) Does 'performance' bridge the gap? (c) If arguable, how can it be assessed? (d) Is there 'performance' / 'performativity' threaded throughout the practice of law? How is it different here? (e) What does this reveal about the role of lawyer performance in M&A transactions?	(a) What are the difficulties with / how far can the conclusions of a small study be extrapolated to wider practice? (b) How does or might conducting the research in my organisation limit the interpretation, transferability or replicability of the results? (c) What are suggestions for continuing the research against such a background?
Doctrinal Work	Review of relevant case law and practitioner commentary to establish model M&A transaction eg references to "typical structure", "common approach"			
Data Collection	Experience-based chapter, supported by literature review.	(i) Review of one or two recently completed M&A transaction(s) at the subject firm to find out sites of breakdown eg "this isn't market practice". (ii) Semi-structured interviews with participant lawyers to find out how they perceived behaviours in getting deal done (and establish any correlation with (i)). (iii) Questionnaire to clients under consideration to find out perception of lawyer performance as against "standard business". **Sample:** Two files (each c.1500 emails and a full suite of documents). Range of team for a standard transaction between 7 and 10 lawyers.		
Data Analysis		Content / thematic analysis of file(s) and semi-structured interview transcripts by way of a description-focused / interpretation-focused coding approach, using NVivo or similar.		
Theory	Turner – rituals and social drama; liminality and 'fault lines'. Falk Moore – law and legal processes not as culmination but evolution, through (i) regularisation: the acceptance of norms, (ii) situational adjustment: the need to revise norms, and (iii) indeterminacy: state of constant flux.	Goffman – general idea of performance in a social world. Austin / Foucault / Butler – performativity of language (Austin), agency as an illusion (Foucault), neither performativity *or* agency are conscious decisions but instead dictated (Butler); link to professionalism, hierarchical and fixed roles on an M&A transaction. Schechner – assessment of complex relationships; performance "quadrilogue". Cho and Trent – three-step method for performance assessment: as intended, as performed, reflections.		Conclude – interaction of ritual, performance and legal practice. Acknowledgement and investigation of insider status. Moustakas – bracketing of own views.

Appendix 2: Infographic used for internal purposes

PHD INFO

"LET ME TAKE INSTRUCTIONS ON THAT"

Lawyer performance in an M&A transaction

Tom Proverbs-Garbett | University of Birmingham

The project is based around a study of legal professionals. It considers the role the performance of lawyers plays in practice. It is based around the ethnographer's concept of "ritual" and adopts analytical tools from the study of performance, particularly the notion of performativity - the idea that the very act of performing, rather than its substance, has real-world consequences.

HOW IS THIS MODELLED?

RITUAL

An M&A transaction modelled in ritual terms. Do sites of rupture appear - areas where that ritual model breaks down - in the real world?

PERFORM

Performance fills those liminal sites of rupture as a fixing agent, and can be discerned using particular forms of analysis - before, during and after the act.

OUTCOME

What does this indicate about the role of performance in M&A transactions? Is it possible to extrapolate to the wider practice of law?

WHAT DO I NEED?

Files

One, ideally two, recently completed share purchase transactions - of the "just right" variety.

A follow up interview

A short individual interview with as many members of the team - inc. specialists as possible.

Consent

To use your responses in the research. Nothing will be credited by name; the focus is on generalities.

Is performance an underrated factor in the practice of law?

What might the data set describe in terms of privilege?

Appendix 3: Interview schedule and initial questions

Housekeeping

Consent form - have you read it? If ok to continue, perhaps you would be able to return it, just confirming you agree or e-sign or send me an email, attaching it, confirming consent.

Should highlight:

- No one will see the material apart from you, me and possibly my supervision team at the university. So it's a totally open, totally safe space.
- I'm not testing your legal acumen or knowledge of the law or the transaction or anything like that. I'm taking a much more macroscopic view of the project and I'm interested in behaviour and experience. So if you don't have experience of something, just say.
- You can decline to answer any or all questions and you can terminate your involvement in the interview at any time if you choose.
- I'll send you a transcript once the interview has been completed, you will send to you. You may withdraw your interview from the research project if within one month of the date of interview.
- Treat me initially - it won't be the case all the way through - but treat me initially as if I know nothing about what you do.

