Neutral Citation Number: [2012] EWHC 2343 (Ch)

Case No: 8690 of 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
The Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 10 August 2012

Before :

THE HONOURABLE MR JUSTICE DAVID RICHARDS

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IN THE MATTER OF COROIN LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

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Between :

PATRICK McKILLEN	**Petitioner**
- and -	
(1) MISLAND (CYPRUS) INVESTMENTS LIMITED **(A company registered in Cyprus)** **(2) DEREK QUINLAN** **(3) ELLERMAN CORPORATION LIMITED** **(a company registered in Jersey)** **(4) B OVERSEAS LIMITED** **(a company registered in the British Virgin Islands)** **(5) RICHARD FABER** **(6) MICHAEL SEAL** **(7) RIGEL MOWATT** **(8) COROIN LIMITED**	**Respondents**

AND

IN THE HIGH COURT OF JUSTICE **Claim No. HC 11 C03437**
CHANCERY DIVISION

BETWEEN

PATRICK GERARD MCKILLEN **Claimant**
- and -
(1) SIR DAVID ROWAT BARCLAY
(2) SIR FREDERICK HUGH BARCLAY
(3) MISLAND (CYPRUS) INVESTMENTS LIMITED
(4) ELLERMAN CORPORATION LIMITED
(5) B OVERSEAS LIMITED
(6) MAYBOURNE FINANCE LIMITED
(7) THE TRUSTEES OF THE SIR DAVID AND SIR FREDERICK BARCLAY FAMILY SETTLEMENTS
(8) RICHARD FABER
(9) MICHAEL SEAL
(10) RIGEL MOWATT
(11) NATIONAL ASSET LOAN MANAGEMENT LIMITED **Defendants**

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MR PHILIP MARSHALL QC, MR RICHARD HILL QC, MR GREGORY DENTON-COX and **MS RUTH DEN BESTEN** (instructed by **Herbert Smith LLP**) appeared for the **Petitioner/Claimant**.

MR KENNETH MACLEAN QC, MR EDMUND NOURSE, MR SA'AD HOSSAIN and **MISS EMMA JONES** (instructed by **Weil, Gotshal & Manges**) appeared for **Misland (Cyprus) Investments Limited, Ellerman Corporation Limited, B. Overseas Limited and Maybourne Finance Limited**.

MR STEPHEN AULD QC, MR MICHAEL FEALY and **MR MICHAEL d'ARCY** (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) appeared for **Derek Quinlan**.

MR JOE SMOUHA QC and **MR EDWARD DAVIES** (instructed by **Ashurst LLP**) appeared for **Richard Faber, Michael Seal and Rigel Mowatt**.

LORD GRABINER QC and **MR. EDMUND NOURSE** (instructed by **Weil, Gotshal & Manges**) appeared for **Sir David Barclay and Sir Frederick Barclay**.

MR ROBIN DICKER QC and MR WILLIAM WILLSON (instructed by **Hogan Lovells International LLP**) appeared for **National Asset Loan Management Limited**.

MR NIGEL DOUGHERTY (instructed by **DLA Piper UK LLP**) appeared for **Coroin Limited**

Hearing dates: 19-23, 26-30 March, 2-4, 18,20, 23-27,30 April and 1,10,11,14,21-25 and 29 May 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE DAVID RICHARDS

Mr Justice David Richards :

Introduction

1. At the heart of this case lies a battle for control of three of London's leading hotels – Claridge's, The Connaught and The Berkeley.

2. The contenders for control are Patrick McKillen and Sir David and Sir Frederick Barclay. Mr McKillen is the last man standing of a consortium of investors who purchased the hotels in 2004. He has a 36.2 % shareholding in Coroin Limited (the company) which heads the group of companies owning the hotels. The Barclay brothers have extensive and diversified business interests, including hotels and in particular the Ritz Hotel in London. In January 2011, a company controlled by them acquired indirectly a 24.78% interest in the company, which has since increased to 28.36%.

3. The remaining shares are owned by Derek Quinlan, also a member of the original consortium but now in severe financial difficulties. His shares are fully charged to secure debts now held by companies controlled by the Barclay brothers.

4. The Barclay brothers have made no secret of their aim to obtain control of the company. There is nothing wrong in this aim, provided that unlawful means or means which are unfairly prejudicial to the interests of other shareholders are not used to achieve it.

5. Mr McKillen alleges that the Barclay brothers or companies controlled by them have used unlawful or unfairly prejudicial means, comprising principally breaches of contract by shareholders and breaches of duty by directors of the company appointed by them.

6. These allegations form the basis of two sets of proceedings brought by Mr McKillen, which are the subject of this judgment. The first is a petition under section 994 of the Companies Act 2006, alleging that the affairs of the company have been conducted in a manner unfairly prejudicial to Mr McKillen's interests as a member of the company. The principal remedy which he seeks is an order that the shares held by companies associated with the Barclay brothers be sold to him. This would give him control of the company. The second is a claim for damages in tort for conspiracy to cause him loss by the same unlawful means as are alleged in the petition and for inducing breaches of contract.

7. The allegations made by Mr McKillen fall into two broad categories, although they are all said to form part of a scheme to obtain control of the company. First, he alleges that there have been breaches of pre-emption provisions contained in a shareholder agreement and the articles of association of the company. Shares or interests in shares have been sold or disposed of to the Barclay brothers or their interests without first being offered to the other shareholders. This allegation relates principally to arrangements and agreements made by the Barclay interests with Derek Quinlan. It was initially also part of Mr McKillen's case that the purchase by the Barclay interests of the company holding the 24.78 % interest triggered the pre-emption provisions. However, this claim, which turned on the proper meaning of

the pre-emption provisions, was decided against Mr McKillen as a preliminary issue, the Court of Appeal at [2012] EWCA Civ 179 affirming my decision at first instance at [2011] EWHC 3466 (Ch). Mr McKillen has amended his petition to plead an alternative case that an express contractual duty of good faith in the shareholders agreement nonetheless required the shares in question to be offered to the other shareholders.

8. There is a further element to Mr McKillen's case on the pre-emption provisions. He says that charges given by Mr Quinlan on his shares to secure personal borrowings have become enforceable, thus triggering a power vested in the directors to require them to be offered for sale to the other shareholders, but the directors have failed to exercise the power.

9. The second broad category of allegations comprises allegations of breach of duty against the directors appointed by the Barclay interests. There are a number of such alleged breaches, all said to be motivated by a desire to advance the interests of the Barclay brothers and their associated companies rather than the company itself. In particular, they relate to the company's dealings with the National Asset Management Agency ("NAMA"), an Irish state-owned entity to which I refer below.

10. Mr McKillen had also raised a case that the assignment in September 2011 of the company's bank debts by NAMA to a company owned by the Barclay brothers was invalidated by breaches of the relevant facilities agreement, specifically an obligation of prior notice to and consultation with the company and a restriction on permitted assignees. NAMA was joined as a respondent to the petition and submitted to the jurisdiction of this court for the purpose of determining these allegations. It denied any breach of the relevant provisions but in any event it asserted that those provisions did not apply to an assignment of the debts by NAMA. This too was tried as a preliminary issue. The Court of Appeal at [2012] EWCA Civ 864, reversing my decision at [2012] EWHC 129 (Ch), held in NAMA's favour. The Court of Appeal refused permission to appeal but Mr McKillen has applied to the Supreme Court for permission. The position is therefore that Mr McKillen cannot rely on his case that the assignment of the debts to NAMA involved a breach of the facilities agreement, unless the Supreme Court gives permission to appeal and allows his appeal.

11. The principal issues which therefore arise may be summarised under these headings:

i) Were the pre-emption provisions triggered by the agreements made between Mr Quinlan and the Barclay brothers and their interests?

ii) Allied to issue (i), did Mr Quinlan and Sir David Barclay make on 15 January 2011 the oral agreement alleged by Mr McKillen?

iii) Were the pre-emption provisions triggered by charges over Mr Quinlan's shares becoming enforceable?

iv) If shares had been offered to Mr McKillen under the pre-emption provisions, would he have been able to finance their purchase?

v) Did the directors of the company appointed by the Barclay interests commit the breaches of duty alleged against them?

vi) Was Sir David Barclay a shadow director of the company?

vii) Has Mr McKillen established a case of unfairly prejudicial conduct under section 994 of the Companies Act 2006?

viii) The tort claim.

12. The structure which I have adopted for this judgment is first to set out the background and some general points. The facts are complex and often crowded into relatively short periods. I do not think there is any alternative to a chronological account of the facts. While it is long and detailed, a large volume of the more peripheral facts are omitted. The picture was a good deal more hectic for the main participants than appears from the chronology, because there were dealings with many other parties which in the end got nowhere and did not contribute to the story relevant to this case.

13. In the chronological section I make findings on many of the disputes of fact, but I deal with the principal factual issues in the sections which follow. Those sections, which are addressed to the main issues set out above, deal also with relevant legal principles.

14. For convenience, the following is a summary table of contents.

Background

15. In order to give some context to the detail which follows there are some broad points to mention at this stage. The consortium which was formed in 2004 to acquire the hotels comprised five Irish investors or groups of investors, of whom the principal three were property developers and investors. Both the investors and the company were financed by Irish banks. Although the hotels themselves have remained profitable, the international financial crisis which began in 2008, and specifically the Irish banking crisis, led to serious problems both for the company and for at least some of the investors.

16. The position by 2010 was that the company was over-indebted to the extent of some £150-200 million. Its bank facilities totalling some £650 million had been transferred to NAMA and they were due to mature on 31 December 2010. While the company could support commercial bank facilities of up to about £450 million, it could not raise the full amount of £660 million in that way. The principal shareholders in 2010 were unable to provide capital to bridge the gap. Their attempts to agree terms with outside investors failed.

17. Mr Quinlan was and remains in severe financial difficulties. From 2009 and throughout 2010 he was very active in trying to find buyers for his shares. Following the collapse of negotiations for new investment at the end of 2010, the third major investor, the Green family, also decided to sell their stake. Only Mr McKillen wished to retain an interest, although he was prepared to contemplate a reduction to 25% or even 20% on terms acceptable to him.

18. The problem remained that the bank facilities, now with NAMA, fell due for payment at the end of 2010. In December 2010, NAMA agreed in principle to an extension of two years to the facilities so as to give the shareholders time to find a long term solution. Nonetheless, NAMA's statutory purpose and express policy required it to recover the value of the loan by repayment or sale as soon as practicable.

19. In January 2011 the Green family sold Misland (Cyprus) Investments Limited (Misland) to a company controlled by the Barclay brothers. Misland owned the Green family's 24.78% stake in the company. This changed the landscape. There was now a shareholder owned by a group which not only wanted to obtain control of the company but had the means to do so. Unlike the other shareholders, it could raise the funds required to repay the NAMA debt and to acquire the remaining shares.

20. Mr McKillen had opened discussions in January 2011 with Al Mirqab Holding LLC (Al Mirqab), an investment company owned and controlled by the Prime Minister of Qatar, Sheikh Hamad bin Khalifa Al Thani (Sheikh Hamad), and his son Sheikh Jassim bin Hamad Al Thani (Sheikh Jassim). In February 2011 an agreement was reached between Mr McKillen, the Barclay interests and Al Mirqab for the company to be owned in the proportions 41:41:18, with Mr McKillen holding the 18 % interest, and on the basis that the Barclay interests and Al Mirqab would raise the finance required to re-pay the debt to NAMA. Although it was expressed to be a legally binding agreement, Mr McKillen thought better of it and it did not proceed. This failed agreement had, as I find, a profound effect on NAMA's attitude to the company. It demonstrated that with shareholder agreement NAMA could be re-paid the full amount due to it within a short timescale.

21. Despite attempts to do so, Mr McKillen and the Barclay interests were unable to reach agreement. The problem of re-financing the NAMA debt remained. The Barclay interests were willing to provide the finance necessary to re-pay the NAMA debt, but would do so only if they had control of the company. This was particularly so given that raising the initial finance would require the personal guarantees of the Barclay brothers for very substantial sums. Mr McKillen was not prepared to agree to the Barclay brothers or their interests having control of the company, nor would he agree to a rights issue to raise capital to bridge the

company's funding gap. He clung to the hope that NAMA could be persuaded to revive its agreement in principle of some months earlier to extend its debt by up to two years. As I find when I come to consider the detail of this, I am satisfied that there was no possibility of NAMA agreeing to this.

22. Towards the end of September 2011 NAMA sold its debt at par with accrued interest to a company owned by the Barclay brothers. The Barclay brothers took this step both to advance their aim of obtaining control of the company and to avoid the debt being sold by NAMA to other possible competitors for control. In particular, serious interest was being shown by Malaysian and Abu Dhabi investors who had purchased debts secured on some of the shares in the company. The debt fell due for payment on 30 September 2011 and, following its acquisition, the Barclay interests proposed a rights issue to fund repayment of part of the debt. Mr McKillen objected to the proposal for a rights issue and to its terms and these proceedings were commenced shortly thereafter. No rights issue has proceeded and the debt acquired from NAMA remains outstanding.

The financial position of the company

23. The financial position of the company in 2010-2011 is of central importance. The underlying hotel businesses are successful and profitable. The enterprise value of the businesses and assets in that period (excluding the company's own borrowings) has been variously put at £900 million – £1 billion.

24. The problem is that the company has substantial loan liabilities of some £660 million, incurred to purchase the hotels, refurbish The Connaught and purchase properties adjacent to Claridge's and The Berkeley. All the evidence in the case, and there is a good deal of it, shows that the indebtedness is too high in relation to the businesses. The evidence consistently suggests that the debt should be reduced to no more than £450-500 million.

25. Both the company and the Barclay interests have been able to negotiate bank facilities at about that level, but no more, except in the case of the Barclay interests with the benefit of personal guarantees by Sir David and Sir Fredrick Barclay for £200 million or more. The proposals negotiated by the company in 2010 envisaged new capital of £200 million, with new bank facilities of about £450 million.

26. The consistent view of outsiders is that the company needs to reduce its bank debt to a level of £500 million or less. NAMA's view in January 2011 was that the appropriate level was £400-450 million, having regard to cash flow. Goldman Sachs in September 2011 considered that the company could support up to about £495 million of senior term loan, assuming a return to 'normalised' market conditions. The view of Alvarez & Marsal, following their appointment as the company's independent financial advisers in October 2011, was that a capital injection of £150 - 200 million was required.

27. The need for the company to fill this gap in its financing, as NAMA put increasing pressure on the company, is the single most significant factor in this case.

Main parties

28. For the purposes of this case, there are four parties whose actions and aims are central to the events and to the issues: the Barclay brothers, Mr McKillen, Mr Quinlan and NAMA. It is convenient to say something about each at this stage.

The Barclay brothers and their business organisation

29. The clear and open aim of the Barclay brothers is to secure control of the company. Mr Quinlan spoke admiringly of their skills as deal-makers. In the case of the company, they have moved quickly and decisively as opportunities have arisen. Their case is that they act within the law, certainly within what they understand from the advice they take to be the law. Within that constraint, they act with determination to achieve their aim.

30. As owners of the Ritz Hotel, they have naturally taken a keen interest in the company's hotels for a number of years and have from time to time considered offering to buy one or more of them. They made their move when the Green family decided to sell and the opportunity arose to buy Misland with its 24.78% shareholding. It was a particular advantage that they could buy Misland without triggering the pre-emption provisions, entitling them to appoint one out of the six directors. The means by which they have tried to secure control are summarised in the outline chronology, and set out more fully in the chronological section. In addition to those steps, they tried but failed to purchase debts secured on Mr McKillen's shares, including the use of banks to act as fronts for them in approaching the lenders. These steps are set out by Mr McKillen in his petition, seemingly as among the grounds for relief. They cannot assist Mr McKillen, not only because they failed but also because they do not involve the conduct of the affairs of the company or any act or omission of the company.

31. Sir David and Sir Frederick Barclay have over many years built up significant business interests in a number of different sectors. They are now in their late seventies and are resident in Monaco, where they maintain an office. One of the pleaded issues in this case is whether Sir David Barclay is or was a shadow director of the company. There has therefore been exploration of the extent to which the Barclay brothers exercise actual control over the affairs of the companies carrying on what may loosely be called their business interests. The overall conclusion which I draw from the evidence in this case is that all the companies comprising the "Barclay interests" are within their control, in the sense that they are able if they choose to control their decisions and activities. Those acting on their behalf frequently refer to them as controlling the companies and they are content to be seen as controlling the companies.

32. The evidence I have heard also shows that they are content to leave a good deal of the business to the executives whom they have appointed but that they take an interest, and sometimes a very keen interest, in particular aspects of the businesses. In particular, they will be directly involved in decisions to make significant acquisitions or disposals of assets, in this case shares in the company or debts due from the company or from individual shareholders. I have heard evidence from four

senior executives in the Barclays organisation and they are all highly professional, strong-minded individuals. They are certainly not ciphers, simply rubber stamping decisions taken by the Barclay brothers. They are prepared to argue their corner but they would, I think, be reluctant ultimately to take a decision of which the Barclay brothers did not approve. In many cases, however, the Barclay brothers are content to leave matters to their senior executives and the evidence of one executive, Philip Peters, that they often say *"do what you think is best"* rings true.

33. The precise structure of ownership of the Barclay business interests is not relevant to the issues in this case and I have not had evidence on it. Most of the Barclay companies involved in the case are ultimately owned by the trustees of the Sir David and Sir Frederick Barclay family settlements. But the trustees have played no part at all in the relevant events and indeed were ignorant of many of them. Whatever the precise ownership structure and whatever, if any, beneficial interests the Barclay brothers have in these companies and whatever, if any, legal rights of control they have, I am satisfied, as I have said, that they could in practice control all the "Barclay companies" involved in this case.

34. The companies principally involved are B Overseas Limited ("B Overseas"), Ellerman Corporation Limited ("Ellerman"), Ellerman Hotels Group Limited (EHGL) and Maybourne Finance Limited ("MFL"). B Overseas, EHGL and Ellerman are owned ultimately by the trustees of the family settlements, while MFL is indirectly owned by the Barclay brothers themselves. I will refer to these companies and any other companies under the practical control of the Barclay brothers as the Barclay interests without usually distinguishing between the individual companies. B Overseas was the company that acquired Misland from the Green family in January 2011 and also acquired in September 2011 debts due from Mr Quinlan and secured over his shares in the company. Ellerman acquired other debts due from Mr Quinlan, secured over part of his shareholding. EHGL made a written conditional agreement with Mr Quinlan on 17 February 2011 to purchase his shares. MFL was the company which acquired at the end of September 2011 the debts due from the company to NAMA (the NAMA debt).

35. The affairs of these companies, and many other business interests of the Barclay brothers, are managed from an office in St James's Street in London where a number of senior executives are based. The four executives who gave evidence before me have offices there, and each has his own area of responsibility. Richard Faber's background is in corporate finance and he is one of the principal investment managers within the group dealing in particular with investment opportunities and transactions. Michael Seal is a chartered accountant whose principal responsibility lies in the areas of tax, corporate structure and pensions. He is not generally involved in operational or banking matters. Mr Peters' background is in commercial banking and his primary responsibility is to manage the banking and finance requirements and relationships of the companies. Rigel Mowatt is also a chartered accountant. His primary responsibilities are the management and financing of various businesses, although he is also involved in the acquisition and disposal of businesses. He is particularly involved in the Telegraph Media Group which occupies a substantial part of his time, with the result that he spends only a minority of his time at the St James's Street offices.

36. Also based at the St James's Street office is Aidan Barclay, son of Sir David Barclay. He is chairman of the Ellerman group of companies which includes B Overseas, EHGL and Ellerman. Mr Faber would in the normal course of events look to Aidan Barclay for decisions on what might be called shareholder matters, although he was in direct and frequent contact with Sir David and Sir Frederick Barclay as well. From July 2011 Aidan Barclay was ill which meant that he was unable to play an active role in the companies. Mr Faber looked instead to Sir David Barclay for decisions on "shareholder matters". Although these executives work in the same offices in St James's Street, it does not automatically follow that they each know exactly what the others are doing. While they will of course have informal discussions together and may communicate more formally, the evidence indicates that they each get on with their own particular projects and, moreover, they may often be absent from the office, travelling on business. In particular, Mr Mowatt, based for the most part elsewhere, does not involve himself in what the others are doing.

37. Overall the evidence supports what Mr Faber said in his witness statement about the degree of involvement of the Barclay brothers in the businesses. After referring to the fact that they spend most of the year abroad, while the business is based in London, Mr Faber continues:

> "*that is not to say that Sir David and Sir Frederick play no part in the business anymore, they do. They built the business up and still take a keen interest in how it is doing, what is happening, and what deals there are to be done or being done. ...they remain public faces of the business. However, they have no desire to know everything that goes on, only the important or interesting issues and deals. Routine deals and details are no part of their lives and the business has teams of professionals to do that. Moreover, they no longer deal with the lawyers or look at the transaction documents: others are employed to do this including internal and external lawyers*."

Mr Faber adds that his experience is that "*major issues or transactions are discussed round the family and consensus is usually reached before major steps are taken….*".

38. Dealing specifically with the company, Mr Faber says:

> "*The Coroin deal has not been a run of the mill transaction for the group. First, there is its size and complexity. Next, Sir David and Sir Frederick have had more involvement than they would in most business matters of the group. The transaction is substantial and of interest to them personally, given their long experience in the hotel industry. Also, Aidan was ill during the second half of 2011, giving Sir David, in particular, greater involvement than he would otherwise have had*."

Mr McKillen

39. Mr McKillen has been a property investor and developer for many years. A leading member of the group of Irish developers who became very prominent in international property development from the 1990s to the financial crisis in 2008, he built a large portfolio of property investments in Ireland, the United Kingdom, western Europe, Japan, Vietnam, Argentina and the US. Like the other members of the consortium which bought the hotels in 2004, he had very little experience of hotels. Mr McKillen has survived better than some other developers, no doubt because of a more prudent approach. But there is no doubting the financial pressure on him following the international financial crisis. Like other Irish developers and investors, he was badly affected by the Irish banking crisis, as most of his finance came from the major Irish banks. Facilities for very substantial amounts matured in 2010. While they have not been called in or enforced, Mr McKillen has not been able to re-finance them.

40. Mr McKillen's financial position in 2011 has been the subject of extensive disclosure and evidence, because the respondents deny his claim that, if the shares held by Mr Quinlan had been offered to other shareholders under the pre-emption provisions, he could have raised the funds to purchase his pro rata share. I deal with this issue later.

41. Mr McKillen's aims in 2010-2011 as regards his participation in the company were threefold.

42. First, unlike the Green family and Mr Quinlan, he did not want to sell his shares. In negotiations with US equity funds in 2010 and Al Mirqab in 2011 he was prepared to see a reduction in his equity stake to 20% or less, but he nonetheless wished to retain an equity interest of, at the very least, 15%. Secondly, he was anxious to play a significant role in both the management of the business and the redevelopment of Claridge's and The Berkeley, and to receive substantial remuneration for it. He had in mind a figure of £5 million for at least three years, preferably longer. This was agreed in principle with Al Mirqab in early January 2011 and it was "*a key attraction*" as his solicitor described it in a letter of advice to him dated 17 February 2011. It was put to Mr McKillen that this was just disguised consideration and there was no intention to perform a management role. I accept Mr McKillen's denials, although by the time he was negotiating with the Barclay interests later in the year he was demanding a "pre-emption fee" of £25 million as well as a management fee of £5 million per annum for 5 to 7 years. I do not however accept Mr McKillen's evidence that a significant part of the management fee would go in paying necessary staff. This was a late addition to his evidence and not one which I found convincing. I am satisfied that it was a major aim of Mr McKillen to earn substantial remuneration of the order of £5 million per annum from the company. His third aim was to avoid a rights issue. I will later deal with this in more detail.

Derek Quinlan

43. Mr Quinlan was a high profile figure in the group of prominent Irish property investors. He operated principally by assembling consortia to invest in projects, taking an enhanced equity position as his reward. It was he who in 2004 put together the consortium to purchase the Savoy group of hotels, which included the

hotels still owned by the company. He became the public face of the group. He has not been able to weather the storm and his massive borrowings were transferred to NAMA. NAMA and the banks have not taken action to enforce the security over his property interests, seeing it as likely to achieve better returns if he is closely involved in the disposal process. He disposed of assets with a value of some €2 billion in 2010-2011.

44. Mr Quinlan's interest in the relevant period has been in selling his shares. But the picture is a little more complex. He and his close financial adviser Gerard Murphy tried throughout 2010 to act as the introducer of a deal for the acquisition of the company or at least a controlling interest, in return for substantial fees of up to £50 million. This involved discussions with various parties, principally with Sheikh Hamad and Sheikh Jassim and with Sheikh Mansour bin Zayed Al Nahyan (Sheikh Mansour) of the Abu Dhabi ruling family, but with others also, such as the Oberoi group in India and Raj Kumar in Singapore. Nothing came of it.

45. Sir David and Sir Frederick Barclay have provided financial support to Mr Quinlan and his family, starting with a loan of €500,000 in November 2010 and continuing with sums totalling some £1.86 million and €500,000 during 2011. Mr McKillen alleges that these payments were made under an oral contract made on 15 January 2011 for the sale of Mr Quinlan's shares to NAMA, which triggered the pre-emption provisions and was for that reason kept secret. This is a significant issue which I later address.

NAMA

46. NAMA plays a pivotal role. I later describe its purpose and powers, but as the state-owned repository of many of the loans and other financial assets of Irish banks, its main function is to recover the maximum value of those assets as quickly as practicable. Its importance in this case, as transferee of the company's senior bank facilities, lies in whether it would be prepared to agree an extension of two years or so to those facilities. Mr McKillen's case is that it would have done if the Barclay brothers through MFL had not bought the debt. In that way, the company would have been given time to find a satisfactory long-term solution to the acknowledged problem that it was over-indebted with senior debts of about £660 million.

Other participants

47. In addition to the parties above, there is a large cast of characters who have played roles in the unfolding events. The hotels in question are widely regarded and described as "trophy assets" and as such they attract a great deal of interest, and have done for many years. They have been fought over before. When part of the Savoy group, they attracted the attention of Lord Samuel and Land Securities and of Sir Charles Clore in the 1950s and of Trusthouse Forte plc in the 1980s. In the period relevant to this case, interest has been shown from a number of quarters, some of it serious, some of it transient and opportunistic. Those involved have included ruling families, foreign governments, property investors and investment funds, with their attendant intermediaries.

48. It may be helpful to identify a few of the participants who played a significant role. Foremost are Sheikh Hamad and Sheikh Jassim and their entity Al Mirqab. In this judgment, as in the evidence and during the trial, they are collectively referred to, without disrespect, as the Qataris. They played a significant part at different times. In mid-2010 they were negotiating with Mr Quinlan with a view to a purchase of his shares leading to an acquisition of the entire share capital. These discussions ultimately failed in August 2010. In early January 2011, Mr McKillen visited Doha in Qatar for discussions with Sheikh Hamad and Sheikh Jassim with a view to an agreement with them, whereby the Qataris would make an offer for all the shares in the company other than about 25 % to be held by Mr McKillen. These negotiations were interrupted by the acquisition of Misland by the Barclay interests. Further negotiations led to the written binding agreement on 12 February 2011 between Al Mirqab, the Barclay interests and Mr McKillen. Al Mirqab's lawyer, Fady Bakhos, was closely involved in this agreement. The Qataris had no further involvement until early this year when, with the assistance of Tony Blair Associates and a personal intervention by Tony Blair with Sheikh Hamad, the Qataris agreed to finance the acquisition of shares by Mr McKillen if he were to succeed in obtaining an order to purchase the Barclay interests' shares in these proceedings.

49. Sheikh Mansour and those acting for him held discussions with Mr Quinlan in the course of 2010. The Barclay interests had discussions with him in the course of 2011 with a view to a possible joint venture in relation to the company. His principal representative was Aasim Mahmood. The interest from Abu Dhabi was serious, as shown in December 2010 when Aabar Investments, an Abu Dhabi sovereign wealth fund, acting together with Robert Tchenguiz, a property developer, acquired debts of Mr Quinlan secured by a second charge over his shares in the company. This clearly signalled a significant interest in taking a position in the company and perhaps seeking control. From about May 2011 they were acting in collaboration with a Malaysian based investor and, together, they approached NAMA with a view to buying the debt due from the company.

50. The Malaysian based investor was Jho Low, a businessman with some backing from a Malaysian sovereign wealth fund. Through an entity called The Wynton Group, offers were made to the company and its shareholders in January and February 2011. As will later appear these were not at the time taken seriously by most of the shareholders. Mr Low persisted in his interest and in April 2011 he acquired a debt due from Mr Quinlan to NAMA which was secured on part of Mr Quinlan's shareholding in the company, bidding more for the debt than the Barclay interests were prepared to pay. The debt was acquired through an associate company called JQ2. This too was a clear demonstration of serious interest in the company.

Proceedings

51. As I mentioned, there are two sets of proceedings, a petition under section 994 of the Companies Act 2006 and a claim under CPR Part 7 for damages in tort for conspiracy to injure by unlawful means and inducing breaches of contract. There is a substantial, but not complete, identity between the respondents and defendants to these proceedings. Misland, Ellerman and B Overseas are parties to both sets of proceedings and in addition MFL is a defendant to the tort claim. Mr Quinlan is a respondent to the petition but not a defendant to the tort claim. Mr Faber, Mr Seal and Mr Mowatt who were all at various times directors of the company are parties

to both sets of proceedings. Additional parties to the tort claim, but not to the petition, are Sir David and Sir Frederick Barclay. The trustees of their family settlements were named as defendants to the tort claim but the action is not being pursued against them, in the light of evidence that they had no involvement in the relevant events. NAMA is also named as a defendant but no claim in tort is made against it. The purpose of joining it was to enable the issue of the validity of the assignment by NAMA of the company's debt to be determined.

52. Six parties or groups of parties have been separately represented by leading and junior counsel at the trial: Mr McKillen, Sir David and Sir Frederick Barclay, the Barclay interests, the three directors of the company appointed by the Barclays interests, Mr Quinlan and NAMA. The company has attended by junior counsel only when necessary. It is of course neutral in this dispute among the shareholders.

53. There has been disclosure of a very large volume of documents. Complex corporate transactions involving many parties over a period in excess of a year generate a great deal of paper. The chronological bundle for the trial comprises 54 files, with a total number of pages approaching 20,000. Text messages played a vivid, and sometimes significant, part in the story. Many of the principal players, including Sir David Barclay, frequently send and receive text messages. Disclosure of text messages has been far from complete, with some extensive gaps on the respondent's side and some gaps on Mr McKillen's side. Explanations have been given in the evidence and in correspondence. Although Mr McKillen's closing submissions invite me to draw adverse inferences from the loss of these text messages, it does so only in the most general terms. I do not know precisely what inferences I am invited to draw, but in any event I am not persuaded that I should reject the explanations given.

54. I heard evidence from a number of witnesses. Mr McKillen gave evidence, as did his financial adviser and close associate, Liam Cunningham, who was also his alternate director on the board of the company. Likewise, Mr Quinlan and Mr Murphy gave evidence. Mr Faber, Mr Seal, Mr Mowatt and Mr Peters gave evidence. Sir David Barclay and Aidan Barclay did not give evidence. Sir Frederick Barclay provided a short witness statement under the Civil Evidence Act but did not give oral evidence. The absence of these witnesses was the subject of submissions on behalf of Mr McKillen, inviting me to draw adverse inferences. I deal with that issue later in this judgment. Finally two officers of NAMA, John Mulcahy and Paul Hennigan, gave evidence. Mr Hennigan was closely involved on a day to day basis in dealing with the loans to the company and he reported to Mr Mulcahy as head of portfolio management and a member of NAMA's credit committee.

55. I do not propose to make general comments or give thumbnail sketches of the witnesses, save only to say this. The disclosure provided by NAMA and the evidence provided by Mr Hennigan and Mr Mulcahy, whom I regarded as wholly reliable witnesses, was invaluable in establishing the approach and attitude of NAMA at different stages of the story.

56. The trial occupied 30 days in court of which 20 days were taken up with cross examination of witnesses. I have been provided with many hundreds of pages of closing submissions, all of the highest standard, which were supplemented by oral

submissions. Many issues were explored in evidence and submissions have been made on them, but the parties' cases are defined by their pleadings. This is of particular importance to proceedings under section 994 of the Companies Act 2006. The breadth of the jurisdiction means that the petition plays, in my judgment, a vital role in defining the basis of the petitioner's case. This is not a question of taking technical pleading points. The petition must be read sensibly. But it does mean that the grounds on which the petitioner says the affairs of the company have been conducted in an unfairly prejudicial manner should be fairly set out in the petition. Only in this way will the respondents be able properly to meet the case and the court be able to keep the proceedings within manageable bounds: see *Re BSB Holdings Ltd (No2)* [1996] 1 BCLC 155 at 159-160, a case of comparable size and complexity.

57. The petition was amended on four separate occasions. Very extensive amendments were proposed shortly before the start of the trial. As I had given directions for a speedy trial and all the pre-trial stages had been completed in accordance with a very tight timetable, there could be no criticism of Mr McKillen or those representing him in making the application so close to trial. Because of the importance of the petition to the proper conduct of the trial, I looked closely at each of the amendments proposed and allowed only those which could be said to be arguable on the facts or the law. Amongst the amendments which I rejected were those based on the legal proposition which I held to be unarguable, in the absence of partnership or express provision, that shareholders as joint venturers owed each other fiduciary duties. I also rejected amendments, on the grounds of both law and the facts proposed to be pleaded, that Sir David and Sir Frederick Barclay were de facto directors of the company and that Sir Frederick Barclay was a shadow director of the company. I did however allow an amendment to plead that Sir David Barclay was a shadow director. See [2012] EWHC 521 (Ch).

58. There were a number of applications in the course of the trial. The most substantial was an application by Mr McKillen for that part of the trial dealing with his financial position to be heard in private and for the continuation of a confidentiality regime which restricted the documents disclosed by Mr McKillen on that issue to certain solicitors and counsel for the respondents but did not permit the respondents to have access. This was opposed by a number of English and Irish newspapers and broadcasters, who appeared by counsel, as well as by the respondents. I rejected the application: see [2012] EWHC 1158 (Ch).

Unpleaded issues

59. Many unpleaded issues were canvassed in the course of evidence, and some have been pursued in the closing submissions, which it is unnecessary or inappropriate to address. I will mention just a few first.

60. I refused an application by Mr McKillen, after Mr Faber had completed his evidence, for permission to amend the petition to allege that Mr Faber acted in breach of his duties as a director of the company in his dealings with NAMA in March 2011. Submissions to this effect are nonetheless made in Mr McKillen's closing submissions. If an amendment had been permitted, this would have been a substantial issue on which Mr Faber would have been entitled to give evidence in chief. Without it being pleaded and fully addressed, it would be procedurally unfair

to consider the allegation, even if only going to Mr Faber's credit. It is in any event too large and contentious a subject to be considered for the purposes of credit only.

61. There was a significant amount of cross examination of the respondents and their witnesses as to allegedly improper disclosure of confidential information of the company, allegations which do not feature at all in the petition. In due course it transpired that the unauthorised disclosure of confidential information was endemic among all the shareholders, including Mr McKillen. In closing, Mr Marshall made clear that it does not feature as a basis for the petition.

Outline chronology

62. It may be helpful to set out an outline chronology of the key events before moving on to the chronological account.

63. Much of 2010 was taken up in seeking new investment in the company. On 26 June 2010, despite the strenuous efforts of the directors and shareholders of the company, its loan facilities with Anglo Irish Bank and Bank of Ireland were transferred to NAMA. In December 2010, NAMA agreed in principle to extend the transferred loan facilities by two years.

64. In August 2010, Mr Quinlan and Mr Murphy put a proposal for an acquisition of a majority stake in the company to Sir David Barclay but it was quickly rejected. The Barclay brothers continued to keep an eye on the company and in or about early November 2010 there was an agreement or arrangement that if Mr Quinlan was considering selling his shares he would let the Barclay brothers know so that they could make a matching offer. Mr Quinlan and the Barclay parties say that this was no more than a gentleman's agreement but Mr McKillen contends that it was a binding agreement.

65. January and February 2011 was a particularly busy and important time in this case. In early January 2011, Mr McKillen had discussions with the Qataris with a view to a transaction under which the Qataris would take a majority interest in the company, buying out all the shareholders except Mr McKillen who would be left with an interest of about 25% of the equity and a management contract for a number of years at an annual fee of £5 million.

66. On 15 January 2011 Mr Quinlan signed an exclusivity agreement with the Barclay interests, to last until 16 February 2011. It is a significant part of Mr McKillen's case that on the same day a binding oral agreement was made between Sir David Barclay and Mr Quinlan for the acquisition by the Barclay interests of Mr Quinlan's shares. This is denied by Mr Quinlan and the Barclay interests. On 18 January 2011 B Overseas agreed to purchase Misland with its holding of a 24.78 % interest in the equity of the company. The agreement was completed on 21 January 2011 and on the same day Misland served notice on the company exercising its right to appoint Mr Faber as a director. On 29 January 2011 Ellerman acquired debts owed by Mr Quinlan to Bank of Scotland (Ireland) Limited which were secured on part of Mr Quinlan's shareholding representing approximately 22 % of the company.

67. On 12 February 2011, Mr McKillen, Al Mirqab and the Barclay interests signed an agreement providing for the company to be owned in the ultimate shares of

18:41:41 respectively. This would require a sale of part of his holding by Mr McKillen and the acquisition of those shares and the other shares in the company by the Barclay interests and Al Mirqab. On 17 February 2011, Mr Quinlan and the Barclay interests entered into an agreement for the purchase of Mr Quinlan's shares, conditional on compliance with or waiver of the pre-emption provisions in the shareholders agreement and articles of the company. Towards the end of February 2011 Mr McKillen pulled out of the tripartite agreement and negotiations to implement it came to an end.

68. Immediately after the tripartite agreement had been signed and with a view to giving effect to it, the Barclay interests conducted intensive negotiations with Barclays Bank with a view to providing a facility to repay the debt due to NAMA. Although NAMA had agreed in principle in December 2010 to extend the term of the facilities by two years, it had not committed itself to doing so and in February 2011 it allowed a short extension to the facilities to enable the tripartite agreement and its re-financing proposals to be put into effect. Following the breakdown of that agreement, there were further discussions on the company's behalf with NAMA to persuade it to revert to the proposal for a two year extension. NAMA was no longer prepared to agree to that and instead allowed three month extensions to 30 June 2011 and again to 30 September 2011. In April 2011 the Malaysian interests purchased from NAMA debts due from Mr Quinlan secured over part of his shareholding representing 13.5% of the company's equity.

69. On 16 May 2011, Mr Quinlan gave a one year irrevocable power of attorney in relation to his shares to Mr Faber or failing him any director of Ellerman. On the same day, Mr Mowatt replaced Mr Quinlan as a director of the company. In June and July the Barclay interests conducted negotiations with two banks with a view to agreeing a facility to provide the funds required either to purchase the company's debt to NAMA or to make a loan to the company to enable it to repay those debts. Those negotiations were not completed until mid-September 2011 when agreement was reached on a facility with Barclays Bank.

70. In early August 2011 the Barclay interests opened discussions with NAMA with a view to purchasing the company's debt. There was at that time rival interest from Malaysian and Abu Dhabi interests. NAMA rejected formal offers made by the Barclay interests in the first half of September 2011, insisting that it would accept nothing less than full repayment of the debt together with accrued interest. In mid-September 2011 the Barclay interests reached agreement with the Malaysian and Abu Dhabi interests, under which the latter sold to the Barclay interests debts of Mr Quinlan secured on shares in the company. On 23 September 2011 the Barclay interests made an offer to NAMA for the purchase of the company's debt on the terms required by NAMA. NAMA accepted the offer and the assignment was completed on 27 September 2011. On 28 September 2011 the Barclay interests sent to the company an initial proposed term sheet for the extension of the loan facility. The proposed conditions included a requirement that the facility be reduced by way of the proceeds of an equity issue for at least £200 million by 12 December 2011. Mr McKillen strongly objected to the terms. The company appointed Alvarez & Marsal as its independent financial advisors. MFL agreed the first of a series of suspensions of its security rights, to enable negotiations to proceed for a longer term

re-financing. This has continued to be the case since the issue of the present proceedings on 5 October 2011.

Shareholders agreement

71. When the company was established in May 2004, the initial shareholders entered into a shareholders agreement dated 14 May 2004. There were seven subsequent amendment agreements, the last of which was dated 23 October 2009. A composite agreement incorporating the terms of all the amendments was prepared and, while it is stated not to be a legally binding document, it has for convenience been used by all the parties in the present proceedings.

72. Recital B to the shareholders agreement records that the initial investors entered into the agreement:

> "*…for the purpose of the subscription for shares and loan stock as therein set out, for regulating the future conduct of the business of the Company and its subsidiaries and for the purpose of regulating their relationship with each other*."

73. Clause 3.1.1 provides:

> "*The primary objective of the Company in undertaking the Relevant Business is to manage and turnaround the Primary Assets. It is acknowledged that this is likely to be achieved by initial self management of the Primary Assets followed by entry into management contracts with international hotel operators and ultimately the sale of some or all of the Primary Assets (other than Claridge's Hotel). It is agreed that the Company shall initially seek to sell the Savoy Hotel and the Berkeley Hotel or their respective holding entities*."

In fact there were two changes to the objectives so stated. First, management contracts have not been made with international hotel operators but, rather, the hotels have been managed by a wholly-owned management company. Secondly, although the Savoy Hotel was quickly sold, the decision was taken to retain The Berkeley.

74. Clause 3.2 imposes a series of "business covenants" on the company for the benefit of the investors' interests. Clause 3.4 contains a series of "protective covenants" whereby the shareholders agreed to procure the company not to take various steps without the prior consent in writing of the holders of a majority of the voting shares. These steps include the creation or issue of share or loan capital, the appointment of additional directors and changes to the nature or scope of the relevant business.

75. Clause 3.7 provides for allottees or transferees of shares to become parties to the shareholders agreement. Clause 4 deals with the composition of the board of directors, voting rights and other matters relating to board and general meetings. Clause 5 confers pre-emption rights on the allotment of new shares or convertible securities.

76. Clause 6 contains detailed pre-emption provisions with regard to the transfer of existing shares. I will refer in more detail to these provisions in the section of this judgment dealing with Mr McKillen's pre-emption claims.

77. Clause 8.3 provides that in the event of any inconsistency between any terms in the shareholders agreement and any provision in the articles of association of the company, including the provisions of clause 6, the terms of the shareholders agreement shall prevail and the shareholders shall make such amendments as may be necessary to the articles to ensure consistency with the shareholders agreement. By reason of this clause, the focus has been on the pre-emption provisions contained in the shareholders agreement rather than the largely identical provisions in the articles of association, as was also the case on the trial and appeal of the preliminary issue relating to the sale of Misland.

78. Clause 8.5 contains a series of provisions including in particular an obligation on the shareholders to act in good faith towards each other. Mr McKillen relies on clause 8.5 and alleges that the respondents have been in breach of it. I shall refer in detail to its terms when I consider that head of claim.

79. By clause 8.13 the agreement is to be governed by and construed in accordance with Irish law, but all parties have accepted that there is no relevant difference between English and Irish law and, while clause 8.13 gives a non-exclusive jurisdiction to the Irish courts, no party has objected to the jurisdiction of this court.

80. Articles of association were adopted in accordance with the shareholders agreement. The articles currently in force were adopted on 19 October 2009. They incorporate Table A in the schedule to the Companies (Tables A to F) Regulations 1985 and set out certain matters, such as the rights attached to the various classes of shares in the company, the pre-emption rights on the allotment of new shares, provisions dealing with directors including their appointment and, in article 5, pre-emption provisions as regards existing shares. It is not necessary for the purposes of these proceedings to refer in further detail to the articles of association.

81. There are five classes of shares in the capital of the company which rank *pari-passu* in all respects and have the same voting rights, save as regards the appointment of directors. Each of the A, B, C and D classes of shares confers the right to appoint one director. The E shares carry no such right. The maximum number of directors is six, of whom two may be co-opted by the board. The directors appointed by the four classes of shareholder have different numbers of votes at board meetings: the A director has 70, the B director 7, the C director 48 and the D director 70. Any co-opted director has one vote. The shares allotted to Mr McKillen, Misland and Mr Quinlan were A shares, C shares and D shares respectively.

The facts: chronological account

Formation of the company and initial investors: 2004

82. In early 2004, the Savoy Group of hotels, comprising the Savoy Hotel as well as the three hotels still owned by the company, was put up for sale by its then owners, two American private equity funds. Mr Quinlan was approached as a possible investor who might organise a syndicate to purchase the hotels. He negotiated an exclusivity

period commencing on 12 March 2004 and ending in early April when a deposit of £20 million would be required, with completion to follow on 7 May 2004. The agreed purchase price would be £750 million. Mr Quinlan's intention was to raise £665 million by way of loan finance and the balance from equity investors including himself.

83. In addition to legal and financial due diligence, the period following the making of the exclusivity agreement was used by Mr Quinlan to organise and raise the debt finance and the equity investment. This was by no means straightforward. Debt finance of £665 million was provided by a syndicate comprising Anglo Irish Bank and four other banks. Mr Quinlan encountered considerable problems in organising a syndicate of equity investors. All those who initially agreed in principle to invest pulled out. Completion was delayed until 14 May 2004 by which time Mr Quinlan had obtained the commitment of four investors or groups of investors in addition to himself. They were Mr McKillen (on behalf of himself and Padraig Drayne in equal shares), Misland, three individuals who invested through Quinlan Nominees Limited, and Moya Doherty and John McColgan. Mr McKillen and Mr Drayne agreed in principle to become investors on 20 April 2004, followed by Ms Doherty and Mr McColgan on or about 1 May 2004. Misland, acting by Ian Buchanan on behalf of the Green family, agreed on 10 May 2004 and the individuals who invested through Quinlan Nominees Limited on 11 May 2004.

84. The total amount paid by the investors was £110 million. Misland, Mr McKillen (with Mr Drayne) and the Quinlan Nominees investors as a single group each agreed to invest £25 million for interests of 20% each. As agreed with his co-investors, Mr Quinlan paid £10 million for his 20% interest, given that he had introduced the opportunity. Ms Doherty and Mr McColgan in fact provided £12.5 million, rather than £25 million, but this shortfall did not prevent the completion of the purchase. They received a 10% interest and the balance was taken up, as to 5%, by Mr McKillen (with Mr Drayne), Mr Quinlan and Misland in equal proportions and, as to the remaining 5%, by Kyran McLaughlin.

85. Each investment of £25 million was applied in subscribing at par £24.9 million nominal of loan stock, 100,000 special redeemable preference shares of £1 each and 2,000 ordinary shares of 10p each. Mr Quinlan subscribed at par for £10 million loan stock, 1,000 redeemable preference shares of £1 each (carrying the right to a total of £15 million on a return of capital) and 2,000 ordinary shares.

Changes in shareholdings: 2004-2010

86. There were subsequent changes in the investors and their respective holdings of shares. At the end of 2004 Mr Quinlan and Mr McKillen (with Mr Drayne) purchased in equal parts the shares held by the Quinlan Nominees investors. This was agreed by the other shareholders. As a result, the percentage shareholdings became: Mr Quinlan 31.66%, Mr McKillen and Mr Drayne 31.66%, Misland 21.66%, Mr McColgan and Ms Doherty 10% and Mr McLaughlin 5%.

87. In March 2007 Mr Drayne transferred his interest to Mr McKillen. In 2011, Mr Drayne issued proceedings claiming an entitlement to ownership of a portion of these shares but in the present case all parties have proceeded on the basis that Mr

McKillen is the beneficial owner of the shares registered in his name. The transfer of Mr Drayne's interest to Mr McKillen was capable of triggering the pre-emption provisions in the shareholders agreement and in the articles of association but all parties agreed to waive their rights in that respect.

88. In the course of 2008, Mr McColgan and Ms Doherty sold their shares to the remaining shareholders so that the equity was then held as follows: Mr Quinlan 35.185%, Mr McKillen 35.185%, Misland 24.074%, and Mr McLaughlin 5.556%.

89. In October 2009 Mr McLaughlin negotiated to sell a 2% interest in the company to Misland but Mr Quinlan and Mr McKillen took up their rights under the pre-emption provisions, so that the 2% holding was sold in equal parts to them and to Misland with the result that the holdings were then as follows: Mr Quinlan 35.93%, Mr McKillen 35.93%, Misland 24.584% and Mr McLaughlin 3.556%.

90. In February 2010, £3 million was raised by a rights issue which was taken up by all the shareholders except Mr Quinlan, with the result that the equity holdings became: Mr McKillen 36.2%, Mr Quinlan 35.4%, Misland 24.78% and Mr McLaughlin 3.58%. These remained the percentage holdings as at the beginning of 2011.

Events: 2004-2008

91. Only a few points need be noted in respect of the period from May 2004 to September 2008. The parties intended at the start to sell the Savoy and Berkeley hotels as soon as practicable. The Savoy was sold for £230 million in January 2005 to Prince Al-Waleed bin Talal, who had made an unsuccessful bid for the entire group. At an early stage the parties decided to retain The Berkeley.

92. In June 2005, the shareholders personally borrowed £28 million under a facility with Anglo Irish Bank to purchase a property in Knightsbridge adjoining The Berkeley hotel. The purchase was made by, and the loan was made to, Goldrange Properties Limited as nominee for the shareholders.

93. In mid-2005 the shareholders purchased a property at 41-43 Brook Street, adjoining Claridge's. In March 2008 this property was sold to Claridge's Limited.

94. A major refurbishment of The Connaught was carried out between March 2007 and the end of 2008. Ambitious development plans were prepared for Claridge's and The Berkeley, and planning permission was obtained in 2006, although it has not as yet been feasible to implement these plans in the very different economic and financial conditions prevailing since the latter half of 2008.

Management of the group

95. The day to day management of the group was, and remains, in the hands of a chief executive officer and staff employed by Maybourne Management Limited which acts as the management company for the hotels and the group. The present CEO, Stephen Alden, was appointed in 2006.

