Neutral Citation Number: [2025] EWHC 32 (Comm)

Case No: CL-2023-000282

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 24/01/25

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) MACDONALD HOTELS LIMITED **(2) MACDONALD BOTLEY PARK LIMITED**	**Claimants**
- and -	
BANK OF SCOTLAND PLC	**Defendant**

- -
- -

Tim Lord KC, Fred Hobson KC and Vanshaj Jain (instructed by **Enyo Law LLP**) for the **Claimants**
Andrew Mitchell KC, Elizabeth Fitzgerald And **Rupert Allen** (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 9-10, 14-17, 21-24, 28-29 and 31 October, 4-7 and 19-21 November 2024.

- -

Approved Judgment

This judgment was handed down remotely at 08.30am on 24 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the trial of a claim by the claimants against the defendant ("BOS"), which the claimants quantified at the start of the trial at up to about £118m. Part of the claim and perhaps the largest element by value concerned what the second claimant alleged to be the "*forced disposal"* of a parcel of development land at Botley Park, Hampshire, in July 2015. However, that claim was discontinued following the completion of Mr Donald Macdonald's oral evidence.

2. Thereafter the claim continued in relation to what the first claimant ("MHL") alleges to have been the forced disposal of three hotels, being (a) the Randolph Hotel in Oxford, which the first claimant owned and which it maintains it was forced to sell and lease back in March 2014; (b) the Old England Hotel on Lake Windermere, which MHL owned and maintains it was forced to sell and enter into a management agreement with the new owners in August 2015; and (c) the Marine Hotel in North Berwick. The Marine was owned at all material times by a subsidiary of MHL's called Macdonald Marine Limited ("MML"). MHL maintains MML was forced to sell the Marine on the basis that MHL would enter into a management agreement with the new owners. The sale took place and MHL entered into a management agreement in respect of the Marine in October 2015.

3. MHL alleges that the disposal of the Randolph was forced upon it by BOS in breach of the express terms of a shareholders agreement dated 30 July 2003 between MHL and Uberior Investments Limited, ("Uberior"), a wholly owned subsidiary of BOS, to which BOS was also a party ("SHA"). MHL alleges that the disposal of the Old England Hotel was forced upon it (and on MML in relation to the Marine) by BOS in breach of what are alleged to be the implied terms of a Facility Agreement between MHL and BOS known in these proceedings as the 2014 Facility Agreement.

4. The claim in respect of the Marine is brought by MHL as assignee of BWUK Operator Ltd (formerly known and referred to hereafter for convenience as MML), which had been sold by MHL to Glencairn Finance Limited on 20 October 2015. BOS maintains that the assignment was invalid or, in any event, the claim by MHL could only be brought by it following the assignment, and that since it is agreed between the parties that MHL's claim as assignee is to be deemed issued on 18 July 2024 and that the relation back doctrine is not to apply, it follows that the Marine Hotel element of the claim is statute barred.

5. The core allegation made by MHL is that by forcing the sale of the hotels, BOS acted in bad faith, contrary to the express term relied on and/or the alleged implied terms. MHL alleges that it should have been permitted by BOS (if it had been acting in good faith) to repay BOS in other ways and/or over a longer period so as to enable them to avoid or delay selling the hotels at what it maintains were undervalues, in the sense that the hotels were sold at a time in the economic cycle when hotel values were historically low.

6. BOS denies that (i) the express term relied on has the effect for which the claimants contend; (ii) the implied terms asserted are to be implied into the 2010 or 2014 Facility Agreements; (iii) there has been a breach of either the express terms relied on or the implied terms, if such are to be implied, and (iv) any alleged breach as may be proved has caused the alleged or any loss to the claimant. In addition, and aside from the limitation defence it relies on in relation to the Marine Hotel claim, BOS also maintains that any claim that MHL might otherwise have had in relation to the sale of the Randolph Hotel was discharged by a Deed of Waiver ("DoW") dated 19 March 2014. MHL disputes that such is the effect of the DoW as a matter of construction or because MHL is entitled to avoid the DoW on the ground that it was procured by misrepresentation. In addition, it pleaded and maintained until its closing submissions an allegation that BOS had procured MHL's agreement to the DoW by economic duress. That allegation was abandoned by its omission from its closing submissions. It was not resurrected in the course of Mr Lord KC's closing oral submissions.

7. The value of the remaining hotel sale claims depended on various issues of principle and detail that were in dispute at the start of the trial. However, those were largely resolved by agreement between the parties during the course of the trial with the result that the sums recoverable by way of damages depend upon the resolution of six remaining issues of principle. It was agreed I would reach conclusions on those issues (to the extent that it is necessary to do so once conclusions have been reached on the liability issues) and the parties would carry out the necessary calculations. In the result, although the parties had relied on extensive expert evidence from no less than 7 witnesses, it was not necessary for any of those witnesses to be called to give evidence and it is not necessary that I refer to it further at this stage.

8. The trial took place between 9-10, 14-17, 21-24, 28-29 and 31 October, and 4-7 and 19-21 November 2024. I heard oral evidence adduced by MHL from:

    i) Mr Donald Macdonald, who was during the relevant period the Chairman of MHL;

    ii) Mr Gordon Fraser, who was at the relevant time the Finance Director of MHL;

    iii) Mr James Davidson, who was at the relevant time the Corporate Finance Manager of MHL;

    and oral evidence adduced by BOS from:

    iv) Mr Richard Dakin, who was the Head of Corporate Real Estate within a division of BOS known as the Business Support Unit ("BSU") between 2009-2014;

    v) Mr Duncan Smith, who was BOS's relationship manager responsible for the relationship between MHL and BOS between 2009 and the last quarter of 2014;

vi) Mr Ian Guthrie, one of BOS's officials responsible for hotel exposure via customers managed from within the BSU and who was involved in BOS's relationship with MHL between 2012 and 2014;

vii) Mr Bruce Anderson, who was a director of Uberior from 2002 to February 2015. Uberior was at all material times a wholly owned subsidiary of BOS that held shares in the entities with which BOS entered into joint venture relationships (including with MHL) and was a director of MHL between 2005 and July 2014 as Uberior's nominee;

viii) Mr Alasdair Gardner, an official employed by BOS who was head of a division within the organisation of BOS referred to variously as the Mainstream or frontline lending team and who became involved in the relationship of BOS with MHL in 2014; and

ix) Mr Matt Bentley, an official employed by BOS who became involved in the relationship between MHL and BOS from 2015.

9. This is a very heavily documented commercial claim relating to events that occurred between 10-15 years ago. In those circumstances, the oral evidence of each of the witnesses of fact must be tested, wherever possible, against the contemporary documentation, admitted and inconvertible facts and inherent probabilities – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 413 – and their subsequent conduct – see Bailey v. Graham [2012] EWCA Civ 1469 per Sir Andrew Morritt CHC at [57]. Whilst it is necessary to consider all of the relevant evidence and not simply such documentation as may be available – see Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at [88]-[89] - there is nothing either in this authority or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques referred to above. Given the passage of time that has elapsed since the occurrence of the events relevant to this claim, use of these techniques is all the more appropriate – see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) at [15]-[22]. This is the approach I have adopted.

The Randolph Hotel Claim

Factual and Contractual Background Down to 19 March 2014

10. At all material times MHL (and its publicly owned predecessor) owned and operated a portfolio of hotels that included the Randolph, the Old England and the Marine Hotels. BOS was at all material times its commercial banking services provider. Relatively unusually for a commercial, as opposed to an investment, bank or private equity house, BOS was willing to enter into relationships with its customers that involved both an equity and a debt element. In this case that involved BOS (via Uberior) acquiring a 50% shareholding in what became MHL. That relationship was governed by the SHA. The SHA was terminated by agreement on 19 March 2014, when Uberior sold back its shares in MHL and MHL and BOS entered into what is known in these proceedings as the 2014 Facility Agreement. It is for that reason that the express terms of that agreement are of no application to the Old England and Marine claims.

The SHA

11. The parties to the SHA (who were "*Parties*" as defined by the terms of the SHA) included Uberior and the Governor and Company of the Bank of Scotland and "*control*" was defined as meaning:

> " … the possession, direct or through one or more intermediaries or together with persons Acting in Concert, of the power to direct or cause the direction of the management or policies of any person and, without limitation, for the purposes of this Agreement, an interest in shares in the capital of a company conferring in the aggregate 50% or more of the total voting rights conferred by all the issued shares in the capital of that company shall be deemed to confer control of that company;"

The provisions of the SHA that matter for present purposes are all in Section 6, under the subheading "*Business of the Group and conduct of the Parties"* and are to the following effect:

> "6.2 The Parties hereby agree and undertake to each other to exercise all voting rights and other powers of control available to it to procure that the Business shall be carried out at all times in the best interests of the Company and the Group on sound commercial profit making principles in such a manner as to maximise the Group's profits and to minimise its losses. …
>
> 6.3 Each Shareholder and, separately, the Company (insofar as it may validly do so) hereby respectively agrees with and undertakes to the other Parties as follows-
>
> 6.3.1 to exercise all voting rights and other powers of control available to it so as to give full effect to the terms and conditions of this Agreement including, where appropriate, the carrying into effect of such terms as if they were embodied by the memorandum and articles of association of the Company and/or the relevant member of the Group (as the case may be);
>
> 6.3.2 to procure that all third parties directly or indirectly under its control shall refrain from acting in a manner which will prevent the Company or the Group from carrying on the Business in a proper and reasonable manner; and
>
> 6.3.3 generally endeavour to promote the Business and the interests of the Group;
>
> …
>
> 6.5 Each of the Parties agrees with the others that:
>
> 6.5.1 during the term of this Agreement, all transactions entered into between any of them or any Affiliate or Connected Person

> of them and the Company or any member of the Group shall be conducted in good faith on arm's length terms and otherwise on the basis set out or referred to in this Agreement;
>
> 6.5.2 it shall act in good faith towards the other Parties, the Company and the Group…"

As I explain in more detail below, when interpreting a particular contract provision it is necessary to read the provision as a whole, in the context of the contract in which it appears when read as a whole and in its more general commercial context. Given the split roles played by BOS and Uberior explained above, BOS places particular emphasis on the content of clause 12 of the SHA as relevant to the proper construction of the provisions referred to above. In my judgment it was correct to do so. In so far as is material clause 12 provides:

> "12.1. The Shareholders confirm and agree that it is their objective and intention that, so far as practicable, the activities of the Group are financed from their own resources.
>
> 12.2 No Shareholder shall be obliged to provide financial facilities to the Group, except as expressly provided pursuant to this Agreement and, for the avoidance of doubt:
>
> 12.2.1. any consent or approval or other action of any B Shareholders or any B Director shall not bind or oblige BOS to make any financial facilities available to the Group;
>
> 12.2.2 any consent, approval, waiver or other action of BOS under this Agreement shall not bind or oblige BOS under the Facility Agreements; and
>
> 12.2.3 no B Shareholder or B Director shall be entitled to give or deemed to have given any consent, approval or waiver or otherwise bind or obligate BOS under the Facility Agreements."

Finally, by clause 17 of the SHA it was agreed between the parties that *"(n)one of the provisions of this Agreement shall be deemed to constitute a partnership amongst the Parties (or any of them*) …"

12. MHL's case is that the effect of those parts of clause 6 set out above was to place on BOS "*an express duty of good faith"*. It is common ground that the SHA was in force at the time when the Randolph Hotel came to be sold and MHL's claim in relation to that hotel is advanced exclusively by reference to an allegation that by forcing it to sell the Randolph, BOS acted in breach of the alleged express duty of good faith contained in the SHA.

Relevant Core Principles of Contractual Construction

13. The principles that apply when construing contracts as a matter of English law (and which apply therefore to each of the contracts with which this claim is connected) are now very well established. They have been summarised in

various judgments at all levels over the last decade or so and were authoritatively re-stated by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] AC 1173 ("Wood v Capita") in the judgment of Lord Hodge JSC at [10] and following.

14. In summary, all contracts must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. As Lord Hodge emphasised in his judgment in Wood v Capita, in carrying out that exercise:

> "It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. …
>
> Interpretation is … a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest … Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. …
>
> This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated …
>
> … Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals."

To this it is only necessary to add, in this case at least, that whilst the unitary exercise to which Lord Hodge refers requires a court to consider commercial consequences, commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it – see FCA v. Arch insurance (UK) Limited and others [2020] EWHC2448 (Comm); [2020] Lloyd's Rep IR 527 *per* Sir Julian Flaux CHC and Butcher J at [64], approved by the Supreme Court in the same case at [2021] UKSC 1 *per* Lords Hamblen and Leggatt JJSC at [47], with whom Lord Reed PSC agreed, and Lords Briggs JSC and Hodge DPSC

concurred at [314]. As the Divisional Court in that case also noted, *"…(a)rguments which rely on what is absent from the drafting of the contract are to be treated with caution and in many cases provide little assistance*…" I return to this last point later in this judgment where it may be relevant to a short point of construction.

15. The focus of the parties in relation to the construction issues that matter was on the text of the relevant contracts read as a whole, in their commercial context and bearing in mind their commercial purpose, and commercial common sense subject to the restraints noted above. I do not disagree with this approach, not least because all of the agreements that are relevant to this case have been drafted by apparently experienced and skilled legal advisors acting for each of the parties and in my judgment therefore any issues of interpretation that matter are likely to be ones that can and should be resolved principally by textual analysis save where any particular provision lacks clarity.

Construction Issues Concerning the SHA

16. It is not in dispute that "*the Parties"* referred to in clause 6.2 and clause 6.5 included BOS. MHL's pleaded case relies on clauses 6.2, 6.5.1 and 6.5.2.

17. Applying the principles set out above, clause 6.2 is concerned with the exercise by each party of all voting rights and other powers of control available to it. The "*it*" referred to is and can only be the Party that is exercising the voting rights or right of control under scrutiny. In the context of this case that can only mean BOS since Uberior is not a defendant. It follows that the clause can only apply to any exercise by BOS of its shareholder voting rights in respect of Uberior and the reference to "*other powers of control"* can likewise apply only to its powers of control over Uberior. BOS did not have, nor is there any pleaded allegation to the effect that BOS had any direct control over MHL.

18. Clause 6.5.1 is not concerned with the conduct of the parties in negotiating any transaction to which the clause refers but with the conduct of the parties when carrying into effect such transactions. Clause 6.5.2 is more widely expressed but in my judgment is not a provision that governs the conduct of negotiations between the parties concerning the provision of financial facilities to MHL reading clause 6.5.2 together with clauses 12.2 and 12.2.1. BOS was not obliged to make any financial facilities available to MHL, nor to extend or renew such facilities as and when an existing facility expired by the effluxion of time and it was fully entitled to pursue any negotiations concerning the provision or renewal of such facilities exclusively in its own commercial best interests.

19. I accept that in principle the facility agreements between MHL and BOS (once agreed) were transactions to which clause 6.5.1 applied and thus that BOS was required to administer those facilities "…*in good faith on arm's length terms*…" as long as the SHA was in force. The main focus of the parties' submissions by the end of the trial concerned the content of this requirement.

20. In my judgment, applying the principles summarised above, the effect of this phrase must "… *take its meaning from the context in which it is used*…" – see Re Compound Photonics Group Limited [2022] EWCA Civ 1371 *per* Snowden

LJ at [147]. This is a fact specific issue therefore and not one likely to be assisted by the construction of similar let alone materially different iterations of clauses that import the good faith concept into other contracts entered into in different commercial contexts - see Re Compound Photonics Group Limited (ibid.) *per* Snowden LJ at [147].

21. That said, I accept that in most cases, an express obligation to conduct a contractual relationship, or some part of it, in good faith requires the parties concerned to conduct themselves honestly and not in bad faith. However, in my judgment the point made by Snowden LJ in [155] of his judgment in Re Compound Photonics Group Limited (ibid) applies with equal force on the facts of this case - there is no equivalence between the duty of good faith imposed by the general law on partners, between whom there is a fiduciary relationship, because here, as in Re Compound Photonics Group Limited (ibid.), the parties to the SHA have expressly agreed that their relationship was not to be one of partnership. Reading clauses 6.5.1 and 17 together suggests the parties intended the effect of the requirement to act in good faith to be limited, or as it is formulated in some authorities[1], modest or undemanding in scope.

22. The obligation imposed by clause 6.5.1 was not to conduct transactions in good faith alone, but rather "… *in good faith on arm's length terms*…" This phrase lacks clarity even though it appears in a professionally drawn agreement arrived at following negotiations where both parties were represented by solicitors with substantial commercial experience. I conclude that this phrase is one that Lord Hodge referred to in his judgment in Wood v Capita as a provision that may have been a negotiated compromise or one that was adopted because the negotiators were not able to agree more precise terms. The addition of the phrase "… *on arm's length terms…"* suggests that the probable intention of the parties was to require the parties to act honestly, conscionably and (if this is different) not act in bad faith when dealing with each other under the terms of the relevant transaction being considered, whilst at the same time not being required to go (or to consider going) beyond the contractual obligations, or forego the contractual rights, that they each had, other than to the extent required by the general law. In my judgment a conclusion that the effect of the provision went any further than this must be "… *capable of being derived as a matter of interpretation or implication from the other terms of the contract in issue in the particular case*…" – see Re Compound Photonics Group Limited (ibid.) *per* Snowden LJ at [243]. The provisions to which I have referred, when read together, do not support such a conclusion and there is nothing in the SHA read as a whole or in the wider commercial context or which can be derived from commercial common sense as qualified in the way identified earlier that would support such a conclusion either.

23. It follows from what I have said so far, that as a matter of construction, clause 6.5.1 did not require BOS to subordinate what it considered to be its own commercial best interests when administering the facilities it had agreed with MHL so long as pursuit of those interests (i) did not breach BOS's contractual

[1] See e.g. Al Nehayan v Kent [2018] EWHC 333 (Comm) *per* Leggatt LJ (sitting as a first instance judge) at [175] and Astor Management AG v Atalaya Mining plc [2017] EWHC 425 (Comm) *per* Leggatt J at [98].

obligations to MHL (as qualified by the general law, if and to the extent they were so qualified) in respect of the relevant transaction and (ii) was not dishonest or unconscionable or pursued in bad faith. Subject to those modest constraints, clause 6.5.1 does not qualify the ability of BOS to enforce the terms of its facility agreements with MHL in accordance with their terms. As I said earlier, it has no impact at all on the terms that BOS could insist on when offering facilities. That is the necessary effect of clause 12.2 when read together with clauses 6.5.1 and 6.5.2 and clause 17.

24. In those circumstances, I conclude that it could not and would not be a breach of the terms of the SHA for BOS to insist on MHL reducing its indebtedness and its loan value to EBITDA[2] ratio as part of the negotiations for a renewal of an existing facility since such a renewal was by definition a new facility that BOS could grant or not as it chose or grant only on such terms as it chose – see clause 12.2 of the SHA.

The Facility Agreements

25. I refer as necessary later in this judgment to the detailed terms of the various facility agreements between BOS and MHL. It is necessary to note at this stage only that it is common ground that MHL's commercial lending relationship with BOS was governed by facility agreements that were renewed on different detailed terms on various occasions including in 2010 and 2014 and that neither of these facilities contained any express terms to the effect set out in Section 6 of the SHA.

26. Although the provisions of the facility agreements were complex, the short point is that the facility agreements precluded MHL or its subsidiaries from creating any security or selling or disposing of any relevant assets (it being common ground that the Hotels were such assets) otherwise than with the prior written approval of BOS. These provisions were inserted into the facility agreements in order to protect the security provided by MHL to BOS to secure the loans BOS made available to MHL. MHL's case is that the effect of these provisions in particular in the 2014 Facility Agreement was to confer on BOS a discretion to determine whether, when and on what terms it would permit MHL to dispose of its assets (and those of its subsidiaries) in order to pay down its debt in accordance with the terms of the Facility Agreement concerned and so were subject to a term to be implied on the basis explained in Braganza v BP Shipping Limited [2015] UKSC 17; [2015] 1 WLR 1661 ("Braganza"). MHL maintains that in the circumstances the terms to be implied in particular into the 2014 Facility Agreement were that BOS would (a) act in good faith and not arbitrarily or capriciously in exercising its discretion and exercise its discretion consistently with its contractual purpose; (b) take into account all relevant considerations and not take into account any irrelevant considerations, and (c) would not use the discretion for an improper purpose.

[2] Earnings Before Interest, Taxes, Depreciation and Amortization, which is a revenue assessment metric.

27. BOS denies that any such term is to be implied into the facility agreements on the basis that (a) the requirement for it to provide written approval was expressed in clear terms to be unqualified and that fact, in combination with the protections provided by the general law for those who secure debt against property, means that the alleged implied terms cannot or should not be implied into the facility agreements; but (b) in any event, MHL has not proved that BOS breached any such terms if they are to be implied and any breach that has been proved has not been proved to have caused the alleged or any loss by reference to the sale of the Old England and Marine Hotels. I return to this issue in more detail below when considering MHL's claims concerning the Old England and Marine Hotels.

The Material facts Down to 19 March 2014

28. The facts on which the claimant relies for its claims start in 2009. Prior to that, MHL had had a long-standing commercial relationship with BOS, whose parent company was HBOS Plc ("HBOS") until its merger with Lloyds TSB Bank Limited ("Lloyds") referred to below. MHL's case is that in the period before 2009, the parties' relationship and in particular its joint venture relationship flourished. It was however a business that depended on very extensive borrowing. On the date when MHL, BOS and Uberior entered into the SHA, MHL and BOS also entered into a super senior Facility Agreement, a senior Facility Agreement and a subordinated senior Facility Agreement ("2003 Facility"), by which BOS made loan facilities available to MHL in the total amount of £453.68m. The principal purpose of the joint venture the subject of the SHA was to facilitate the de-listing of the Macdonald group from the London Stock Exchange. The principal purpose of the 2003 Facility was to fund that exercise. The delisting occurred on 4 December 2003.

29. On 19 October 2005, MHL refinanced its borrowings with BOS, with BOS providing loans of £620m, including two term loan facilities for £275m and £55m respectively (each of which were repayable in full by 30 September 2010), a bridging loan of £200m (which was repayable in full by 31 October 2007) and ring-fenced amounts for capital expenditure ("Capex") funding (£75m) and working capital (£15m) ("2005 Facility").

30. By the end of 2007, the bridging loan had been repaid by the sale of 24 hotels. At that time MHL's business plan included:

> "… de-gearing the business through the disposal of assets, ultimately resulting in a company with debt reduced to c£100m. This process commenced with the disposal of 24 assets in January 2007 to Moorfield (to be managed by Accor) for £432.5m, which resulted. in pre-tax gains for MHL in excess of £120m. The proceeds were entirely used to reduce the debt burden."

The sale referred to was the sale that enabled the bridging loan to be repaid. However, that pre-dated the onset of the global financial crisis and involved the sale of hotel assets that had been identified for disposal.

31. In September 2008, Lehman Brothers collapsed and the international banking crisis followed. This necessitated stabilisation of the UK banking system. As part of that exercise, in January 2009, HBOS merged with Lloyds to become Lloyds Banking Group Plc ("LBG").

32. MHL's case was that this change of control led to BOS adopting a strategy of exiting its joint venture relationships and aggressively reducing the size of its commercial loan book by requiring borrowers such as MHL to reduce aggressively their indebtedness including by asset disposals. It is not seriously in doubt that such was the case although in my judgment the concern BOS had with its lending to MHL was both with the volume of lending and its ratio of loan value to MHL's EBITDA. It was concerned with each of these metrics both for its own commercial reasons and because of the impact each had for the long term health of MHL – see by way of example the evidence of Mr Dakin (T8/87/7-126) and Mr Guthrie (T9/161/4-8). I accept this evidence not least because BOS through its subsidiary Uberior had a substantial equity interest in MHL. As Mr Macdonald acknowledged in the course of his cross examination there was nothing wrong in this approach:

> "Q. That desire to de-gear or the need to de-gear or deleverage, if you prefer that expression, that became even more important following 2009, didn't it –
>
> A. It did.
>
> Q. -- with the Financial Crisis –
>
> A. That's right.
>
> Q. -- because the Financial Crisis was, very broadly, a debt crisis, wasn't it?
>
> A. The goalposts --
>
> Q. The capital markets --
>
> A. The goalposts moved and the landscape -- the funding landscape totally changed.
>
> Q. And there was a very severe tightening in credit conditions.
>
> A. That's right, my Lord.
>
> Q. And there was a desire across all financial markets, really, to de-risk balance sheets.
>
> A. That's right, my Lord.
>
> Q. And you accept the bank was entitled to react to that changed goalpost?
>
> A. Yes, my Lord."

The change of approach was the inevitable consequence of the global financial crisis. None of this would excuse action being taken otherwise than in accordance with the agreements that governed the relationship between BOS and MHL, but it does provide the context in which the change in approach should be understood. It is difficult to see how in such circumstances, such otherwise lawful action could sensibly be characterised as BOS acting in a manner that was dishonest, capricious or unconscionable, or as BOS acting in bad faith towards MHL.

33. On or about the time when HBOS and Lloyds were merging, management of MHL's banking relationship was moved to the BSU. There was a significant amount of debate in the course of the trial as to whether at any particular time MHL was being managed in the "*non-core*" part of the BSU and if it was, whether it should have been, or should have been managed in that way for as long as it did. To my mind none of this matters. If BOS conducted itself as it was obliged to do contractually then from where within its organisation it managed its relationship with MHL did not matter. Similarly, if BOS did not conduct itself as it was obliged to do contractually, that factor did not matter either. Similarly, much was made of the inadequacy of the information barrier that existed between those officials at BOS involved in administering the joint venture relationship between Uberior and MHL and those involved with managing the banking relationship between BOS and MHL. It was clear that the information barrier did not work well in some instances and for some periods. However, whilst that might have been or be an internal managerial or regulatory concern, again that does not matter for present purposes for the reasons already given in relation to the BSU issue, particularly given what is alleged by MHL against BOS.

34. As already noted, the sums lent under the 2005 Facility (other than the bridging facility which was due to be repaid in full by 31 October 2007 but in fact was repaid at the end of 2007) were repayable in full by 30 September 2010. The negotiations relating to this issue started in June 2009. There were broadly three choices available to the parties at that stage – either the sums that fell due on 30 September 2010 were repaid by MHL from its own resources, or refinanced by MHL borrowing what was required from another lender, or refinanced by BOS. No one suggests that the first option was a possibility and the second proved not to be an available option either – MHL explored the possibility of debt refinance with 4 other commercial banks. In each case, MHL's debt to EBITDA ratio (at that stage circa 12x EBITDA) was massively outside those banks' lending parameters. As the MHL internal report summarising the outcome of these approaches said:

> "None of the banks we approached were interested in participating in a refinancing of the full facility, but there was interest to participate if the facility was tranched into a senior piece with lower leverage and a fully subordinated junior piece.
>
> …

> All the banks felt that the leverage, at 12x LTM EBITDA (or 9x 110x EBITDA less central costs) were too high in this market for their credit committees to accept. The range of views regarding the appropriate leverage was 3x — 7x LTM EBITDA, with Barclays and RBS both suggesting 6x — 7x, Clydesdale 5x maximum and Santander 3.5x to 4x (perhaps up to 5x with a sound business case)."

