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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
BEFORE THE HONOURABLE MR JUSTICE WAKSMAN

Claim No. CL–2016–000049

26 February 2021

BETWEEN

(1) PCP CAPITAL PARTNERS LLP

(2) PCP INTERNATIONAL FINANCE LIMITED

Claimants

-and-

BARCLAYS BANK PLC

Defendant

JUDGMENT

Hearing dates: 8-12, 15-17, 19 and 22-24 June, 2, 6-10, 13-16, 20-24, 27-28 and 31 July, 3-7 August and 12-16 and 19 October 2020

Joe Smouha QC, James Collins QC, Robert Weekes and Owen Lloyd by (instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP, Solicitors**) for the Claimants

Jeffery Onions QC, David Quest QC, Charlotte Eborall, Alexander Polley and Oliver Butler (instructed by **Simmons & Simmons LLP, Solicitors**) for the Defendant

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GENERAL INTRODUCTION

The Parties

1. In this case, the First Claimant, PCP Capital Partners Limited, is a limited partnership ("the Partnership"). The partners were Amanda Staveley and Craig Eadie. Some time after the events with which this case is concerned, the Partnership assigned all of its property (including its claims) to the Second Claimant (PCP International Finance Limited) of which Ms Staveley is the sole owner. I refer to the Claimants collectively as "PCP". In relation to the events of 2008 and 2009, PCP refers to the Partnership alone.

2. The Defendant is Barclays Bank Plc ("Barclays"). One of its divisions was and is known as Barclays Capital Investments ("BarCap"). This is not a subsidiary company or other separate entity, but rather that part of Barclays which deals with capital investments. It features prominently in this case.

The Capital Raise of October-November 2008

3. The claim made by PCP against Barclays arises, in summary, as follows. In the second half of 2008, financial markets across the world had deteriorated sharply, exemplified by the bankruptcy of Lehman Bros in September 2008. The emerging global financial crisis caused governments, regulators and banks to consider what steps were necessary to avoid a collapse of the international banking system.

4. In the UK, there was concern at government level that the major clearing banks did not have sufficient Tier 1 capital. Such capital consists of equity capital (i.e. ordinary shares) and disclosed reserves. It may also include other types of stock, for example preference shares. It is regarded as the principal basis of a bank's financial strength and its ability to absorb losses immediately. In the case of HBOS/Lloyds and RBS, the injection of necessary further Tier 1 capital was essentially provided by the government, colloquially known as the "bailout", such that those banks were now owned in part by the state and therefore effectively part-nationalised.

5. For its part, Barclays did not wish to go the same way as the other banks. It considered that to be bailed out by the government would spell the end of its autonomy and quite possibly the end of the bank itself, at least in its present and contemplated future form. On any view, it was very determined to avoid a bailout. It is said by PCP that in fact it was desperate to do so. Quite how desperate it was, and what the consequences were, is one of the issues in this case.

6. Barclays was in a somewhat different position from the other banks. Its Tier 1 capital adequacy was much stronger and as a result, there was the real possibility that it could raise the required additional capital privately i.e. by going to the market as opposed to being bailed out. Indeed, it had already raised £4.5bn in a capital raising in June 2008, £2bn of which came from the State of Qatar. I refer

to this capital raising as “CR1”. On 13 October 2008, Barclays announced that it needed to raise a further £6.5bn of which £3bn was to be raised by the end of the year. The Financial Services Authority (“FSA”), acknowledging that there was no need for an immediate bailout, had in fact given Barclays until 31 March (originally 30 June) 2009 to raise the requisite additional capital. I refer to this further capital raising as “CR2”

7. On 31 October, a state-owned entity called Qatar Holding (“QH”) and a Qatar company called Challenger Universal Limited (“Challenger”) agreed to invest £2.3bn into Barclays by means of the acquisition of the various financial instruments described below. Challenger was an investment vehicle representing the beneficial interests of HH Sheikh Hamad bin Jassim bin Jabr Al-Thani (“Sheikh Hamad”), the Prime Minister and Foreign Minister of Qatar and also Chairman of QH, and Vice Chairman, CEO and Board Member of the Qatar Investment Authority (“QIA”). Where appropriate I shall refer to both such entities together as “Qatar”. In addition, PCP, acting through its three wholly-owned corporate special purpose vehicles (“the SPVs”) agreed to invest £3.5bn by means of the acquisition of the same types of instrument. The SPVs were described by Barclays in the announcement about the subscriptions issued on 31 October (“the Announcement”) as “entities representing the beneficial interests of HH Sheikh Mansour Bin Zayed Al Nahyan” (more fully HH Sheikh Mansour bin Zayed bin Khalifa Al Nahyan) (“Sheikh Mansour”), a member of the Royal Family of Abu Dhabi and with whom Ms Staveley had had business dealings previously. Ms Staveley says that it was PCP which introduced Sheikh Mansour to Barclays for the purposes of CR2.