Initial questions (semi-structured, so just a starting point):

- Tell me about your role in the business.
    - What sort of work have you been doing so far at the firm?
- How did you get involved [in the transaction]?
- Can you give me a break down of the project? [How much did you know about it?]
- What would be your usual role on a transaction like this?
    - Is that what you did?
- How did you work with other lawyers?
- Did the transaction seem typical to you?
    - [You might not have much experience -]I'm thinking of areas where people said, "we don't normally do it like that".
    - Were there any memorable moments? [When things went well or not so well…]
    - What happened? [Did other people get involved? Who and how?]
- How did you feel about your contribution? [Did it feel like a typical [trainee][associate][senior associate] role? Were your ideas listened to?]
- Is there anything else you want to say / ask?

Appendix 4: Participants

Participant	Date and time of interview	Position
1	23 August 2021 @ 16.30	Trainee
2	24 August 2021 @ 10.15	Associate
3	25 August 2021 @ 11.00	Trainee
4	25 August 2021 @ 15.00	Senior Associate
5	26 August 2021 @15.30	Partner
6	27 August 2021 @ 10.00	Legal Director
7	27 August 2021 @ 14.30	Associate
8	1 September 2021 @ 11.00	Partner
9	1 September 2021 @ 15.30	Paralegal
10	3 September 2021 @ 16.30	Partner
11	7 September 2021 @ 08.30	Senior Associate
12	8 September 2021 @ 11.00	Solicitor
13	9 September 2021 @ 15.15	Legal Project Manager
14	10 September 2021 @ 10.00	Partner
15	13 September 2021 @ 11.00	Partner
16	13 September 2021 @ 16.00	Trainee
17	16 September 2021 @ 16.00	Senior Associate
18	25 February 2022 @ 15.00	Partner

Bibliography

Articles and Books

Adams, K, 'The New Associate and the Future of Contract Drafting' [2011] New York Law Journal 4.

Adams, W, 'Conducting Semi-Structured Interviews' in Kathryn Newcomer, Harry Hatry and Joseph Wholey (eds), *Handbook of Practical Program Evaluation* (Jossey-Bass 2015).

Adu, P, *A Step-by-Step Guide to Qualitative Data Coding* (Routledge 2019).

Alifirević, S, 'Performance Studies as New Anthropology of Events' [2017] 12 AM Journal of Art and Media Studies 149.

Alogna, F, and Savitt, W, 'The Versatile M&A Lawyer: Bridging the Gap Between Courtroom and Boardroom' [2017] 72 Business Lawyer 719.

Austin, J.L., *How To Do Things With Words* (Harvard University Press 1962).

Ballakrishnen, S, and Dezalay, S, 'Law, Globalisation and the Shadows of Legal Globalisation' in Swethaa Ballakrishnen and Sara Dezalay (eds), *Invisible Institutionalisms, Collective Reflections on the Shadows of Legal Globalisation* (Hart Publishing 2021).

Balmer**,** J, *Piecing Together the Fragments: Translating Classical Verse, Creating Contemporary Poetry* (Oxford University Press 2013).

Berkman, J, *Due Diligence and the Business Transaction: Getting a Deal Done* (Apress 2013).

Berkovic, D, Ayton, D, Briggs, A, and Ackerman, I, 'The View From the Inside: Positionality and Insider Research' [2020] 19 International Journal of Qualitative Methods 1.

Beunza, D, and Ferraro, F, 'Performative Work: Bridging Performativity and Institutional Theory in the Responsible Investment Field' [2018] 40 Organization Studies 515.

Bial, H, and Brady, S, (eds), *The Performance Studies Reader* (3rd ed, Routledge 2016).

Bigger, S, 'Victor Turner, Liminality, and Cultural Performance' [2009] 30 Journal of Beliefs & Values 209.

Bourdieu, P, *Habitus and Field: General Sociology, Volume 2* (1982-1983) (Polity 2023).

Bradney, A, ''It's About Power': Law in the Fictional setting of a Quaker Meeting and in the Everyday Reality of 'Buffy the Vampire Slayer'' [2006] 6 Issues in Legal Scholarship (i).

Braun, V, and Clarke, V, 'Using Thematic Analysis in Psychology' [2006] 3 Qualitative Research in Psychology 77.

– – *Successful Qualitative Research: A Practical Guide for Beginners* (Sage 2013).