These conclusions provide incidental support for BOS's own view that there needed to be a significant reduction in MHL's loan to EBITDA ratio and also reflected MHL's view that debt and the leverage ratio had to be reduced – see Mr Macdonald's evidence at T3/78/4-16 and that of Mr Fraser at T/6/31-39.

35. This left only a renegotiation by MHL with BOS. In the environment that applied during the period of this negotiation, BOS was plainly entitled to insist on provisions within any new facility that addressed its twin concerns of debt volume and MHL's loan to EBITDA ratio. As I have explained, there was nothing within the SHA that precluded such an approach and even if that is wrong and in principle clause 6.5.1 could be said to apply to the negotiation of the new facility, there is nothing within the content of the good faith obligation that could preclude BOS from addressing those issues in its negotiation of the new facility. It is not suggested by MHL that BOS was obliged to proceed in relation to the negotiation otherwise than in what it perceived to be its own interests.

36. Mr Macdonald said of this exercise in his witness statement that:

> "We hit a brick wall every time we tried to discuss our approach with the Bank, however. There was no longer any constructive relationship, and we were simply dictated to by the Bank. Given the Bank's total control over MHL's refinancing we had no option other than ultimately, and very reluctantly, to agree …"

Some care has to be adopted in assessing this: as I have explained BOS had real concerns about its own exposure and the long-term health of MHL. That was an entirely legitimate commercial concern since the amount lent and the ratio of the sums lent to MHL's EBITDA had a direct impact on the risk faced by BOS and were significantly outside what would be regarded as conventional at the time these negotiations were taking place, as is apparent from MHL's summary of the attitude to refinancing shown by other institutional lenders (see above). It was fully entitled to negotiate in its own best interests and it is hardly surprising, given what it then perceived to be in its own commercial best interests, that it stood firm in relation to the terms and duration of what became Facility B in the 2010 Facility – that is what came to be referred to by the parties as the *"deleverage bridge*". Whilst undoubtedly, MHL's negotiating position was not a strong one, there is nothing in BOS's approach to this exercise that could be characterised as bad faith even if, contrary to which I have concluded, there was any good faith obligation that applied to BOS in respect of its negotiation of a new facility. Mr Macdonald's complaint that there was a lack of constructive engagement is, in reality, a complaint that BOS maintained its position in its

own best interest rather than acceding to MHL's demands, which it had advanced in its own commercial best interests.

37. As I explain below in more detail, creating the deleverage bridge involved splitting the total sum the subject of the 2010 Facility into three, of which the two that matter for present purposes are Facility A and Facility B. This structure was by design an attempt by BOS to incentivise MHL to repay the Facility B element of its borrowing by the end of March 2012 for the purpose of reducing (a) the total sums lent by BOS to MHL and (b) MHL's loan to EBITDA ratio. As I explain below MHL, largely at the insistence of Mr Macdonald, very strongly resisted the inclusion of the deleverage bridge in the 2010 facility. In the end however, it was agreed between the parties. It is not in dispute that was so and that BOS sought to include this arrangement is not alleged to be a breach of any duty owed to MHL by BOS.

38. The structure insisted on by BOS and ultimately agreed to by MHL required that MHL either repay Facility B and thereby reduce its debt to BOS by £60mwithin 18 months of what would become the 2010 Facility taking effect or pay interest on Facility B on and after on 31 March 2012 at a rate that increased from that date from 3% above LIBOR (as defined in the 2010 Facility Agreement) to 10% above LIBOR. Importantly, repayment was not required but it was accepted that the increased interest margin would be a major incentive to repay Facility B by 31 March 2012. Mr Macdonald considered that this requirement would be significantly damaging to MHL because it would be forced to sell assets by the end of the bridging period in order to repay that sum if the enhanced interest requirement was not to apply.

39. Although MHL accepted BOS's terms and executed the 2010 Facility document, I consider it improbable that Mr Macdonald ever fully accepted its implications or the notion that in order to reduce or extinguish the Facility B lending, assets and, in reality, prime assets would have to be sold. Mr Macdonald was concerned that the sale of hotels (the main category of assets held by MHL) at this time would be damaging because hotel sale prices were at historically low levels. There is no issue that this was so as is plain from the economic and historical context in which the renegotiation was taking place.

40. Since there was no market or likely to be no market for what MHL called its non-core assets, if it had to sell assets, the assets it would have to sell were its prime hotels at historically low market prices. This was a source of difficulty for two reasons. First, it involved selling prime assets at historically low prices but secondly it impacted adversely on what the parties referred to as the leverage ratio – that is the ratio of debt to revenue measured using the EBITDA metric. Whilst the sale of a prime asset might result in a reduction in total debt, it would also result in a reduction in revenues (not least because again broadly the prime hotels were the ones that generated most income) so that the leverage ratio would remain much as it was or even increase, even though total debt was reduced. It is for that reason that a sale and leaseback was likely to represent the optimal solution both for MHL and BOS.

41. For these reasons, BOS was not merely concerned to see a reduction of debt but also the reduction of the debt to EBITDA ratio. This was understood by both parties as is reflected for example in a conversation between Mr Fraser on the one hand and Mr Iain Corstorphine on behalf of BOS on 3 July 2009 to the effect that:

> "Gordon again raised the possibility of churning parts of the portfolio to reduce debt and raise cash for strategic capex - the writer agreed that this was a sensible approach with the key requirement being a reduction in the Debt / EBITDA multiple rather than pure debt reduction. Gordon agreed and this was his intended approach"

Notwithstanding Mr Macdonald's views as to what was being proposed, it is clear that internally BOS considered that as a matter of judgment a tougher negotiating stance might have been appropriate. When the relevant Credit Committee considered the 2010 Facility proposal its judgment was that it was prepared to support it if that is what BOS's officials responsible for the relationship considered appropriate, "… *rather than pushing for a more aggressive approach to dispose of assets and deleverage the business*…" as by implication it would have preferred. It is noteworthy that here too the twin concerns of reducing debt and the leverage ratio were the issues of concern.

42. On 20 August 2010, MHL conceded the deleverage bridge in the terms that BOS had been insisting on – see the letter of that date from Mr Fraser on behalf of MHL to BOS, which stated that whilst disappointed "*… the Board are prepared to accept the period and pricing …"* of the deleverage bridge as part of what became the 2010 Facility. That facility was contained in and governed by a Facilities Agreement dated 29 October 2010 ("2010 Facility").

43. In so far as is material for present purposes, the 2010 Facility defined "*Permitted Disposal*" as meaning:

> "… any sale, lease, licence, transfer or other disposal which, except in the case of paragraphs (b), (d) and (g) is on arm's length terms:…
>
> (g) permitted with the prior written approval of the Majority Lenders; … "

It defined the "*Total Commitments"* as meaning the sum of Facility A (£276m), Facility B (£60m) and the Total Revolving Facility (£10,560.111), it defined the "*Transaction Documents"* as meaning:

> "Transaction Documents" means the Finance Documents, the Shareholders' Agreement, the Lerche Loan Note Documents, the Lerche Shareholders Agreements, the Management Agreement and the Constitutional Documents".

or any "… *amended, novated, supplemented, extended or restated*…" version of such documents. The *"Termination Date*" was defined as meaning 30 September 2013.

44. In relation to repayment, Facility A was to be repaid as to £5m on 30 September 2011, as to a further £6m on 30 September 2012 and as to the balance on the Termination Date and Facility B was to be repaid on the Termination Date. In relation to Facility B (which as I have said was the deleverage bridge), the interest payable on that element increased from LIBOR plus 3% to LIBOR plus 10% from 1 April 2012 although it was repayable only on the Termination Date. The marginal increase was capitalised at the end of each interest period so that the interest that MHL had to pay remained at LIBOR plus 3% but the principal sum loaned increased. It follows from this that on 30 September 2013, the position would broadly be the same as it was when the 2005 Facility came to an end – MHL would either have to repay the sums then outstanding, or find another institution or institutions to refinance its debt or seek a new facility from BOS.

45. This Facility B structure was insisted on by BOS because the amount of MHL's borrowing and its debt to EBITDA ratio were well outside what was then acceptable to BOS (or, as I have concluded, any other commercial bank lender approached by MHL). The terms of the bridge did not require early repayment but was structured so as to pressurise MHL to repay that sum before the increased interest margin started to apply. This approach by BOS was consistent with other provisions within the 2010 Facility that required MHL to reduce the debt to EBITDA ratio over the life of the facility from no higher than 14x EBITDA at 30 September 2011 to no higher than 13x EBITDA by 31 December 2011 and no higher than 11.5x EBITDA by 31 December 2012 – see clause 23.2.3. Failure to deliver on these benchmarks was an event of default entitling BOS to call for repayment of the sums the subject of the 2010 Facility – see clause 25.19 of the 2010 Facility.

46. By clause 24.13 of the 2010 Facility, MHL was not permitted to create or permit to subsist any Security over any of its assets unless it was a Permitted Security, or sell or dispose of its assets including its property and receivables on terms under which it retained or obtained an interest in such assets unless it was a Permitted Transaction. Under clause 24.14, MHL was prohibited from disposing of any of its assets unless it was a Permitted Disposal or Permitted Transaction. The effect of these various provisions is not in dispute – Permitted Disposal, Permitted Security and any Permitted Transaction were defined in such a way that none of the transactions or proposed transactions referred to hereafter could be entered into by MHL without the prior written approval of BOS.

47. While the negotiations leading to the 2010 Facility were progressing, MHL or at least Mr Macdonald started seeking alternative ways to discharge Facility B without the need to sell assets. This started with an updated corporate strategy discussion document produced by MHL dated October 2010. Given the terms of the 2010 Facility unsurprisingly the purpose of the strategy was identified as being "*... to put in place a strategy to enable the repayment of this bridging*

facility before March 2012 … [and]… reduce the EBITDA to debt ratio from current 12 to c8 by September 2013".

48. MHL's preferred strategy at that stage involved establishing a fund with 8 investors contributing approximately £200m and obtaining debt finance of up to approximately £400m and with that acquire underperforming hotels from other owners and operators, with those managing the fund entering into 20-year management agreements for those properties with MHL ("Fund"). This was to be combined with a series of sales of hotels owned by MHL to the fund. The schedule of MHL hotels to be sold included both the Randolph and the Marine. Whilst this this would improve loan value to EBITDA for MHL by increasing revenues, it could only result in reduced borrowing by MHL if its assets or some of them were sold to the fund. As Mr Fraser put it in his oral evidence, "… *that idea, that wouldn't produce any debt reduction for MHL unless MHL assets were transferred into the fund*."

49. Thereafter, MHL retained Lazard & Co Limited ("Lazard") to act as its advisor in relation to the Fund proposal. Lazard advised that a number of potential investors be approached concerning investment into a new joint venture company to be formed for the purpose of carrying the fund concept into commercial effect. One of those that Lazard advised should be approached was Starwood Capital Group ("Starwood"), a US based private investment firm.

50. Initially at least the Fund was not presented as having any linkage with repayment of Facility B. This is apparent for example from a speaking note prepared by Lazard for use in discussions with potential investors, which included the following text:

> " • We understand that £60m of the re-negotiated debt needs to be paid down within 18 months. What are the consequences if this is not paid down?
>
> • the £60m is a "deleveraging bridge". If not repaid within 18 months the margin over LIBOR increases from 300bps to 1,000bps. There are a number of strategies open to Macdonald in relation to repaying this strip e.g. asset sales, sale and leaseback etc. but it is not under pressure to do so and it is not part of this transaction"

However, by March 2011, that had changed and MHL's board saw the Fund as being "… *crucial given the importance of paying down some of our debt*…" and that "… *if assets were sold from MHL banking covenants would need to be revisited; this was not felt to be an issue given the emphasis Lloyds are placing in paying down the debt*." The significant point is that the Fund structure was seen by the board of MHL as a means of selling assets whilst at the same time retaining or increasing income through management contracts "*... without a significant increase in central costs"*. This is apparent from the minutes of a board meeting on 27 April 2011 in which consideration was given to a suggestion by Mr Peter Opperman, who was a Uberior-appointed Non-Executive Director of MHL between 29 September 2010 - 11 August 2011, that

the Randolph be sold. It would appear that those on the board who were not Uberior appointees preferred the Fund route because "… *this would enable us to pay down debt whilst at the same time maintaining an interest in the hotels through a management contract*".

51. At this stage I need to refer to some internal communications within BOS concerning Mr Macdonald. These were identified during the trial as reflecting a vindictive attitude by some of BOS's officials towards Mr Macdonald, which was the true motivation for BOS acting as it did in relation to its management of MHL's banking relationship. These surfaced broadly at two stages in the events relevant to this dispute – first during 2011-2 when Mr Opperman was appointed by Uberior to be a non-executive director of MHL and again in 2015 as I explain in more detail below.

52. The relationship between Mr Opperman and Mr Macdonald in particular was an unhappy one from the outset and rapidly became a hostile one because Mr Opperman was perceived by Mr Macdonald and to a lesser extent Mr Fraser as not being concerned with the long term interests of MHL as a going concern, but simply in pressurising its board to agree to the sale of assets to reduce the value of the sums loans by BOS, which Mr Macdonald judged to be highly disadvantageous for the reason summarised earlier. I am conscious of the fact that Mr Opperman did not give evidence and has not had an opportunity to address these points. That said, some of the terms in which he expressed himself to Uberior officials and its appointees to MHL's board was inappropriate, reflects a personal animus on the part of Mr Opperman and would be regarded as offensive by Mr Macdonald had he been aware of it at the time. For example, in an email to Messrs Gateley, Moss and Anderson dated 9 May 2011, Mr Opperman refers to Mr Macdonald by implication as the "*enemy"*. This was not picked up specifically in the response from Mr Gateley, which merely referred to Mr Macdonald's approach as based on a "*... misaligned view on valuation…"*. That response is not one that can be criticised.

53. Mr Opperman's personalised approach continued with an email exchange commencing on 25 May 2011 with an email from him to Messrs Moss and Anderson captioned "*A cunning plan"*. That was an unprofessional way to describe the management of a joint venture relationship, as ought to have been understood by both Mr Opperman and the recipients of the email. The substantive detail of the proposed scheme does not matter because effect was not ever given to it. However, at one point Mr Opperman suggests as a means of pressuring MHL's agreement to the proposed scheme that Mr Macdonald be told that if it breached its covenants under the 2010 Facility BOS "… *would put me in to run bank's position, plus Macdonald would pay my fees not Uberior. (Donald would then spontaneously combust)*…". Whilst I can understand subjectively why Mr Macdonald might consider that inappropriate, I do not consider that it goes any further that is to be expected in a tense and fractured commercial relationship.

54. Mr Anderson responded to Mr Opperman in these terms:

> "There is a touch of bonnie prince charlie here.... principled prince from the western isles fighting for what is rightfully his against the tyrant and not supportive London based guys.
>
> Will he be ousted by his own men or met on the battlefield where he turns and runs dressed as a woman leaving his loyal team to be tortured and hung!"

Mr Opperman felt the need to respond to this in these terms:

> "Taking Bruce's analogy a step too far, we need to entice Bonnie Price Charlie to Colluden. How we get him there is the key, it is almost as though someone he trusts needs to tell him why don't you buy the equity and try to renegotiate the debt. Could the Hanoverian Lazard's put the thought in his head?
>
> My weak recollection of Colluden was that the Macdonald's never joined in the battle because they were in a strop."
>
> This triggered a further response from Mr Anderson to the effect that:
>
> "The macdonald clan was betrayed by the macgregors to the duke of cumberland. Are Moss or Opperman related to the Macgregors, unfortunately the andersons were massacred. We need some board room "guile"."

Mr Macdonald is fully entitled to object to Bank officials referring to him in these terms. It was hurtful, inappropriate and unprofessional. However, whilst it represents an error of judgment by the people concerned to have communicated in these terms and possibly a failure by the bank's senior management to control the manner in which its officials and appointees communicated, in my judgment it reflects a degree of frustration that had developed as a result of what was perceived to be intransigence on the part of MHL led by Mr Macdonald. It does not support the contention that BOS acted in bad faith in the steps it took in relation to MHL thereafter, not least because of the latitude that BOS extended to MHL concerning the fulfilment of its obligations under the 2010 Facility and, thereafter, in relation to its obligations under the 2014 Facility. Uberior acceded to demands from MHL that Mr Opperman be removed as its nominated non-executive director of MHL.

55. By June 2011, an alternative plan had started to emerge from MHL's management. In essence what was proposed was in reality a slimmed down version of the fund proposal. This scheme involved selling assets to a new company ("Newco"), which was to have a minimum of 3 equity investors, one of which was to be MHL and that MHL would sell a number of hotels with development potential to Newco at a price equivalent to an independent Jones Lang La Salle valuation carried out for BOS in March 2010 subject to MHL being given 20-year management contracts to manage the hotels for the new company.

56. Thereafter, although the Uberior nominated directors of MHL continued to push for the sale of the Randolph, the majority of the board continued to focus on the Fund concept or the new company concept as their preferred mechanism for selling assets and thereby reducing debt while at the same time enhancing income. However, by this stage it had been recognised that if the fund concept did not work then the Randolph would have to be sold in order to address the need to repay Facility B before the change in interest date took effect. Mr Macdonald acknowledged in the course of his evidence that he was willing to consider the sale of the Randolph at this stage, but he made clear that it was in his view the worst outcome available. As he put it:

> "A. If that was the only way to survive, we would have sacrificed The Randolph for 40 million.
>
> Q. So you were prepared to sell, if it came to it, the Randolph for 40 million?
>
> A. If we had to … we would have done whatever we had to do, but we had several options. At least we had three options…"

57. It was in this context that MHL started to explore with Starwood whether either of these options I have so far mentioned would be of interest to it. However from as early as April 2010, Starwood had been clear with Lazard that buying the Lloyds stake in MHL was seen as "… *crucial to the attractiveness of the deal and would be unlikely to be interested without it*…". Lazard's notes suggest that Starwood "… *would want to do this as a lone partner as "money with which Macdonald could have an intelligent conversation*", but later in the same note it was reported that Starwood was prepared to be one of two or three partners although Starwood had to be the biggest; but that Starwood was more interested in an investment of between US$400-600m and was not interested in the opportunities in the existing portfolio. No proposals, much less firm proposals, were forthcoming from Starwood at this time.

58. By August 2010, MHL had met with representatives of Starwood and in relation to the fund concept, Mr Fraser's analysis was that:

> "…a deal needs to be brought to the table and the likes of Starwood would prefer this to be in region of £2 billion rather than £200 million. In order that "the Fund" buys out the Bank's shares in MHL a structure needs to be agreed to reduce the debt in MHL and also release some capital for investment in our existing estate. Possible structures include:
>
> (i) The sale of one or a number of trophy hotels;
>
> (ii) The sale of c4 properties to a Newco into which MHL would co-invest with Monument[3]; or

[3] Monument Leisure Limited, an entity controlled by Mr Macdonald.

> (iii) The sale of c 14 hotels into Newco which would require additional investors or perhaps an AIM listing."

59. There was a further conversation with Starwood, MHL and Lazard in September 2011. Starwood's emphasis at that stage was on the need for "… *a three way conversation and that it is imperative to gauge Lloyds' objectives and thinking with respect to Macdonald*…". The reason for this was alluded to in a report prepared by Lazard for MHL in November 2011. It reported that of the 14 parties contacted, 5 remained interested. Of those, three were highly interested including Starwood. It added that:

> "Valuations vary, but investors universally questioned the view of there being value today in the equity of Macdonald Group and are therefore unwilling to invest equity in the current capital structure
>
> - enterprise valuations of around 10x EBITDA
>
> - however, investors have been very cautious of putting forward formal offers for the group until [BOS] position is made clearer"

Although the notes are opaque as to what Starwood was expecting from BOS, when read together this material makes it abundantly clear that Starwood did not want to invest in MHL directly because of the high level of debt and the risk that posed for MHL. More generally, the note makes the point that the "*enterprise value*" of MHL (i.e. in the context in which the parties were using that phrase, the price a willing arm's length purchaser was likely to pay for MHL's shares or a portion of them) was 10x EBITDA whereas MHL's debt was circa 12x EBITDA, which meant the shares had no value or as some of the documentation generated at the time put it, there was no equity in MHL. One implication of this was that if an investor was to be attracted it was necessary to reduce debt. Aside from selling assets, the only other way of achieving that was if BOS wrote off a portion of what it was owed. It was this point that the second bullet point in the quotation above was alluding to.

60. By December 2011, BOS had rejected the Newco proposals. By this stage it was proposed that the Newco be owned as to 50% by MHL and as to 50% by Monument. The difficulty was that it was proposed that part of the proceeds of sale of assets by MHL to the Newco would be used to finance MHL's investment in the new company rather than repaying its borrowing to BOS. As was recorded in Mr Duncan Smith's internal note prepared prior to a meeting with Mr Fraser that was due to take place on 1 December 2011, MHL or rather Mr Fraser had already been informed by representatives of BOS that this Newco structure did not address BOS's concerns. Mr Smith's analysis at this point was that MHL "… *appear to be accepting that the Fund route is not viable*." As summarised in BOS's note of the meeting, Mr Fraser explained what was proposed as being:

> "MHL, principally Donald Macdonald we believe, are now promoting "Monument Newco" as the solution. While we have

> had very limited detail on this proposal it is clear that it involves MHL selling assets to Newco at a c7.5x multiple. It is obvious, and Gordon Fraser agrees, this proposal would only increase the leverage within MHL (currently c. 13x)."

Such an outcome failed to address one of BOS's two key concerns – indeed it made it worse.

61. Unsurprisingly therefore, the conclusion at the 1 December meeting was that "… *Gordon Fraser accepts that the Monument Newco does not work for MHL or [BOS] however stated that he needed assistance persuading his Chairman that this is the case*." At the meeting, Mr Fraser had maintained that Mr Macdonald was keen on the new company proposal because he believed it would provide what the bank wanted namely £60m of debt reduction. As explained above, that was not and never had been the sole concern of the bank. When put to Mr Macdonald in cross examination, he accepted that what was proposed would have increased not decreased leverage within MHL. He also accepted that what the bank wished to achieve was a decrease not an increase in leverage and he accepted that this was the point made in the MHL internal analysis contained in its Strategy Review Document dated January 2012 at page 14. Mr Macdonald accepted that BOS's reasons for rejecting this proposal were rational and sensible – see T3/145/7-11.

62. By January 2012, internally, MHL recognised that aside from the outright sale to third parties of assets in its property portfolio, the only other solutions were either for BOS to "*... give MDH other hotel assets to manage …"* thereby generating increased EBITDA or the "… *introduction of new investors in the consolidated business to return debt*…" to the bank or "… *disposals of hotel assets / non hotel assets to pay down deleverage bridge*…"

63. There was no contact by MHL with BOS about an arrangement with Starwood and the logs maintained by Lazard suggests there was a six month period between September 2011 and March 2012 when there was no further contact between Starwood and MHL.

64. In March 2012, Starwood expressed a wish to Lazard to "*reconnect"* but emphasised that "*... they would require full consent between all parties, management, equity holders and debt holders…"* and that Starwood saw that "*... as a fundamental prerequisite to any transaction and would not want to undertake discussion where any single party was "unwilling to negotiate"*. Starwood would also "*... require at least 50% voting control in any situation"*. As Mr Macdonald accepted in the course of his cross examination, the reason for this was because BOS owned "*... half the company and it was owed a lot of money"* – see T3/173/1-5. Although not stated in terms, this approach by Starwood was consistent with Starwood expecting a partial write off of MHL's existing debt as at least one outcome of negotiations with BOS.

65. On 8 August 2012, there was a further meeting between representatives of Starwood and MHL. Ahead of the meeting - see the email of 7 August 2012 from Ms Victoria Varga of Lazard copied to Mr Fraser - Lazard prepared a

document setting out the headline proposals that the document suggests Starwood would be asked to consider. In summary that document proposed "*A potential transaction that could combine £75m of new money in the form of preferred equity, with [BOS] rolling over £130m of debt"*. The document set out the detail of what was proposed under the heading "*Key Assumptions*" as being:

> " – Lloyds' current £321m of debt outstanding to be paid down as follows
>
> - £72m repaid from proceeds from sale of Manchester (£50m) and sale-and-leaseback of Randolph (£30m) in September 2012
>
> - 10% of proceeds retained by the Company
>
> - £75m repaid from new money investor
>
> - £130m of Lloyds debt rolled-over into the new structure at 450 basis points
>
> - Approximately £44m of Lloyds debt is written-down in the envisaged structure"

Two points arise from this proposal – firstly the proposal depended on a sale and leaseback of the Randolph Hotel and secondly it depended on a partial write off of debt by BOS. In the course of his cross examination, Mr Macdonald accepted both these points as he was bound to do – see T3/177/19-25. That document seems to have gone no further however and the next MHL internal document relating to refinancing is a document entitled "*Group refinancing Presentation*" dated 21 August 2012. It contained at Section 5 (entitled "*Corporate transaction update*") a reference to a "*Donald Macdonald dinner with Lazard, Starwood and [BOS] — 8 August 2012*". There is then a note in relation to that meeting which records that "*Starwood particularly keen to progress acquiring all of … Bank debt/assets and would like to agree a deal in principle with [BOS] by the end of September 2012*". In context that could only be a reference to a partial write off of MHL debt since otherwise a "*deal"* was not required, merely the repayment of the sums due to BOS.

66. On the following day (22 August 2012) Starwood wrote to Mr Cumming in his capacity as Managing Director Global BSU at LBG in the following terms:

> "STARWOOD CAPITAL HOTEL INVESTMENT & STRATEGIC MANAGEMENT ("Project SCHISM")
>
> Further to our meeting On August 8, we are delighted to set out how we believe Starwood Capital can optimize the realisation by Lloyds Banking Group ("LBG") of its hotel interests, As we understand it, LBG has significant exposure to a number of UK hotel groups, including, Macdonald Hotels. De Vere, Principal Hayley and Menzies (the "Hotel Portfolios") …

> When assessing the efficiency and streamlining opportunities from consolidation across the Hotel Portfolios, the list can appear almost endless. We consider that a substantial element of cost savings may be achieved just by the combination of the Hotel Portfolios named above and the eradication of duplication of costs. We expect any such streamlined central overhead would also absorb and add value to individual assets or groups of hotels, including those held by the Bank in Ireland. These savings should be significantly augmented by the simplification of brands and product service propositions. Our medium term objective would be to distil these portfolios into "full service", "limited, service' and "Village" brands, with accretive disposals likely to occur at the Tail and Top ends of the merged Hotel Portfolios. Starwood has targeted a specific focus on this opportunity, which we have termed "Project SCHISM", to reflect that we bring more to the table than capital in the form of Hotel Investment. Starwood also will dedicate senior resource in the leadership of this project to provide strategic management which will deliver industry-changing improvement to the operating potential of these Hotel Portfolios.
>
> As we set out in our credentials (enclosed with this letter), large-scale hotel industry turnarounds have been our lifeblood for over 15 years. For our base case we anticipate using the Macdonald Hotels Group as the consolidating management platform, but would expect to involve heavily our unparalleled Hotel Strategic Management team… ."