8. On the basis of those investments, Qatar would hold 15.5% of Barclays’ share capital (taking into account the shares acquired in CR1) and Sheikh Mansour (through the SPVs) would hold 16.3%. The total capital raise from this exercise would therefore be £5.8bn.

9. The deal changed slightly before the intended completion date of 27 November, in that each of Qatar and the SPVs agreed to take £250m less in one of the instruments, so that an amount of £500m of such instruments could be offered to existing Barclays shareholders instead. Most of the balance between those investments and the £6.5bn sought by Barclays was made up of a separate offering to existing shareholders of £1.5bn worth of one of the other instruments. These investments were all approved by Barclays shareholders at an EGM on 24 November 2008 and completion took place as anticipated, on 27 November.

10. However, and contrary to her plans, on 20 November, Ms Staveley agreed on behalf of PCP to transfer its ownership of the SPVs to International Petroleum Investment Company (“IPIC”), an Abu Dhabi state-owned entity whose Chairman was Sheikh Mansour. The precise reason or reasons

why Ms Staveley was or felt compelled to do this are disputed. However the effect was that PCP thereby lost control of the SPVs' intended investment into Barclays. The SPVs still duly made that investment on 27 November but their ownership had changed. In March 2009 and after protracted negotiations, PCP obtained from IPIC a fee of £30m in respect of its services relating to IPIC's investment in Barclays. After deduction of what Ms Staveley says were the expenses incurred in this exercise, there was a net fee, or profit, of £19m.

PCP's claim against Barclays

11. PCP's claim against Barclays arises thus: one of the principal actors in BarCap, and with whom Ms Staveley was negotiating in October and November 2008, was Roger Jenkins. He was Head of Structured Capital Markets at BarCap and also executive Chairman of its Middle East business which was called "Investment Banking and Investment Management for the Middle East and North Africa" ("IBIM MENA"). Ms Staveley says that on three occasions in October 2008, he represented to her that PCP would get "the same deal" as Qatar in respect of the investments (the Same Deal Representation - "SDR"). She contends that the SDR covered not only the actual terms of the instruments themselves (which were indeed the same for both investors) but also any other fees or remuneration paid to Qatar in return for their investment in Barclays. She says that PCP relied upon the SDR in particular by causing the SPVs to make the investment on 31 October.

12. Some 5 years later, in 2013, Ms Staveley learned that, in 2012, the Serious Fraud Office ("SFO") had started an investigation into CR2 and that the FSA had been investigating both CR1 and CR2, leading to the issue of "warning notices" to Barclays. The subject-matter of those investigations were a payment of £42m made by Barclays to Qatar in June 2008 (at the time of CR1) and a further payment to Qatar of £280m made, or commencing, at the time of CR2. Each payment was expressed to be in consideration of various services to be provided by Qatar, set out in short letter agreements each described as an "Advisory Services Agreement" dated 25 June and 31 October 2008 respectively ("ASA 1" and "ASA 2"). Those sums were far in excess of the disclosed contractually agreed commissions payable to the investors on their subscriptions, which amounted to £62m so far as Qatar was concerned (and £110m for the SPVs).

13. In addition, having looked further into the matter, Ms Staveley questioned a payment of £66m to Qatar, described in the CR2 Announcement as a fee "for having arranged certain of the subscriptions in the Capital Raising". She says that this cannot have been a truthful description because it was PCP which introduced Sheikh Mansour and brought him to the table as it were, and not Qatar. Second, she says that she had been told by Mr Jenkins on the morning of 31 October that in truth, this payment actually related to CR1 and not CR2 at all, being a payment of overlooked fees in

respect of that earlier capital raising. This has been referred to as the "June Representation" ("the JR").

14. On 30 June 2015 and by its then solicitors, PCP sent a letter before action to Barclays' solicitors, Simmons & Simmons ("the LBA"). On 25 January 2016, PCP issued its original Claim Form. In the course of subsequent solicitors' correspondence, Ms Staveley saw that Barclays had also provided a £3bn loan to Qatar drawn down on or about 17 November 2008 ("the Loan").

15. As a result, Ms Staveley alleges that the SDR was false because in truth, the £280m payment under ASA 2 and the £66m so-called arrangement fee were no more than disguised fees paid to Qatar by Barclays in exchange for its investment. Moreover, the Loan, although not a fee as such, was yet another benefit which Qatar had obtained and in truth formed part of its overall deal with Barclays. Accordingly, the SDR was false and since Barclays (through Mr Jenkins in particular) knew the true purpose of those payments, the SDR was knowingly false. Moreover, as far as the £66m was concerned, this also rendered the JR knowingly false. PCP also alleges that by reason of the Loan, a separate and implied representation to the effect that Barclays had not lent to Qatar the sums required for its investment or sums which otherwise facilitated that investment (the Investor Representation – "the IR") was knowingly false. The allegations in relation to the Loan were added to the (then) Amended Particulars of Claim on 2 August 2017.

