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**

- -

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.

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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,

say, less than 10%. On 31 August 2010 Mr Murphy forwarded Sir David's email to Mr Hennigan at NAMA and commented "I have met Sir D several times on this with and without DQ. There is no future in these negotiations".

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.