The letter goes on to refer to using MHL "… *as the consolidation driver in our base case*…" and "*Targeted disposals of trophy assets …"* with the long-term goal being "… *to exit a restructured, efficient hotel group that has the right hotels with the right branding with a relevant product and service quality that takes advantage of the changing regional hotel market*…" There then followed, under the heading "*Capital Structure"*, a table that set out sources of capital totalling £1.9b, which included bank debt described as being rolled over, with a repayment to the Bank of £1.260b. The letter concluded by seeking access to significant detailed information as well as tours of "*selected properties"*.

67. The letter did not constitute a proposal, much less one that involved BOS being repaid. It was an invitation to start a process as is apparent in particular from its concluding paragraph. It depended on BOS being able to transfer or require the transfer of some or all of the hotels owned or operated by De Vere, Principal Hayley and Menzies to MHL or MHL's management. However, the letter is silent as to how that might be achieved. I am satisfied that BOS was not in a position to deliver such transfers unless it had appointed Law of Property Act receivers over particular hotel assets, or had placed the companies concerned into administration. In fact, neither of these steps had been taken by BOS in relation to any of the entities identified by Starwood and the contrary is not alleged by MHL. Mr Macdonald accepted that this was the position in his letter of 17 September 2012, referred to in detail below. His comment in those

circumstances that "*... it is difficult to comprehend how the bank can say it is not in control of companies in which it has taken a write off of debt and where the equity has been wiped out…"* appears to ignore (i) these points, (ii) the risk to a bank of becoming a *de facto* or shadow director of one of its customers and (iii) that the customers identified in the Starwood letter were not (and are not alleged to have been) in breach of their banking covenants with the result that attempting unilaterally to alter contractual relationships would place BOS is breach of contract with or duty to those customers.

68. That the Starwood letter was not a formal proposal and was not understood by MHL to be a formal proposal is apparent from Mr Macdonald's oral evidence. He accepted that a consequence of what was proposed was that all or most of MHL's assets would have been transferred – see T3/125/13-22 – but in truth he had no better idea of what Starwood was proposing than had BOS because as he conceded in cross examination the relevant parties had " …*never sat round the table, the bank, the fund provider and ourselves*."

69. It was unclear from the letter whether Starwood was expecting BOS to accept a discount from the headline sum it was owed by MHL assuming that Starwood acquired MHL and used it as the platform for what was proposed. In the course of his cross examination, Mr Dakin was asked about this point – see T9/37/18-23, where he made the point that the valuation multiple for MHL's hotel estate was 10x its EBITDA whereas its debt to EBITDA ratio was about 13x EBITDA, which implied that there would have to be a discount – a point that I accept in light of the contents of the Lazard note of November 2011 referred to earlier - but as he also accepted there were other ways a transaction could be structured – see T9/39/1-4. The key point for present purposes is that the Starwood letter did not address that issue at all, which is a further indicator that it was not, and was not intended to be understood as being, a formal offer capable of acceptance.

70. Mr Cumming's views as to the Starwood letter are apparent from an internal email dated 12 September 2012, which was his briefing note for the LBG CEO for a high level meeting he was due to have with Mr Martin Gilbert, who was then a senior figure in the Scottish financial services industry and a long standing friend and confidant of Mr Macdonald. In so far as is material Mr Cumming's response to the Starwood letter was:

> "I understand that Martin will mention his relationship with Donald Macdonald, Executive Chairman, Macdonald Hotels and will also promote the idea of a consolidation exercise in the UK mid-range hotel market. Donald has been pushing for this for some time and has suggested that a combination of Macdonald, De Vere and Principal Haley (all in BSU) should be undertaken with the Macdonald management taking control.
>
> There are a number of issues with the potential consolidation which I have made very clear to Donald:

> (i) We are not in control of De Vere or Principal Haley - the companies are not in covenant breach and are performing reasonably well in a challenging market. Both have Boards which oversee the businesses.
>
> (ii) A consolidation exercise does not address LBGs strategic imperative of Non-Core debt reduction unless there is a significant equity injection and/or debt raising.
>
> (iii) Independent professional advice has confirmed that our current strategies for De Vere (break up and sale of constituent parts) and Principal Haley (sale - currently on the market) will maximise the level of debt reduction.
>
> Donald Macdonald has been having private discussions with Starwood Capital regarding a possible significant equity injection to facilitate a consolidation and I have also met Starwood separately. During my meeting I made it clear that we are not in control but happy to introduce Starwood to De Vere initially to see if the Board of De Vere are interested in joining a consolidation exercise. A meeting is being arranged in the short term. Antonio should be aware that Starwood do not necessarily see the Macdonald management team as the individuals to take forward a consolidated business - Donald is not aware of this fact.
>
> The discussions around potential consolidation are ongoing at the same time as the debate around the refinance of the existing LBG facilities. Donald's push for the consolidation is in part driven by his desire not to sell assets and his excessive head office cost base.
>
> I would suggest that Antonio merely listens to Martin and says that he is aware that I am fully involved in the debate." [Emphasis supplied]

71. On 17 September 2012, Mr Macdonald wrote to Mr Cumming concerning the Starwood letter, which he described as "… *a major step forward in achieving a solution for MDH and for the Bank*" and noticeably not as an offer. He implicitly recognised that Starwood would be seeking a discount from the full value of the loans by BOS to MHL by remarking that "… *Starwood has …no intention of trying to obtain an extraordinary discount from the Bank on the debt*.

72. On 27 September 2012, there was a meeting between Mr Davidson representing MHL and a team of officials representing BOS led by Mr Duncan Smith. In the course of that meeting (according to Mr Smith's note) Mr Davidson enquired whether BOS was aware of the Starwood proposal and that as part of this the Bank should give MHL more hotels to run; that Mr Smith confirmed that he was aware of the proposal but is recorded as adding that "… *exerting control in the manner MHL suggest was not in the banks gift as they did not control any of the businesses*." The note also records Mr Davidson as saying that there was

a possible investor available to MHL which would repay the deleverage bridge "*… on condition that bank [took] a "discount" on the remaining debt"* and that Mr Smith had responded that "*…this was unlikely to be acceptable…"*.

73. On 28 September 2012, Mr Dakin responded to Mr Macdonald's letter of 17 September. In it he stated that:

> "Firstly, I want to make it clear that we categorically deny the Bank is in "control" of the entities you mention in your letter or, indeed, Macdonald Hotels. We are acutely aware of our position, which is purely in our capacity as debt provider to the company. As in any commercial arm's length transaction where the Bank has provided finance, the Bank is free to express its opinions on proposals and set out what we would require to continue to provide support to the company. However, it is down to the Board of the company to review the Bank's position and take the business decisions that affect the company and its various stakeholders. The Bank has never sought to put pressure on the company or "control" its affairs and to do so, would be wholly improper.
>
> Regarding the Starwood proposal, which suggests that we sell our debt to a new entity managed by Macdonald Hotels. We regret we do not believe it will be possible for the Bank to support this structure where we "deliver" the four companies mentioned. This is for the reasons stated in the second paragraph and importantly you will also be aware, given it is widely reported in the financial press, that Principal Hayley Group is currently in a sales process which is being run by Goldman Sachs. However, you will also appreciate that in the context of the other names you have quoted, we are unable to comment further due to customer confidentiality. At Starwood's request though, we have introduced them to Andrew Coppel CEO at DeVere and further meetings between Starwood and the Board of DVG are being arranged to discuss this proposal further. I have also mentioned this to Andy Cumming in his capacity as a Non-Executive Director of Macdonald Hotels Limited."

The letter concluded by stating that BOS looked forward to continuing the re-finance discussions (necessary because of the impending expiry of the 2010 Facility) and confirmed BOS's understanding that MHL's proposal was that contained in its presentation of 24 September 2012 and concluded by adding that BOS remained "… *consistent around the need for a reduction in the borrowing level as part of any refinancing request*." The 24 September presentation had included a proposal for the sale and leaseback of MHL's flagship hotel in Manchester and the Randolph. The position in summary was that MHL was much more attracted to what it called the Starwood offer and BOS remained entirely clear that it could not deliver what Starwood required and sought instead reductions in lending and MHL's leverage ratio by disposals.

74. The debate concerning the refinancing necessary as a result of the impending expiry of the 2010 Facility continued throughout the last quarter of 2012. In the course of a meeting on 18 October 2012 Mr Macdonald returned to the Starwood proposal and in that context repeated the point made in correspondence referred to earlier to the effect that BOS could deliver the hotel groups by reason of its control of them. The internal email prepared by Mr Dakin summarising the meeting states that Mr Dakin again "… *refuted the allegation reminding [Mr Macdonald] we had already answered this point in writing/verbally previously. He reluctantly accepts the point*." In the course of the meeting Mr Rucker, the Chief Executive Officer of Lazard who attended the meeting with Mr Macdonald as his or MHL's advisor, is recorded as remarking that the "*Starwood proposal*" was "… *highly unlikely to be successful for the reasons outlined previously by the Bank*…" which left as the only options the sale of assets or a capital injection that would be unlikely to succeed other than by BOS discounting its debt (for the reasons explained earlier in this judgment), which Mr Macdonald himself was clear both in his evidence and at this meeting he did not want.

75. By November 2012, Lazard was advancing two possibilities on behalf of MHL, being:

> "Broadly, there are two types of scenario, both of which are being actively worked on by Macdonald:
>
> 1. Introduction of an outside investor
>
> — either to facilitate a consolidation play or as a stand-alone investment directly into Macdonald
>
> — terms, timing and achievability outside of LBG / Macdonald's control
>
> 2. Capex spend / asset sale:`
>
> — largely within the control of LBG / Macdonald
>
> — success of options dependent on management retention
>
> Macdonald would intend to pursue attractive Scenario 1 options but implement a defined Scenario 2 'road map' to be agreed with LBG in the event that a Scenario 1 option is not achievable."

There was thus an apparent recognition by MHL or its advisors that (a) there was no third-party proposal at that date capable of being accepted and in consequence (b) it would be necessary to prepare to sell assets in case a third - party offer was not forthcoming in the limited time that remained before the 2010 Facility came to an end. As part of this, MHL sought amendment of the 2010 Facility debt to EBITDA covenant to enable the accounts to be signed-off without an Emphasis of Matter qualification. In the event of a third party investment, the document expressed the hope for "*... a degree of debt write down by LBG"*. The second (asset sale) scenario involved in most of its

iterations the sale and leaseback of at least the Randolph Hotel. The paper was approved by the Board of MHL and presented to BOS.

76. Internally within BOS, Mr Smith recorded of this proposal that "… *any equity raising will require debt forgiveness by the Bank which would likely be unpalatable*…" and that the proposed sale and leaseback of the Randolph Hotel in the event that equity raising proves unsuccessful "… *does not go far enough and is certainly not in the spirit of the various discussions to date*."

77. There then followed discussions concerning a covenant concession. The proposal was described in BOS's Aggregated Credit Report dated 13 December 2012 accurately as being sought by MHL:

> " - To avoid a forecast covenant breach, MHL has requested that the Net Debt: EBITDA covenant be held at its current level of 13x from the December 2012 test date to the expiry of facilities in September 2013. This is to enable the Audited Accounts to be signed off without an Emphasis of Matter statement which Management believe would have a negative operational impact (with suppliers etc) and also may have a negative impact on any subsequent asset disposals as any sale could be perceived as distressed. The covenant level is currently 13.0x and is due to ratchet down at the December 2012 test date to 11.5x.
>
> - In parallel MHL are continuing to seek to raise 3rd party equity to achieve debt reduction. We do not believe, however, this is a credible option without significant debt forgiveness by LBG to underpin future equity returns. MHL, however, is determined, driven primarily we believe by Donald Macdonald ("DM") Executive Chairman, to fully exhaust this in preference to disposing of assets and have requested yet further time to explore this option.
>
> - Following various discussions with the Borrower it is now proposed that as a condition of LBG amending the leverage covenant, MHL and LBG will enter into a Memorandum of Understanding ("MoU") whereby if MHL is unable to raise new equity on terms that are acceptable to all stakeholders (including LBG), then MHL will immediately contract to sell the Randolph Hotel on a sale and Leaseback basis (credible offers received of c.e34m, 17x multiple) by 31e March 2013 with cash completion by 30t" June 2013. This will require both initiatives to be progressed in parallel."

78. On 19 December 2012, sanction was sought and ultimately obtained from the credit committee within BOS to maintain the EBITDA covenant at 13x EBITDA rather than it reducing to 11.5x EBITDA as had been required by the 2010 Facility. In granting this concession, it was recorded that from BOS's perspective, the attempt to raise equity was:

> "… unlikely to be palatable to LBG as it will require the bank to take a significant write off to create equity value for the new investor and management. Team reiterated that they and Richard Dakin had made it very clear to MHL that the Bank would not take a discount on its debt to underpin future equity returns. IC[4] also noted that the Team believed that any offer would unlikely be acceptable to DM given the level of "control" that will be sought be a new investor."

In relation to the Randolph Hotel, the report to the credit committee from the team responsible for managing BOS's relationship with MHL was that:

> "… there was a list of credible buyers interested in the asset and that MHL had instructed heads of terms to be drafted with the preferred bidder at £34m, … It was highlighted that the Randolph hotel would be profitable after rent payments and that the sale and lease back is achieving 17x multiple which clearly achieves deleverage. Given the interest in the asset to date which is in an excellent location in a strong market, the Team believe there are multiple buyers for this asset."

79. The proposal so sanctioned was carried into effect by a non-binding Memorandum of Understanding ("MoU") dated 20 December 2012 and a formal Deed of Variation to the 2010 Facility also dated 20 December 2012.

80. The purpose of the MoU was to "… *make certain amendments to the terms of the MHL Facilities Agreement to avoid a potential breach by MHL of certain of its terms and in particular the financial covenant set out in clause 23.2.3 of the MHL Facilities Agreement*". It was recorded in the MoU that it was not intended to be legally binding but subject to that it was agreed that MHL would present heads of terms for the raising of additional funds from a third party to be used to reduce the debt due to BOS "*… by no later than 5pm on 31 March 2013"* but that if that deadline could not be met then MHL was to negotiate a contract to sell and lease-back the Randolph Hotel by no later than that date and time, with completion to follow by no later than 5pm on 30 June 2013. As is obvious, but for these arrangements MHL would have defaulted on its EBITDA covenant.

81. The proposed variation to the EBITDA covenant was provided for by the Deed of Variation. It is worth noting in passing that the agreement contained a recital to the effect that:

> "It is intended by the parties hereto that this amendment agreement shall take effect as a deed notwithstanding that the parties hereto may execute this deed under hand."

82. Negotiations continued between MHL and Starwood in January 2013. The first concrete proposal came from Starwood following a meeting on 4 January 2013 attended by Mr Macdonald and Mr Desmond Taljaard of Starwood. The only

[4] lain Corstorphine, the Head of Corporate Real Estate within the BSU.

document of significance was a spreadsheet produced by Starwood. It was put to Mr Fraser in the course of his cross examination that the effect of this document was that it proposed:

> "… a transaction whereby the bank is going to take a haircut on its debt of -- you don't get this figure from this document, but you can do the maths -- 80 million, namely the difference between its current debt of 320 or so and the debt going forward of 240. That involves a haircut of 80 million…"

Mr Fraser's response was to agree with the proposition that the proposal was for a recapitalisation of MHL with what Mr Mitchell KC characterised as "*… a haircut of the Lloyds Bank debt…"*. Mr Fraser also accepted that if he had noticed this at the time he would in effect have put a line through it because he was aware that a debt write off of this magnitude would not be acceptable to BOS. As Mr Mitchell KC put to Mr Fraser:

> "Q. … This obviously won't work, will it, because we all know Lloyds aren't going to write off their debt or any part. Why didn't you say that?
>
> A. No, I agree, and I don't know. I absolutely don't know…"

As is clear from what I have set out above (a) internally BOS was clear that a substantial debt write off would not be acceptable; (b) Mr Fraser knew full well that was so and (c) no proposal not involving such a debt write off had been received by MHL from Starwood down to 4 January 2013.

83. On 23 January 2013, there was a meeting between Mr Rucker of Lazard (acting on behalf of MHL) and Mr Dakin, in which two equity injection sources were discussed – Starwood and a proposal involving London & Regional Properties Limited ("L&RP"). The key points that emerged from that discussion, as summarised by Mr Dakin in an internal email, was that L&RP would not consider investing without a "*write off of min £50m…*" to which Mr Dakin recorded his response as being "*… there was no appetite to write off such a large amount…"* and that what is referred to in the internal email as the "… *merger of LBG' hotel businesses etc with Donald running etc…*" was described by Mr Rucker as a "… *nonstarter and I agreed*." This was so for the reasons identified earlier in this judgment. The point concerning debt write off would have applied equally to any such proposal from Starwood had it been drawn to BOS's attention at that time.

84. There was an MHL board meeting the next day. The note that appears in the Minutes concerning these two possible transactions described them as:

> "**Secure outside investment** - this is our preferred option and would come either from Starwood as part of its proposed industry consolidation or from an outside investor, such as London and Regional. The issue with either type of investment is that the investor is likely to require LBG to agree to a debt write-off and whilst LBG has taken write-offs in relation to other

> hotel companies, the fact that the business continues to trade profitably appears to mean that LBG is less willing to accept a write-off in our case."

It is apparent that as far as the MHL board was concerned, no proposal had been received by MHL from Starwood at that date. This is apparent from Mr Cumming's comment recorded in the Minutes for that meeting that "… *once Starwood's proposal is articulated and it is deemed satisfactory from our perspective, we should approach LBG as soon as possible thereafter to present the proposal to them for their consideration*." The timing point was no doubt driven by the fact that the end of the extended deadline arrangements recorded in the Deed of Variation and Memorandum of Understanding was approaching. The comment otherwise shows that no concrete proposal capable of being offered to BOS had been forthcoming from Starwood down to that date.

85. The only other event with which Starwood was involved directly concerned a draft letter prepared within MHL and sent to Starwood as a draft for Starwood then to send to BOS. It was headed "*Draft Letter to LBG from Starwood*". The part of the draft letter that is relevant for present purposes is that it states expressly that the "… *issue facing any investor in MDH is the level of debt in the company in relation to its earnings*…" It then set out what purported to be a proposal from Starwood to inject £60m into MHL but conditionally on a write off of £50m of MHL's debt to BOS. This proposal was advanced by MHL as something Starwood should propose to BOS notwithstanding that (i) BOS had informed MHL's advisor Mr Rucker that it had no appetite to write off debt at that level and (ii) as Mr Fraser had accepted in the part of his cross examination referred to above, he was well aware that BOS was not going to write off any part of MHL's debt. There were a number of other proposals in the draft that were obviously adverse to BOS's interests, including continued funding of debt and waiver of its entitlement to interest at the higher rate applicable to Facility B. This led to the following exchange in cross examination of Mr Fraser:

> "Q. … even if you knew about it, … it's proposing something which you knew wouldn't fly with the bank, because Mr Macdonald and your evidence is that the bank would never, and should never actually be asked or expected, to write off significant amounts of debt. And yet this is a -- you're trying to goad, if that's the right word, Starwood or encourage Starwood to make a proposal which you know or must reasonably foresee is not like to fly. Is that fair?
>
> A. It's absolutely fair."

86. Although Mr Fraser sought to distance himself from the document (for obvious reasons given what he had said in his evidence as summarised above) and maintained that he could not recall drafting it, I conclude that it was probably Mr Fraser who drafted the document on the instructions of Mr Macdonald. I reach that conclusion because the document was sent to Starwood by Mr Fraser's secretary at the time under cover of an email in the following terms:

> "From: Heather Russell
> Sent: 24 January 2013. 17:31
> To: Desmond Taljaard (dtaljaard@Starwood.com)
> Cc: Gordon Fraser
> **Subject**: Note from Gordon Fraser - Macdonald Hotels
>
> Dear Desmond
>
> Further to your conversation with Donald this morning I attach a draft letter from Starwood to LBG in respect of a proposed transaction with Macdonald Hotels.
>
> Hopefully this gives you a starting point
>
> Kind regards
>
> Gordon
>
> Gordon Fraser
> Group Finance Director
> Macdonald Hotels Ltd
> Tel: 01506 815205/815245
> Fax: 01506 815223
> Email: gfraser@Macdonald-hotels.co.uk"

In my judgment it is close to inconceivable that Ms Russell would have sent out the email with the attachment other than on the instructions of Mr Fraser. In my judgment this is put almost beyond doubt by the terms of the subject caption. Mr Fraser accepted that if he had drafted it, it would have been on the instructions of Mr Macdonald – see T6/194/5-24. He also accepted a little later in this section of his cross examination that if he had drafted it, it would have "*… come out of a conversation with Mr Taljaard and Mr Macdonald…*" A little later he went on to suggest however that the origin of the draft was Mr Rucker. I reject that as improbable given the conversation between Mr Rucker and Mr Dakin on 23 January referred to above.

87. In truth the main driver for avoiding the sale and leaseback of assets in preference to almost any other arrangement was from first to last Mr Macdonald. Although he attempted to disguise it when giving evidence, my impression from the evidence as a whole is that notwithstanding the way in which MHL was structured, he was at all material times the dominant force within the executive group at MHL. I have no doubt at all that if Mr Macdonald insisted on a letter being sent in draft to Starwood, Mr Fraser would have complied and would have done so notwithstanding his knowledge as to the realities as set out earlier. I conclude that the draft letter was drafted by Mr Fraser and sent to Starwood by his secretary on his instructions, on the instructions of Mr Macdonald. In truth there should have been no dispute about this issue. In fact, Starwood never sent the letter to BOS.

88. By late February 2013, no proposal had been received from Starwood either by BOS or MHL, as is apparent, for example, from Mr Fraser's email to Mr Cumming of 23 February, which includes the comment:

> "I totally agree that we have to get a proposal from Starwood quickly so that both we as a Board and the Bank can evaluate this. Starwood have been delayed due to the time taken to complete the Principal Hayley deal but they have now made an information request to us."

89. The next proposal was a document sent to BOS by Mr Fraser on 19 March 2013 that included a proposal that BOS write off £30m of the debt due from MHL. Consistently with its position throughout as summarised above, BOS made it clear "*… that the suggested £30m debt write-down is not something we are able to contemplate and, we understand, was not raised or discussed at the last meeting between Donald, Richard and Gordon on 5th March*." Despite its appearance in the document, Mr Fraser's evidence was that it was not being pursued seriously – see T6/208/14-21. How it came to be included in the document is unclear.

90. On 27 March 2013, Mr Fraser wrote to BOS concerning the MoU, which it will be recalled required MHL to make signed heads of terms available in relation to any third-party investment by 31 March 2013 and, in the event that timetable was unlikely to be met, to pursue the sale and leaseback of the Randolph Hotel. Having made the point that the memorandum was not legally binding, Mr Fraser then wrote:

> "As you know we are in discussions both with Starwood and with another potential investor, both of which we believe represent realistic options which may result in a significant alteration to Macdonald Hotels' relationship with the Bank and in all likelihood a very significant reduction in the amount of debt which is outstanding to the Bank from the Group. Those discussions are proceeding but are doing so perhaps more slowly than any of us would have appreciated or would wish partly due to the delay in Starwood concluding the Principal Hayley transaction with the Bank. Accordingly it is unlikely that we will meet any of the indicative timetables set out in the Memorandum of Understanding."

91. On 2 April 2013, a meeting took place at Lazard's offices attended by Messrs Macdonald, Fraser and Davidson for MHL, Mr Rucker for Lazard, as MHL's advisor, and Messrs Dakin, Guthrie and Corstorphine for BOS. The meeting commenced with an announcement from Mr Rucker in relation to equity raising from third parties that:

> "… this exercise has only really generated interest from "bottom-feeders" and the conclusion was that pursuing this avenue was not in anyone's interest (including LBG given the suggestion of debt forgiveness to facilitate PE investment today).

> Accordingly, … no reliance should be placed on the delivery of new equity for the purposes of our refinancing discussions. DMcD echoed this opinion.."

In cross examination Mr Macdonald agreed that (i) he was present at the meeting, (ii) the note of what was said was accurate and (iii) he had expressed agreement with what Mr Rucker had said, as the note records – see T4/46/11-18. The following exchange then took place:

> "Q. You asked for time to pursue Starwood, but within days, you accept the game is up and that particular possibility of repaying debt was over. (Pause) Is that right?
>
> A. Yes."

Mr Fraser's evidence was even clearer. Having been taken to Mr Rucker's statement as set out in the note, the following exchange took place:

> "Q. And that was an indication, clear indication to the bank, conveyed to the bank, amongst other people, by Mr Rucker on your behalf that they shouldn't place any reliance on any equity route, they should get on with the refinancing; is that right?
>
> A. That's correct.
>
> Q. And as part of the refinancing discussions, which I was going to take rather shortly, as I explained, as part of the refinancing conditions in 2014, as it became, you agreed to sell The Randolph and you did sell The Randolph –
>
> A. We did."

Mr Fraser agreed that, as a result of what was said in the course of the meeting by Mr Rucker and Mr Macdonald, BOS would have understood it was accepted by MHL that the third-party equity investment route was closed and that the only route available to reduce debt and the debt to EBITDA ratio was asset disposal – see T6/216/12-18.

92. By 9 April 2013 Lazard was setting out refinancing proposals made necessary by the expiry of the 2010 Facility that expressly included the sale and leaseback of the Randolph Hotel at £32.5m with the Strathclyde Pension Fund being the preferred bidder. At the board meeting that followed, in effect third party equity financing dropped out of consideration while MHL agreed a refinancing package with BOS and in relation to the sale and leaseback of the Randolph Hotel it was reported that:

> "In terms of the potential sale and leaseback of the Randolph RGF[5] confirmed that Heads of Terms have been agreed with Strathclyde Pension Fund, whilst another bidder has also

[5] Mr Fraser

> recently emerged. RGF advised that a pension fund is only likely to be interested in an asset sale (rather than a share sale) which would have tax implications."

93. Thereafter negotiations concerning the refinance of the 2010 Facility continued. It is not necessary that I take up time describing every turn and document that was generated in the course of that negotiation. The only point that matters for present purposes is that at no stage thereafter was it suggested that the refinance should proceed other than on a basis that included the sale and leaseback of the Randolph Hotel. These negotiations concluded with execution of the 2014 Facility on 19 March 2014 with the 2010 Facility being extended until then to avoid a default. As part of the suite of agreements the parties entered into on that date, they agreed to discharge the SHA with effect from that date and to enter into the DoW. I return to the DoW having considered MHL's claim that it was forced to sell and leaseback the Randolph Hotel in breach of clause 6 of the SHA.

Sale of The Randolph Hotel

94. Some time was taken up at trial with exploring why the sale of the Randolph was delayed beyond the deadline imposed by the MoU but in my judgment none of this assists in resolving the issues that matter. It is worthwhile recording however that Mr Fraser explained in the course of his oral evidence that the delay in selling and leasing back the Randolph was caused in part by what the MHL directors perceived to be in MHL's best interests but also by the need to complete the 2014 refinancing negotiations with BOS. As Mr Fraser put it, "… *the reason it was done right at the end was Strathclyde Pension Fund*[6] *wanted to know before they signed the deal that we had a refinance, because we were liable, obviously, for the rental*." I accept this evidence on the basis that it is inherently probable that the purchaser from, and lessor to, MHL of the Randolph would have such a concern in the circumstances. Put entirely straightforwardly, unless MHL agreed terms with BOS it would be insolvent and was bound to enter either administration or be wound up. No would be lessor would wish to enter a long lease with a lessee in such circumstances unless and until refinancing had been agreed.