96. Until 2009 Mr Quinlan, through a management company owned by him, was responsible for overseeing the management of the group on behalf of the

shareholders. In January 2005 the board formally confirmed an annual fee of £300,000 which was increased to £450,000 in April 2005. Mark Hennebry, who had joined Mr Quinlan's management company in 2002, assumed a lead role. He had previously acted as the "asset manager" of investments made by Mr Quinlan and his investment syndicates in a number of hotels, with responsibility for monitoring those investments. Approximately £300,000 of the management fee covered Mr Hennebry's remuneration.

97. Mr Hennebry explains in his evidence that the role of the asset management team was to be responsible to the investors for the management of the hotels, dealing with many aspects of the business, including ownership and real estate matters, annual budgets and capital expenditure plans. Mr Hennebry explains also that he became the shareholder representative on behalf of all the shareholders, attending most board meetings.

98. Board meetings were held on a fairly regular basis and were generally attended by the directors appointed by the different shareholders or their alternates. Of these directors, only Mr Quinlan and Mr McKillen played an active part in the group's business outside the board meetings. This was recognised by the board when it resolved in January 2005 to meet the expenses of both of them, although Mr McKillen did not in fact charge any expenses to the company.

99. Mr Quinlan was identified as the public face of the group, having organised the syndicate of purchasers and being actively involved in many aspects of the business. Mr McKillen was heavily involved in the process of obtaining planning permission for developments at the hotels and in the refurbishment of The Connaught in 2007-2008. He was involved also in other matters including dealings with Anglo Irish Bank.

100. There is considerable disagreement between Mr Quinlan and Mr McKillen as to the extent of their respective activities, which it is unnecessary to resolve. It is clear, and each acknowledges, that they were both actively involved in various aspects of the group's business.

101. There were some changes in the management structure in 2009, resulting from the financial difficulties faced by Mr Quinlan. The other shareholders and their representatives, particularly it would appear Mr Buchanan for Misland and the Green family, were concerned that the group's reputation would be damaged by the personal financial problems of Mr Quinlan as its public face. The board resolved in October 2009 to reduce the management fee to the sum of £300,000 required to meet the costs of Mr Hennebry's remuneration, and subsequently resolved to terminate the management contract with Mr Quinlan with effect from the end of 2009. Mr Hennebry was engaged as a consultant under an agreement with Cadence Advisory Limited, a service company which he set up for the purpose, and continued as asset manager and shareholder representative in that capacity.

Loan facility changes

102. There were changes to the company's loan facilities. The initial advances totalling £675 million were made by a syndicate of five banks. The overall debt level was reduced on the sale of the Savoy Hotel. New loan facilities totalling £460 million

were established in September 2005 and from that time all bank finance was provided by Anglo Irish Bank and Bank of Ireland. The facilities were later increased, principally as a result of advances totalling £70 million to refinance the refurbishment of The Connaught and an advance of £35 million for the purchase of the property at 41-43 Brook Street from the shareholders in March 2008.

Irish banking crisis and its consequences

103. The international financial and banking crisis, particularly following the collapse of Lehman Brothers in September 2008, had a profound effect on the position of Irish banks and hence on the company and its shareholders. So far as the shareholders were concerned, both Mr Quinlan and Mr McKillen had large facilities with Irish banks and were likely to come under pressure in respect of them. Mr Quinlan was in serious difficulty from mid-2008 and his problems worsened with time. He failed to meet interest payments due in June 2008 on loans from Anglo Irish Bank and BOSI.

104. The company's own loan facilities were provided by Irish banks. The facilities fell due for repayment at the end of 2010 and it became increasingly apparent that those banks would not be able to provide replacement facilities on maturity. These concerns were increased when in January 2009 Anglo Irish Bank was taken into state ownership and in April 2009 the Irish Government announced proposed legislation to create NAMA as a State-owned entity to which loans and other financing arrangements provided by Irish banks would be transferred. Mr McKillen and the other shareholders were very concerned about the effect as they saw it of a transfer of the company's loan facilities to NAMA. As Mr McKillen explains in his witness statement there were two major areas of concern. First, there was a concern that NAMA might try to sell the loans to a hedge fund with a "*loan to own*" attitude by which Mr McKillen meant an aggressive lender which buys a debt package with the purpose of trying to find a default in the relevant facility agreement, calling in the loan with a view to foreclosing on the underlying assets. Secondly, there was a concern that a transfer would cause reputational damage to the hotels. Mr McKillen explains that NAMA was perceived as a "*bad bank*" set up by the Irish Government to deal with distressed property loans to failing businesses.

105. In or about October 2009, it became clear that it was proposed that the company's loan facilities should be transferred to NAMA. Strenuous efforts were then made by the company and its shareholders to persuade the banks, NAMA and the Irish Government that the loan should not be transferred to NAMA. In the event these efforts were unsuccessful and the loan facilities were formally transferred to NAMA on 25 June 2010.

Search for new equity: 2009 - 2010

106. Against this background, in the course of 2009-2010, the directors and shareholders of the company gave urgent consideration to bringing in new equity so as to improve the company's financial position and to refinance the existing facilities. On 20 October 2009, Mr Hennebry briefed the board on his discussions with a number of both large and smaller banks. He reported that all the banks without exception highlighted the fact that debt service ratios, i.e. interest payments as a proportion of

net revenue, were tight and that the company would require new capital either prior to a refinancing or as part of a refinancing. It was agreed that Mr McKillen and Mr Buchanan would work with Mr Hennebry to gauge interest from potential investors. It was further agreed that a shareholding of between 25% and 50% would be offered but it was recognised that new capital at the level of 25% would not fully recapitalise the balance sheet.

107. Discussions were held with a number of interested parties in late 2009 and early 2010. Serious discussions were held with two US investment funds, Westbrook Partners introduced by Mr McKillen and Northwood Investors LLC introduced by Mr Buchanan on behalf of the Green family. Each made presentations to the shareholders in June 2010, following which the two funds worked together to propose a deal under which they would invest £200 million for a 42% equity interest. While Mr McKillen was content to accept the dilution of his equity interest which this would entail, it proved impossible to reach final terms when Westbrook changed its terms. Northwood came back on its own, again with a proposed equity injection of £200 million for a 42.5% interest. Terms could not however be agreed, principally because Mr Quinlan rejected the proposal. Mr Quinlan likewise rejected a further proposal made by Northwood in October 2010 for an investment of £200 million of mezzanine finance, with Deutsche Bank providing a senior debt facility of £475 million, to repay the existing senior facilities now held by NAMA. These proposals were discussed at a board meeting on 3 November 2010 when the opposition of Mr Quinlan was made clear. Mr Hennebry reported that the company had been actively pursuing an extension of the NAMA loan but no heads of terms had by that stage been received from NAMA. The only alternative to an extension was therefore the deal proposed by Northwood and the board agreed to continue negotiations with both Northwood and Deutsche Bank and with NAMA in parallel. The deal with Northwood did not proceed, on account, it appears, of both the opposition of Mr Quinlan and problems with syndicating the senior debt.

Mr Quinlan's position: 2010

108. By this stage relations between Mr Quinlan and the other shareholders were at a low ebb. There was a view amongst the other shareholders that he was not cooperating with the company and frustrating an equity injection. Some shareholders considered that Mr Quinlan's well-publicised financial difficulties were bringing adverse media attention to the group's hotels. At the board meeting on 3 November 2010 it was resolved by a majority to pursue the collection of unpaid bills amounting to £285,000 due to the hotels from Mr Quinlan, and to ratify the issue in October 2010 of proceedings against him.

109. As a result of his financial difficulties, Mr Quinlan was engaged in trying to sell his many assets. In evidence he said that in 2010-2011 he had realised some £2 billion from the sale of assets, most of which were charged to secure borrowings.

110. Mr Quinlan made strenuous efforts to find a purchaser for his shares in the company in the course of 2010. On 31 May 2010, he and Mr Murphy had discussions with a member of the ruling Al Nahyan family in Abu Dhabi. Twice in June 2010 he had meetings with Sheikh Jassim in Qatar concerning the possible sale of assets, including his shares in the company. Further discussions with Sheikh Jassim and his lawyer Mr Bakhos took place in July and August 2010 and there were meetings

with Sheikh Hamad in Mougins in the South of France and Cala di Volpe in Sardinia. The prospect of any deal fell through towards the end of August 2010 when it proved impossible to agree a price. Mr Murphy said that he kept the relationship "*sort of simmering*" after August because his strategy was to keep all doors open, but it had clearly gone off the boil. At the end of August 2010 Mr Quinlan met Sheikh Mansour, of the Abu Dhabi ruling family who engaged Barclays Capital on his behalf. Again, however, it proved impossible to agree terms. In September 2010 Mr Murphy and Mr Quinlan met representatives of the Oberoi group of hotels in India. But it transpired that one of the principal shareholders in the Oberoi group was not prepared to give his backing to a deal. Discussions took place in October 2010 with Raj Kumar in Singapore and in November 2010 with a Qatari entity called Mega Trade.

111. A feature of many of these discussions was an understanding that Mr Quinlan and Mr Murphy would receive "*fees*" in amounts varying, as regards Mr Quinlan, from £25 million to £50 million. Terms were not agreed for any of these deals, including terms as to the payment of a fee, but it appears to have been accepted in some cases that a fee of this order would be paid to Mr Quinlan. Such fees were not linked just to a sale of Mr Quinlan's shares, but would be payable if the purchaser acquired either 100% ownership or at least control of the company.

The Barclay brothers' interest in the company and discussions with Mr Quinlan: 2010

112. It is convenient at this point to turn to consider the interest shown by the Barclay interests in the company's hotels and their dealings with Mr Quinlan, in each case before the end of 2010. Given their connection with the Ritz Hotel in London, the Barclay brothers had an obvious interest in the company's hotels. Mr Faber gives evidence that those and a few other similar hotels were something that the Barclay interests naturally kept an eye on, looking for opportunities either to take control and run the hotels or to buy and make a turn on them. They had indeed given consideration to making an offer for the hotels or some of them in 2004. The Barclay interests were well aware that, with the collapse of the Irish banking system, there was a real possibility of a sale of the company or its assets. In April 2010, as a result of an introduction made by Deutsche Bank, Mr Faber had a short meeting with Mr Buchanan. Mr Buchanan suggested that the Barclay interests might be interested in joining them in refinancing the group. I accept Mr Faber's evidence that this was very much a preliminary discussion and that nothing came of it. On 20 July 2010, following a conversation with Ken Costa of Lazard, Lazard supplied to Aidan Barclay some historical financial figures in relation to the three hotels. On the same day, this information was passed on to Sir David and Sir Frederick Barclay. Lazard, it appears, was then acting for Qatar Holdings LLC, part of the Qatari investment authority.

113. In his witness statement, Mr Quinlan gives an account of how he met and got to know the Barclay brothers, which was not challenged. They and their wives first met in November 2005 when Mr and Mrs Quinlan were invited to the island of Brecqhou in the Channel Islands which is owned by the Barclay brothers. They met again in June 2006 when the Barclay brothers and their wives spent an evening with Mr Quinlan and his wife at their house in the south of France. They spoke regularly on the telephone and Sir David Barclay and his wife became good friends of Mrs Quinlan. They met a number of times in France and elsewhere over the following

years. The Barclay brothers are resident in Monaco and Mr Quinlan had a villa on Cap Ferrat. The Barclay brothers were grateful to Mr Quinlan when he and his partners donated part of a site in Old Church Street, Chelsea to one of Sir Frederick Barclay's charities so that a school for children with learning difficulties could be built on it. Sir Frederick had a family reason for his close involvement in this project. While the construction of the school also benefitted Mr Quinlan and his partners because it fulfilled one of the conditions of planning consent for the site as a whole, the transferred land was very valuable and, as described by Mr Quinlan, the Barclay brothers were "*extremely grateful and very appreciative*".

114. In July 2010 Mr Quinlan, together with Mr Murphy, were due to meet Sheikh Hamad and Sheikh Jassim in Sardinia. While there, Mr Quinlan also met Sir David Barclay and, he says, briefly discussed the value of the company and its hotels. Mr McKillen challenges Mr Quinlan's evidence that this was a chance encounter. He says that it is too much of a coincidence, but I see no good reason to doubt Mr Quinlan's evidence in this respect. Over a six week period in the second half of July and during August 2010, Mr Quinlan met the Barclay brothers about seven times at the Café de Paris in Monte Carlo. On some of these occasions they discussed a possible purchase of Mr Quinlan's shares in the company. Mrs Quinlan was sometimes with them, as was Mr Murphy. These meetings covered a wide range of topics of conversation and were not restricted to discussions about the company.

115. In July and early August 2010, the principal focus of the efforts of Mr Quinlan and Mr Murphy was a possible deal with the Qataris. Mr Murphy gives evidence that following a meeting with Mr McKillen on 12 August 2010, in which Mr McKillen spoke disparagingly about the Qataris, he concluded that he should seek to find a new buyer and with that in mind he developed a proposal to put to the Barclay brothers. On 27 August 2010 Mr Murphy emailed to Sir David Barclay a copy of the shareholders agreement and supplemental agreements, a review by the company's solicitors of the pre-emption provisions, the pre-emption articles and a draft document described as "Project Ben deal scenario summary" which Mr Murphy had prepared. Mr Murphy had arranged to meet Alistair Barclay on the same day and it is apparent that these documents were emailed in advance and for the purpose of that meeting. The proposal set out in the deal summary document was that Mr Quinlan should sell his shares to the Barclay interests who, with the agreement of the other shareholders, would provide £200 million for a 42% holding, thereby replacing the two US investors with whom the company was then negotiating. The main assumptions are stated to be: first, Mr Quinlan would sell his 33.44% shareholding for £95.3million, representing an enterprise value of £950 million; secondly, Mr McKillen would not sell his shares as he was happy with 42% dilution and would not participate in the cash call or would only partially participate; thirdly, "*facilitator fee to be agreed [as discussed]/ paid once DQ sell his shares*".

116. This proposal did not get anywhere. Two days later, Sir David Barclay emailed Mr Murphy to say "*Having difficulties with shareholders over price and another shareholder remaining. I would very much like to do a deal but not easy I am afraid*". An attached letter showed that Sir David was thinking in terms of an enterprise value of £800 million and that he was not happy with outside shareholders although he would live with Mr McKillen having a shareholding of,

117. Mr Quinlan and Mr Murphy were asked during cross-examination about the "*facilitator fee*" referred to in the draft Project Ben document. They said that the fee they proposed would be at a level of £1-2 million (Mr Murphy) or £1-3 million (Mr Quinlan) for the purpose of funding Mr Quinlan's private office, comprising Mr Murphy, Mr Kelly and others. Mr Murphy gave evidence that this was a suggestion that he put to Sir David Barclay when they met by chance in the Hotel de Paris in Monte Carlo shortly before 27 August 2010. His evidence was that he indicated that if a deal was done with Mr Quinlan "*I would expect that there would be a fee paid to me – basically my plan being to use that fee to run the office, to pay myself and Mr Kelly and other suppliers*".

118. Both Mr Quinlan and Mr Murphy accepted in their oral evidence that NAMA was making payments towards continuing costs, including office costs, but they said that they did not cover all the costs and there were difficulties in dealing with NAMA. It was put to both of them that they were in fact proposing fees of the order being discussed with the Qataris. While I have no difficulty in accepting that Mr Murphy would be pitching for a fee of a million or two, which he would share with Mr Kelly and perhaps others, I am wholly unpersuaded that the Barclay brothers would begin to contemplate the payment of fees running to many millions of pounds of fees or that Mr Quinlan or Mr Murphy would think it sensible to suggest it.

119. Mr Murphy explained that there was a basic difference between dealing with the Qataris and dealing with Barclay brothers:

> *"The Qataris proposed fees – it is cultural in the Gulf I believe. We were I suppose in some way helping in the deal. In relation to the Barclay brothers, it is a very, very different kettle of fish. The Barclay brothers were deal makers in their own right and did not need me, certainly, or Mr Quinlan to guide them through the process. They were never going to pay us a fee on the scale we are talking about. I might have got an office fee, my Lord, if I was lucky, or a fee for carrying out some of the work, but there was absolutely no question whatever of the Barclay brothers paying us a fee like one we spoke to the Qataris about, and many other people as well*".

120. I will need to come back to the question of fees when I deal with Mr McKillen's case of an agreement made between the Barclay interests and Mr Quinlan in mid-January 2011. At this stage, it is enough for me to say that I am satisfied that the proposal to purchase Mr Quinlan's shares was in any event quickly rejected by Sir David Barclay, principally on the grounds of the price being suggested and also because he was not keen there should be any significant minority shareholdings. There is no evidence to suggest that the question of a fee was seriously considered, still less agreed. It is convenient also to say here that I consider it also to be in the highest degree unlikely that Sir David bothered to read the shareholders agreement or the solicitors' analysis of it. His principal interest would be in the price and in the question of whether there would be minority shareholders. Having decided that the

proposal was unsatisfactory so far as those issues were concerned, it is highly improbable that he would have concerned himself with matters which he would in any event have regarded as the domain of lawyers. These documents were not even sent to the Barclay interests' London office for comment.

121. While Mr Quinlan gives evidence that he and his wife met the Barclay brothers in the weeks after August 2010, he denied discussing a deal in relation to the company with them. Mr Murphy may have made a further attempt to persuade Sir David Barclay that the enterprise value of the group was more than £800 million, but I am satisfied that there were no substantial discussions between Mr Quinlan and the Barclay brothers or their representatives during September and October 2010 as regards the company and Mr Quinlan's investment in it.

Pre-emption arrangement between Mr Quinlan and the Barclay brothers: October-November 2010

122. In late October 2010, a payment of €500,000 was made by a company owned or controlled by the Barclay brothers to Mr Quinlan. Either at the time of the payment or shortly afterwards Mr Quinlan agreed with Sir David Barclay that he would tell him if he was going to sell his shares in the company.

123. The petition pleads that "an agreement was reached to the effect (at least) that Mr Quinlan would not sell his shares without first giving the Barclay Brothers the opportunity to match the price offered, i.e. that the Barclay Brothers would be given a right of first refusal, over the shares". Although not there spelt out, I understand this to be an allegation of an enforceable agreement.

124. In their response dated 2 February 2012 to Mr McKillen's request for further information in these proceedings, the Barclay interests stated that "*as a quid pro quo for the first payment of €500,000, Sir David asked Derek Quinlan to let him know if he intended to sell off his shares in Coroin and to allow Sir David to match any other offer received, i.e., to give him the option of offering for the shares if Derek Quinlan decided to sell them in future. This was a 'gentlemen's agreement' and was not intended to have contractual force".*

125. The evidence on this is as follows.

126. On 28 October 2010, Mr Quinlan faxed a handwritten letter to Sir David Barclay. It was headed "self-loan-€500,000" and the letter read: "*Many thanks for helping at this time. I will repay your loan by 12 Nov 2010 when I expect my deal to close."* He then gave his account details. The deal to which he referred was the sale of a yacht berth in the south of France. The deal fell through and Mr Quinlan did not repay the loan. Nor has he since repaid it or been pressed to do so. It may be that Mr Quinlan's request for a loan, rather than a gift, was prompted by personal pride but there can be no doubt that at the time the payment was treated as a loan.

127. In his first witness statement, Mr Quinlan explained that his financial position was precarious at this time and that he had a tax bill payable in Switzerland. The documents show that he was due to pay a total of 300,000 Swiss Francs in equal instalments on 1 October, 1 November and 1 December 2010 and that the first of those was in fact paid on 28 October 2010. He says that he requested Sir David

Barclay for assistance and that Sir David was willing to provide it and asked only for the bank details to which the money should be sent. He goes on to say that he met Sir David about a week later at the Ritz Hotel in London, with Mr Murphy also present. In the course of the conversation which covered a number of topics, Sir David said he would like to know if Mr Quinlan was ever selling his shares in the company. Mr Quinlan describes this as a casual comment. In his witness statement Mr Murphy, who was present at the meeting at the Ritz with the Barclay brothers in early November, supports Mr Quinlan's account of what was said at that meeting. He goes on to say that as far as he was aware at no point was a right of first refusal provided and that there was no agreement of any sort linking the loan to Mr Quinlan's shares.

128. Some account of the loan and discussion concerning Mr Quinlan's shares was given in an email sent by Mr Murphy on behalf of Mr Quinlan to NAMA on 23 January 2011. Following the acquisition by the Barclay interests of Misland, NAMA had requested a written brief on the implications of the purchase and also an explanation of the relationship between Mr Quinlan and the Barclay brothers. Mr Murphy prepared a draft which included "*In October Sir David gave a personal loan to DQ of €500k to keep the family going financially and in return they asked DQ to ensure that BB would have an opportunity to buy his MHG interests if he was ever selling. This was a gentleman's agreement "to a friend in need" with no documentation."* Mr Faber made some changes to the draft following a conversation with Sir David Barclay on 23 January 2011. The first sentence of the passage concerning the loan in October 2010 was changed to "*In October Sir David gave a personal loan to DQ of €500k to keep the family going financially and requested that BB would have an opportunity to match any offer DQ might receive in the future for his shares if he was ever selling"*.

129. Mr Quinlan was cross-examined about the loan. First I should say in the light of some of the questions put to Mr Quinlan that I am satisfied that it was Mr Quinlan who approached Sir David Barclay for the loan and that he did so because he lacked funds with which to pay pressing bills. It was put to Mr Quinlan that when he did not repay the loan on 12 November 2010, an arrangement was made whereby he gave the Barclay brothers the right of first refusal in relation to his shares in the company. Mr Quinlan denied this suggestion and said that when he met the Barclay brothers early in November, Sir David asked if he would be happy to tell him if he, Mr Quinlan, was selling his shares to which Mr Quinlan replied that he would be happy to do so. That, he says, is the only thing they agreed: "*I would advise him if I was selling my shares*". His comment on Mr Murphy's draft email to NAMA in January 2011, and in particular the reference to "in return" was as follows: "*it is accurate to say in return, but not on that date. It was when we met in the Ritz hotel in early November that this came up."* His comment on the Barclay interests' response to the requests for further information which I have quoted above was as follows: "*there was a quid pro quo in November. When I made the call from the Capital Hotel at the end of October 2010, there was no question, no discussion, about the Coroin shares……….. there was no discussion about quid pro quos on that date. It was when I met Sir David and Sir Frederick in the Ritz Hotel in November that this came up*."

130. In the light of the email drafted by Mr Murphy in January 2011 and its form following the amendments made after Mr Faber had discussed it with Sir David Barclay, and in the light of the Barclay interests’ response to the request for further information, there was clearly a connection between the loan and Mr Quinlan’s agreement to give the Barclay brothers advance notice of any proposal to sell his shares. The only purpose of giving such notice would be to enable the Barclay brothers to make a counter offer if they were so minded. I am satisfied in the light of Mr Quinlan’s evidence and the terms of his hand written letter of the 28 October 2010 that this was not discussed in his telephone conversation with Sir David Barclay on 28 October 2010. I am also satisfied that it was discussed, albeit briefly, at the end of the meeting at the Ritz Hotel in early November 2010. I am entirely satisfied that the parties did not intend to create a legally binding agreement. Rather, because Sir David Barclay had made the loan of €500,000 and because the parties well knew Mr Quinlan might very well not be able to repay it, Mr Quinlan acceded to Sir David Barclay’s request to be informed of any proposal to dispose of his shares. In the light of the agreements later made between the parties, I consider it unlikely that an enforceable agreement would have been made without it being recorded in writing, probably in a formal agreement.

Sale of Misland: October 2010 – January 2011

131. In the light of the disagreements between Mr McKillen and Mr Quinlan as to the way forward for the company, the Green family had by October 2010 decided that it would pursue a possible sale of its interest in the company without reference to the other shareholders. They instructed Lazard to act on their behalf. Lazard produced a discussion document, in effect a sales pitch for the Green family’s stake. It stated that the Green family was willing to sell its 24.78% interest in the company for £75 million implying a group enterprise value of £969 million. The section of the document headed “Transaction Overview” stated that “*acquisition would be of Cyprus vehicle Misland avoiding need to offer shares pre-emptively to other shareholders*” and that the other assets held by Misland would be removed from Misland unless the purchaser wished to retain them. The document also contained suggestions as to how a purchaser of Misland could seek to obtain control of the company.

132. On 7 October 2010, Lazard and Mr Buchanan on behalf of the Green family presented their proposals to representatives of the Barclay interests, including Aidan Barclay. Following this meeting, Aidan Barclay wrote on 8 October 2010 to Bank of Scotland Corporate, “*We have ‘agreed’, subject to due diligence and contract, to purchase the Green family’s shareholding (24.78%) of the Maybourne Group for a consideration of £75m. We are currently working on signing and funding this acquisition in the early part of next week*”. The letter goes on to state that the Barclay interests’ plan would eventually be to acquire 100% of the shares of the company, which depending on how events unfolded, could be in a matter of weeks or, for example, in two years’ time. In fact, there was no progress with this transaction and it does not appear from the evidence that there was any further discussion with the Green family until December 2010.

133. Discussions with the Green family were renewed in December 2010. A deal was agreed between Sir Frederick Barclay and Mr Buchanan in mid-December but it did not at that stage proceed to a contract. The Green family kept their options open. As

potential bids for the whole company emerged in early January 2011, they wanted the company and shareholders to co-operate with the bidders, but they also wanted to keep the deal agreed with Sir Frederick Barclay alive, as they were by no means certain that other offerors would "*deliver*". For their part, the Barclay interests started to work on a possible purchase of all or a majority of the shares, including discussions with Deutsche Bank to raise finance.

134. On 18 January 2011 Mr Faber met Mr Buchanan in Ireland and agreed a deal to purchase Misland for £70 million. The deal was approved by Aidan Barclay and Sir Frederick Barclay in a telephone call and the agreement for the purchase of Misland was signed late on 18 January 2011 and completed on 21 January 2011. This move took Mr McKillen and the other shareholders by surprise.

Offers by Wynton

135. Before dealing with the major events of January and February 2011, this is a convenient point at which to mention offers which were made and revised during that period by an entity called The Wynton Group (Wynton). As mentioned earlier, it appears that Wynton was controlled by a Malaysian businessman, Jho Low, and his brother. In mid-December 2010, advisers to Wynton made an indicative offer for the shares of the company. Mr McKillen met Jho Low and his advisers at Claridge's on 29 December 2010. A revised letter of intent was sent to the shareholders on 3 January 2011, proposing an acquisition of all the shares on the basis of an enterprise value of £1 billion, subject to due diligence and agreement of documentation including warranties and indemnities. An accompanying letter from a Malaysian Bank indicated that it was intended to seek to raise up to £950 million of debt and/or mezzanine finance and £50-£100 million of equity. A further letter of intent dated 10 January 2011 was sent to the shareholders.

136. Although Mr Buchanan on behalf of the Green family was prepared to take this approach seriously, neither Mr Quinlan nor Mr McKillen did so. Mr Murphy on Mr Quinlan's behalf described it as "*pure fantasy due to their plan to raise a £900 million bond with little over £100 million equity*". In an email dated 11 January 2011, after Mr McKillen had had his meeting in Doha on 9 January 2011, he wrote that he did not have anything like the same comfort or belief that it was a reliable offer compared with interest from Qatar. He said "*my sense is that it is an offer that can't really be delivered either in time or structure. The delivery of the Malaysian government bond is not guaranteed and the deal may end up in an open ended bridging situation because it does not have the proper financing. I also sense that some Malaysian government may have a political motive and that will naturally delay execution. I am conscious that on paper the Malaysian deal is better to me personally, however, we should be looking at credibility and execution"*. Mr McLaughlin was of the same view. Even Mr Buchanan was not confident that Wynton would deliver, and so had asked Sir Frederick Barclay on or about 6 January 2011 to keep the Barclay offer for Misland open.

137. Mr McKillen said in evidence:

> *"The Malaysians offered an unrealistic finance package with £900 million debt and no one appreciated that it was realistic – nobody. I met the Malaysians and I did not believe they had the credibility to deliver £1 billion."*

138. In an email on 13 January 2011, Mr McKillen repeated his view. He wrote that "*with regard to the Malaysian offer, I feel that to labour the company with £900 million of debt is in itself unrealistic*". The provision on 15 January 2011 of a letter from 1 Malaysian Berhad, an investment vehicle wholly owned by the Malaysian government, confirming its support for the offer, did not allay the concerns of the majority of the shareholders. A further letter from Wynton dated 24 January 2011 stated that the financing for the offer had "in principle" been fully underwritten by Malaysian government-backed investment funds.

139. On 7 February 2011, Wynton made a revised offer, on the basis of an enterprise value of £1.028 billion. Instead of an offer for all the shares of the company, it was an offer, subject to contract, made to each shareholder to purchase that shareholder's interest and it was not expressed to be conditional upon acceptance by any other shareholder. The offer was stated to be open for acceptance until 5.00pm on 11 February 2011. A board meeting of the company was scheduled for 8 February 2011 and Wynton requested that its offer be considered at that meeting. The offer was not approved by the board. Only Mr McLaughlin supported it and on 11 February 2011 he signed a contract for the sale of his shares to Wynton, which led to his shares being offered round to the other shareholders at the price offered by Wynton under the pre-emption provisions.

Dealings in January 2011

140. I will turn now to the dealings in January 2011 between Mr McKillen and the potential Qatari investors and between Mr Quinlan and the Barclay interests. The sequence of events is of importance because of Mr McKillen's case that in January 2011, and specifically, as it was put in closing, on 15 January 2011, Mr Quinlan reached a binding agreement with the Barclay interests for a disposal of his shares to them.

Mr McKillen's dealings with Al Mirqab: January 2011

141. Although Mr Quinlan's discussions with the Qataris in July and August 2010 had ultimately come to nothing, Mr Murphy was anxious to maintain contact with them. To that end he had at least one meeting with Credit Suisse, advisors to the Qatari interests, in London in December 2010. In early January 2011, he suggested to Mr McKillen that he should speak to the Qataris. He suggested that the Qataris were interested in taking a 75% stake in the company, but allowing Mr McKillen to retain a 25% shareholding and to be the projects director and main promoter of the hotels with appropriate compensation. This was of interest to Mr McKillen and accordingly he and Mr Murphy met William Mansfield of Credit Suisse on 6 January 2011. At the meeting Mr Mansfield confirmed that Sheikh Hamad was interested in acquiring a 75% interest in the company, allowing Mr McKillen to retain 25%. Mr Mansfield indicated that Sheikh Hamad would refinance the NAMA loan facilities and would be likely to agree a purchase on the basis of an enterprise value of not less than £900 million. It was agreed on that basis that Mr Mansfield and Mr McKillen would go to Doha in Qatar to meet Sheikh Hamad and that Mr Murphy should go with them to provide comfort that Mr Quinlan would be in favour of a deal. As appears from an email sent on 7 January 2011 by Mr Murphy to Mr McKillen, Mr Murphy had confirmed with Mr Quinlan that he would accept a deal based on an enterprise value of £900 million subject to the other shareholders

accepting it. Mr McLaughlin confirmed his support in writing. Mr Buchanan refused to provide a letter of support but said that if the Qataris genuinely made an offer on the basis of an enterprise value of £900 million the Green family would be willing to sell.

142. In a further email late on 7 January 2011, Mr Murphy set out the reasons for accepting an offer of £900 million from the Qataris. These included *"we don't think Q will chip the price"* and *"we know Q can write the cheque unlike so many potential purchasers who are all talk but lack financial substance in the end*." Another reason, Mr Murphy mentioned, was that "*we think the Viceroy/Wynton £1b deal is pure fantasy due to their plan to raise a £900m bond with a little over £100m equity*".

143. Mr Murphy explained in his oral evidence that he was enthusiastic about the possibility of a deal with the Qataris because he believed that if Mr McKillen and Mr Quinlan were "*on the same page in terms of a deal, then something could be achieved*". He distinguished his own enthusiasm for a deal with the Qataris with the rather less enthusiastic attitude of Mr Quinlan. He agreed that he would have spoken to Mr Quinlan about the first of the two emails sent on 7 January 2011 but added that he may possibly have over-stated Mr Quinlan's enthusiasm. He said that Mr Quinlan suspected that the Qataris might try to chip the price. As regards the second email he did not agree that the views expressed as to the reasons for supporting a deal with the Qataris were shared by Mr Quinlan, notwithstanding the repeated use of the word "*we*". He regarded the possibility of a deal with Qataris as being "*very much my own initiative*". He further suggested that he may have misled Mr McKillen into thinking that Mr Quinlan's support was greater than in fact it was, because he thought he could bring Mr Quinlan round to the idea that the Qataris' offer was the best offer, particularly if Mr McKillen agreed to it.

144. On 9 January 2011 the trip to Doha took place. There were meetings initially with Sheikh Jassim, which did not go well because he indicated privately to Mr Murphy that Sheikh Hamad was not prepared to pay as much for Mr Quinlan's shares as for the other shares in the company. He proposed that the purchase of Mr Quinlan's shares would be on the basis of an enterprise value of £800 million as opposed to £875-900 million for the other shareholders. Mr Murphy was very shocked by this proposal. Mr McKillen, when told about it by Mr Murphy, was also surprised and considered that Mr Quinlan was being unfairly treated. He sought in conversation with Sheikh Jassim and others to persuade them to increase the offer being made for Mr Quinlan's shares to the same level as the other shares. Subject to that point, Mr McKillen's discussions on 9 January 2011 with Sheikh Jassim and later with Sheikh Hamad were very satisfactory from his point of view. As he explains in his witness statement, he left Doha on 9 January 2011 with the understanding that they had secured a good offer in principle for the shareholders. The opportunity involved refinancing the NAMA facility and "*offered a secure personal situation for me notwithstanding the proposed reduction in the size of the shareholding, giving me a long term interest in the company and the opportunity to continue to manage the company going forward, for a fee of £5 million per annum and for a minimum three year term*".

145. Mr Murphy not unnaturally took a rather different view. He said in evidence that what happened on that day confirmed all of Mr Quinlan's suspicions. Mr Murphy's

reaction was to see if he could revive discussions with Sheikh Mansour of Abu Dhabi. He was in any event travelling to Abu Dhabi on other business. On 12 January 2011 he had a meeting with Harry Martin of Barclays Capital, representing Sheikh Mansour, and an intermediary Aasim Mahmood. In his oral evidence Mr Murphy said that his discussions in Abu Dhabi made clear that a deal involving Sheikh Mansour had no realistic prospect because of the size of fees which Mr Mahmood was looking to achieve.

146. Mr McKillen reported on his discussions in Doha to Mr Buchanan and Mr McLaughlin in an email sent on 11 January 2011. The offer being made by the Qataris was "*the most credible offer we have had to date and one we should not miss out on. We at least know that funding and execution is not an issue with the Qataris*". He continued "*the alternative of not doing a deal is two years in NAMA and the effect of that we both know well – we risk losing control of the business along with the equity*". He expressed a lack of confidence in the credibility of the proposal from Wynton. He ended by saying "*having seen so many offers over the 18 months, I strongly believe we should pursue the most realistic offer (i.e. Qatar) which can be delivered on time and hence avoiding the catastrophic situation of ending up in NAMA*".

13-14 January 2011

147. On or before 7 January 2011, Sir David Barclay called Mr Quinlan and suggested they should meet at Gstaad in Switzerland within a few days. Mr Quinlan flew to Switzerland on 12 January 2011 and was joined by Mr Murphy the following day. The arrangement was to meet Sir David on 13 January 2011 but he was unwell and it was agreed to meet the following day. Mr Quinlan and Mr Murphy had dinner with Mr Faber that evening but there was no discussion of any proposal in respect of Mr Quinlan's shares except that Sir David Barclay would present a proposal to Mr Quinlan the following day.

148. In the days following the meeting in Qatar on 9 January 2011, Mr McKillen had numerous discussions with representatives of the Qataris. Late in the afternoon on 13 January 2011 he emailed Mr Buchanan and Mr McLaughlin to say that in the next 24 hours the Qataris would make an offer in the range of £875-900 million, which would be available for acceptance for a few days. Contact must also have been made with Mr Quinlan or Mr Murphy because at 18.23 UTC (7.23pm in Switzerland), Mr Murphy texted Mr McKillen to say that Mr Quinlan had agreed to support the Qatari deal and that they were both going to ring Mr Bakhos within the hour to tell him.

149. During the evening of 13 January 2011 Mr Quinlan spoke to Mr Bakhos. Mr Bakhos apologised for what had occurred in Doha on 9 January and stated that his principals would make an offer which would not involve any discount on the price for Mr Quinlan's shareholding. Mr Quinlan said that he would be willing to consider a deal with the Qataris. Privately, as Mr Quinlan made clear to Mr Murphy, he was not entirely keen to proceed with the Qataris in the light of what had happened on 9 January but Mr Murphy was, as Mr Murphy put it, pushing for him to do a deal with the Qataris.

150. Evidence of Mr Quinlan wavering in his intentions is shown by an email sent by Mr Murphy at about 10.30pm on 13 January 2011 after dinner with Mr Faber. The email was sent to Mr Mahmood and said "*DQ wants to do Twins deal and Twins are tabling their offer in writing tomorrow. I believe the Twins deal will fail but Q have their proposal. Paddy wants to do Q deal*". Mr Murphy goes on to say that Mr McKillen would at that stage not meet Sheikh Mansour and that the Green family were promoting Wynton's bid which would in Mr Murphy's view fail. He stated that he regarded the Qatari deal as the most credible but that it could fail as the Green family might not support it.

151. Just after midnight Mr Murphy sent an email to the other shareholders and to Mr Hennebry to say that he and Mr Quinlan had discussed the possible deals and had come to *"the following definitive conclusions"*. They were not satisfied with the deal from Wynton but "*the new deal proposed by Paddy from the Qataris has a definite air of financial credibility to it and we would support it as an exit strategy for Derek subject to: 1) our Bank's approval and 2) a majority of shareholders accepting it*". In his second witness statement, Mr Quinlan said that he had not seen this email before and that it did not accurately reflect his thoughts at the time as he remained uncomfortable about doing a deal with the Qataris. In his oral evidence, Mr Murphy said that this email was not the result of any conversation in which Mr Quinlan expressed his support for a Qatari deal. He said that he was on a solo run when he was writing the email and that he was still trying to bring Mr Quinlan and Mr McKillen together. He overstated the position in the hope that he could get the agreement of both Mr Quinlan and Mr McKillen. He believed at that stage that he could change Mr Quinlan's mind. He did not want to blow the deal up so he sent the email just to keep the door open.

152. The meeting with Sir David Barclay took place on the morning of 14 January 2011. Present were Sir David, Mr Faber, Alistair Barclay, Mr Quinlan and Mr Murphy. They discussed the purchase of Mr Quinlan's shares and as recorded by Mr Faber in his witness statement " *a (non-binding) agreement in principle was reached that we would buy his shares on the basis of an enterprise value of £900 million, i.e. about £80 million for Mr Quinlan's shares*".

153. In his second witness statement, Mr Quinlan says of this meeting that Sir David said that he was willing to offer £900 million for the whole group and that there would be no due diligence or warranties. While Mr Quinlan does not recall a specific timetable being discussed, he thought that the deal could be completed reasonably quickly. He says that he believed it was a significant improvement on the Qatari offer due to the fact there would be no due diligence or warranties and he told Sir David that he thought the offer would be acceptable to shareholders. He mentioned also that any offer would be subject to the pre-emption provisions. I accept the evidence of Mr Faber and Mr Quinlan as regards this meeting.

154. During the morning of 14 January 2011 Credit Suisse sent a letter, on behalf of the Qataris, containing an indicative offer to the shareholders of the company. It put an enterprise value of £875-£900 million on the company. It stated that any final offer would be subject to Mr Quinlan, the Green family and Mr McLaughlin agreeing to sell all of their interests in the company but it recorded that the Qataris were willing to allow Mr McKillen to retain an equity interest reflecting his future role in the business. It was conditional also on the satisfactory completion of a reasonable

scope of financial, tax, pensions, legal, property and commercial due diligence and on the agreement of appropriate legal documentation including representations, warranties and indemnities from the selling shareholders. It stated that the indicative offer was opened for acceptance to mid-night on Saturday 15 January 2011.

155. In the car on the way to the airport after the meeting with Sir David Barclay, Mr Murphy received details of the written offer made during the morning by Credit Suisse and informed Mr Quinlan. Mr Murphy called Mr Faber and told him about the offer. Mr Faber says in his witness statement that he said something along the lines that the Qatari offer was not a problem since Mr Quinlan had a deal with the Barclay brothers but Mr Murphy gave the strong impression that Mr Quinlan might not stand by it. In his second witness statement, Mr Murphy agrees that he most likely did give this impression to Mr Faber. He was not enthusiastic about doing a deal with the Barclay brothers because he believed that any sustainable deal would have to include Mr McKillen. He thought the Qatari offer would be acceptable to Mr McKillen and that Misland could possibly be required to sell under the drag-along provisions of the shareholders agreement. He comments that he did not know that the Barclay brothers would shortly agree terms for the purchase of Misland and that, if he had known, it would have changed everything.

156. Mr Quinlan flew back from Geneva to London and Mr Murphy to Dublin. Shortly after 4.00pm Mr Murphy sent an email from the airport to the shareholders of the company which began "*I have been asked to expand on why we are prepared to support the Q proposal*". A number of reasons are given, of which the first is that the Qataris are credible buyers with cash to complete and not someone offering a high price to get an exclusive deal and then chip. Another reason is that the shareholders have run out of time to complete a deal having held out as long as they could. The email was sent to, amongst others, Mr Quinlan. Mr Quinlan says in his second witness statement that he does not remember seeing it at the time and that he would not have had access to his emails while travelling. In any event, he says that it did not reflect his thoughts at the time since he remained unconvinced about the Qatari deal and thought that he should do a deal with the Barclay brothers.

157. Mr Faber immediately relayed the contents of his call from Mr Murphy to Sir David Barclay who told him that he should return to London and make sure that Mr Quinlan continued to support the proposal from the Barclay interests. Mr Faber returned to London that afternoon and explained the position to Aidan Barclay. Mr Faber met Mr Quinlan at the Capital Hotel in Knightsbridge, with Mrs Quinlan also present, on the evening of Friday 14 January 2011 and again at about 10.30am on Saturday 15 January 2011. At each of these meetings Mr Faber impressed on Mr Quinlan the merits of the offer which the Barclay interests were prepared to make, stressing not only the price based on an enterprise value of £900 million but also in particular that it would not be subject to due diligence or warranties. At the meeting on Saturday morning, Mr Quinlan explained to Mr Faber that there was to be a board meeting of the company and that it was all very difficult.

15 January 2011

158. A conference call among the shareholders or their representatives took place at noon on Saturday 15 January 2011. Those participating were Mr McKillen, Mr McLaughlin, Mr Buchanan and Mr Murphy, with Mr Hennebry in attendance. Mr

McKillen wished to have support for his negotiations with the Qataris and in particular wished the shareholders to enter into a binding exclusivity agreement for a period of three weeks. Mr Buchanan on behalf of the Green family made clear that Misland would not agree to giving the Qataris exclusivity. Mr McLaughlin was willing to do so and Mr McKillen, Mr McLaughlin and Mr Hennebry understood Mr Murphy to agree to exclusivity on behalf of Mr Quinlan. There is a difference in the evidence as to the extent to which Mr Murphy participated in the conversation. I do not consider it necessary to resolve this detail because it is clear that at the very least Mr Murphy allowed the others to understand that Mr Quinlan did agree to such exclusivity. Indeed Mr Murphy was himself in favour of the deal with Qataris and during that day had a number of calls with Mr Quinlan, seeking to persuade him to support the Qatari deal.

159. Mr Quinlan and Mr Faber met again in the afternoon with Aidan Barclay also present. By the end of that meeting Aidan Barclay and Mr Faber believed that they had persuaded Mr Quinlan not to sign the Qatari exclusivity agreement. They called Sir David Barclay who thought that they should get something in writing from Mr Quinlan.

160. Mr Quinlan returned home to Putney and that evening received a telephone call from Sir David Barclay. Sir David spoke first to Mrs Quinlan and then to Mr Quinlan. In his first witness statement Mr Quinlan said that Sir David told Mrs Quinlan that he would support the family and try to get Mr Quinlan back on his feet. In his second witness statement, Mr Quinlan said that he has since discussed this with his wife and she could not confirm with certainty that Sir David made those comments on that specific evening but he accepts that it is possible that Sir David made reference to the fact that he would support the family. Mrs Quinlan passed the telephone over to Mr Quinlan. Sir David wanted to know whether he had Mr Quinlan’s support for his proposals. Mr Quinlan said that he did support them. Mr Faber had arranged the preparation of a short exclusivity agreement and took it round to Mr and Mrs Quinlan’s house later that evening. Mr Faber understood that an exclusivity agreement was as far as the Barclay interests could go with Mr Quinlan in view of the pre-emption provisions. Mr Quinlan signed the agreement.

161. Mr Faber understood that Mr Quinlan had accepted the fundamentals of the deal which the Barclay interests were proposing, on the basis of an enterprise value of £900 million. He denied the suggestion put to him in cross-examination that Mr Quinlan was promised a facilitation fee. He said that he never once had a conversation with Mr Quinlan about a facilitation fee. He was not aware that there had ever been any discussion between Mr Quinlan and the Qataris about a fee and he said that he and the Barclay interests were never asked to match any fees. Mr Faber commented that the level of fees discussed with the Qataris in about August 2010 would have represented a considerable additional enterprise value and would have certainly affected the view of the Barclay interests as to whether it was an attractive transaction.

162. Mr Faber denied also that the arrangement made on 15 January 2011 involved Mr Quinlan agreeing that he would thenceforth be using all of his rights in relation to his shares for the benefit of the Barclay interests. Equally he denied that Mr Quinlan agreed to act in accordance with instructions given to him by Barclay interests.

163. At 1.55pm on 15 January 2011, Mr Murphy had informed Mr McKillen of the dealings between Mr Quinlan and the Barclay interests. In a text he said: "*Greens are talking to Barclay Twins who have now contacted Derek. They are proposing a role for you, more than 900. Close in a week. No due diligence. No warranties. Seems incredible. Don't blow a gasket on this news. Talk to me. It might offer a compromise. You would have the power of the telegraph behind you*". Later that evening Mr Murphy informed the other shareholders about the exclusivity agreement with the Barclay interests. In an email sent at 10.39 pm, he said Mr Quinlan believed that a better deal could be agreed with the Barclay brothers and that they would table an offer the following week at £900 million on terms that would not include any due diligence or warranties, would provide for payment in a matter of days and would give a future role to Mr McKillen (to be agreed directly with him). Given that other shareholders had understood from Mr Murphy that Mr Quinlan would support an exclusivity agreement with the Qataris, the understandable reaction from Mr McKillen, Mr McLaughlin and Mr Hennebry was a mixture of incredulity and anger.

164. What becomes very clear from a number of texts and emails sent by Mr Murphy is that he felt personally let down by Mr Quinlan's decision and embarrassed as regards the other shareholders and the Qataris. In an email to Mr Bakhos and Mr Mansfield at 10.50pm on 15 January 2011 Mr Murphy said that he very much regretted what had happened but then went on to float the possibility of a deal involving the Barclay interests and the Qataris. In a text message to Mr McKillen sent on 16 January 2011, Mr Murphy said "*you have no idea how badly I feel about the way Derek has behaved and you have been treated. He has killed off a chance for me and Owen to get a few bob*". On the morning of 16 January 2011 Mr McKillen texted Mr Murphy to say: "*That man deserves no respect. I know you did your best Gerry*".

165. I am satisfied that Mr Murphy and Mr Quinlan were by no means of one mind in the days leading up to 15 January 2011 about the respective merits of dealing with the Qataris or the Barclay interests. It is clear that Mr Murphy strongly favoured a deal with the Qataris. This is borne out by Mr Murphy's text messages to Mr McKillen in early January 2011 when he was encouraging Mr McKillen to enter discussions with them, for example: "*This is THE deal for us.*" He felt that a solution to the company's difficulties could only be found if both Mr McKillen and Mr Quinlan agreed on a proposal. As Mr McKillen was keen on a deal with the Qataris and seemed to have an antipathy towards the Barclay brothers, Mr Murphy believed that the best course for all concerned, including Mr Quinlan, was to reach an agreement with them. He sought to persuade Mr Quinlan of this view and I am satisfied that it coloured the approach which he took in some of the emails supporting a Qatari deal, to which I have referred. I do not consider that Mr Murphy's emails are by any means a reliable indicator of Mr Quinlan's state of mind at any particular time. Mr Murphy was no doubt also attracted by the possibility of making, as he puts it, "*a few bob*". He explained in answer to questions from me that he had a hope that the Qataris might pay a fee for Mr Kelly and himself for their office. He said that it could have been anything from £100,000 to £1 million.

17 January 2011

166. As I mentioned earlier, the Barclay interests agreed the purchase of Misland on 18 January 2011. The position at that point therefore was that the Barclay interests had acquired an interest of just under 25% in the shares of the company and, so far as any written agreement showed, had by the exclusivity agreement of 15 January 2011 prevented Mr Quinlan from selling his shares to the Qataris or anyone else before 17 February 2011. Meanwhile on 16 January 2011 Mr McKillen and Mr McLaughlin had entered into an exclusivity agreement with the Qataris, lasting until 7 February 2011. The position was accurately summarised by Mr Faber in an email sent on 18 January 2011 to a contact who had heard a rumour that the Qataris were close to agreeing a deal in relation to the company: "*we are now demonstrating negative control (we can block things) and I hope we can take a positive step forward in the coming day or two*". In the same email and with remarkable prescience Mr Faber said "*this is a soap opera and has a few chapters left to run*". I doubt whether Mr Faber then realised quite how many chapters were left to run.

23-27 January 2011

167. On 23 January 2011 Mr Murphy sent to Mr Hennigan at NAMA the background brief on the implications of the sale of Misland to the Barclay brothers. The document also refers to the arrangements between the Barclay interests and Mr Quinlan. It refers to the exclusivity agreement signed on 15 January 2011 adding that it "*is the only agreement DQ has with BB*". It continues that on 15 January 2011 the Barclay interests did not seek to agree to buy Mr Quinlan's shares as this would merely give Mr McKillen an opportunity under the pre-emption provisions. The same document states that "[f]*or several practical reasons DQ supports BB as a shareholder and will align himself with their stake and support the sale of his shares when it is appropriate to do so. Adopting a contrary stance in the current circumstances would most likely damage DQ's equity value and reduce what DQ can repay his creditors*". The document states also that "*Sir David intends to place the professional services of Cork Gully (Stephen Cork) at the disposal of the Quinlan family in order to effect a speedy settlement with creditors*". On 24 January 2011, Mr Murphy emailed Stephen Cork at Cork Gully stating "*Derek Quinlan now has a supporter in the form of the Barclay brothers ('BB')"*.