– – 'One Size Fits All? What Counts as Quality Practice in (Reflexive) Thematic Analysis?' [2021] 18 Qualitative Research in Psychology 328.

Bukamal, H, 'Deconstructing Insider–Outsider Researcher Positionality' [2022] 49 British Journal of Special Education 327.

Butler, J, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

– – *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999).

Butler, N, Delaney, H, and Spoelstra, S, 'Risky Business: Reflections on Critical Performativity in Practice' [2018] 25 Organization 428.

Cabantous, L, Gond, JP, Harding, N, Learmonth, M, 'Critical Essay: Reconsidering Critical Performativity' [2016] 69 Human Relations 197.

Carney, G, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' [2015] 36 Statute Law Review 46.

Cassell, C, 'Template Analysis' in Richard Thorpe, Robin Holt (eds), *The SAGE Dictionary of Qualitative Management Research* (Sage 2008).

Chaffer, A, 'High Court Clarifies Whether Warranties are Representation in Share Purchase Agreements' [2017] 38 Company Lawyer 290.

Chavez, C, 'Conceptualizing from the Inside: Advantages, Complications, and Demands on Insider Positionality' [2008] 13 The Qualitative Report 474.

Cho, J, and Trent, A, 'Validity Criteria for Performance-related Qualitative Work: Toward a Reflexive, Evaluative, and Coconstructive Framework for Performance in/as Qualitative Inquiry' [2009] 15 Qualitative Inquiry 1013.

Clark, E, Draper, J, and Rogers, J, 'Illuminating the Process: Enhancing the Impact of Continuing Professional Education on Practice' [2014] 35 Nurse Education Today 388.

Cohen, T, Helzer, E, and Creo, R, 'Honesty Among Lawyers: Moral Character, Game Framing, and Honest Disclosures in Negotiations' [2022] 38 Negotiation Journal 199.

Collins, C, and Stockton, C, 'The Theater of Qualitative Research: The Role of the Researcher/Actor' [2022] 21 International Journal of Qualitative Methods 1.

Collins, H, and Evans, R, *Rethinking Expertise* (University of Chicago Press 2009).

Corbin Dwyer, S, and Buckle, J, 'The Space Between: On Being an Insider-Outsider in Qualitative Research' [2009] 8 International Journal of Qualitative Methods 54.

Cover, R, 'Nomos and Narrative', [1983] 97 Harvard Law Review 4.

Dawson, F, 'Essential Terms and Condition Precedent' [2017] 133 Law Quarterly Review 183.

De Vaus, D, *Research Design in Social Research* (Sage 2001).

Deggs, D, and Hernandez, F, 'Enhancing the Value of Qualitative Field Notes Through Purposeful Reflection' [2018] 23 The Qualitative Report 2552.

Denzin, N, 'Performance texts' in William Tierney and Yvonna Lincoln (eds), *Representation and the Text: Re-framing and the Narrative Voice* (University of New York Press 1997).

– – 'Reading and Writing Performance' [2003] 3 Qualitative Research 243.

– – *Performance Ethnography* (Sage Publications 2011).

DePamphilis, D, *Mergers, Acquisitions, and Other Restructuring Activities* (Elsevier Science & Technology 2015).

Deriu, F, 'Performance Studies Floating Free of Theatre: Richard Schechner and the Rise of an Open Interdisciplinary Field' [2013] 26 Alicante Journal of English Studies 13.

Derrida, J, *Limited Inc* (Northwestern University Press 1988).

Dinovitzer, R, Gunz, H, and Gunz, S, 'Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice' [2014] 51 American Business Law Journal 661.

– – 'The Changing Landscape of Corporate Legal Practice: An Empirical Study of Lawyers in Large Corporate Law Firms' [2015] 93 Canadian Bar Review 343.

Doshi, B, and Thomson, S, 'Warranties and Indemnities in Contracts: Protecting and Exploiting IP' [2007] 2(6) Journal of Intellectual Property Law & Practice 377.

Elbers, N, van Wees, K, Akkermans, A, Cuijpers, P, and Bruinvels, D, 'Exploring Lawyer–client Interaction: A Qualitative Study of Positive Lawyer Characteristics' [2012] 5 Psychological Injury and Law 89.