95. In the result, on 7 February 2014, contracts were exchanged with completion being made conditional on completion of what became the 2014 Facility Agreement. The contract provided for a lease back to MHL for a term of 35 years with an option to MHL to extend the lease for a further 25 years and a payment to MHL by the purchaser of £32.3m. The price was paid by MHL to BOS in reduction of its indebtedness to the level provided for by the 2014 Facility Agreement.

96. In November 2019, MHL sold its leasehold interest in the Randolph to a third party for £27m. It is not alleged that this was caused by any breach of duty by the Bank.

[6] The purchasers of the Randolph.

The Randolph Hotel Claim

97. MHL's only pleaded case claim concerning the sale of the Randolph, is at paragraph 34.1.6 of the Re-Re-Amended Particulars of Claim:

> "The Company put forward proposals by which it could deliver the reduction in the Bank's lending to the Company and its subsidiaries, but without destroying value in the business. One such proposal was developed with Starwood Capital Group which involved the Company taking over management of other distressed hotel groups who owed money to the Bank (as it had previously done in the 1990s, at the Bank's request). As part of the structure proposed by Starwood Capital Group, third party debtors would take over the debt to the Bank. The Bank rejected the proposal."

Although the Starwood proposal is described as being "*one such proposal"* no other has ever been pleaded. The allegation of breach in relation to the sale of the Randolph Hotel is at paragraph 44.2 of the Re-Re-Amended Particulars of Claim, where it is pleaded that:

> "44.2 As pleaded at Paragraph 34.1 above, the Bank (including through its agents Uberior and Mr Opperman) insisted upon and imposed the Sale and Lease Back of the Randolph Hotel. In doing so, the Bank acted (i) in bad faith, in such a way as to undermine the parties' bargain and deprive the Company of that which it had bargained for, and/or in a manner contrary to acceptable standards of commercial dealing, and (ii) contrary to the objects and purposes of the Parties' bargain."

Its causation case is pleaded at paragraph 45 of the Re-Re-Amended Particulars of Claim, where it is pleaded that:

> "45 But for the Bank's breaches of duty, the Company, … would not have
>
> …
>
> 45.4 disposed of the following hotel assets in the following ways (or at all):
>
> 45.4.1 Sale and Lease Back of the Randolph Hotel;
>
> …
>
> 46 Instead, the Company and MML would have retained the Randolph Hotel, … for a longer period, and sold … at a higher price than it did."

MHL expanded upon this in its Re-Amended Reply but only to the limited extent of pleading:

> "48A. As to the third sentence of Paragraph 35.4, the Company's principal focus was on the proposal for an investment by a fund and obtaining fresh equity into the business to pay down some or all of the debt to the Bank. This culminated in the proposal from the Starwood Capital Group described in Paragraph 34.1.6 of the POC, which would have had the effect of discharging the debt to the Bank."

and:

> "60. … The proposal from Starwood involved Starwood taking an interest in all of the Bank's hotel assets including the Company Group's assets, and repaying the Company Group's debt to the Bank. It would not have involved an asset disposal until the Bank's debt had been repaid."

98. I accept BOS's submission that MHL should be held to its pleaded case applying the principles identified in in BP Gas Marketing Ltd v La Société Sonatrach and another [2016] EWHC 2461 (Comm) at [382]:

> "… an allegation of breach of [a duty of good faith], put at its lowest, involves an assertion that the other party has not acted in good faith. This is a serious allegation. In such circumstances the party making such allegation should plead its case with proper particularity so that the other party knows the case it has to face as to what breach is alleged to have occurred and when, and the party making such allegation will generally be held to its pleaded case as to what breach of duty is said to have occurred, and when, due to the nature of the allegation being made, and the fact that the evidence that will be called, will have been called to rebut that specific allegation, and only that allegation."

I would be entitled not to follow this only if I considered it to be plainly wrong. Not merely do I not consider what the Judge said to be plainly wrong but with respect it is plainly right. Whilst the principle is something that should apply in all cases where such an allegation is made, it is particularly important when such an allegation is made against a commercial bank or other financial institution, where the reputational damage caused by an unpleaded adverse finding could be particularly damaging.

99. The only "*proposal*" on which MHL could and did rely was the letter of 22 August 2012, referred to above. As I have explained, thereafter nothing that could be regarded as any more concrete was ever suggested by Starwood and the view internally both at BOS and MHL was that no proposals worthy of consideration were ever put forward by Starwood whether after 22 August 2012 or at all. As I have concluded above, the 22 August letter cannot be considered in any real sense a proposal.

100. Four points emerge from MHL's pleaded case:

i) It depended on MHL (or, possibly, Starwood or a newco formed by Starwood) taking over the management of distressed hotel groups that owed money to BOS (in order that MHL could earn management fees and thereby increase its EBITDA whilst not increasing or even decreasing its volume of debt) but that was not what Starwood had proposed and in any event was not something within BOS's gift unless it had (but in fact it had not) appointed Law of Property Act receivers over particular hotel assets or placed the companies concerned in administration – the point made by Mr Cumming for example in his internal email dated 12 September 2012, quoted above, at sub paragraph (i) and the final sentence of the penultimate paragraph, also quoted above (each relevant part being underlined in the quotation);

ii) What is pleaded assumes Starwood or third-party investors would take over the debt due to BOS but that is not what the Starwood letter proposed either - the point made by Mr Cumming in his internal email quoted above at sub paragraph (ii) and the second sentence of the penultimate paragraph quoted above, the relevant parts of which are underlined in the quotation set out above;

iii) MHL's case critically is that BOS rejected this proposal, but (even accepting without deciding that the Starwood letter contained a "*proposal*" capable of acceptance) BOS didn't reject it, as I have explained at some length above. To the extent that it depended on forcing other customers to agree to what was being suggested it was simply something that it could not deliver on – something that even Mr Macdonald was prepared to concede however reluctantly as I have explained – see above and Mr Macdonald's letter of 17 September 2012; and

iv) To the extent that it depended on a partial debt write off, that was not something BOS was prepared to agree to and as I have explained above that was accepted by Mr Fraser to be BOS's position and to be known by MHL to be BOS's position.

Notably, it is not alleged against BOS either that it did control any of the other hotel groups identified by Starwood or that BOS acted in bad faith in saying that it could not require its customers to act in the manner that was apparently being suggested. That was not what was suggested to BOS's witnesses in cross-examination and no legally defensible basis for BOS not being able to act as alleged has been identified. Equally, it is not suggested that BOS was required by its express duty of good faith to agree a partial debt write down or otherwise to act in what it perceived to be contrary to its own commercial best interest.

101. I do not accept that the 22 August letter was a proposal that was capable of acceptance even in principle. I have explained already why that is so. That this is so is apparent when the letter is read as a whole, but is particularly apparent from the highly preliminary nature of the financial aspects of the proposal contained in the letter when read in combination with the final few lines of the letter. As the letter stated:

> "To date we have had very limited information on the financial information of the Hotel Portfolios, and therefore the analysis we set out below is very much a framework for a pricing discussion, rather than a definitive proposal. Any definitive proposal could only be developed after more meaningful information has been provided and due diligence completed."

Thus although MHL described the letter in paragraph 94 of its opening written submissions as "*... a formal proposal..."*, that was not how the claim was opened orally – where Mr Lord KC accepted (correctly) that the letter was not a "*definitive proposal"* It is entirely apparent that no one at MHL or acting on its behalf considered the letter to be a proposal capable of acceptance – that much is clear for example from the communications between Mr Fraser and Mr Cumming referred to above. Although it is said that BOS was required by its good faith obligation to engage with Starwood, I do not see why that should be so. It was for MHL to obtain a proposal from Starwood, which BOS could then either accept or reject or make counter proposals if it chose to do so.

102. However, the real problem was that what was being suggested as a possible solution required BOS to deliver what it could not deliver – namely forcing customers that were covenant compliant and controlled by their boards to enter into an arrangement against their will for the benefit of Starwood and MHL. Mr Macdonald accepted albeit reluctantly that this was so not later than 18 October 2012 at the meeting between him, Mr Rucker, and Mr Dakin on behalf of BOS. It was not suggested that BOS was able to force Principal Hayley or De Vere to do what Starwood was apparently seeking and no such case has been pleaded. Although it was suggested to BOS's witnesses that such a transaction could not proceed without the consent of BOS, that is not the point. It had a veto in order to protect its security interest. However, that is not the same thing as being able to force a proposal on a covenant compliant and solvent company that is in the control of its board to enter into a transaction that the board of that company did not consider appropriate. In any event, on the documentation, each company had embarked on a debt reduction strategy that BOS supported. It is simply not sustainable to suggest that it would be a breach of the good faith obligation owed by BOS to MHL to cease supporting those arrangements because it was commercially or financially beneficial to MHL to do so. Since MHL was pushing the fund project or an investment by Starwood, it was for it and/or Starwood to formulate a proposed scheme with all necessary consents from the commercial parties involved and then provide the proposal to the Bank for consideration.

103. Aside from the difficulty identified above, there was another. There is no doubt that if a third party wanted to take on the whole of the debt owing to BOS, then BOS would have readily agreed. However, even Starwood's letter of 22 August was premised on a valuation of MHL at a multiple of 10x EBITDA before taking account of Capex and restructuring costs. Given that the debt due to BOS was between 12 and 13xEBITDA, it followed that the debt had to be reduced to a ratio of loan to EBITDA below 10x before it could make any commercial sense for a third party such as Starwood to acquire MHL. Although there may have been other ways of achieving this such as converting some of the debt into an

equity interest, the most obvious way of achieving such an outcome was for BOS to forgive part of the sum due to it. As I have explained in detail above, BOS was not prepared to do so and it was known to both Mr Macdonald and Mr Fraser that it was not prepared to do so. Mr Macdonald was aware from at least September 2012 that Starwood would require BOS to forgive part of MHL's debt – that much is apparent from the letter of 12 September 2012 in which Mr Macdonald had stated that Starwood had "…*no intention of trying to obtain an extraordinary discount from the Bank on the debt*". I accept that the obvious implication of this letter is that Starwood was seeking a discount that was not extraordinary but which was never specified beyond what is set out in the summary of key events set out above.

104. In fact, what happened is that Starwood acquired Principal Hayley and a part of De Vere by direct negotiation. There was nothing to prevent Starwood adopting the same approach to MHL. In fact, it did not do so. That is the point of the communications between Mr Fraser and Mr Cumming at the back end of negotiations that led to the 2014 Facility Agreement. That can only have been because either Starwood was not interested or was interested only on terms that were not acceptable to MHL or which it knew would not be acceptable to BOS because it involved a substantial write off of debt due to it from MHL – a point that appears to have been acknowledged at the MHL board meeting on 24 January 2013. There was no difference between the position in relation to Starwood and that of other institutional investors that had been approached when refinancing prior to the 2010 Facility Agreement was sought – outside investors could only be interested if BOS agreed to write off debt and that was not acceptable to BOS. As Mr Fraser put it in his statement "… *(e)very proposal for equity investment (not including the Fund proposal, our preferred option) collapsed because the Bank refused to either write-off debt or cede equity in the business to the prospective investor*." Mr Fraser suggested that any agreement with Starwood by MHL would have enabled BOS to be paid in full – see T6/166/9-16 – but there was never any formal offer to that effect. Had there been such an offer, BOS would I am sure have accepted it immediately if only for the reasons identified by Mr Guthrie in paragraph 15 of his witness statement as augmented by his oral evidence in cross examination at T9/132/1-11.

105. I am very sceptical as to whether Starwood would have entered into any such arrangement. Mr Fraser seemed to suggest that it would be willing to do so because of the discounts that it was alleged the Bank had made in relation to the debt due from Principal Hayley and De Vere when Starwood had acquired its interest in those companies. There is no satisfactory evidence as to whether BOS made any such discounts (because this has never been a pleaded issue) but even assuming that it did, that does not lead to the conclusion that Starwood would not have sought a similar discount as the price of acquiring MHL given (i) its enterprise value and loan value to EBITDA, (ii) the economic conditions that applied at the time and (iii) that the underlying economic purpose of Starwood acquiring companies that operated hotels was to create value by consolidation. Given those factors, it is inherently improbable that Starwood would have been willing to proceed in relation to MHL in a way that was materially different from the model it used in relation to the other companies (or parts of companies)

it had acquired. In short, paying MHL's debt in full because it had profited from a discount when acquiring De Vere makes no commercial sense.

106. All this is beside the point however – the key point is that at no stage did MHL receive an offer or proposal from Starwood (or any other potential investor). On 27 March 2013, Mr Fraser had written to Mr Dakin of BOS in terms that suggested MHL was continuing its discussions with Starwood but they were going more slowly than anticipated. However, as set out earlier, at the meeting on 2 April 2013, Mr Rucker reported (and Mr Macdonald concurred with him) that the attempt to raise equity had "… *only really generated interest from "bottom-feeders" and the conclusion was that pursuing this avenue was not in anyone's interest*…" and that accordingly *"… no reliance should be placed on the delivery of new equity for the purposes of our refinancing discussions*." The key point that arises from this is that by the time this statement came to be made, MHL had been seeking investment from third party sources since shortly after the 2010 Facility Agreement had been completed without success. MHL would have defaulted under its 2010 Facility Agreement covenants at the end of December 2012 but for the willingness of BOS to vary its terms. The decision to abandon those discussions was a decision taken by MHL.

107. That being so, MHL's reliance on a BOS internal email exchange between Mr Unni and Mr Smith on 26 September 2012 is misplaced. Mr Unni had asked Mr Smith whether there was any milage "*internally"* in the outline scheme that was described by Mr Macdonald's 17 September letter advocating support for what had been set out in Starwood's 22 August letter "*… leaving aside any deliverability issues"* to which Mr Smith's response was:

> " Nope
>
> Menzies sold, PH on market and de vere has a plan."

Quite what was meant is unclear since the points made in the second line were the "… *deliverability issues…"*. This was put to Mr Smith in cross-examination and he made precisely that point – see T11/134/22-25. When it was pointed out that he was being asked about the internal position apart from the deliverability point, Mr Smith's evidence was that:

> " That's what Mr Unni asked, but my response was we just can't deliver it, so it doesn't go any further.
>
> Q. No, but he's asking you specifically about the possible traction for Starwood, leaving aside the deliverability. He's saying, well, put deliverability on one side, what's the bank's attitude to Starwood? That's what you have been asked, isn't it?
>
> A. That's what Dino asked, but that's not what I responded with?
>
> Q. I see.
>
> A. It was just undeliverable."

I accept this evidence which is consistent with what I have said earlier concerning the position of the Bank and the companies identified. However, that is neither here nor there for present purposes. If and to the extent that Mr Lord KC was suggesting that the email was hinting at some hidden agenda, it goes nowhere simply because as I have explained there was no offer ever made that was capable of acceptance or at least being the starting point for a negotiation or which was capable of getting round the difficulty created by BOS's inability to deliver what was being sought.

108. It is now necessary to return to MHL's pleaded case. I have set it out in whole earlier but in summary it has alleged and therefore must prove that BOS acted in breach of its good faith obligations imposed upon it by clause 6 of the SHA by insisting and imposing upon MHL the sale and leaseback of the Randolph Hotel by its rejection of what MHL characterises as a proposal it developed with Starwood "… *which involved the Company taking over management of other distressed hotel groups who owed money to the Bank (as it had previously done in the 1990s, at the Bank's request). As part of the structure proposed by Starwood Capital Group, third party debtors would take over the debt to the Bank.*"

109. For the reasons that I have developed at some length earlier in this judgment, I find that allegation has not been proved.

110. It has not been proved by MHL that there was ever a proposal (or at any rate one that was ever put to BOS), much less one that involved third party debtors taking over MHL debt to BOS. As I have said above, had any such proposal been put to BOS it is highly probable that it would have seized that opportunity with both hands. In fact as I have said no proposal was ever put forward to BOS by either Starwood or MHL; and all the discussions that appear to have taken place between MHL and all third parties involved, or, had they developed to a formal proposal, would have involved, BOS being asked to forgive a substantial (but never ultimately quantified) amount of the sum owed by MHL to BOS but would probably have been in excess of the difference between MHL's debt to EBITDA ratio of circa 12x its EBITDA and its enterprise value of approximately 10x its EBITDA. As I have found earlier, BOS was not willing to agree to such a discount and that was known to each of Mr Fraser and Mr Macdonald long before the sale and leaseback was completed.

111. In addition and in any event, as I have found BOS was not in a position to force its customers to permit MHL to take over management of that customer's hotels absent the appointment of a receiver or administrator and that was not (or has not been proved to have been) the position in relation to any of the corporate customers of BOS in respect of which interest had been expressed (Principal Hayley and De Vere).

112. In summary therefore there was never a proposal capable of being accepted as pleaded by MHL in paragraph 34.1.6 of the Re-Re-Amended Particulars of Claim, much less one that had the or any of the characteristics pleaded. It follows that the allegation made in paragraph 34.1.6 that BOS rejected that proposal must necessarily fail. All that BOS ever did was to indicate (a) that it

was not in a position to require any of its customers to deal with either Starwood or MHL as suggested and (b) it would not be prepared to waive any or any substantial part of the total sum owed to it by MHL.

113. It follows that in the end the construction issues between the parties concerning clause 6 of the SPA are immaterial since the claim in respect of the Randolph Hotel fails at the factual level I have indicated.

114. Finally and in any event the allegation made in paragraph 44.2 of the Re-Re-Amended Particulars of Claim that "… *the Bank (including through its agents Uberior and Mr Opperman) insisted upon and imposed the Sale and Lease Back of the Randolph Hotel*…" fails as well (a) for the reasons already given but (b) in any event because the decision to discontinue the third party equity injection discussions announced at the meeting on 2 April 2013 by Mr Rucker and Mr Macdonald was not the result of any decision by BOS but was the decision of the board of MHL taken for the reasons identified by Mr Rucker and agreed with by Mr Macdonald at the 2 April meeting – that the exercise had "… *only really generated interest from "bottom-feeders" and the conclusion was that pursuing this avenue was not in anyone's interest (including LBG given the suggestion of debt forgiveness to facilitate PE investment today)*." True it is that MHL were up against the deadline imposed by the MoU and extension to the 2010 Facility Agreement but (i) that was noticeably not relied on by Mr Rucker and Mr Macdonald as a reason for discontinuing the search for third party investment; (ii) a further extension could have been sought if it was thought the discussions with Starwood (or with L&RP) were going anywhere but noticeably that was not sought; but (iii) the reason given suggests that the terms being sought by each of those that MHL included substantial partial debt releases which Messrs Rucker, Fraser and Macdonald knew would not be acceptable to BOS. It is neither pleaded nor submitted that any part of the good faith obligations contained in clause 6 of the SHA required BOS to agree to forgive any part of the debt due to it from MHL.

In the result, this part of MHL's claim fails. *W*

115. Given my conclusions concerning the Randolph Hotel Claim, strictly it is not necessary for me to determine the issues that arise in relation to DoW. However, I consider it is appropriate to do so. Two points arise. The first concerns whether the Randolph Hotel Claim comes within the scope of the DoW as a matter of construction and the second is whether MHL is entitled to avoid the DoW on the ground that MHL's agreement to it was procured by misrepresentation.

116. *The Background*

Mr Macdonald acknowledged in his evidence that he had threatened legal action against BOS "*a few times*" in the period down to 19 March 2014 – see his answers in cross examination at T4/49/19-22. It was put to and accepted by Mr Fraser in the course of his cross examination that MHL had made some quite serious complaints and allegations against BOS in the period leading up to the 2014 Facility Agreement – see T7/143/22-25. It was this that led to BOS's requirement that MHL enter into what became the DoW. Mr Macdonald

accepted that BOS's requirement for a deed of waiver was the result of a concern that it may face claims from MHL once the 2014 Facility Agreement had been completed as Mr Macdonald had threatened – see T5/91/1-4. Mr Macdonald maintained in the course of his evidence that MHL was forced into entering into the DoW by duress – but that case was abandoned as I have explained. After various attempts to deflect from a question asked of him a number of times concerning why he maintained MHL had entered into the DoW, the following exchange took place between Mr Mitchell KC and Mr Macdonald:

> "Q. But do you agree you didn't rely on anything said by the bank; you took your own view?
>
> A. No, that's true."

117. Mr Macdonald's acknowledgement of the reasons for BOS requiring MHL to enter the DoW reflected accurately the reasons given by BOS in its pre-contractual correspondence. Prior to the parties entering into the DoW, when the issue had first been raised, Mr Fraser had stated to Mr Smith that:

> "As long as the legal wording reflects the principle of drawing a line under things and doesn't go further then this would be acceptable.
>
> The Board needs to agree to it but on a personal level these points seem reasonable"

By an email of 17 January 2014, Mr Fraser raised a number of points concerning the proposed waiver, which had apparently been of concern to MHL's board including specifically, a requirement for a general waiver in relation to matters of which the Board had no knowledge or which may arise in the future.

118. On 21 January 2014, Mr Guthrie responded to this on behalf of BOS conceding these points and explaining why it was seeking the waiver in these terms:

> "**Waiver**
>
> We consider this is a standard provision in these circumstances. The waiver requested by the Bank is not intended to compromise any future claims that Macdonald Hotels may have under the proposed new facility going forward or in respect of any matters where the Board has no knowledge. It is requested in relation to compromising any unresolved past discussions or previous allegations which have been made by the Board in relation to previous restructures (such as 2010 - which are denied) or the historic conduct of the banking relationship, which have been previously raised. The Bank wishes to draw a line in the sand under these historic issues and move forward constructively and consensually as you have stated. We can only do this if these issues are resolved. You will appreciate that in circumstances where the Bank is considering entering into new contractual arrangements, it is entirely reasonable that these previous issues

> are resolved as a precondition. For the avoidance of doubt, we should make clear that this in no way reflects a concern on the Bank's part. in respect of its past conduct.
>
> Again we have asked the Bank's lawyers to incorporate appropriate wording, which will be shared with Dickson Minto[7] in early course." [Emphasis supplied]

Both parties were clear therefore that the purpose of seeking the DoW was "… *to draw a line in the sand*…" in respect of all unresolved allegations made on behalf of MHL other than *"… any future claims that Macdonald Hotels may have under the proposed new facility going forward or in respect of any matters where the Board has no knowledge*…" Whilst MHL initially objected to entering into the DoW at all, it did not seek any other carve outs apart from those that BOS had indicated it was willing to concede.

119. The MHL board accepted the waiver requirement in principle at its meeting on 22 January 2014 and by his email of 23 January 2014, Mr Fraser confirmed MHL's agreement to BOS in these terms:

> "**Waiver**
>
> We note that the Bank requires a waiver in respect of historic issues raised as a precondition to the new refinancing arrangements and that this is a standard provision required by the Bank in these circumstances. On the basis that the Board also wishes to draw a line in the sand under these historic issues and move forward constructively and consensually we would agree to an appropriately worded waiver. We appreciate your clarification that a waiver would not compromise any future claims that Macdonald Hotels may have under the proposed new facility or in respect of any matters where the Board has no knowledge.
>
> Again we note that you have asked the Bank's lawyers to incorporate appropriate wording into the refinance documentation and again we have asked Dickson Minto to review this wording." [Emphasis supplied]

That both parties wished to "… *draw a line in the sand under these historic issues and move forward constructively and consensually*…" was material background known to both the parties, that is relevant to the correct construction of the DoW.

120. The terms of the DoW were negotiated between the parties' solicitors thereafter in the usual way. In the course of that exercise, BOS's solicitors (Maclay Murray & Spens) had openly conceded that the DoW should be subject to the exceptions identified by Mr Guthrie in his correspondence referred to above and

[7] MHL's Edinburgh solicitors, who acted for MHL in relation to the 2014 Facility negotiations.

accepted by Mr Fraser on behalf of MHL and maintained in an email of 28 February 2014 that they had amended the draft in order to reflect that fact.

121. These negotiations concluded with the DoW, which is dated 19 March 2014 between MHL (and various subsidiaries) on the one side and BOS (in various capacities) on the other. In Recital C it was recorded that:

> "In consideration for the Finance Parties entering into the Amendment and Restatement Agreement[8], each of the Relevant Parties has agreed to enter into this Deed in respect of certain claims and complaints, howsoever arising, which may be competent to it in respect of the documents entered into prior to the date of this Deed (but not those entered into on or around or after the date of this Deed)."

A "*Finance Party*" was defined expressly by the DoW as being BOS in its various capacities and a "*Relevant Party*" as being MHL and its various subsidiaries identified as parties to the DoW.

122. The phrase "*Relevant Documents*" is defined by the DoW as meaning the "*Finance Documents"* and those were defined as meaning "… *a facilities agreement dated 19 October 2005, which was amended and restated on 4 February 2008, 19 June 2009 and 29 October 2010 and amended on 20 December 2012, 1 October 2013, 20 December 2013, 30 January 2014 and 26 February 2014*…" The claims covered by the DoW therefore do not include any claims in respect of the 2014 Facility Agreement but does include claims in respect of the documents constituting the 2010 Facility Agreement as varied.

123. The paragraph of the DoW relevant for present purposes is clause 2.1, which is to the following effect:

> "In consideration for the Finance Parties entering into the Amendment and Restatement Agreement, each of the Relevant Parties hereby:
>
> 2.1 acknowledges and agrees (subject to the terms of this Clause 2) that (i) it has no claim or complaint of whatever nature competent to it at the date of this Deed against any Finance Party and which relate to or arise from facts, matters or circumstances known to the Relevant Parties or any of them at the date of this Deed arising from, relating to or in connection with the Relevant Documents, including all documents and matters ancillary thereto (and all and any discussions and negotiations pertaining thereto), howsoever arising, in any jurisdiction and specifically, but without prejudice to the foregoing generality, whether arising from, or under statute, contract, common law, or

[8] The 2014 Facility Agreement

> otherwise and (ii) irrevocably and unconditionally waives and discharges any and all such claims and complaints which may be, or may become, competent to it against any Finance Party in any jurisdiction and which relate to or arise from facts, matters or circumstances known to the Relevant Parties or any of them at the date of this Deed; …"

MHL's pleaded case as to the construction of the DoW is pleaded in paragraph 37 of its Re-Re-Amended Particulars of Claim:

> "The Claimants' primary case will be that, as a matter of construction, none of its claims fall within the Deed of Waiver, because (i) the claims for breach of the Shareholders' Agreement and/or the Good Faith Implied Term are not claims covered by Clauses 2.1-2.2 of the Deed of Waiver, and (ii) the claims for breach of the Disposal Implied Term (which only concern events occurring and/or losses crystallising after March 2014) are not subject to the Deed of Waiver."

Its alternative pleaded case (other than that of duress which was abandoned as I have explained) is that:

> "In the alternative, if any of the claims are subject to the Deed of Waiver, then it the Claimants will say that the Deed of Waiver is … liable to be rescinded for misrepresentation."

That is then expanded on in the pleading in the ways set out below when considering the misrepresentation issue.

124. *The DoW Construction Issue*

I turn first to MHL's pleaded construction issue. I do so by applying the principles in relation to the interpretation of contracts summarised above. Although MHL submitted that it should be treated as having waived any claim for breach of the SHA only by clear wording, in my judgment that does not lead to the displacement of those principles. In English law, there are no special rules for the interpretation of settlement agreements – see BCCI v Ali [2001] UKHL 8; [2002] 1 AC 251. The DoW was such an agreement. Although both parties were represented by Scots solicitors, that is immaterial because the parties have agreed that the DoW was to be governed by English law – see clause 8.1.