168. In an email to a contact dated 24 January 2011, Mr Faber wrote that "*Derek is an old acquaintance so we hope to emerge with 60% shortly*".

169. On 24 January 2011, Aidan Barclay and Mr Peters attended a meeting with Mr Hennigan and others from NAMA. Mr Peters' hand written notes of the meeting include the following: "*'Agreement' DQ to acquire and share pro rata price"*. Mr Peters gave evidence that this was a reference to the agreement in principle with Mr Quinlan that he would sell his shares to the Barclay interests based on an enterprise value of £900 million. Mr Hennigan recalled that Aidan Barclay said that the Barclay brothers "*had a debt of gratitude to Derek Quinlan, they wished to see him get back on his feet and they were going to provide him support with the day-to-day expenses*".

170. Mr Peters followed up the meeting with a letter to NAMA on 25 January 2011 to confirm points made at a meeting. He referred to the acquisition of Misland and to the intention to make an offer to the other shareholders on the basis of an enterprise value of £900 million. He stated also that "*we have signed an exclusive 'agreement'*

with Derek Quinlan to acquire the shareholding in Coroin at the same pro-rata equity value as per Misland, as set out in (1) above. We did not specifically discuss the topic of Derek Quinlan extending his exclusive arrangement with us, if necessary for any reason, although Graham did ask the question as we were leaving your building. To be clear, if we find ourselves in such a position, it would be natural for Derek Quinlan to extend his exclusive arrangement with us for a longer period of time".

171. On 24 January 2011, provoked no doubt by the publicity surrounding the sale of Misland to the Barclay interests, further indicative offers from third parties were sent to shareholders. PCP Capital Partners, whose chief executive officer, Amanda Staveley, had become well known when Abu Dhabi and Qatari funds invested in Barclays Bank in 2008, sent an indicative offer, subject to contract, offering to purchase the company on the basis of an enterprise value of £960 million. There is no evidence that any of the shareholders ever took this or other approaches from PCP Capital Partners seriously.

172. At this stage, it was the intention of the Barclay interests to proceed as swiftly as possible to a purchase of all the shares in the company, if that were possible. At the meeting with representatives of NAMA on 24 January 2011, Aidan Barclay stated their intention to purchase all the shares of the company within the following 4 to 8 weeks. He also said that, while they wished the two year extension to the NAMA debt to proceed, their intention was to refinance the whole of that debt within twelve months. They were already having detailed discussions with Deutsche Bank and with Barclays Bank with a view to raising within a short period the finance required to repay the NAMA debt. Deutsche Bank proposed terms conditional on the Barclay interests obtaining 51% control of the company. Those terms were rejected on the grounds that they were significantly more expensive than the NAMA debt. Discussions with Barclays Bank proceeded on the basis of a facility either to a Barclay interests' company or directly to the company to refinance the NAMA debt. The latter would be adopted only if the Barclay interests had majority control of the company. Barclays Bank required the personal guarantees of Sir David Barclay and Sir Frederick Barclay.

173. On 25 January 2011, PR consultants acting for the Barclay interests emailed Mr Faber to tell him that The Times was likely to run an article the following day. They identified questions and invited any comment that Mr Faber wished to make. One of the questions was "*Will you buy Kyran McLaughlin stake imminently?*" The comment provided by Mr Faber was as follows: "*An offer has been made to all the shareholders including Kyran. We hope they will all accept in due course as it represents immediate cash – so we are buying 'as seen'. Makes our offer unique as no due diligence so 100% certainty. Due to pre-emption rights we would prefer all 3 remaining shareholders sold at same time, but we are happy to deal individually if need be. The alternative is we refinance the company to lower the debt and dilute all the shareholders to take control. This option is available to us as we control 60% of board votes*".

174. On 25 January 2011 NAMA had written to the directors of the company and to Mr Quinlan in relation to Mr Quinlan's shareholding and to his exclusivity agreement with the Barclay interests. The letter drew attention to the rights of NAMA as the holder of a charge over part of his shareholding. Mr Murphy replied to NAMA,

having first spoken to both Mr Quinlan and Mr Faber. Mr Murphy stated in his reply "*Derek has only ONE agreement with the Barclay brother* [sic] *which is as set out in the letter Derek signed with their BVI company and which I copied to you. His agreement is as you state in your letter. Derek has NOT agreed to sell his shares and cannot do so without approval from NAMA and Bank of Scotland and the second charge party. It will be Derek's banks' prerogative to approve any sale*".

175. Mr Faber became a director of the company on 21 January 2011 as the appointee of Misland. A board meeting of the company was held on 25 January 2011 and it was the first to be attended by Mr Faber. The minutes record that he introduced himself to the board, noting that Ellerman was the investment holding company for Sir David and Sir Frederick Barclay. As regards dealings with NAMA, Mr Faber informed the board that he had discussed the refinancing with NAMA and suggested that the Ellerman team should assist Mr Hennebry with completing the refinance. This was welcomed and accepted by the board.

176. Between 27 January 2011 and 8 February 2011 there were email exchanges and discussions relating to the closure of company's data room which is the subject of complaint in Mr McKillen's petition. I will deal separately with the sequence of events in relation to this matter when I come to deal with allegations of breach of duty by the directors.

Formation of MFL

177. As part of the planning, MFL was formed on 28 January 2011. It was wholly-owned by Maybourne Holdings Limited, another newly-incorporated company with the Barclay brothers as its directors and shareholders. There is an issue as to the purpose in establishing it. Mr McKillen's case is that even at this early stage the intention was to purchase the NAMA debt and MFL was established to be the vehicle for the acquisition. I do not accept either limb of this case. First, it is clear from the purposes expressed in the draft term sheets provided by both Deutsche Bank and Barclays Bank that the purpose of the proposed loans would be to provide, either directly to the company or through a company controlled by the Barclay family, the funds needed to repay the NAMA debt. The purchase of the debt is not mentioned. Secondly, the evidence of Mr Peters and Mr Seal was that a purchase of the debt was not at this time being contemplated. Mr McKillen relies on paragraph 12 of Mr Peters' first witness statement (made at an early stage in the proceedings and not his evidence at trial) to show that the purpose of the meeting with NAMA on 24 January 2011 was to explore a purchase of the NAMA debt. That paragraph must be read with Mr Peters' third witness statement, particularly paragraph 24, as well as his oral evidence. I am satisfied that the purchase of the debt was not then in contemplation and that it was the NAMA representatives who at the meeting mentioned that they would be prepared to sell the debt as a means of recovering its value.

178. I am satisfied that MFL was established so as to be used, as needed, in relation to financing in connection with transactions concerning the company, or its shares, without any clear plan as to precisely how it would be used. It is perfectly possible that it would have been used as the borrower under the facilities then being discussed with the banks, but equally it might be used in any other way relevant to financing. This is the evidence of Mr Peters and Mr Seal which I accept. An email

from the Barclay interests' solicitors to the Jersey incorporation agents setting up Maybourne Holdings Limited said that MFL *"will be acquiring loans"*. I am satisfied that this was not its only purpose and that it was not referring specifically to an acquisition of the loans which then comprised the NAMA debt.

Assignment of security to the Barclay interests

179. On 29 January 2011, Ellerman purchased from Bank of Scotland (Ireland) Limited a debt owed by Mr Quinlan and secured on part of his shareholding representing a 21.34% interest in the company. This was prompted by Mr Quinlan who was anxious that the Barclay interests should acquire it. BOSI was pressing for payment and Mr Quinlan knew that he would face severe difficulties if it remained his creditor. The Barclay interests were not at first keen to buy the debt but they were persuaded to do so, principally because they learnt that another party was making enquiries about purchasing it. This raised the possibility that a new security holder might be able to exercise the right attached to the shares to appoint a director. Mr Faber and others on the Barclay side assumed this was Aabar Investments and Robert Tchenguiz. In December 2010 they had acquired from Royal Bank of Scotland a debt secured by a second charge on Mr Quinlan's shares. Mr Quinlan consented in writing to the transfer to the Barclay interests on 28 January 2011 and the sale of the debt and associated security was completed the following day.

180. The fact that this transaction was prompted by Mr Quinlan and that the Barclay interests needed to be persuaded to proceed with it is relevant to two points made by Mr McKillen. First, it is suggested in his closing submissions that the acquisition was the next step in the plan to acquire control of the company. If by that is meant that it was a pre-planned step, contemplated by the Barclay interests at the time of the acquisition of Misland, I reject it. Secondly, it is alleged that there was a connection between the acquisition of the debt and a payment of £500,000 made by the Barclay brothers to Mrs Quinlan on 31 January 2011. At the end of January 2011, Mr and Mrs Quinlan were in Gstaad and met the Barclay brothers at least once, on 29 January 2011. On that day, Mr Quinlan signed a form of consent to the assignment, although it is not by all means clear that his consent was required. There was discussion also as to the financial pressures on the Quinlan family. The suggestion that the payment was made in return for Mr Quinlan's co-operation in the assignment of the debt does not seem likely, in view of the fact that it was Mr Quinlan who was keen for the debt to be acquired and persuaded the Barclay interests to acquire it.

181. On 4 February 2011, Ellerman as security holder was registered as the holder of the shares, as permitted by clause 6.18 of the shareholders agreement and as agreed by all the directors. Mr McKillen requested confirmation that there had been no transaction between Mr Quinlan and the Barclay interests. This confirmation was given in a letter dated 3 February 2011.

Agreement between Barclay interests and Al Mirqab: 2 February 2011

182. The Barclay interests quickly decided that the best way forward was a joint venture with the Qataris. Accordingly, on or before 26 January 2011 Aidan Barclay spoke to Sheikh Jassim and followed up their conversation with a letter dated 26 January 2011 which enclosed draft heads of terms for a 50/50 joint venture. Sheikh Jassim

had evidently asked how they should next proceed. Aidan Barclay said that they had not had a direct conversation with Mr McKillen. He suggested that the Qataris should not release Mr McKillen and Mr McLaughlin from their exclusivity agreement. He added that the Barclay interests had exclusivity obligations from Mr Quinlan which they would maintain. He suggested that they would not make any overtures to Mr McKillen or Mr McLaughlin and Sheikh Jassim should not make any more overtures to Mr Quinlan. "*Instead we will work to acquire all of Derek Quinlan's shares whilst you work in parallel to acquire all of Paddy McKillen's and Kyran McLaughlin's shares, so that we ultimately, together, after adjustment, will hold all the shares and related assets 50/50*". The Qataris responded on 27 January 2011 with proposed amendments to the heads of terms and there were further exchanges.

183. A joint venture agreement was signed on 2 February 2011 by Sheikh Hamad and Aidan Barclay for the "Barclay Family". As previously discussed it contemplated 100% ownership of the company held by the parties for their joint benefit on an equal 50/50 joint venture basis. It provided that the Barclay interests were to undertake the role of asset manager, involving operational responsibility and day to day management of the group. Their fee was to be at a rate of 5% of group gross operating profit, not to exceed £3 million for the financial year 2011.

Agreement between Mr McKillen and Al Mirqab: 3 February 2011

184. The Barclay interests were not alone in dealing at this time with the Qataris. Their acquisition of Misland undermined the arrangements which Mr McKillen had made with the Qataris in mid-January 2011 which would have involved the company being owned as to 75% by the Qataris and as to 25% by Mr McKillen. In the light of this development Mr McKillen resumed discussions with the Qataris which resulted in heads of terms being signed between them in Doha on 3 February 2011. The heads of terms recited the acquisition by the Barclay interests of Misland and provided for alternative courses to be taken by the parties to deal with this new situation. Clause 2 gave Mr McKillen an opportunity until midnight on 10 February 2011 to obtain a firm acceptance from the Barclay interests to either of two proposals: first, a purchase of their current interests in the company for a net profit of £20 million; secondly, if that were not acceptable to the Barclay interests, Mr McKillen was to offer to split the hotels between the two parties so that Claridge's would be owned by the Barclay interests and the other properties would be owned by Al Mirqab and Mr McKillen on the terms of their proposed joint venture. Clause 3 provided that, if Mr McKillen failed to obtain a firm acceptance of either of those proposals, the parties empowered Sheikh Jassim to enter into direct discussions with the Barclay interests with the aim of offering one of the following proposals. The first proposal was that there would be a joint acquisition of the company on the basis of a 40-40-20 split between respectively Al Mirqab, the Barclay interests and Mr McKillen subject to the following terms. First, Mr McKillen would further reduce his shareholding from 20% to 15% if it was necessary to secure the firm acceptance by the Barclay interests of this proposal. Secondly, Mr McKillen would have a senior managerial role in conjunction with the Barclay interests in the management of the group or Mr McKillen would have an independent leading management role in The Berkeley hotel. Thirdly, the management would be under the supervision of a board of directors representing the interests of Al Mirqab, the

Barclay interests and Mr McKillen on a pro-rata basis. Fourthly, the terms and conditions of each party's management role would be discussed and agreed between the three parties. The alternative to that proposal would be an offer to the Barclay interests to split the hotels so that Mr McKillen would independently own The Berkeley and the Barclay interests would own the other hotels, such split being subject to the right of Al Mirqab to be a partner.

Agreement between the Barclay interests, Mr McKillen and Al Mirqab: 12 February 2011

185. On 11 February 2011 Aidan Barclay, Howard Barclay and Mr Faber travelled to Qatar to have further discussions with a view to taking forward the deal with the Qataris. They knew that Mr McKillen would be there and they assumed that he would be negotiating his exit from the company. They were not aware of the agreement which Mr McKillen had made on 3 February 2011. On 12 February 2011 there were private meetings involving Mr McKillen with Mr Bakhos and the Barclay representatives with Sheikh Jassim, followed by a tripartite meeting attended also by Sheikh Hamad. The Barclay representatives were informed, in effect as a *fait accompli* as Mr Faber describes it, that Mr McKillen would not be selling out completely but would remain an 18% shareholder with the remaining 82% being split equally between the Barclay interests and the Qataris. The Barclay interests accepted this condition but there was negotiation on other terms, in particular as to the basis on which Mr McKillen would continue to have any active management role in the company. The compromise reached on that aspect was that Mr McKillen would manage the group for a term of one year for a fee of £5 million.

186. The three parties signed a binding agreement giving effect to these terms in the course of 12 February 2011. The parties to the agreement were named as Al Mirqab and its affiliates (Al Mirqab), the Barclay family (Barclay) and Mr McKillen (PM). Clause 1 provided:

> *"The parties commit to work together on a joint venture basis divided as follows: 41% to the benefit of Al Mirqab, 41% to the benefit of Barclay and 18% to the benefit of PM (referred to as our 'partnership')".*

Clause 4 provided:

> *"…….the management of the Maybourne Hotel Group will be entrusted to PM for term of one year from the date the Parties have acquired the Maybourne Hotel Group. At the end of such term, the Parties shall agree by majority on the future management arrangements of the Maybourne Hotel Group."*

Clause 5 provided that Mr McKillen would be paid a management fee amounting to £5 million for the first year of management. Clause 6 provided that the parties were to have pro-rata representation on the board. By clause 7 the parties agreed to treat the agreement as confidential, with a requirement to agree on a public announcement once they had acquired the company. Clause 8 provided that the agreement was intended to be legally binding upon the parties and clause 9 provided that it was governed by English law.

187. As regards Mr McKillen's proposed management role, Mr Faber on behalf of the Barclay interests took the view that, as it was an appointment for only one year and was not anticipated to involve any significant change to the way in which the hotels were managed, this arrangement in effect represented an exit fee for Mr McKillen. Given that the appointment was for only one year and that the development plans for the hotels, which Mr McKillen identifies as his principal area of interest, presented a project which would take several years to fulfil, it appears to me likely that this was indeed the case. While Mr McKillen may well have hoped that he might be able to negotiate an extension, the Barclay interests clearly did not regard it as a long term role and it seems unlikely that Al Mirqab saw it differently. There was unlikely to be any obvious commercial advantage in extending his appointment beyond a year, certainly at an annual fee of £5 million.

188. Mr Faber's evidence was that Mr McKillen appeared to be very happy to sign the agreement and delighted that the Barclay interests and the Qataris were going to work together to refinance the company. The conversations with Mr McKillen were, Mr Faber says, good natured. Mr McKillen said that refinancing the company was an absolute priority and the other parties agreed with him. While the Qataris were suggesting Credit Suisse as the source of funding, Aidan Barclay proposed Barclays Capital to whom Aidan Barclay and Mr Faber spoke after the deal was signed on 12 February 2011, with Mr Faber emailing some further details later that evening. The intention was for Barclays Capital to come back quickly with refinancing proposals.

Steps to implement the 12 February 2011 agreement

189. The Barclay interests' representatives returned to London on Sunday 13 February 2011 and within a day or two Mr Bakhos travelled to London to finalise the deal.

190. Within a day or so, Barclays Bank provided an indicative term sheet, agreeing to provide a £660 million loan facility in principle but requiring the personal guarantees of Sheikh Hamad and the Barclay brothers. It made clear that it was not prepared to provide the facility without these personal guarantees although attempts were made to persuade it otherwise.

191. Special purpose vehicles were set up for the purposes of implementing the agreement. This was explained by Mr Faber late in the evening of 12 February following the signature of the agreement, in an email to Barclays Bank. He said that a New Co would be formed to be owned by B Overseas and Al Mirqab. New Co would form Bid Co which would acquire 82% of the shares in the company. Mr McKillen would retain an 18% holding. Shortly afterwards, Ellerman Group Holdings Limited and EHGL, both incorporated in the BVI, were established as New Co and Bid Co respectively.

192. A draft agreement for the purchase by EHGL of the shares needed to reduce Mr McKillen's holding to 18% was sent to Mr Cunningham as Mr McKillen's representative on 15 February 2011. An agreement for the purchase by EHGL of Mr Quinlan's shares at a price of £80 million was provided to him in draft on 15 February 2011. It was signed by Mr Quinlan and EHGL on 17 February 2011 (the 17 February agreement). The agreement provided that the sale was subject to compliance with the shareholders agreement and the company's articles of association. This disposal by Mr Quinlan of his shares required the release by

NAMA of its charge and NAMA approved the sale and provided a release on 23 February 2011.

193. Mr McLaughlin's shares were acquired. The Barclay interests had declined in early February to make an offer for his shares but within a few days found that he was proposing to sell his shares to Wynton. On that basis he initiated a pre-emption round. The Barclay interests made the only offer and purchased them. On 23 March 2011 Mr McLaughlin resigned as a director and was replaced by Mr Seal.

194. Following the agreement there was a real urgency to finalise the financing and implement the agreement as quickly as possible. The reason for this was that the extension to the NAMA facilities expired on 14 February 2011. Until the weekend of 12-13 February 2011, all parties including Mr Faber had been working towards an extension of the NAMA facilities for two years. It was the expectation of all concerned, including Mr Faber, that the two year extension would be agreed on 14 February 2011. This created a real dilemma once the agreement had been made on 12 February 2011. On the one hand, the NAMA facilities expired on 14 February 2011. On the other hand, the re-financing which had been negotiated intensively over the week-end with Barclays Bank would be on better terms than those available from NAMA. Moreover the proposed two year extension of the NAMA facility included heavy pre-payment penalties. It was therefore in nobody's interests at that point that the two year extension with NAMA should be entered into but there was further work to do in negotiating the terms of facilities to be provided by Barclays Bank and in agreeing the necessary documentation. It became urgent therefore to negotiate with NAMA an extension of the facilities for a short period. Great efforts were made to achieve this, which included a telephone call by Sheikh Hamad to Brian Lenihan, the Irish Finance Minister. NAMA agreed a two-week extension on Tuesday 15 February 2011.

Termination of the agreement by Mr McKillen

195. Although, as he confirmed in evidence, Mr McKillen had carefully read the agreement of 12 February 2011 before signing it, he was having second thoughts about it within a few days and ultimately, later in February, refused to proceed with it. The source of the difficulty appears to have been a meeting with Mr Bakhos on Tuesday 15 February 2011. Mr McKillen emailed Mr Bakhos the following day: "*After your attitude during yesterday's chat, I want to make something very clear, my present shareholding in Maybourne was earned over a 6 year period by a lot of sweat and tears. It was very clear from our chat yesterday that there is an attempt to bully me into an unacceptable deal that puts my last 6 years and my future at risk. For the record I will not be bullied by you, Barclays or anyone else for any money*". Mr McKillen referred in his email to some critical comments made by Mr Bakhos regarding Mr Cunningham's absence in Argentina. Mr Bakhos responded to this email later on 16 February 2011. He said that it had not been his intention to offend Mr McKillen and apologised if he had done so. He continued "*but knowing that Liam [Cunningham] is at the far end of the planet with different time zones was shocking to me; since I knew we could not progress to finalise the arrangement we reached in Doha in his absence*". He expressed the hope that they would proceed with the agreement and continued "*We are under enormous pressure to finalise before other bidders emerge. We have made good progress since our agreement on Saturday: financing is ready, NAMA on board and standing still for us, and DQ*

completed. We need to re-engage with each other we complete our arrangement. If you do not want to deal with me personally, that is fine with me. But you need to stay engaged with my principals directly".

196. Discussions were resumed between the parties or their lawyers, but by 24 February 2011 Mr McKillen had decided, and made clear, that he would not proceed with the agreement.

197. In explaining his decision to pull out of the agreement, Mr McKillen has said in this case that it was caused by a change in the proposed structure for the deal. He says that his understanding on 12 February 2011 was that there would be three shareholdings, the Qataris and the Barclay interests with 41% each and himself with 18%. In those circumstances, by siding with either the Qataris or the Barclay interests in the event of dispute between them, he would hold the balance of power, which he saw as a distinct advantage. He says that he subsequently learned that it was intended by the Qataris and the Barclay interests to form a single holding company for their combined interests of 82% and he would not be in a position to exercise a casting vote. I am not satisfied that this is the true explanation or indeed that it played any significant part in Mr McKillen's thinking. The deal reached in Doha was not in terms on the basis that there would be three shareholders in a single company but rather that their interests would be held ultimately in the agreed proportions. More significantly when Mr McKillen's solicitors on 17 February 2011 wrote a long letter to him, raising concerns in relation to the agreement this point was not raised. If it had the central significance which Mr McKillen attaches to it, one would expect that to be clear from his solicitor's letter. Moreover, Mr Cunningham emailed Anglo Irish Bank on 15 February 2011 in relation to this deal and said specifically that "[n]*ewco will be established which will hold 82% of Coroin, this newco will be jointly owned 50/50 by the Barclay Brothers and the Qatari's….. This will result in the net position of 41%, 41% and 18%"*.

198. The letter dated 17 February 2011 from Arthur Cox, Mr McKillen's solicitors, gives a good picture of Mr McKillen's concerns. The letter was written following a meeting between them. The letter points out the inherent risks for Mr McKillen entering into a joint venture in the shareholdings envisaged *"with parties having a significantly stronger financial position, regardless of the level of legal protection put in place"*. They expressed the view that these risks would be exacerbated "*where a potential party to the joint venture [the Barclay interests] applies a very different management style and business strategy to the running of a hotel business compare to that which you have employed in the group to date*". Reference is made to the need for mutual trust and co-operation between the parties and the letter notes *"your heightened concerns following your meeting in London on Tuesday*", that being the meeting with Mr Bakhos. They then refer to two specific risks "*which present a serious threat to your position in the short to medium term"*. First, the proposed refinancing for a period of only one year raised questions as to how the funding would be provided thereafter: "*An equity refinancing in these circumstances would carry the risk that you would suffer a serious dilution of your holding*". Secondly,

> *"We had understood that a five-year management agreement would be put in place between you and Bidco, whereas the structure currently proposed only envisages a one-year deal. Such an arrangement would not provide you*

> *with a firm basis from which to direct the implementation of the proposed strategy of the Group for the duration of the time period expected to be needed to deliver that strategy. A one-year management deal therefore deprives the transaction of what we had understood to be a key attraction for you concluding any potential deal with the other parties."*

They strongly advised that a new shareholders agreement be agreed in order to provide Mr McKillen with "*appropriate legal protection*".

199. In his evidence, Mr McKillen described the meeting with Mr Bakhos as "heated" and said that Mr Bakhos had made clear that there would not be provisions in the shareholders agreement protecting Mr McKillen against dilution in the event that further funding was required. Mr McKillen realised that he would not be in position to keep pace financially with the Qataris or indeed with the Barclay interests. I conclude that it was general concern as to the future of the relationship which caused Mr McKillen to withdraw. Although the 12 February 2011 agreement was stated to be legally binding, the Qataris, who took legal advice on this, and the Barclay interests decided not to seek to enforce the agreement.

200. It did not become absolutely clear that Mr McKillen would not proceed with the agreement for some days. In the meantime steps continued to be taken with a view to implementation of the agreement. NAMA formally extended the term of existing facilities by 14 days and entered into a letter agreement dated 16 February 2011 with the Barclay interests setting out the terms on which NAMA would be repaid and on which NAMA would release its charge on Mr Quinlan's 13.52% shareholding. Criticisms were made in the course of cross-examination of Mr Faber and others that this letter included a provision whereby the company would pay what is described as "exit fee" of £13.5 million on 28 February 2011. In my judgment, no criticism can be made of this term. It was part of the price exacted by NAMA to enable the new deal to proceed, which at that time all parties including McKillen had agreed and thought was in the best interest of the company.

Discussions between Mr McKillen and the Barclay interests: March 2011

201. Following the breakdown in late February 2011 of negotiations involving the Qataris, there were discussions in March 2011 between the Barclay interests and Mr McKillen. The Barclay interests proposed that Mr McKillen should waive his pre-emption rights over Mr Quinlan's shares which would be bought by the Barclay interests, giving them a majority shareholding in the company, while Mr McKillen would retain his shareholding. The NAMA debt would either be extended for two years, which would of course be dependent on NAMA's agreement, or refinanced by a bridge loan with a commercial bank. The Barclay interests would arrange long term debt finance, likely to be £475-520 million, with the balance being "facilitated by the Barclay family on market terms for mezzanine debts". There would be a new shareholders agreement, with pre-emption rights, equal board representations, a management fee payable to each shareholder of £2.5 million in the first year (to be reviewed annually, with an assumption that it would rise to £5 million each per annum and intended to be "whatever the company can financially support" without affecting essential capital expenditure or the ability to finance the company), and an option for Mr McKillen after seven years to sell his shares to the Barclay interests.

202. Mr McKillen turned down this proposal unless he received a substantial payment for not exercising his pre-emption rights. On his behalf, Mr Cunningham put forward a figure of £35 million. The Barclay interests were not willing to agree this and these discussions came to nothing.

NAMA: March 2011

203. There were discussions with NAMA as regards an extension to the loan facilities. I give some detail of these discussions and NAMA's position in the section dealing with NAMA. The outline, for present purposes, is that the facilities were due to expire on 28 February 2011, following the extension granted on 16 February 2011. On 8 March 2011, NAMA notified the company that it had extended the facilities to 21 March 2011. On 22 March 2011 the credit committee of NAMA agreed an extension for three months, and so rejected the company's request for a two-year extension. The new facilities agreement was made on 1 April 2011, with an expiry date of 30 June 2011.

Purchase of security over Mr Quinlan's shares from NAMA: March – April 2011

204. There were also negotiations during March 2011 for the purchase of Mr Quinlan's indebtedness to Anglo Irish Bank which had been acquired by NAMA. It was secured over part of Mr Quinlan's shareholding representing 13.5% of the company's shares. The Barclay interests were anxious to buy it to prevent any other party purchasing the debt and thereby being entitled to be registered as the holder of the shares or taking steps to enforce the charge. There was competition to purchase the debt. NAMA was approached by those acting for Wynton early in March 2011 and an offer to purchase the debt for £49.1 million was made by Wynton on 21 March 2011. The Barclay interests were not prepared to offer as much, so NAMA accepted Wynton's offer and on 4 April 2011 executed an assignment in favour of JQ2 Limited, a company associated with Wynton and used as the vehicle for the purchase.

Wynton: April – May 2011

205. This purchase demonstrated that Wynton retained a serious interest in the company. Sir Frederick Barclay met representatives of Wynton on or about 21 April 2011 and discussed possible co-operation. He also had discussions with Sunil Mittal and approached Sheikh Mansour. Negotiations with Wynton with a view to joint ownership of the company continued in May 2011, including meetings with Jho Low attended by Sir Frederick Barclay and Aidan Barclay on 16 May 2011 and by Mr Faber on 17 May 2011. These negotiations effectively came to an end on 23 May 2011 when Mr Low insisted on a three-way split involving the Abu Dhabi interests behind Aabar as well as Wynton and the Barclay interests. The latter were not interested in only a one-third interest.

16 May 2011

206. On 16 May 2011, Mr Quinlan resigned as a director of the company, at the request of the Barclay interests and was replaced by Mr Mowatt. On the same day, Mr Quinlan executed the power of attorney in favour of Mr Faber or any director of Ellerman, to which I refer in more detail in the section dealing with pre-emption.

Discussions between Mr McKillen and the Barclay interests: June 2011

207. Negotiations between the Barclay interests and Mr McKillen were resumed at the beginning of June 2011 when Mr Cunningham and Mr Faber had a series of meetings. Mr McKillen was prepared to accede to the Barclay interests' key requirement of control, but on terms which included the payment of a pre-emption fee of £25 million and a project management fee for 4 to 7 years at £5 million per annum. These terms were again not acceptable to the Barclay interests. Mr McKillen also sought a soft loan of £21-30 million to purchase a sufficient number of Mr Quinlan's shares to take his holding up to 45%. On 8 June 2011, the Barclay interests put a proposal to Mr McKillen, which included a pre-emption fee of £5 million, no management fee other than remuneration on a non-executive basis, and a loan to enable Mr McKillen to purchase some of Mr Quinlan's shares. This was not acceptable to Mr McKillen and further discussions between Mr Faber and Mr Cunningham failed to bridge the gap.

Negotiations between the Barclay interests and banks: June-July 2011

208. From the start of June 2011, the Barclay interests were negotiating with Barclays Bank with a view to agreeing a facility to provide funding either to purchase the company's debt to NAMA or to provide the company with the finance necessary to repay the debt. Such financing would be necessary if a deal were struck with Mr McKillen, but equally the Barclay interests saw this as a means by which they might both resolve the problem faced by the company and also increase their prospects of obtaining control of the company.

209. Mr Peters was primarily responsible for these negotiations on behalf of the Barclay interests. In an email dated 31 May 2011 to Mr Stoneley at Barclays Bank he explained the purpose and benefit of the acquisition of the NAMA debt as follows:

> *"The benefit to us is that it prevents any other party from 'agitating' our plans to acquire the entire share capital of Coroin Limited. The NAMA facility expires at the end of June 2011, unless otherwise agreed by NAMA".*

At the conclusion of the letter he wrote:

> *"By effecting an early refinancing, we ensure another third party does not gain access to assets by similarly refinancing and making demand at the 30 June maturity. This enables the Barclay family to go forward from a position of strength and tackle the remaining equity acquisitions".*

210. Following the collapse of the negotiations between the Barclay interests and Mr McKillen, which inevitably created an uncertain position from a lender's point of view, Barclays Bank required the personal guarantees of Sir David and Sir Frederick Barclay in the sum of £260 million.

211. The negotiations with Barclays Bank were difficult. This led the Barclay interests to open discussions also with HSBC. Again the personal guarantee of Sir David and Sir Frederick Barclay was a requirement. In an email on 28 June 2011, Mr Peters

offered a personal guarantee from them in the sum of £135 million. Discussions with HSBC reached the point of draft term sheets which were provided on 13 July 2011, subject to credit committee approval but the proposals involved the loan being split between HSBC and one other, undetermined, institution. It was at that time in the prevailing conditions very difficult to obtain a Bank loan for as much as £660 million from one institution. Nonetheless, the Barclay interests preferred to have a single lender and, as Barclays Bank were prepared to negotiate on the basis that it would be the only lender, they decided to proceed with negotiations with Barclays Bank, not HSBC.

212. With the sole exception of a valuation obtained from Jones Lang LaSalle ("JLL") to which I will later refer, no allegation of unfairly prejudicial conduct, acts or omissions is made in the petition as regards the conduct of any of the respondents in relation to the negotiations with Barclays Bank or HSBC. In his closing submissions, Mr McKillen seeks to criticise Mr Faber in a number of respects. First, it is said that he provided, in breach of duty, confidential information concerning the performance of the company to Mr Peters to be passed on to the banks. Secondly, Mr Faber helped Mr Peters in the drafting of some of the proposals to the banks and was generally aware of Mr Peters' negotiations with the banks. He did not disclose these negotiations to the company and it is suggested that, in acting as he did, he was acting for a purpose which was not only collateral but hostile to the company's interests. Thirdly, it is said that Mr Faber could and should have pursued these negotiations on behalf of the company rather than on behalf of the Barclay interests.

213. I do not propose to address these submissions in detail. First, they are not pleaded as grounds for the relief sought in the petition and indeed are not pleaded at all. Secondly, they are themselves contentious issues which would require careful analysis of the relevant evidence before deciding. Since they are not pleaded, they could be relied on only for the purposes of credit but the contentious nature of the issues prevents them being relied on for that purpose. I comment elsewhere on the submissions which have been made concerning the disclosure of confidential information, and the fact that all shareholders seem to have been engaged in this conduct. I should say that the suggestion that Mr Faber could and should have sought to obtain this finance from Barclays Bank or HSBC on behalf of the company appears to me to be entirely unrealistic. The availability of such finance, certainly following the breakdown of negotiations with Mr McKillen which would have put the shareholder structure of the company on an agreed basis, was dependent on the provision of very substantial personal guarantees by Sir David and Sir Frederick Barclay. It is inconceivable that they would have been willing to give such guarantees in respect of a loan to the company where they did not control the company and where there had been no agreement as to the shareholder structure with Mr McKillen.

214. Mr Peters continued to negotiate with Barclays Bank through July 2011. A draft term sheet was provided by Barclays Bank on 20 July 2011 on which there was broad agreement in principle. It provided for a facility of £660 million (or a lesser amount depending on the price paid for the NAMA debt). It was to be a term loan but the final maturity date is not specified in the draft term sheet. The borrower was to be a newly formed single purpose vehicle ultimately owned and controlled by the Barclay brothers. Two alternative purposes of the facility were specified:

> *"1. purchase the existing indebtedness of Coroin owed to NAMA ('Plan A');*
> *2. on lend to Coroin for the purpose of refinancing the existing indebtedness which Coroin has from NAMA ('Plan B')."*

215. In a section headed alternative scenarios, the current scenario is described as one whereby the Barclay brothers have the ability to control both decisions of the Board and decisions of over 50% of the voting shares of the company. In that scenario and also if the Barclay Brothers were to lose such control, they were required as a term of a facility to provide personal guarantees for all interest shortfalls and repayment to an amount of £260 million.

216. When the draft term sheet was sent out on 20 July 2011, the intention of Barclays Bank and the Barclay interests was to sign the finalised facility agreement by the end of July. In fact this timetable was not achieved and the proposal was not put to the Barclays Bank credit committee for approval as had been initially expected. While there was substantial commercial agreement on the terms of the facility, the detailed terms remained to be agreed and were the subject of negotiations between lawyers during August and the first half of September 2011. Barclays Bank credit committee approval was formally given on 15 September 2011. The requirement for personal guarantees from the Barclay brothers for £260 million was maintained because Barclays Bank considered that the company could support only £400 million of senior debt.

Mr Faber's memorandum 1 August 2011

217. With substantial agreement on the terms of a facility agreement with Barclays Bank, the Barclay interests turned their attention from the end of July 2011 to a consideration of how best to deal with the NAMA debt. On 28 July 2011 Sir David Barclay, Mr Faber and Mr Peters had a long telephone call in which they debated the benefits of buying the NAMA debt as against offering the company refinance on 30 September 2011 when the debt would mature. There were at the same time communications with Sheikh Mansour with a view to a partnership in relation to the company, but in the end nothing came of this. On 1 August 2011, Mr Faber prepared a memorandum for Sir David Barclay to summarise the discussion which they had had and setting out Sir David's view of the ideal outcome.

218. Under the heading "Control of Coroin", the memorandum set out three means by which this could be achieved.

219. The first was a purchase of Mr Quinlan's shares. It recites the obstacles to such a purchase which, as the memorandum states, had been blocking Misland for the previous six months. Those obstacles were: first, the need for the permission of Mr Quinlan's debt holders including JQ2 and Aabar; secondly, the need for a waiver by Mr McKillen of his pre-emption rights; thirdly, if JQ2 were registered as the holder of the shares charged to secure Mr Quinlan's debt purchased from NAMA, it could also participate in a pre-emption round; and, fourth, the possibility that if Mr Quinlan became bankrupt any sale could subsequently be challenged.

220. The second means is described as *"Rights Issue/Private Placements"*. The memorandum states as follows:

> *"Faced with a potential foreclosure of the senior loan, the Board of Coroin could decide to hold a private placement to raise satisfactory funds (£160m minimum) to refinance the Senior Debt Holder.*
> *While this may allow McKillen to participate, his backers will have to ask themselves what he has achieved by participating. He will not have control of the company because other shareholders (Misland/Ellerman/Malaysians) will also participate, thus it is a significant equity contribution McKillen would need to source, without it achieving very much.*
>
> *There may also be ways in which Maybourne Finance, as the new debt holder on September 30 could force the company into lowering its debt from £660m to £500m by Christmas, thus forcing Coroin's board to accept equity from an outside party which may include Maybourne Finance or its fellow group companies.*
>
> *The debate will be around which structure creates the best landscape to lower the price of the equity. Presumably it is better to be in default to Maybourne Finance, Maybourne Finance demands an equity injection to avoid foreclosing, and the equity injection comes either from Maybourne Finance or its fellow group companies".*

221. The third means identified is "*Appropriation of the assets via foreclosure*". Under that heading the memorandum states as follows:

> *"If Maybourne Finance decides to acquire to Coroin's debt from NAMA, or become the lender to Coroin on September 30, it can choose to foreclose on the borrower following a default by Coroin on the facility (including on a repayment at maturity)."*

The memorandum continues by discussing different timelines which might apply to such a step. The memorandum also identifies certain problems in relation to this possibility, including "some form of litigation by McKillen".

222. A further issue is identified:

> *"The Coroin directors have a difficult position in that their director's duties require them to seek the best terms available to Coroin on a refinancing of the NAMA debt – i.e. that the market and any hostile entity could offer to refinance on lower/better/longer terms than Maybourne Finance can offer (and which Barclays as lender to Maybourne may need to approve). Failing to go with those better third party terms would mean that a disappointed minority shareholder (McKillen, JQ2 if they are on the register) could sue and may even be able to injunct the refinancing. This is a greater risk on a refinancing. On a foreclosure the directors would still have to show that they tried to refinance on positive terms ahead of that foreclosure".*

223. The memorandum goes on to discuss various possible ways forward. The first is *"Foreclosure or Rights Issue with an Equity Partner"*. The costs could be shared with the partner who could either be a shareholder in the business or a buyer of one of the hotels. In the former case, the memorandum states that:

> *"…the partners have a choice – either hold a rights issue at the end of September and dilute Paddy McKillen's interests or simply foreclose. The issue of new shares would need consent under the current shareholders agreement of Coroin, but as Misland and Ellerman (through its holding of DQ's 22%) hold more than 50% of the shares, they could give that consent".*

224. The second possible way forward is "Foreclose or Rights Issue in an Agreement with Abu Dhabi (Aarbar)/Malaysians". Under this heading the memorandum states:

> *"If we had an agreement with DQ's debt holders to split the assets in due course it would enable the partnership to have a negotiation with Paddy McKillen in advance of a foreclosure or a rights issue. If McKillen allows the partners to purchase DQ's 35% we will not foreclose and not hold a dilutive rights issue. This allows McKillen to keep his equity position, and has enabled the partnership to acquire 63.4% of the equity and control, potentially for a £900m purchase price. If McKillen refuses the partnership could foreclose (subject to the higher risk of litigation from him)".*

225. The third way forward is headed *"Wait until late September"* and the memorandum states as follows:

> *"We could continue to hold to our current position, and see what events unfold and determine how we respond. However by waiting we will eventually have to put the Malaysians on the share holder register – probably by the end of August which will give them a seat at the main table and the ability to frustrate us, and we will give time to the Abu Dhabi and Malaysians to acquire the NAMA £660m Coroin debt, which may well change the perceived negotiations which then take place. For instance I believe the Malaysians and Abu Dhabi will target a £200m rights issue at the end of September but offer cheap ongoing debt to the company once they have taken control. NAMA has also stated they are expecting an offer for the debt from them in September".*

226. The document ends with a *"Summary"*, which reads as follows:

> *"Although it is financially less attractive to consider buying the debt from NAMA, it will position us favourably for any negotiation with H.H. Sheikh Mansour or indeed the debt holders (Abu Dhabi/Malaysians) and Paddy McKillen in due course as we will hold as strong a position as possible.*

In order to mitigate the costs of buying the debt we could propose to send an offer letter to NAMA, or visit them this week and seek a discount to the debt purchase. By owning the NAMA debt we would anyway be entitled to a 1% termination fee, which gives us £6.6m refund should a third party remove Maybourne Finance on September 30th. If we could extract even a further 1% haircut this will save us £13.2m in total and go some way to offsetting the Barclays Bank fees.

The choice NAMA currently has is to wait until September 30th and see Coroin pay back £660m plus the 1% fee – a total £666.6m. The closer we get to September the more commercially appealing it will be for NAMA to wait for the redemption.

Once Maybourne Finance owns the debt it can write to Coroin and put it on notice that it will not extend the loan beyond the end of September, which would mean the directors would need to go out and find alternative arrangements which may include, potentially, a rights issue, thus teeing up a negotiation with McKillen to allow us to buy DQ shares, or with the debt holders to reach an agreement on the foreclosure plan, or Mansour as a partner for the 100% purchase. The only risk is that the company refinances itself anyway, for example through JQ2".

227. Mr Faber and Sir David Barclay met on 4 August 2011 to discuss Mr Faber's memorandum. What emerged either from that meeting or over the next few days was essentially a two-pronged strategy on the part of the Barclay interests. First, they were already in discussions with Sheikh Mansour as I earlier mentioned and they regarded it as important to continue those discussions, with a view either to forming a partnership with Sheikh Mansour or at least to removing both him and Wynton and its associates as possible rivals for control of the company. To that end Mr Faber went to Abu Dhabi for meetings on 16 and 17 August 2011. Negotiations for a partnership did not come to a conclusion, but agreement in principle was reached in respect of the charges held by Aabar and JQ2 over Mr Quinlan's shares. Aabar would release its second charge and the Barclay interests would purchase from JQ2 the debt secured over Mr Quinlan's 13.32% shareholding. This was part of a larger transaction under which the Barclay interests would relinquish claims in respect of an unrelated matter. The negotiations were not completed during Mr Faber's visit to Abu Dhabi and there were protracted negotiations through the rest of August and during much of September to finalise the details. Ultimately agreement was reached on all aspects. A contract was signed on 14 September 2011 and the transaction was completed on 23 September 2011. The Barclay interests had thereby achieved one of their objects, removing Sheikh Mansour and Wynton as rivals for control of the company.

228. The other part of the strategy was to open discussions with NAMA with a view to the purchase of the NAMA debt. Although Mr Faber texted Mr Hennigan on 5 August 2011 to suggest a meeting, no meeting in fact took place. On Monday 8 August 2011 Mr Peters met Sir David and Sir Frederick Barclay and they discussed opening negotiations with NAMA. On the following day Mr Peters spoke to Mr Hennigan and put forward a proposal to purchase the NAMA debt. The proposal

was to pay £660 million to NAMA for the debt but on the basis that NAMA would pay the net arrangement fee of £12.4 million. Mr Hennigan told Mr Peters that it was NAMA's expectation to recover the par value of the NAMA plus accrued interests. Mr Hennigan sought instructions from his superior in NAMA who informed him that NAMA's position was that it required a par recovery and would not agree to paying the arrangement fee. Mr Hennigan reported this to Mr Peters and told him that NAMA would be pursuing some other options. NAMA was at this time in discussion with Wynton with a view to a sale of the debt.

229. There was no further contact between the Barclay interests and NAMA during August. Mr Peters was away on holiday and Mr Faber was largely taken up with dealing with Sheikh Mansour and Wynton.

230. On 8 July 2011, NAMA had agreed to extend the loan facility to 30 September 2011. Mr Hennebry on behalf of the company was doing what he could to identify possible sources of refinance and also dealing with NAMA. He arranged lunch on 26 July 2011 with representatives of Bank of China who had been introduced to the company by KPMG. This did not lead anywhere and in Mr Faber's view it never had any prospect of doing so.

231. On 5 August 2011, Mr Hennebry wrote to NAMA to put forward a proposal under which the company would repay £500 million of the NAMA debt and the remaining £160 million would be restructured as a junior loan, ranking after a new senior loan from a third party lender for the £500 million. The term of the junior loan would be 5 years but Mr Hennebry wrote, "*Coroin would then be well placed to work through solutions to refinance the junior loan away from NAMA over the course of the next two to three years*". NAMA's internal documents show that its immediate decision was to reject this proposal and to re-iterate that its only interest was in receiving repayment in full of its existing senior debt. NAMA's formal response was contained in a letter dated 10 August 2011 to the company which stated:

> *"While we appreciate your effort to seek a solution to the refinance of Coroin, please take this letter as confirmation that NAMA will not consider a partial repayment proposal, as such any proposal should be for the full amount of the £660m debt plus accrued interest.*
> *I also wish to take this opportunity to state that I can give no guarantee or expectation that NAMA will agree to extend the facilities beyond the 30 September 2011 maturity date".*

232. On the evening of 4 August 2011 Mr Hennebry had shown a draft of his letter to NAMA to Mr Faber. Mr Faber said in evidence that he was worried that NAMA would see this as a ridiculous proposal. He contacted NAMA to warn them that this letter was coming. He knew that NAMA's only concern was to be repaid the full amount of the debt as soon as possible and he also knew that NAMA was seriously considering the sale of the debt to a third party, be it the Barclay interests, Wynton or someone else. When asked in cross examination to explain why he went behind Mr Hennebry's back in this way, he said, after referring to NAMA's position which had been made clear to the company:

> *"So when Mr Hennebry, God bless him, puts together a proposal which, if you go to 11284, suggests that NAMA should take a junior position*

> *with a three and three-quarter per cent margin, it is just not a flyer. It is not commercial. It is an effort and I am not going to stop Mr Hennebry making an effort because, as Mr Marshall has pointed out, that is his job, but it is not what NAMA have asked for or indicated that they want. I am entirely clear what their request was and, therefore, I am trying to warn NAMA that, do not worry I have not forgotten what you want or what you have told us".*

Mr Faber regarded it as being in the company's best interests to warn NAMA that it understood what NAMA required.

233. NAMA's response to Mr Hennebry's proposal was discussed in a conference call on 15 August 2011, attended by Mr Cunningham, Mr Faber, Mr Seal, Mr Mowatt, Mr Hennebry, Mr Alden and representatives of DLA Piper, the company's solicitors. Mr Hennebry described the present state of play with regard to his discussions with Bank of China and others and asked the other directors for an update. Mr Cunningham referred to the possibility of a French bank but Mr Faber and Mr Seal did not mention the Barclay interests' negotiations with Barclays Bank or the approach to NAMA. It was agreed that a response would be sent to NAMA. An email sent by Mr Alden immediately after the telephone call records that a note to NAMA would be drafted "*asking about whether they are attempting to sell debt as there is a provision in the facilities agreement for them to consult with the company if they are"*. Mr Hennebry drafted a letter which contained the following paragraph:

> "*In reference to the possibility that NAMA may be considering selling the company's loan to another Bank, financial institution etc, the company expects that notification and consultation as required under the facilities agreement would commence at least four weeks prior to any such transfer or assignment in order for the company to have adequate time to consider it. In addition, please can you confirm if NAMA is currently in discussion with any party at this time regarding its loan to the company".*

234. Mr Hennebry circulated the draft letter among the directors. Mr Seal promptly wrote to Mr Faber and Mr Mowatt saying that he could not believe that there was a requirement for NAMA to give this confirmation. Mr Mowatt responded promptly saying "*I agree. Where does the four weeks come from?"*. Mr Seal replied saying that they should wait for Mr Faber to respond but *"It seems nonsense to write to NAMA in terms as suggested*".

235. Weil, Gotshal & Manges, the Barclay interests' solicitors, advised that there was an obligation to notify and consult on a proposed transfer in the facilities agreement but that it was "*absurd*" to suggest the company be given four weeks' notice. Mr Seal emailed Mr Hennebry on 17 August 2011 to say that he was *"not actually sure why we are asking NAMA anything about the possibility of selling their loan. If they have obligations under the facilities agreement then I am sure they will be only be too well aware of them. I would therefore be inclined to exclude any reference to this"*. In a telephone conversation the following morning Mr Seal told Mr Hennebry that his view was that there was little point in telling NAMA their duties under the facilities agreement. Mr Hennebry, after a number of calls with Mr Seal, told him that he did not think there was any point in sending a letter to NAMA that contained

nothing more than an expression of disappointment at the rejection of the company's offer of a junior loan.

236. Mr Cunningham was concerned to find that, contrary to his understanding of the decision taken in the board telephone call, a letter was not being sent to NAMA and he accordingly emailed the directors on this point. In an email to Mr Faber, Mr Seal said that he thought it was "*futile to raise the issue of debt sale and their obligations*" in a letter to NAMA. Mr Seal expanded on this in an email to Mr Hennebry on 21 August 2011:

> "*It was indeed only after seeing the draft letter prepared by DLA that I thought it inadvisable to include reference to the sale of the NAMA debt. Agreeing to review a draft is not of itself agreement to send the letter. Being cognisant of the fact that a letter was to be sent I thought it best just to include the reference to the our* [sic] *disappointment in their decision not to consider an extension beyond the end of September and to reject the mezzanine proposal. If you recall it was you who told me that if that was all that was to be said it was best not to send the letter at all. That was your decision and not mine*".