Evans, C, and Lewis, J, 'Analysing Semi-Structured Interviews Using Thematic Analysis: Exploring Voluntary Civic Participation Among Adults' [2018] Sage Research Methods Datasets, <https://methods.sagepub.com/dataset/interviews-thematic-civic-participation> accessed 30 March 2025.

Falk Moore, S, *Law as Process: An Anthropological Approach* (Routledge 1978).

– – 'Comparison: Possible and Impossible' [2005] 34 Annual Review of Anthropology 1.

Farrell, F, 'Iterability and Meaning: The Searle-Derrida Debate' [1988] 19 Metaphilosophy 53.

Fawkes, J, 'Performance and Persona: Goffman and Jung's Approaches to Professional Identity Applied to Public Relations" [2015] 41 Public Relations Review 675.

Fife, W, *Doing Fieldwork* (Palgrave Macmillan 2005).

Flick, U, *An Introduction to Qualitative Research* (SAGE Publishing 2009).

Friedman, L, 'Coming of Age: Law and Society Enters an Exclusive Club' [2005] 1 Annual Review of Law and Social Science 1.

Galleta, A, *Mastering the Semi-Structured Interview and Beyond* (New York University Press 2013).

Geddes, A, Parker, C, and Scott, S, 'When the Snowball Fails to Roll and the Use of 'Horizontal' Networking in Qualitative Social Research' [2018] 21 International Journal of Social Research Methodology 347.

Glogar, O, 'The Concept of Legal Language: What Makes Legal Language 'Legal'?' [2023] 36 International Journal for the Semiotics of Law 1081.

Goffman, E, *The Presentation of Self* (Anchor, 1959).

Gold, J, Thorpe, R, Woodall, J, and Sadler-Smith, E, 'Continuing Professional Development in the Legal Profession: A Practice-based Learning Perspective' [2013] 38 Management Learning 235.

Gulati, M, and Scott, R, 'The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design' [2011] 40 Hofstra Law Review 1.

Gunz, H, and Gunz, S, 'Client Capture and the Professional Service Firm' [2008] 45 American Business Law Journal 685.

Halsema, A, and Halsema, L, 'Jobs that Matter: Butler's "Performativity" in the Dutch Police Force' [2006] 3 Critical Perspectives on International Business 230.

Hamzehee, J, ‘Adaptation Unites Us! A Call for Performance Studies and Forensics Interpretation to Adapt with Each Other’ [2023] 43 Text & Performance Quarterly 212.

Hightower, R, ‘M&A Without a Map: For Daredevils Only!’ [2009] 20 The Journal of Corporate Accounting & Finance 59.

Hollander-Blumoff, R, and Bodie, M, ‘The Market as Negotiation’ [2021] 96 Notre Dame Law Review 1257.

Howson, P, *Due Diligence: The Critical Stage in Mergers and Acquisitions* (Taylor & Francis Group 2003).

Hunter, L, ‘Being In-between: Performance Studies and Processes for Sustaining Interdisciplinarity’ [2015] 2 Cogent Arts & Humanities 1.

Information Commissioner's Office, ‘Guide to the UK General Data Protection Regulation (UK GDPR)’ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/> accessed 30 March 2025.

Jackson, S, ‘What is the “Social” in Social Practice?: Comparing Experiments in Performance’ in Tracy Davis (ed), *The Cambridge Companion to Performance Studies* (Cambridge University Press 2008).

Javadi, M, Zarea, K, ‘Understanding Thematic Analysis and its Pitfalls’ [2016] 1 Journal of Client Care 34.

Jenkins, R, *Pierre Bourdieu* (Taylor and Francis, 1992).

– – ‘Erving Goffman: A Major Theorist of Power?’ [2008] 1 Journal of Power 157.

Jones, A, and Kimbrough, S, ‘The Normative Aspect of Signalling and the Distinction Between Performative and Constative’ [2008] 6 Journal of Applied Logic 218.

Kawulich, B, 'Participant Observation as a Data Collection Method' [2005] 6 Forum: Qualitative Social Research 43.

Kershaw, B, ‘Performance as research: live events and documents’ in Tracy Davis (ed), *Cambridge Companion to Performance Studies* (Cambridge University Press 2008).

Kivunja, C, and Bawa, A, ‘Understanding and Applying Research Paradigms in Educational Contexts’ [2017] 6 International Journal of Higher Education 26.