125. MHL's case is that its claim concerning the allegedly forced sale of the Randolph is not a claim that comes within the scope of the phrase "… *arising from, relating to or in connection with the Relevant Documents*…", which as I have said are contractually defined to mean the "… *facilities agreement dated 19 October 2005, which was amended and restated on 4 February 2008, 19 June 2009 and 29 October 2010 and amended on 20 December 2012, 1 October 2013, 20 December 2013, 30 January 2014 and 26 February 2014…*" MHL argues that its Randolph Hotel claim is not within the scope of the DoW because its claim is for alleged breach of the SHA, not any of the Relevant Documents

as defined and its claim is not one that in any relevant sense arises from or is related to or is in connection with any of the Relevant Documents as defined.

126. BOS submits that I should reject this submission on the basis that it fails to distinguish between causes of action on the one hand and a "*claim or complaint of whatever nature competent to it*…" on the other. The word "*competent"* is perhaps not the most apposite word to be used in this context but from its context would have been understood by reasonable people in the position of the parties as meaning available to MHL to sue upon or otherwise seek a remedy in respect of. In that context the difference between a cause of action and a claim is a distinction without a difference because a cause of action is generally considered as a matter of English law to be '… *simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person*…' – see Letang v Cooper [1965] 1 Q.B. 232 per Diplock LJ as he then was at pages 242–3. This approach has been consistently followed ever since.

127. The words "… *claim or complaint…"* would have been understood by reasonable people with all the relevant background knowledge available to the parties as meaning what Diplock LJ held was meant by the phrase "*cause of action*". This is consistent with what in my judgment was meant by the use of the word "*competent"*. In some contexts the word "*claim"* can mean what Diplock LJ referred to in Letang v Cooper (ibid.) as a "*form of action*" by which he meant the legal classification of a claim made in respect of a cause of action (e.g.. a claim for damages against a professional by a client can be brought both in contract and tort in respect of the same factual situation). I don't think that is what the parties meant by the use of the words "… *claim or complaint…"* In my judgment that point is emphasised by the use of the phrase "… *of whatever nature competent to it…"* which was probably intended to refer to legal classification. In my judgment it is emphasised also by the inclusion of the phrase "… *but without prejudice to the foregoing generality, whether arising from, or under statute, contract, common law, or otherwise*…". I am not persuaded that the word "*complaint"* adds anything.

128. In my judgment therefore the phrase *"… claim or complaint of whatever nature competent to it..."* should be interpreted as meaning any cause of action however legally classified available to MHL. In my judgment therefore, reasonable people with all the knowledge available to the parties would have concluded that the phrase included a claim in damages for alleged breach of the SHA as long as the claim was in respect of a factual situation that arose from, was related to or connected with one or more of the Finance Documents as defined. In my judgment that is emphasised by the entirely general effect of the phrase "… *whether arising from, or under … contract … or otherwise*…". That phrase does not limit contractual claims to claims brought under one or more of the Relevant Documents and permits any claim arising from or under any contract as long as the claim that arose from, was related to or connected with one or more of the Finance Documents.

129. Part of the information known to both parties was that the historic issues between the parties included that Mr Macdonald through Mr Fraser had made

implicit allegations that pressure to sell the Randolph was contrary to the good faith obligations owed by BOS to MHL under the terms of the SHA. MHL had asserted that pressure to sell the Randolph was contrary to BOS' good faith obligations under the SHA by a letter to Mr Nigel Moss, a managing director of Uberior, from Mr Fraser dated 12 May 2011, in which Mr Fraser complained about the conduct of Mr Opperman (then Uberior's nominated non-executive director of MHL) in applying what he (and no doubt Mr Macdonald) considered to be inappropriate pressure to sell the Randolph Hotel. In that context Mr Fraser stated that

> "UVL, and the Board have been joint venturers together since 2001 and, despite what the lawyers always tell us, we view the relationship as a partnership. We each owe the other duties to act in good faith and in the best interests of the Company to maximise profits and minimise losses. We are gravely concerned that UVL's short term exit driven focus is out of step with the fundamental principles of our joint venture,"

130. A similar point was made in a later letter dated 26 May 2011 from Mr Fraser to Mr Moss in the context of demands that BOS remove from the board of MHL the nominee director who was pushing for a sale of the Randolph, where Mr Fraser observed that the Macdonald directors on the MHL board "…*remain gravely concerned that the UVL exit driven focus is out of step with the fundamental principles of our joint venture*."

131. Given that context, no reasonable person in the position of the parties and with all the knowledge available to them both could have concluded that the intention of the parties to be derived from the language used was to exclude claims that were connected with one or other of the Finance Documents as defined other than such a claim when formulated as a claim for damages for breach of the SHA. This conclusion was consistent with both parties wishing to draw a line in the sand under these historic issues. That would not be achieved by an agreement that barred some claims in respect of a factual situation that arose from, was related to or connected with one or more of the Finance Documents as defined but not others. Viewed as a whole, reasonable people with all the knowledge available to the parties would not have concluded that was what the parties intended or meant by the language they had used.

132. I am satisfied that, as a matter of construction, the Randolph Hotel claim is one that is connected with the 2010 Facility Agreement. The agreement for the sale and leaseback of the Randolph was executed on 7 February 2014 and although it completed on the same day as the 2014 Facility Agreement was completed that was for the particular reasons noted earlier concerning the requirements of the purchaser concerning MHL being a going concern. The sale was undertaken for the purpose of reducing the gross sums lent under the 2010 Facility Agreement and reducing the gross loan to EBITDA ratio – as Mr Fraser accepted in the course of his cross examination, the sale was in part at least to repay the deleverage bridge under the 2010 Facility – see T7/141/15-24. The consequence was that the sum refinanced under the 2014 Facility was smaller than would otherwise have been the case, again as Mr Fraser accepted – see

T7/141/25- 142/1-6. MHL's complaint was that BOS was in breach of its clause 6 SHA obligations by requiring the sale of the Randolph rather than agreeing what MHL contends to be the Starwood proposal, because the latter would have been a more satisfactory way of satisfying MHL's obligations under the 2010 Facility Agreement. As Mr Fraser put it in his oral evidence:

> "Q. At this time, the relevant time -- just get our heads around the relevant time -- one of the complaints that you had made was in relation to The Randolph and it was -- if one was to try and summarise it in a pithy sentence, it would be that your complaint anyway is that the bank was insisting on asset sales and not allowing you to embark upon a different route by way of repayment of the 2010 facility. Is that a fair summary of the complaint you made at the time?
>
> A. Yes, but I've told you -- you've got my evidence as why we sold The Randolph.
>
> Q. Yes, and your complaint is we should have gone with the Starwood proposal.
>
> A. Yes."

133. *The DoW Misrepresentation Issue.*

For MHL to succeed in its claim that it is entitled to seek recission of the DoW for misrepresentation, it must establish firstly that the representor (here BOS) has made a statement of fact on which the representee (here MHL) was intended and entitled to rely. The question whether a representation has been made and, if so, in what terms, is determined objectively, according to the impact that whatever was said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee – see Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland PLC [2010] EWHC 1392 (Comm); [2011] 1 Lloyds Rep 123, at [81] followed in by Zacaroli J (as he then was) in Farol Holdings and others v. Clydesdale Bank Plc and another [2024] EWHC 593 (Ch). Secondly the representation must be false. Thirdly, it must be shown that the representor (BOS) intended the representee (MHL) to rely on the statement and that the representee (MHL) was induced to enter (in this case) the DoW in reliance on the representation – see Farol Holdings and others v. Clydesdale Bank Plc and another (ibid.) at [211] and [215] to [216]. As Zacaroli J added in relation to reliance:

> "217. The relevant question in this respect is whether the claimant would have entered into the contract if the representation had not been made at all, not whether it would have done so if it had been told the true position: see Raiffeisen (above) at [180], approved by the Court of Appeal in SK Shipping Europe Ltd v Capital VLCC 3 Corp [2022] EWCA Civ 231; [2022] 1 Lloyd's Rep 521, per Males LJ at [61].

> 218. The identification of the appropriate counterfactual if the statement had not been made, however, is a question of fact, and in some cases this may necessarily involve asking what would have happened if the truth had been told. That might be the case where, if the representation had not been made, the true position would have been revealed as a result of questions asked by the representee: Raiffeisen at [182] to [185]; SK Shipping at [61]. Even then, however, the "truth" is that which is sufficient to correct the falsity of what was said: Raiffeisen at [192] to [193]."

134. MHL's pleaded case in relation to these issues is at paragraph 41 of the Re-Re-Amended Particulars of Claim, which is in these terms:

> "By Mr Guthrie's email of 21 January 2014, it was expressly and/or impliedly represented to the Company Claimants that, in respect of matters covered by the Settlement Agreement Deed of Waiver (i) the Bank was not aware of any wrongdoing which would or might give rise to a claim by the Company Claimants, and/or (ii) had no reason to believe that it might be accused of such wrongdoing (the "Representations"). Mr Guthrie's email was understood as containing the Representations by both the Chairman and Gordon Fraser."

MHL's case as to falsity is pleaded in paragraph 42 of the Re-Re-Amended Particulars of Claim in these terms:

> "The Representations were false. On 28 July 2014, the FCA issued a Final Notice against the Bank and Lloyds Bank PLC, finding that it had breached Principles 5 and 3 of the Authority's Principles for Businesses by manipulating submissions to both the Repo Rate and LIBOR. The Bank was fined £105m. It is to be inferred that the Bank was aware or could with reasonable diligence have become aware of the FCA's investigation into the same facts and matters, and/or that those facts and matters created a risk that they would be fined by the FCA, by the time of the Deed of Waiver. In the premises, the Representations were made negligently; alternatively, innocently."

MHL's case on reliance is pleaded in paragraph 42A as being that MHL "… *through the Chairman and Mr Fraser, relied on the Representations in causing the Claimants company to enter into the Deed of Waiver*."

135. The part of Mr Guthrie's email relied on by MHL as constituting the alleged representation are the words "(*f)or the avoidance of doubt, we should make clear that this in no way reflects a concern on the Bank's part. in respect of its past conduct*." However, that statement has to be read in the context of the rest of the relevant part of the email which was to the following effect:

> "… [The DoW] is requested in relation to compromising any unresolved past discussions or previous allegations which have been made by the Board in relation to previous restructures (such

> as 2010 - which are denied) or the historic conduct of the banking relationship, which have been previously raised. The Bank wishes to draw a line in the sand under these historic issues and move forward constructively and consensually as you have stated. We can only do this if these issues are resolved. You will appreciate that in circumstances where the Bank is considering entering into new contractual arrangements, it is entirely reasonable that these previous issues are resolved as a precondition. For the avoidance of doubt, we should make clear that this in no way reflects a concern on the Bank's part. in respect of its past conduct."[Emphasis supplied]

136. In my judgment it is plain and I find that the "*past conduct"* referred to by Mr Guthrie was BOS's conduct in respect of which MHL or Mr Macdonald on its behalf had made previous allegations namely those "… *made by the Board in relation to previous restructures (such as 2010 - which are denied) or the historic conduct of the banking relationship.*" I reach that conclusion applying the principles set out earlier because (i) it was in relation to those allegations that the DoW was being sought by BOS as Mr Guthrie makes clear in the first sentence quoted above; (ii) it was in respect of those allegations (and no others) that the Bank wished to draw a line in the sand, as to which see the second sentence quoted above; (iii) that this was BOS's purpose is emphasised both by the statement in the penultimate sentence quoted above that it considered it was reasonable "… *that these previous issues are resolved as a precondition*…" of entering into the 2014 Facility Agreement; and (iv) Mr Guthrie's confirmation that it was not intended that the DoW would compromise any future claims that MHL might have under the proposed 2014 Facility Agreement or any claims by MHL relating to matters of which it had no knowledge. That being so, I do not accept that the statement in the final sentence was intended to refer to anything other than those allegations that MHL had made down to the date of Mr Guthrie's email concerning previous banking facility restructures or the conduct to that date of BOS's banking relationship with MHL.

137. It is worthwhile noting that (as Mr Fraser accepted in the course of his cross examination – see T7/144/17-22) at the stage when the email was sent by Mr Guthrie, the DoW was not in existence – the principle was one still being discussed, which was why the email came to be sent. The first draft of the DoW was not circulated until 21 February 2014. In those circumstances, it is difficult to see how either the email or the final sentence of the section in it concerning waiver could have been understood as being made "… *in respect of matters covered by the Settlement Agreement Deed of Waiver*…". In those circumstances, I accept BOS's submission that "… *Mr Guthrie could not reasonably be understood as making any statements as to whether the Deed of Waiver, as finally agreed almost two months later, might extend to other potential claims that he (or the Bank more widely) was or ought reasonably to have been aware might have been available to MHL*."

138. Given these conclusions, the LIBOR falsity allegation made by MHL is not one I need consider.

139. These conclusions are enough to enable me to conclude that MHL's rescission claim based on misrepresentation must fail. However, I should make clear that I am also unpersuaded that MHL has proved reliance on the alleged representation for the following reasons.

140. As I have explained any reliance in the terms pleaded would be entirely unreasonable given what was actually said and the context in which the statement relied on appears. Aside from that, MHL's pleaded case is that Mr Guthrie's email was understood as containing the pleaded representations by both Mr Macdonald (referred to in the pleading as the "*Chairman*") and Mr Fraser. As to Mr Macdonald, although his statement suggested otherwise, when it came to cross examination he entirely abandoned that part of his evidence. In Paragraph 82 of his statement he had stated of the DoW that:

> "We would have refused to enter into it had we been aware that the Bank did in fact have concerns about its prior conduct which it was not revealing to us. I understood Mr Guthrie's email to be indicating that the Bank was not aware of any conduct on its part which could give rise to a claim by MHL, and it was on that basis, together with the absence of alternative options, that (reluctantly) we signed the Deed of Waiver."

However, when he came to give oral evidence it was as follows:

> "Q. … But what's your legal case about the waiver, the deed of waiver? What's your case in these proceedings about it?
>
> A. I don't know, my Lord.
>
> Q. Well, I asked you about this on Day 1 and I don't think you knew then. I asked you about duress. You don't know what your legal case is about the deed of waiver?
>
> A. I know plenty about duress, my Lord, but I don't know the issue about the deed of waiver.
>
> …
>
> Q. … The deed of waiver -- we can go to the document if you like. Do you, by which I mean the company, I don't mean you personally, do you accept that you're bound by the terms of that document which the company signed?
>
> A. No, I don't.
>
> Q. Right. Why don't you?
>
> A. Because we signed it under duress.
>
> Q. Right.

A. We had the option of signing it and not having funding to go forward --

Q. Right.

A. -- the business.

Q. And why was it signed under duress? Explain to me what the duress was.

A. Well, we wouldn't have a company, we wouldn't have a business if we hadn't signed it.

Q. You wouldn't have got the refinancing, you mean?

A. That's exactly what I mean, yes.

Q. That's right. And could you have got refinancing from any other bank?

A. No. Well, we hadn't tried by that time, because the bank was still shareholders of Macdonald Hotels at that stage.

Q. So you had, on the duress case, you had no option but to sign it if you wanted the bank not to call a default and instead grant you a new facility; is that right? Is that your case?

A. Well, it was either we signed it with the deed of waiver or we had no refinance, my Lord.

Q. Right. I understand that. That is, I think to be fair, your duress case, or the essence of it. Is there any other reason why you say you're not bound by it? You the company, I mean.

A. Well, I can only speak as an individual, and if it was left to me I would have -- and we had been bound by it, I would have challenged it. But I'm not a lawyer. I can only say what I -- what I think, which … might be totally wrong.

Q. I'm not asking you as a lawyer, I'm asking you as a member of the board of the company. Nothing that was said to you by the bank about it led you to enter into it. Do you agree?

A. I didn't enter into it. I was forced into it, my Lord.

Q. I understand that. You were forced into it, you had no option. That's your duress case. Nothing that was said to you by the bank led you to enter into it?

A. It's a fearful way to work, throwing people a deed of waiver in the height of a fearful economic climate when I'm trying to help the bank and help -- and keep the company alive.

> Q. You took your own view, is what I'm really getting at. Whatever the bank said as to the reason for it and why it wanted it, you took your own view as to whether you should enter into it and you felt you had no choice but to do so. Is that a fair summary of why you entered into –
>
> A. No, we had no option, my Lord, but to enter into it.
>
> …
>
> Q. You didn't rely on anything said to you about the bank, you took your own view about whether to enter into it; do you agree?
>
> A. We had no option but to enter into it.
>
> Q. But do you agree you didn't rely on anything said by the bank; you took your own view?
>
> A. No, that's true."

141. Aside from the fact that Mr Macdonald was wrong to suggest that other banks had not been approached – see the earlier part of this judgment where I set out Mr Fraser's analysis of the response of other institutions that had been approached and their reasons for not wanting to become involved – what is apparent from this evidence is that (a) Mr Macdonald considered that MHL had entered the DoW only as a result of duress because MHL had no choice but to accept the 2014 Facility on the terms that it was offered, which included entering into the DoW; and (b) in entering into the DoW MHL had not relied on anything said or written by BOS. Thus as far as Mr Macdonald was concerned, MHL had entered into the DoW for the reasons he set out in his oral evidence and for no other reasons. On this basis, MHL's pleaded case concerning reliance in fact must necessarily fail in so far as it is based on its pleaded assertion that MHL "… *through the Chairman relied on the Representations in causing the Claimants to enter into the Deed of Waiver."*

142. Mr Fraser's written evidence on the reliance issue was that he understood the sentence of Mr Guthrie's email that is the basis of MHL's misrepresentation claim that "… *I understood to mean that the Bank believed that it had not acted improperly in any way that might give rise to a claim by MHL. I took that at face value (as regards what the Bank considered about its behaviour) and that was the basis on which we entered into the Deed of Waiver*."

143. I am deeply sceptical about this part of Mr Fraser's evidence. Firstly, it is entirely inconsistent with Mr Macdonald's oral evidence as set out above and in particular the last two questions and answers. Secondly, as I have found, no one could reasonably have understood the section of Mr Guthrie's email in this way. Thirdly, his assertion containing his understanding is not consistent with his email of 23 January, which in material part stated that:

> "We note that the Bank requires a waiver in respect of historic issues raised as a precondition to the new refinancing

> arrangements and that this is a standard provision required by the Bank in these circumstances. On the basis that the Board also wishes to draw a line in the sand under these historic issues and move forward constructively and consensually we would agree to an appropriately worded waiver. We appreciate your clarification that a waiver would not compromise any future claims that Macdonald Hotels may have under the proposed new facility or in respect of any matters where the Board has no knowledge."

Mr Fraser could not have understood the final sentence of Mr Guthrie's email in the way he alleges in his statement, given his understanding as to what BOS was seeking and why as set out in his email response. Fourthly, his claimed understanding is inconsistent with his recognition that by insisting on the DoW, BOS was aware of a risk that MHL might otherwise bring claims – see T7/162/7-10. Finally, in truth the only reason why MHL were prepared to agree the DoW was because BOS had indicated that its absence was a deal breaker so far as the 2014 Facility Agreement was concerned. That is why the 2014 Facility expressly makes entry into the DoW a condition precedent to the grant of the facilities the subject of the 2014 Facility Agreement. That was the effect of Mr Macdonald's oral evidence, the relevant part of which I have reproduced above and was the basis of his insistence that MHL agreed to the DoW only because of duress – the claim that was abandoned after his evidence had been completed. Mr Fraser's evidence to contrary effect – see T7/154/25-155/15 - was evidence that I found profoundly unconvincing.

144. As noted above, the relevant question in this respect is whether MHL would have entered into the DoW if the representation had not been made. It is obvious from Mr Macdonald's oral evidence that MHL would have done so for the reasons he gave. Mr Fraser initially accepted that if the final sentence of the waiver section of Mr Guthrie's email had not been included in the email MHL would have signed the DoW because there was no other alternative source of funding available to MHL. That concession was consistent with Mr Macdonald's oral evidence and was inevitable in the circumstances, if administration or insolvent liquidation was to be avoided. Mr Fraser's subsequent attempt to go back on that was entirely unconvincing. In my judgment it is entirely incredible that Mr Macdonald would have countenanced the alternative which would have been the collapse into administration or liquidation of his life's work. Regrettably, I have to reject this part of Mr Fraser's evidence.

145. In those circumstances, I reject MHL's rescission claim. It follows that even if I am wrong in the conclusions set out earlier concerning MHL's factual case in respect of its Randolph Hotel claim, that claim is nonetheless one that is within the scope of the DoW and has been waived and released. In the result the Randolph Hotel claim fails.

The Old England Hotel and Marine Hotel Claims

The Alleged Implied Terms

146. MHL's Old England and Marine claims are made exclusively by reference to an alleged breach by BOS of what MHL characterises in its pleadings as the "*Disposal Implied Term*", a phase that for convenience I have adopted hereafter. It does so because the SHA was discharged by agreement on the same date that MHL and BOS entered into the 2014 Facility Agreement, when Uberior sold its shares in MHL – see clause 4 of the Share Buyback Agreement between Uberior and MHL dated 19 March 2014.

147. MHL's pleaded case as to the Disposal Implied Term is set out in paragraph 19B-19D of the Re-Re-Amended Particulars of Claim in these terms:

> "19B.1 By Clause 1.1 (Definitions) of both the 2010 and 2014 Facilities, (i) "Permitted Disposal" was defined as "any sale, lease, licence, transfer or other disposal which…(q) permitted with the prior written approval of the Majority Lenders."; (ii) "Permitted Security" and "Permitted Transaction" were defined in such a way that none of the transactions which the Company and MBPL proposed to enter into as described in Paragraph 34 below fell within those definitions.
>
> 19B.2 Pursuant to Clause 24.13 (Negative Pledge) of the 2010 Facility, the Company, MML and MBPL were not permitted by reason of Clause 24.13.1 to create or permit to subsist any Security over any of their assets, except as permitted under Clause 24.13.13. Under Clause 24.13.14, that prohibition did not apply to any Security which was a Permitted Security or Permitted Transaction. Materially identical provisions were contained in Clause 24.16 of the 2014 Facility.
>
> 19B.3 Pursuant to Clause 24.14, the Company, MML and MBPL were not permitted by reason of Clause 24.14.1 to enter into a single transaction or series of transactions to sell, lease, transfer or otherwise dispose of an asset, except as permitted under Clause 24.14.3. Under Clause 24.14.3, that prohibition did not apply to any Permitted Disposal or Permitted Transaction. Materially identical provisions were contained in Clause 24.17 of the 2014 Facility.
>
> 19C. The Bank was and remained the sole lender under the Facility Agreement, with the consequence that it was the only Majority Lender. The Bank therefore had a discretion under sub-clause (q) of the definition of Permitted Disposal, read with Clauses 24.13-14 of the 2010 Facility and 24.16-17 of the 2014 Facility, to determine whether, when and on what terms it would permit the Company, MML or MBPL to dispose of their its assets in order to pay down its debt in accordance with the terms of the Facility Agreement.

> 19D. The discretion described in Paragraph 19C was subject to an implied term, which was necessary to give business efficacy to the contract and/or fell to be implied as a matter of law, that the Bank would (i) act in good faith and not arbitrarily or capriciously in exercising that discretion, including exercising its discretion consistently with its contractual purpose; (ii) would take into account all relevant considerations and not take into account any irrelevant considerations, and (iii) would not use the discretion for an improper purpose (the "Disposal Implied Term"). The Disposal Implied Term applied inter alia when the Bank required MHL the Company, MML or MBPL to sell a particular asset or property, in the same way as it did when the Bank was asked to consent to the sale of a particular asset or property."

As I noted earlier, MHL alleges the Disposal Implied Term is to be implied into the 2010 and/or 2014 Facility Agreements on the basis explained in Braganza.

148. I start with the applicable general principles. I have set out earlier the principles that apply to the construction of contracts. In relation to the implication of terms into contracts, the applicable principles are those set out comprehensively in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72; [2016] AC 742 and applied in Ali v. Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531. In summary where, as here, there is a detailed commercial agreement:

i) Terms are to be implied only if to do so is necessary in order to give the contract business efficacy or was so obvious that it goes without saying;

ii) It is a necessary but not a sufficient requirement that the term that a party seeks to have implied appears fair or is one that the court considered that the parties would have agreed if it had been suggested to them;

iii) Construing the words that the parties have used in their contract and implying terms into the contract both involve determining the scope and meaning of the contract;

iv) Construing the words used and implying additional words are different processes governed by different rules;

v) In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered because it is only after the construction exercise has been undertaken that the necessity question and the allied question whether the terms sought to be implied contradict the express terms of the contract concerned can be answered. This point is of particular importance in the specific context of a claim to imply terms of similar effect to those argued for by MHL in this case – see the part of the judgment of Males LJ in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613.

149. As was made clear by all the judgments in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) and emphasised by Lord Hughes in Ali v. Petroleum Company of Trinidad and Tobago (ibid.) at paragraph 7, the "… *concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion*." In relation to inconsistency between a suggested implied term and an expressly agreed term, he added:

> "… if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

It is for this reason that the principle set out in sub-paragraph (v) above is fundamental.

150. Finally, particular care is required when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties. The reason for this is obvious. Where an issue has been left unresolved, it is much more likely to be the result of choice rather than error. This point was one emphasised in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) and by Fancourt J in UTB LLC v. Sheffield United Limited [2019] EWHC 2322 (Ch) who at paragraph 203 summarised the applicable principle as being that where " … *detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same)*".

151. In relation to Braganza implied terms, generally, such terms will not be implied to qualify an express and unqualified power – see Nelson v British Broadcasting Corporation [1977] IRLR 148, a decision of the Court of Appeal, Reda v. Flag Limited [2002] UKPC 38, a decision of the Privy Council; and IBRC v. Camden Market Holdings Corp [2017] 2 All E R (Comm) 781, a decision of the Court of Appeal, where it was held that an express and unrestricted power to market the sale of loans by disclosing information to potential counterparties could not as a matter of law be circumscribed by an implied qualification. Such terms are not to be implied so as to qualify termination rights that are not expressly qualified – see Lomas v. IFB Firth Rixon [2012] EWCA Civ 419; TSG Building Services Plc v. South Anglia Housing Limited [2013] EWHC 1151 (TCC) and Taqa Bratani Limited and others v. Rockrose UKCS8 LLC [2020] EWHC 58 (Comm); [2020] 2 Lloyds rep 64.