237. On 22 August 2011 Mr Cunningham emailed the other directors of the company:

> "*It seems to me that we are all attempting to refinance the company on an individual basis and not approaching this with a united front, which in its own right is unhelpful.*
>
> *Shouldn't the company appoint someone like Goldman Sachs who might have a broader knowledge of what is happening throughout the market place to see what they can raise in terms of senior debt finance.*
>
> *Then as a company and as a board we can present a cohesive refinance plan*".

238. There followed email exchanges between Mr Faber, Mr Seal and Mr Mowatt. Mr Mowatt asked who should be recommended as the financial adviser or whether they go with the suggestion of Goldman Sachs and who would manage the process. Mr Seal expressed the view that it was best to go with the suggestion of Goldman Sachs and that there should be a committee of the board comprising Mr Hennebry, one of the Barclay interests' directors and Mr Cunningham. But he added that they should await Mr Faber's view once he had spoken to Sir David Barclay. Mr Faber agreed with the approach of appointing Goldman Sachs and Mr Seal's suggestion of a board committee but he was due to have a discussion with Sir David Barclay and Mr Compagnoni, a partner in Weil, Gotshal & Manges who regularly acts for the Barclay interests. Mr Faber reported back to Mr Seal and Mr Mowatt that Sir David Barclay was against the idea, stating that it created unnecessary work for a result guaranteed to fail. Mr Faber gave evidence that he agreed with Sir David's view that attempts by Goldman Sachs to obtain replacement financing for the company were bound to fail and that in that sense the appointment of Goldman Sachs would serve no purpose. Mr Mowatt emailed to say that he respected Sir David's view but

"should we not have a meeting with Goldman's?" Mr Faber evidently discussed it with Mr Compagnoni whose advice was to agree to the appointment of Goldman Sachs. However, Sir David Barclay strongly disagreed. Mr Mowatt responded *"difficult one!"* He explained in evidence that he meant that it was difficult if they had to go against Sir David's wishes, because they would not want to go against him unless it was unavoidable. Mr Seal agreed that it was *"v difficult"*.

239. Mr Faber emailed Mr Cunningham, having discussed its contents with Mr Seal and Mr Mowatt, as follows:

> *"Whilst the idea of appointing an advisory firm is appealing to the board as we contemplate the near term requirement to refinance the business, we do face the inevitable task of explaining to the advisor the current shareholder situation and over leverage. As you, Mark and I discussed at Maybourne's offices only a short while ago, the simple truth is the current register when combined with an over indebtedness to the tune of £160-200m make the refinancing impossible, especially as the banking market moves against us by the day.*
>
> *So if the board wishes to appoint a bank/ advisor then we can agree to it, but I think the board could use the precious little time we have left to September 30th to impress upon the shareholders to agree a way forward where either of these two matters is resolved by the following manner:*
> *1) Sell a hotel to lower overall debt.*
> *2) Bring in new financing to lower debt.*
> *3) Allow Misland to acquire Quinlan's shares, and therefore allow banks we know well to refinance in its current state of indebtedness. As we have discussed before this will mitigate the financing requirement (via new equity or sale of assets) as we can give the banks wider comfort than they will inevitably require.*
> *We have proposed a number of solutions to this and offered you different contracts to satisfy Paddy, but as yet I have not received your acceptance except for terms which are on terms we cannot accept because the refinancing banks will not accept them.*
> *Therefore I think its time the board discuss option one or two, in conjunction with appointing an advisor because Paddy doesn't appear to want to accept our various proposals".*

240. Mr Cunningham replied on 23 August 2011. He said that the idea of appointing an adviser was purely to widen the options open to the company by going to someone who was more familiar with the options available in the market. Whilst acknowledging that the timeframe was short, he and Mr McKillen were not as convinced as Mr Faber that the NAMA debt would not be rolled over. Mr Cunningham went on to say that he thought that they should exhaust how much senior debt could be obtained. He felt that while the Barclay interests' banking contacts might be happy to provide finance only if the Barclay interests had a majority stake, other banks might not be as restrictive and an adviser might source the financing. He made clear that Mr McKillen would not agree to the sale of a hotel

as this would be very damaging to senior staff morale and could result in serious management issues. As to bringing in new financing, this was an option they would look at but only if it meant a new equity stake from a new third party investor, as Mr Cunningham made clear in a further email on 26 August 2011. As to Mr Quinlan's shares he said that Mr McKillen would exercise his pre-emption rights if those shares became available.

241. On 26 August 2011 Mr Compagnoni advised in an email that it was sensible to go along with the suggestion for the appointment of Goldman Sachs. He advised that *"This is all about process and the directors being seen to have done the right thing by the company in covering off all options from the company's perspective as it faces its debt running out at the end of September*". It was not, he advised, an unreasonable suggestion in the circumstances. Mr Mowatt commented in an email to Mr Seal "*we need to convince David that we need to appoint GS"* to which Mr Seal responded *"I regret that it will not be possible!"*.

242. On 26 August 2011 Mr McKillen took two steps. First, he emailed NAMA referring to the obligation of consultation on NAMA contained in the facility agreement. He asked for confirmation that there would be consultation and he also asked for confirmation that NAMA was not in negotiations with any third party. He therefore sent the letter which he had hoped the company would send. He also emailed Bob Diamond, then Chief Executive of Barclays Bank. This was a cold call. He introduced himself and then continued: *"I understand BarCap have been having discussions around refinancing the company debt structure. I have to date not been privy to the discussions but would very much like to be and play my part."* Mr McKillen received a reply on behalf of Mr Diamond in which he was told that Barclays Bank was currently conflicted and therefore could not discuss the matter with him.

243. NAMA replied to Mr McKillen's email on 29 August 2011. It confirmed that NAMA was aware of its obligations under the loan agreement. It continued:

> *"NAMA's objective is to achieve full repayment of our debt as soon as practicable. The company and shareholders are well aware of our objective and we note that the company has been in refinancing talks for close to two years now without success. As you recall no doubt we facilitated the restructuring of the Knightsbridge loan into the company earlier this year to assist and enhance the ability to achieve refinancing by the company.*
> *In our view the three months extensions is not the real issue, as we understand that refinancing by the company was very close very early this year only to be thwarted at the last minute by a disagreement amongst the shareholders over certain issues. NAMA reserves its rights to achieve its objective of achieving full par debt repayment by any means available to it. We would welcome any near term firm proposals by the company to achieve full par debt repayment as soon as possible"*.

244. Agreement was reached to the appointment of Goldman Sachs on behalf of the company. On 5 September 2011, Goldman Sachs produced a draft proposal. They stated that they believed that the company could support up to about £495 million of

senior term loan at an average cost of about 7% assuming a return to "*normalised*" market conditions. The balance of about £165 million would be required either from existing shareholders or, potentially, new mezzanine/preferred equity investors. They warned that market conditions had been challenging in the previous few weeks and that no significant real estate deals had been closed during the recent market turbulence, although investors continue to evaluate new opportunities and "*the pipeline remains robust*".

245. Mr Faber responded on 6 September 2011 to the draft paper from Goldman Sachs. He emailed Mr Hennebry and the other directors:

> *"I can't see how this proposal can work. We have until the end of the month, not Christmas to refinance the debt. This advice is not what the board needs now and only considers the refinance options. Unless the board is given strong evidence we will receive an extension we need a far more detailed short term plan."*

246. On 7 September 2011 Mr Peters wrote to NAMA with an offer, subject to contract, to acquire the NAMA debt. The price offered was the par value of the loan of £660 million together with accrued interest, but it also contained a term that NAMA would pay a fee of £10 million to the Barclay interests in recognition of NAMA's accelerated receipt of the debt. This offer was rejected on 12 September 2011 on the grounds that the fee would give NAMA less than full recovery.

247. On 8 September 2011, Mr Cunningham emailed Mr Hennebry, copied to Mr Faber, with regard to the letter from NAMA. Mr Cunningham said "C*onsidering we are all concerned about deadlines. We should not delay writing to NAMA at all, we can soften the language to say we have engaged with Goldman as against appointed them. It allows us know sooner rather than later what NAMA's stance will be. We wouldn't be happy with any further delay in engaging with NAMA*". In private exchanges between Mr Faber and Mr Seal they agreed that they could see no harm in such a letter being sent to NAMA. On 9 September 2011, Mr Hennebry on behalf of the company wrote to NAMA requesting an extension of the maturity date from 30 September 2011 to 31 January 2012 "*at the earliest"*. The letter stated also:

> *"Refinancing the company's loan from NAMA remains the priority and every effort continues to be made to achieve this objective. With stronger trading results which underpin the property values and which provide improved interest cover, the company is confident that a refinancing can take place in the near term. We are engaging with an investment bank to assist in this process and their view is that a refinancing transaction would be viewed positively by the real estate debt of market.*
> *It has also become clearly evident over the last couple of months that the quarterly maturity deadlines are counterproductive in our efforts to refinance the debt. A longer maturity date of one year would remove this avoidable uncertainty and allow the company to focus on refinancing. I would welcome your thoughts on this matter".*

248. On 9 September 2011, Mr Faber, Mr Seal and Mr Mowatt as directors decided to terminate Mr Hennebry's consultancy contract with the company. I will deal separately with this matter and the events leading up to it later in this judgment.

249. On 13 September 2011, NAMA wrote to the company in response to its letter of 9 September 2011. It did not respond directly to the request for an extension of the facilities to 31 January 2012 but the letter included the following:

> *"I am not clear what evidence you have that the quarterly debt maturity deadlines are counter-productive to your efforts in achieving a refinance of the existing facilities. Perhaps you would like to elaborate in concrete terms how a change in the maturity date would have the desired effect of achieving a refinance?*
>
> *As you know it is been our wish that this loan be repaid in full at the earliest opportunity and this continues to be our objective".*

250. On 15 September 2011, Mr Peters wrote again to Mr Hennigan at NAMA, seeking to persuade him of the merits of the offer which had been made by the Barclay interests in its letter dated 7 September 2011 and subsequently rejected by NAMA. NAMA responded on 16 September 2011, reiterating its refusal of the offer. The letter stated:

> *"Coroin Limited owes NAMA principal of £660m plus accrued interest, repayable in full on 30 September 2011. NAMA would not be acting in the interests of the tax payer if it sold the debt for less than £660m given that NAMA expects Coroin will repay its debts in full as the asset value exceeds the amount of the senior debts we hold.*
> *Your offer was discussed amongst NAMA's Chairman, Chief Executive and Chairman of the Credit Committee. They reiterated the position that NAMA will only consider the sale of the Coroin debt at par value plus accrued interest.*
>
> *If you or any of the Coroin shareholders believe that Coroin will be unable to repay its debts and will default on its obligations on 30 September I will bring this to their attention to ensure we are prepared accordingly".*

251. On the same day Mr Peters replied stating that the Barclay interests would reflect on their position further and no doubt speak again after the week-end. The letter continues:

> *"In the meantime, in relation to the point you make in the last paragraph of your letter, I should point out that these discussions we are having (and have had to date), concerning a possible purchase of NAMA's debt due from Coroin, are completely separate and distinct from anything to do with Coroin itself. Here at 20 St James's Street we have been rigorous in maintaining an information barrier between me, my team and the rest of my colleagues on all matters relating to*

> *Coroin, so I have no idea or view on what Coroin and its directors/board are doing in relation to its financing arrangements, or as to its affairs or ability to meet its obligations to NAMA. If you construed anything in my letter to the contrary then it was not intended and is, in fact, not the case".*

252. Following a board meeting of the company on 16 September 2011, Carole Walker on its behalf sent a letter on the same day to NAMA in the following terms:

> *"Please be assured that refinancing the company's loans away from NAMA remains our priority. As previously stated, we have been in discussions with a leading international investment bank to assist us with this process. Initial indications have been very positive and we have another meeting with them scheduled for early next week. However, we remain firmly of the view that a loan of this magnitude will take more than 3 months to refinance.*
>
> *Further to your request to us to elaborate in concrete terms as to why a longer maturity date would help facilitate the refinancing process, we plan to provide examples from our experience to date together with the additional insight of the investment bank on this issue following our meeting with bank* [sic] *next week".*

253. On 20 September 2011 Mr Peters called Mr Hennigan to ask whether NAMA had all the approvals in place to sell the debt. Mr Hennigan replied that they had approval for a sale at par plus accrued interest. Mr Hennigan told Mr Peters that NAMA would not be granting another extension to the debt.

254. It is apparent from a letter dated 20 September 2011 from Morgan Stanley to Mr Cunningham that he had been discussing a refinancing of the company's debt with them. The letter states that Mr Cunningham is hopeful of securing a senior loan of up £500 million and that Morgan Stanley would be interested in underwriting a loan for the remaining amount. The letter states:

> *"We understand that the group's current running annualised EBITDA is upwards of £53 MM, which would not enable you to service on an ongoing basis any mezzanine financing in full. We confirm that we will be willing to allow you to accrue (PIK) some of the interest on a capitalised basis thereby increasing the notional amount due in refinancing of the new term loan in 2016".*

The letter further states that their cost of capital is 15% per annum upwards.

255. A board meeting of the company was held on 21 September 2011, attended by Mr Seal, Mr Faber, Mr Mowatt, Mr Cunningham, Mr Alden and Ms Walker. There was a report on the recent correspondence with NAMA and a report of a meeting with Goldman Sachs on 20 September 2011, which had been attended by Mr Faber, Mr Mowatt, Mr Cunningham, Mr Alden and Ms Walker. The minutes of the meeting record:

> *"On first review of the refinancing proposals submitted by* [Goldman Sachs]*, it is apparent that the proposal is too expensive and will drain the company of cash".*

256. On 23 September 2011 Mr Peters called Mr Hennigan at NAMA and offered to buy the NAMA debt at par plus accrued interest, saying that a written offer would follow. Mr Peters said that they wished to do the deal as soon as possible and he and Mr Hennigan agreed to work towards 27 September 2011 as a target date. Later that day Mr Peters sent the offer letter, subject to contract. It fulfilled NAMA's requirement for a full recovery of £660 million plus accrued interests.

257. NAMA accepted the offer and the sale of the NAMA debt to the Barclay interests was completed on 27 September 2011.

Should adverse inferences be drawn from the absences of witnesses?

258. It is submitted for Mr McKillen that the court should draw adverse inferences from the absence of four witnesses who might have been called by the respondents or some of them: Sir David Barclay, Sir Frederick Barclay, Aidan Barclay and Mrs Quinlan.

259. It is of course well settled that in civil proceedings the court may draw adverse inferences from a party's decision not to give or call evidence as to matters within the knowledge of the party or of witnesses who, it is reasonable to conclude, would have given evidence if asked to do so. Whether or not in any particular instance it is appropriate to draw an adverse inference from the absence of a witness and, if so, the weight to be attached to such inference will always depend on the particular circumstances of the issue to which the evidence would go. In *Murray v DPP* [1994] 1 WLR 1, a case to which Mr Marshall referred me, Lord Mustill made observations at p.5 which, although said in the context of criminal proceedings, are in my view applicable also in civil proceedings:

> *"Everything depends on the nature of the issue, the weight of the evidence adduced by the prosecution on it……. and the extent to which the defendant should in the nature of things be able to give his own account of a particular matter in question. It is impossible to generalise, for dependant upon circumstances the failure of the defendant to give evidence may found no inference at all, or one which is for all practical purposes fatal."*

260. An obvious case where an adverse inference may be drawn is where the issue is what was said in a conversation between two parties with no other witness present. The claimant gives evidence of his version of the conversation but the defendant declines to give evidence. Assuming that the claimant's evidence is capable of being accepted, the court is highly likely to draw an adverse inference from the defendant's failure to give evidence. Another case to which Mr Marshall referred me, *Crawford v FIS* [2005] UKPC 40, provides an illustration of this. A bank in Jamaica and associated companies were the subject of a statutory intervention by the Ministry of Finance. The group of companies had been controlled by the defendant who was a director of the relevant companies. The companies brought claims against him based or consequential on mis-management or misappropriation

in the financial affairs of the group. It appears that there was substantial evidence in support of the claims but the defendant refused to give evidence. By way of example, one of the claims was in relation to payments totalling over $1.48 million which the bank had made to or for the benefit of the defendant. There were no vouchers of any kind. The defendant's service contract, which it was suggested might have permitted such payments, was not produced. The court was entitled to draw an adverse inference from the failure of the defendant to give evidence and to find that he had been helping himself to the bank's funds. Giving the decision of the Privy Council, Lord Walker stated at paragraph 12:

> *"The weight to be attached to a defendant's failure to testify varies with the circumstances of the case. It is plain that in this case the Chief Justice and the Court of Appeal attached a great deal of weight to Mr Crawford's silence, and their Lordships are satisfied that they were right to do so. Mr Crawford was the chairman and chief executive of the bank, the building society and merchant bank. It is an irresistible inference that he was the directing mind behind Regardless, Holdings and the rest of the group. The consolidated proceedings raised many grave issues as to his stewardship of the whole of companies. His failure to testify was a strong indication that he had no satisfactory answer to what was alleged against him"*.

261. The basic requirement is to consider the appropriate inference, if any, to be drawn and the weight to be attached to it in the particular circumstances of the case. Mr Marshall placed emphasis on a passage from the judgment of Gillard J in the Australian case of *O'Donnell v Reichard* [1975] VR 916 at 921, cited by the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at 339:

> *"…….. it may be accepted that the effect of the party failing to call a witness who would be expected to be available to such party to give evidence for such party and who in the circumstances would have a close knowledge of the facts on a particular issue, would be to increase the weight of the proofs given on such issue by the other party and to reduce the value of the proofs on such issue given by the party failing to call the witness."*

This is not, however, an absolute proposition applicable irrespective of the circumstances of the case.

262. Mr Marshall accepted that the circumstances of the relevant issues in this case were not akin to the stark case of the conversation or event in which there are only two witnesses and only one of the witnesses gives evidence. On the contrary, there are no issues to which the evidence of any of these witnesses would go, which involves a dispute between evidence given by Mr McKillen or his witnesses on the one hand and the account which might be given by the persons not called as witnesses on the other. They are, on the contrary, issues on which evidence supporting the respondents' cases has been given by the respondents or their witnesses, with no contrary evidence called by Mr McKillen.

263. The starkest example is the telephone conversation on 15 January 2011 between Sir David Barclay and, first, Mrs Quinlan and, then, Mr Quinlan. Mr McKillen alleges

that a binding agreement was made in the course of that conversation between Sir David Barclay and Mr Quinlan. Mr Quinlan has given evidence and has denied that any such agreement was made. Mr McKillen has not and cannot call any direct evidence of that discussion, there being no other witnesses to it and no document recording it. Instead, and I mean no criticism of this, he relies on inferences which he submits should be drawn from the subsequent course of events and from various comments made in various communications. The task of the court is to assess the totality of that evidence and to reach a conclusion on it. If the court believes Mr Quinlan's account, and does not conclude that it is displaced by the course of subsequent events and the documents, then it is hard to see why an adverse inference should be drawn by the failure of Sir David Barclay to give evidence. There is no doubt that his case is that no such agreement was made. Mr Marshall would have had to say either that Sir David Barclay would not be prepared on oath to support that case or that his evidence would not survive cross-examination. In view of the findings on the evidence, which I make later in this judgment, either of these possibilities appears somewhat fanciful. If, on the contrary, I had not been persuaded by the evidence of Mr Quinlan and other witnesses, Mr McKillen does not need to rely on the absence of Sir David Barclay as a witness.

264. Many of the matters on which it is submitted that the court should draw an adverse inference from the absence of Sir David Barclay as a witness are of a similar category. They are all issues on which witnesses called by the respondents gave evidence supporting the respondents' cases and on which Mr McKillen and his witnesses could not give evidence. They include Sir David's discussions with Mr Quinlan and Mr Murphy in July and August 2010, the circumstances in which the loan of €500,000 to Mr Quinlan and the pre-emption arrangement was made in October/November 2010, the meeting in Gstaad on 14 January 2011 and the circumstances in which Mr Hennebry's consultancy contract with the company was terminated in September 2011. The same is true of the financial support given by Sir David Barclay to Mr Quinlan and his family.

265. In other cases, it is submitted that adverse inferences should be drawn in respect of documents, in particular text messages, sent by Sir David Barclay. Those communications are relied on by Mr McKillen as evidence in support of his case. I have to consider whether they are capable of bearing the significance which is attached to them by Mr McKillen. If they are capable of bearing that weight, then that is a matter which I take into account in favour of Mr McKillen's case in arriving at its overall conclusion. To that extent, Sir David Barclay is at a disadvantage because he has not put forward an explanation which detracts from the significance which I otherwise attach to the communication.

266. There is in total a good deal of evidence and, having regard to that evidence, I do not think that it is appropriate to draw an adverse inference from the absence of Sir David Barclay as a witness. But, even if it were, I am satisfied having looked at all the evidence that it would not make any difference to the findings which I have made. In saying this, I have put to one side that Sir David Barclay's position is that he is medically unfit to give evidence. That is a point which I shall shortly consider separately.

267. What I have said above as regards an adverse inference in relation to Sir David Barclay applies all the more strongly to Sir Frederick Barclay. He did provide a

short witness statement which was submitted as hearsay evidence under the terms of the Civil Evidence Act. When Mr McKillen issued an application requiring Sir Frederick Barclay to attend for cross-examination, he made it clear through his solicitors that even if such an order were made he would not attend. In those circumstances, Mr McKillen did not pursue his application. Sir Frederick's involvement in the relevant transactions was a good deal less direct than that of Sir David Barclay. It may well be that Sir Frederick was kept apprised of relevant developments by Sir David, but if it is not appropriate to draw adverse inferences from the absence of evidence from Sir David Barclay on matters in which he was directly involved, it is certainly not appropriate to do so in relation to the absence of evidence from Sir Frederick whose involvement was for the most part indirect.

268. As regards Sir Frederick Barclay's witness statement, it is a denial of allegations made against him in a form which subjects him to the contempt jurisdiction of the court under CPR 32.14. However, as can be seen from the rest of this judgment, I have not found it necessary to take account of Sir Frederick's witness statement in making my findings of fact.

269. The role of Aidan Barclay became clearer in the course of the oral evidence of Mr Faber than perhaps it had previously been. There were quite a number of matters which Mr Faber said he would refer to Mr Barclay for decision. The closer involvement of Sir David Barclay after July 2011 resulted from Mr Barclay being ill for that period. Nonetheless, Mr Faber was more closely involved in the main than Mr Barclay and there is little on which Mr Barclay can give evidence on which there is not already a considerable body of evidence.

270. It is noticeable that there are very few inferences which I am invited to draw from Aidan Barclay's absence. There are five, set out in paragraph 664 of Mr McKillen's closing submissions. The first is that the Barclay brothers were the key decision-makers because he would have given evidence if he had been a key decision-maker. Leaving aside the faulty logic, there is more than enough direct evidence as to who made which decisions. The second is that he chose not to give evidence because his evidence would have been unhelpful to the respondents' case. This is entirely general, with no identification of the issues on which the inferences should be drawn. The third is that he knew that a binding agreement was made with Mr Quinlan on 15 January 2011, but there is no particular evidence suggesting that Mr Barclay knew of the alleged agreement. The fourth, that he failed to disclose to Mr McKillen the joint venture agreement made at the beginning of February 2011 with Sheikh Hamad is accepted but is of little relevance. The fifth, that he was fully aware of the attempts to acquire the NAMA debt and facilitated it, is true to the extent shown by other evidence but his involvement was as I have mentioned above clearly curtailed by his illness. Given the amount of other evidence, and the issues on which Mr Barclay might be expected to give direct evidence, I see little or no room for any adverse inference from his absence as a witness.

271. No adverse inference should, in my judgment, be drawn from the absence of evidence from Mrs Quinlan. The main issue to which evidence is said to be relevant is the alleged agreement made on 15 January 2011. It is however important to bear in mind that the case that such an agreement was made during Sir David Barclay's telephone conversation with Mr Quinlan on that date emerged only in the course of cross-examination of the respondents' witnesses. Ironically, it was Mr Quinlan's

evidence in his first witness statement of his wife's recollection of the conversation which played an important part in, and may have prompted, this allegation. I have in any case found that it is likely that some reference was made in that conversation to Sir David Barclay's intention to support the Quinlan family. It is not, and cannot be, suggested that the alleged agreement was made in the course of Sir David Barclay's conversation with Mrs Quinlan. The agreement if made at all was made with Mr Quinlan. There is nothing in the point that Mrs Quinlan would have given evidence as to the detail of the payments made and benefits conferred on Mr Quinlan and his family. Before the trial, Mr McKillen applied for further information in relation to such payments and benefits but I held that the details provided were sufficient for the purposes of the trial.

272. I earlier referred to the position taken by Sir David Barclay that he is medically unfit to give evidence. I have already concluded that in any event adverse inferences should not be drawn from his absence as a witness. Without going into the details, which are the subject of a confidentiality regime agreed between the parties, Sir David Barclay underwent heart surgery on or about 20 September 2011. Shortly after that, he complained of various symptoms which could affect his ability to give evidence. He has been under the care of distinguished consultants in cardiology and surgery. The consultant cardiologist provided a letter dated 20 February 2012, supplemented by a further letter dated 18 March 2012 and the consultant surgeon provided a letter dated 19 March 2012. The consultant cardiologist is clearly doubtful that the symptoms experienced by Sir David Barclay result from the operation but he is satisfied as to the existence of these symptoms, both as a result of his own observation of Sir David Barclay, most recently on 18 March 2012, and on the basis of a detailed report from the registered nurse who is continuously supervising Sir David. The consultant cardiologist concludes his letter of 18 March 2012 by saying that he has re-examined Sir David Barclay and that he is firmly of the opinion that Sir David Barclay would be unable to face a stressful court session with prolonged examinations. The consultant surgeon concurs in this opinion on the basis of the reports of his symptoms provided by the registered nurse and the consultant cardiologist.

273. It is submitted for Mr McKillen that the court should not accept that Sir David Barclay is unable to give evidence for medical reasons. Objection is taken to the form in which the medical opinions have been put before the court. It is submitted that such opinions should have been contained in expert reports for which the permission of the court should be obtained. I do not accept this objection. In my experience, and I suspect the experience of most other judges, reports on the medical conditions of parties or witnesses for the purposes of a trial are not the subject of formal expert evidence such as is given on issues in the case. The medical opinions are usually provided in letters from the medical practitioners. Secondly, it is submitted that the letters do not constitute a sufficient medical explanation for Sir David Barclay's absences as a witness. Attention is drawn to a number of occasions on which Sir David Barclay appears to have been active since his operation in September 2011. A number of those occurred within a few days of the operation and the evidence is that the symptoms reported in the consultant's letters manifested themselves not immediately but a little while after the operation. Other matters such as sending and receiving emails and text messages are not inconsistent as it seems to me with the symptoms described by the consultants. Reference is made also to Sir

David Barclay's signing statements of truth on his defence on the 9 December 2011 and on his amended defence on 15 March 2012, as well as on his three-page disclosure statement on 13 January 2012. This again seems to me to be in no way comparable to giving oral evidence in court. A party can be taken slowly through a defence, enabling him properly to verify it by a statement of truth.

274. Much reliance was placed on the fact that Mr McKillen's solicitors had suggested that Sir David Barclay should be examined by an independent consultant agreed by both parties. I have to say that this is not a course which I have ever seen used to determine whether a party or witness is medically fit to give evidence. I am aware of it occurring in the case of respondents to proceedings for disqualification orders under the Company Directors Disqualification Act where the issue was whether the proceedings should be stayed on the grounds that in view of the medical condition of the respondent a fair trial was impossible. I do not consider that any adverse conclusion should be drawn from the refusal to submit to an independent medical examination in this case. The issue for the court on the evidence put before it is whether the party, in this case Sir David Barclay, has satisfied the court that he is medically unfit to give evidence, so as to displace any adverse inference that might otherwise be drawn from his failure to give evidence. Such a party could of course agree to an independent examination but in the absence of doing so the court will reach its conclusion, on the material put before it. If that material does not pass muster, without being bolstered by an independent consultant's report, the consequence is that the court will not accept the explanation of the party or witness for his absence.

275. It is apparent that this is not one of those cases where the condition of the witness is so obvious that the court can without difficulty conclude that he is medically unfit to give evidence. Symptoms of fatigue, stress and lack of concentration require a judgment as to whether the witness is fit to give evidence. But it is a medical judgment, albeit one which will be subject to judicial scrutiny. There is in my judgment no reason to doubt the existence of the symptoms which have been referred to and the judgment of the consultants. In particular the consultant cardiologist is clear that Sir David Barclay is medically unfit to give evidence. The court can, of course, take various steps to mitigate the adverse effects of giving oral evidence. But there is clearly a limit to what can be done in this respect and I have no doubt that Sir David Barclay's evidence would have been the subject of vigorous and sustained challenge. The evidence before me is quite insufficient to cast serious doubt on the medical opinions expressed in the consultants' letters and I am satisfied that there are good medical reasons for the absence of evidence from Sir David Barclay.

Pre-emption

Introduction

276. Mr McKillen alleges that the pre-emption provisions in relation to shares in the company contained in the shareholders agreement were triggered by two quite separate events or series of events. First, it is alleged that the security given by Mr Quinlan over his shares to secure his borrowings became enforceable. Secondly, it is said that the arrangements made between Mr Quinlan and the Barclay interests as regards his shares also triggered the pre-emption provisions. Those arrangements

comprised both agreements and other arrangements admittedly made and also an oral agreement which is alleged by Mr McKillen to have been made on 15 January 2011 but is denied by Mr Quinlan and the Barclay interests.

277. The pre-emption provisions are contained both in the shareholders agreement and in the articles of association of the company. Those provisions are in largely similar but not quite identical terms. I shall deal with these issues by reference to the provisions of the shareholders agreement. Clause 8.3 of that agreement provides that in the event of any inconsistency between the terms of the agreement and the articles of association, the terms of the agreement are to prevail and the shareholders are required to make such amendments as may be necessary to the articles to conform to the terms of the agreement.

278. Clause 6 of the shareholders agreement, containing the pre-emption provisions, is a long and elaborate clause but it is necessary to refer only to a few of its provisions.

279. Clause 6.1 provides:

> *"Except in respect of a transfer made pursuant to clauses 6.14, 6.15 and/or 6.16, a Shareholder (the Proposing Transferor) desiring to transfer one or more Shares (or any interest therein) (the Transfer Shares) may at any time give notice in writing to the Company (Transfer Notice) of his desire to transfer the Transfer Shares and the sale price thereof and other sale terms, as fixed by him. For the purposes of this clause 6, 'Share' shall be deemed to include Loan Stock and any other debt or other instrument convertible into share capital of the Company"*.

This clause differs from many standard form pre-emption clauses by not requiring a member who desires to transfer his shares to give a transfer notice, but only giving him the option of doing so. If a shareholder does give a transfer notice pursuant to clause 6.1, sub-clauses 6.2 to 6.5 make provision for the shares to be offered round to the other shareholders and what the shareholder may do if the pre-emption offer is not accepted.

280. Clause 6.6 is directly relevant to both ways in which Mr McKillen puts his case. It provides as follows:

> *"If any Shareholder*
>
> > *6.6.1 (being a corporate Shareholder) enters into liquidation or receivership or suffers the appointment of an examiner or any Shareholder Security becomes enforceable or suffers any analogous proceeding (not being a voluntary liquidation for the purpose of and followed by a reconstruction or amalgamation while solvent upon such terms as may be approved by all of the Shareholders); or*
> >
> > *6.6.2 (being an individual Shareholder) becomes or is adjudged bankrupt in any part of the world or enters into any composition or arrangement with his creditors generally or any Shareholder Security becomes enforceable; or*

> *6.6.3 attempts to deal with or otherwise dispose of any Shares or interest in Shares in the Company otherwise than in accordance with the provisions of this Agreement;*
>
> *such Shareholder or as the case may be, his personal representatives, if so notified by the Company following a determination by the Directors at any time within a period of one month after the occurrence of any such event, shall be deemed to have given a Transfer Notice in respect of all Shares held by it or him on the date of such notice and the provisions of clause 6.7 shall apply."*

281. Again this is a somewhat unusual provision. Rather than requiring a shareholder to give a transfer notice upon the occurrence of the specified events, it confers on the directors a discretion to determine whether the shareholder should be deemed to have given a transfer notice. If the directors exercise the discretion in favour of requiring a transfer notice, the transfer notice will be deemed to relate to all the shares held by the shareholders, even though the security may have become enforceable over only some of his shares or he may have sought to deal with or dispose of only some of his shares. Clause 6.7 provides for the mechanics of the offer round following a determination by the directors that a transfer notice is deemed to have been given.

282. Clause 6.17 provides:

> *"No Share nor any interest therein shall be transferred, sold or otherwise disposed of save as provided in this clause 6."*

Agreements and arrangements between Mr. Quinlan and the Barclay interests as regards his shares

283. The provisions of clause 6 of the shareholders agreement apply to the transfer, sale or other disposal not only of shares, but also of any interest in shares. "*Interest*" here means an equitable interest in the shares themselves: see the judgments at first instance and in the Court of Appeal on the preliminary issue as to whether the sale of Misland triggered the pre-emption provisions: [2011] EWHC 3466 (Ch) and [2012] EWCA Civ 179.

284. Mr McKillen relies upon a number of agreements and arrangements as involving a sale or disposal of interests in Mr Quinlan's shares as being contrary to clause 6.17 of the shareholders agreement or coming within clause 6.6.3.

285. He relies first on the agreement alleged to have been made on 15 January 2011 between Mr Quinlan and Sir David Barclay. I shall consider the case on this alleged agreement in detail after considering the other ways in which this part of the case is put.

286. There are admitted transactions which, Mr McKillen asserts, involved a sale or disposal of an interest in Mr Quinlan's shares, "*especially when taken cumulatively*". These transactions are said to be as follows:

   a. A right of first refusal given to Sir David Barclay in October 2010;

b. The acquisition in January 2011 by Ellerman of Mr Quinlan's debts to BOSI and its registration as the holder of his shares charged to secure those debts;

c. The 17 February Agreement;

d. The power of attorney granted by Mr Quinlan on 16 May 2011;

e. The acquisition in September 2011 by B Overseas of all other debts secured on Mr Quinlan's shares.

287. I have dealt in the chronological section with the so-called grant of a right of first refusal in October 2010. I have found that the arrangement made was not intended to have, and did not have, legal effect. In any event, it is accepted on behalf of Mr McKillen that a mere right of first refusal, even if enforceable, does not confer a proprietary interest in an asset: *Pritchard v Briggs* [1980] 1 Ch 339. It is nonetheless submitted that in order to give clause 6 proper effect, it is necessary to construe an *"interest in shares"* as going wider than the conferring of a proprietary or equitable interest in those shares. It is submitted that the grant of a right of first refusal has a direct impact on other shareholders, because it means that they will be inhibited in obtaining a third-party offer for the entirety of the shares in the company. It is said that in these circumstances the shareholder conferring a right of pre-emption would, in practical terms, be conferring an interest in respect of his shares to the detriment of the other shareholders.

288. I do not accept this submission for two reasons. First, for the reasons given in the judgments delivered on the preliminary issue regarding the sale of Misland, the phrase *"interest in shares"*, in the context of clause 6, is to be given its usual proprietary meaning. Secondly, I do not, in any event, follow the logic of the submission being made. The suggested right of first refusal is at best no more than a right to *match* an offer. It by no means follows that third parties would be deterred from making offers for the entire issued share capital. In any case, if the holder of the right of first refusal does seek to match the offer, then the sale to him will trigger the pre-emption provisions, and the other shareholders will be able to purchase the relevant shares and then accept the third party's offer.

289. The transfer to Ellerman of the shares charged to secure Mr Quinlan's debt to BOSI which Ellerman acquired was effected pursuant to clause 6.18 of the shareholders agreement, which provides that

> *"Nothing in this clause 6 shall prohibit or restrict the grant by a Shareholder of any Shareholder Security or the transfer of any Share to the holder for the time being of such Shareholder Security and the Directors shall approve such transfer….."*

290. While Mr McKillen accepts that Ellerman was entitled to be registered as the holder of the charged shares without triggering any pre-emption rights if it was no more than the holder of the charge granted to secure the BOSI debt, he submits that Ellerman acquired an interest which went beyond that of a mere security holder and which constituted an interest in shares within the meaning of the pre-emption provisions. Mr McKillen's case that Ellerman acquired an interest beyond that of a mere security holder depends on establishing his case that such further interest was

acquired either as a result of the pre-emption arrangements made in October/November 2010 or of the agreement allegedly made on 15 January 2011. I have already rejected the submission that the arrangement for a right of first refusal conferred any interest in shares on Ellerman or other Barclay interests and I later consider whether there was an agreement made on 15 January 2011 which conferred any such interest. Subject to that, the transfer to Ellerman on or about 1 February 2011 did not trigger the pre-emption provisions.

291. In their closing submissions, counsel for Mr McKillen referred to written forms of confirmation which were given by Ellerman and Mr Murphy on behalf of Mr Quinlan to the effect that there were no arrangements between Mr Quinlan and any of the Barclay interests for the acquisition of an interest in Mr Quinlan's shares including the transfer of voting or other rights in those shares. It may be observed that the directors had no power to impose this requirement on Mr Quinlan and Ellerman unless it was restricted in its ambit to the disclosure of a transfer or agreement to transfer an interest in the shares which would trigger the pre-emption provisions. Subject to the issue of the alleged 15 January 2011 agreement, there has been no transfer or agreement to transfer any interests in Mr Quinlan's shares which would have had that effect. If the use of the word "arrangement" in the form of confirmation was intended to cast a wider net, it was an illegitimate interference on the part the directors in the right of Ellerman to take a transfer pursuant to clause 6.18 of the shareholders agreement. In its context, it cannot properly have been understood to go further than such arrangements as conferred a proprietary or equitable interests in the shares. In any event, the allegation that the representations were untrue and that Ellerman was registered as the holder of the shares on the basis of its own false representation formed no part of Mr McKillen's pleaded case.

292. The 17 February agreement was a legally binding agreement for the sale of Mr Quinlan's shares and loan stock to EHGL for an aggregate price of £80 million. The agreement of sale is however expressed to be subject to

> *" (i) compliance with the terms of the shareholders agreement relating to the Company and the Company's articles of association; and*
> *(ii) consent to the transfer to us of the Securities on the terms of this letter first having been duly received from any person who holds any security interests over the Securities and whose consent is thereby required to the sale which is the subject of this letter…"*

293. As regards the second of these conditions, Mr McKillen relies on the fact that by September 2011 the Barclay interests had acquired all the charges over Mr Quinlan's shares and it was therefore within their power to give the relevant consent. Accepting that for the moment, there remains the first requirement, to comply with the terms of the shareholders agreement and the articles of association. This is clearly intended as a reference to the pre-emption provisions. It follows that the 17 February agreement involves no breach of clause 6.17 of the shareholders agreement. Until compliance with the terms of clause 6 there can be no transfer, sale or other disposal of Mr Quinlan's shares or an interest in them under the agreement. Clause 6.6 applies only to attempts to deal with or otherwise dispose of any shares or interest in shares in the company *"otherwise than in accordance with the provisions of this Agreement"*. By virtue of the express condition, the 17

February agreement was not an attempt to deal with or dispose of shares or an interest in shares otherwise than in accordance with the provisions of the agreement, but rather was an agreement to do so in accordance with the provisions of the agreement.

294. A similar issue arose in *In re Ringtower Holdings Plc (1989) 5 BCC* 82. The court was there concerned with a conditional agreement under which a shareholder irrevocably undertook to accept an offer for its shares and to vote in favour of special resolutions removing pre-emption provisions in the company's articles and re-registering the company as a private company. The issue was whether the shareholder by making the agreement had evidenced a desire to transfer or dispose of its shares or an interest therein for the purposes of the pre-emption articles. The agreement to accept the offer, when made, was legally binding but the making of the offer was conditional, amongst other things, on the removal of the pre-emption provisions in the articles. Peter Gibson J rejected the submission that the agreement triggered the pre-emption article and said at p.99 that he was *"unable to see how any present or unequivocal desire on the part of [the shareholder] to transfer or dispose of its shares or an interest therein can be discerned from the conditional agreement constituted by the letter of undertaking"*.

295. If, as in that case, the condition requiring the removal of the pre-emption articles was sufficient to prevent the conditional agreement from amounting to a desire to transfer the shares or any interest therein, it is in my judgment all the clearer that the 17 February agreement was not an attempt to deal with or dispose of Mr Quinlan's shares or an interest in them *"otherwise than in accordance with the provisions of"* the shareholders agreement.

296. On 16 May 2011 Mr Quinlan granted a power of attorney in favour of Mr Faber or, failing him, any director of Ellerman. It was expressed to be irrevocable and to remain in force for a period of one year. Like any power of attorney, it was the appointment of an agent to exercise powers attached to the shares on behalf of Mr Quinlan as holder of the shares but in this case at the discretion of the attorney. Apart from relying on the power of attorney to evidence the agreement said to have been made on 15 January 2011, the submission on behalf of Mr McKillen was that combined with the earlier admitted agreements this power of attorney showed that Mr Quinlan had in practice no real interest in his shares. It was submitted that the practical effect of the arrangements made, including the power of attorney, was to enable the Barclay interests to step into the shoes of Mr Quinlan in every real sense. The commercial objective of the pre-emption process, it was submitted, was to prevent arrangements having that practical effect. The difficulty with this submission is that it remains necessary before the pre-emption provisions are triggered to demonstrate that there has been a disposal, transfer or sale of the shares or an interest in them. If the earlier agreements had not disposed of the shares or an interest in them, then the grant of the power of attorney does not by itself do so.

297. Finally, the acquisition in September 2011 by the Barclay interests of the remaining debts of Mr Quinlan secured on his shares cannot in my judgment advance the position. It did not involve Mr Quinlan as shareholder taking any steps to transfer the shares or an interest in the shares and in any event the only interest transferred was a security interest. Once again, unless the prior agreements had involved a

transfer of an interest in shares, then the acquisition of these debts in September 2011 cannot and did not do so.

298. It follows that, in my judgment, none of the admitted agreements made between Mr Quinlan and the Barclay interests, either singly or in combination, involved a transfer of an interest in his shares such as to trigger any of the provisions of clause 6 of the shareholders agreement. Mr McKillen's case that the pre-emption provisions were triggered must therefore depend on his allegation of an agreement reached on 15 January 2011, to which I now turn.

Alleged 15 January Agreement

299. Mr McKillen alleges that on 15 January 2011 a binding oral agreement was made between Mr Quinlan and Sir David Barclay in respect of Mr Quinlan's shares, by which Mr Quinlan dealt with or disposed of his shares or an interest in his shares for the purposes of the pre-emption provisions of the shareholders agreement (either in breach of clause 6.1 or triggering clause 6.6 by reason of clause 6.6.3). It is not disputed by Mr McKillen that any agreement dealing or disposing of shares must for these purposes amount to an enforceable contract. Where, as here, there is no question of a transfer of the shares themselves, an agreement for their sale or transfer or other disposal must be specifically enforceable if it is to have the effect of transferring an interest in the shares.

300. Mr McKillen's case is that the exclusivity agreement signed by Mr Quinlan on 15 January 2011, which was an enforceable agreement, did not reflect the real agreement between the parties at that time.

301. The pleaded case, as it originally appeared in paragraph 34 of the petition, was that "*Mr McKillen believes that on or around 1 February 2011 the Barclay Brothers (or Barclay Interests) and Mr Quinlan entered into an agreement in respect of certain of Mr Quinlan's shares in the Company intended to achieve the transfer or effective transfer of shareholder control to the Barclay Brothers without going through the required pre-emption process*". This was amended on 13 March 2012 to widen the period in which it was alleged that the agreement was made. The words "alternatively at some other dates" were added after "on or around 1 February 2011".

302. Paragraph 33E of the Petition, which was added by amendment, referred to payments, benefits and assistance provided by the Barclay brothers to Mr Quinlan and his family and alleged that they were provided:

> "*a. as part of the consideration for an agreement or agreements as pleaded at paragraphs 34…… below, under which Mr Quinlan conferred beneficial ownership, alternatively some other direct interest, in the shares to the Barclay Brothers (or one of their entities) or to their order; alternatively*
>
> *b. as part of the consideration for an agreement on the part of Mr Quinlan to sell his shares or achieve the transfer or effective transfer of his shares to the Barclay Brothers without going*

> *through the required pre-emption process (and/or at a time of the Barclay Brothers' choosing)".*

303. Mr McKillen's written opening put the case as follows:

> *"Even before the 17 February Agreement, a deal had been reached with Mr Quinlan, as Mr Faber accepts. Mr Faber accepts that the 17 February Agreement simply reflected the fundamentals of the deal which had been agreed in January: see paragraph 69 of his witness statement. On this further basis there was an infringement or triggering of the pre-emption provisions. In addition, the deal that had been arrived at with Mr Quinlan plainly entitled the Barclay Interests to control Mr Quinlan's voting rights, both as shareholder and director. This amounted to a conferring of rights over Mr Quinlan's own rights attaching to his shares. Shares in a company are themselves a bundle of rights, of which voting rights are key components. Accordingly, by agreeing to hold those rights for the Barclays' benefit, Mr Quinlan was granting an interest in the shares".*

No further details of the alleged agreement were put forward at that stage. It should be noted that Mr Faber had not accepted that a binding agreement was made in January 2011. In paragraph 69 of Mr Faber's witness statement the word "*agreed*" was in inverted commas in the phrase "*reflected the fundamentals of the deal which had been "agreed" in January*" and in paragraph 30 he had referred to the agreement as "*a (non-binding) agreement in principle*".

304. In the course of the cross-examination of some witnesses, particular Mr Faber, Mr Quinlan and Mr Murphy, Mr Marshall developed a case that a binding agreement had been reached in the course of Mr Quinlan's telephone conversation with Sir David Barclay early in the evening of 15 January 2011.

305. It is important to see how the case was put to Mr Quinlan. Mr Marshall did not cross-examine on the detail of the telephone conversation. However, he put to Mr Quinlan "*You were promised payments by the Barclay brothers in return for agreeing with them to exercise all the rights associated with your shares for their benefit and at their direction*" and "*the purchase of your shares was in effect what had happened*".

306. In the closing submissions for Mr McKillen, the case was put as follows:

> *" …….. in this call, Sir David made clear that if Mr Quinlan would agree to sell to the Barclay brothers, and (in order to avoid the pre-emption provisions) to conceal the fact of the agreement to sell until such times as it could be admitted openly, the Barclay brothers would, at the very least, agree to support his family financially and, as seems likely, provide other consideration equivalent to that offered by the Qataris. In any event, whether or not any figures were discussed the agreement was that the financial support would be provided in return for the agreement to sell*".

307. Paragraph 125 of Mr McKillen's closing submissions contains the following "overview" of his case on the alleged agreement:

> "*On a review of the whole of the evidence it is clear that Mr Quinlan reached a decision in the afternoon or early evening of 15 January 2011 that he would no longer support the Qataris' bid for the Company but instead would sell his shares to the Barclay Brothers. He agreed during (or following) a telephone call with Sir David Barclay on 15 January that the Barclay Brothers could acquire his shares at a price based on an enterprise value for the Company of £900 million. Although the true nature of the agreement could not be revealed, and the transfer could not be formally and openly completed, until the pre-emption provisions could be "dealt with" (by the Barclay Brothers acquiring the remaining shares or reaching a deal with the remaining shareholders), it was agreed that the parties would behave as though the transfer had been effected and ownership had formally passed and Mr Quinlan would exercise all the rights associated with his shares for the benefit of and at the direction of the Barclay Brothers (achieving in practice the effect of a completed sale). In return, it was agreed that the Barclay Brothers would, at the very least, support Mr Quinlan and his family financially, and they are also likely to have promised other consideration at least equivalent to the fees previously negotiated with the Qataris. As explained further below, the negotiations between Mr Quinlan and the Barclays effectively ended on 15 January 2011, because everything had been agreed".*

308. The allegation is summarised in paragraph 158: *"Mr Quinlan agreed to sell his shares, and to give effect to that agreement by exercising all the rights attaching to his shares as though the sale had already taken place"*.

309. The existence of the alleged agreement is not supported by any direct evidence. Mr Quinlan repeatedly denied it in his evidence. Sir David Barclay did not give evidence but Mr Faber denied it in his evidence. Although the agreement is said to have been made in a telephone conversation between Mr Quinlan and Sir David, I regard it as highly unlikely that if such an agreement were made, Sir David did not inform Mr Faber. It is not recorded in any document. On the contrary, the written agreements made between Mr Quinlan and the Barclay interests on 15 January 2011 and 17 February 2011 are inconsistent with it.

310. It is submitted for Mr McKillen that the existence of this agreement can be inferred from a number of different matters. These may be summarised as follows.

311. First, in his dealings with various potential purchasers in 2010, and in particular with the Qataris, Mr Quinlan discussed the payment to him of very substantial fees, payable if they obtained control of the company. The sums being talked about were very large indeed, ranging from £25 million to £50 million. It should therefore be inferred that in Mr Murphy's discussions with Sheikh Jassim on 9 January 2011 and in the telephone discussion with Mr Bakhos on 13 January 2011, similar fees were offered to Mr Quinlan. It follows, it is submitted, that in order to obtain Mr Quinlan's agreement not to sell to the Qataris but rather to agree a sale with the Barclay interests, they must have agreed to pay similar fees to Mr Quinlan.

312. Secondly, the Barclay brothers provided substantial financial support to Mr Quinlan and his family from January 2011. The principal sums paid were four payments to Mrs Quinlan as follows: £500,000 on 31 January 2011, £500,000 on 14 April 2011, €500,000 on 7 July 2011 and £825,000 on 16 December 2011. In addition, on 16 April 2011, a little over £35,000 was paid to a firm of solicitors in respect of fees owed by Mr and Mrs Quinlan. In addition, sums were paid on behalf of Mr and Mrs Quinlan to creditors and others. Details of these payments were requested but it was said that neither the Barclay brothers nor Mr and Mrs Quinlan had records which would enable the details to be provided. However, it was said that they amounted in total to less than the cash payments. The Barclay brothers have also been paying for Mr Quinlan's legal representation in the present proceedings. Mr McKillen alleges that the reasonable explanation of these payments is that they were made pursuant to a contractual entitlement of Mr Quinlan arising under the alleged agreement on 15 January 2011.