Klamrzynski, G, and Grieb, C, 'Fundamentals of Middle-market Acquisition Financing' [2015] 132 The Banking Law Journal 92, 93.

Klusmeyer, D, ‘Violence, Law, and Politics: Hannah Arendt and Robert M. Cover in Comparative Perspective’ [2015] 34 Criminal Justice Ethics 312.

Korobkin, D, ‘Bankruptcy Law, Ritual, and Performance’ [2003] 103 Columbia Law Review 2124.

Lash, S, ‘Performativity or Discourse? An Interview with John Searle’ [2015] 32 Theory, Culture & Society 135.

Lawrence, T, and Suddaby, R, ‘Institutions and Institutional Work’ in Stewart Clegg, Cynthia Hardy, Thomas Lawrence and Walter Nord (eds), *Handbook of Organization Studies* (2nd edn, Sage 2006) 220.

Lawrence, T, Suddaby, R, and Leca, B, 'Introduction: Theorizing and Studying Institutional Work' in Thomas Lawrence, Roy Suddaby and Bernard Leca (eds), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (Cambridge University Press 2009).

Leader, K, 'The Trial's the Thing: Performance and Legitimacy in International Criminal Trials' [2020] 24 Theoretical Criminology 241.

Leca, B, and Cruz, L, 'Enabling Critical Performativity: The Role of Institutional Context and Critical Performative Work' [2021] 28 Organization 903.

Leiboff, M, 'Theatricalizing Law' [2018] 30 Law & Literature 351.

Lewis, J, *The Anthropology of Cultural Performance* (Palgrave Macmillan 2013).

Liu, S, 'The Legal Profession as a Social Process: A Theory on Lawyers and Globalization' [2013] 38 Law & Social Inquiry 670.

Lorentzen, P, Taylor Fravel, M, and Paine, J, 'Qualitative Investigation of Theoretical Models: The Value of Process Tracing' [2017] 29 Journal of Theoretical Politics 467.

Loxley, J, *Performativity: The New Critical Idiom* (Routledge 2006).

Macaulay, S, 'Notes on the Margins of Lawyering, in Three and a Half Minutes' 40 Hofstra Law Review 25.

Maguire, M, and Delahunt, B, 'Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars' [2017] 3 AISHE-J 3351.

Mair, L, 'Review: Law as Process by Sally Falk Moore' [1979] 35 RAIN 13.

Maksimovic, Y, and Phillips, G, 'The Market for Corporate Assets: Who Engages in Mergers and Asset Sales and Are There Efficiency Gains?' [2001] 56 *The Journal of Finance* 2019.

Malhotra, N, and Morris, T, 'Heterogeneity in Professional Service Firms' [2009] 46 Journal of Management Studies 895.

Manning, S, 'Performance' in Bruce Burgett and Glen Hendler (eds), *Keywords for American Cultural Studies* (2nd ed, New York University Press 2014).

Marcus, B, Weigelt, O, and Hergert, J, 'The Use of Snowball Sampling for Multi-source Organizational Research: Some Cause for Concern' [2017] 70 Personnel Psychology 635.

Maxwell, I, 'The Limits of Ritual' (2017) 1 Performance of the Real <https://doi.org/10.21428/b54437e2.350e0b75> accessed 30 March 2025.

McFee, G, 'Triangulation in Research: Two Confusions' [1992] 34 Educational Research 215.

Merton, R, *On Theoretical Sociology* (Free Press 1967).

Miller, J.H, 'Performativity as Performance Performativity as Speech Act: Derrida's Special Theory of Performativity' [2007] 106 The South Atlantic Quarterly 219.

Minnar, A, 'Challenges for Successful Planning of Open and Distance Learning (ODL): A Template Analysis' [2013] 14 International Review of Research in Open & Distance Learning 81.

Morgan, D, 'Paradigms Lost and Pragmatism Regained: Methodological Implications of Combining Qualitative and Quantitative Methods' [2007] 1 Journal of Mixed Methods Research 48.

Moustaira, E, ‘Narratives of Laws, Narratives of People’ in James Nafziger (ed), *Comparative Law and Anthropology: Research Handbooks in Comparative Law series* (Elgar 2017).

Mullender, R, ‘Two Nomoi and Clash of Narratives: The Story of the United Kingdom and the European Union’ [2006] 6 Issues in Legal Scholarship (i).