16. The making and meaning of the SDR, JR and IR, are disputed by Barclays to various degrees, along with their falsity and any allegation of dishonesty

17. Parts of PCP's case (although it says not essential ones) are that:

    (1) ASA 2 was in fact a sham in the sense required by the case-law on the subject, and/or

    (2) The proceeds of the Loan were used for or at least facilitated Qatar's investment in Barclays; however, PCP does not positively allege that unlawful financial assistance within the meaning of s151 of the Companies Act 1985 had occurred, stating it is not necessary for its case to do so.

18. PCP then says that as a result of these fraudulent misrepresentations, and in the counterfactual world that would have existed had they not been made:

    (1) At the time, Ms Staveley would have learned from Barclays about ASA 2, the true nature of the £66m payment and the existence of the Loan;

    (2) Armed with that knowledge, and where PCP's negotiating position as the larger of the two putative investors was very strong (whereas Barclays' negotiating position was very weak), she would have been able to secure from Barclays fees of the same order as (and *pro rata*

to) those in fact agreed with Qatar, with a value of up to just over £1bn; this further fee for PCP has been referred to as the "Additional Value" ("AV");

(3) Moreover, PCP would have been able to obtain further time from Barclays either to secure third party debt finance for a part of the investment or, if necessary, to bring in other investors; this has been referred to as "Additional Time" ("AT");

(4) On any view, the AV and/or AT would have enabled her to resist the call made on 20 November for her to transfer ownership of the SPVs; PCP would therefore have remained in control of the investment, albeit that the ultimate beneficial owner of all or most of the investment would be Sheikh Mansour;

(5) Further, Ms Staveley would have negotiated with Sheikh Mansour/IPIC at the time, remuneration for PCP's work on the deal which would be far in excess of the £30m which it ultimately received. On PCP's case, Ms Staveley had in fact already agreed with Sheikh Mansour a fee of at least 10% of the underlying investments (which would amount to £325m) but this required her to raise 60% of the investment in the form of non-recourse debt finance which had not been done by 20 November;

(6) Remaining in control and with the benefit of the AV and AT, PCP says, that in addition, it would have obtained the necessary debt finance for the investment and in the end would have received a substantial fee; this in essence, constitutes the loss which PCP says it has suffered due to the fraud, and represents its damages claim against Barclays.

19. It will be obvious from the above that, quite apart from the question of what did happen (as to which there are a number of disputes) the assessment of the counterfactual case, if misrepresentation is made out, involves a combination of matters either to be proved on the balance of probabilities or established by way of loss of chance. In that context, PCP points to various different possible scenarios as to what, counterfactually, PCP could or would have obtained in terms of AV ("the Scenarios"). Secondly there is a range of possible remunerations which PCP did or would have secured for itself ("the Remuneration Bases"). As refined in the course of this litigation and argument at trial, PCP's final claim for loss is now put at up to £660m. Originally, that loss was put at up to £1.6bn.

20. As a result of the criminal proceedings referred to below, the trial was adjourned on two occasions.

21. There has been a series of amendments to the statements of case but for ease of reference, I shall simply refer to the latest iterations of each as the Particulars of Claim, the Defence and the Reply unless the context otherwise requires. I should add that although the parties produced an Agreed

Case Memorandum and List of Issues as long ago as 24 November 2016, they remain, broadly, accurate and useful documents.

22. Part 1 of this judgment deals with general matters, Part 2 is concerned with liability and Part 3 considers causation and loss.

THE CRIMINAL AND FCA PROCEEDINGS

23. Following the investigations referred to above, the SFO brought criminal charges in relation to these matters against Barclays Plc and four senior Barclays executives, being John Varley, previously Group CEO, Mr Jenkins, Tom Kalaris, CEO of Barclays Wealth and Investment Management, and Richard Boath, Managing Director, Financial Institutions Group at BarCap. The charges consisted of counts of conspiracy to defraud in relation to CR1 and CR2. The essential basis was that in June and October 2008, public statements were made in prospectuses to shareholders that no fees had been paid to Qatar in return for its investments other than those stated. However, because ASA 1 and ASA 2 were in truth no more than disguised fees in the total sum of £322m and were themselves shams, those statements were untrue to the knowledge of the relevant defendants, who had acted dishonestly. In February 2018 Barclays Bank Plc, i.e. the Defendant here, was added to those charges.

24. However, in May 2018 the charges against both Barclays companies were dismissed. Subsequently the cases against the four individuals were all dismissed by the trial judge at the end of the prosecution case in the first trial in April 2019 on the basis that there was no case to answer. There had also been charges in respect of unlawful financial assistance because of the Loan, but once such charges against the Barclays defendants were dismissed (as they had been earlier), similar charges against the individual defendants were dismissed also.