313. Thirdly, it is said there was a *volte-face* on the part of Mr Quinlan in the course of 13-15 January 2011. It is said, by reference to the emails sent by Mr Murphy and Mr Murphy's agreement in the telephone board meeting on 15 January 2011 to a continuation by Mr McKillen of exclusive negotiations with the Qataris, that Mr Quinlan was by that time committed in a non-binding way to a deal with the Qataris. It is said that his sudden change to backing an offer by the Barclay interests must have been the result of inducements offered by the Barclay interests.

314. Fourthly, reliance is placed on text messages and emails sent by Sir David Barclay and others in the period following 15 January 2011.

315. Fifthly, reliance is placed on the conduct of Mr Quinlan after 15 January 2011 as a shareholder and director, which, it is said, provided consistent support for the Barclay brothers.

316. I think it convenient first to state my overall conclusion on this issue. I am satisfied on the totality of the evidence that no binding agreement was reached on 15 January 2011 between the Barclay brothers or any of the Barclay interests and Mr Quinlan, other than the written exclusivity agreement signed on that day. There are several grounds for this conclusion, which I shall set out before addressing the detail of Mr McKillen's submissions and before stating why I do not consider that they provide the basis for the inference sought to be drawn.

317. First, I heard Mr Quinlan and Mr Faber cross-examined at some length in relation to this issue and having seen them give their evidence and in the light of the various factors to which I shall refer I am satisfied that they were telling the truth.

318. Secondly, Mr McKillen's case amounts to an allegation of outright and sustained dishonesty on the part of Sir David Barclay, Mr Quinlan, Mr Murphy, Mr Faber (because, as I have mentioned, I cannot see that he would have been kept in ignorance of the agreement) and perhaps others. It involves the allegation of secretly making the suggested oral agreement while at the same time making a written agreement which was quite contrary to, and designed to conceal, the oral agreement and of thereafter misleading the other shareholders, the company, NAMA and finally the Court that the exclusivity agreement was the only binding agreement

made on 15 January 2011. I do not consider that the evidence comes anywhere near establishing so serious an allegation.

319. Thirdly, the exclusivity agreement not only contradicted the alleged oral agreement but would in practice have made it impossible to enforce the alleged oral agreement. In the face of the exclusivity agreement signed by both sides, neither side would have had any real prospect of establishing in Court as against the other the making of the alleged oral agreement. If it could not be enforced in Court proceedings, it was clearly not worth making. Anyone, let alone experienced and sophisticated business people like Sir David Barclay and Mr Quinlan, would have been able to appreciate that.

320. Fourthly, both sides were acutely aware of the pre-emption provisions and the need to avoid triggering them. The alleged oral agreement would, however, do precisely that. Both in the exclusivity agreement and in the 17 February agreement, great care was clearly taken to avoid triggering the pre-emption provisions. Why, therefore, should the parties act so recklessly as to make the alleged oral agreement?

321. Fifthly, the Barclay interests were in all other cases careful to document their binding agreements. The alleged oral agreement is wholly out of character with all the undisputed dealings between the Barclay interests and Mr Quinlan.

322. Sixthly, the exclusivity agreement was sufficient for the Barclay interests' purposes at that stage. Their concern was to prevent Mr Quinlan from throwing in his lot with the proposed Qatari deal. The exclusivity agreement achieved that and allowed the Barclay interests time to reach agreement with the other shareholders. In fact, that was achieved during the exclusivity period. First, they acquired Misland and, secondly, they reached agreement with Mr McKillen on 12 February 2011.

323. Seventh, and allied to the last point, there is no commercial reason why the Barclay interests should commit themselves to purchase Mr Quinlan's shares at a time when they had yet to do any deal with any shareholder, particularly the deal involving the purchase of Misland which they understood, correctly, would not trigger the pre-emption provisions.

324. Eighth, there are private communications on the Barclay side which are wholly inconsistent with the alleged agreement. In an email dated 16 March 2011 to Mr Seal, Mr Faber addressed the position if no deal was reached with Mr McKillen:

> *"….we will continue to live in a worsening board environment where decisions will be driven by board votes. In this scenario it will be good to have two Ellerman board members, even though it does not improve our voting capacity, which will continue to hinge on the fact we can ask Derek to support us (if he is so minded and until he goes bankrupt)."*

This is inexplicable if the alleged agreement had been made. Mr Faber would have no reason to mislead Mr Seal as regards any such agreement. Although the email was referred to in Mr McKillen's opening, it was not put to Mr Faber. It was put to Mr Seal but without any suggestion that it misstated the position.

325. In a private memorandum dated 1 August 2011 from Mr Faber to Sir David Barclay, on which Mr McKillen places some reliance for other purposes, Mr Faber summarises the state of affairs as regards the purchase of Mr Quinlan's shares. He refers to the 17 February agreement. There is no mention of the alleged oral agreement but, if it had in fact been made, Mr Faber would surely have referred to it in this memorandum.

326. Ninth, Mr Quinlan's decision to commit to an exclusivity agreement and to agree in principle to co-operate with the Barclay interests was, objectively, a reasonable commercial choice. They were willing to move fast to make an offer at an enterprise value of £900 million with no due diligence and no warranties. The Qataris' offer was at £875-900 million, with a requirement for due diligence and warranties. The Barclay interests' offer could reasonably be seen on all counts as the better offer even before taking account of the treatment by the Qataris of Mr Quinlan's position on 9 January 2011.

327. I reject the suggestion that the Barclay interests' position of not requiring due diligence was a sham. The request to Mr Murphy for certain documents in an email on 16 January 2011 was not due diligence of the sort or scale usually found on such transactions, and for which the Qataris required four weeks. Nor would Mr Quinlan have known of even this modest request when he signed the exclusivity agreement on 15 January 2011.

328. My findings on the agreements and understanding reached between the Barclay interests and Mr Quinlan are as follows. The only binding agreement made before the 17 February agreement was the signed exclusivity agreement. There was agreement in principle that Mr Quinlan would accept an offer made to the shareholders by the Barclay interests for the purchase of their shares at a price based on an enterprise value of £900 million and on terms which did not require due diligence or warranties. I am satisfied that both sides believed that the Barclay interests would move quickly to make such an offer. I am satisfied too that Mr Quinlan made clear that he would co-operate with the Barclay interests. They would be allies but not on a basis which conferred any enforceable rights against Mr Quinlan.

329. Either in the conversation on 15 January 2011 or at around that time, I find that Sir David Barclay indicated to Mrs Quinlan that he and his brother were prepared to provide financial support to Mr Quinlan and his family. No figures were discussed. No commitment was entered into. But the Barclay brothers made clear to Mr and Mrs Quinlan that they could rely on them for support. Quite apart from any desire to help the Quinlan family, it was, as is said in Mr McKillen's closing submissions, in the interests of the Barclay side to keep Mr Quinlan out of bankruptcy, so avoiding the pre-emption provisions being triggered on that basis. There was no contract for the provision of support in consideration for Mr Quinlan's co-operation in relation to the company. Nonetheless, common sense must have suggested that, however well-disposed the Barclay brothers were to Mr Quinlan and his family, their patience and generosity might well wear thin if he were to act contrary to their interests.

330. I turn now to deal with each of the areas of evidence on which reliance is placed by Mr McKillen.

331. As regards fees, there is no evidence that any fee was offered by the Qataris to Mr Quinlan or to Mr Murphy on his behalf in January 2011. As it appears from the evidence, the position in January 2011 was very different from the position in July and August 2010. In the earlier period it was Mr Quinlan who appeared to have the means of procuring for the Qataris a purchase of the company or control of it. It will be remembered that, on the evidence of Mr Quinlan and Mr Murphy and I see no reason to doubt it, fees would have been payable if control of the company were achieved, rather than simply a purchase of Mr Quinlan's shares. Whilst it is true that it appears to be Mr Murphy who got the parties together in early January 2011, the Qataris no longer had any need of Mr Quinlan as an intermediary. They had direct discussions and reached an agreement in principle with Mr McKillen on 9 January 2011 and they agreed to continue negotiations directly with Mr McKillen. Moreover, it was Mr McKillen's evidence that he was told by the Qataris in January 2011 that they had difficult dealings with Mr Quinlan in August 2010, finding that he reneged on deals which they understood to have been agreed.

332. The stance of Sheikh Jassim on 9 January 2011, that the Qataris would pay a significantly lower price to Mr Quinlan than to the other shareholders because he was seen to be a distressed seller, is inconsistent with any agreement to pay him fees. However, Mr Marshall suggested that the reduction in the price to be paid to Mr Quinlan of about £35 million equated to the level of fees being discussed in August 2010. It could therefore, he suggested, be inferred that this reduction was proposed to take account of a fee of about that amount still to be paid to Mr Quinlan secretly if the deal being discussed on 9 January 2011 were to proceed. There is no evidence for this. If true, it would mean presumably that when on 13 January 2011, Mr Bakhos on behalf of the Qataris told Mr Quinlan that they would pay the same price to him as to other shareholders, he would in fact be receiving not only that full price but also a substantial fee. Looking at the course of dealings with the Qataris during January 2011, it appears to me highly unlikely that they were offering Mr Quinlan any fee. It may be noted that Mr McKillen did not call Mr Bakhos or anyone else on the Qatari side to give evidence.

333. Further, the purpose of this suggestion is to lay the ground for the allegation which was put to Mr Quinlan that the Barclay interests agreed to pay him substantial fees of the order of those which Mr Quinlan discussed with the Qataris in July-August 2010. On the basis of the evidence which I have heard concerning the Barclay brothers and their operations, and their approach to the acquisition of control of the company, I regard it as fanciful that they would be willing to pay Mr Quinlan "*fees*" of any amount remotely approaching the sums being discussed in August 2010.

334. It is a possible explanation of the payments made to and benefits conferred on Mr and Mrs Quinlan by the Barclay brothers since January 2011 that they were contractually obliged to provide them. This is denied by Mr Quinlan and the Barclay brothers who say that they represented financial support to the Quinlan family at a time when they were and continued to be in serious financial difficulties. This too is a possible explanation for the payments and one which is supported by Mr Quinlan's evidence that the payments were made following requests by him and because he understood the Barclay brothers to be willing to support him as a friend. As I have earlier suggested, I think it likely that the Barclay brothers were aware of the commercial advantages to them if they did provide support to Mr Quinlan and

his family. That does not mean that they were not also motivated by a genuine desire to support the Quinlan family, and it certainly does not mean that they were providing the support in accordance with a contractual obligation to do so. There is no particular pattern to the payments and Mr Quinlan's evidence is that they were made following calls to the Barclay brothers from Mrs Quinlan. I have some difficulty in seeing how there could be an enforceable contract where the consideration consisted of an obligation to provide unspecified amounts of financial support at unspecified times. How many payments were the Barclay brothers required to make? How much in total were they required to pay? There would need to be answers to these questions before either Mr Quinlan could enforce an obligation to make payments or before the Barclay brothers could enforce the obligations of Mr Quinlan in respect of his shares. But, leaving these difficulties to one side, I approach the issue of the alleged agreement on the basis that the payments made, whilst possibly consistent with it, do not establish it.

335. I should mention here a point made on behalf of Mr McKillen. In the course of 2011, the Barclay interests acquired all the debts secured over Mr Quinlan's shares. Mr Quinlan is not being required to meet the interest due on those debts. It is said that when this non-collection of interest is added to the payments made to or for the benefit of the Quinlan family, the result is that the total support received by Mr Quinlan from the Barclay brothers is of a similar order to the level of fee that he had been seeking from the Qataris and others. It is submitted that it is likely that an agreement to waive the payment of interest was part of the consideration offered in return for Mr Quinlan's agreement on 15 January 2011 to sell his shares. This submission rests on the false basis that it must have been contemplated at that time that the Barclay interests would acquire the debts secured over Mr Quinlan's shares. In fact, the evidence shows that the Barclay interests were initially reluctant to accede to Mr Quinlan's suggestion at the end of January 2011 that they should purchase the debt due to BOSI. Moreover, in April and May 2011, they were not prepared to pay what was needed to acquire Mr Quinlan's debt to NAMA, which sold it instead to a company associated with Wynton. Only in September 2011 did the Barclay interests acquire the remaining debts secured on Mr Quinlan's shares. I do not consider there is any basis for supposing that any question of waiving interest on Mr Quinlan's secured debts was contemplated by the Barclay brothers or by Mr Quinlan in mid-January 2011.

336. As regards what is said to have been Mr Quinlan's *volte-face* in the course of 13-15 January 2011, I have already in large part addressed this in the chronological section. I am satisfied for the reasons there stated that Mr Murphy's emails are often not a reliable guide to Mr Quinlan's thinking. It is clear that Mr Murphy was very keen for a deal to be reached with the Qataris. It was his analysis for the reasons which he gave that this was the most promising outcome for the company and one which, as he said, might result in a "*few bob*" for himself. Mr Quinlan had every reason to distrust the Qataris following Mr Murphy's meeting with Sheikh Jassim on 9 January 2011. It was only on the evening of 13 January 2011 that the Qataris through Mr Bakhos indicated to Mr Quinlan that they would not "chip" his price. It was clear from Mr Quinlan's oral evidence that he was deeply suspicious of potential purchasers whom he thought might "chip" the price. It was a constant theme of his evidence. I find credible his evidence that the suspicions about the Qataris were by no means wholly allayed by Mr Bakhos' telephone call. Mr

Quinlan was no doubt happy to leave as many opportunities open for as long as was possible, but when on 15 January 2011 he was required to make a choice and acceded to the request from the Barclay interests that he should sign an exclusivity agreement, it was not in my judgment a *volte-face*.

337. The fourth area of evidence relied on by Mr McKillen comprises statements made after 15 January 2011 by Sir David Barclay and others on the Barclay side, many made in private communication which are said to reveal the true position.

338. A number of text messages were sent by Sir David Barclay to Mr Murphy from 19 January 2011.

339. The first read *"Gerry, deal done with Greens, O Danny Boy, H. E. SIR David your friend"*. The second sent a few minutes later read: *"will need your help with nama, PM nows wants to meet with richard, I will now standby derrick and family and help him in every way i can on the road back to recovery, David"*. I fail to see how either of these text messages, taken separately or together, supports the existence of the agreement alleged to have been made on 15 January. The most that can be drawn from them is the reference in the second that Sir David Barclay "will now stand by" Mr Quinlan. This, however, appears to link Sir David Barclay's support for Mr Quinlan not to a contract already made with Mr Quinlan but to the agreement just made to purchase Misland.

340. Mr McKillen relies in particular on a text sent to Mr Murphy on 22 January 2011 in which Sir David states:

> *"The purchase of Derrick shares present me with the opportunity to put forward my support based on a settlement I know what has to be said I am considering whether to make a direct approach or through a my lawyer I will think about it. My son Chairman of the Telegraph is meeting NAMA on Tuesday."*

341. Mr McKillen relies on the reference to the "*purchase of Derrick shares*" as evidencing the alleged oral contract. Of course it could evidence a contract of purchase but it could equally well evidence an agreement in principle, particularly when coupled with the exclusivity agreement. If Sir David Barclay thought he had a binding agreement to purchase Mr Quinlan's shares, it is difficult to see why he should send a text on 21 January 2011 saying "*Morning Derrick my advice is not be distracted by what the gataries [sic] would have or what they are willing to pay now*". Equally, the existence of a binding agreement as regards Mr Quinlan's shares does not sit easily with Sir David Barclay's texts to Mr Murphy on 15 February 2011:

> "*Gerry i understand you were prepared to meet the Malay people why would you want to do that? David*".

and

> *"Gerry following my text re your proposal to meet with the Malay people sounds like a very disloyal thing to do, i am lost for words, David"*.

Rather than saying it was *"a very disloyal thing to do"*, Sir David Barclay could simply have said that a sale to Wynton would be a breach of contract.

342. The same points may be made as regards a text from Sir David Barclay to Mr Murphy sent on 24 January 2011 and relied on by Mr McKillen:

> *"NAMA have no say in the matter. The deal is done with the majority. A bird in the hand is better than a promise from the Middle east and joe lewis of this world."*

Further, the last sentence reads as an encouragement to stay with the existing agreement with the Barclay interests, which would be unnecessary if it were a binding agreement.

343. Two further text messages from Sir David Barclay to Mr Murphy, sent on 24 and 28 January 2011, are relied on by Mr McKillen. They read:

> "*To stop this speculation we need to put out a press annousement to day that we now reached an agreement 55 pe cent of the shares. This message to all concerned. AB travelling back. Will talk when landed*".

and

> "*Yes Gerry we will think of releasing a new press announcement to today, to let our detractors [know] we have the control SD*".

344. Both texts are concerned with what is to appear in the press, not in a technical document such as a prospectus or pleading. "Agreement" and "control" can well refer to the position in practice not law. Even on Mr McKillen's case it would be perverse if the Barclay interests wished the press to publish that they had made a contract which would trigger the pre-emption provisions. Moreover, in a commercial situation such as this, it was very much in the interests of the Barclay brothers to talk up the level of control which they had achieved. It is worth noting that when an article appeared on 29 January 2011 in the Irish Times stating that sources close to the Barclay brothers and reports in the UK media had said "*The Brothers reached agreement with Mr Quinlan to purchase his 35% stake in the Group*", Mr Murphy was quick to correct it with a statement that Mr Quinlan had not yet agreed to sell his 35% stake in the company.

345. Undated texts were sent by Sir David Barclay to Mr Faber. One refers to the possibility of briefing a Sunday newspaper to the effect that Mr McKillen is a "*one-third owner against Barclay 64% controlled business*". The other refers to Mr McKillen having "*signed a contract with us and the Q people in so doing he was acknowledging we were the rightful owners of Misland and Derek's shares*". No suggestion has been made as to the dates of these texts and it is clear that the second post-dates the agreement signed in Qatar on 12 February 2011 and may well post-date the 17 February agreement with Mr Quinlan. Neither of these texts messages were put to their recipient, Mr Faber, in cross-examination. In a third undated text also sent to Mr Faber and also not put to him, Sir David Barclay said "*We have purchased DQ's shares by way of a contract as well as holding the debt*". This was clearly sent after 29 January 2011 and the reference to "*a contract*" is in my view most likely a reference to the 17 February agreement.

346. Reliance is placed on two statements made by Mr Faber. First on 18 January 2011 Mr Faber said in an email "*We are demonstrating negative control (we can block things)*". Mr Faber said in evidence that he was referring to the exclusivity agreement and the email seems to me to be entirely consistent with that explanation. Secondly, on 25 January 2011 Mr Faber provided the Barclay interests' PR consultants with possible answers to questions that might be raised by the press. I have earlier quoted the suggested response provided by Mr Faber to the question "*Will you buy Kyran McLaughlin's stake imminently?*" which ended with "*We control 60% of board votes*". In circumstances where the Barclay interests owned Misland with its block of nearly 25% and had reached an agreement in principle with Mr Quinlan for the purchase of his shares, combined with the exclusivity agreement, it is credible, as Mr Faber said in evidence, that the use of the word "*control*" was "*a positive spin on where we are. I mean, it is what you would expect to want to put out as we are dealing with PR*".

347. Mr McKillen relies on notes made by Mr Peters of the meeting with NAMA representatives on 24 January 2011, which include "*'Agreement' DQ to acquire same pro-rata price*". The use of inverted commas round the word agreement appears to me to support the Barclay interests' case rather than Mr McKillen's case. They naturally refer to an agreement in principle for the purchase of Mr Quinlan's shares, which is precisely what the Barclay interests maintain was agreed on 14/15 January 2011. It was not suggested to Mr Peters that it referred to a binding contract.

348. In the course of negotiating bank facilities, Barclays Bank emailed Mr Peters on 21 March 2011 to say "*An unguaranteed facility where no shareholders can force a Rights issue or an alternative refinancing strategy is potentially disadvantageous to us all*". Mr Peters, seeking to reassure Mr Stoneley of Barclays Bank, replied "*We are already able to call a rights issue today – bear in mind that, with DQ's votes, we have the majority of the directors votes being 125 out of the total of 197 i.e. 63%*". The reference to Mr Quinlan's votes shows an expectation on Mr Peters' part that Mr Quinlan could be relied on to vote with the Barclay interests, but I find it hard to see that it provides significant support for the existence of a binding agreement going further than the 17 February agreement. On the contrary, it tends to suggest that legally the Barclay interests do not control Mr Quinlan's votes.

349. In a letter dated 21 March 2011 from Aidan Barclay to Aasim Mahmood, copied to Mr Faber, Mr Barclay requested a meeting with Sheikh Mansoor and said "*As you are aware, we are now substantial and controlling shareholders in the Maybourne Hotel Group*". By the time of this letter, the Barclay interests were registered as the holders of over half the shares in the company. If the letter refers to control by the Barclays interests, the co-operation between the Barclay interests and Mr Quinlan, together with the 17 February agreement, made it substantially true as a matter of practical reality. Mr Barclay's letter may be contrasted with Mr Faber's letter on the same day to Mr Mahmood, stating "As you know the Barclay family are positioned to become the majority owner of the Maybourne Hotel Group", a statement which is consistent with the 17 February agreement rather than the alleged agreement of 15 January 2011.

350. Mr McKillen does not gain support from an email sent on 31 January 2011 by Mr Murphy to Peter Lukas, an intermediary trying to fix a deal for the sale of Mr

Quinlan's shares. Mr Murphy forwarded to Mr Lukas the statement issued on Mr Quinlan's behalf, correcting the article which had appeared in the Irish Times and making clear that Mr Quinlan had not yet agreed to sell his shares in the company. In the accompanying email Mr Murphy said "*Yes, Peter that is exactly the position. We will not be selling Derek Quinlan's shares unless there is a full sale. However, we are joined at the hip and will be supporting Misland (Barclays) and so one could say that there is now a very solid block of 60% plus*". It seems to me clear that Mr Murphy is saying that Mr Quinlan has not sold his shares to the Barclay interests or anyone else, but is closely allied with and supporting the Barclay interests.

351. The final major area of evidence relied on in support of the alleged agreement made on 15 January 2011 is the conduct of Mr Quinlan after that date which, it is said, is reasonably explicable only if the agreement had been made.

352. First, it is said that Mr Quinlan and Mr Murphy discharged their functions as a director or alternate director in a manner which mirrored or followed the actions of Mr Faber. It is to be inferred, Mr McKillen alleges, that Mr Quinlan and Mr Murphy were acting on instructions from the Barclay interests. It is said that there were no occasions on which Mr Quinlan acted otherwise than in accordance with the interests and wishes of the Barclay interests. In fact, there were only two board meetings of which complaint is made in the period between 15 January 2011 and 16 May 2011 when Mr Quinlan ceased to be a director. They were on 25 January and 8 February 2011. There does not appear to have been any divisive issue or any question on which Mr Quinlan could demonstrate partisan support for the Barclay interests, save possibly for a division of opinion at the meeting of 8 February 2011 as to whether the data room should remain closed. With the exception of the data room issue and the release of Deutsche Bank, it was not argued, and never put to Mr Quinlan, that he took any decision in his capacity as a director other than in what he considered to be the best interests of the company.

353. Secondly, reliance is placed on some email exchanges between Mr Faber and Mr Murphy on 23 January 2011 preparatory to the board meeting fixed for 25 January 2011. Mr Faber spoke of needing to talk about how "*we handle the board meeting given PMcK stand point re: Q*" (referring to the Qataris) and of wanting to use the board meeting "*to get some resolutions passed*". He met Mr Faber on 24 January 2011 "*to run through the board matters for tomorrow*". In fact, as I have mentioned, there was no contentious business at the board meeting and it is not clear which issues Mr Faber wished to discuss. To my mind, the tenor of these exchanges is not that of instructions being given by a person with a contractual entitlement to do so but of one shareholder/director seeking the co-operation of another shareholder/director at a forthcoming board meeting. There is no dispute that Mr Quinlan was co-operating with the Barclay interests but these emails and text messages appear to me to go no further than that.

354. Thirdly, reliance is placed on Mr Murphy's co-operation in obtaining a release for Deutsche Bank from the company. The background is that Deutsche Bank had during 2010 been discussing with the company terms for a refinancing of the NAMA debt. In January 2011, the Barclay interests wished to negotiate with Deutsche Bank for the grant of facilities to finance the purchase of shares and to refinance the NAMA debt. Deutsche Bank required a formal release from the company. It is not suggested that there was any good reason why Deutsche Bank

should not be released for this purpose and in fact the shareholders agreed to its release, although it is said on behalf of Mr McKillen that he did not appreciate that Deutsche Bank would be working with the Barclay interests. The points principally relied on in this connection are: first, an email from Mr Faber to Deutsche Bank on 1 February 2011, saying "*we will ask Derek's advisor under power of attorney for him, to release the Bank*"; secondly, the speed with which Mr Kelly on behalf of Mr Quinlan agreed to the release once he received an email from Mr Hennebry raising the point; and thirdly, a further email from Mr Faber saying that it was he who had asked Deutsche Bank to be released from the company and adding "*please write supporting to release them*". None of this suggests that Mr Quinlan was under an obligation to support the release. It is consistent with the release being an unobjectionable step and with Mr Quinlan co-operating to achieve it.

355. Fourthly, Mr McKillen relies on the grant by Mr Quinlan of a charge on a small number of shares which he had acquired in 2009 from Mr McLaughlin under the operation of the pre-emption provisions. This further charge was granted by a deed dated 1 February 2011, two days after the transfer by BOSI of its secured debt to Ellerman. It was Mr Quinlan who suggested to the Barclay interests that this further charge be granted. Mr Quinlan's evidence was that he believed that BOSI had been entitled to a charge on these shares, although they had overlooked that entitlement. Mr McKillen has not sought to disprove this evidence by reference to the relevant documentation. Mr Quinlan could of course have let sleeping dogs lie but I think it likely that he preferred those shares to be charged in favour of the Barclay interests rather than in favour of NAMA, which would have required a charge if it had become aware that the shares were unencumbered. Indeed, a week later, on 8 February 2011, NAMA did seek a charge on the shares but Ellerman was able to inform it that they were charged to it, with a covenant by Mr Quinlan not to grant any further security. I have difficulty in understanding how this episode can support the existence of the agreement allegedly made on 15 January 2011.

356. Fifthly, reliance is placed on the acquisition by the Barclay interests of Mr Quinlan's debt to BOSI secured over part of his shareholding. I have earlier summarised the evidence relating to this transfer. It was Mr Quinlan who sought to persuade the Barclay interests that they should take an assignment of this debt and the Barclay interests decided to do so in order to forestall its acquisition by any other party interested in acquiring control of the company. The Barclay interests had to pay a premium for this debt over the value attributable to the charged shares on the basis of an enterprise value of £900 million. It is suggested on behalf of Mr McKillen that the Barclay interests were prepared to do this only because they had the benefit of the agreement allegedly made on 15 January 2011. In my view, this does not follow. Whether or not there was the alleged agreement, the Barclay interests had good commercial reasons for acquiring this secured debt. In particular, once the security holder was registered as the holder of the charged shares, it could exercise the right to appoint a director. On any basis, the Barclay interests would not wish this power to be exercisable by a potential competitor for control of the company.

357. Sixthly, Mr McKillen relies on Mr Quinlan's failure to encourage and pursue alternative offers, either when he entered into the exclusivity agreement, or when he supported the closure of the data room at the end of January 2011 or when the

exclusivity period expired on 16 February 2011. This presupposes that anyone considered that there were any credible bidders available other than the Barclay interests and the Qataris. He decided to deal with the Barclay interests rather than the Qataris for the reasons already given. He and Mr Murphy did not consider a deal with Sheikh Mansour was possible for reasons already given, and it is to be noted that Mr McKillen did not pursue any negotiations with Sheikh Mansour. PCP Capital Partners was not taken seriously by any of the shareholders.

358. The only possible candidate as another bidder was the Malaysian group, Wynton. Although the Green family showed interest when Wynton made an approach in early January 2011, neither Mr Quinlan nor, significantly, Mr McKillen considered that it had any credibility. Their proposal to fund the purchase by £900 million of debt and only £100 million of equity was regarded as unrealistic. Mr McKillen said in evidence "*The Malaysians offered an unrealistic finance package with £900 million debt and no one appreciated that it was realistic – nobody. I met the Malaysians and I did not believe they had the credibility to deliver £1 billion*". It was put to Mr Quinlan in cross-examination that if he was truly free to sell his shares and wished to protect the interests of his creditors, then at any rate after the expiry of the exclusivity agreement he would, like Mr McLaughlin, have served a transfer notice expressing the desire to sell his shares at the same price as that being offered by Wynton. But to do that, and thereby to antagonise the Barclay interests, he would have had to be confident that Wynton would make and be able to complete a firm offer. In fact, the scepticism as to Wynton's ability to raise the requisite funds persisted. As to protecting the interests of his creditors, NAMA approved the 17 February agreement and the conditional sale of Mr Quinlan's shares to the Barclay interests, notwithstanding that it had details of Wynton's offer.

359. There are further dealings as regards Wynton on which Mr McKillen relies. On 23 February 2011, Wynton's advisers sent a renewed offer for Mr Quinlan's shares to Mr Murphy. By then Mr Quinlan was bound by the 17 February agreement. On Mr Faber's advice, Mr Murphy replied that *"DQ has undertaken to sign a contract to sell his shares to a third party which is legally binding and so there is no possibility DQ can consider your offer either now or in the future"*. The submission that this was not a reference to the 17 February agreement because Mr Quinlan had already signed that agreement, rather than having simply undertaken to sign it, is fanciful.

360. There were text exchanges between Sir David Barclay and Mr Murphy on 23 February 2011 when Sir David again thought Mr Quinlan might be dealing with Wynton. Mr McKillen relies in particular on two. Sir David Barclay sent the following text to Mr Murphy:

> *"If i have misjudged you i am sorry but it is not helpfull to have discussion with others about Maybourne we are not making progress with Paddy because of Gatar backing and RT* [Robert Tchenguiz] *is relying on higher value to hold us to ransom the price of the deal has increased substantially and will reflect on our proposed arrangement"*.

Mr Murphy replied:

> *"Sir David. The price we agreed for DQ shares has never changed. We have signed off on it and so have Nama with you. You can't blame us for what others do? Gerry".*

361. It was submitted that Sir David's reference to the increased price reflecting on "*our proposed arrangement*" was a reference to the side payments to Mr Quinlan and that Mr Murphy's reply referred to agreement on the price reached in January 2011. It is not in dispute that the price was agreed in January 2011. The dispute is whether it was agreed in principle or as a binding commitment. Mr Murphy's text seems to me consistent with the former. The price was agreed in January 2011, but when he says "[*w*]*e have signed off on it and so have Nama with you*" he is clearly referring to the binding 17 February agreement. Why refer to that agreement if a binding agreement had already been made in January 2011? It is not clear what Sir David meant by "*our proposed arrangement*" but a "*proposed*" arrangement is not consistent with an existing contract under which, on Mr McKillen's case, payments have already been made. Neither of these texts was put to Mr Murphy.

362. Seventh, JQ2 approached Mr Murphy in May 2011 to suggest discussions for a purchase of Mr Quinlan's shares. Mr Murphy forwarded the email to Mr Faber, asking "*What do you want us to do*", and to Sir David Barclay, saying "*We will be guided by you and RF* [Mr Faber]*"*. Mr Murphy agreed to send a reply along the lines suggested by Mr Faber. Mr Murphy also told Mr Faber that *"[w]e are happy to take your instructions"* on whether to convert loan notes into ordinary non-voting shares. He also looked to Mr Faber for guidance on whether to challenge the sale of Mr Quinlan's loans by Anglo Irish Bank and NAMA to JQ2. Mr McKillen submits that all this is "*consistent with the reality being that all Mr Quinlan's rights and interests in "his" shares in the company were continuing to be held for the benefit of, and exercised in accordance with the wishes of, the Barclay Brothers*". In my judgment, it is simply consistent with being bound by the terms of the 17 February agreement.

363. In about early May 2011 the holder of the second charge over Mr Quinlan's 21.34% shareholding gave notice to redeem the first charge held by the Barclay interests as assignee. Mr Murphy sought to persuade Sir David Barclay to cooperate with this, in a text message sent on 6 May 2011 in which Mr Murphy also said "*Sir David. We are 100% committed to you and so who owns our debt will NEVER be an issue between us. You do NOT need our debt to tell us what to do. We will ALWAYS do that anyway*." Mr McKillen submits that this commitment to comply with instructions was "*in accordance with*" the alleged oral agreement. In my view, it is more obviously consistent with being bound by the 17 February agreement and with a non-binding agreement to cooperate with the Barclay interests.

364. Finally, Mr Murphy said in an email dated 17 April 2011 to Mr Faber "*Derek would do nothing unilaterally without referring to yourselves in advance*". This, however, was not said in the context of exercising rights attached to Mr Quinlan's shares in the company or exercising his votes as a director. It was said in the context of the possible bankruptcy of Mr Quinlan and, in particular, whether he might apply for his own bankruptcy. This would be a concern to the Barclay interests, at least partly because it would trigger the pre-emption provisions.

365. For the reasons given above, I reject Mr McKillen's case that a binding oral agreement was made by Mr Quinlan and Sir David Barclay on 15 January 2011, or at any other time.

Enforceability of charges over Mr Quinlan's shares

366. The case that the security over Mr Quinlan's shares became enforceable so as to trigger clause 6.6 centres on two charges granted by Mr Quinlan in favour of Bank of Ireland (Scotland) Limited (BOSI). I should mention that reliance was also placed on a charge which, it appeared, had been given by Mr Quinlan in favour of Anglo Irish Bank on 2 September 2010. Such a charge was indeed pleaded by Mr Quinlan but it appears that Mr Quinlan, reluctant to grant this further charge, did not return the executed charge document to Anglo Irish Bank. It is common ground that other security in favour of Anglo Irish Bank over Mr Quinlan's shares did not become enforceable.

367. The first charge to be granted by Mr Quinlan in favour of BOSI was dated 14 May 2004 (the 2004 charge). It secured all sums due under a facility letter dated 6 April 2004, as amended by a supplemental letter dated 21 April 2004. The charge extended to Mr Quinlan's shares and convertible loan stock in the company.

368. Whether the security created by the 2004 charge had become enforceable depends on a combination of provisions contained in the 2004 charge, the facility letter and BOSI's general conditions. I return to these in detail later.

369. The other charge in favour of BOSI was created by a charge document dated 20 October 2005 (the 2005 charge). The 2005 charge secured sums due under the facility letters dated 6 and 21 April 2004 and under a further facility letter dated 17 October 2004. The security is expressed to be enforceable upon the happening of an Event of Default which is defined as "*any failure by the Chargor to pay upon written demand by the Bank any sums which are due and payable to the Bank by the Chargor whether as principal, surety or in any other manner whatsoever*". It is common ground that there has been only one written demand for payment of any sum secured by the 2005 charge. While it is also common ground that payment was made in response to that demand, there is nonetheless an issue as to whether a default occurred and the charge became enforceable. This is the only occasion on which it is alleged that the 2005 charge became enforceable.

370. Mr Quinlan submits that neither charge has become enforceable. First, the 2004 charge has not become enforceable on a proper analysis of the relevant provisions of the charge, the facility letter and the general conditions. The 2005 charge did not become enforceable because the only sum which was the subject of a written demand for payment was paid. Secondly, he submits that the terms of the 2004 charge were superseded by the 2005 charge so that the question of whether the former charge became enforceable does not arise. It is not suggested that it had become enforceable prior to the execution of the 2005 charge. While Mr Quinlan places the greater emphasis on the first of these submissions, the second logically comes first and I will address it now.

Did the 2005 charge supersede the 2004 charge?

371. The sequence of events as regards the two charges is as follows. As mentioned above, the 2004 charge was created by a deed executed and dated 14 May 2004, securing sums due under the facility letters dated 6 and 21 April 2004. Under a facility letter dated 4 November 2004, Mr Quinlan borrowed further sums from BOSI to purchase additional securities in the company. By the terms of that letter, he agreed to give BOSI security over his entire interests in the company and on 21 December 2004 executed a deed, expressed to be supplemental to the 2004 charge, which expressly included within the property charged by the 2004 charge the additional securities purchased by Mr Quinlan. Further sums were borrowed by Mr Quinlan under a facility letter dated 18 March 2005 which were also expressed to be secured by the 2004 charge. Mr Quinlan executed a deed dated 14 April 2005, stated to be supplemental to the 2004 charge and containing a clause which expressly amended the 2004 charge to define facility letter as including the letters dated 6 and 21 April 2004, 4 November 2004 and 18 March 2005.

372. Mr Quinlan borrowed further sums under a facility letter dated 17 October 2005, which provided that the loan would be secured by, amongst other things, "*an extension of the security held by the Bank over the shares and loan stock held by or on behalf of the Borrower in Coroin….*". Instead of executing a supplemental deed, as had previously occurred, Mr Quinlan executed a new deed of charge, the 2005 deed. By the 2005 deed Mr Quinlan granted a first equitable charge and mortgage over his shares and loan stock in the company as detailed in the first schedule. It was therefore a charge over precisely the same property as charged by the 2004 charge, as supplemented by the deed of charge dated 21 December 2004.

373. Mr Quinlan submits that the 2004 charge was superseded by the 2005 charge. He relies on a number of points for this submission. First, the 2005 charge expressly created a "*first equitable mortgage and charge in favour of*" BOSI. Secondly, the property charged is the same as that charged by the 2004 charge together with the supplemental deed executed in December 2004. Thirdly, it would be odd to have different charges with different provisions, for example as to enforceability, applying to the same security for liabilities covered by both charges. Fourthly, by clause 7(f) of the 2005 charge, Mr Quinlan represented and warranted that "the Charged Property is free from any Security Interest of any kind other than the security created pursuant to this Charge".

374. As an alternative to the submission that the 2005 charge superseded or replaced the 2004 charge, it was submitted for Mr Quinlan that the effect of the 2005 charge was to amend the terms of the security previously granted by the 2004 charge, such that the terms of security were set out in the 2005 charge.

375. In further support of these submissions, Mr Quinlan relies on seven deeds executed by him in favour of BOSI following the 2005 charge. Each is expressed to be a supplemental deed and deed of confirmation and each provides that "*this Deed should be construed as one single Deed with each of the Security Documents*" and that "*provisions contained in the Security Documents which are inconsistent with the terms of this Deed shall cease to apply*". "*Security Documents*" is defined to include "*the Equitable Charge*" which itself was defined in the first, second, third and fourth supplemental deeds (made between 19 May 2006 and 10 December

2007) as the 2005 charge, as supplemented. They did not refer to the 2004 charge. The fifth, sixth and seventh supplemental deeds referred to the 2004 charge but in somewhat inconsistent ways. The fifth supplemental deed dated 22 January 2008 defined "Equitable Charge" to mean the 2004 charge "as amended and supplemented" by the subsequent deeds including the 2005 charge. However, the sixth and seventh supplemental deeds dated 2 May 2008 and 9 September 2008 respectively referred separately to the 2004 charge and the 2005 charge and did not state that the former was amended by the latter.

376. As against this, Mr McKillen relies on express provisions of the 2005 charge. Clause 14.1(a) provides that the 2005 charge *"shall be in addition to and not in substitution for or limitation of and shall neither be prejudiced nor affected by, nor shall it prejudice or affect, any other security held by"* BOSI. Clause 17.1 provides that the 2005 charge *"shall be in addition to and shall be independent of every other security which [BOSI] may at any time hold for any of the Secured Obligations. No prior security held by [BOSI] over the whole or any part of the Charge Property shall merge in the security hereby constituted"*.

377. While it may at first sight appear odd that BOSI should have taken separate and inconsistent charges over the same property, such that there might in the absence of express provision be good argument for reading the two consistently, it seems to me that the express provisions of the 2005 charge just cited make clear the parties' intention that the 2004 charge was to continue unaffected. The powers of the court under insolvency law to set aside prior transactions made within specified periods before the start of bankruptcy provide a good reason why banks commonly seek to preserve pre-existing security, even where a new charge covering the same security is executed. The provisions of the supplemental deeds do not in my view assist Mr Quinlan's argument. The first four do not refer to the 2004 charge and the last two expressly distinguish between the two changes and do not treat the earlier charge as amended by the latter. Only the fifth refers to the 2005 charge as amending the 2004 charge but in context it is a misdescription, and in any event the reference cannot be relied on as an operative provision to amend the 2004 charge.

378. I turn to the second issue whether either of the charges has become enforceable for the purposes of clause 6.6 of the shareholders agreement.

Has the 2005 charge become enforceable?

379. As detailed above, it is common ground that the 2005 charge became enforceable only upon *"any failure by the Chargor to pay, on written demand by the Bank any sums which are due and payable to the Bank by the Chargor"*. On 10 September 2009 BOSI wrote to Mr Quinlan, stating that he had failed to make interest payment due under a loan agreement dated 28 August 2006 on three occasions in 2009. The letter recorded that failure to pay constituted an event of default under the loan agreement *"unless remedied within 60 days to the satisfaction of the majority lenders in the manner set out in the proviso (the "Proviso") to clause 19.1 of the Loan Agreement"*. The proviso to clause 19.1 of the loan agreement provided that non-payment of amounts due or any of the other events specified in clause 19.1 would not constitute an event of default, if it arose in relation to one or more but not all of the borrowers and within 60 days of the occurrence of the event the defaulting

borrowers were replaced by other persons acceptable to the majority Lenders. It is not suggested that this occurred in this case.

380. The letter dated 10 September 2009 continued:

> *"We hereby make formal demand for payment forthwith of all outstanding interest payment.*
>
> *In the event that the outstanding interest payments are not immediately paid or the above Event of Default is not remedied to the satisfaction of the Majority Lenders within 60 days of the date of this letter in the manner specified in the Proviso, the Lenders will be entitled to exercise all rights conferred upon them by Clause 19.2 of the Loan Agreement including the right to demand immediate repayment of the Loan together with all interest and other sums (including any applicable broken funding costs). In the event that such sums are not paid we reserve the right to exercise the power to appoint a receiver over the Secured Assets, the power of sale and all other powers conferred on us by law or by the Security Documents."*

The rights conferred by clause 19.2 are not to enforce security but to accelerate repayment of borrowings and to terminate any existing commitment to lend.

381. It is common ground that Mr Quinlan paid the amount demanded in the letter dated 10 September 2009 on or about 4 November 2009. BOSI had not by then taken any steps to exercise the rights under clause 19.2 or to exercise any rights arising under the 2005 charge.

382. It is submitted for Mr McKillen that the failure to pay the sums demanded "*forthwith*" or "*immediately"* meant that there was a failure by Mr Quinlan to pay on written demand the sums due. The words *"forthwith"* and "*immediately"* appear in the letter dated 10 September 2009. They do not appear in the definition of event in default in the 2005 charge.

383. The issue is whether BOSI was entitled to enforce the 2005 charge following Mr Quinlan's failure to pay "forthwith" the sums demanded in the letter dated 19 September 2009. In my judgment it was not entitled to do so. Its rights of enforcement could not be determined by reference only to the terms of the 2005 charge but required account to be taken also of the loan agreement under which the unpaid sums had fallen due and the letter dated 10 September 2009. The letter demanded payment of the outstanding interest immediately or the substitution of new borrowers within 60 days of the date of the letter. Necessarily BOSI had to wait until the expiry of the 60 days before it could take the next step of exercising those rights. It could not rely on the failure to meet the first alternative of immediate payment without waiting the 60 days allowed for the second alternative. Even then those rights were not to enforce security but to demand immediate repayment of the principal amount of the loan together with all other sums due and only in the event that such sums were not paid did BOSI reserve the right to exercise powers of enforcement. In my judgment, the provisions of the 2005 charge did not allow BOSI to leapfrog over the requirements contained in the loan agreement dated 28 August 2006 and BOSI's letter of demand. Reading these

documents together, and bearing in mind that the relevant provision in the 2005 charge does not use the words *"immediate"* or *"forthwith"*, BOSI would not be entitled to enforce the 2005 charge at least until 60 days had passed from the letter dated 10 September 2009. That is the basis on which Mr Quinlan and, it appears, BOSI proceeded at the time and in my judgment they were right to do so.

384. It follows that the 2005 charge did not at any time become enforceable. If it had become enforceable, it would have fallen to the directors to determine under clause 6.6 of the shareholders agreement whether to deem a transfer notice to have been given by Mr Quinlan. Given the circumstances of the demand just referred to and the draconian consequences of a deemed transfer notice, I am far from satisfied that the directors would have considered it appropriate to deem a transfer notice to be given. It appears to me much more likely that they would have waited at least until the expiry of the 60 days to see whether payment was made and whether BOSI was likely to take any enforcement action as against the shares. In any event Mr McKillen has not established, or even addressed, whether the directors would have taken action under clause 6.6 and unless he can show that they would have done, he cannot show that he has suffered any prejudice in relation to this matter.

Has the 2004 charge become enforceable?

385. The relevant provisions in relation to the enforceability of the 2004 charge are as follows. The 2004 charge in clause 1.1 defines "*Events of Default*" to mean "*the events of default set out in the Facility Letter and any one an 'Event of Default'*". The facility letter is the letter dated 6 April 2004 as amended by the supplemental letter dated 21 April 2004. Clause 10.1 provides that upon "*the happening of an Event of Default*" BOSI is entitled to exercise a power of sale and clause 11.1 provides that it may, at any time after the power of sale has become exercisable, appoint a receiver. Clause 2.3 provides that the liabilities secured by the charge shall become due and payable upon written notice by BOSI and that Mr Quinlan shall pay all actual and contingent liabilities on the occurrence of any Event of Default. Clause 2.4 provides that Mr Quinlan will *"notify the Bank in writing on the occurrence of any Event of Default or of the occurrence of any event which with the lapse of time or giving of notice or both would or may constitute an Event of Default"*.

386. Notwithstanding the definition of "*Events of Default*" in the 2004 charge, the facility letter does not set out the Events of Default but incorporates BOSI's standard loan conditions. Paragraph 9 of the facility letter provides:

> *"In addition to the terms contained in this facility letter, the Loan is subject to the conditions set out in the Bank's General Loan Conditions (Ref:01.01.04) attached. Unless expressly excluded or varied by the terms of this facility letter, the General Conditions shall apply to the loan".*

387. Condition 9 of the General Conditions is headed "*Events of Default*". It sets out in twenty numbered sub-paragraphs various events, such as a failure by the borrower to pay sums due to BOSI on the due date. It continues "*then, and in such case and*

at any time thereafter, the Bank may in its absolute discretion" and there then follow four numbered paragraphs of which the fourth is:

> *"Declare that the Security Documents have become enforceable immediately in accordance with their terms whereupon the same shall be immediately enforceable".*

388. It is submitted for Mr McKillen that the Events of Default for the purposes of the 2004 charge are each of the events listed in the twenty numbered sub-paragraphs in paragraph 9 of the General Conditions. Accordingly, where clause 10 of the 2004 charge provides that "*upon the happening of an Event of Default the Bank shall have and be entitled to exercise the power to sell or otherwise dispose of*" the charged property, that power arises when any of the listed events occurs without the need for a declaration that the security has become enforceable in accordance with the fourth numbered paragraph above.

389. In my judgment, these documents must be read consistently with each other, unless there is provision in the 2004 charge or the facility letter which is inconsistent with the terms of the general conditions: see paragraph 9 of the facility letter. The effect of condition 9 of the General Conditions is to make the security enforceable only upon the occurrence of one of the twenty listed events together with a declaration issued by the Bank, in its absolute discretion, that the security has become enforceable. There is nothing in the terms of the 2004 charge which conflicts with condition 9 read in its totality. The definition of Events of Default in the 2004 charge does not require that the need under condition 9 for a declaration of enforceability should be ignored. Clause 2.4 expressly contemplates that an event of default may require the giving of notice following the occurrence of any event. It would require rather more than is contained in the definition of Events of Default in the 2004 charge to create a conflict with the terms of the General Conditions in circumstances where, unless expressly excluded or varied, the General Conditions are to apply to the loan.

390. It is not in dispute that a number of events occurred in 2010 and 2011 which fell within one or more of the twenty numbered sub-paragraphs in condition 20 of the General Conditions. It is also common ground that there has been no declaration pursuant to condition 9 that the security had become enforceable. It follows, in my judgment, that the 2004 charge has never become enforceable.

Issues under clause 6.6 of the shareholders agreement

391. These conclusions, that the charges over Mr Quinlan's shares have not become enforceable, mean that it is unnecessary to decide some further issues on the construction and application of clause 6.6 of the shareholders agreement but I will briefly address them. Those issues arise from the terms of clause 6.6 providing that, if the security had become enforceable, a transfer notice would be deemed to be served only if the directors made a determination to that effect within one month after the security became enforceable.

392. Mr Quinlan and the Barclay interests rely on the fact that there was no determination by the directors that a transfer notice should be deemed to be given

within one month after the occasions on which the charges are said to have become enforceable.

393. It is submitted for Mr McKillen that in order to make clause 6.6 workable it is necessary to imply an obligation on a shareholder to notify the company of the occurrence of any of the events which acts as a trigger under clause 6.6. It is pointed out rightly, in my view, that many of these events could occur without the company or its directors knowing about it. Bankruptcy in any part of the world is a trigger. It could well occur without coming to the attention of the company or the directors. Even more likely, he might enter into an arrangement with his creditors, or security over his shares could become enforceable, without coming to the knowledge of the company or its directors. It would then be a matter of chance whether the directors had an opportunity of making a determination under clause 6.6.

394. Viewed objectively, it cannot sensibly have been the intention of the parties to the shareholders agreement that clause 6.6 should work as haphazardly as the respondents suggest. There is no difficulty, in order to give commercial sense to the provision, in implying an obligation to give notice to the company of the occurrence of any of the triggering events within the knowledge of the shareholder: see *Tett v Phoenix Property and Investment Co. Ltd*. [1986] BCLC 149 (CA).