Mullings, B, ‘Insider or Outsider? Both or Neither: Some Dilemmas of Interviewing in a Cross Cultural Setting’ [1999] 30 GEO Forum 337.

Mungham, G, and Thomas, P, ‘Studying Lawyers: Aspects of the Theory, Method and Politics of Social Research’ [1981] 8 British Journal of Law and Society 79.

Naeem, M, Ozuem, W, Howell, K, and Ranfagni, S, ‘A Step-by-Step Process of Thematic Analysis to Develop a Conceptual Model in Qualitative Research’ [2023] 22 International Journal of Qualitative Methods 1.

Niemi-Kiesilainen, J, Honkatukia, P, and Ruuskanen, M, ‘Legal Texts as Discourses’ in Åsa Gunnarsson, Eva-Maria Svensson, Margaret Davies (eds), *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Routledge 2007).

Oleksy, W, ‘Performativity Revisited: J. L. Austin and His Legacy’, in Jacek Mianowski, Michał Borodo, and Paweł Schreiber (eds), *Memory, Identity and Cognition: Explorations in Culture and Communication* (Springer 2019).

Ozcan, P, Han, S, and Graebner, M, ‘Single Cases: The What, Why, and How’ in Raza Mir and Sanjay Jain (eds), *The Routledge Companion to Qualitative Research in Organization Studies* (Palgrave Macmillan 2017), pre-edit version: <http://www.pinarozcan.com/wp-content/uploads/2018/07/Ozcan-et-al-Single-Case-Chapter-2017-Pre-edit.pdf> accessed 30 March 2025.

Painter, R, ‘Ethics and Government Lawyering in Current Times’ [2019] 47 Hofstra Law Review 965.

Probst, B, ‘Both/and: Researcher as Participant in Qualitative Inquiry’ [2016] 16 Qualitative Research Journal.

Priya, A, ‘Case Study Methodology of Qualitative Research: Key Attributes and Navigating the Conundrums in Its Application’ [2021] 70 Sociological Bulletin 94.

Pyle, R, ‘Law, Ritual and Language’ [1984] 8 ALSA F 381.

Punch, K, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage 2005).

Rabe, M, ‘Revisiting "Insiders" and "Outsiders" as Social Researchers’ [2003] 7 African Sociological Review 149.

Rayner, J, ‘In-house Conference: Inside Stories’ (2019) The Law Gazette <https://www.lawgazette.co.uk/in-house/in-house-conference-inside-stories/5070770.article> accessed 30 March 2025.

Rebelo, T, Lourenço, P, and Dimas, I, ‘The Journey of Team Learning Since “The Fifth Discipline”’ [2020] 27 The Learning Organization 42.

Richmond, D, ‘Lawyers' Professional Responsibilities and Liabilities in Negotiations’ [2009] 22 Georgetown Journal of Legal Ethics 249.

Rongits, N, ‘Researcher-Participant Relationship: Strategic Dances in Research Encounters’ [2024] 7 Human Arenas 576.

Rottmann, S, Glas, A, and Essig, M, 'Procurement Process of Professional Services: A Case Study of Legal Services' [2015] 7 International Journal of Information, Business and Management 144.

Schechner, R, 'Selective Inattention: A Traditional Way of Spectating Now Part of the Avant-Garde' [1976] 1 Performing Arts Journal 8.

– – *The Future of Ritual: Writings on Culture and Performance* (Routledge 2004).

Schwarcz, S, 'Explaining the Value of Transactional Lawyering' [2007] 12 Stanford Journal of Law, Business & Finance 486.

Searle, J, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969).

Senge, P, *The Fifth Discipline: The Art and Practice of the Learning Organization* (Random House 2006).

Shams, P, *Judith Butler and Subjectivity: The Possibilities and Limits of the Human* (Palgrave Macmillan 2020).

Sharpe, R, 'Type, Token, Interpretation and Performance' [1979] 88 Mind 437.

Smejkalova, T, 'Legal Performance: Translating into Law and Subjectivity in Law' [2017] 22 Tilburg Law Review 62.

Snyder, F, 'Review: Law as Process by Sally Falk Moore' [1979] 6 British Journal of Law and Society 135.