152. The effect of these authorities is that where, applying the principles of construction noted earlier, the express terms of a contract confer on a party an absolute contractual right, then to imply a term that qualifies such a right is not permitted as a matter of law, because to do so would be to permit an implied term that contradicted an express term of the contract contrary to the "*cardinal rule"* identified by Lord Neuberger in Marks and Spencer Plc v. BNP Paribas

Securities Services Trust Co (Jersey) Limited (ibid.) at [28] – see the conclusion of Beatson LJ in IBRC v. Camden Market Holdings Corp, ibid. at [42]. The fundamental distinction in this area was that identified by Jackson LJ in Mid Essex Hospital Services NHS Trust v. Compass Group UK [2013] EWCA Civ 200 at paragraph 83 – that is between (a) a decision whether or not to exercise what as a matter of construction is an absolute contractual right, such as an unqualified right to terminate without cause, where the Braganza principles are not engaged, and (b) what, as a matter of construction, is a discretion conferred by agreement on one party to a contract, which involves "… *making an assessment or choosing from a range of options, taking into account the interests of both parties*…" where it would be absurd "… *to read the contract as permitting the party in question to exercise its discretion in an arbitrary, irrational or capricious manner…*". This distinction is to be read subject to the warning given by Males LJ in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613, where at [113] he warned that:

> "… it is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken. To say that a term provides for an absolute contractual right and therefore no term can be implied puts the matter the wrong way round."

153. I have so far considered the principles applicable as a matter of construction of the contract into which it is sought to imply a Braganza term. However, the necessity and contradiction questions relevant to the implication of terms cannot be answered without taking account of any protections conferred on the parties to particular types of contracts as a matter of general law. That is potentially of significance where the contract in issue is concerned with a loan secured by a charge over land – see Yorkshire Bank Plc v Hall [1999] 1 WLR 1713 at 1728, where Walker LJ pointed out that a mortgagee's duty to the mortgagor or to a surety depends partly on the express terms on which the transaction was agreed and partly on duties that equity imposes for the protection of the mortgagor and the surety, with the latter having "… *nothing to do with the implication of terms in a contract under the general law of contracts*…" but only on "… *whether, on the true analysis of the transaction, it is or is not a mortgage*…" – see Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 *per* Lloyd LJ at [148]. I refer to this hereafter simply for convenience as the Mortgage Exception.

154. Some care is required when considering the applicability of the Mortgage Exception as an answer to a submission that a contractual discretion should be made subject to a Braganza type implied term. Whilst a decision by a mortgagee for example whether or not to appoint an LPA receiver or to exercise a power of sale could not be said to be subject to a Braganza type implied term for the reasons identified by Walker LJ in LJ in Yorkshire Bank Plc (ibid,) and Lloyd LJJ in Socimer (ibid.), different considerations apply to contractual rights that arise in relation to the loan that has been secured by the mortgage concerned and which are unconnected with the rights of the parties in their capacity as

mortgagors and mortgagees. An example of such a provision may be one that permits a lender that is also a mortgagee in respect of the loan secured by the mortgage concerned to alter interest rates – see Paragon Finance plc v Nash and another [2001] EWCA Civ 1466; [2002] 1 WLR 685 *per* Dyson LJ as he then was at [30] to [32] and [36]. In relation to contractual rights that are not within the Mortgage Exception, the issue remains first to identify whether as a matter of construction the relevant right is an absolute right as a matter of construction, in which case the implication of a Braganza type term would be excluded applying the principle identified by Lord Neuberger in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) at [28] – see Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613 per Males LJ at para. 113. If as a matter of construction the right is not to be regarded as absolute or unqualified then it is probable that a Braganza term will be implied.

155. Where in principle a Braganza type term is to be implied, the effect and scope of the term to be implied will depend to an extent at least on the nature of the right in respect of which it is being implied. An example is Property Alliance Group v Royal Bank of Scotland [2018] EWCA Civ 355, [2018] 1 WLR 3529, where the issue was whether a term that permitted RBS at any time to require a valuation to be carried out of various secured properties was unqualified in the sense referred to above or whether it was subject to a Braganza type qualification. The Court of Appeal concluded that the provision had been inserted for the benefit of RBS and that RBS was free to act in its own interests and that it was under no duty to attempt to balance its interests against those of Property Alliance Group. However, the Court of Appeal was prepared to infer that "… *RBS could not commission a valuation … for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them*."

156. Turning first to the express terms that are relevant to this dispute, Clauses 24.16 and 24.17 of the 2014 Facility Agreement placed contractual prohibitions on MHL on the creation of third-party security over, or the sale, lease, transfer or other disposal of, any of its assets against which MHL's borrowing from BOS was secured other than a Permitted Security, Transaction or Disposal. A "*Permitted Disposal*" was contractually defined to mean any sale, lease, licence, transfer or other disposal that was permitted with the prior written approval of BOS. A "*Permitted Security*" was any Security or Quasi-Security (as defined) permitted with the prior written approval of BOS and a "*Permitted Transaction*" were broadly any transaction permitted by the documentation constituting the 2014 Facility Agreement. The main focus of attention was on what constituted a Permitted Disposal with MHL submitting that since a disposal to be permitted required that BOS provide its prior written approval, it followed that this conferred on BOS a discretion whether and if so on what terms it would permit a Disposal that was subject to a Braganza type qualification.

157. Applying the principles set out above it is necessary first to decide whether the prohibition against disposals otherwise than with the consent of BOS is one that comes within the scope of the Mortgage Exception. I am satisfied that it does not. It is not a prohibition that arises from the relationship of mortgagor and

mortgagee between the parties and is not one that is subject to or controlled by the general law that applied to BOS in its capacity as a mortgagee. Whether a property is or is not to be charged as security for a loan depends exclusively on what has been agreed between the parties as a term of the loan. It is an incident of the loan agreement between the parties. The equitable rules applicable to the relationship of mortgagor and mortgagee are not material to an agreement as to what is to be charged by way of security, only as to how the mortgagee conducts itself in relation to what has been charged. Deciding whether or not to release a property otherwise charged by way of security for a loan in my judgment is similar in kind to a power unilaterally to require a valuation as in Property Alliance Group v Royal Bank of Scotland (ibid.) or unilaterally to increase the applicable interest rate as in Paragon Finance v Nash (ibid.).

158. It follows from this that the next question is whether the power of BOS to permit what would otherwise be a Prohibited Disposal is an absolute or unqualified right of the sort that would preclude the implication of a Braganza type implied term. BOS submits that a decision whether or on what terms to consent to the release of its security "*... is plainly in the category of "absolute right""*. In doing so it elides a decision whether or on what terms to release security with a decision as to how to enforce its security. In my judgment it is wrong to have done so. As I have explained such a decision has nothing to do with the enforcement of rights as a mortgagee. Such enforcement is governed by the equitable rules relating to the conduct of mortgagees - see Yorkshire Bank Plc v Hall (ibid.) per Walker LJ at 1728 - whereas that is not so in relation to a decision to release property from the charge to which it is otherwise subject. Thus, that a mortgagee has an absolute right to seek possession of a mortgaged property at any time after a mortgage has been executed whilst correct – see Western Bank Ltd v. Schindler [1977] 1 Ch 1 – is not material.

159. BOS submits that under the terms of the 2014 Facility Agreement to which I referred earlier, MHL was subject to an absolute prohibition against disposing of the property constituting BOS's security. I agree, subject to the important point that the right was expressly made subject to such a disposal being permitted with the prior written approval of BOS. This necessarily means that the parties were agreed that MHL might request the consent of BOS to such a disposal. Once such a request has been made (if it was) it necessarily follows that the Bank would have a number of options available to it, including at least accepting what was proposed, rejecting it or making counter proposals. No reasonable person with all the background knowledge of the parties could have thought that the Bank was entitled simply to refuse to consider the request or refuse it for reasons unconnected with its commercial best interests. Had that been the parties' intention then there would have been no purpose in inserting the provision concerning permission, because it is always open to a party to a contract to request a variation to it and to the parties to such an agreement and to control that process by an appropriately drafted entire agreement provision.

160. That said however, as BOS submits, the starting point is that the parties have agreed what is an otherwise unqualified prohibition on disposal. No reasonable person with all the knowledge of the parties could have thought that by including an express right to dispose with the prior written approval of BOS it

was intended to impose on BOS anything approaching an obligation to act otherwise than in what it perceived to be its own best interests or even to attempt to balance its own interests against those of MHL when arriving at a conclusion or do anything other than exercise its own judgment (necessarily arrived at by its officials and subject to its own internal management controls). However, there is nothing in the language used by the parties that would lead a reasonable person with all the knowledge of the parties to understand what had been agreed as entitling the Bank to refuse its consent when no reasonable person in its position could have refused or for a purpose unrelated to its legitimate commercial interests. A more cautious lender might have omitted the express permission qualification and left the lender to seek a variation to the agreement. However, that is not what the parties agreed. If the express reference to permission is to have any meaning at all it cannot be treated as creating nothing more than would be available to any party seeking a contractual variation.

161. I have returned more than once to the question whether a reasonable person with all the background knowledge of the parties would have concluded that it was intended that BOS should have an absolute right to refuse to release security for the same reasons that led BOS to seek the DoW when entering into the 2014 Facility Agreement. In my view, that BOS sought the DoW and its reasons for doing so is part of the factual background relevant to the construction of the 2014 Facility Agreement. Generally, a lender will not wish to expose itself to the risk of legal challenge by a debtor, particularly where such challenges in the past have led to that lender requesting a waiver by reference to such claims as the price of granting a new facility. I have also considered whether the fact that the 2014 Facility Agreement had been entered into years before the decision of the Supreme Court in Braganza is material to the construction issue.

162. I have concluded that the second of these points is close to immaterial because the point was one that had been considered in any number of earlier cases including specifically in relation to secured lending. The first is more difficult but I have come to the conclusion that a reasonable person with all the relevant background knowledge available to the parties would not have come to a different conclusion from that referred to earlier by reference to it. Aside from BOS not relying on that point for these purposes, in my judgment it is outweighed by the effect of the parties agreeing expressly that BOS could consent to a change in or release from its security carrying with it the necessary implication that MHL could seek such a change. Given that it was always open to MHL to seek a variation of the 2014 Facilities Agreement, even if the relevant words had not been included, unless that language is simply to be ignored as having no effect, it must have been intended to have some effect as I have said. It is that which leads me to conclude that a qualifying term is to be implied. Given the ongoing concerns of both parties about the level of debt and the debt to EBITDA it was entirely foreseeable that such requests might be forthcoming and that a dispute might arise. If the parties had wished to avoid this risk they could have left paragraph (q) out of the definition of Permitted Disposal and left MHL to seek a variation to the 2014 Facility Agreement.

163. Finally in construing this part of the 2014 Facility Agreement, BOS places some reliance on the absence from paragraph (q) of words similar to those appearing

in paragraph (g) within the definition of Permitted Disposals, by which a disposal of any "*Core Propert*y" for full market value is permitted providing (amongst other conditions) "*… the prior written approval of [BOS] has been obtained (such approval not to be unreasonably withheld)*…" [Emphasis supplied]. It is argued that a reasonable person with all the relevant background knowledge of the parties would have inferred from the absence of such wording in paragraph (q) that it was intended that BOS should have an absolute right to refuse permission for any disposal sought by reference to that provision. I am unpersuaded by this argument.

164. Firstly, it is necessary to consider paragraph (q) in its contractual context. It is the final provision in a long list of Permitted Disposals, most of which are carefully and narrowly defined. This includes the sale of Core Property referred to in paragraph (g). Paragraph (q) is necessarily concerned with a transaction other than one coming within one of the earlier paragraphs and thus is one not within the contemplation of the parties at the time the 2014 Facility Agreement was entered into. A reasonable person with all the background knowledge of the parties would have concluded that in respect of such a transaction a rather more wide-ranging right to refuse had been intended by the language used by the parties than was appropriate for example in relation to paragraph (g). My construction gives effect to this. However, such a person would not have concluded from the language used by the parties that it had been intended that BOS would be entitled to refuse its consent when no reasonable person in its position could have refused or for a purpose unrelated to BOS's legitimate commercial interests. In any event, it is worthwhile remembering in relation to this submission the point made by the Divisional Court in FCA v. Arch Insurance (UK) Limited and others (ibid.) that *"…(a)rguments which rely on what is absent from the drafting of the contract are to be treated with caution and in many cases provide little assistance*…".

165. It follows from what I have said above, that as a matter of construction, the 2014 Facility Agreement does not confer on BOS an absolute right to refuse its consent in the sense the case law considered above means. It follows therefore that if a Braganza type term was to be implied into the 2014 Facility Agreement, such a term would not contradict the express terms of that provision.

166. The question that remains is whether the implication of such a term is necessary and if so in what terms.

167. So far as the first of these considerations is concerned, I am satisfied that it is necessary to imply such a term for all the reasons identified by the Court of Appeal in Property Alliance Group Limited (ibid) at [169]. The parties having expressly agreed that BOS could agree a change in the Security, that necessarily implied that MHL was entitled to seek such a change – something that was intended to benefit at least, and perhaps only, MHL. Whilst I accept that in considering such a request, BOS (a) was free to act in what it perceived to be its own best interests; (b) was not obliged to balance its interests against those of MHL, when arriving at a conclusion or (c) do anything other than exercise its own judgment (necessarily arrived at by its officials and subject to its own internal management controls) in arriving at a conclusion. However, neither

party could have intended that BOS would be entitled to refuse consent for a reason or reasons unconnected with what it perceived to be its own commercial best interests or to refuse consent when no reasonable entity in the position of BOS could have refused consent. Such a qualification is one that otherwise satisfied the requirements for the implication of terms set out above. No other qualification is necessary.

168. It was suggested on behalf of BOS that a decision to this effect would have "*serious and far-reaching implications for all mortgagor-mortgagee relationships*" because "*… it would risk dragging the Court into a re-examination of the merits of – or apparently the adequacy of the reasons given for – any decision taken by a mortgagee in relation to the preservation of its security*." I disagree. First, I am concerned with a bespoke not a standard form agreement. Secondly, if a lender considered such a risk a real one in any particular case, it would take steps to ensure that its lending agreements were drafted so as to avoid that risk. One straightforward way of achieving that in the circumstances of this case would have been to omit paragraph (q) and leave it to MHL to seek a contractual waiver or variation in respect of any disposal not coming within any of the other species of Permitted Disposal. Thirdly, it has for many years been the practice to include in leases covenants against particular uses of property without the consent of the lessor, subject to a qualification that consent was not to be unreasonably withheld, without the consequences to which BOS alludes being perceived to be a problem. Fourthly, whilst financial institutions can normally be relied on not to act in breach of a constrained and narrow term to the effect I have implied that cannot necessarily be said to be so for all lenders in all circumstances. Excluding such a term in all circumstances would risk unfairness and injustice for those who may not be as strong or well-resourced as the parties in this case.

The Old England and Marine Hotel Claims

169. These claims both concern the repayment of Facility B within the 2014 Facility of £54,700,000, which it had been agreed by clause 7.1.2 of the 2014 Facility Agreement would be repaid in full on the Termination Date as defined for Facility B, which was 31 December 2014. As was acknowledged in the summary of the then proposed 2014 Facility Agreement prepared by MHL's solicitors, Facility B was "*… to be paid by the end of 2014 from disposals*…". Facility B was, as Mr Fraser accepted in his oral evidence, what remained of the deleverage bridge under the 2010 Facility following the sale of the Randolph Hotel – see T7/1/22-2/8.

170. The 2014 Facility Agreement contemplated that Facility B within the 2014 Facility Agreement would be repaid in part by the sale with vacant possession of another hotel owned by MHL called the Manchester Hotel. It was for this reason that paragraph (l) within the Permitted Disposal definition permitted the sale by MHL "*… of the Manchester Hotel for full market value, provided that (i) the net consideration receivable in cash will not be less than £42,700,000…*"; and the EBITDA by which MHL's compliance with its covenants was to be tested was defined as being "*Adjusted EBITDA"* which amongst other

adjustments excluded the part of MHL's EBITDA "… *attributable to the business carried on solely and exclusively at the Manchester Hotel*…"

171. What followed completion of the 2014 Facility Agreement was a by now familiar story of changed strategies by MHL and last minute requests for deadline extensions. First MHL decided that it wished to pursue a sale and leaseback of the Manchester Hotel coupled with the sale of additional assets to enable the discharge of the 2014 Facility. By August 2014, a sale subject to contract of the Manchester and one other hotel had been agreed with Hermes Real Estate Investment Management Limited ("Hermes") at a total price that included £34m for the Manchester Hotel. By 24 November 2014 this changed again. It was described in an internal BOS email to Mr Guthrie:

> "I have spoken to Jim[9] and, whilst your message last week that Facility B needed to be repaid by the year end was loud and clear, he doesn't currently have an agreed proposal as to how this will be delivered. From Jim's perspective the Hermes S&L[10] transactions can be delivered almost immediately. However DM is now talking about another proposal which would result in c. £50m being repaid from:
>
> 1. £15m from sale of Old England to Monument
>
> 2. £10m from sale of another hotel to Cardrona Charitable Trust[11] (i .e. another DM vehicle)
>
> 3. £25m investment into the company by a third party. At this stage Jim does not have any details on who this potential equity investor is or the terms of any equity investment
>
> In summary MHL are still considering the 'proposal' that they are going to present to the bank and any business plan will follow this 'proposal'."

On the same day, Mr Fraser wrote to Mr Guthrie "… *to request formally a deferral in the repayment date for our Facility B, which as you know is otherwise repayable on 31 December 2014*." The ostensible reason for this request was what was implied to be a recently expressed view by Hermes that MHL's title to the Manchester Hotel was a good rather than absolute leasehold title which had resulted in a drop in its offer price to £20m. In fact, that change by Hermes had become apparent much earlier than this. The letter went on to propose in relation to Facility B that:

> "(A) sale of Manchester: if you will consent to the amended deal for Manchester then we shall proceed with the sale of Manchester on the amended terms. This will generate proceeds

[9] Mr Davidson of MHL.
[10] Sale and Leaseback.
[11] A Scottish based charity, the trustees of which included Mr Macdonald, his immediate family, and Mr Iain Gillies, a director of Monument from February 2015 and of MHL from September 2015.

> of £20m and can, we believe, be completed before the end of December 2014;
>
> (B) sale of The Old England: the Old England will be sold to Monument Hotels at current value (as established by a valuation by Christies). We believe that that hotel will be valued at around £15m but do not believe that that transaction will be able to be implemented by the end of December 2014;
>
> (C) sale of the Marine: the Marine in North Berwick will be sold to a Trust funded by the Macdonald family at current value (as established by a valuation by Christies). We believe that that hotel will be valued at around £12m but again do not believe that that transaction will be able to be implemented by the end of December 2014;
>
> (D) each of the Old England and the Marine Hotel will be managed by Macdonald Hotels for the new owners and there will also be a buyback clause in each of the contracts."

The letter went on to express confidence that MHL could "*deliver*" sale of the Old England and Marine Hotels "… *within a period of 6 months from the date on which you indicate that we may pursue this alternative approach…*" which was the period of extension sought. The letter concludes by noting that, if MHL's accounts were to be the subject of an unqualified audit report, agreement was required to the alternative Facility B proposals.

172. BOS expressed disappointment in respect of these proposals. This was unsurprising given (i) the history down to the date when the 2014 Facility had been agreed, (ii) the entirely clear terms in which the 2014 Facility Agreement specified when repayment of Facility B was to take place (as had been explained in equally clear terms to the MHL board by its solicitor prior to MHL entering into the 2014 Facility Agreement – see above), (iii) the clear message from BOS to MHL that repayment was expected as agreed (see for example the opening lines of the internal email to Mr Guthrie quoted above) and (iv) until then MHL had not indicated it would not be repaying Facility B as agreed. Notwithstanding this, BOS had no real choice but either to wait for MHL to default and then take non-consensual enforcement action against it or grant an extension. It chose to extend time for repayment of Facility B to 31 March 2015.

173. Notwithstanding that Mr Fraser had informed BOS by his letter of 24 November that MHL was willing to proceed with the sale of the Manchester on the revised terms offered by Hermes if BOS agreed, that is not what in fact happened.

174. On 14 December 2014, Mr Fraser approached Barclays Bank Plc ("Barclays") concerning the possibility of a mortgage on the Manchester Hotel and at a meeting of the board of MHL on 15 December 2014, it was resolved to inform Hermes that MHL would not be proceeding with the sale and leaseback transactions on the Manchester and other hotel then in negotiation (the Berystede Hotel). It did so notwithstanding (a) what it had said to BOS on 24 November, (b) that it had yet to have any meetings of substance with any

alternative finance source (as is apparent from the preceding paragraph in the minutes of the 15 December meeting) and Mr Fraser's advice that:

> "Facility B
>
> … the Bank had agreed a maximum 3 month extension to the Facility B expiry date to 31 March 2015. RGF[12] added that based on his discussions with the Bank he felt it very unlikely that the Bank would approve a further extension of this Facility. AC[13] agreed with this. … RGF thanked AC for his assistance in securing this vital extension."

These events resulted in this exchange between Mr Mitchell KC and Mr Fraser:

> "Q. So you have got a meeting with Aviva three days later and a meeting has also been arranged -- it doesn't say when -- with Barclays. So before you've arranged -- before you've met -- you have arrived to meet, but hadn't yet met -- you've pulled the plug on Hermes.
>
> A. Yes, that's correct, yes.
>
> Q. And you haven't -- by pulling the plug on Hermes, which -- just to make the point, at the risk of repetition. You've procured an extension from the Bank of Scotland for more time on the basis of needing more time to progress the sale and leaseback of Manchester plus Old England plus Marine; yes?
>
> A. Yes.
>
> Q. You have procured that extension, but you've pulled the plug on an essential strand of that proposal, namely The Manchester bit, without even engaging the Bank of Scotland's reaction to what would be a further change of plan.
>
> A. Yes, that's correct."

175. By 15 January 2015, a BOS internal email from Mr Bentley[14] to Mr Webster[15] shows that BOS had been informed that MHL was seeking higher bids for the Manchester but that its "*… preferred strategy is apparently to repay the rest of Facility B by raising £28m of 3rd finance (in the name of our borrower MHL)*…". As is noted in the same email, the purpose of this was "… *so Manchester doesn't have to be sold*…" because Mr Macdonald *"… apparently thinks there is significant future development value in the Manchester asset.."* .but the effect of such an arrangement "… *would not reduce MHL's leverage, only our exposure to MHL…*". The possibility of Barclays' involvement had

[12] Mr Fraser
[13] Mr Cumming
[14] Then MHL's Relationship Manager within Core BSU, a role that he continued in until November 2015
[15] Then the Head of Mid-Markets Core BSU at BOS

obviously been discussed. Presciently as it turned out Mr Bentley referred to this possibility in these terms:

> "• DU[16] mentioned that Barclays (who are speaking to MHL regarding the possible £28m refinance) have indicated an appetite to take a larger part of LBG's exposure.
>
> • Apparently a meeting is being lined up between Alasdair and the head of Barclays in Scotland (Ally Scott)
>
> • DU thinks this would be a good outcome for LBG but the high leverage may prevent Barclays from proceeding."

176. On 30 January 2015, Barclays sent what turned out to be its first offer letter to Mr Fraser. It was an offer of facilities of up to £26m and was an indicative offer not an offer of a facility. Critically for present purposes, the loan to value ratio of the proposed loan by Barclays was not to exceed 60% and debt to EBITDA ratio was not to be more than 6x. If that transaction was to proceed it required BOS's consent if it was to be a Permitted Transaction. The indicative offer was sent by Mr Fraser to Mr Gardner on behalf of BOS by email on the same day. As must have been obvious, this proposal would not be attractive to BOS because, although it reduced the debt outstanding, (a) it replaced it with debt that would be secured against an asset that had hitherto been security available to secure the whole of MHL's indebtedness to BOS so to that extent it would be losing some of the security it enjoyed and (b) it would increase MHL's total actual Loan to EBITDA ratio with BOS.

177. On 25 February 2015, Mr Unni informed Mr Fraser that " … *the proposed Barclays "replacement debt" deal on Manchester doesn't work for the Bank from a deleveraging perspective*…". Internally, it had been agreed that the message to MHL should be "… *that the Bank is not keen on the proposal to effectively "replace" LBG debt with 3rd party secured debt as a means of repaying the balance of the deleverage bridge and that they should therefore be looking to progress other options to deliver this by the 31st Marche deadline*."

178. What then transpired was two fundamentally different views as to the attractiveness of a third party secured finance agreement with MHL being unwilling to sell the Manchester Hotel because it had redevelopment potential, which a third party refinance would enable MHL to take advantage of, whereas BOS was not prepared to agree to that course because it perceived the benefits of having a second charge over the Manchester differently to how MHL viewed it and because of the effect it would have on MHL's actual BOS loan to EBITDA ratio.

179. MHL's initial reaction to Mr Unni's response to MHL is recorded in an email from Mr Unni dated 26 February 2015. In it, Mr Unni set out the substance of what MHL identified to be the re-development benefit of retaining the Manchester Hotel as being:

[16] Mr Unni

> "Following this, the company provided us this afternoon with figures for what they see as the potential upside on value from holding the asset and improving trading, plus undertaking some redevelopment opportunities. This redevelopment essentially involves:-
>
> (i) refurbishment of some floors of the hotel to a 5 star product (forecast by MHL to generate £3.9m of additional profit and therefore c.£40m of additional value, based on their assumed 10x income multiple);
>
> (ii) undertake some residential development on the upper floors of the hotel (forecast by MHI to generate £3m of additional profit);
>
> (iii) undertake residential development on the existing car park (forecast to generate £20m of additional profit.
>
> In addition, they believe that even without any redevelopment, holding the asset would allow them to increase current EBITDA from £5m to £8m over a 5 year period (and thereby generate an additional £30m of sale value, based on the 10x multiple)."

180. This resulted internally in Mr Gardner saying that if MHL called he would be "*… fairly blunt with them and use this as an opportunity to ensure they understand where we intend to take relationship…"*. Mr Webster expressed agreement with this approach in an internal email on the same day. Mr Shelley noted that there was not a lot of difference between what MHL was offering (£25m plus a second charge against £30m from the sale and leaseback proposed) but Mr Webster did not agree. He identified as features of the proposed arrangement that were unattractive to BOS that (a) the refinance would not reduce the debt on MHL's balance sheet; (b) it increased BOS loan to value ratio (i.e. the amount of the loan outstanding against the value of the security available) and (c) its loan to EBITDA ratio, all in his view to be considered against what he considered to be a history of avoidance and vacillation. He concluded this email by saying:

> "I appreciate we are setting down a marker but given where we may end up taking this relationship in terms of firm management I believe that actually declining something makes a very real statement of intent from the outset of this LBG mgt change.."

181. Mr Lord KC was critical of this internal email analysis in both his cross-examination and his closing submissions. He said it was entirely inappropriate that BOS officials should be considering "*… setting down a marker…"* or "*…making a statement of intent…"* and that by doing so it was rejecting what MHL was proposing for reasons other than those permitted by the Disposal Implied Term.

182. I do not agree. First as I have said the effect of the term that I consider should be implied is not one that requires the Bank to (a) act other than in what it

perceived to be its own best interests; (b) balance its interests against those of MHL, when arriving at a conclusion, much less defer to MHL or (c) do anything other than exercise its own judgment (necessarily arrived at by its officials and subject to its own internal management controls) in arriving at a conclusion. In any event, given that the relationship between MHL and BOS was an ongoing one and given the history of failures to comply with agreements and understandings concerning repayment over a number of years and most acutely in respect of the 2014 Facility B, the Bank was fully entitled to act in its own commercial best interests to make clear to MHL and Mr Macdonald that it was no longer prepared to tolerate the failure of MHL to comply with its obligations as and when it, or some of its directors, considered that to be in its best interests.