395. The next issue is whether, for the purposes of clause 6.6.2, a shareholder security can become enforceable more than once, in the absence of a waiver by a chargee of an earlier breach. If, for example, the shareholder misses a series of interest payments and, in respect of each, a declaration is made by the chargee that the security is enforceable, does the security become enforceable only on the first of such occasions or does it become enforceable each time the relevant declaration is made? It is submitted for Mr Quinlan and the Barclay interests that, as a matter of ordinary language, security can become enforceable only once, unless there is a waiver of a prior breach. If a security is already enforceable, it is submitted that it makes no sense to say that it "becomes enforceable" when a further event of default occurs.

396. As a matter of general language, I would agree with this approach but it fails in my judgment to give full effect to the purpose and effect of clause 6.6. As Mr Quinlan and the Barclay interests have been at pains to emphasise, the occurrence of an event listed in clause 6.6 does not automatically trigger the deemed service of a transfer notice but gives the directors the discretion whether to determine that a transfer notice should be given. They have also, rightly in my view, been at pains to point out that there could be circumstances, such as a trivial event giving rise to a right of enforcement without any real prospect that enforcement would follow, where the board could quite properly determine that no transfer notice should be deemed to be given. This is all the more the case when it is remembered that the deemed transfer notice, if determined to be given, applies to all the shares held by the shareholder, not just those shares which are subject to the charge. If those submissions are accepted, which I believe they should be, their reading of "*becomes enforceable*" could deprive clause 6.6 of much of its purpose. A decision by the directors not to determine that a transfer notice be deemed to be given on a trivial event of default would deprive the directors of the ability to do so, in the event of a subsequent, but more substantial, event of default making the security enforceable. It seems to me very unlikely that the parties to the agreement can have intended this

result. The words "*becomes enforceable*" are not incapable of applying to a succession of events of default giving rise to rights of enforcement and I would hold that they do so apply in those circumstances.

397. There is a further issue which I should mention. Mr Quinlan pleads in his defence that if, contrary to his primary case, security over his shares became enforceable, the same is true of security over Mr McKillen's shares, so that Mr McKillen cannot complain of unfair prejudice in this respect. It follows from my decision on Mr Quinlan's security that this point does not arise. Mr Quinlan applied towards the end of the trial to amend his defence to add a reference to a further security over Mr McKillen's shares which had only lately been disclosed. In the light of my decision on the issue of enforceability, I refuse the application.

Mr McKillen's ability to finance the purchase of shares

398. If I had concluded that the pre-emption provisions would have been triggered as regards Mr Quinlan's shares, and if those shares had been offered round to the shareholders, the issue arises as to whether Mr McKillen could have purchased the shares or a sufficient proportion to give him control. Mr McKillen's pleaded case in his petition is that he could and would have done so, and this is denied by the respondents. Mr McKillen's evidence is that he would have purchased shares equal to a 20% stake, bringing his holding up to 56%. This would cost about £48 million at an enterprise value of £900 million or £58 million at an enterprise value of £950 million.

399. Issues of law arise, such as whether a failure to comply with or operate the pre-emption provisions caused unfair prejudice to Mr McKillen only if he would have taken up the shares. There is also the prior issue whether a failure by a shareholder to give notice of a relevant event when required involves conduct of the affairs of the company or an act or omission of the company, so as to fall within section 994. In view of my conclusion that the pre-emption provisions were not triggered, these issues do not arise for decision. However, I should make the relevant findings of fact on the evidence which I heard on Mr McKillen's ability to finance a purchase of shares.

400. Mr McKillen's case, as originally pleased in his petition, was:

> " *Mr McKillen intended to retain funds to purchase all or a proportionate share of Mr Quinlan's shares in the Company once they became available pursuant to the pre-emption rights*."

401. Subsequently, Mr McKillen made clear that he was not saying that he could have financed a purchase of shares out of his own funds. The petition was amended to read:

> "*Mr McKillen would have raised funds to avail himself of any opportunity to purchase all or a proportionate share of Mr Quinlan's shares in the Company once they became available pursuant to the pre-emption rights.*"

402. I will not here recite the tortuous process by which evidence and disclosure was provided on this issue. The upshot was a substantial amount of disclosure by Mr McKillen and two witness statements by Mr Cunningham. Both Mr McKillen and Mr Cunningham were cross-examined on this issue.

403. Certain matters are not in dispute. First, Mr McKillen did not himself have the funds required for any purchase. Secondly, Mr McKillen did not have any committed facilities available to him for this purpose, until the agreement dated 16 March 2012 with Al Mirqab Capital (SPC), an entity under the same control as Al Mirqab Holdings LLC. Thirdly, Mr McKillen does not suggest that he could have obtained a loan facility for this purpose from a bank or similar commercial lender.

404. In support of his case, Mr McKillen relies on three principal matters. First, there were a number of parties who were interested in the company in 2011, in particular the Qataris, Wynton, and Sheikh Mansour. Secondly, he relies on the agreement dated 16 March 2012 with Al Mirqab. Thirdly, he had discussions or negotiations with a number of potential funding parties in 2011, six of which reached the stage of draft term sheets.

405. The parties, such as the Qataris and Wynton, who demonstrated a substantial level of interest in the company in 2011, were concerned to achieve an equity position in the company. Wynton made offers, first for all the shares and then for each member's shares. It subsequently acquired, through JQ2 Limited, debts secured on part of Mr Quinlan's shareholding and later took part in negotiations with the Barclay interests and Sheikh Mansour for a joint venture. Sheikh Mansour and related Abu Dhabi interests had also bought debts secured on Mr Quinlan's shares and were involved in the joint venture negotiations. The transactions these parties were considering were very different from a personal loan to Mr McKillen to enable him to purchase shares and there is no evidence to suggest that they would have had any interest in making any such loan.

406. The negotiations and agreements with the Qataris in January-February 2011 were all concerned with the Qataris either obtaining at least 75% ownership of the company or, after the Barclay brothers became involved with the purchase of Misland, entering into a joint venture with the Barclay brothers and Mr McKillen.

407. It is true that on 21 January 2011, immediately after the acquisition of Misland became known, Mr Bakhos emailed Mr McKillen with a suggestion that if the shares held by Misland were as a consequence offered round under the pre-emption provisions, Al Mirqab "*would be prepared to provide you with funding to acquire some or all these shares*" subject to the price reflecting an enterprise value of no more than £875-900 million and:

> "*our reaching a satisfactory arrangement under which it may be possible for my Principal in due course to obtain ownership of the shares concerned, together with sufficient additional shares to provide control of the company.*"

This condition would have to be satisfied in a way which did not itself trigger the pre-emption provisions.

408. It is said for Mr McKillen that this has been achieved in the agreement dated 16 March 2012, and could also have been achieved in January 2011. However, Mr Bakhos' letter was concerned with Misland's shares, not Mr Quinlan's. The whole thrust of the discussions and negotiations was to achieve a joint venture with the Barclay interests. At that time, unless Misland's shares were offered round and sold with the result that the Barclay brothers' involvement ceased, there is no basis for concluding that the Qataris would have been prepared to finance a purchase of Mr Quinlan's shares without reaching an agreement with the Barclay brothers.

409. I do not consider that the agreement dated 16 March 2012 with Al Mirqab provides a basis for inferring that a similar agreement could have been reached in 2011 with Al Mirqab to purchase Mr Quinlan's shares. First, the agreement is the product of the proceedings. It is driven by the prospect that Mr McKillen might obtain orders for the sale to him of the shares held and owned by Misland and/or Mr Quinlan.

410. Secondly, relations between Mr McKillen and the Qataris broke down after Mr McKillen pulled out of the tri-partite agreement dated 12 February 2011. There was mutual distrust. Mr McKillen felt badly treated by them and, as evidenced by Arthur Cox's letter dated 17 February 2011, had no confidence in them as a party to a joint venture. In evidence, he said that they had "*burned their bridges*" with him. He needed to be persuaded by close friends and family before dealing again with them in February 2012. For their part, the Qataris felt that Mr McKillen had reneged on the agreement and took advice on proceedings against him. I am satisfied that each would have been very reluctant to deal with the other and it is significant that Mr McKillen did not approach the Qataris in 2011 when he was holding funding discussions with a large number of parties. It would appear that it was only Tony Blair's personal approach to Sheikh Hamad during a meeting in Qatar in February 2012 that brought the two together. There is no evidence of Mr Blair's involvement, or any likelihood of his involvement, at any relevant time in 2011.

411. Negotiations with potential funders is the third basis for Mr McKillen's case. Mr McKillen relies in particular on the discussions with six possible funders who issued draft indicative term sheets. I will consider each of these in turn.

412. Mr McKillen was introduced to Och-Ziff Capital Investments LLC (Och-Ziff), a hedge fund, in May 2011. At the end of June 2011, it provided a proposal for a loan of £48 million, at rates of interest with a minimum of 15% pa, which represented high risk equity-type returns. Och-Ziff required security over both the shares to be acquired and Mr McKillen's existing holding, although Mr McKillen said in evidence that the latter security requirement was dropped. Mr McKillen was advised at the time that refinancing this facility would be difficult, and probably only achievable with the injection of new funds or other assets by him on an asset sale. Mr McKillen agreed that the terms were unattractive and that he would not have agreed to them. Further term sheets were prepared in July 2011 but on terms which did not significantly change from the June term sheet.

413. No terms were produced by Och-Ziff which Mr McKillen would have agreed. Mr McKillen did not call any witnesses from Och-Ziff and I am unable to find that it is likely that they would have reached agreement on terms acceptable to each side.

414. In August 2011, Mr McKillen approached Ong Beng Seng, a Singapore businessman and hotelier, for financial support to purchase Mr Quinlan's shares if offered under the pre-emption provisions. Mr McKillen had known Mr Ong for about 10 years and had been in contact with him about the company since January 2011 but had not previously sought support.

415. Mr Ong's interest was not in making loans but in acquiring an equity stake in the company. A proposal was put forward by Leisure Ventures Pty Limited, a joint venture company owned equally by Mr Ong and a company called Hotel Properties Limited. The proposal for a loan of £54 million was set out in draft heads of terms sent on 9 September 2011 by Leisure Venture's solicitors, who wrote in a covering email:

> "*As discussed between Mr B.S. Ong and Mr Patrick McKillen and subsequently between you and me, our willingness to provide the share financing is by way of a first step to acquire a shareholding within the Coroin Limited (the holding company) and therefore we have provided in the HOT that when the Loan Amount is advanced, we would have documentation executed with PMcK in place which will give us rights to become a 50:50 shareholder with you in due course.*"

416. This requirement conflicted with the pre-emption provisions because it would involve the conferral of rights to acquire shares from Mr McKillen, and hence an interest in those shares, simultaneously with his acquisition of them.

417. Mr McKillen's solicitors provided amended heads of terms on 5 October 2011, removing the requirement for rights in favour of Leisure Ventures to acquire shares and substituting a financial penalty against Mr McKillen if Leisure Ventures did not acquire the shares within a specified period.

418. This was quickly picked up by Alex Lee of Hotel Properties Limited , on behalf of Leisure Ventures, who said in an email on 7 October 2011:

> "*I am afraid that will not meet our requirement.*
>
> *We thought we have made it very clear through Evershed to Arthur Cox and from myself to you.*
>
> *If our most fundamental requirement is not met, I believe it would not be very meaningful for us to discuss other terms.*"

In cross examination, Mr McKillen dismissed this as just "*toing and froing negotiations*". It was not, he said, a deal-breaker. However, it looks as if it was regarded as fundamental and it was not followed by agreement to remove the requirement. Whether it was a deal-breaker is a matter for evidence from Leisure Ventures but Mr McKillen called none.

419. The only development was that an offer on significantly worse terms was made in February 2012. Instead of providing 100% of the funding required to purchase

some or all of Mr Quinlan's shares, it proposed 75% of the funding up to £37.5 million required to purchase a 19.86% holding, based on an enterprise value of £908 million rather than £930 million as before. This would have left a funding gap of some £18.5 million. The interest rate was 10%, not 6%. Moreover, Leisure Ventures required a period of not less than three weeks for due diligence, despite having been provided with information.

420. In the earlier draft heads, Leisure Ventures had required six weeks and Mr McKillen's solicitors suggested four weeks in response. But the offer period under clause 6.2 of the shareholders agreement was only four weeks.

421. In light of these difficulties, it was not in my judgment likely that Mr McKillen could have reached agreement in 2011 with Leisure Ventures or Mr Ong for the provision of funding to purchase shares offered under the pre-emption provisions.

422. In January 2012, Mr McKillen was contacted by Talos Capital Limited, a hedge fund or hedge fund manager. Its CEO worked for Blackstone when it owned the Savoy Group, so he was familiar with the company's hotels, and he obtained Mr McKillen's contact details from NAMA. Mr McKillen's evidence is that there were about ten meetings in January/February 2012, leading to a two-page heads of terms. This proposed a loan facility of a figure in square brackets of £48 million to purchase a 20% shareholding from Mr Quinlan under the pre-emption procedure. It envisaged a 50/50 joint venture with Mr McKillen to own the company, once Mr McKillen had an unconditional right to buy the Barclay brothers' interest in the company. The proposal was therefore clearly made in the context of these proceedings and the possibility of a successful outcome for Mr McKillen.

423. There is no evidence from Talos Capital Limited. There is no explanation why the approach to Mr McKillen was not made until January 2012. The reasonable inference is that it was the prospect of a joint venture made possible by Mr McKillen's proceedings.

424. There are no good grounds for concluding that Talos Capital Limited had any interest in 2011 for lending funds to Mr McKillen to purchase Mr Quinlan's shares or some of them. Mr McKillen made no approach to Talos Capital Limited at any time, despite seeking funds to purchase Mr Quinlan's shares.

425. On 16 September 2011, Mr McKillen had a meeting with Morgan Stanley as managers of the Morgan Stanley Real Estate Fund No. 7 (MSREF), a property investment fund. On 4 October 2011, MSREF provided an indicative term sheet. Rather than a loan to Mr McKillen, funding of £45 million would be provided through an issued of preferred redeemable shares by a special purpose vehicle to be owned by Mr McKillen. At a meeting on 6 October 2011, Morgan Stanley said that they would prefer the funding to be provided in that way because a loan to Mr McKillen would require "*tiresome and intrusive*" know-your-client procedures "*which will be slow*". They were however prepared to be flexible on this point.

426. Capped at £45 million, representing on a 20% holding an enterprise value of £850 million, the facility was insufficient. Mr McKillen said in evidence that he would supplement it with his own funds. Mr McKillen did not demur at the suggestion that the interest rate of 20% pa was "*eye-wateringly large*". He said "*That is the*

name of the game. If you want money quick, 15 to 20%". Mr McKillen did not pursue this proposal because of its cost.

427. On 31 October 2011, Mike Walsh, who was introducing a number of possible funders to Mr McKillen, met the CEO of Round Hill Capital, an investment management group, which led to a letter of intent dated 2 December 2011 from Global Asset Capital Europe LLP (GAC), part of a private equity firm with, according to its brochure, $1 billion under management.

428. The letter of intent proposed financing the purchase of shares held by Misland and/or Mr Quinlan if Mr McKillen succeeded in the present proceedings. The "*ultimate goal*" was to acquire 50:50 control of the company, but, pending removal or waiver of the pre-emption provisions, the funding would be provided as a loan. The interest on the loan was to be the dividends and other profit derived from the shares acquired with it. Since the company did not pay dividends and, with its borrowings, was not obviously in a position to do so, it is not clear how this would work. Mr McKillen admitted that he did not understand it.

429. Most striking is that neither the letter of intent nor any subsequent communication indicated the amount of funding which GAC was prepared to provide. It also required a four-month exclusivity period which Mr McKillen said in evidence he would definitely not agree. Negotiations with GAC extended over a period of some three months up to early March 2012. I am not satisfied that any agreement could have been reached with GAC or that the negotiations with GAC provide a reliable basis for concluding that Mr McKillen could have raised funds to purchase shares under a pre-emption offer.

430. A company called Avington Financial Limited (Avington) was introduced to Mr McKillen at the end of November 2011. Mr McKillen's evidence is that it manages investments for some wealthy Canadian families. It provided a draft term sheet in January 2012, where the objective was stated as:

> "*To become a 50% / 50% equity partner with Patrick McKillen or entities controlled by Patrick McKillen ("PM") in Coroin Limited ("Coroin" or the "Company") in the event that PM is presented with the opportunity to acquire 100% of the voting and total issued shares in the Company (the "Shares") in a single transaction or in a series of transactions leading to the ultimate acquisition of 100% of the Shares.*"

431. Avington offered to make a bridge loan of £35-48 million to Mr McKillen to finance the acquisition by him of up to 14% of the shares to bring his holding up to 50%. The term would be five years at an interest rate of 8%. It was conditional on the completion of due diligence and an exclusivity period of 120 days.

432. Avington's interest was clearly prompted by the prospect of success by Mr McKillen in these proceedings opening the way to a 50:50 joint venture. Mr Browne of Le Bruin Private Limited who introduced Avington emailed Mr Cunningham on 14 December 2011 to say that Avington had "*advised that they have the funding in place to back Paddy in the battle with the BB*". There were

problems with their draft offer which were never resolved. First, the funding offered was too small. Mr McKillen said in evidence that he would only accept funding to bring his holding up to 56%. Secondly, he would never agree to exclusivity. Thirdly, confirmation of the availability of funding was not received. On 15 February 2012, Avington emailed to say that they were waiting to hear back from one family office and then would be in touch. I was not shown any further evidence on this. Nor was there any evidence that they would have agreed Mr McKillen's points on the amount of funding or the exclusivity period.

433. Mr McKillen had discussions with a variety of other parties but none reached the point of an indicative term sheet. These included the following. There were discussions in May 2011 and again between November 2011 and February 2012 with Blackstone Advisory Partners, which is associated with the Blackstone private equity fund. Discussions were held between October 2011 and February 2012 with Walter Kwok, from Hong Kong, and with an intermediary acting for him. Mr McKillen met Mr Kwok once. Mr McKillen lost interest after a short time. Mr Cunningham continued the discussions but they never came close to an agreement. There were discussions also with John Caudwell, the Kumar family from Singapore, the Abu Dhabi Investment Authority and others but none of them got to the point of serious engagement. None of these proposals and discussions, including those which resulted in a draft term sheet, provides any solid basis for concluding that Mr McKillen could have raised funds in 2011 to buy a 20% stake from Mr Quinlan if the pre-emption provisions had been triggered and followed.

434. There were significant outstanding issues on even the most advanced of these proposals. Mr McKillen called no evidence from any of them to say that a deal could have been achieved and, if so, how. Most of the interest arose only after Mr McKillen started these proceedings. No doubt they were perceived as opening up the possibility that Mr McKillen could gain 100% control of the company. This is striking given that Mr McKillen was seriously trying to arrange the necessary finance from May 2011.

435. It is said on Mr McKillen's behalf that a bridging loan on expensive terms could be arranged, on the basis that it would be soon refinanced. But there is no adequate answer in the evidence to the obvious question of how this would be done. The evidence as to Mr McKillen's overall financial position is such, I find, that he could not raise a conventional term facility for this. Even if his net cash flow was sufficient to service a facility, he could not offer adequate security as his existing 36% holding was not available, being already charged to secure existing (and as yet un-refinanced) borrowing.

436. It might be thought that achieving a 56% controlling interest would provide a basis for refinancing a bridge loan. In the absence of a conventional facility, the only realistic source for finance would be an investor interested in a joint venture, but this would almost certainly require a much larger stake than 56%, probably 100%. Otherwise, the joint venture investor would have to face the prospect of the Barclay interests as a substantial minority shareholder and would not itself be able to have a controlling holding while allowing Mr McKillen a continuing equity stake. There is no evidence that an investor would have been willing to proceed on that basis.

437. Without reassurance that bridging finance would be repaid, it is unrealistic to think that Mr McKillen could have obtained such finance. Mr McKillen relies on his unencumbered ownership of a number of properties in Vietnam, Argentina, California, France, Ireland, Dubai and Kazakhstan and his equity in a number of encumbered properties in France, England and Germany.

438. The evidence about Mr McKillen's property interests came in a very unsatisfactory form, and I disallowed a substantial part at the trial.

439. Insofar as Mr McKillen says that he could have used any of these interests as security, I have no evidence from any potential lenders that they would have been acceptable. So far as prospective sales are concerned, if this were seriously relied on, I would expect proper expert evidence, but there is none. I do not regard the evidence as a satisfactory basis for concluding that Mr McKillen could probably have used property sales to raise funds for a purchase of a 20% shareholding. It is telling that he did not seek to sell properties for this purpose in 2011, or even contemplate doing so, even though he was trying to raise finance from May 2011 and even though he thought from September 2011, if not before, that the pre-emption provisions might be triggered imminently.

440. On the evidence before me, I conclude that Mr McKillen would not have been able in 2011 to raise the funds necessary to buy a 20% stake in an offer under the pre-emption provisions.

National Asset Management Agency (NAMA)

441. The National Asset Management Agency is an Irish public body established by the National Asset Management Agency Act 2009, enacted by the Irish Parliament in December 2009. It was established as part of Ireland's response to the international economic and financial crisis and in particular to the severe problems in the Irish banking sector. Its statutory purpose, which it is permitted to fulfil through subsidiaries, is to acquire loans and related assets from banks and other credit institutions facing financial difficulties. In the transactions relevant to the case, NAMA acted through a wholly-owned subsidiary, National Asset Loan Management Limited, but I will refer to both as NAMA without distinction.

442. NAMA aims to deal expeditiously with the loans acquired by it and to protect or otherwise enhance the value of those loans for the purpose of contributing to the achievement of its objectives. As at 1 January 2012, it had acquired loans with a nominal value of over €74 billion from five participating financial institutions, including Bank of Ireland and Anglo Irish Bank. A witness statement filed on behalf of NAMA states:

> *"The Agency's objective is to obtain the best achievable financial return for the Irish State on this portfolio, and in the case of each individual loan to achieve such a return as soon as practicable in order to reduce the value of the portfolio to zero as soon as commercially practicable."*

443. For this purpose NAMA's statutory powers include all steps necessary or expedient to realise the value of assets acquired by it, including disposing of loans for the best achievable price: see section 11(a) of the National Asset Management Agency Act 2009. Section 12 confers on NAMA all powers necessary or expedient for or incidental to the achievement of its purposes and performance of its functions, including the power to transfer debt securities and to sell assets for such consideration and on such terms as the Board of NAMA thinks fit. John Mulcahy, the Head of Portfolio Management at NAMA, said in evidence that "*our focus is to get our money back*". The options for doing so are threefold. First, it can encourage the debtor to repay or refinance the loans. Secondly, it can seek to sell the loan to third party. Thirdly, it can enforce the security for the loan, where such power has arisen. Clearly, as Mr Mulcahy confirmed, the best outcome for NAMA is to recover the full par value of a loan together with accrued interest and costs.

444. The establishment of NAMA caused considerable concern to the shareholders of the company at that time, both as regards the company as a substantial borrower from Bank of Ireland and Anglo Irish Bank and, in the case of Mr McKillen and Mr Quinlan, as very substantial borrowers from those banks. Their personal facilities had expired but had not been repaid nor, as had previously been the case, rolled out into new term facilities. Instead the facilities went into default but steps to enforce the security for them were not taken.

445. The view of the shareholders, as regards both the company and themselves, was that a transfer of their loans to NAMA would be catastrophic. So far as the individuals were concerned the loans to Mr Quinlan were transferred to NAMA in March 2010. His financial position was so dire that there was little he could do about it. Mr McKillen successfully resisted the transfer of his loan facilities to NAMA. He brought proceedings in the Republic of Ireland against NAMA and, on appeal to the Supreme Court of Ireland, he succeeded in his claim that NAMA had not validly resolved to acquire his debts: *Dellway Investments Ltd v NAMA* [2011] IESC 4 (3 February 2011). In a later judgment the Supreme Court also held that NAMA was required to give notice of any intention to consider making a decision to acquire his debts so as to give him an opportunity of making representations: [2011] IESC 14 (12 April 2011). This left it open to NAMA to resolve afresh to take a transfer of his debts but on 6 July 2011 it resolved not to do so.

446. The concern as regards the company was twofold. First, the shareholders were concerned that if the loan facilities were transferred to NAMA it might try to sell them to a more aggressive lender. Secondly, there was a concern that a transfer to NAMA would cause reputational damage to the hotels owned by the company. They considered that NAMA had an international reputation as Ireland's "bad bank" set up to deal with distressed properties loans which had failed, which was certainly not the case with the loans to the company.

447. Accordingly, after the Irish Government announced in the course of 2009 that it intended to establish NAMA, but even before the statute establishing NAMA had been enacted, the company was active in seeking to discourage the transfer of the company's loans to NAMA. These efforts continued through the autumn of 2009 and into 2010 and included approaches to the European Commission. However, on 25 June 2010 the loan facilities were transferred to NAMA.

448. At this stage there were three separate loan facilities, comprising a Facilities Agreement originally dated 21 September 2005 (the Senior Facilities Agreement), a Subordinated Facility Agreement also dated 21 September 2005 and a Facilities Agreement dated 12 March 2008 to finance the purchase of a property in Brook Street, adjacent to Claridge's. At the time of the transfer of the facilities to NAMA, some £625 million had been drawn down and, other than one tranche of the Senior Facilities Agreement, they were all due to expire on 31 December 2010. A fourth facility had been made available by Anglo Irish Bank to a number of the shareholders for the purchase of a property in Knightsbridge adjacent to The Berkeley. All four facilities were effectively consolidated into a single Facility Agreement dated 1 April 2011. At that time a total of approximately £648.4 million was outstanding.

449. Following the transfer to NAMA, the manager at NAMA with day-to-day responsibility for the company's facilities was Paul Hennigan. Mr Hennigan's unchallenged evidence is that throughout his dealings with the company he made it clear that NAMA was keen to exit its position with the company as soon as practicable. All the shareholders and directors of the company understood that NAMA was not a normal commercial lender but aimed to achieve repayment as soon as possible and might sell the loans.

450. NAMA's approach to dealing with the company's facilities was complicated by the fact that in March 2010 it acquired Mr Quinlan's personal loans from Anglo Irish Bank. These loans were secured over part of Mr Quinlan's shareholding in the company representing some 13.52% of the total equity of the company. Accordingly, NAMA's interests were best served not only by a repayment in full of the company's loans but also by maximising the value of the company's equity. This made NAMA reluctant to enforce the loan facilities if they were not repaid by the expiry date of 31 December 2010. Although enforcement would almost certainly result in repayment of the loans, enforcement would impair the value of Mr Quinlan's equity.

451. As detailed in the chronological section, all attempts during 2010 to raise the finance necessary to repay the NAMA debt, by a combination of loan facilities and equity investment, had failed by early November 2010. The company and its shareholders decided to seek a two-year extension to the loan facilities from NAMA. This was raised with Mr Hennigan by Mr Buchanan at a meeting on 5 November 2010 and was followed on 19 November 2010 by a formal application from the company. Mr Hennigan viewed this request as a last resort, the company having exhausted all other forms of refinancing. At their meeting on 5 November 2010 Mr Buchanan had told Mr Hennigan that Ernst & Young had been appointed by the company to advise the directors on their legal duties and obligations given that there was a very strong likelihood that the company would be insolvent within three months if the facilities were not extended. Mr Buchanan had explained to Mr Hennigan that the advantage of an extension for a period as long as two years was that it would allow the company to seek a sale of the group without any association of a distressed asset sale. NAMA initially suggested an extension of 18 months but by the end of December 2010 an extension of two years had been agreed in principle. Certain key terms, such as the interest rate and an arrangement fee of 1% of the total size of the facilities, were agreed in principle but further terms remained

to be agreed and the proposed new facility agreement still had to be drafted. Accordingly, on 24 December 2010 NAMA agreed to extend the facilities to 31 January 2011 and, by the terms of the extension letter, confirmed that, if requested, it would give reasonable consideration to a further extension to 1 March 2011.

452. NAMA's approach to the company at this stage may be summarised as follows. First, the company's overall indebtedness to NAMA was well secured. Secondly, the level of indebtedness was nonetheless too high because the anticipated cash flow would be only just sufficient to allow the company to service the debt. Thirdly, the company was over-leveraged by about £200 million and any new lender would require a reduction in the debt. Fourthly, the existing shareholders were unable to provide the necessary new equity or other funding, so that new equity or similar finance would have to come from external sources. Fifthly, the shareholders were in disarray and it was necessary for shareholder issues to be resolved. Sixthly, a two-year extension would provide the time and stability needed for a sale and refinancing of the company. Progress towards a resolution of the problems would be closely monitored, with a view to a sale at an earlier opportunity.

453. The approach of NAMA was significantly affected by the events of January-February 2011: the purchase by the Barclay interests of Misland and the tripartite agreement between the Barclay interests, Mr McKillen and Al Mirqab. Although the agreement with Al Mirqab failed, these events demonstrated to NAMA that it was possible for its loan facilities to be repaid within a relatively short time scale and for Mr Quinlan's shares to be purchased, provided that the shareholders could reach agreement amongst themselves. The arrival of a wealthy investor such as the Barclay interests with ambitions to control the company, either alone or with others, indicated to NAMA that this was achievable.

454. NAMA first heard of the purchase of Misland by the Barclay interests on 21 January 2011. It learnt also about the exclusivity agreement signed by Mr Quinlan on 15 January 2011. Mr Barclay and Mr Peters attended a meeting in Dublin on 24 January 2011 with Mr Mulcahy, Mr Hennigan and other representatives of NAMA. The note of the meeting prepared on the same day by Mr Hennigan records that Mr Barclay expressed his intention to purchase 100% of the shares of the company within the following four to eight weeks and requested NAMA to finalise the proposed two year extension to its facility but stated that he intended to refinance 100% of the debt within 12 months. NAMA regarded this as a positive development, indicating an exit for NAMA both by repayment of its loan facilities and a sale of the equity over which it held security. Mr Hennigan's memorandum sets out the return that NAMA could expect on the assumption that the debt was refinanced by the end of 2011.

455. On 1 February 2011, NAMA agreed to extend the deadline on its facilities to 14 February 2011. Discussions on the final terms of the 2-year extension to the NAMA facilities continued. Mr Hennebry reported to a board meeting of the company on 8 February 2011 that although the loan agreement was substantially complete there were still some outstanding issues. Nonetheless, the extension was seen as imminent. The minutes record Mr Faber as saying that the company should remain focussed on the NAMA refinancing proposition "*so as to allow the Board to act from a position of strength and allow the company to stabilise before looking to a 3rd party debt provider for a longer term solution*". He reported on the same day to

Aidan Barclay that the Board remained confident that the outstanding points would be dealt with and that the extended facility would be entered into on Friday 11 February or Monday 14 February 2011.

456. On 4 February 2011, the Barclay interests informed NAMA that it had acquired Mr Quinlan's secured debts from BOSI, and offered to purchase his debts to NAMA which were secured on part of his shareholding, representing 13.52% of the equity of the company. The price offered was £35 million, representing an enterprise value of £900 million. Mr Mulcahy regarded this as a reasonable offer but on 7 February 2011 NAMA received a competing offer from Wynton at a price equivalent to an enterprise value of £1.028 billion.

457. On Saturday 12 February 2011, the Barclay interests, Al Mirqab and Mr McKillen made their agreement in relation to the company. Mr Hennigan was informed that this would involve the purchase of Mr Quinlan's shares and the repayment in full of the NAMA facilities through credit facilities negotiated by the Barclay interests with Barclays Bank. A further two week extension of the NAMA facilities was requested in order to finalise these arrangements. At its meeting on 15 February 2011 the credit committee of NAMA agreed the extension and agreed to the proposed repayment of its facilities and to a sale of Mr Quinlan's debt, but on terms that the company would pay an "exit fee" of £13.5 million. The fee's purpose was to compensate NAMA for not selling the loans to Wynton at a higher price.

458. The terms agreed with NAMA were contained in two letters, one from the company to NAMA and the other from EHGL to NAMA, each dated 16 February 2011. The agreement with the company provided that NAMA would extend the present facilities until the close of business on 28 February 2011 "*so that the Group may complete a refinance of the entire current NAMA senior debt facilities, totalling £660 million, plus all accrued interest, on or before such date*". It provided also for the payment of the balance of the arrangement fee, amounting to £2.3 million, on completion of the third party refinancing. The agreement with the Barclay interests provided, first, for a period of exclusivity until the close of business on 28 February 2011 during which time NAMA would not enter into discussions with or accept any offer from any third party relating to the refinancing of its facilities or the sale or purchase or refinancing of debt owed by Mr Quinlan. Secondly, NAMA agreed to release its charge over shares in the company held by Mr Quinlan upon receipt of £35 million. Thirdly, EHGL agreed to procure that the company would pay NAMA the exit fee of £13.5 million upon the refinancing of the group. Fourthly, NAMA undertook to seek to agree with Anglo Irish Bank that the latter would consent to the sale of shares held by Mr McKillen in the company. Fifthly, EHGL agreed that it would procure that on the refinancing the company would pay NAMA's costs and legal fees incurred to date relating to the two-year extension subject to a cap of £500,000.

459. Mr Hennigan's unchallenged evidence was that these were very positive developments for NAMA and reaffirmed their view that refinancing by an external party would only be available where there was both shareholder agreement and a financially solid shareholder with majority control.

460. NAMA gave internal approval to a sale of Mr Quinlan's personal loan facilities on 22 February 2011. On the same day it received further evidence that the proposed

deal was proceeding when a request was sent to it by Anglo Irish Bank for approval to the sale of its security over part of Mr McKillen's shareholding representing 18.23% of the equity of the company. This request was regarded as important by NAMA, in particular because, while they had concerns as to whether Mr McKillen would in fact support the deal, the request had come via Mr Cunningham so it was believed to be fully supported by Mr McKillen.

461. The first indication to NAMA that the deal might not proceed was on 25 February 2011 when Mr Hennigan received a call from Mr Hennebry to say that refinancing might be about to fall through. On 1 March 2011 Mr Hennigan called Mr Faber to ascertain the position. Mr Faber confirmed that the agreement would not proceed on account of Mr McKillen's rejection of it. Mr Hennigan says that NAMA viewed this action as "*bizarre*" because a credible proposal for refinancing the company's debts had been rejected by the shareholders "*for no apparently good reason*".

462. The importance of the events of January-February 2011 for NAMA is summarised by Mr Mulcahy and Mr Hennigan in their witness statements.

463. Mr Mulcahy states:

> *"…….the BarCap Refinance did demonstrate that, contrary to Coroin's assertions in late 2010, the company did not need a two-year term to be able to raise the necessary funds for a full refinance. In fact, it had been able to raise sufficient funds in the course of less than two months. The only reason that the deal had not gone through was due to shareholder disagreement. As such, and also to focus the shareholders on the aim for finally completing the successful refinance or sale, we decided that NAMA would only offer Coroin a three-month, rather than a two-year, extension in order to keep them focused on the refinancing or other exit for NAMA."*

464. In his witness statement, Mr Hennigan says:

> *"67. NAMA saw the position differently as a result of the failed BarCap Refinance. In December 2010 NAMA had agreed in principle to a two year extension because, according to Coroin, the shareholders and directors could not arrange a full refinance without a two year window in which to do so.*
>
> *68. It was now clear, after the BarCap Refinance, that Coroin did in fact have the ability to raise the full amount for a refinance, and could do so with a maturity date of just two months. The BarCap Refinance had only failed because the shareholders could not agree personal terms, not because of the short extension.*
>
> *69. Consequently NAMA adopted a new strategy moving forwards. It would not grant a two year refinance. Instead, it would only grant short extensions, keeping Coroin aware that it needed to push hard to find a way*

> *of agreeing a refinance out of NAMA. Because of the actions of the shareholders NAMA had formed the view that it was imperative to exit Coroin at the earliest opportunity.*"

465. In early March 2011, NAMA held discussions with the Barclay interests and with representatives of Wynton with a view to agreeing a sale of Mr Quinlan's debt secured on part of his shareholding. The Barclay interests were no longer prepared, by payment of the £13.5 million fee, to match the Wynton offer but Wynton was prepared to proceed with a purchase of the debt at a price of £49.1 million which was agreed by NAMA in early April 2011. This too appeared to NAMA to be a positive sign. As Mr Mulcahy comments, "*there were clearly now two interested and well-backed parties in competition for control of Coroin.*"

466. NAMA's position became very clear in the course of March 2011. Although Mr Hennebry seems to have understood from a conversation with Mr Hennigan on 28 February 2011 that NAMA was moving towards approving a two-year extension and permitting drawdown the following week, I am satisfied that he misunderstood the position. A telephone conversation with Mr Hennigan later that evening showed that NAMA was far from agreeing any such new facility. On 3 March 2011 Mr Hennigan told Mr Hennebry that if the company wished to renew its requests for a two-year extension then it would have to make the request in writing. Mr Hennebry on behalf of the company wrote in those terms to NAMA on the same day.

467. There was at this time continuing discussion, or the prospect of continuing discussion, between the Barclay interests and Mr McKillen with a view to reviving in some form the deal which had been agreed in February 2011. Aidan Barclay and Mr Faber met Mr Hennigan and Mr Mulcahy at NAMA's offices on 2 March 2011. The main purpose of the meeting was to discuss the Barclay interests' offer for Mr Quinlan's debt but in the course of the meeting Mr Barclay and Mr Faber explained that they expected or hoped that the collapsed deal could still be revived and for that reason, at that stage, wished to there be a delay in the two-year extension.

468. On 8 March 2011, NAMA informed the company that the facility would be extended only till 21 March 2011. Mr Hennigan's evidence is that the purpose of this short extension was to enable the shareholders to revive the deal agreed in February and in particular the Barclays Bank refinance. In a letter dated 9 March 2011 to the company, NAMA made clear that any agreement at the end of 2010 for an extension to the facilities had been an agreement in principle only. In the letter NAMA made clear its position:

> "*Please note that we were assured by Coroin that the Anglo facilities would be repaid in full by no later than 28 February 2011. This did not happen. NAMA is under a statutory duty to protect the interests of the Irish State and Ireland's taxpayers in respect of loans that it has acquired under the NAMA Act 2009. If NAMA considers it necessary to make facilities to Coroin in any way conditional upon, or subject to, reaching satisfactory agreements or compromises with Coroin's shareholders then this is a matter for NAMA in the discharge of its statutory objectives. Coroin's option is to obtain third*

> *party financing and repay Anglo in accordance with the contractual terms of the various facilities agreements."*

The letter ended *"NAMA will continue to discharge its statutory obligations in such manner as it considers appropriate to protect the interests of the Irish State"*.

469. On 10 March 2011, Mr Hennebry and Mr Cunningham met Mr Hennigan and Mr Mulcahy to discuss an extension to the NAMA debt. The latter made clear that NAMA would not grant a two-year extension without shareholder consensus. They would at most consider a three-month extension to permit time for the shareholders to reach agreement. As Mr Hennebry reported to the board of the company the following day, NAMA was prepared to sell the loan as it was becoming increasingly frustrated with the situation, although it would not sell it at a discount and it appreciated the potential damage to the value of the shares over which it held security.

470. The prospect of an agreement among the shareholders led NAMA to state that it would extend the NAMA debt until 31 March 2011, as Mr Hennebry reported to the board of the company on 14 March 2011. Mr Hennebry further reported that NAMA's position "*remains unchanged in that they still seek reassurance from the shareholders on the long term solution*".

471. Agreement was not reached with Mr McKillen in the course of discussions in mid-March 2011. On 22 March 2011 the NAMA credit committee agreed to offer the company a three-month extension of the facilities. The minutes record that the reduced refinance period followed a change in the shareholders and was intended to encourage the shareholders to agree external refinance with a third-party. Mr Hennigan conveyed this decision to Mr Hennebry in a call on the same day during which he made clear that NAMA retained the ability to sell the NAMA debt. Mr Hennigan also made clear that a two-year refinance was firmly off the cards and that NAMA now expected the company to press hard for a sale or refinance within the following three months. Mr Hennigan followed this up with an email on 29 March 2011 in which he stated that "*if appropriate, any extension to the 3 month facility will be considered on the basis of Coroin's or the shareholders' progress in achieving a 3rd party refinance out of NAMA*".

472. It is in my judgment clear that by the end of March 2011 the approach of NAMA to the company's indebtedness had irrevocably changed. NAMA's primary function was to realise to the best advantage of the Irish State and taxpayer the loans which had been transferred to it. The events of February 2011 had made clear that it could realistically expect full repayment of the NAMA debt. It was clear that, if the shareholders could reach agreement, the debt could be refinanced. NAMA's assessment was that the debt could not be refinanced by a conventional senior loan facility alone. It would need a significant amount of equity injection or perhaps mezzanine finance. It considered that in order successfully to refinance the debt the company needed a financially strong equity holder and it recognised such a party in the Barclay interests. However, it was not concerned with the identity of the purchaser of the NAMA debt. It was prepared to sell to any party which could raise the funds required to purchase debt at par with accrued interest. A short extension of the debt was needed to bring pressure on what NAMA regarded as a dysfunctional

group of shareholders. It would keep the shareholders focussed on resolving matters.

473. In his cross-examination of Mr Mulcahy and Mr Hennigan, Mr Marshall sought to make the case that NAMA's decisions with regard to an extension of the debt were influenced by what was said to them by Mr Faber and Mr Barclay in the course of meetings and communications. I am satisfied that this was not the case. NAMA had every reason to refuse a lengthy extension to the NAMA debt, acting with a view to the pursuit of its statutory purposes, and in my judgment their decisions would have been the same whatever was said to them by representatives of the Barclay interests.

474. The new consolidated facilities agreement was executed on 1 April 2011, with a maturity date of 30 June 2011. The accompanying letter from NAMA to the company highlighted that "*nothing in this letter shall oblige or commit NAMA or the Finance Parties in any way to grant any extension to any Repayment Date or agree any roll-over of any Loans or to renew or refinance any Loans and any such decisions shall be for NAMA to make in its absolute and sole discretion*".

475. As it appeared to NAMA, and indeed was the case, nothing was achieved during the three-month extension to 30 June 2011 which would bring closer a refinancing of the NAMA debt. Negotiations between the Barclay interests and Mr McKillen came to an end in June 2011 without acceptable terms being agreed. Although in its letter dated 16 June 2011 to NAMA, requesting a further three-month extension, the company wrote that every effort continued to be made to achieve the primary objective of refinancing the NAMA debt and that the company was confident that a refinancing could take place in the near term, there was in truth little basis for this.

476. On 8 July 2011 NAMA agreed to grant a three-month extension, expiring on 30 September 2011. By then, there had been a further significant development in NAMA's approach to dealing with this debt. As an alternative to a repayment of the debt, NAMA now started to give serious consideration to a sale of the debt. It had previously been inhibited in this respect by its continuing interest in the equity of the company, which might be damaged by a sale of the debt. As well as its security over part of Mr Quinlan's shareholding, it had a potential interest if it sought a transfer of bank loans to Mr McKillen secured on his shareholding. However, in April 2011, NAMA had sold the Quinlan debt to Wynton and on 6 July 2011 the board of NAMA resolved not to acquire Mr McKillen's debts. Its sole interest was therefore in the speedy realisation of the debt due from the company. Mr McKillen accepted in cross-examination that he appreciated that this was the case. The NAMA board paper supporting the recommendation for board approval to the extension of the company's facility to 30 September 2011 stated as follows:

> "*Coroin is the holding company for the Maybourne Hotel Group. NAMA previously provided a 3 month facility extension to encourage the shareholders to refinance the debt. The shareholders of Coroin have requested another 3 month extension to 30th September to allow sufficient time to identify an alternative lender, noting that trading performance is satisfactory.*

> *NAMA PM is uncertain as to the ability of the shareholders to secure alternate financing in light of the current shareholding structure therefore NAMA PM will consider alternative exit strategy during the extension period."*

477. In July 2011 NAMA took active steps to pursue a sale of the company's debt. It contacted Wynton's lawyers who responded that it was still interested in a purchase of the debt. On 28 July 2011, the board of NAMA approved a sale of the NAMA debt at par, without specifying any purchaser. At a meeting on 4 August 2011, Mr Hennigan told Mr Hennebry that NAMA had opened discussions with a view to a sale of debt and that NAMA might well sell the debt in the near future. In addition to discussions with Wynton, NAMA engaged in discussions with a view to a possible sale of the NAMA debt to the Barclay interests. These started with a call from Mr Peters on 9 August 2011.

478. There was no room for the company or its directors and shareholders to misunderstand NAMA's position, nor in fact did they do so. In a letter dated 10 August 2011, rejecting a proposal which had been put by the company to NAMA, Mr Hennigan made clear that the only proposal NAMA would consider was full repayment of the debt plus accrued interest. He added:

> *"I also wish to take this opportunity to state that I can give no guarantee or expectation that NAMA will agree to extend the facilities beyond the 30 September 2011 maturity date"*.

This letter was discussed in a conference call of the directors of the company on 15 August 2011 and they well understood that NAMA might seek to sell the debt, so much so that there was a proposal for a letter to be written to NAMA asking whether NAMA was in discussion with any parties with a view to a sale of the debt.

479. Mr McKillen's evidence was that he was aware of rumours that NAMA might be in discussions with possible purchasers of the debt. He emailed NAMA on 26 August 2011 to say that he was alarmed by the statement in Mr Hennigan's letter of 10 August 2011 quoted above and he sought confirmation that NAMA was not in negotiations with any third party with a view to a sale of the debt. Mr Mulcahy made NAMA's position abundantly clear in his reply to Mr McKillen sent on 29 August 2011:

> *"NAMA's objective is to achieve full repayment of par debt as soon as is practicable. The company and shareholders are well aware of our objective and we note that the company has been in refinancing talks for close to 2 years now without success. As you recall no doubt we facilitated a restructuring of the Knightsbridge loan into the company this year to assist and enhance the ability to achieve refinancing by the company.*
>
> *In our view the 3 month extensions is not the real issue, as we understood that refinancing by the company was very close earlier this year only to be thwarted at the last minute by a disagreement amongst the shareholders over certain issues.*

> *NAMA reserves its rights to achieve its objective of achieving full par debt repayment by any means available to it. We would welcome any near term firm proposals by the company to achieve full par debt repayment as soon as possible."*

480. The company was no more able in the period from July to September 2011 to put forward proposals which NAMA would regard as remotely satisfactory than it had been in the preceding three months. All that NAMA received in July was a letter dated 18 July 2011 stating:

> *"We remain committed to exploring all available options to enable us to refinance the existing facilities. Indeed, Coroin and its shareholders are actively engaged in discussions with several banks which it is hoped would lead to a refinance before the end of September."*

NAMA was hardly likely to be impressed by generalised statements of this sort, nor was it.

481. On 5 August 2011 Mr Hennebry wrote to Mr Hennigan with the proposal that there should be a refinancing on the basis that 75% of the NAMA debt would be repaid out of a new senior facility and that NAMA would accept a junior position with respect to the balance of 25%. Leaving aside the fact that the company was nowhere near arranging the finance for this proposal, it was from NAMA's point of view a wholly unrealistic suggestion. NAMA's interest, as it had made clear on many occasions, was the repayment in full of the existing indebtedness as soon as possible. Not only was the suggestion of taking a deferred position in respect of 25% of its debt intrinsically unattractive, when all parties are agreed that an enforcement of the security would be likely to result in full repayment of the debt, but the interest offered on the junior debt was at a rate (3.75% over LIBOR) lower than the rate under the existing senior debt and significantly lower than market rates for comparable mezzanine finance.

482. The company's next move was to write to NAMA on 9 September 2011, requesting an extension of the maturity date to 31 January 2012 at the earliest. The letter stated:

> *"Refinancing the company's loans away from NAMA remains the priority and every effort continues to be made to achieve this objective. With stronger trading results which underpin the property values and which provide improved interest cover, the company is confident that a refinancing can take place in the near term. We are engaging with an investment bank to assist in this process and their view is that a refinancing transaction would be viewed positively by the real estate debt market.*
>
> *It has also become clearly evident over the last couple of months that the quarterly debt maturity deadline is counterproductive in our efforts to refinance the debt. A longer maturity date of one year would remove this avoidable*

> *uncertainty and allow the company to focus on refinancing. I would welcome your thoughts on this matter*."

This letter showed that the company was in truth no further forward than it had been when it wrote, in strikingly similar terms, to NAMA on 8 July 2011. In fact, it appeared the position was worse. The letter indicated that it might take at least a year to achieve a refinancing and its reference to "*engaging with an investment bank*" indicated that company was not yet in discussions with any potential sources of finance.

483. NAMA's reply dated 13 September 2011 made clear its scepticism at the contents of the company's letter. Mr Hennigan wrote:

> *"I am not clear what evidence you have that quarterly debt maturity deadlines are counterproductive to your efforts in achieving a refinance of existing facilities. Perhaps you would like to elaborate in concrete terms how a change in the maturity date would have the desired effect of achieving a refinance?"*

The letter ended with the now familiar statement that it was NAMA's wish that "*this loan be repaid in full at the earliest opportunity*". The inability of the company to provide the concrete evidence requested by NAMA was exposed by its reply dated 16 September 2011. Referring again to the company's discussions with a leading international investment bank, it stated *"initial indications have been very positive and we have another meeting with them scheduled for early next week"*. It goes on to state that they planned to provide examples from their own experience to date together with the additional insight of the investment bank on how a longer maturity date would facilitate the refinancing process. The company was unable to provide anything of more substance in its letter dated 26 September 2011, requesting a further extension.

484. On 23 September 2011 Mr Hennigan, supported by NAMA's credit and risk department, recommended to the credit committee that any loan extension should be rejected "*to encourage the company or the shareholders to refinance the debt out of NAMA*". This was stated to be in line with its approved strategy. On the same day the Barclay interests had made a new offer to NAMA to purchase the NAMA debt at par plus accrued interest, thus fulfilling NAMA's requirements. Mr Hennigan's evidence, which I accept, is that even if this offer had not been received his recommendation would have been the same given the lack of any progress on the company's part with a refinancing of the debt.

485. As detailed in the chronological section, discussions had continued in August and September between NAMA and Wynton and the Barclay interests as possible purchasers of the NAMA debt. In mid-September 2011 the Barclay interests reached agreement with Wynton and the interested Abu Dhabi parties, so that thereafter the Barclay interests appear to have been the only prospective purchasers of the debt.