25. In June 2019 the Court of Appeal allowed an appeal against the dismissal by the Judge of the conspiracy charges against Mr Jenkins, Mr Boath and Mr Kalaris. However, it upheld the Judge's dismissal of the case against Mr Varley. A retrial of Mr Jenkins, Mr Boath and Mr Kalaris commenced in October 2019 and ended on 28 February 2020 when they were all acquitted.

26. In the meantime, there had been proceedings brought by the Financial Conduct Authority ("FCA" – which succeeded the FSA on 1 April 2013) against Barclays, Mr Jenkins, Mr Varley and Mr Chris Lucas (who would have stood trial in the criminal case but for his ill-health) pursuant to the warning notices issued against all of them in March 2013. Those proceedings were, again, concerned with ASA 1 and ASA 2 although principally with the fact that they had not been disclosed in the relevant prospectuses. They were all stayed during the criminal trial.

27. In April 2020 the FCA discontinued those proceedings against Mr Varley and Mr Jenkins. They remain on foot so far as Barclays is concerned.

THE INSTRUMENTS

28. The instruments acquired by Qatar and the SPVs ("the Instruments")were as follows:

(1) Reserve Capital Instruments ("RCIs"). These are securities akin to preference shares. They were redeemable in whole (but not in part) at the option of Barclays from June 2019. Until that time, they would pay an annual coupon of 14% and thereafter at LIBOR plus 13.4%. Because of tax relief available to Barclays, that coupon represented to it a true cost of 10%. Each of Qatar and the SPVs subscribed ultimately for £1.25bn worth of RCIs;

(2) In addition, and in conjunction with the subscription for the RCIs, Qatar and the SPVs each purchased, for a nominal consideration, Warrants which were akin to share options. The Warrants would entitle the holders, if and when exercised, to purchase up to £1.5bn worth of new ordinary shares in Barclays at a fixed exercise price of 197.775p. This was equal to the average closing price for such shares over the trading days 29/30 October 2008 ("the Average Closing Price"). The exercise period was 5 years from issue. For the sake of clarity, where I refer to the warrants actually acquired or a potential further issue of the same such Instruments, I shall refer to them as "Warrants". If I am referring to warrants in general I shall just say "warrants";

(3) Thirdly, Mandatorily Convertible Notes ("MCNs"). These were subject to mandatory conversion into ordinary shares on 30 June 2009. The conversion price was fixed at 153.276p being a discount of 22.5% from the Average Closing Price. Until conversion, the MCNs would pay a coupon of 9.75%. Qatar Holding subscribed for £500m worth of MCNs and Challenger subscribed for £300m, making a total of £800m. The SPVs subscribed for £2bn worth. The structure of the MCNs meant that, on acquisition, the amount of shares into which they would be converted on 30 June 2009 was fixed. Thus, to take the relevant SPVs MCNs as an example, purchasing £2bn worth would entail about 1.3bn shares (i.e. £2bn divided by £1.53276). Putting the coupon to one side, whether the SPV made a profit or loss on the MCNs depended on whether, as at 30 June 2009, Barclays shares were then worth more, or less, than £1.53276 each.

29. It follows from the above that the total capital actually invested by Qatar was £2.05bn while that invested by the SPVs was £3.25bn.

30. While the Warrants were in effect provided to both investors free of charge, they were extremely valuable because of the fixed exercise price, at least if one took the view that Barclays' share price would rise significantly above the current average closing price in the 5 years from issue.

31. Finally, each investor would receive a commission equal to 4% of the amount of the MCNs and 2% of the RCIs subscribed for. For Qatar, this would yield a total commission of £57m while for the SPVs it would be £105m.

<u>CHRONOLOGICAL OVERVIEW</u>

Introduction to Overview

32. Before identifying in detail the factual and legal issues between the parties in this Part of the judgment, it will be helpful to set out a relatively brief chronology of the principal events. This will serve the purposes of introducing the key transactional documents and giving an overview of the many dealings between the various parties unfolding at great speed over a short period, principally but not exclusively, 8-31 October 2008. Such dealings included agreeing the precise nature and terms of the Instruments, the extent of the subscriptions by Qatar and the SPVs, discussion of fees required by Qatar, legal advice as to what was to become ASA 2, and the drafting and execution thereof, the production of a document for the benefit of Barclays which assured it of the involvement of Sheikh Mansour in connection with the SPV's subscription, the negotiation and agreement of the Loan, discussion with banks about providing debt finance in connection with the SPV's investment, discussions with Sheikh Mansour about the remuneration to be paid to PCP (Barclays not accepting that there were any real such discussions) and preparing the groundwork for the EGM, in particular negotiating the "clawback" for existing shareholders.