183. Whilst Mr Lord KC takes forensic exception to the phraseology used, in my judgment there is nothing objectionable about it or the concepts that stood behind them. Those positions were certainly not breaches of the implied term. On the contrary, the Bank's officials had reached a view as to what was proposed, which was to be viewed against the failures and deviations from what had been promised set out above and had decided that it was in the bank's best interest to firmly reject what was proposed and to insist on compliance with what had been promised namely repayment of the sum outstanding under Facility B.

184. Thereafter further discussions took place with the same points and counterpoints being made by the parties. The Bank continued to make the points that (a) it was concerned not only (i) to reduce MHL's debt but also (ii) its leverage ratio and (b) that it did not consider being a second chargee to Barclays to be in its best interests given the low debt to value and debt to EBITDA ratios that Barclays required in respect of any loan by it secured against the Manchester Hotel which in BOS's view would serve only to increase the top slice portion of the value of the Manchester Hotel available to Barclays to secure its advance while reducing the residual bottom slice amount available to secure BOS's total group indebtedness.

185. Symptomatic of the tone of these discussions is a BOS internal email from Mr Gardner to Mr Unni amongst others of 3 March 2015, in which he described the then state of the discussions as being:

> "As discussed have advised Gordon[17] (FD) that definitively the Refi[18] of Manchester asset to Barclays for £25m (with us granted a 2nd charge) is not attractive to the bank and we would wish them to repay facility B by end of March with the expectation that this will be progressed through Asset sales (which could include a sale and leaseback). This as per the terms of the facility document executed in March 2014. Clearly they are not happy and I was given the usual request of who they could escalate this to. I have pushed back that this is not an individual position but is the collective view of the Bank.

[17] Mr Fraser
[18] Refinance

> Subsequent to this I have had a difficult conversation with Donald Macdonald who is deeply unhappy with this decision - I have re- iterated to him we wish to continue to support but this needs to be under the terms of the documented facility letter.
>
> During the call Donald indicated he would be writing to the CEO's office and Chairman to express his disquiet.
>
> I indicated to him that we would be willing to meet with him but that we expected the company to abide by the terms of the facility agreement.
>
> Donald made a number of comments that he would be seeking legal advice and he felt we were pulling the plug on him — I have strongly rebuffed this and re-emphasised that we would wish to continue to support but had and remain clear that this must be through a structure with less gearing."

186. On 6 March 2015, there was a meeting between Mr Cumming in his capacity as a non-executive director of MHL (he having by this stage ceased to be employed by BOS) and various BOS officials led by Mr Gardner at which the same point was made in which BOS's note of the meeting records Mr Gardner as having told Mr Cumming that:

> "AG[19] reiterated the Bank's requirement for the full repayment of Facility B as previously agreed and documented. AJC[20] advised that MHL now considers there to be significant long term upside value in retaining the Manchester hotel, which would benefit both the Bank and MHL and was now not willing to sell at a price MHL felt was sub optimal. AJC reiterated that the Barclays proposal was at an advanced stage and that other than the S&L via Hermes (which would involve a price chip which MHL is no longer willing to consider), there are no other options currently on the table to achieve the repayment of Facility B by 31st March 2015. AG re-affirmed the contractual requirement to repay Facility B by 31st March 2015, a date which had already been extended and that the Bank is not agreeable to the Barclays option as it does not achieve any de-gearing for MHL although AG advised AJC that LBG fully understands if MHL wishes to choose different asset sales to achieve the debt reduction, rather than the Manchester hotel.
>
> …
>
> AJC suggested that LBG perhaps considers alternatives to debt reduction — particularly around value enhancements to the existing security package as MHL does not really have appetite to reduce the hotel portfolio. AG again reiterated the Bank's

[19] Mr Gardner
[20] Mr Cumming

> requirement to see de-gearing via permanent debt reduction, and that this must commence via the repayment of Facility B by 31st March 2015, per the documented agreement. AJC highlighted that there are no advanced plans to sell any other assets and therefore the 31st March 2015 deadline for the repayment of Facility B will be unable to be met unless LBG agreed to the Barclays proposal. AG again re-affirmed LBG's decision not to agree to this proposal as it does not achieve the necessary de-gearing which has been clearly articulated."

Thus, again MHL (for which at this stage Mr Cumming was advocate) was seeking to take advantage of what was presented as a *fait accompli* to force BOS to either agree the course that the MHL board led by Mr Macdonald was demanding or to settle for what BOS was thought likely to regard as even more sub optimal, namely the collapse of MHL into either administration or insolvent liquidation. BOS however had resolved to hold MHL to its contractual obligations. That this was MHL's plan to my mind was apparent from the comment attributed to Mr Cumming in the note that Mr Macdonald:

> "… will not be happy with this decision and will almost certainly write to LBG's Chairman and Chief Executive. AJC highlighted that given his knowledge of Bank procedures, LBG would not be in a position to insist on the repayment of Facility B by 315t March 2015 whilst ongoing correspondence was taking place with the Bank's Executive. AG acknowledged DD's option to write to the Executive but re-affirmed the Bank's requirement to have something agreed by 31St March 2015 which is agreeable to LBG."

187. Whilst MHL was entitled to engage in this sort of brinkmanship, in pursuit of what no doubt Mr Macdonald at least considered to be in MHL's best interests, it is difficult to see how it could be said that BOS was acting in breach of the implied term I have concluded should be implied into the 2014 Facility by rejecting what was proposed and insisting on what had been agreed between the parties less than a year earlier, which it considered to be in its best interests.

188. This is particularly so given Mr Fraser's evidence concerning the effect of the then proposed Barclays loan. On 10 March 2015, a meeting had taken place between Mr Fraser and Mr Davidson on behalf of MHL and Messrs Gardner, Webster and Bentley on behalf of BOS, which was concerned primarily with the proposed Barclays loan as an alternative to the sale and lease or management back of the Manchester Hotel. That discussion took place against a background that the sale of the Old England (Windermere) and Marine Hotels (North Berwick) so as to provide £27m odd by way of repayment of Facility B was "*... expected to complete by 31 March 2015…"*. In relation to the Barclays loan then being proposed by MHL to repay the remainder of Facility B, Mr Webster reiterated BOS's point that BOS was concerned not merely to reduce exposure but to reduce MHL's loan to EBITDA ratio and added that a sale to and lease or manage back from Hermes of the Manchester Hotel achieved both these objectives. This was obviously correct since it resulted both in a capital sum that

would reduce the sums owing under Facility B whilst ensuring that MHL continued to receive a substantial income from management of the hotel on behalf of its new owners. In that context Mr Fraser was recorded as having *"... confirmed that the Hermes £34m deal was still on the table and Hermes were desperate to do the deal*." Mr Fraser also confirmed that (as recorded in the Note) Mr Bentley had made the point that a loan to Barclays on the terms proposed would have worsened MHL's loan to EBITDA ratio – a point with which Mr Fraser agreed as being "*basic maths"* – see T7/83/10-20.

189. Mr Bentley is also recorded in the Note as having said that "… *because the hotel would be funded separately, subject to another lender's control, the asset and income would not be factored into the residual LBG lending proposition, and this would therefore deteriorate as Barclays lending was less stretched*." This is shorthand for the point I summarised earlier, namely that BOS did not consider being a second chargee to Barclays to be in its best interests. This point was explored in cross examination of BOS's witnesses. Mr Gardner was asked why this was so and his answer was that it was a matter of banking principle – see T10/152/10. He added that it was "*standard banking practice"* that the benefit of a second charge would be excluded from leverage calculations. He added that "… *through all my banking career, that is how we assessed lending, so whether it's set in a policy document or whether that's just how you're trained, that's how you would do it...*" unless there was a *de minimis* level of lending against the asset. As Mr Bentley put it when he was asked about this, "(*t)he keyword here is "control". Barclays would have had full control over the MHL Manchester Hotel, and in a default scenario, they could have sold it outside of Bank of Scotland's control*."

190. Mr Fraser's oral evidence on this was that he understood the point recorded in the Note as being that part of BOS's concern about what was proposed was that BOS would lose control of both the asset and income of the Manchester Hotel if it acceded to what was proposed – see T7/82/13-16 – and that in consequence it would not take into account what might remain as part of the security offered for what remained as lent after any Barclays transaction had completed – see T7/83/1-9. Mr Fraser maintained that he could not recall this particular point being discussed at the 10 March meeting.

191. If and to the extent he was suggesting that the issue was not or might not have been discussed at the 10 March meeting, I conclude that it was. The Note was a near contemporaneous meeting note prepared within BOS and there was no reason why the note should be inaccurate in respect of this issue but accurate in respect of the other points summarised in it. Finally, it is apparent that this issue was discussed from Mr Fraser's letter to Mr Webster dated 13 March 2015, in which Mr Fraser said of the proposed Barclays transaction amongst other things that

> "We understand that the bank has a concern with this structure and to address this, would suggest that the balance of the value of Manchester beyond the Barclays debt should be disregarded in the LTV. The earnings should be included in the covenants

> net of the interest and repayments to Barclays, to the extent paid out."

As Mr Fraser accepted in cross examination, the concern he was attempting to address was the point concerning loss of control of the Manchester Hotel to Barclays – see T7/91/7-18. There was no interaction between MHL and BOS between 10 and 13 March where this issue arose. In my judgment therefore the Bank's Note of the 10 March meeting is an accurate summary of what was said and the structural issue was discussed as being one of the reasons why the Barclays proposal was not acceptable to BOS.

192. At that meeting there was a suggestion that Barclays might be prepared to increase its lending from £25m to £30m. Internally, on 12 March 2015, Mr Bentley circulated a calculation as to the impact that would have. In that email he calculated that *"…(e)ven at £30m, a refinance of Manchester stretches Leverage from the current position*…". This reflected the view he had previously expressed internally by reference to a loan from Barclays of £25m. On 16 March 2015, Mr Bentley wrote to Mr Fraser rejecting MHL's Barclays proposal. In so doing Mr Bentley recorded that:

> "Facility B - Timescale
>
> As you highlight, reaching agreement on the contractual repayment of Facility B is the primary step forward. The original agreed maturity date was 31 December 2014. It became necessary to extend the maturity date when you advised the Bank in November 2014 that the Company was not progressing Manchester's sale & leaseback to Hermes.
>
> The Bank agreed a revised contractual Maturity Date of 31st March 2015. To avoid a default at maturity, we need to agree an acceptable repayment proposal with you and then gain credit support for this by 31st March 2015."

Having summarised the options, Mr Bentley turned to the proposed Barclays re-finance, in respect of which he set out BOS's position in these terms:

> "…
>
> - We outlined in the meeting that repaying Facility B is not solely a matter of reducing the Company's exposure to the Bank, it is equally a matter of reducing the Company's leverage.
>
> - The refinance you propose would have an adverse Impact on the Company's leverage position for the remaining BoS borrowing group, because Barclays require a priority lending position. As a result, BoS would have to release control of Manchester's Income and its asset value. As such, Manchester's profitability and its security value would no longer feature within BoS's lending structure.

- I will highlight my analysis in order to provide clarity in respect of the above:

    - If (for simplicity) we assume the Marine & the Old England are sold for £27m, the Company's EBITDA is £25m and its debt Is £270m, then the Company's leverage is 10.8x.

    - However, a £25m refinancing of Manchester, which contributes £5m EBITDA, would reduce the Company's debt with BoS to £245m but would also reduce the BoS borrowing group's EBITDA to £20m. The BoS borrowing group's leverage would therefore increase to c12.2x — hence the effect of the refinance would be to increase effective leverage from less than 11x to more than 12x.

- On this basis, a refinance as initially proposed is not attractive to the Bank.

- Your letter mentions how certain aspects of any Manchester refinance could potentially be disregarded for the purposes of the BoS financial covenants. If there is a feasible way for the Company's exposure to be refinanced, whilst a binding legal agreement is made to retain BoS's control over Manchester's profit etc, we would be happy to consider this proposal further. However, I anticipate that Barclays might have difficulty in this type of binding agreement in BoS's favour.

If Option 2 cannot be unlocked and Option I remains unattractive to the Company, another solution is required for the repayment of the remaining £27.7m of Facility B (again assuming the successful completion of the anticipated sales of the Marine and the Old England hotels).”

This letter identifies two reasons for rejecting what was proposed – the effect on leverage and the effect on priority. It cannot be read in isolation from what had gone before however and does not entitle MHL to conclude that the effect of this letter was that BOS abandoned its reliance on other objections not set out in the letter.

193. Thereafter Barclays sent to MHL a second indicative terms letter. As before it was expressly stated on its face not to be an offer to arrange or finance a facility. The sum the subject of this indicative offer was £29m, of which £2m was for capital expenditure with the balance to be used to discharge the Facility B payment due to BOS. The terms proposed included placing Manchester Hotel’s operational banking with Barclays; that the facility was not to represent more than 50% of the market value of the Manchester Hotel; and debt service cover was to be not less than 1.25 x the cash flow available for debt servicing which was defined as being the Manchester Hotel’s EBITDA adjusted in various ways

which do not matter for present purposes. Cashflow in excess of Debt Service Cover as defined was to be split as to 25% in early repayment of the £27m Barclays term loan with the balance being distributed to MHL. This proposal was subject to a number of conditions precedent including a "*letter from LBG confirming their agreement to allow the Facilities to complete upon the Company's acceptance of the terms*."

194. The proposal was not or at any rate did not set out any detailed basis for "… *a binding legal agreement … to retain BoS's control over Manchester's profit* etc…". The reason for this is obvious – Barclays would not only require a fixed charge over the asset against which it was lending (the Manchester Hotel) but a floating charge over sufficient of its income to ensure that the sum loaned could be repaid at the end of the term. Whilst the amount required would probably reduce marginally over time because of the utilisation of the 25% of excess cashflow to repay the term facility, there was likely to be a sum due at the end, because of the way in which surplus cashflow was to be calculated and because the sum would vary in amount from year to year. That being so, it was highly improbable that Barclays would cede control of the Manchester Hotel's revenues and what was proposed plainly demonstrated that it would not, given what it required for example in relation to the Manchester Hotel's operational banking requirements.

195. It was no doubt considerations of this kind that led Mr Fraser to write to Mr Bentley on 25 March 2015 in which Mr Fraser suggested that:

> "… we would like to suggest that you disregard the balance of the value of Manchester in the LTV covenant and that Manchester's earnings are only taken into account in calculating EBITDA to the extent paid out to us in cash (as if our interest in Manchester was an investment rather than, as it actually is, an ownership interest with a limited prior charge). We would advise that we have received a revised term sheet from Barclays (albeit subject to credit approval) which:
>
> • increases the proposed loan from £24m to £27m
>
> • retains the level of the proposed capex facility at £2m
>
> • allows the transfer of 75% of the surplus cash flow into the main group
>
> The fact is that our strategy for the repayment of Facility B was based on the sale of Manchester and then the refinance of Manchester and, given the amount of time and energy that has been devoted to this transaction, we are reluctant to abandon it without exploring all possible options with you, not least because it delivers a significant cash return to you of £27m in fairly short order."

The difficulty about this, when read in conjunction with what Barclays had said in its second indicative offer, was that MHL's income would be less (a) because

the surplus to be divided between MHL and Barclays was less than actual EBITDA for the Manchester Hotel; and (b) because MHL was to receive only 75% of that reduced sum. None of this takes account of the uncertainty created for BOS by such a proposal given Barclays' requirement for there being no events of default to be checked annually for 12 months forward. Plainly accepting such a change in security would place BOS in a worse position than if the transaction with Barclays did not proceed and MHL proceeded with the sale and lease or manage back of the Manchester Hotel.

196. MHL's proposals were considered by the relevant BOS credit committee on 30 March 2015 when it (a) rejected the Barclays proposal on the basis that it increased rather than decreased leverage but (b) reluctantly again agreed to extend MHL's time for repayment of Facility B from the end of March to 31 May 2015. However, its minutes state that no further extensions would be granted and that MHL was to be informed that unless Facility B was repaid by 31 May, BOS would consider calling a cross default. Mr Bentley wrote to Mr Fraser to that effect on 7 April 2015. In it, Mr Bentley set out BOS's position as being:

> "Bank Response
>
> In mid-February, Alasdair Gardner advised you that the refinance proposal via Barclays was not acceptable to the Bank and our letter to you of 16th March 2015 sought to show how such a refinance would effectively increase leverage unless BoS retained control over the asset -- which was noted as being probably unacceptable to Barclays.
>
> Your latest proposal does not solve this principle structural issue and so we re-affirm the Bank's position, that refinancing Manchester is not an acceptable means of partially repaying Facility"

In relation to the consequences, Mr Bentley states BOS's position as being:

> "As Facility B was not repaid by the 31st March 2015, you will be aware that Facility B is in default and that the standard cross-default provisions within the facility agreements mean that the Group's other facilities are also in default. The Bank is prepared not to take any action at this time, to enforce any of its rights under these defaults, but it reserves its right to do so and we will write to you formally in this respect shortly.
>
> Instead and exceptionally, we are prepared to permit one further time extension, by changing Facility B's Termination Date to 31st May 2015. The Bank sees this as the final extension and expects Facility B to be fully repaid by 18th June 2015 in a manner that is acceptable to the Bank."

In cross examination, Mr Fraser acknowledged the basis of BOS's refusal as being the structural point concerning control:

> "Q. So you understood -- you may not have liked it or agreed with it, but you understood that the bank's position wasn't really dependent upon particular figures, certainly not the ones you had done, but on a more structural and principled problem, which is essentially the second charge point; agreed?
>
> A. Yes, it was based -- yes, yes, it was based on the bank's rules that we asked them to consider reviewing."

197. Mr Macdonald likewise acknowledged that this was the basis for the Bank's refusal to agree – see T5/79/12 – 80/5 – although he chose to characterise that decision as "*madness"*. Although he suggested that it was decision taken by a particular faction within the Bank because they disliked Mr Cumming, this is difficult to understand given that officials within BOS could only act with credit committee approval and had done so at each stage. BOS could have declared MHL in cross default and caused it to be placed in administration or insolvent liquidation at various earlier stages but even at the last moment was prepared to grant a further short extension to enable MHL to avoid these consequences. The internal correspondence shows that the decision was collaboratively taken by officials holding senior positions within the BOS structure, including Mr Gardner, Mr Tim Hinton to whom Mr Gardner reported and Mr Bester. Mr Gardner was asked by Mr Lord KC whether I could take it that the rejection of the Barclays proposal was the Bank's "*collective decision"* and he agreed. I accept that evidence as consistent with the documentation.

198. The notion that the decision was taken by some element within the BOS structure acting vindictively because of a disagreement with Mr Cumming is not apparent on any of the documentation, is inherently improbable and is one that I reject. Firstly, so far as this issue was considered in cross examination at all, it was on the basis that Mr Cumming was assisting BOS behind the scenes – see T10/129/6-13. Secondly, it would appear from the credit committee minutes that it was only because of Mr Cumming's attempt to broker a consensual outcome that it was prepared to extend MHL's time for repayment of Facility B from the end of March to the end of May 2015 – which is described in the Minutes as being a decision reached after "*… careful consideration and in acknowledgement that Andy Cumming is working hard in his capacity as Non-Executive Director at MHL to effect the satisfactory repayment of Facility B…*". This was the latest in a long line of extensions and is inconsistent with Mr Macdonald's theory – see T7/17/12-18/21. Notwithstanding what the credit committee had directed, in fact, the May deadline came and went with MHL seeking an extension to the end of December 2015. Not even the sale and manage-backs of the Marine and Old England Hotels were completed by 31 May. MHL sought an extension to 31 August and in the event the sale of the Old England Hotel completed on 5 August 2015 and that of the Marine on 20 October 2015 with Facility B being repaid only on 13 May 2016. The sales were permitted and the terms of the sale permitted MHL to buy them back.

The Old England and Marine Hotel Claims - Liability

199. MHL's pleaded case is that in breach of the Disposal Implied Term:

> "The Bank withheld its consent to the Barclays refinance of the Manchester Hotel and insisted upon and imposed the Sale and Manage Back of the Old England Hotel and the Sale and Manage Back of the Marine Hotel. There was no rational, non-arbitrary and non-capricious basis on which the Bank could have refused consent to the Barclays refinance of the Manchester Hotel – the Bank insisted that it be de-risked to the amount of new debt over the Manchester Hotel, but nevertheless retain security over it. Further or alternatively, it is to be inferred that the Bank took account of irrelevant considerations and/or failed to take account of relevant considerations, since no rational bank in its position could have adopted the stance that it did, and/or used its discretion for an improper purpose (such purpose is presently unknown to the Claimants, but can only have been improper absent any proper purpose for the Bank behaving as it did). The Claimants infers that the Bank did so acting in bad faith towards the Company (together with MML as its wholly owned subsidiary)."

This reduces to allegations that:

i) There was no rational basis on which BOS could have refused to consent to the Barclays re-finance of the Manchester Hotel; and

ii) BOS was acting irrationally by insisting that it be paid the sum offered by Barclays by way of re-finance but at the same time insisting on retaining security over the asset against which Barclays was offering a secured loan and that by so doing BOS was acting in bad faith and for an improper purpose.

These assertions were augmented by paragraph 85 of the Re-Amended Reply, where it is pleaded that:

> "If the Bank was concerned about the risk posed to it by the Group's debt, then it was irrational to resist the total debt the Group owed to the Bank being reduced by the amount which would have been realised by the Barclays refinancing, which the Bank would have received together with (i) a second charge over the Manchester Hotel, which would have preserved the remaining value over the Manchester Hotel above the debt which would be owed to Barclays as available in respect of the Group's other borrowings, and (ii) the fact that the value of the Manchester Hotel would have increased considerably, because the proposed facility from Barclays also included £2m of capex which was projected to have increased the value of the Manchester Hotel by c.£10m."

200. I reject the notion that there was no rational basis on which BOS could have refused consent to the proposed re-finance by Barclays.

201. Firstly, this formulation ignores altogether that less than a year prior to this proposal emerging, MHL had entered into the 2014 Facility Agreement that contemplated the reduction of the total debt due from MHL to BOS by the sale of assets including specifically the Manchester Hotel. That is apparent from the evidence set out above, from the inclusion within the definition of Permitted Disposals of the vacant possession sale of the Manchester Hotel and the exclusion of earnings generated by the Manchester Hotel from the definition of EBITDA relevant for assessing whether MHL had complied with its covenants contained in the 2014 Facility Agreement. It was only after the 2014 Facility Agreement had become binding between the parties that MHL sought to avoid this first by proposing a sale to and lease back from Hermes of the Manchester and Berystede Hotels and then (on 24 November 2014, slightly more than a month before the final repayment of Facility B was due under the 2014 Facility Agreement) that it did not want to proceed with the sale and leaseback of the Berystede Hotel. It was MHL who proposed the sale of the Old England Hotel to make up a shortfall caused by the proposed sale and lease back to Hermes of the Manchester Hotel and the sale of the Marine Hotel to make up the shortfall caused by omitting the Berystede Hotel. Thereafter MHL started to explore the possibility of re-finance with Barclays. In any event by the time when BOS came to reject the improved Barclays proposal, the sum that it proposed should be lent by Barclays and repaid to BOS was £27m whereas by then Hermes was willing to pay £34m.

202. Secondly, it ignores altogether that what was proposed would not reduce debt on MHL's balance sheet and would increase in real terms the ratio of MHL's debt to BOS to its EBITDA. Although it had been suggested by MHL at one stage that this was wrong, Mr Fraser accepted in cross-examination it was correct and that position was not altered by the cross-examination of BOS's witnesses – see T6/12/7-19, 13/1-12 and 17/17-15/18 for Mr Fraser's evidence.

203. MHL was also wrong to contend that BOS's calculations concerning leverage were wrong because they were not calculated in accordance with clause 23 of the 2014 Facility Agreement. As noted earlier, the effect of this was to exclude the income derived from the Manchester Hotel when calculating EBITDA. MHL is wrong on this point because that is concerned with compliance by MHL with the covenants contained in the 2014 Facility Agreement. It has nothing to do with the issue that arose in relation to a consideration of the Barclays proposal, which was concerned with an assessment in fact of the actual effect on gross lending and the total loan to EBITDA of MHL in the two scenarios to be considered – the sale for £34m and leaseback of the Manchester Hotel (which would release £34m to reduce total borrowing by that sum whilst at the same time impacting the total loan to EBITDA by reducing borrowings on one side of the ratio and including earnings net of lease costs on the other side of the ratio) and a loan of £27m on the other, which would reduce borrowings by a smaller amount and remove all EBITDA from the Manchester Hotel from the total loan to total EBITDA calculation. As I have said earlier, clause 23 of the 2014 Facility Agreement was drafted on the assumption that MHL would sell the Manchester Hotel with vacant possession to pay back in part Facility B. It was for that reason that the Manchester Hotel income was to be ignored when considering the covenants. MHL chose not to adopt that course. BOS was fully

entitled to evaluate the effect of the alternatives suggested by reference to the financial reality of what each scenario involved. It is for this reason that the cross-examination of Mr Bentley that in doing the leverage calculations he carried out he was not calculating the leverage ratio in accordance with the Facility Agreement was misplaced – for as Mr Bentley said "(*w)e were taking the total leverage of the company, as anybody would when assessing the risk and the impact of The Manchester finance*…" – see T12/159/14-23.

204. As set out above, the adverse impact on the actual loan to EBITDA ratio of the Barclays proposal was a point made very clearly on behalf of BOS from the first time that it became aware of the terms being proposed by Barclays. Those terms were sent to BOS under cover of an email from Mr Fraser dated 30 January 2015. As that email makes clear, repayment of Facility B was intended thereafter to come from (a) the sum to be borrowed from Barclays and (b) the balance from the disposal of the Old England and Marine Hotel. Thus, from the point at which a vacant possession sale of the Manchester Hotel was abandoned by MHL, repayment of Facility B was going to involve the disposal of the Old England and Marine Hotels whether what remained of Facility B after those disposals was repaid by either (i) the sale and lease back of the Manchester Hotel or (ii) the Barclays re-finance proposal. Internally it became clear to BOS very quickly that the Barclays proposal was not in BOS's best interests from a deleverage perspective and BOS made that point to MHL not later than 25 February 2015 – see Mr Unni's email to Mr Gardner of that date referring to a conversation between him and Mr Fraser earlier that day. Thereafter that point was one that was consistently made by BOS to MHL as set out in the emails and meetings I refer to earlier in this judgment.

205. BOS had been entirely clear throughout its discussions with MHL's representatives that it sought from MHL both a reduction in MHL's total indebtedness to BOS and a reduction of the ratio of total debt to EBITDA. Agreeing to the Barclays proposal did not achieve both these objectives.

206. Thirdly BOS considered that what was proposed by Barclays would materially adversely affect the security that BOS had in respect of the total sum owed by MHL to BOS by requiring BOS to substitute for a first charge securing all sums due from MHL (which then totalled about £300m) over both the property and income of the Manchester Hotel with a second charge over the property and access to 75% of a reduced part of the Hotel's cashflow, if any. This was made worse by the fact that although Barclays was to lend £29m, £2m of that was for capital expenditure so that Barclays' charge would be for a sum greater than was repaid to BOS. This was significant because the Manchester Hotel was one of the more profitable in MHL's portfolio. As Mr Fraser accepted, the effect of what was proposed was treating a junior lender as entitled to senior security and he also accepted BOS was entitled to decide whether the proposed second charge was adequate for its purposes – see T7/65/19-25. It was, as Mr Fraser accepted, a "*very unusual"* proposal – see T6/66/1-5. I leave out of account the point that Barclays didn't indicate a willingness to accept a second charge. It was not asked to do so but in any event it would not have done so given that BOS's charge over the Manchester Hotel and its income was part of a cross

securitisation package and that the ratio of total borrowing by MHL from BOS to EBITDA and loan to value ratio were as high as they were.