486. In my judgment, it is very clear that by August and September 2011, there was no prospect whatsoever of NAMA agreeing to an extension to the facilities by one

year, let alone two years. There was simply no way in which any party could persuade NAMA to agree to an extension to the debt without concrete evidence that a full refinancing would be forthcoming in the very near future. Mr McKillen's belief that NAMA could be persuaded to agree a further extension does not bear examination. His evidence, if accepted, on the company's dealings with NAMA in this period suggests that he did not have a grasp on the realities of the situation. His views that the proposal made in early August 2011 involving NAMA taking a junior position in respect of 25% of its debt was *"a brilliant idea"* and that NAMA's letter dated 13 September 2011 should be "*seen as positive*" were fanciful.

Alleged breaches of duty by directors

487. Leaving aside the pre-emption issues, the principal basis for Mr McKillen's case of unfairly prejudicial conduct of the affairs of the company rests on allegations that the directors appointed by the Barclay interests acted in a number of respects in breach of their duties as directors.

488. The duties of directors are now largely codified in sections 170 to 177 of the Companies Act 2006 but they reflect the fiduciary and other duties of directors long established at law and in equity. The duties are owed to the company: section 170(1). The duties most relevant to the present proceedings are as follows. Under section 172(1), a director "*must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole*" and in doing so he must have regard, amongst other matters, to the factors set out in sub paragraphs (a) to (f). Section 173(1) requires a director to exercise independent judgment. Section 174(1) requires a director to exercise reasonable care, skill and diligence. Under section 175(1) a director "*must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.*" A conflict of interest includes a conflict of duties: Section 175(7). By section 177(1), if a director is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

489. The directors in question are Mr Faber, Mr Seal and Mr Mowatt. They were appointed as directors on the following dates: Mr Faber on 21 January 2011, Mr Seal on 23 March 2011 and Mr Mowatt on 16 May 2011. Mr Faber ceased to be a director on 11 October 2011, but the other two remain directors. They were all appointed by the exercise of powers attached to shares registered in the names of companies comprising the Barclay interests.

490. Most of the alleged breaches occurred in the period July to September 2011 although there is a breach alleged against Mr Faber at the end of January 2011. An allegation that they had been in breach of duty by blocking redevelopment plans for Claridge's and The Berkeley was abandoned in Mr McKillen's closing submissions. I shall deal with each of the alleged breaches in their chronological order.

Closure of the data room

491. This is an allegation against Mr Faber. Mr Seal and Mr Mowatt had no involvement in it. The events complained of occurred in late January and early February 2011.

They should be seen in the context of the other events at this time which I have set out in the chronological section of this judgment. I shall first set out the sequence of events directly relevant to this issue.

492. In the course of 2010 the company established an electronic data room to contain confidential information relating to the company, its operations and its financial position. The purpose was to provide information to Northwood as a proposed investor and Deutsche Bank as the lead for a new banking syndicate. When the Northwood deal fell through in November 2010, the data room was closed. With new approaches and discussions with third party purchasers and investors in early January 2011, there was renewed interest in the data room. It appears that at some point in January 2011 Credit Suisse acting on behalf of the Qataris was told that it would have access to the data room. In addition Mr Buchanan on behalf of the Green family was concerned that Wynton should also have access to it. On 10 January 2011 Wynton executed a non-disclosure agreement as a pre-condition to access. There is however no evidence that either Credit Suisse or the Qataris or Wynton in fact accessed the data room in January 2011.

493. Mr Faber attended his first board meeting on 25 January 2011, when there was no reference either to any proposed sale of shares in the company or to the existence of or access to a data room. On 27 January 2011, Mr Hennebry sent an email to the directors in which he referred to the negotiations then taking place with NAMA with a view to an extension to its facilities. He continued in the email as follows:

> *"Separately and in parallel to the Nama process, DLA are in the process of putting the finishing touches to a "draft" sale & purchase agreement which will be sent to the lawyers acting for the potential acquirors who continue to show an active interest in acquiring the company which it is hoped will, amongst other things, give the board opportunities to explore the terms on which potential bidders may be willing to conclude a transaction and finance any such acquisition and the impact on the group of such financing arrangements going forward (which is obviously very important from the company's standpoint). In connection with these processes DLA are continuing to populate the data room, update their draft vendor legal dd report and respond to material due diligence enquiries to the extent they are able to do so".*

494. Mr Faber promptly called Mr Hennebry and then emailed a letter to him, stating:

> *"As I mentioned, I was extremely surprised by the last paragraph of the email in which you detailed the action DLA is taking purportedly on behalf of Coroin in connection with the sale of the company and the provision of information (potentially of a confidential nature) to third parties.*
>
> *This is a key matter for Coroin and, given the importance of such potential steps, these actions must be viewed and discussed by the board. Further action must not be taken without the board's authority".*

He confirmed their earlier conversation in which Mr Hennebry had agreed that work on any sale documentation would cease and he would not send documentation to any third parties. He would inform all members of the board in detail of the steps taken to date in relation to any purported sale, including details of any information which had been made available to third parties. Mr Hennebry did not in fact provide details of any information which had been made available to third parties, so it is a reasonable inference that no such information had been provided. Mr Faber continued in his letter to say that he was instructing the secretary to convene a board meeting by no later than noon on 31 January 2011 to enable the board to consider and review the position. The instruction was subject to the receipt of agreement by directors holding between them at least 100 votes, as required by the shareholders agreement for a meeting to be held on short notice.

495. I do not doubt that Mr Faber was extremely surprised to read the last paragraph of Mr Hennebry's email. The preparation and distribution to lawyers acting for potential purchasers of a draft sale and purchase agreement relating to the shares in the company is necessarily an act on behalf of the shareholders of the company. It requires the support of the shareholders. Whatever the position of the Green family, once the Barclay interests had acquired Misland, there could be no assumption that Misland remained interested in a sale of its shares. On the contrary, there was every reason to suppose that the Barclay interests were not interested in selling shares but in buying them.

496. Mr Faber gave evidence that he had not been aware before Mr Hennebry's email that there was a data room. In an email sent to him on 16 January 2011 Mr Murphy had referred to getting access for the Barclay brothers to the company data room and the need for a non-disclosure agreement. Mr Faber had given Mr Murphy the following day an address for a non-disclosure agreement. Whether or not Mr Faber had that exchange in mind when he spoke to Mr Hennebry following receipt of Mr Hennebry's email on 27 January 2011, I find it entirely plausible that he may not have done, he had no reason to believe that a draft sale and purchase agreement was being prepared or that other potential purchasers were being given access to the data room.

497. Mr Faber's request for a board meeting to be held on short notice was followed 17 minutes later by an email of support from Mr Murphy. The combination of the votes capable of being cast by Mr Faber and Mr Quinlan or by Mr Murphy as his alternate exceeded the 100 votes required for the meeting to be called on short notice. Accordingly, on 28 January 2011, Ms Walker gave notice of the meeting to be held at 11.00am on 31 January 2011.

498. Mr McKillen emailed the other directors objecting to the meeting convened for 31 January 2011 and saying that in any case that he would not be in London on that date due to commitments which he could not change at short notice. He said that "*as a gesture of goodwill I am prepared to attend a meeting on 8 February to facilitate an early discussion of the matters raised*". He also said that the provision of information had been discussed with and approved by all of the shareholders and directors including Misland and its nominee and its appointee on the board and as such he failed to see how a further discussion could reasonably and in good faith be considered as sufficiently urgent to justify a meeting at such short notice. Mr McKillen's evidence demonstrated that he was at least in part motivated in his reply by a desire to show that he would not be pushed around by the new owners of Misland.

499. Mr Faber responded that he would accept a delay in the meeting until 8 February 2011 as requested by Mr McKillen, conditional upon no further steps being taken by the company or its advisers in connection with any offer for the company or its assets and of no further data room access being provided to third parties pending a proper discussion at the meeting on 8 February 2011. The following day Mr McKillen agreed to the conditions specified in Mr Faber's letter.

500. In an email dated 31 January 2011 DLA raised concerns as regards to the closure of the data room: *"that was made operational last week to which advisors to a prospective bidder currently had access"*. The advisers in question were Credit Suisse. Their concern was that closing the data room, as opposed to not posting additional information to it, could be seen as closing off a process with a party at a time when the company should, technically, be considering all options open to it in light of its refinancing position.

501. The board meeting was held on 8 February 2011. The minutes of the meeting record;

> *"With the NAMA refinance now imminent, the meeting agreed that the company would not engage with any third parties until such time as the refinancing was complete. This would provide a solid balance sheet and remove the perception of distress that surrounds the Company…… It was agreed that the data room would remain closed"*.

There was some difference in the evidence as to whether a vote was taken on this issue, with Mr McKillen voting against the continued closure of the data room. I find that no vote was taken but that Mr McKillen did register his objections to the closure of the room. Mr Faber's evidence was that Mr McKillen's concern appeared to be that he had been embarrassed in his dealings with the Qataris by this decision. I am satisfied that Mr McKillen went somewhat further than that.

502. On the basis of these largely undisputed facts, the petition alleges that the decision to close the data room and Mr Faber's insistence on its closure before the meeting on 8 February 2011 was a breach of fiduciary duty on the part of Mr Faber and Mr Quinlan. Somewhat surprisingly, notwithstanding that Mr McKillen had known all the material facts since the time at which they occurred, this allegation did not feature in the petition as presented or as amended in early February 2012 but was brought in as one of a number of amendments made shortly before the start of the trial.

503. It is alleged in the petition that the decision to close the data room and Mr Faber's insistence on its closure prior to the meeting:

> *"i. was not in the interests of the Company, as it would reduce the prospects of the Company being able to obtain financing from third parties (as part of an acquisition of or investment in shares in the Company or at all) at a time when the Company's facilities with NAMA were due to expire on 31 January 2011 and an extension had not yet been agreed, and further*

> ii. *was calculated to advance the sectional interests of the Barclay Brothers, and accordingly motivated by a collateral purpose rather than being actions considered most likely to promote the success of the company for the benefit of its members as a whole."*

504. The short answer to this allegation, as an instance of conduct which was unfairly prejudicial to Mr McKillen as a member of the company or indeed to any claim for relief for breach of fiduciary duty, is that the closure of the data room caused no loss or prejudice at all. No potential purchaser or finance provider was put off by its closure. The Qataris were content to enter into agreements with the Barclay brothers on 2 February 2011 and with Mr McKillen on 3 February 2011, without any access to the data room. Equally they were prepared to enter into the tri-partite agreement on 12 February 2011 without any such access. The closure of the data room did not prevent Wynton from making an offer to the shareholders on 7 February 2011.

505. Nor was there any damage to the company in its dealings with NAMA. It is true that NAMA was initially concerned when it learnt that the data room had been closed: "*They've gone nuts that we closed the data room*" as Mr Faber described it in an internal email but it did not in fact prevent NAMA from agreeing a short extension of the facilities and from thereafter dealing with the company first in the light of the tri-partite agreement reached with the Qataris and then subsequently. It is quite impossible to conclude that events in relation to NAMA would have been any different at all if the data room had remained opened. Their concerns stemmed from the fact that Credit Suisse as advisers to the Qataris did not have access to the data room with the result, as they initially saw it, that it would affect the prospects of a deal of the Qataris. But, as is clear, that was not the case and NAMA had no further grounds for concern once agreement was reached with the Qataris.

506. As regards Mr Faber's motivation for seeking the closure of the data room, it was not in my judgment improper or a breach of duty on his part to seek its closure. This must be seen in the context of, first, the circumstances in which the data room was initially established and, secondly, the change in those circumstances brought about by the purchase of Misland by the Barclay interests. The data room was originally established in circumstances where all the shareholders accepted the need for new capital in order to refinance the company but none of them was prepared to provide it. All the shareholders, with the exception of Mr McKillen, wished to sell their shares. In drafting a share purchase agreement and in making information available in a data room, the company was facilitating the injection of new capital by a third party and the sale of shares of existing shareholders. The circumstances were substantially altered by the purchase of Misland by the Barclay interests. Misland did not wish to sell its shares, and was clearly interested in buying the shares of other shareholders. Moreover, it was prepared and in a position to provide the further capital required by the company. A third party offer for the shares of the company was no longer feasible if it did not have the support of the Barclays interests, because they would refuse it. The data room was no longer relevant, as events showed. In those circumstances, Mr Faber was not, in my judgment, acting wrongfully in seeking the closure of the data room. Nor can Mr McKillen complain about the closure of the data room pending the meeting held, for his convenience, on 8 February 2011 because he agreed to its closure during that period.

JLL Valuation

507. It is alleged that Mr Faber acted in breach of his duties as a director by taking steps to obtain a valuation of the company's hotels from Jones Lang LaSalle (JLL) in July 2011.

508. The relevant facts are as follows. As appears from the chronological section, from mid-June 2011 Mr Peters on behalf of the Barclay interests was negotiating with HSBC and with Barclays Bank with a view to agreeing a facility to enable the Barclay interests to purchase or refinance the NAMA debt. By 8 July 2011 the discussions with HSBC had got to the point where a draft term sheet from HSBC was imminent. It would appear that HSBC wanted to see an up-to-date valuation of the group's hotels and properties, because on that day Mr Peters emailed HSBC to ask:

> *"Assuming that HSBC want to undertake the transaction with us, and receive the necessary internal approvals, would you please confirm that if we got JLL to update their valuations from May 2010 that would suffice for your purposes?"*

509. JLL had produced a valuation of the company's hotels in May 2010 for the purposes of discussions then taking place between the company and Deutsche Bank for a new facility. On 8 July 2011, Mr Faber emailed JLL, saying: "*We are currently keen to engage JLL to refresh the valuation of Maybourne Hotel group from last June*". The coincidence of timing, combined with Mr Peters' evidence that obtaining the valuation is something that Mr Faber would have dealt with, makes it highly probable that Mr Faber's approach to JLL was prompted by the need to obtain a valuation for the purposes of negotiations with HSBC, and I so find. Mr Faber's email to JLL would give the impression that the valuation was being sought by the Barclay interests. In the course of their subsequent exchanges, however, it became clear that Mr Faber envisaged that the company would be the client and would pay for the valuation. JLL made clear that they would wish to re-inspect the hotels and Mr Faber arranged this with Mr Alden, with visits to The Connaught and The Berkeley taking place on 21 July 2011. Mr Hennebry was kept informed of these visits.

510. On or about 20 July 2011 Mr McKillen discovered that Mr Faber had taken steps to instruct JLL and that they were inspecting the hotels. He called Mr Faber in the evening of 20 July 2011 and, in an email sent two days later, Mr Cunningham confirmed that Mr McKillen was "*absolutely outraged*" that these steps had been taken without consultation. The email made clear that Mr McKillen wanted to be fully involved in the valuation process. JLL met Mr McKillen on 27 July 2011 to discuss in particular any proposed changes to the development proposals for the hotels. At a board meeting on 11 October 2011 attended by Mr Cunningham as Mr McKillen's alternative, as well as by Mr Seal, Mr Mowatt and Mr Alden, it was unanimously resolved to obtain an up-to-date valuation from JLL. JLL was willing to provide the draft valuation provided their fee was paid. Their agreed fee of £112,500 was paid, with the specific approval of Mr Cunningham.

511. It is alleged in the petition that Mr Faber liaised with and directed the appointment of JLL purportedly on behalf of the company without authority and, "*principally or at least in part for the benefit and use of the Barclay brothers and their interests*". The petition invites the inferences that, first, "a *purpose for instructing to JLL to*

value the company was in order that the valuation could be provided to Barclays Bank to satisfy the condition imposed on planned provisions of funding to MFL" and secondly "a *purpose of instructing JLL to value the Company was in order that the valuation could be used by MFL in the planned appropriation of assets*". The planned appropriation of assets alleged in the petition would occur following a purchase of the NAMA debt and a foreclosure.

512. In my judgment, the evidence supports neither of these inferences. The evidence does suggest, and I find, that Mr Faber's initial instructions to JLL were for the purpose of providing a valuation which could be used by the Barclay interests in negotiations with HSBC. In fact, however, this is not how matters proceeded. No valuation by JLL was used by the Barclay interests in their discussions with HSBC nor is there any evidence that any such valuation was used in their discussions with Barclays Bank. Instead the company was quickly identified as the client and JLL's work for the production of the valuation was undertaken with the full co-operation of Mr Hennebry, Mr Alden and Mr McKillen. Mr McKillen was clearly angry that JLL had been instructed without consultation with him but he nonetheless co-operated with them. No fee for the valuation was paid by the company until the board unanimously resolved to do so on 11 October 2011. The valuation was then provided to the company, for its own purposes.

513. In my judgment, these events disclose no breach of duty on the part of Mr Faber, nor, importantly, any loss to the company or any prejudice to Mr McKillen or any other shareholder in the company.

514. It was Mr Faber's evidence, and this would seem to be plainly correct that the Barclay interests would not be in a position to use a valuation obtained by and addressed to the company. If the Barclay interests wished to rely on a valuation, they would have to obtain their own. It is true that in his memorandum dated 1 August to Sir David Barclay, Mr Faber referred to the headline figures as appearing in the draft JLL valuation. Whether those figures had been provided orally or in writing by JLL does not appear from the evidence. This, however, is the only evidence of any use being made of the JLL valuation for any purposes other than those directly of the company. As for the allegation that a purpose of the valuation was for use by the Barclay interests in the event of a foreclosure, Mr Faber makes clear in his memorandum that following a foreclosure the lender would have to select its own valuer. It is significant that Mr Peters never saw the valuation.

515. It cannot be denied that, objectively speaking, it was in the interests of the company to obtain an up-to-date valuation of its properties, even though it was highly unlikely that the company would be able to procure refinancing without agreement amongst its shareholders. If such agreement could be reached, then the company would need to move quickly to co-operate in obtaining funding for the purpose of refinancing the NAMA debt. It made obvious sense that any valuation should be prepared by JLL, given their previous experience.

Draft Letter to NAMA

516. Mr McKillen alleges that Mr Seal was in breach of his duties as a director in interfering with the contents of a letter to be sent on behalf of the company to NAMA.

517. On 10 August 2011 NAMA had written to the company, rejecting its proposal for refinancing the NAMA debt contained in the company's letter dated 5 August 2011. A board meeting was held by telephone on 15 August 2011 to discuss the company's response to NAMA's rejection. Mr Hennebry, Mr Cunningham, Mr Seal, Mr Mowatt and Mr Faber, who was then in Abu Dhabi, participated in the call. No note or minute was taken of the discussion but in an email sent just after the call by Mr Alden to Ms Walker, Mr Alden reported "*discussed blunt response from NAMA re our proposal to refinance with their help. Also concerning that they refer to no obligation to roll over debt. Toby will be drafting a note to NAMA asking about whether they are attempting to sell the debt as there is a provision in the facilities agreement for them to consult with the company if they are*". It was agreed that Mr Hennebry would circulate the proposed draft letter among the directors for their comment. Mr Hennebry circulated the draft on the following day. After expressing in the first paragraph the company's disappointment that the previously proposed refinancing route had been rejected, the draft letter continued:

> *"In reference to the possibility that NAMA may be considering selling the company's loan to another bank, financial institution etc the company expects that notification and consultation as required under the facilities agreement would commence at least four weeks prior to any such transfer or assignment in order for the company to have adequate time to consider it. In addition, please can you confirm if NAMA is currently in discussion with any party at this time regarding its loan to the company".*

518. There were email exchanges between Mr Seal, Mr Mowatt and Mr Faber regarding the wording of this draft letter to which I shall refer in a little more detail. The upshot was that Mr Seal responded to Mr Hennebry suggesting that in effect the second paragraph should be excluded. Mr Hennebry took the view that there was little or no point in sending a letter which did no more than express the company's disappointment, although Mr Seal's view was that it was important to have a response on record. In any event Mr Hennebry did not send a response. When Mr Cunningham discovered this, he raised his concerns that a letter along the lines agreed, as he saw it, during the conference call on the 15 August 2011 had not been sent. In the end Mr McKillen wrote a letter to NAMA making the points included in Mr Hennebry's draft letter and received an abrupt response.

519. It is alleged in the petition that it is to be inferred that Mr Seal sought to delay the company from contacting NAMA or setting out the company's entitlement as regards consultation on the sale of the NAMA debt "*as he was aware that NAMA was in discussions with*" the Barclay interests. It is further alleged that "*in this regard Mr Seal was in a position of conflict and preferred his duty to or interest in Ellerman Investments and the Barclay interests to his duty to the company, in breach of his duties to the company"*. Consistent with this allegation, it is alleged in the closing submissions for Mr McKillen that Mr Seal was seeking to ensure that NAMA did not inform the company that the Barclay interests were in discussions with NAMA for the purchase of the NAMA debt.

520. This allegation requires a careful consideration of the emails sent in the days following the circulation of Mr Hennebry's draft. Throughout much of this period Mr Faber was in Abu Dhabi and, although he was able to participate in the

521. In the light of this Mr Hennebry saw little point in sending a letter to NAMA at all and this prompted Mr Cunningham to ask why no letter had been sent. In that context, Mr Seal emailed Mr Hennebry on 21 August 2011, saying "*it was indeed only after seeing the draft letter prepared by DLA that I thought it inadvisable to include reference to the NAMA debt. Agreeing to review a draft is not of itself agreement to send the letter. Being cognisant of the fact that a letter was to be sent I thought it best just to include the reference to the our [sic] disappointment in their decision not to consider an extension beyond the end of September and to reject the mezzanine proposal. If you recall it was you who told me that if that was all that was to be said that it was best not to send the letter at all. That was your decision and not mine. I would ask you to make that perfectly clear to Liam*".

522. In his witness statement, Mr Mowatt says in relation to the draft letter circulated by Mr Hennebry that he thought demanding four weeks' notice from NAMA of any assignment of the loan was unrealistic and "*had the potential negatively to affect negotiations between Coroin and NAMA*". He further says that he believed that it was futile to ask who NAMA were negotiating with. In his witness statement Mr Seal says that he regarded the inclusion of the request for information with regard to negotiations and for a four week consultation period as inappropriate. He states that NAMA was under no obligation to comply with these requests and would simply reject them. He continues "*I was concerned that the inclusion of these matters in a letter would present Coroin in an uncommercial light and might have a detrimental impact in the context of the important and delicate negotiations between Coroin and NAMA regarding the possibility of extending Coroin's loan facility*".

523. Looked at objectively, it would in my judgment be reasonable for Mr Seal and Mr Mowatt to form these views. The company had already put to NAMA a refinancing proposal which the directors appointed by the Barclay interests regarded as so

unattractive commercially to NAMA as to be bound to be rejected. NAMA was clearly not required to answer the questions which Mr Hennebry proposed should be asked and it could be thought unlikely that they would answer them. Making such a request was unlikely to advance negotiations between the company and NAMA. The concerns expressed by Mr Seal and Mr Mowatt in their witness statements were borne out by the very short response of NAMA when Mr McKillen himself raised these questions with them.

524. At the same time, it must be acknowledged that MFL had made an approach to NAMA on 9 August 2011 with a view to a possible purchase of the NAMA debt and had chosen not to disclose the approach to the company. They would therefore have an interest in preventing the company from asking the question which might elicit that very information.

525. In deciding whether Mr Seal was motivated by a desire to conceal the Barclay interests' negotiations with NAMA or, alternatively, by a view that this was an unwise letter for the company to send to NAMA at this time, there are two striking points. First, there is internal email communication between Mr Seal, Mr Mowatt and Mr Faber and in none of those emails is there any indication that the letter should be amended with a view to preventing disclosure of the Barclay interests' discussions with NAMA. On the contrary, Mr Seal emailed on receipt of the first draft of the letter on 16 August 2011: "*It seems a nonsense to write to NAMA in terms as suggested*". Secondly, Mr Mowatt was involved in the discussions about the terms of the letter and indeed talked directly to Mr Hennebry about the draft letter. Mr Mowatt's evidence that he believed it to be futile to ask NAMA who they were negotiating with was not challenged. Thirdly, the oral offer made by Mr Peters to NAMA on 9 August 2011 was rejected by NAMA the following day. No further offer or approach was made until the written offer on 7 September 2011. Mr Hennebry's draft letter was not prepared at a time of continuing communication between MFL and NAMA.

526. I accept the evidence of Mr Seal and find that in proposing amendments to the draft letter, he was not motivated by a desire to conceal the discussions taking place between the Barclay interests and NAMA.

527. If a letter had been sent to NAMA, asking whether it was in negotiation for a sale of the debt and, if so, with whom, it is clear from its response to Mr McKillen's letter that NAMA would not have answered it. Even if it had said that it was in discussions with MFL, the company would not, for reasons later given, have been able to change the course of events. The company and its members suffered no loss or prejudice.

Dismissal of Mr Hennebry

528. On 9 September 2011 Mr Hennebry's consultancy contract with the company was terminated. The decision was taken by Mr Faber, Mr Seal, Mr Mowatt and Mr Alden. The petition alleges that the decision was taken without good reason and without any reference to the board or attempt to convene a board meeting and during a crucial period of negotiation between the company and NAMA. It is alleged that the decision was not taken in the best interests of the company. As Mr Hennebry acted as a liaison officer between the company and its shareholders, it is

alleged that the shareholders had a legitimate expectation that they would all first be consulted before he was dismissed. The petition alleges that the decision to dismiss Mr Hennebry was intended to exclude Mr McKillen and obstruct his involvement in the company.

529. In his witness statement Mr Hennebry described his role between May 2004 and September 2011 as "*the asset manager and shareholder representative*" for the company. From 2004 until early 2010 he was employed by Mr Quinlan's asset management companies. The role of asset manager was, he describes in his witness statement, to be responsible to the shareholders for management of the hotels, dealing with many aspects of the business including ownership and real estate aspects, annual budgets and capital expenditure plans. As shareholder representative, he attended company board meetings and his role was to liaise between the company and its shareholders. In 2008, the vice-president of finance of the company left and was not replaced. Some of his responsibilities were taken up by Ms Walker and a financial controller, but, Mr Hennebry explains in his witness statement, in view of his background in finance and accounting, he took on more aspects of a chief financial officer's role.

530. In early 2010 Mr Hennebry established his own advisory firm, Cadence Advisory Limited, which contracted with the company for the provision of his services. Under the terms of the consultancy contract, Mr Hennebry's company was paid a fee of over £20,000 per month and a bonus of £200,000 was paid in March 2011. The services provided under the consultancy agreement were set out in the schedule to the agreement and they are stated to be "*to act as the representative for the Company's shareholders and in this respect provide, as requested, financial and asset management consultancy services to the Company and any other Group companies*". A number of specific matters are then set out including budget review, leases, banking and legal matters, general corporate matters and business development. Paragraph 2 of the schedule stated that the consultant will report to the shareholders as required.

531. The idea of terminating Mr Hennebry's contract appears first to have surfaced on 17 August 2011 in an email from Mr Faber to Mr Seal and Mr Mowatt. The email chain concerned a proposal to pay some intra-group dividends. There was some frustration at this time amongst those directors as regards this and one or two other issues. In the email sent by Mr Faber he says *"We should think about changing DLA and Mark* [Hennebry] *in the coming days. Will make our lives considerably easier"*. It next surfaced in a text sent by Sir David Barclay to Mr Faber. The time and date of the text is unknown but it was during the period when consideration was being given to engage Goldman Sachs to advise the company. The text reads *"Agreed. Its better we run the Goldman process and fire Hennebry. That way u can brief them. Also we don't have to appoint Goldman. We can appoint anyone"*.

532. The decision to terminate Mr Hennebry's contract was taken at a meeting on 8 September 2011 attended by Mr Faber, Mr Seal, Mr Mowatt and Mr Alden. Mr Alden was asked whether the company needed Mr Hennebry's services and whether it would cause the company any difficulties if his contract was terminated. Mr Faber, Mr Seal and Mr Mowatt are unanimous in their evidence that Mr Alden was clear that Mr Hennebry was not needed by the company. Mr Faber's evidence is that Mr Alden said *"It was beyond him what Mr Hennebry was supposed to be doing*

and he and the office had little or no involvement with him". According to Mr Mowatt, Mr Alden's opinion was that Mr Hennebry was surplus to requirements and had no real role in the business.

533. So far as Mr Hennebry's role as shareholder representative was concerned, the view of Mr Faber, Mr Seal and Mr Mowatt was that it had become redundant. The role may well have had some real content at a time when the shareholders were a disparate group, some of whom played little or no part in the management of the business. With the sale of Misland to the Barclay interests and the sale by Mr McLaughlin of his shares, the situation had changed. Neither Mr McKillen nor the Barclay interests, nor Mr Quinlan for that matter, needed Mr Hennebry to act as their representative in dealings with the company. They were all well capable of direct involvement with the company's affairs.

534. As regards the services provided directly to the company, Mr McKillen stresses in particular his role in representing the company in its dealings with NAMA. For reasons which were for the most part outside the control of Mr Hennebry, it was the view of Mr Faber and the others that Mr Hennebry was unable to make any impact in this role. Mr Hennebry was unable to make any headway in raising outside finance while the disagreement between the shareholders continued. In the absence of firm proposals to refinance the debt, he was not in a position to achieve anything of substance for the company in its dealings with NAMA, which by now was not interested in any long term extension to the debt.

535. Looked at objectively, it was in my judgment a view which a director could reasonably come to that the expense of continuing to engage Mr Hennebry was no longer justified. Mr Mowatt gave direct and impressive evidence as to his thinking on this topic. He made clear that he was principally swayed by the views of Mr Alden. I am satisfied that he voted in favour of the termination of Mr Hennebry's contract only because he was persuaded by what Mr Alden said that there was no point in its continuation.

536. It is not clear to me how the sectional interests of the Barclay interests were particularly advanced by the removal of Mr Hennebry. They were able to pursue their negotiation with NAMA and a variety of other third parties for a long period before 9 September 2011 without Mr Hennebry's position causing any difficulties. If one then examines the course of events following 9 September it is difficult to see that Mr Hennebry's removal made any difference.

537. While Mr Faber accepts that he perceived Mr Hennebry to be in some degree in Mr McKillen's camp, and felt no doubt that it would be convenient if Mr Hennebry was no longer involved, I am satisfied that there were grounds on which the directors could and did reasonably conclude that it was in the company's interests to terminate his contract and that therefore the decision to terminate the contract was not a breach of duty.

538. The manner in which the decision was taken, at a meeting at which no notice was given to Mr McKillen or Mr Cunningham, is unquestionably a matter which is open to criticism. However, the subject was raised at a duly convened board meeting held on 21 September 2011. The issue was discussed and Mr Cunningham proposed the reinstatement of Mr Hennebry, a resolution which was defeated. As Mr McKillen

accepted in evidence, it would have made no difference to the course of events if he had been given notice of and attended the meeting on 9 September 2011. I should add that it does not seem to me that there is anything in the allegation that the decision to dismiss Mr Hennebry was intended to exclude Mr McKillen or obstruct his involvement in the company. It made no difference to Mr McKillen's ability to participate, either himself or through Mr Cunningham in the affairs of the company.

Security held by Ellerman over Mr Quinlan's shares

539. This relates to the debt due to BOSI secured on part of Mr Quinlan's shareholding which was purchased by Ellerman at the end of January 2011. The allegation pleaded in the petition is that Mr Faber, Mr Seal and Mr Mowatt failed to disclose to the company or the other directors that the security over these shares had become enforceable. In his closing submissions, Mr McKillen abandons the claim as against Mr Seal and Mr Mowatt. The claim is maintained against Mr Faber, the allegation being that he knew that the security had become enforceable by July 2011 but failed to disclose it. The result was that the directors did not have the opportunity of determining whether to deem a transfer notice to have been given in respect of Mr Quinlan's shares.

540. In the light of my decision that the security in favour of BOSI over Mr Quinlan's shares had not become enforceable, it follows that this claim must fail.

Non-Disclosure of the Barclay interests' negotiations with NAMA

541. I have in the chronological section set out the sequence of events as it applies to the attempts by the Barclay interests to purchase the NAMA debt. Serious consideration of this possibility began towards the end of May 2011 when Mr Peters on behalf of the Barclay interests started negotiations with Barclays Bank with a view to an appropriate facility and MFL was identified as the company which might borrow the necessary funds and purchase the NAMA debt. Negotiations to this end with Barclays Bank and HSBC continued through June and July 2011. Discussions were started with NAMA on 9 August 2011 and after something of a lull over the holiday period resumed in earnest with MFL's offer letter sent on 7 September 2011. That offer was rejected as was an attempt to repeat it. Finally, agreement was reached between the parties on or about 26 September 2011. MFL's negotiations with NAMA were conducted by Mr Peters. Although Mr Faber texted Mr Hennigan on 5 August 2011 to suggest a meeting, this was not followed up and Mr Faber did not participate in the negotiations with NAMA which were initiated by Mr Peters on 9 August 2011.

542. It is alleged that each of Mr Faber, Mr Seal and Mr Mowatt failed to disclose to the company that MFL was in negotiations with NAMA to acquire the NAMA debt and were accordingly in breach of their duties as directors to the company.

543. The case is summarised in paragraph 58(g) and set out more fully in paragraphs 68A – 68F of the petition. Paragraph 58(g) alleges that Mr Faber, Mr Seal and Mr Mowatt failed to disclose to the company that MFL was in negotiation with NAMA to acquire the company's debts, and were throughout 2011 involved as directors of the company in relation to the company's own negotiations with NAMA in

circumstances where they had a conflict of interest. Though linked, this involves two separate alleged breaches of duty, as later appears.

544. Paragraph 68A alleges that representatives of the Barclay interests including MFL and Mr Faber had been in negotiations with NAMA in relation to the acquisition of the company's debt from January 2011 onwards. As appears from the chronological section and the section dealing with NAMA, I do not accept that negotiations with NAMA for a purchase of the debt started before early August 2011.

545. Paragraph 68A.1 pleads: *"The true motivation of the Barclay Brothers in seeking to acquire the NAMA debt was to further the Scheme to acquire ownership and control of the Company, by enforcing the debt or using the threat of enforcement to force a dilutive rights issue."* In support of this allegation, reliance is placed on the negotiations with Barclays Bank in June and July 2011 for a facility to enable the debt to be acquired or repaid, Mr Faber's memorandum dated 1 August 2011 to Sir David Barclay and a further memorandum dated 8 August 2011 from Mr Faber to Sir David Barclay.

546. Paragraphs 68B and 68C plead that Mr Faber, Mr Seal and Mr Mowatt were aware of the negotiations to acquire the company's debt and the alleged true motivation in doing so. As regards Mr Seal and Mr Mowatt, reliance is placed on the fact that they were sent a copy of Mr Faber's memorandum of 1 August 2011. As regards Mr Faber, reliance is placed on the memoranda written by him and on the more general proposition that:

> "*Mr Faber was one of the principal investment managers working for the Barclay Brothers and Barclay Interests in relation to the potential acquisition of ownership and control of the Company from April 2010 onwards.*"

547. Paragraph 68D alleges the following breaches of duty. First, sub paragraph (a) alleges that Mr Faber, Mr Seal and Mr Mowatt failed to disclose to the company or to the other directors that NAMA was prepared to sell the debt to whoever was prepared to pay the asking price. Pausing there, it will be apparent from the chronological section and the section dealing with NAMA that this is an unsustainable allegation. It was clearly known to all concerned, including in particular Mr McKillen, that NAMA was very ready to sell the debt as a means of realising its value. Sub paragraph (a) continues that they were in breach of duty in failing to disclose that MFL (and Mr Faber) was engaged in negotiations to acquire the NAMA debt "*for the purpose of furthering the Barclay Brothers desire to obtain ownership and control of the Company*". Secondly, sub paragraph (b) alleges that Mr Faber, Mr Seal and Mr Mowatt were as directors of the company involved in discussions relating to the company's own negotiations with NAMA in circumstances where they had a plain conflict of interest which was not disclosed to the board and where the only appropriate course for them would have been to disclose the conflict of interest and absent themselves from board discussions or to resign their positions as directors of the company.

548. Further breaches are alleged against Mr Faber. First, in paragraph 68D(a) it is alleged that he participated in MFL's negotiations with NAMA and in the scheme for the acquisition of the company of the NAMA debt and sought to further that

scheme to the detriment of the company. Secondly, paragraph 68D(c) pleads that Mr Faber's text message to Mr Hennigan on 5 August 2011 in effect encouraging Mr Hennigan to ignore the letter shortly to be sent by Mr Hennebry on behalf of the company was a breach of duty by Mr Faber as a director of the company.

549. The loss or prejudice flowing from these alleged breaches of duty is pleaded as follows in paragraph 68F:

> "*Had the company or its board of directors been made aware of the above matters prior to 27 September 2011, it could and would have explored alternative means of re-financing the debt owed to NAMA. It would have concluded that it was not in the interests of the Company or its members as a whole (or its members including Mr McKillen) that its debt should be acquired by a vehicle of the Barclay Brothers rather than an independent and responsible lending institution.*"

550. It is submitted that, if well founded, these allegations involve the breaches of two separate duties on the part of the directors. The first, in reliance on *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324 and *Whillock v Henderson* [2009] BCC 314, is put in Mr McKillen's closing submissions as follows: "*failure of this kind by directors to inform their co-directors or take steps to protect the company where they are aware that it has suffered or is about to suffer damage will amount to a breach of duty that comprises relevant conduct of the company's affairs*". This is an aspect of the duty of directors under section 172 of the Companies Act 2006 to act in the way they consider in good faith would be most likely to promote the success of the company. I understand the directors to accept that this duty may give rise to an obligation on directors to disclose to the company matters of which they are aware. Reference can also be made to *British Midland Tool Ltd v. Midland International Tooling Ltd* [2003] 2 BCLC 523 and *Shepherds Investments Ltd v. Walters* [2007] 2 BCLC 202. The second duty is the duty set out in section 175 to avoid conflicts of interest. Even without the alleged detrimental purpose of the intended acquisition of the NAMA debt, the fact that MFL was negotiating to acquire the debt conflicts with the company's own negotiations with NAMA. Assuming that Mr Faber, Mr Seal and Mr Mowatt had competing interests or duties in their capacities as directors or executives of companies within the Barclay interests, they were under a duty to disclose the relevant facts. The breaches alleged against Mr Faber alone engage both of these duties.

551. It is necessary to take each of the elements in this part of the case in turn.

552. First, it is beyond dispute that in June and July 2011 the Barclay interests were considering seriously the possibility of buying the NAMA debt, as an alternative to re-financing it, and had engaged in serious negotiations with Barclays Bank and HSBC for a facility to enable it to do so. It is further beyond dispute that from about 9 August 2011 the Barclay Interests actively pursued with NAMA a purchase of the debt.

553. The acquisition of the NAMA debt by the Barclay Interests was not intrinsically detrimental to the company or its interests. NAMA was a creditor with a statutory objective and single-minded purpose to achieve full recovery of the indebtedness as

soon as possible. By August 2011, it was not inhibited in how it did so by having any equity interest in the company, as had been the case earlier in 2011. It did not mind who it sold the debt to, nor were there any commercial reasons why it should not, if necessary, enforce the debt. As against NAMA, it could well be beneficial to the company if the debt were held instead by a substantial shareholder. The benefit to the company would not come from the possibility that a shareholder would be a more indulgent creditor than NAMA or any other holder of the debt. It could not be expected that a new holder of the debt including a shareholder would tolerate a lengthy extension of the debt in circumstances where all were agreed that the company was seriously over-indebted. What might be expected is that the shareholder holding the debt would present the company with the opportunity of re-financing the debt in the obvious way, that is to say by a rights issue.

554. As I have elsewhere observed, the position facing the company at this stage was that it had no prospect of raising the funds necessary to reduce its borrowings except by the injection of new capital. As Mr Cunningham made clear in his correspondence with Mr Faber, Mr McKillen did not object to an injection of capital from a new investor but he did object to the capital being provided by the existing shareholders. This is a surprising position. Unless there are good reasons justifying a different approach, the opportunity of providing new capital should, both commercially and legally, be first offered to the existing equity holders. Shareholders have statutory pre-emption rights over the issue of new shares for cash, which may be removed or modified only by the articles of association or a special resolution: sections 560-577 of the Companies Act 2006. Further, it is a requirement of the shareholders agreement that all new shares be offered first to the existing shareholders: clause 5.

555. Mr McKillen alleges that the Barclay interests would use the NAMA debt to force a dilutive rights issue. The reference to *"a dilutive rights issue"* is not entirely clear. Dilution will always occur where a shareholder does not take up his rights in a rights issue. If the word "dilutive" is to have any real meaning in this context, it must be a rights issue at an unjustifiably low price, thereby increasing the number of shares to be issued, in circumstances where it was known or anticipated that one or more of the shareholders (in this case Mr McKillen) would not take up his rights. The same would be true of a rights issue at a proper price in circumstances where it was not reasonably believed that a rights issue was necessary or desirable but was instead motivated by a desire to dilute those shareholders who it was known or anticipated would not take up their rights. In those circumstances rights issues may constitute breaches of duty and unfairly prejudicial conduct: see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, *In re A Company* (1986) 2 BCC 99453, [1986] BCLC 430 (CA), *In re A Company* [1986] BCLC 362 at 366-367. The evidence and in particular the memorandum produced by Mr Faber in August 2011 on which Mr McKillen relies, does not in my judgment establish that the Barclay interests had in mind a dilutive rights issue in either of these senses. They certainly had in mind a rights issue and had in mind that Mr McKillen might well not wish or be able to take up his rights but it does not follow that a rights issue would be improper. Indeed, as I say elsewhere, a rights issue was an obvious and legitimate means of providing a solution to the financial problem faced by the company at that time.

556. The next issue is the knowledge of the individual directors. Clearly they can only disclose what they know.

557. As Mr McKillen's closing submissions acknowledge, the position is rather different as regards each of the directors. Of the directors Mr Faber was the most involved. He had a strategic role in advising on, and implementing, the Barclay interests' plans to obtain control of the company. It was in that capacity that he prepared the memorandum dated 1 August 2011 for Sir David Barclay which specifically addressed the acquisition of the NAMA debt. Mr Faber acknowledges that he was aware that Mr Peters was conducting negotiations with Barclays Bank and HSBC in June and July 2011 and that from early August negotiations were under way between Mr Peters on behalf of MFL and NAMA. For the most part he was not closely concerned with those negotiations but he certainly knew of their existence and that their purpose was to acquire the NAMA debt before its maturity on 30 September 2011.

558. Mr Seal's involvement was more remote than that of Mr Faber, but he acknowledges that he knew that Mr Peters was negotiating both with banks from June 2011 and subsequently with NAMA. He knew that the negotiations with the banks in June-July 2011 were for the grant of a facility to MFL with the purpose of either purchasing the NAMA debt or a loan by MFL to the company to enable it to repay NAMA. Neither of these alternatives in June-July 2011 was regarded as being the primary purpose. They were genuine alternatives of equal weight. Mr Seal resigned as a director of MFL on 14 June 2011, to avoid a conflict of interest as director of the company, because either alternative, if pursued, would involve a conflict. Mr Seal knew that in late July and early August 2011, with the bank facility agreed in principle, Mr Faber, Sir David Barclay and Mr Peters were considering the next steps to be taken by the Barclays interests. He accepted in evidence that he was kept in the loop. Mr Faber sent his memorandum dated 1 August 2011 to Mr Seal. I find that Mr Seal read it carefully, as appears from his email of 2 August 2011 with its reference to "*a cold towel job*" and a detailed query arising from page 5 of the memorandum. I reject Mr Seal's evidence that he gave it just "*a cursory glance*". The memorandum informed Mr Seal of the possibilities being considered, but not the course that would be followed. Mr Seal's evidence, which I accept, is that he was unaware of the offer made on 7 September 2011 by MFL to purchase the debt and that when the purchase of the NAMA debt was made on 27 September 2011 it came as something of a surprise to him. I also accept his evidence that:

> "*I knew they were talking. I had no knowledge of how close or otherwise they were or that a deal could have been done with both the funders for MFL or the Barclay company, as well as NAMA's agreement to sell. As I said earlier, I doubted whether NAMA would actually agree to assign the debt.*"

This does however show, as does other evidence, that Mr Seal knew that negotiations were taking place with NAMA and that a purchase of the NAMA debt was one of the main alternatives, albeit that he doubted whether NAMA would sell the debt. This, as it seems to me, is a sufficient degree of knowledge to have put Mr Seal in a position of conflict, given his duties to the Ellerman group companies.

559. Mr Mowatt's knowledge and involvement was a good deal less than that of Mr Seal. In this context, it is important to note that Mr Mowatt's involvement in the management of the Telegraph Media Group meant that he spent a lot of time at its offices and rather less at the St James's Street offices.

560. Mr Mowatt knew that MFL had been formed as a possible vehicle to help refinance the company and he resigned as a director on 14 June 2011 on the advice of Mr Seal. I accept Mr Mowatt's evidence that Mr Seal told him no more than at some point there could be financing arrangements involving MFL and the company. Given that Mr Mowatt was only peripherally involved in this part of the business, there was no particular reason why he should be told or request more details.

561. There is no evidence that Mr Mowatt was aware of the negotiations with Barclays Bank or other banks in June-July 2011, and I accept Mr Mowatt's denial in evidence of any knowledge of them.

562. Mr Faber sent his memorandum dated 1 August 2011 to Mr Mowatt. Mr Mowatt's evidence was that he read it. He regarded it as a document prepared before the August holidays for Sir David Barclay to read, in which Mr Faber hypothesised on the various options open in relation to the company. This is consistent with Mr Faber's covering email, that he was "*trying to highlight some of the possibilities and obstacles we face*". He thought that it was sent to him so as to brief him on what was going on. He was not otherwise aware of what was happening or being considered. He did not receive any further documents and he did not discuss it with Mr Faber or Mr Peters. I accept his evidence. I also accept his evidence that he did not know of the negotiations with NAMA or the offer to it, and that he first learnt of them on 27 September 2011. There is no evidence to the contrary, and Mr Mowatt's evidence on this, as on other matters, was given in a direct and convincing manner.

563. In my judgment, Mr Mowatt knew nothing which could give rise to a duty of disclosure to the company. He did not know that a decision to make an offer to NAMA or even to start negotiations had been taken, he did not know that there were any negotiations or offers, nor did he know of negotiations with banks for a facility.

564. The position is different with Mr Faber and Mr Seal. Each knew that MFL was negotiating with NAMA. Mr Faber knew that the negotiations were for the purchase of the debt and Mr Seal knew that a purchase of the debt was a real possibility. If a duty of disclosure arose as regards these matters, their knowledge was sufficient for the duty to apply to them. They were each asked why they had not disclosed these matters. Mr Seal did not see why the company would need to know about discussions with NAMA. Mr Faber was clear in his view as to why he chose not to disclose the negotiations to the board. It was "*because this was patently something I felt would be in the company's best interests, but not necessarily something Mr McKillen would like*".

565. Mr McKillen's case is that the purpose of the Barclay interests in seeking to acquire the NAMA debt was to enforce the debt or use the threat of enforcement to force a dilutive rights issue, to the detriment of the company. In seeking to establish this case, heavy reliance is placed on documents produced in June 2011 in the context of the negotiations with Barclays Bank for a facility and on the memoranda prepared

by Mr Faber in early August 2011. Rather less attention is paid to the offer in fact made by MFL on 28 September 2011 immediately after it acquired the debt. It seems to me that what was in fact done is a better guide to whether damage to the company was planned than wide-ranging discussion documents prepared nearly two months earlier.

566. It cannot be doubted that the documents on which Mr McKillen relies contain ideas which, if developed and implemented, would properly be seen as damaging to the company. One of the alternative plans put forward to Barclays Bank in June 2011 was that if the Barclay interests had "*not obtained control of a satisfactory amount of the shareholding of Coroin within [3] days Business Days of utilisation of the Facility then [MFL] shall appropriate the shares of the subsidiary companies of Coroin through the share charge contained in the existing debenture granted in favour of NAMA*". Likewise, Mr Faber's memorandum set out a number of alternative ways forward, including some which envisaged the appropriation of assets through foreclosure. At the same time Mr Faber warns of the legal and other difficulties which this course would involve.

567. The closing submissions for the directors rightly emphasise that the duty under section 172 is subjective, to the extent that a director must act in the way he considers, in good faith, would be most likely to promote the interests of the company. The closing submissions cite the following passage from the judgment of Jonathan Parker J. in *Regenterest plc (in liquidation) v. Cohen* [2001] 2 BCLC 80 at para. 120. Although referring to the corresponding equitable duty, I agree that it is equally applicable to the duty under section 172:

> "*The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interests; but that does not detract from the subjective nature of the test.*"

568. I have no difficulty in accepting Mr Faber's evidence that he genuinely believed that a rights issue would be in the best interests of the company. He denied in evidence that the plan was to acquire the debt and foreclose on it and the events after 27 September 2011 corroborate this denial.

569. If, however, the intention had been to foreclose and appropriate the company's assets in that way, as some of the ideas mooted in Mr Faber's memorandum envisaged, it could not reasonably be seen as likely to promote the success *of the company* nor would I accept that Mr Faber, an intelligent and astute man, would think so. The last sentence of the passage from Jonathan Parker J's judgment is in point.

570. It is clear that Mr Faber's memorandum is not a blueprint for action, but, as he said in his covering email to Mr Seal and Mr Mowatt, he was "*trying to highlight some of the possibilities and obstacles we face*".

571. MFL's proposal on 28 September 2011 was for a 3 month extension to the existing facility on terms that it was "*to be reduced by way of the proceeds of an equity issue for the minimum sum of £200,000,000 (net) by no later than 12th December 2011*". Failure so to reduce the debt would be an event of default.

572. Objections were taken to some of the other terms, such as some very substantial fees, and it may well be that they were well-grounded objections. Alvarez & Marsal certainly thought so, when they were appointed in early October 2011, with the concurrence of Mr Faber, Mr Seal and Mr Mowatt, as the company's financial advisers.

573. In my judgment, however, the fundamental elements of the proposal, a 3-month extension and a requirement to reduce the debt by £200 million through an equity issue, could not be described as damaging or detrimental to the company. On the contrary, a reduction in indebtedness and an increase in capital was what the company had needed for well over a year, and what Mr McKillen himself had been negotiating for with the US equity funds in 2010 and with Al Mirqab in January-February 2011.