Solomon, J, Solomon, A, Joseph, N, and Norton, S, 'Impression Management, Myth Creation and Fabrication in Private Social and Environmental Reporting: Insights from Erving Goffman' [2013] 38 Accounting, Organizations and Society 195.

Sovacool, B, Iskandarova, M, and Hall, J, 'Industrializing Theories: A Thematic Analysis of Conceptual Frameworks and Typologies for Industrial Sociotechnical Change in a Low-carbon Future' [2023] 97 Energy Research & Social Science Review 1.

Spicer, A, Alvesson, M, and Kärreman, D, 'Critical Performativity: The Unfinished Business of Critical Management Studies' [2009] 62 Human Relations 537.

– – 'Extending Critical Performativity' [2016] 69 Human Relations 225.

Susskind, R, *Tomorrow's Lawyers: An Introduction to Your Future* (2nd ed, Oxford University Press 2017).

Teasdale, S, 'The Importance of Legal Due Diligence in International Transactions' [2017] 49(12) Franchising World 40.

Thomas, G, 'Doing Case Study: Abduction not Induction, Phronesis not Theory' [2010] 16 Qualitative Inquiry 575.

Tiersma, P, *Legal Language* (The University of Chicago Press 2000).

Tombs, S, 'Review of Keith Hawkins *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency*' [2004] 67 The Modern Law Review 704.

Turner, V, *The Anthropology of Performance* (PAJ Publications 1988).

Ward, I, 'The English Question, the English Constitution, and the English Mind' [2006] 6 Issues in Legal Scholarship 1539.

Weisberg, R, *Poethics: And Other Strategies of Law and Literature* (Columbia University Press 1992).

Waksler, FC, 'Erving Goffman's Sociology: An Introductory Essay' [1989] 12 Human Studies 1.

Wheelock, W, 'The Problem of Ritual Language: From Information to Situation' [1982] 50 Journal of the American Academy of Religion 49.

Wickert, C, and Schaefer, S, 'Towards a Progressive Understanding of Performativity in Critical Management Studies' [2015] 68 Human Relations 107.

Yates, G, and Hinchcliffe, M, *A Practical Guide to Private Equity Transactions* (Cambridge University Press 2010).

Yin, R, *Case Study Research and Applications: Design and Methods* (Sage 2018).

Zieman, G, 'Participant Observation' in Sheri Klein (ed), *Action Research Methods* (Palgrave Macmillan 2012).

Zinn, R, 'The First 100 Days: A Blueprint for M&A Integration Success' (22 August 2023) Pioneer Management Consulting <https://www.pioneermanagementconsulting.com/insights/the-first-100-days-a-blueprint-for-ma-integration-success> accessed 30 March 2025.

Cases

Global Asset Capital, Inc and another v Aabar Block S.A.R.L. and others [2017] EWCA Civ 37, [2017] 4 WLR 163.

RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14, [2010] 3 All ER 1.

Triumph Controls - UK Ltd & Anor v Primus International Holding Company & Ors [2019] EWHC 565 (TCC), [2019] All ER (D) 92.

Walford and others v Miles and another [1992] 1 All ER 453.

Legislation

Data Protection Act 2018.

Companies Act 2006.

Stock Transfer Act 1963.

Stamp Act 1891.

Websites

DocuSign <www.docusign.co.uk> accessed 30 March 2025.

Grant Thornton LLP, *Completion mechanisms: Determining the Final Equity Value in Transactions* (2016) ICAEW Corporate Finance Faculty <https://www.icaew.com/-/media/corporate/files/technical/corporate-finance/guidelines/icaew-completion-mechanisms-

v2.ashx?la=en> accessed 30 March 2025.

HM Government, *How to Manage Competitively Sensitive Information* (25 September 2014) <https://www.gov.uk/government/publications/limiting-risk-in-relation-to-competitors-information> accessed 30 March 2025.

Law Commission, *Electronic Execution of Documents: Paper 386* (3 September 2019) <https://assets.publishing.service.gov.uk/media/5f466016e90e07298ea3c838/Electronic-Execution-Report.pdf> accessed 30 March 2025.

Solicitors' Regulation Authority, *Solicitors' Code of Conduct* (2019) <https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/> accessed 30 March 2025.

– – *SRA Principles* (2019) <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 30 March 2025.

Transcend Corporate Limited <https://transcendcorporate.com/> accessed 30 March 2025.