207. BOS had been clear from at least 16 March 2015 that it was not willing to allow its control of its security interest over the Manchester Hotel to be removed as the price of paying off half of Facility B, when what was proposed did not address the leverage issue and the available alternative was one that achieved all BOS's objectives and was in BOS's best interests - see the letter to Mr Fraser from Mr Bentley dated 16 March 2015, which made all of these points. As Mr Bentley put it in that letter:

> "The refinance you propose would have an adverse impact on the Company's leverage position for the "remaining BoS borrowing group, because Barclays require a priority lending position. As a result, BoS would have to release control of Manchester's income and its asset value. As such, Manchester's profitability and its security value would no longer feature within BoS's lending structure."

As that letter made clear;

> "If there is a feasible way for the Company's exposure to be refinanced, whilst a binding legal agreement is made to retain BoS's control over Manchester's profit etc, we would be happy to consider this proposal further. However, I anticipate that Barclays might have difficulty in this type of binding agreement in BoS's favour."

As I have explained earlier, the binding legal agreement issue was not one that was ever addressed. The position remained therefore that whilst the Barclays proposal would have reduced the total amount of MHL indebtedness, it would not have done so to the same extent as would the sale and lease back to Hermes. Hermes were willing to pay £34m whereas the sum to be lent by Barclays was £27m. However, the Barclays proposal would not have addressed the leverage issue and Barclays' indicative terms would have undermined BOS's security package as agreed with MHL as set out in the 2014 Facility Agreement in the manner explained above. Although it was impliedly suggested to BOS's witnesses that BOS's apparent approach to sums secured by a second charge was wrong or unjustified and one that no reasonable institutional lender in the position of BOS would have adopted, there was no evidence to support that proposition. If the approach was a wrong one it did not trigger any concerns in the minds of any of the officials within BOS including in particular those sitting on the Credit Committee that considered the various proposals. In those circumstances, I accept the evidence of Mr Gardner and Mr Bentley on that issue.

208. In relation to the suggestion that the Manchester Hotel would increase in value as a result of its development potential, that was a point considered by BOS. It was entitled to conclude that its commercial priority lay in reducing debt and MHL's loan to EBITDA ratio rather than hoping for an increase that might have

benefited it at some time in the future. That this was the approach is apparent for example from the email from Mr Unni to Mr Gardner of 26 February 2015, where he records informing MHL that "… *the Bank wanted to see real deleverage now, rather than something with significant future development and trading risk associated with it*…".

209. I do not accept that Mr Gardner initially encouraged a belief that BOS would approve a re-finance arrangement with Barclays. The only documentary evidence that provides any support for such a conclusion is an email of 15 January 2015 from Mr Unni. That referred to Mr Gardner's team within BOS (the Mid Markets Scotland team) having indicated "… *that they may be prepared to consider repayment of the bridge via replacement 3rd party finance, subject to:- (i) the other 2 disposals and Botley (see below) having been satisfactorily completed; and (ii) assessing the terms attached to any such replacement funding and resultant impact on the Bank's residual LTV."* Barclays' first indicative term sheet was produced on 30 January 2015. In a file Note dated 10 February 2015, there was a conference call between various BOS officials including Mr Gardner and Mr Bentley. In relation to the Barclays proposal Mr Gardner is recorded as indicating that in "*MM Good Book's opinion"* the proposal was one that BOS should not accept. In my view it was only possible to attempt an evaluation of what was being proposed once Barclays had indicated what in principle it was prepared to consider offering.

210. The note of 10 February 2015 contains some references to Mr Macdonald that were gratuitously offensive and hurtful. I do not intend to set out those comments in this judgment. It is regrettable that BOS officials should have chosen to communicate with each other in such terms and Mr Macdonald is fully entitled to be offended that they should have done so. He was then the Chairman of a major operating company which was a long-standing customer of the Bank. That said, MHL had not conducted itself in all respects as might be expected in its relationship with BOS as explained earlier. This was particularly so in relation to MHL's conduct in respect of the repayment of Facility B after the 2014 Facility Agreement had been completed. However, that does not justify referring to Mr Macdonald in the terms used.

211. To the extent that MHL rely on this as leading to the inference that BOS rejected the Barclays proposal in effect out of spite, it is one that I reject. That this was not what occurred is apparent when the BOS internal material is read as a whole, when the underlying logic of BOS's position is considered and when it is borne in mind that BOS granted numerous extensions of time to MHL for it to comply with the obligations it had undertaken when entering into the 2014 Facility Agreement. In any event what is suggested is inconsistent with the suggestion considered above that BOS's decision was because of a grudge held by someone within the BOS structure.

212. Similarly, I reject the contention that the comment of Mr Webster in his email of 26 February 2015 suggests otherwise. There was nothing offensive in what Mr Webster said. He was fully entitled to the view that the time had come to make clear that the relationship between BOS and MHL was to be more firmly managed than it had been in the past. To have taken that view was not

capricious, arbitrary or one taken otherwise than in the legitimate commercial best interests of BOS and in any event is not pleaded as such. It does not invalidate any of BOS's reasoning, which was that the proposed re-financing was to be rejected for the reasons I have summarised above.

213. In my judgment none of this is irrational in the sense that no secured lender in the position of BOS would have acted as it did in relation to the Barclays proposal. Alleging that the amount of debt due to BOS would have been reduced had the Barclays proposal been accepted reflects the position adopted in particular by Mr Macdonald that this was BOS's only legitimate concern. It was not and, as recorded above, Mr Macdonald understood and however reluctantly came to accept that this was not BOS's only concern and that it was rationally entitled to be concerned about the leverage issue as well. In fact, the sale and leaseback of the Manchester addressed all BOS's concerns. It may well be that the MHL board or Mr Macdonald considered the Barclays proposal rather than the sale and leaseback of the Manchester Hotel was in MHL's best interests but that is immaterial. Even assuming that the Disposal Implied Term had the scope for which MHL contends, rather than the rather more limited scope which I have concluded such a term could have, BOS did not act in breach of it by preferring its own commercial best interests over those of MHL.

214. Even if all that I have said so far is wrong and I should have concluded that BOS acted in breach of an implied term of the 2014 Facility Agreement by not consenting to the proposed Barclays re-finance scheme, there is a further fatal flaw in MHL's case.

215. MHL always sought agreement in relation to the Barclays refinance proposal on the basis that it would be completed alongside the sale and manage back arrangements for the Old England and Marine Hotels and not as alternatives. At no stage was it suggested that if the Barclays proposal had been accepted the Old England and Marine Hotels would not have been disposed of as they were. Their disposal was always necessary in order to complete repayment of Facility B.

216. MHL claims that but for BOS's alleged breaches of duty, MHL would not have disposed of the Old England Hotel on sale and manage back terms and would not have caused MML to dispose of the Marine Hotel on such terms. That is fatally flawed because as I have explained, throughout the discussions between MHL's representatives and BOS once the sale with vacant possession of the Manchester Hotel was abandoned, it had been accepted by MHL that these hotels would have to be disposed of on such terms to reduce the Facility B debt whilst at the same time minimising the reduction of its EBITDA. The dispute in relation to Facility B was always about what was to be done with the Manchester Hotel. MHL's alleged loss from this alleged breach is pleaded exclusively by reference to what is alleged to have been the permanent loss caused by the sale and manage back arrangements in respect of the Old England and Marine Hotels.

217. In those circumstances, I conclude that the Old England and Marine Hotel claims fail.

The Marine Hotel Claim – Limitation

218. *Introduction*

As originally formulated, the Marine Hotel claim was brought by MHL. However, any losses recoverable in respect of that claim had been suffered by MML and so were not recoverable by MHL, applying the reflective loss principle. Accordingly, MHL abandoned its original claim in respect of the Marine Hotel, took an assignment of MML's claim as described much earlier in this judgment and then amended its Particulars of Claim so as to advance that claim in its capacity as assignee of MML's claim. In doing so, MHL waived its right to rely on the relation back doctrine by which a claim brought by way of amendment relates back to the date when the amended claim form was originally issued.

219. On that basis BOS argues that the Marine Hotel claim is statute barred because it is subject to the 6-year limitation period that applies to claims for breach of a simple contract imposed by s.5 of the Limitation Act 1980 ("LA"). MHL argues that this is wrong because the 2014 Facility Agreement was executed as a deed by MHL. And it follows that the applicable limitation period is the 12-year period specified for such claims by LA, s.8, even though it accepts that BOS did not execute the 2014 Facility Agreement as a deed.

220. Two issues arise therefore – being firstly whether the assignment was valid given the terms of the 2014 Facility Agreement and secondly, if the assignment was valid, what limitation period applied to claims for damages for alleged breach of the terms of the 2014 Facility Agreement. Strictly, it is probably unnecessary for me to resolve these issues given the conclusions I have reached so far but I do so in the interests of completeness.

221. *The Assignment Issue*

By clause 28.1 of the 2014 Facility Agreement, the parties agreed that:

> "28.1 **Assignment and transfers by Obligors**
>
> No Obligor or any other member of the Group may assign any of its rights or transfer any of its rights or obligations under the Finance Documents."

"*Obligor"* was defined as meaning *"a Borrower or a Guarantor*"; "*Group*" as "*… the Parent and each of its Subsidiaries for the time being...*"; "*Parent"* as MHL and, as is common ground, MML was a subsidiary as defined of MHL.

222. BOS submits that the effect of clause 28.1 was to preclude MML from assigning any of its rights under the 2014 Facility Agreement, which it argues included any causes of action. MHL argues that the prohibition contained in clause 28.1 ceased to apply when MML ceased to be a subsidiary of MHL, which it submits occurred in October 2015, when MHL transferred its shares in MML to Glencairn Finance Limited, a company controlled by Mr Macdonald. If BOS is correct in its submission, then the assignment of what had been MML's cause

of action to MHL would be ineffective – see Linden Gardens Trust Limited v. Lenesta Sludge Disposals Limited and others [1994] 1 AC 85 ("Linden Gardens").

223. The first question that arises is whether "*rights"* includes accrued causes of action. That is an issue of construction. I conclude that a reasonable person with all the background knowledge of the parties would have concluded that "*rights"* in this context included all rights that accrued as a result of a breach of the 2014 Facility Agreement. If that were not so then the effect of the provision would be confined to the right to future performance and there is no commercial or other basis for thinking that BOS (for whose benefit the clause was included) could have intended to preclude the assignment of the right to future performance but not the right to claim damages for an alleged breach of one of the relevant contracts coming within the scope of the clause. This distinction was considered by Lord Browne-Wilkinson in his leading judgment in Linden Gardens. Whilst he acknowledged that the issue is a matter of construction in every case, his reasons for rejecting the conclusion that the scope of such a clause should be confined to the right to future performance are compelling. These included that the reason for including such a clause is likely to be that the party benefiting from it wanted to deal only with those whom that party had chosen to contract with - see 105E – and the confusion that could arise if such a construction was to be adopted – see 105H-106A. This led Lord Browne-Wilkinson to conclude at 106B that the parties to the contract in issue in that case:

> "… cannot have contemplated a position in which the right to future performance and the right to benefits accrued under the contract should become vested in two separate people. I say again that that result could have been achieved by careful and intricate drafting, spelling out the parties' intentions if they had them. But in the absence of such a clearly expressed intention, it would be wrong to attribute such a perverse intention to the parties. In my judgment, clause 17 clearly prohibits the assignment of any benefit of or under the contract."

Whilst of course the language used in that case was different from that used in clause 28.1 and the commercial context of the contract in which the relevant term appeared was different from this case, the points made and the conclusion reached are expressed generally and in my judgment apply with equal force to the language used by the parties in this case construed in the commercial context in which they used it.

224. Lord Browne-Wilkinson also rejected a submission that an assignment in breach of a contractual prohibition was nonetheless effective to vest a cause of action, which he treated expressly as being a contractual right, in an assignee – see 108F-G, where he rejected the proposition on the basis that *"(i)f the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz., to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.*"

225. The remaining point is whether the transfer by MHL of its shares in MML to Glencairn caused the prohibition in clause 18.1 to cease to apply to MML. MHL submits that the effect of this was that MML ceased to be a "… *member of the Group*…" within the meaning of clause 28.1. I agree that is so. A member of the Group is defined contractually as being MHL "… *and each of its Subsidiaries for the time being…"* and "*Subsidiary"* is defined as meaning "… *a subsidiary within the meaning of section 1159 of the Companies Act 2006*." That section defines a "*subsidiary*" of another company as being

> "A company is a "subsidiary" of another company, its "holding company", if that other company–
>
> (a) holds a majority of the voting rights in it, or
>
> (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
>
> (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,
>
> or if it is a subsidiary of a company that is itself a subsidiary of that other company."

MML ceased to be a subsidiary as defined in that section (and therefore as defined in the 2014 Facility Agreement) when MHL transferred its shares in MML to Glencairn.

226. The question that remains is whether, upon such a transfer, MML ceased to be an Obligor. "*Obligor"* was defined as meaning *"a Borrower or a Guarantor*". A "*Borrower"* was defined as meaning "… *an Original Borrower or an Additional Borrower unless it has ceased to be a Borrower in accordance with Clause 28*…". The "*Original Borrowers"* were defined as those subsidiaries of MHL listed Part 1 of Schedule 1 to the 2014 Facility Agreement. That list included MML. Thus, the issue that matters is not whether MML ceased to be a member of the Group but whether it ceased to be an Original Borrower in accordance with clause 28.3.

227. In so far as is material, clause 28.3 provides that:

> "…
>
> 28.3.2 If a Borrower is the subject of a Third Party Disposal, the Parent may request that such Borrower (other than the Parent) ceases to be a Borrower by delivering to the Agent a Resignation Letter.
>
> 28.3.3 The Agent shall accept a Resignation Letter and notify the Parent and the other Finance Parties of its acceptance if:

> (a) the Parent has confirmed that no Default is continuing or would result from the acceptance of the Resignation Letter;
>
> (b) the Borrower is under no actual or contingent obligations as a Borrower under any Finance Documents;
>
> (c) where the Borrower is also a Guarantor (unless its resignation has been accepted in accordance with Clause 28.5 (Resignation of a Guarantor)), its obligations in its capacity as Guarantor continue to be legal, valid, binding and enforceable and in full force and effect (subject to the Legal Reservations) and the amount guaranteed by it as a Guarantor is not decreased (and the Parent has confirmed this is the case); and
>
> (d) the Parent has confirmed that it shall ensure that any relevant Disposal Proceeds will be applied in accordance with Clause 9.2 (Disposal, Insurance and Report Proceeds and Excess Cashflow).
>
> 28.3.4 Upon notification by the Agent to the Parent of its acceptance of the resignation of a Borrower, that company shall cease to be a Borrower and shall have no further rights or obligations under the Finance Documents as a Borrower except that the resignation shall not take effect (and the Borrower will continue to have rights and obligations under the Finance Documents) until the date on which the Third Party Disposal takes effect.
>
> 28.3.5 The Agent may, at the cost and expense of the Parent, require a legal opinion from counsel to the Agent confirming the matters set out in Clause 28.3.3(c) above and the Agent shall be under no obligation to accept a Resignation Letter until it has obtained such opinion in form and substance satisfactory to it."

228. The "*Agent"* is BOS. MML was a "*Borrower*" and it was the subject of a "*Third Party Disposal*". However, MHL (the Parent) did not deliver a Resignation Letter to BOS. Therefore, there was no Resignation Letter for BOS to accept and therefore MML did not "… *cease to be a Borrower*…" on the date when the Third Party Disposal took effect.

229. MHL argues however that MML ceased to be a Borrower when the term of the 2014 Facility Agreement came to an end with the repayment of the loans to which it is related. It is common ground that that had occurred prior to the purported assignment of MML's rights to MHL in 2024. MHL contends that the prohibition against assignment came to an end when the 2014 Facility Agreement came to an end. In support of that construction, it relies on clause 39.7, which provides that the obligations set out in clause 39 (which is concerned with confidentiality) continue for 12 months after repayment of all amounts payable by MHL and its subsidiaries and all BOS's commitments have come to an end. It submits that on a proper construction of the 2014 Facility Agreement that is the only provision that survives the end of the 2014 Facility

Agreement and is consistent with the intention of the parties that no other rights and obligations should survive.

230. I am not able to accept MHL's construction. It is common ground that this issue is one of construction with the question to be decided being whether, as a matter of construction, the parties intended at the date when they entered into the 2014 Facility Agreement, that the prohibition on MML assigning any cause of action it may have continued as well after as before the end of the term of the 2014 Facility Agreement.

231. The language used by the parties is entirely general in effect. It precludes any Borrower (including MML) from assigning any of its rights under the 2014 Facility Agreement. As I have explained that includes any causes of action that might have been available to it for breach of any of the terms of the 2014 Facility Agreement. The alleged cause of action had accrued well before MHL's transfer of its shares in MML to Glencairn and certainly well before the term of the 2014 Facility Agreement had come to an end. The commercial context and purpose of such a provision is something I have considered already – see above. It is difficult to see how a reasonable person with all the knowledge of the parties could think that the parties intended the prohibition against assignment to apply only as long as the 2014 Facility Agreement was in operation but then to cease to apply when the commercial justification for such a prohibition would be the same after the 2014 Facility Agreement had come to an end as during its currency.

232. In my judgment therefore, the prohibition is one which as a matter of construction was intended to apply to any causes of action that had accrued prior to either a Borrower ceasing to have that status by operation of the clause 28.3 machinery or the coming to an end of the agreement. Clause 28.3 provides a mechanism by which a subsidiary can cease to be a Borrower. If that mechanism is not invoked before the end of the term of the Facility Agreement, then either (a) MHL is not at that stage entitled to submit a Resignation Letter or (b) continues to be entitled to do so. Which of these solutions applies does not matter for present purposes because MHL did not submit such a letter at any stage before the purported assignment. Even if such a letter had been submitted, it would not have affected the prohibition against assignment. Although Clause 28.3.4 appears to provide that upon acceptance by BOS of a Borrower's resignation, the Borrower will cease to have any obligations under the 2014 Facility Agreement, it my judgment it would be wrong to conclude as a matter of construction that a prohibition against doing something (assigning a cause of action) constituted an obligation. In my judgment this derives some textual support from clause 28.3.3(b), which provides that BOS shall not accept a Resignation Letter unless the Borrower concerned is under no actual or contingent obligations as a Borrower under the 2014 Facility Agreement. If the prohibition against assignment is construed as being an obligation for these purposes, it is difficult to see how BOS could come under an obligation to accept a letter when otherwise the machinery was invoked. That is unlikely to have been the intention. Accordingly, it is more likely that the parties intended that the prohibition on assignment would be one that applies as well after as before a Borrower ceasing to be such.

233. In those circumstances, any cause of action in respect of the Marine Hotel claim was non assignable by and remained vested in MML.

234. *The Limitation Issue*

The following part of this judgment proceeds on the assumption that, contrary to what I have concluded above, the assignment to MHL of the Marine Hotel claim cause of action was effective and the issue that remains is whether it was nonetheless statute barred at the date when MHL amended its pleadings so as to bring the claim as assignee of the cause of action. As I have explained, that depends on whether the limitation period that applies is that set by LA, s.5 or LA, s.8, which in turn depends on whether the 2014 Facility Agreement was a deed or not.

235. By s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 (LPMPA):

> "An instrument shall not be a deed unless—
>
> (a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and
>
> (b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties."

BOS submits that the effect of this provision, in relation to a document that has been executed by one party as a deed and by the other as a simple contract, is that it will enable the party who executed the document as a simple contract to enforce it as if it were a deed against the party who executed it as such, whereas the party who executed the document as a deed is nonetheless limited to enforcing the document as if it was a simple contact against the party who signed it as such. In this context therefore, BOS submits that whilst it would be entitled to the benefit of the 12 year limitation period in relation to any claim by it against MHL for breach of the 2014 Facility Agreement, MHL is entitled only to the benefit of the 6 year limitation period in respect of any claims it brings against BOS for any alleged breach of the 2014 Facility Agreement.

236. LPMPA, s.1(2) distinguishes between deeds that are unilateral deeds (that is one to which there is a single party) and multi-party deeds (one to which there is more than one party). In relation to the latter, it requires that (a) the document makes it clear on its face that it is intended to be a deed by the (that is all the) parties to it; and (b) is validly executed as a deed by one or more of those parties.

237. Were it necessary to look only at the statute, I would consider BOS's interpretation mistaken to the extent that it suggests that a document should have different effects in respect of different parties to it. LPMPA, s.1(2) starts out with the words *"(a)n instrument shall not be a deed unless…*" thus the concern of the sub-section is to identify whether or not a particular instrument or document is a deed or not. The sub-section then goes on to say that will be so

in respect of a document to which two or more persons are parties if two conditions are satisfied being first, whether the document makes it clear on its face that it is intended to be a deed by the parties (meaning all the parties) to it and secondly whether the document has been validly executed as a deed by one or more of those parties. This leads me to conclude that if this provision were being construed on its own, and absent any estoppels that might arise on particular facts, the consequence would be that if either of these conditions is not satisfied then the document is not in law a deed. If that is so then it takes effect for all purposes and in relation to all parties to it as if it was a simple contract. Any other outcome would operate, potentially at least in an unpredictable and arbitrary fashion. The outcome I have suggested avoids these possibilities.

238. BOS submits that I should reach the conclusion for which it contends because (a) the Law Commission in its working paper No 143 at footnote 14 speculates that such is the law and because that is suggested to be the position in Cartwright, Formation and Variation of Contracts (2024), para 7-14 at footnote 198, where it is stated that "*Where the formality requirements are satisfied as regards some, but not all, of the parties, the instrument may still take effect as a deed but only as regards the compliant parties*."

239. In my judgment this is mistaken. In relation to multi-party deeds, LPMPA, s.1(2) identifies two conditions that have to be satisfied before such a document is a deed. The first is that it makes it clear on its face that it is intended to be a deed by the parties (meaning all the parties) to it. If that is not so in respect of any of the parties to it, then the document is not in law a deed. Providing that condition is satisfied, then the document takes effect as a deed as long as the document has been validly executed as a deed by one or more of those parties.

240. The statutory tests provide the answer to a single question – is the document a deed or not? If on its face it is not intended by all parties to it to be a deed then the document is not a deed. If on its face it is intended by all parties to it to be a deed then that is what it is as long as one of those parties has executed the document as a deed. The paragraph from the Law Commission's working paper does not assist. I query whether it is appropriate to refer to such a paper when attempting to construe a statute. Leaving that to one side, footnote 14 is speculative and unsupported by authority. Paragraph 3.4 of the Report appears to confuse unilateral with multi-party deeds and paragraph 3.5 appears to elide intention (which must be shared by all parties to the document) with execution. At this stage I leave further consideration of this issue to one side because it only arises in this case if the first condition imposed by LPMPA, s.1(2)(a) is satisfied.

241. BOS submits that the 2014 Facility Agreement made clear on its face that it was only intended to be made as a deed by MHL and its subsidiaries (including MML) and not by the Bank. This is reflected in different signature blocks for MHL and its subsidiaries and for the Bank. Each of the Macdonald parties have signed the document on the basis that it is executed and delivered as a deed, whereas that is noticeably not the case in respect of the BOS parties. BOS

submits therefore that the intention requirement is not satisfied in relation to BOS.

242. The agreement starts with a document that describes itself as being a "*Restatement Agreement"* in 12 sections and two schedules. The operative part of the document describes itself as being "*... made as a deed on 19 March 2014…"*. MHL relies on this as determinative of the intention question. In my judgment it is not because that ignores what follows. That document concludes with the statement that:

> "This Restatement Agreement has been entered into on the date stated at the beginning of this Restatement Agreement and executed as a deed by the Parent, the Original Borrowers and the Original Guarantors and is intended to be and is delivered by them as a deed on the date specified above."

243. The "*Parent"* is MHL; the "*Original Borrowers*" and the "*Original Guarantors*" are MHL and the entities set out in Schedule 1, each of which is either a direct or indirect subsidiary of MHL. This statement (in combination with the form of the signature blocks) makes it clear that none of the parties other than the Parent, the Original Borrowers and the Original Guarantors intended to execute the document as a Deed. The other parties are BOS in various different capacities. This can be compared and contrasted for example with the Deed of Variation by which the EBITDA covenant within the 2010 Facility Agreement had been varied, which contained a statement to the effect that

> "It is intended by the parties hereto that this amendment agreement shall take effect as a deed notwithstanding that the parties hereto may execute this deed under hand."

The statement in the Deed of Variation proves intention as required by LPMPA, s.1(2)(a). However, the statement in the Restatement Agreement proves that LPMPA, s.1(2)(a) is not satisfied or is inconsistent with the parties having such an intention. The statute requires that a document is not in law a deed unless it makes it clear on its face that it is intended to be a deed by the parties to it. A document that calls itself a Deed but contains a statement by only some of the parties to it that they intend it to be a deed in combination with the other parties not including such a statement and not executing the document does not provide the clarity the statute requires.

244. Schedule 2 contains the operative provisions constituting the 2014 Facility Agreement. At the end of its operative provisions there appears a similar statement to that at the end in these terms:

> "This Agreement has been entered into on the date stated at the beginning of this Agreement and executed as a deed by the Parent, the Original Borrowers and the Original Guarantors and is intended to be and is delivered by them as a deed on the date specified above."

Everything that I have said above about the effect of the provision that appears at the end of the Restatement Agreement applies with equal force to this statement. It has independent effect if and to the extent that Schedule 2 takes effect as a separate agreement.

245. This is consistent with the approach taken in the Deed of Waiver, where a similar statement is to be found as the end of the instrument and before the signatures.

246. Returning to the instrument I am concerned with, the question that arises is whether it makes it clear on its face that it is intended to be a deed by all the parties to it. In my judgment it does not since the statement that appears in bold at the end of the document makes it clear that such is the intention of the Parent, the Original Borrowers and the Original Guarantors and not BOS. That point is consistent with the way in which the Macdonald parties on the one hand and the BOS parties on the other have executed the document. In those circumstances, when read as a whole, the document does not make clear on its face that it is intended to be a deed by all the parties to it.

247. In light of this conclusion, it is unnecessary for me to decide whether, as BOS contends, the instrument may still take effect as a deed but only as regards the compliant parties, or whether, as I think is clear on the language of the statute, the document is simply not a deed at all. What is clear is that LPMPA, s.1(2)(a) is not satisfied and it follows that on any view the limitation period available to MHL in respect of its claims against BOS for breach of the 2014 Facility Agreement is six years from the date of alleged breach. That being so, the Marine Hotel claim was statute barred at the date when MHL amended its claim to include it by reference to the assignment.

Conclusions

248. For the reasons set out above, it is not necessary for me to consider the quantum issues that remain between the parties and it is undesirable that I should do so given my conclusions on the liability issues between the parties. In the result the claim fails and is dismissed.