574. My conclusion on this aspect of the claim is that the duty of a director to disclose actual or intended damage to the company and, in conjunction with the other directors, to take steps if practicable to prevent or mitigate the damage did not arise on the facts of this case.

575. I move on to consider the claim of a breach of the duty stated in section 175(1) of the Companies Act 2006 to avoid a situation in which a director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. A conflict of interest includes a conflict of duties.

576. It is not suggested that Mr Faber, Mr Seal or Mr Mowatt had a relevant personal interest. What is said is that their respective positions in and duties to the companies comprised in the Barclay interests conflicted with their duties to the company.

577. It seems clear to me that there was the potential for conflict because MFL was negotiating to purchase the NAMA debt while the company was negotiating to extend or modify it. There was a direct competition.

578. The issue is whether any of the directors owed conflicting duties. It is not sufficient, in my view, for the directors to look solely to the position of MFL, relying on the facts that it was not part of the Ellerman group, but was separately owned by the Barclay brothers, and that they had either, in the case of Mr Faber, never been a director of MFL or, in the case of Mr Seal and Mr Mowatt, had ceased to be directors on 14 June 2011, nearly two months before any negotiations with NAMA.

579. MFL was not acting independently of the relevant Ellerman group companies but was acting in tandem with them, with a view to those companies obtaining control of the company. The duty of the directors and executives of the relevant Ellerman companies, acting in the best interests of those companies, was to promote and advance the policy of obtaining control. Steps taken by the company, or which should in its best interests be taken, to deal with and improve its position with NAMA would be likely to conflict with the interests of the Ellerman companies. For the directors common to both the company and the relevant Ellerman companies, there is a conflict of their duties.

580. In my judgment, Mr Faber was in a clear position of conflict. He was not a director of any of the companies which had bought Misland or the secured debts of Mr Quinlan. He was however the executive with primary responsibility for implementing on behalf of all those companies the policy of obtaining control of the company, and he was well aware of the negotiations with NAMA. Mr Seal, like Mr Faber, is a director of Ellerman Investments Limited, which is the management company for the companies comprising the Ellerman group. His duty as such is therefore to promote and advance the interests of the companies managed by Ellerman Investments Limited. Moreover, he had some involvement in, or was at least kept generally aware of, plans and transactions of the Ellerman group of companies as regards the company. He too knew that there were negotiations with NAMA which could well involve a proposal to purchase the NAMA debt. It follows that he too had a conflict of duties.

581. Mr Mowatt is also a director of Ellerman Investments Limited but he had no involvement in, and knew little about, developments as regards the company. Specifically, he had no knowledge of the negotiations with NAMA. There was no actual or potential conflict of which he was aware as regards dealing with NAMA, and there was accordingly no breach by him of the duty under section 175.

582. It was submitted for the directors that section 175(1) did not apply by virtue of section 175(3) because the proposed transfer of the NAMA debt was "*a transaction or arrangement with the company*". I reject this. It was a transaction between NAMA and MFL, not with the company. A sale of a debt due from the company is no more a transaction or arrangement with the company than a sale of shares in the company. This would equally be true if NAMA had a duty under the facility agreement to give notice to and consult with the company before the assignment, but, following the decision of the Court of Appeal on the NAMA preliminary issue, not even that point arises.

583. For the same reason, I do not consider that section 177 is in point, as it is solely concerned with interests of a director in a proposed transaction with the company. By reason of section 175(3), sections 175 and 177 are mutually exclusive. It is not therefore relevant that the directors had made general declarations, as permitted by sections 177(2)(b) and 185, at various meetings of the company. They did not in any event notify the company that Mr Faber and Mr Seal had a conflict of interest arising not from a proposed transaction with the company but from a proposed transaction between MFL and NAMA. The specific declaration relating to MFL made at the board meeting on 27 September 2011 was too late and in any event could not satisfy section 175.

584. Likewise, the exemption from the obligation to give notice under section 177 created by section 177(b), where the other directors are already aware of the relevant director's interest, does not apply. Knowledge on the part of Mr McKillen might nonetheless be relevant to his case of unfair prejudice and I refer to this below.

585. In my judgment, Mr Faber and Mr Seal were in breach of duty under section 175 as a result of the conflict created by MFL's negotiations with NAMA. I do not consider that a breach occurred at the earlier stage when Mr Peters for MFL was negotiating with banks for a facility. Plans were then too uncertain. They were at an exploratory stage. No decision had been taken, even in principle, to seek to purchase the NAMA debt and, until a facility could be agreed at least in principle, it was premature to do so. It is noticeable that the decision-making process was not undertaken until early August 2011, after agreement in principle with Barclays Bank in late July 2011. In any event, Mr McKillen's case rests on MFL's negotiations with NAMA: see paragraph 58(g) of the petition.

586. The issue then is whether this breach caused any prejudice to Mr McKillen, which I address in the section of this judgment dealing with unfair prejudice.

587. There are two allegations of breach of duty made solely against Mr Faber.

588. First, it is alleged that Mr Faber participated in MFL's negotiations with NAMA and that he sought to further the scheme for the acquisition of the NAMA debt to the detriment of the company. I reject this allegation. First, Mr Faber did not participate in the negotiations with NAMA. The nearest he got to it was his text to Mr Hennigan on 5 August 2011 suggesting a meeting which did not take place. Secondly, for the reasons already given, MFL's acquisition of the debt was not detrimental to the company.

589. Secondly, it is alleged that Mr Faber acted in breach of duty when he sent a text to Mr Hennigan on 5 August 2011, advising him to ignore the letter to be sent by Mr Hennebry on behalf of the company with the proposal for NAMA to take a junior position with part of their debt and for repayment of the balance. Mr Faber did this because he thought the proposal was "*ridiculous*" and I am inclined to agree with him. But it cannot be right for a director secretly to interfere in this way with what the company is doing. The right course was to explain to Mr Hennebry and the other directors why it was a ridiculous step for the company to take. Mr Faber's text went further and encouraged NAMA not to grant an extension to the debt beyond 30 September 2011. I am satisfied that Mr Faber genuinely believed that an extension would not help the company because it would simply lead to a further delay in dealing with the need for new capital, but this text is a clear illustration of his conflict of duties.

590. Having said that, I am satisfied that it caused no loss. It is clear that NAMA would have rejected the proposal without any prompting from Mr Faber. It was also not, as I have found, going to grant a further extension.

591. Finally, there is an allegation against all three directors that they breached the duty under section 173 to exercise independent judgment. This is based on the allegation

that they acted on the instructions of Sir David Barclay, and that he was accordingly a shadow director, an allegation to which I now turn.

Was Sir David Barclay a shadow director?

592. Among the many amendments which Mr McKillen applied to make to his petition shortly before trial was an allegation that Sir David Barclay was a *de facto* or shadow director of the company. I refused permission to include the allegation that he was a *de facto* director on the grounds that the matters relied on to support it could not make out a sustainable case, but I did permit an amendment to allege that Sir David Barclay was a shadow director: see [2012] EWHC 521 (Ch) at para 14-78.

593. A shadow director is a "*person in accordance with whose directions or instructions the directors of the company are accustomed to act*": section 251(1) of the Companies Act 2006. By section 251(2) a person is not to be regarded as shadow director *"by reason only that the directors act on advice given by him in a professional capacity"*. The general duties of directors specified in section 171 to 177 of the Companies Act 2006 apply to shadow directors *"where, and to the extent, the corresponding common law rules or equitable principles so apply":* section 170(5). The extent to which those rules and principles apply has been the subject of differing decisions at first instance: see *Yukong Line of Korea Ltd v Rendsburg Corp Investment of Liberia Inc* [1998] 1 WLR 294 and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).

594. In order to make out the case that Sir David Barclay was a shadow director of the company, it is necessary for Mr McKillen to establish that the directors of the company were accustomed to act in accordance with his directions. It is not necessary that all the directors should so act. It is sufficient if it is a majority that does. The instructions must of course be given to them so as to affect their decisions as directors.

595. Much of the closing submissions of counsel for Mr McKillen on this topic is devoted to establishing not that Mr Faber and other directors acted in their capacity as such on the instructions of Sir David Barclay but that decisions of the Barclay interests as shareholders of the company were directed or influenced by Sir David Barclay. Save in the general sense there were circumstances in which Mr Faber and others would consult Sir David Barclay and act in accordance with his wishes and directions, this is irrelevant to a case of shadow directorship. Mr McKillen must show that Mr Faber and others acted in their capacity as directors of the company in accordance with the instructions of Sir David Barclay.

596. The allegation that he was a shadow director is shortly stated in paragraph 60A of the petition and supported by the matters set out in schedule B to the petition. Paragraph 1 of schedule B lists seven matters from which it is to be inferred that Mr Faber, Mr Seal and or Mr Mowatt acted in accordance with the instructions of Sir David Barclay. They are: the closure of the data room, the failure to disclose that Mr Quinlan's shareholder security had become enforceable, the appointment of JLL, the blocking of the redevelopment of two hotels, Mr Seal's position in relation to the letter to NAMA prepared by Mr Hennebry on 16 August 2011, the dismissal of Mr Hennebry and the failure of the directors in question to disclose MFL's

negotiations with NAMA in the course of August and September 2011. The allegation of blocking the redevelopment of two hotels can be disregarded because that allegation has been abandoned. Paragraphs 2 to 5 of schedule B rely on the communications between Sir David Barclay and Mr Faber and the other directors in August and September 2011 in relation to the proposal to appoint Goldman Sachs as financial advisers to the company. Paragraph 6 of schedule B refers to various matters, principally relating to Mr Quinlan and his alternate Mr Murphy.

597. There is, in my judgment, no evidence to support the allegations that the following matters were directed by Sir David Barclay or indeed that he had any knowledge of them: the closure of the data room, the appointment of JLL, the position taken by Mr Seal in relation to the draft letter to NAMA in mid-August 2011 and the alleged failure to disclose that the shareholder security granted by Mr Quinlan had become enforceable. As to the last of those matters, I have held that the security had not become enforceable. Sir David Barclay of course knew of the negotiations with NAMA to acquire the NAMA debt but there is no evidence of any instruction or involvement on his part as to whether those negotiations should or should not be disclosed by Mr Faber or Mr Seal to the other directors of the company.

598. This leaves only the dismissal of Mr Hennebry and the appointment of Goldman Sachs. There was communication between Mr Faber and Sir David Barclay on the appointment of Goldman Sachs. Sir David took the view, as in fact did Mr Faber, that the appointment of Goldman Sachs was pointless in that the company would in any event be unable to raise the funds required to refinance the NAMA debt. Nonetheless, Mr Faber, Mr Seal and Mr Mowatt thought there was merit in the particular circumstances in agreeing the appointment of Goldman Sachs. The emails between them undoubtedly disclose a concern that they should not proceed with the appointment of Goldman Sachs against the opposition of Sir David Barclay. They argued their corner with him and ultimately he appears reluctantly to have withdrawn his opposition. These events show some independence on the part of the directors. If they had simply been accustomed to act in accordance with the instructions of Sir David Barclay they would presumably have simply refused to consent to the appointment of Goldman Sachs. What is certainly clear is that the appointment of Goldman Sachs was not the result of instructions to those directors by Sir David Barclay. What is said is that the withdrawal of Sir David's opposition was on terms that Mr Hennebry would be dismissed. It is then said that Mr Hennebry was dismissed on Sir David's instructions. I do not accept this. I am satisfied that Mr Faber, Mr Seal and Mr Mowatt reached their own decision that the contract with Mr Hennebry's company should be terminated. They did so only after discussing the position with Mr Alden and, particular in the case of Mr Mowatt, I am satisfied that Mr Alden's views were decisive.

599. It follows that none of the matters relied on at paragraph 1 or paragraphs 2-5 of schedule B can establish the case that Sir David Barclay was a shadow director of the company.

600. As regards paragraphs 6 of schedule B, I shall refer first to those matters which do not principally concern Mr Quinlan and/or Mr Murphy. The allegation that Mr Faber was the principal representative of the Barclay interests in their negotiations to acquire Misland and in negotiations with Mr Quinlan, and the extent to which he acted in those respects on instructions from Sir David Barclay, are irrelevant to

whether Sir David Barclay was a shadow director of the company. They do not relate to any activity on the part of Mr Faber in his capacity as a director of the company. Likewise, whether he was appointed by Misland as a director of the company on the instructions of Sir David Barclay is irrelevant because it does not concern Mr Faber's actions in his capacity as a director of a company. Statements that the company or its board were under the control of the Barclay interests do not constitute instances of instructions being given by Sir David Barclay to Mr Faber and other directors and, in a case where there has been so much evidence, they cannot form the basis for some general inference.

601. The other matters relied on in paragraph 6 of schedule B relate principally to relations between the Barclay interests on the one hand and Mr Faber and Mr Murphy on the other. General statements of support for the Barclay interests or the Barclay brothers made by Mr Murphy in text messages do not establish that instructions were given by Sir David Barclay to Mr Quinlan or Mr Murphy as to how they were to act as directors of the company, nor are any pleaded. The matters relied on other than general statements of support are as follows. First, reference is made to Mr Faber asking Mr Murphy to support the registration of Ellerman as the holder of shares held by Mr Quinlan to secure his debt to BOSI which was assigned to the Barclay interests. There is no evidence of any involvement by Sir David Barclay in this. Secondly, in May 2011 when Mr Faber asked Mr Murphy whether Mr Quinlan would be willing to convert his loan stock to non-voting shares, Mr Murphy replied "*We are happy to take your instructions on this.*" This concerned Mr Quinlan's position as an investor in the company, not his actions as a director, and in any case there is no evidence of instructions coming from Sir David Barclay. Thirdly, when on 5 May 2011 Mr Murphy received an email from the solicitors for Wynton asking whether Mr Quinlan would be interested in starting discussions to sell his shares, Mr Murphy asked Mr Faber in an email what they should do and told Sir David in a further email "We will be guided by you and RM". This also concerned Mr Quinlan's position as a shareholder in the company and the response from the Barclay side was, not surprisingly, that Mr Quinlan was bound by the 17 February agreement. Fourthly and finally, it is alleged that Mr Quinlan's decision to resign as a director was in fact taken as a result of instructions from Sir David and Sir Frederick Barclay. Even if true, this would be irrelevant. The instructions needed to constitute Sir David Barclay a shadow director were instructions to Mr Quinlan on the exercise of his powers and duties as a director, not how he was to take his own personal decision whether to resign as a director.

602. My overall conclusion is that there is no evidence of any substance to support Mr McKillen's case that Sir David Barclay was a shadow director of the company. In those circumstances it is unnecessary to consider legal issues as to what duties he would have owed, if my conclusion had been different.

Contractual obligations of good faith

603. Clause 8.5 of the shareholders agreement provides as follows:

> "*8.5 Each of the Shareholders agree that:*
>
> *8.5.1 during the continuance of this Agreement all transactions entered into between any of them or any company controlled by them on the one hand and the Group on the other shall be conducted in*

> *good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement as may be agreed by the parties and in the absence of such agreement on an arm's length basis;*
>
> *8.5.2 each of them shall at all times act in good faith towards the others and shall use all reasonable endeavours to ensure the observance of the terms of this Agreement;*
>
> *8.5.3 no party will seek to increase its profit or reduce its loss at the expense of another; and*
>
> *8.5.4 each of them will do all things or [sic] desirable to give effect to the spirit and intention of this Agreement.*"

604. Express obligations of good faith in contracts governed by English law remain relatively unusual. There has been some, but only limited, analysis in the cases as to the effect of such clauses. I was referred to a number of English and Australian authorities either directly concerned with contractual obligations of good faith or relating more generally to obligations of good faith. Rather than try to elucidate the general principles applicable to such obligations or to analyse clause 8.5 in general terms, I propose to go straight to the specific allegations of breach of clause 8.5 made by Mr McKillen. For the reasons which appear when considering those alleged breaches, this is not a case in which it is necessary to subject the clause to a general analysis.

605. It is of course elementary that the clause binds only parties to the shareholders agreement. The allegations made by Mr McKillen are therefore confined to allegations against Misland and Mr Quinlan. None of these allegations was contained in the petition as originally presented. An allegation that Misland was required to offer its shares round to the other shareholders after it had been purchased by the Barclay interests was added only after Mr McKillen failed on the preliminary issue to establish that the sale of Misland triggered the pre-emption provisions. The remaining allegations against Misland and all the allegations against Mr Quinlan were added by amendment shortly before the trial.

606. The allegations against Mr Quinlan are contained in paragraphs 42E-42G. In paragraph 42E it is alleged that "*in giving assistance and support to the Barclay brothers in furthering their Scheme to obtain control of the Company to the detriment of Mr McKillen, Mr Quinlan was in breach of the obligations owed by Mr Quinlan*" under clause 8.5, in the following respects.

607. First, Mr Quinlan or his alternate used Mr Quinlan's powers as a director "*for the collateral purpose of advancing the interests of the Barclay brothers and/or adversely to affect the interests of Mr McKillen as pleaded at paragraph 37a above.*" Paragraph 37a is concerned with the closure of the data room. I have already dealt with that issue and held that it did not involve any breach of duty nor did it adversely affect the interests of Mr McKillen.

608. Secondly, it is alleged that Mr Quinlan or his alternate discharged his functions as a director "*on the instructions of a third party with whom he had entered into his own*

commercial arrangement, rather than in accordance with the purposes for which they were conferred, as pleaded at paragraph 37 above." Only two instances of Mr Quinlan acting as a director on the instructions of the Barclay interests are pleaded in paragraph 37. The first is the closure of the data room to which I have just referred. The second is agreeing to the release of Deutsche Bank from any obligations owed to the company. I have earlier dealt with that matter and found that it involves no breach of duty. I do not accept on the evidence that it is correct to say that Mr Quinlan acted on the *"instructions"* of the Barclay interests but even if it were, there can be no damage to Mr McKillen if the only instances of acting on such instructions involved no breach of Mr Quinlan's duties as a director.

609. The only other matters pleaded in paragraph 37 are not instances of Mr Quinlan acting on the instructions of the Barclay interests but are of statements made by Mr Faber to the effect that the Barclay interests had an "*alliance*" with Mr Quinlan such that they could control the board votes. However, I have earlier drawn attention to another internal communication from Mr Faber where he makes clear that the Barclay interests are dependent upon the agreement of Mr Quinlan to vote in the same way as the Barclay interests. Assuming for a moment that the Barclay interests were in practice able to control Mr Quinlan's votes as a director, a breach could arise only when that control is exercised to dictate Mr Quinlan's vote on an issue or other action as a director.

610. Thirdly, paragraph 42E alleges that Mr Quinlan assisted the Barclay brothers in promoting a scheme calculated to reduce the prospects of other shareholders, and in particular Mr McKillen, receiving the best price for their shares and/or obtaining investment in the company on terms that they consider advantageous and/or were prepared to agree by reason of the matters pleaded at paragraph 33D(e),(g),(l-n) and 37a and b above. I have already dealt with the matters pleaded in paragraph 37a and b and they do not establish the point here sought to be made. Paragraph 33D(e) pleads the conference call on 15 January 2011 when Mr Murphy, on Mr Quinlan's behalf, Mr McKillen and Mr McLaughlin orally agreed that they would enter into an exclusivity agreement with Al Mirqab and later that day Mr Quinlan signed instead the exclusivity agreement with the Barclay interests. It then pleads that it is to be inferred Mr Quinlan entered into the exclusivity agreement in performance of the agreement reached with Sir David Barclay in October 2010. I have already held that the exclusivity agreement was not in performance of any arrangement reached with Sir David Barclay in 2010. Mr Quinlan was not bound to enter into the proposed exclusivity agreement with Al Mirqab and I do not understand how he can have been inhibited in agreeing to an exclusivity agreement with a different party, in this case the Barclay interests. He plainly was not prohibited from doing so by the other terms of the shareholders agreement and a prohibition to that effect cannot in my judgment be spelt out of clause 8.5. Mr Quinlan was as free to enter into an exclusivity agreement with the Barclay interests as Mr McKillen was with Al Mirqab.

611. Paragraph 33D(g) alleges that the Barclay brothers gave personal assistance to Mr Quinlan and his family "*to induce Mr Quinlan to sell his shares to the Barclay brothers for his personal advantage rather than to Al Mirqab or any other investor irrespective of whether this was part of an arrangement that would have been acceptable to and for the benefit of all shareholders in the Company and in the*

interests of the Company itself." I have earlier found that there was no agreement that the Barclay brothers would provide assistance to Mr Quinlan and his family in consideration for any agreement by Mr Quinlan as regards his shares. I accept that Mr Quinlan must have realised that if he acted in relation to his shares in a way which was contrary to the wishes of the Barclay brothers, then he would be running a risk that they would cease or reduce the assistance they provided. If he had entered into an agreement for the disposal of his shares then the pre-emption provisions would have been triggered. If he has not entered into any agreement as regards his shares which triggers the pre-emption articles, he remains bound by the pre-emption provisions as and when he does so. I do not understand how he can be in breach of an obligation of good faith in these circumstances if he has an understanding with the Barclay brothers as to the use and retention of his shares which is neither prohibited by the other terms of the shareholders agreement nor triggers the pre-emption provisions.

612. Paragraph 33D(l)-(n) concern the making by Mr Quinlan of the 17 February agreement. This is contrasted with the offer made by Wynton which was accepted by Mr McLaughlin in respect of his small holding of shares. I have already dealt with these events. I have found, contrary to the allegation in paragraph 33D(n), that the 17 February agreement was not in accordance either with any agreement reached with Barclay brothers in October 2010 or in accordance with any subsequent agreement for the transfer of Mr Quinlan's shares. The 17 February agreement was expressly conditional on compliance with the shareholder's agreement, i.e. with the pre-emption provisions, and it is in my view not sustainable to argue that it involved a breach of clause 8.5.

613. It follows that there is no factual basis for the allegations made in support of the general averment contained in paragraph 42E. Paragraph 42E(b) alleges that Mr Quinlan concealed or failed to disclose the true and full arrangements between him and the Barclay brothers or Barclay interests. Those arrangements are said to include the agreement with Sir David Barclay reached in October 2010, the 17 February agreement and the power of attorney granted in May 2011. It is alleged that he was under an obligation to disclose them by reason of clause 8.5.2 because such arrangements "*would be material to Mr McKillen's decisions in relation to his own dealings with his shares in the company*". Mr McKillen has not attempted to make good how such disclosure would have affected his decisions in relation to his own dealings with his shares in the company. As regards the 17 February agreement, Mr Quinlan knew following the making of the tri-partite agreement in Doha on 12 February 2011 that the Barclay interests would be acquiring Mr Quinlan's shares. The 17 February agreement, conditional as it was on compliance with the pre-emption provisions, was clearly a step in achieving that agreed object.

614. Paragraph 42E(c) alleges that in accepting the payments and benefits from the Barclay brothers in return for support and assistance in transferring effective ownership and control of his shares in the company to the Barclay brothers in a manner designed to avoid triggering the pre-emption provisions and thereby preventing him from exercising his pre-emption rights, Mr Quinlan "*sought to profit at the expense of Mr McKillen*" in breach of clause 8.5.3. The short answer to this point is that such arrangements as were made did not avoid the pre-emption provisions. As I have just mentioned the pre-emption provisions continued to apply

such that as and when Mr Quinlan disposed or agreed to dispose of his shares, the pre-emption provisions would be triggered. The same is true of the allegation contained in paragraph 42E(d) that in entering into arrangements designed to transfer effective ownership and control of his shares without triggering the pre-emption provisions Mr Quinlan was in breach of his obligations in clauses 8.5.2 and 8.5.4.

615. Paragraph 42F asserts that rather than entering into "*arrangements designed to transfer effective ownership and control of his shares without triggering the pre-emption provisions*" Mr Quinlan was bound by clauses 8.5.2 and 8.5.4 to offer his shares in the company for sale to the other shareholders. In my judgment, an obligation to act in good faith towards the other parties and an obligation to do all things necessary or desirable to give effect to the spirit and intention of an agreement cannot be relied on to extend the scope of the express pre-emption clause, properly construed. In construing the terms of the pre-emption provisions, the court is seeking to give effect to the intention of the parties. To impose a wider set of pre-emption requirements would be to go beyond the intentions of the parties as expressed in their agreement. In my judgment, this would be a clear misuse of the obligations contained in clause 8.5.

616. Paragraph 42G asserts that in order to comply with clause 8.5.2, Mr Quinlan was obliged to inform the company and its shareholders of circumstances indicating that security over his shares had become enforceable. I have already held that the security over Mr Quinlan's shares did not become enforceable.

617. The case against Misland alleges five breaches of clause 8.5, although little is said about them in Mr McKillen's closing submissions.

618. First, Misland is said to be in breach by failing to offer its shares to the other shareholders after it was bought by the Barclay interests. For the same reasons in relation to the similar claim against Mr Quinlan, I do not think this is sustainable. It does not assist to say that Misland disposed of its other assets just prior to the sale, as it was clearly free to do so.

619. Secondly, it is alleged that Misland exercised its rights as a shareholder not for the shareholders' common purpose but in accordance with the wishes and for the benefit of the Barclay interests. No details are given of the occasions when Misland exercised its rights as a shareholder and I am not aware of any, except the appointment of Mr Faber and the acceptance of the pre-emption offer of Mr McLaughlin's shares, which Mr McKillen declined. There is nothing in this allegation.

620. Thirdly, Misland permitted Mr Faber as its appointed director to conduct the affairs of the company in the interests of the Barclay brothers, not in the interests of the company. Leaving aside whether Misland "*permitted*" Mr Faber to act in any particular way as a director, I have rejected the allegations of breach of duty against Mr Faber, save as regards his non-disclosure of a conflicting duty from which no loss to the company or Mr McKillen flowed.

621. Fourthly, Misland failed to disclose the true nature of the relationship between Mr Quinlan and the Barclay interests of which it must have been aware. Leaving aside

how it is said that Misland had such knowledge, and given that the arrangements did not trigger the pre-emption provision, I fail to see how clause 8.5 could have required their disclosure. All that is said is that it was material to Mr McKillen's decisions in relation to his dealings with his shares, but it is not explained how or what difference disclosure would have made.

622. The fifth allegation, that Misland failed to disclose that Mr Quinlan's security had become enforceable, must in any event fail in the light of my decision on that issue.

623. Sixthly, the failure to inform the company or its directors or Mr McKillen of the intention to acquire the NAMA debt or the true motivation for it. In the section on unfair prejudice, I hold that the company and Mr McKillen suffered no loss or prejudice from the non-disclosure of the intention to acquire the NAMA debt and the negotiations with NAMA, and I have earlier held that the true motivation was not as alleged by Mr McKillen. His case is not improved by alleging the non-disclosure to be a breach of clause 8.5.

Unfair prejudice: the Law

624. The jurisdiction of the court to grant relief in respect of unfairly prejudicial conduct in relation to a company is entirely statutory. It was first introduced by section 75 of the Companies Act 1980 and was re-enacted as sections 459-461 of the Companies Act 1985. It is now contained in sections 994-999 of the Companies Act 2006. Its essential elements have remained unchanged. The grounds on which the jurisdiction may be invoked are set out in section 994(1) which permit a member of a company to apply to the Court for relief on the ground:

> *"(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or*
>
> *(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."*

625. The petitioner must therefore establish that, first, the matters of which he complains are either actual or proposed acts or omissions of the company or consists of the conduct of the company's affairs; secondly, that those matters have caused prejudice to his interests as a member of a company; and thirdly, that the prejudice is unfair. I will take each of these elements in turn.

The company's affairs

626. The purpose of the jurisdiction is to provide remedies in respect of the way in which the affairs of the company are conducted. It was perceived prior to the enactment of section 75 of the Companies Act 1980 that there was insufficient protection to shareholders in that respect. The section is not directed to the activities of shareholders amongst themselves, unless those activities translate into acts or omissions of the company or the conduct of its affairs. Relations between

shareholders inter se are adequately governed by the law of contract and tort, including where appropriate the ability to enforce personal rights conferred by a company's articles of association. This important distinction has been emphasised in many of the authorities. In *re Legal Negotiators Limited* [1999] BCC 547 the Court of Appeal upheld the decision of Peter Goldsmith QC, sitting as a deputy Judge of the Chancery Division, to strike out a petition under section 459 of the Companies Act 1985 as unsustainable. Peter Gibson LJ at page 550 summarised the judgment below, with which he said he completely agreed. He said that the Judge

> *"reviewed the authorities from which he drew two points of significance for the case before him. The first was that the starting point was to consider what the parties had agreed between themselves as their commercial relationships, though he recognised this not need always be contained in the articles of association. The second was that the essence of the powers under s.459 is to give a remedy where there is complaint about the way the company's affairs are being conducted through the use (or failure to use) powers in relation to the conduct of the company's affairs provided by its constitution. He regarded the section as concerned with the company's affairs rather than the affairs of individuals and to be concerned with acts done by the company or those authorised to act as its organs".*

At page 551, Peter Gibson LJ said:

> *"Thus, like the Judge I too would lay emphasis on the need to show that it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial. The conduct of a member of his own affairs, for example by requesting a general meeting of the company or seeking answers to an excessive number of questions, is irrelevant".*

I would only add that the refusal by a company to convene a general meeting would be an act of the company, although whether it was either unfair or prejudicial would of course depend on the circumstances. Other authorities in which the same distinction had been drawn include *In re Unisoft Group Limited (No. 2)* [1994] BCC 766, *In re Estate Acquisition and Development Limited* [1995] BCC 338 and *In re Leeds United Holdings Limited* [1997] BCC 131.

627. Counsel for Mr McKillen submitted that *Blackmore v Richardson* [2006] BCC 276 demonstrated that dealings by shareholders concerning their shares may be part of the affairs of the company and found a claim of unfair prejudice. In my judgment, his submission is not borne out by that authority. The case concerned a company with three shareholders which took over a business previously run by them in partnership. An outsider made an offer to purchase all the shares of the company, which was accepted by two of the shareholders. A board meeting was held at which the offeror and his associate were appointed directors and the share transfers by the two selling shareholders were approved. At a board meeting two days later, the third shareholder who was the petitioner was suspended and requested not to attend the company's premises. The Judge held that the acts complained of were unfairly prejudicial conduct, by reference to the basis upon which the parties had gone into

business and converted their business into a company. It was not the dealings between the shareholders alone which brought the case within the jurisdiction conferred by section 459. The Judge at first instance, HHJ Wyn Williams QC (as he then was), referred to the requirement that the petition must be founded upon the conduct of the affairs of the company and said at paragraph 88 of his judgment (October 2004 unreported):

> *"In my judgment, it is impossible in the factual context of this case to separate the sale of their shares which in itself and standing alone could be construed as the purely private business of the first two Respondents, from the steps associated with it which amounted to the conduct of the affairs of the Company. I refer, here, principally to the meetings which were called and conducted on the 23 and 24 June 2002".*

Moreover there had been a serious attempt to exclude the petitioner from the management of the company, contrary to the understanding on which the shareholders had formed the company. This part of the decision below is summarised in paragraph 21 of the judgment of Lloyd LJ in the Court of Appeal, but, as he records, permission to appeal against that part had been refused.

628. The Court will not adopt a technical or legalistic approach to what constitutes the affairs of the company but will look at the business realities. It was held by the Court of Appeal in *Rackind v Gross* [2005] 1 WLR 305 that the affairs of a company could include the affairs of a wholly-owned subsidiary which had common directors. If the affairs of the subsidiary are being conducted in a manner which damages the subsidiary and hence the value of the holding company's interest in the subsidiary, then the omission of the directors of the holding company to take steps to rectify the situation seems to me plainly capable of falling within section 994(1). Likewise, where the directors of a partly owned subsidiary nominated by the holding company permitted the holding company to build up a business at the expense of the subsidiary's business, which was allowed to wither, without taking any steps to protect the subsidiary's position, they were engaged in the conduct of the affairs of the subsidiary: *Scottish Co-operative Wholesale Society Limited v Mayor* [1959] AC 324. See also the decision of Court of Session (Outer House) in *Whillock v Henderson* [2009] BCC 314.

629. By way of conclusion on this aspect, guidance was given by the Court of Appeal in *In re Neath Rugby Ltd (No.2)* [2009] 2 BCLC 427 where at para. 50 of a judgment with which the other members of the Court agreed, Stanley Burnton LJ said:

> *"The judge cited the observations of Powell J in Re Dernacourt Investments Pty Ltd (1990) 2 ACSR 553:*
>
> > *The words "affairs of a company" are extremely wide and should be construed liberally: (a) in determining the ambit of the "affairs" of a parent company for the purposes of s 320, the court looks at the business realities of a situation and does not confine them to a narrow legalistic view; (b) "affairs" of a*

> > *company encompass all matters which may come before its board for consideration; (c) conduct of the "affairs" of a parent company includes refraining from procuring a subsidiary to do something or condoning by inaction an act of a subsidiary, particularly when the directors of the parent and the subsidiary are the same …*
>
> *I would accept these propositions, but with some qualification. (b) may extend to matters which are capable of coming before the board for its consideration, and may not be limited to those that actually come before the board: I do not accept that matters that are not considered by the board are not capable of being part of its affairs. Nonetheless, like the judge, I am unable to see how it can be said that the affairs of Neath and of Osprey were so intermingled that all of the affairs of the latter were the affairs of the former. It would, for example, be quite irrational to suggest that Mr Blyth, when acting as a director of Osprey, was conducting the affairs of Neath.”*

It no doubt goes without saying that the affairs of the company will also encompass matters which must go to the company in general meeting, rather than the board, for consideration.

Prejudice

630. Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. So, for example, removal from participation in the management of a company and the resulting loss of income or profits from the company in the form of remuneration will constitute prejudice in those cases where the members have rights recognised in equity if not at law, to participate in that way. Similarly, damage to the financial position of a member in relation to a debt due to him from the company can in the appropriate circumstances amount to prejudice. The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

631. Where the acts complained of have no adverse financial consequence, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice. In *Rock (Nominees) Limited v RCO Holdings Plc* [2004] BCC 466 the respondent directors of the company procured the sale of an asset to a company of which they were also directors. It was alleged to be a sale at an undervalue and procured in

breach of the respondent directors' fiduciary duties to the company. The evidence established that the price paid was not an undervalue but was the best price reasonably obtainable, and the Court of Appeal upheld the decision at first instance that no prejudice had been caused to the petitioner. At paragraph 79 of this judgment, with which the other members of the Court agreed, Jonathan Parker LJ said;

> *" As to the judge's finding of breach of fiduciary duty on the part of the respondent directors, it is plain that, as the judge found, the respondent directors were "in a position of hopeless conflict". Further, they would undoubtedly have been well advised to obtain an independent valuation. However, no harm was in fact done and no damage or prejudice was caused. Nor is there any question of the respondent directors being personally accountable in any way. That being so, it seems to me to be inappropriate to reach a conclusion that they breached their fiduciary duties, as it were, in the abstract".*

Unfairness

632. On the difficult concept of fairness, the Court has the authoritative guidance given by the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092 and the Court of Appeal in *In re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14. The passage from the speech of Lord Hoffmann in *O'Neill v Phillips* is so central to a consideration of these issues that I consider it right to set it out in full:

> *"5. "Unfairly prejudicial"*
>
> *In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in In re Saul D. Harrison & Sons Plc. [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in In re J. E. Cade & Son Ltd. [1992] B.C.L.C. 213, 227: "The court . . . has a very wide discretion, but it does not sit under a palm tree."*
>
> *Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.*
>
> *In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic*

purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in section 459 runs parallel to that which your Lordships' House, in In re Westbourne Galleries Ltd. [1973] A.C. 360, adopted in giving content to the concept of "just and equitable" as a ground for winding up. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said, at p. 379:

> *"The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act [1948] and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."*

> *I would apply the same reasoning to the concept of unfairness in section 459. The Law Commission, in its report on Shareholder Remedies (Law Com. No. 246) (1997) (Cm. 3769), para. 4.11, p. 43 expresses some concern that defining the content of the unfairness concept in the way I have suggested might unduly limit its scope and that "conduct which would appear to be deserving of a remedy may be left unremedied. . ." In my view, a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. Petitions under section 459 are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted, said that it would be impossible "and wholly undesirable" to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness."*

633. To similar effect is the judgment of Hoffmann LJ in *In re Saul D Harrison & Sons Plc* where he makes clear that the starting point in any case under section 994 is to ask whether the conduct complained of was in accordance with the basis upon which the petitioner agreed that the affairs of the company would be conducted and that, in most cases, this basis is adequately and exhaustively laid down in the articles of association, the material statutory provisions and sometimes in collateral agreements between the shareholders. It is equally well established that it is not every breach of the articles or shareholders agreement which will constitute unfair prejudice.

Conclusions on Mr McKillen's case on unfair prejudice

634. It follows that Mr McKillen must establish conduct of the affairs of the company, or acts or omissions of the company, which have caused prejudice to his interests as a member in a manner which the law recognises as unfair. To the extent that his case is founded on breaches of the articles of association, breaches of the shareholders agreement or breaches of duty by the directors, the element of unfairness may be established.

635. For part of his case, however, Mr McKillen relies also on legitimate expectations of participation in the management of the company. In my judgement, this is not sustainable. The importance of the passage from the speech of Lord Wilberforce in *In re Westbourne Galleries Ltd* cited by Lord Hoffmann in *O'Neill v Phillips* is that it indicates the circumstances in which reliance may be placed on equitable considerations (Lord Hoffmann deprecates the use of the expression 'legitimate expectations', regretting that he introduced it into this area of the law: see p.1102) as giving rise to a possible case of unfair prejudice. It is very important to note that in that passage, having identified that the structure of a company is defined by company law and the articles of association, Lord Wilberforce observed that;

> *"In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small."*

Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company.

636. In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann.

637. This part of Mr McKillen's case arises in relation to his allegation that he has been unfairly prejudiced by exclusion from participation in management. His right to participate in the management of the company is defined by his right as the holder of a particular class of shares to appoint a director to the board of the company. He exercised that right by appointing himself and by appointing Mr Cunningham as his alternate. There has been no interference with that right and no interference with the rights of either Mr McKillen, or in his absence, Mr Cunningham to attend board meetings. On the contrary, they, but mainly Mr Cunningham, have attended all or most of the board meetings held since the purchase of Misland by the Barclay interests. It is clear from the evidence that Mr McKillen and Mr Cunningham have been in no respect inhibited from exercising their rights as directors and from arguing their position. Mr McKillen submits that he has been put in a position of being a permanent minority because directors appointed by the Barclay interests and by Mr Quinlan formed a majority. But there is clearly nothing in the articles or the shareholders agreement which entitles directors to more than the votes at board meetings conferred on them by the shareholders agreement. Nor do the articles or the shareholders agreement prohibit particular groups of shareholders from co-operating with each other unless they have done so in a way which triggers the pre-emption provisions or which constitutes in some way a breach of the obligations of good faith to which I shall later return. The fact that the directors appointed by the Barclay interests and Mr Quinlan may take a position different to that of Mr McKillen does not involve any exclusion of Mr Quinlan or any unfairness unless the position which they take is taken in breach of their duties as directors.

638. Mr McKillen relies on unguarded comments made by Mr Faber in some internal emails to the effect that Mr McKillen's life would be made hell at board level and

that they should do all that they could to make him uncomfortable. That is not, however, the way in which board meetings have in fact taken place. There appears to have been every opportunity for proper discussion at those meetings and it is clear that Mr Cunningham, who for the most part has attended them, has quite properly taken advantage of those opportunities.

639. The matters relied on by Mr McKillen as constituting unfairly prejudicial conduct of the affairs of the company or acts or omissions of the company are summarised in paragraphs 933-959 of his closing submissions. A substantial part of Mr McKillen's case is based on the allegation that a transfer notice should have been given or deemed to have been given in respect of Mr Quinlan's shares. As I read paragraphs 933-946 they are all based on that proposition, except paragraph 941 which concerns the alleged analogous duty arising under the express contractual duty of good faith. I have found that there were no events which triggered the pre-emption provisions, whether under clause 6.6 or 6.17 of the shareholders agreement. If I had found that a transfer notice should have been given or a directors' meeting called to determine whether a transfer notice should be deemed to be given under clause 6.6, some potentially difficult issues would arise as to the nature of the case made by Mr McKillen under section 994. The obligation of a shareholder to give a transfer notice is a personal obligation of the shareholder which is enforceable against him by the other shareholders. The failure of a shareholder to give a transfer notice is not of itself conduct of the affairs of the company or an act or omission of the company. Something more is needed to bring the case within section 994. I would accept that where the directors or a majority of the directors knew that events had occurred which triggered the power of the board to make a determination whether to deem a transfer notice to have been given under clause 6.6 of the shareholders agreement, the failure to do so could properly be described as an omission of the company. If such a meeting had been held and there was a realistic prospect that the board would have determined the transfer should be deemed to be given, then I would accept also that members who may thereby have been deprived of the opportunity of a pre-emption offer may have suffered relevant prejudice. However, in the light of my findings, it is unnecessary for me to analyse whether such a case is pleaded or made out on the evidence.

640. Paragraph 941 and 949-952 of Mr McKillen's closing submission address his case under section 994 based on breaches of the duty of good faith and other provisions of clause 8.5. I have earlier held that there were no breaches of those obligations.

641. Mr McKillen relies on the alleged breaches of duty by the directors as causing or resulting in unfair prejudice to his interests as a member. Plainly the decisions of directors as such involve the conduct of the affairs of the company and if those decisions are reached by the directors or a majority of them in breach of duty and result in prejudice to the member or to the interests of a member then the fact of the decisions being in breach of duty will supply the necessary element of unfairness. I have elsewhere examined the alleged breaches and concluded that, save in one respect, the allegations are not made out. Moreover, on the facts, none of those breaches resulted in any prejudice to Mr McKillen's interests as a member. The closure of the data room had no effect either on the making of offers to the company and its members, principally by the Qataris and Wynton, or on the way in which those offers were considered by the shareholders. The appointment of JLL to

produce a revised valuation of the hotels was approved by the board of the company which approved also the payment of JLL's fee. The company received JLL's valuation report. Mr Seal's encouragement to Mr Hennebry not to write to NAMA on or about the 16 August 2011 in terms which referred to consultation prior to a transfer of the debt and asking whether NAMA was in discussions in relation to a transfer of the debt had no impact on the course of events in August and September 2011 as between the company and NAMA. Likewise, the termination of the company's contract for the provision of Mr Hennebry's services, apart from saving the company the fees payable under that contract, had no impact on the company or its business and in particular had no impact on the course of events as regards the company and NAMA.

642. I have concluded that Mr Faber and Mr Seal were in a position in August and September 2011 where their duty to the company as directors conflicted with their duties as executives of the Ellerman Group and that disclosure should have been made of this conflict. I am satisfied that the failure to disclose this conflict of duties had no adverse impact on the company, and caused no prejudice to Mr McKillen. The same would be true of the other breaches of duty if I had found them to be established.

643. The only prejudice pleaded in the section resulting from the allegations of breach of fiduciary duty is in paragraph 68F that "*Had the Company or its board of directors been made aware of the matters prior to 27 September 2011, it could and would have explored alternative means of refinancing the debt owed to NAMA. It would have concluded that it was not in the interests of the Company or its members as a whole or its members including Mr McKillen that its debt should be acquired by a vehicle of the Barclay Brothers rather than an independent and responsible lending institution*". The company was already exploring the alternative means of refinancing the NAMA debt. The problem was not that it did not know that it had to refinance the debt in short order, but that it was unable to do so. There certainly was not "*an independent and responsible lending institution*" available to provide the necessary finance.

644. The course of events would have been the same. It was impossible for the company to re-finance the NAMA debt without the active support of the Barclay interests. While the company could raise £450-500 million by way of senior debt in a conventional manner, the problem related to the balance. The balance could be raised either by new capital or by borrowing backed by guarantees or security on which the lenders would be prepared to rely. There is no evidence to suggest that any third party would be prepared to provide new capital without very substantial changes to the existing shareholdings. The Barclay interests were not sellers of Misland or the shares which it held in the company and there was no obligation on them to consider the sale of those shares. Unless Mr McKillen was prepared to contemplate a reduction in his share holdings and in effect a return to a deal such as that reached with the Qataris on 12 February 2011 there was no prospect of further capital, except by means of a rights issue but, as earlier mentioned, Mr McKillen would not agree to a rights issue.

645. As regards a loan to bridge the gap, the only source of the requisite security were the Barclay interests. In fact, the financing raised by MFL required the personal guarantees of Sir David and Sir Frederick Barclay. It goes without saying that they

would not be willing to provide a personal guarantee to secure loans to the company if they did not have control of the company. There was the theoretical possibility of some form of mezzanine financing but the proposals which were put forward in that respect, for example by Goldman Sachs, would have been very expensive. Morgan Stanley advised Mr Cunningham that the group's net earnings could not support mezzanine financing in full on an ongoing basis and that it would be necessary to capitalise some of the interest as part of the principal, which would further increase the cost. No case is pleaded nor has any attempt been made to establish that it would have been reasonable or sensible for the company or its shareholders to agree to the type of mezzanine financing that might have been available, still less that it would have been unreasonable to decline it.

646. A sale of assets would not provide the answer. First, Mr McKillen was opposed to a sale of any of the hotels, as Mr Cunningham made clear in his exchanges with Mr Faber in late August 2011. Secondly, the evidence shows that only a sale of Claridge's would release sufficient funds and that was not on the cards as far as anyone was concerned.

647. Mr McKillen's case repeatedly put in cross-examination was that Mr Faber and the other directors should have been pressing hard on behalf of the company for an extension of NAMA's debt by 2 years or at any rate by a substantial period. For the reasons which I give in the section on NAMA, it is in my judgment clear that NAMA was not prepared to grant any such extension but would almost certainly have allowed the facility to go into default on 30 September 2011 without granting any extension. Their often repeated concern was to see the debt repaid or sold at par as soon as possible. If MFL had not purchased it, NAMA is likely to have sought a sale to Wynton and Aabar or another third party. Wynton and Aabar ceased to be competitors only as a result of the deal with the Barclay interests in mid-September 2011.

648. The disclosure of the facts giving rise to the conflict therefore had in fact no impact either on what the company was able to do in relation to the NAMA debt or on what NAMA and MFL in fact did in relation to the NAMA debt. The position is the same as that which existed in *Rock Nominees Ltd v RCO (Holdings) Plc* and no prejudice to Mr McKillen's interests as a member arose as a result of this non-disclosure.

649. There is this further consideration. MFL's deal with NAMA was not a surprise to Mr McKillen. His evidence is that by 26 August 2011 rumours were rife that the Barclay brothers were negotiating with Barclays Bank to raise finance to purchase the NAMA debt. For that reason he wrote on 26 August 2011 to Bob Diamond, then the chief executive of Barclays Bank, requesting a meeting. The brief reply that there could be no meeting because Barclays Bank was conflicted can only have confirmed Mr McKillen's belief.

650. Notwithstanding this knowledge, as in effect it was, Mr McKillen did nothing to raise funds to meet the company's liability. Coming after months when no solution was found, it tends to confirm that even with formal disclosure by Mr Faber and Mr Seal, neither the company nor Mr McKillen could have found an alternative to MFL's purchase of the debt, followed by a rights issue.

651. A final but important point is that, even if Mr McKillen's case as to the true purpose of acquiring the NAMA debt were correct, the prejudice would lie not in MFL's acquisition of the debt but in what MFL and the company then sought to do. MFL was free of any contractual or other constraint on acquiring the debt and the acquisition would not involve conduct of the affairs of the company. If an ensuing foreclosure or a rights issue were in some way improper, a failure by the company to challenge the former or its agreement to the latter would constitute an omission or act respectively of the company potentially open to challenge under section 994. In that way, the real prejudice, if such it were, would be identified and addressed.

652. The section of the petition headed "*MFL Refinancing Demands*" refers in paragraphs 72 to 75 to the proposals made by MFL to the company on 27 and 28 September 2011 for refinancing the NAMA debt which it had by then acquired. Paragraph 76 sets out objections to those terms. Paragraph 78 alleges that "*Any agreement by the Company to the terms proposed by MFL or similar terms*" would in the circumstances be unfairly prejudicial to Mr McKillen's interest as a member of the company. It goes on to allege that the company should instead either challenge the assignment from NAMA or seek to establish whether improved terms were available from MFL or pursue alternative proposals for refinancing the debt.

653. In fact, matters have moved on considerably since the end of September. The board has engaged financial advisers and there have been extensive discussions between the directors and with third parties. So far as I am aware, there is no current proposal to proceed with a rights issue on the terms set out towards the end of September 2011 and these proceedings have not been concerned with and have not investigated whether the course of events since then has involved any unfairly prejudicial conduct of the affairs of the company.

Tort claim

654. In light of my findings and decisions on the breaches of contract and breaches of duty alleged in the petition, I can deal with the tort claim very shortly. It fails. First there have been no breaches of contract and only one breach of duty established. Secondly, Mr McKillen has suffered no loss from that one established breach of duty, nor would he if the other breaches had been established. Without loss, there is no tort. Thirdly, there is no evidence of a combination or agreement of the defendants that Mr Faber and Mr Seal should not disclose the existence of the negotiations with NAMA.

655. Many interesting issues on the limits to the tort of conspiracy to injure by unlawful means were discussed in submissions, such as whether a breach of contract can constitute unlawful means and the degree of knowledge on the defendants' part as to the unlawfulness of the means. A decision on these matters must await a case whose facts merit it. One finding I can and should make is that none of the defendants can have understood that any of their acts would breach clause 8.5 of the shareholders agreement, even assuming any of them had read it which I find highly unlikely with the possible exception of Mr Faber.

Conclusion

656. I wish to repeat the tribute previously paid to the solicitors and counsel engaged for all the parties. I gave directions at an early stage for a speedy trial and a very tight timetable for disclosure and the preparation of witness statements, both of which were very large tasks. The organisation of all the materials for trial was very impressive. The oral and written submissions were of the highest standard and all counsel were unfailingly helpful to me.

657. The overall conclusion is that Mr McKillen's petition and claim fail and will be dismissed. They fail because the alleged breaches of the pre-emption and other provisions in the shareholders agreement and the alleged breaches of duty by the directors are not established (save in one instance) and because Mr McKillen cannot establish any conduct of the affairs of the company which has been unfairly prejudicial to him.