33. The facts as they emerge from the evidence will be analysed in more detail in Parts 2 and 3 of this judgment in the context of my consideration of the individual elements of the claim. For the purposes of this preliminary exercise however, I have essentially relied upon the chronologies which appear (with differing emphases, content and comment) in both sides' closing submissions (see below) to present here a shorter chronology which is intended to be neutral unless otherwise indicated (for example to record an allegation).

Before October 2008

34. On **25 June 2008**, Barclays announced the share issue which constituted CR1 in an RNS Announcement. The RNS (Regulatory News Service) is part of the London Stock Exchange and is a provider of news information which is approved by the FCA. CR1 consisted of a share issue to raise approximately £4.5bn. Of this sum, £500m would be unconditionally invested by Sumitomo Mitsui Banking Corp. The balance of £4bn worth of shares was subject to a conditional placing, being offered first to existing shareholders at 282p per share, which was a 9.3% discount to the

current market price. To the extent that this did not result in the take-up of all such shares, they would then be taken up by a number of companies and other entities up to a maximum in each case. They included the QIA (acting through QH, its wholly-owned subsidiary) subscribing up to £1.7bn, and Challenger subscribing up to £533m. In the event, only 16% of the shares in the conditional placing were taken up by existing shareholders. Accordingly, QH and Challenger were required to subscribe for 84% of their commitment, meaning that QH invested about £1.4bn for a 6.4% stake in Barclays while Challenger invested £437m giving it a 1.9% stake. Thus the total investment cost was a little under £2bn.

35. On the same day, Barclays and QH entered into a one-page letter agreement ("ASA 1") which stated as follows:

> "We are extremely pleased and honoured to be writing to you in connection with a new advisory agreement between our two institutions.
> You agree to provide various services to us, as an intermediary, in connection with the development of our business in the Middle East. You will provide these services over a period of 36 months to a total value of £42,000,000 [handwritten]. In return, we will pay you the sum of £42,000,000 [handwritten] in four equal instalments, the first within two weeks of signing, the second on 1 October 2008, the third on 1 January 2009 and the last on 1 April 2009. Although it is intended that the services provided will not be ones that are subject to Value Added Tax, if we agree to include services on which VAT is payable then we will pay the fee plus the applicable VAT. In addition, if we terminate this agreement without cause we will continue to pay you the fee In the manner agreed above.
> We have discussed the type and scale of services you will provide to deliver value in exchange for this fee and we know this will need to be refined by mutual agreement as our relationship develops further.
> Both parties will monitor and review this arrangement and act in good faith in connection with the formulation and arrangement of the services to be provided.
> We are not creating a partnership or agency arrangement and neither party may make any commitment on behalf of the other without express instructions from the party Intending to be bound.
>
> This letter and the arrangements contemplated by it will be governed by English law."

36. Following the filing for insolvency by Lehman Bros on **15 September 2008**, Barclays acquired part of its business. It intended to undertake a further £700m capital raise for this purpose ("CR 1.5") with Qatar as the investor. A further ASA was prepared in this regard ("ASA1.5"). That document, drafted on or around 3 October, and addressed to Mr Al Sayed of QIA read:

> "We are extremely pleased and honoured to be writing to you in relation to an extension of the advisory agreement between our two institutions dated 25 June 2008. This is in recognition of the great success of the agreement to date.
> The terms and conditions of the 25 June 2008 advisory agreement continue in full force and effect subject to the variations set out in this letter.
> You agree to provide various services to us, in addition to those set out the 25 June 2008 agreement, as an intermediary, in connection with the development of our business in the Middle East. You will provide these services over a period of [ ] months from the date of this letter to a total value of [ ]. In return, we will pay you the sum of [ ] in [ ] equal instalments, the first within [period] of the date of this letter, [timing in respect of other instalments] and the last on [date].
> We have discussed the type and scale of services that you will provide in order to deliver the additional value to us in exchange for this further fee and we know that this will need to be refined by mutual agreement during the period in which you will provide the services . Both parties will continue to monitor and review this arrangement and act in good faith in connection with the formulation and arrangement of the services to be provided.
>
> This letter and the arrangements contemplated by it will be governed by English law."

37. In the event, CR 1.5 never took place because, shortly afterwards, Barclays was required to increase substantially its Tier 1 capital which gave rise to CR 2.

38. On **23 September** Goldman Sachs International ("GSI") announced the raising of capital for itself through a placement to the multinational conglomerate Berkshire Hathaway (principally led and controlled by the well-known entrepreneur Warren Buffett) of preferred stock together with warrants (i.e. share options) which could be exercised at any time within 5 years.

October 2008

39. On **8 October**, the Government announced its measures to stabilise the UK banks. In the case of Barclays it was given until 30 June 2009 to raise the additional capital. Later the same day, Mr Jenkins spoke with Sheikh Hamad and Dr Hussain, Vice-Chairman and Board member of QIA and an adviser to Sheikh Hamad. The latter were interested in investing as part of CR2 in the sum of around $2bn and referred to doing a "Buffett deal" i.e. one which involved the provision of warrants. Mr Jenkins reported that, in addition, Qatar was approaching Barclays and Credit Suisse to raise $4bn by way of loans. A meeting between Sheikh Hamad, Mr Jenkins and Mr Varley in Doha was also planned to take place on Sunday 12 October.

40. On **9 October** Mr Jenkins emailed Fergus McDonald (Head of Investment Banking Division at MENA) about a request from Qatar for a $2bn loan for 18 months. He asked him to review it and said that he would be with Mr Varley in Doha on Sunday. Mr McDonald immediately responded to ask what the purpose of the loan was and Mr Jenkins replied that he was not sure but would find out. In his full reply on 10 October, Mr McDonald stated that this was a "demanding ask", that liquidity was the issue and that any client asking for an unsecured loan to draw down before the year-end would be turned down flat although if anyone could get a deal done with BarCap it would be Qatar. But a loan which was unfunded - i.e. not be drawn down before the year-end - would be definitely preferable. If funded, collateral would be necessary. Because there was at the time "no underwriting market" i.e. where the lending bank would agree if necessary to provide the entirety of the loan, it would have to be a "club deal" and the obligation of Qatar as borrower would be to "deliver all the banks required" to Barclays which would then put the club of banks together.

41. The caution expressed here reflected a conversation between Stephen Jones (Head of Financial Solutions Group and co-head of Corporate Origination EMEA at BarCap) and Bob Thorne when Mr Jones said that they were basically telling clients that, for unsecured loans, Barclays was "shut until next year".

42. On **12 October**, Mr Eadie wrote the following letter to Mr Varley whom he knew from when they had both been junior solicitors at the firm Frere Cholmeley.

> "John,
> Sorry to bother you at a busy time. Amanda Staveley, my partner in PCP Capital Partners, has been asked by a Middle Eastern contact to find out whether your bank would be interested in speaking to him about a possible investment in your bank pursuant to the recapitalisation and stabilisation programme recently agreed between UK banks and the UK government.
> The person concerned is a senior member of the Abu Dhabi ruling family with whom PCP has worked previously. He has material business interests in financial services and elsewhere but does not appear to have personal connections with senior management at your bank. Amanda is meeting him tomorrow to agree details, so at present this is an informal and confidential enquiry to establish whether such an approach might be of interest.
> I can give more information on the telephone if needed. My mobile is […] Non -working hours not a problem."

43. The "person concerned" referred to was Sheikh Mansour and this was understood by those at Barclays.

44. In the evening of 12 October, there was the planned meeting in Doha. Mr Varley was unable to go and in his place went Bob Diamond, BarCap's CEO as well as CEO of Barclays' Investment Banking and Investment Management and its Wealth Management divisions. He was also an executive director of Barclays. Mr Jones was also there. They all met Dr Hussain and then had dinner with Sheikh Hamad who, in the course of the same evening, also held meetings with Credit Suisse and UK Government representatives. After dinner, Mr Diamond dialled into a Barclays meeting.

45. On **13 October**, Mr Jenkins, and Mr Jones met with Dr Hussain again to discuss CR2. The Loan was also on the agenda because Mr Jones emailed Mr McDonald the same day saying that Mr Diamond was keen "we get this request back on track". Mr Jenkins also emailed Mr McDonald saying that Qatar was now waiting to hear their answer on the short-term 18 months loan, asking "where this is". Later on, he emailed Linda King, then Chief Credit Officer for BarCap, to see if Tom Wootton, Barclays' Chief Credit Officer, could see him and brief him on Barclays' exposures in the Middle East and that there was a request for a short facility of $2bn for Qatar coming through which "we need to try to be accommodating on It will come thru thr right channels."

46. Meanwhile, also on 13 October, Barclays announced CR2. The overall amount to be raised was in excess of £6.5bn of Tier 1 Capital. It confirmed that this capital would be raised from investors without calling on government funding. The plan, as approved by the FSA, envisaged the issue of £3bn worth of preference shares by 31 December 2008, the issue of £600m worth of new shares which had previously been announced on 17 September in relation to Barclays' acquisition of Lehman Bros' American business, and the issue of a further £3bn worth of new shares with the intention that this should be done before 31 March 2009. £1bn of this new capital was to come from an existing shareholder (in fact, Qatar). There was a reconvened Board meeting in the evening.

47. On **14 October**, Mr Kalaris called Ms Staveley. He told her to call Mr Jenkins which she later did. He also asked her whether she could put Mr Jenkins in contact with Sheikh Mansour directly but Ms Staveley declined to do so.

48. Mr McDonald also emailed Mr Jones, following the emails of the previous day, saying that he thought Barclays' position was pretty clear from the email he had sent on 10 October, and he was not sure what Mr Jenkins wanted. In a telephone call between Mr Jones and Mr McDonald, Mr Jones said:

> "In answer to your question about the $2bn, it is back on. Diamond has performed a group override, basically, on Sunday and said we have to find a way of making this financing available."

49. In a telephone conversation with Keith Hatton, a director and Head of Executions at the Global Loans Department of BarCap, Mr Jones referred to the meeting on 13 October. He said that it looked like that they would get some capital and he also referred to a discussion about Project Tinbac (see below). He also referred to the $2bn unsecured loan to Qatar which they managed to "kill". He said that:

> "Bob has said that we will look at that very favourably. I explained to Bob on Sunday what the environment was that effectively, as far as BarCap was concerned we had – we could not fund anything between now and the year-end at the risk of being drawn. And he said, "I understand that but I'm going to have to do a group override to find some capital, find a way of booking a—booking a group, something". You know, I mean, he—you know, so—but somehow we've got to find a way of making that work on that basis and I'm going to need your help, frankly."

50. The same day, Mr Jones also held a conference call with staff on the Global Loans Team. This was about Project Tinbac. But Mr Jones also said:

> "One thing also that we need to bear in mind, and I've got a meeting with Roger at midday so we can figure out how we answer the question—how we ask the question, sorry, is they have also asked for $2bn of unsecured financing. And, you know, so that's a separate deal which we had killed two or three weeks ago, that which has now come back to us with a sort of Bob Diamond override saying, you know, we have to find a way of doing this given that these guys are likely to be supportive in our capital raising efforts.
> Clearly the money is not explicitly to fund the capital raising efforts, because we would go to prison if it were, but we need to be aware that there is a 2bn unsecured ask as well that's going on alongside this, and we do need greater clarity on use of proceeds."

51. In an email from Keith Ho, Head of Barclays' Portfolio Management, he said that given the importance of Qatar as one of Barclays' strategic investors and in the light of the fact that it was quite probable that Qatar had "signed up for another £1bn.." he thought it was inevitable that they did the Loan.

52. On **16 October**, Ms Staveley met with HE Khadem Abdulla Al-Qubaisi ("Mr Al-Qubaisi") for the first time at IPIC's office in Abu Dhabi to talk about investing in Barclays. He was the Managing Director and a board member of IPIC. Sheikh Mansour had asked Mr Al-Qubaisi to analyse PCP's proposed deal. The meeting was positive. Afterwards, Ms Staveley had a meeting with representatives from GSI at the Emirates Palace in Abu Dhabi which had been arranged the previous day. GSI produced a short paper referring to "Tasameem, affiliates and co-investors" being

interested in investing in Barclays. Tasameem was an investment vehicle owned by Sheikh Mansour although the reference to it here might have been to other entities related to him as well. GSI was duly appointed as adviser to PCP. Also present was Ali Jassim, an adviser to Sheikh Mansour. That evening, Mr Varley spoke on the telephone with Sheikh Hamad.

53. On **17 October** an ad hoc meeting of Barclays' European Loans Operating Committee ("ELOC") approved an early iteration of the Loan. At that stage, there was to be a £1.2bn, 18 month syndicated loan of which Barclays would be committed to lending at least £300m. The minutes of the meeting set out in an email that day are inaccurate and will be referred to below. When Mr Jenkins was told of the approval, he said that he needed an offer letter for the following Tuesday 21 October which was the date of the dinner referred to below.

54. On **20 October**, Ms Staveley, who was still in Abu Dhabi, met HE Jasim Hussein Al-Nowais ("Mr Al-Nowais"), an Emirati businessman who was head of WAHA Capital a UAE-listed investment company, and also a board member of ADIC, the Abu Dhabi Investment Council. She then met Mr Jassim and David Forbes at IPIC's offices. Mr Forbes was an adviser to Mr Al-Qubaisi and also a director of IPIC's Strategy Department. GSI was also there. Among other things, there was a discussion about obtaining 5-year warrants. Ms Staveley later met again with Mr Al-Nowais. She later spoke with Mr Jenkins on the telephone. There is an issue about that conversation as well as whether a later characterisation of it by Mr Jenkins is correct.

55. On **21 October**, Barclays' Capital Credit Committee ("the BCCC") convened at short notice to approve the Loan in the sum of £300m for one year with an option to extend for 6 months. No structure, term sheet or pricing was produced which is why the BCCC's agreement was in principle. The reason why it met then is because in the evening, Mr Varley, Mr Jenkins and Mr Kalaris were all to have dinner at Mr Jenkins' house with the Qataris, including Sheikh Hamad. This was the "senior management meeting" with Sheikh Hamad "later today" referred to in the minutes. On this occasion, the BCCC also considered Project Tinbac which was a proposed financing of Qatari oil production. However, before the BCCC met, Mr Jenkins had emailed Mr Jones just after 2 p.m. to say that "we all feel we have to do 2bn firm". There is no evidence that this intention, or desire, was put before the BCCC. According to Mr Jenkins, the "we" was Mr Varley, Mr Diamond and himself.

56. In a telephone call later that afternoon between Mr Jones, Mr McDonald and Cyrus Ardalan ("the McDonald/Ardalan Call"), at about 5.30pm, there was the following exchange:

> "STEPHEN JONES: Sorry. Just between the three of us for what I've just been talking to Jean-Marc about, is that Roger has gone to John Varley and Bob Diamond on the $2bn unsecured for Qatar, and said, "I'm sorry but we can't do a $500m hold, Best effort is a $2bn deal". It's pathetic. And John Varley said, "I agree". So, we're giving them $2bn, full stop.
> FERGUS MCDONALD: So, say that again. What was the option? We're underwriting $2billion?

STEPHEN JONES: Yeah. Full stop.
FERGUS MCDONALD: Bloody hell. Okay.
STEPHEN JONES: And that's been taken by the Group CEO and will probably be booked in some way shape or form a group. So,
FERGUS MCDONALD: Right, this is—nothing we can do about that.
STEPHEN JONES: Credit Suisse are also apparently giving them two bn.
FERGUS MCDONALD: lt's great isn't it, how they give us money and then we just sort of give it back to them.
STEPHEN JONES: Oh, be careful about that. You have to say that in the right way. I'm asking for an express use of proceeds clause in respect of our $2bn to indicate it's being used for subscribing in CS, or something like that.
FERGUS MCDONALD: I think it's something we need to be very careful about if both banks are doing it. Okay…"

57. The draft terms and conditions of the Loan stated that the borrower was "Qatar Entity [to be agreed/discussed]" and the Purpose of the loan was said to be "[general corporate purposes-to be discussed]."

58. In a telephone conference with Mr Jones and others, Peter Bulbrook (Managing Director, Global Loans Department at BarCap) said he did not honestly know what he would say to the other participating banks about the purpose of the Loan. While Barclays made a decision because it had to, and had no choice, other banks would question that very very hard.

59. The dinner took place later, and followed an earlier meeting between Mr Jenkins and Sheikh Hamad.

60. On **22 October**, Mr Boath, Mr Jenkins and others met with Dr Hussain at Barclays' Brook Street office. There was a presentation on what by now had become the RCIs and there was then a further discussion between Dr Hussain, Mr Jenkins and Mr Boath alone. Dr Hussain had been complaining that the Qataris had lost out over their investment in CR1 because they ended up paying almost all of their commitment and the Barclays share price had significantly dropped since then. By that stage, they were seeking a 14% coupon on the RCIs (which materialised) and a further total sum of £600m; Barclays had offered £120m. This information was contained in handwritten minutes of the Board Finance Committee ("BFC") which met later the same day.

61. Meanwhile, in the morning, Ms Staveley had another meeting with Mr Forbes. Later the same day Mr Forbes sent an email to Ms Staveley which stated that:

> "we have concluded that Barclays is beyond saving, and accordingly IPIC will not pursue an investment in either preferred or common stock in this company. We wanted to share this conclusion with you immediately."

62. However, it is common ground that Sheikh Mansour was still interested in the investment in his personal capacity and Mr Forbes was to continue to analyse it for him.

63. At 8.30 a.m. on **Thursday 23 October** Mr Jenkins, Mr Jones, Mr Boath and Iain Abrahams (Deputy Head of Structured Capital Markets at BarCap), presented the concept of the MCNs to Mr Varley, Mr Lucas and Mr Kalaris. The concept was agreed and Mr Jenkins and Mr Boath then met Dr Hussain later in the morning at Claridges to discuss the MCNs. At 1 p.m., Mr Jenkins met with

Sheikh Hamad and Sheikha Hind (another member of the Qatari ruling Al Thani family) in order to discuss the Qatari investment.

64. At around 2 p.m., Mr Bottine emailed Mr Bulbrook and Jean-Marc Lejeune (Head of Financing Solutions Group of the Middle East at BarCap) to say that Mr Jenkins wanted to know the price of the Loan. Shortly afterwards, Mr Lejeune emailed Mr Bulbrook to say that Mr Jenkins was "chasing us".

65. At 5 p.m., Ms Staveley met with Mr Jenkins and Mr Jones at Mr Jenkins' house. According to her, in the course of discussing the position of the Qataris, Mr Jenkins stated to her that PCP and Qatar would be getting "the same deal", this therefore being the first occasion on which the SDR was made. Also according to her, she said that PCP would require £3bn worth of warrants if it was to subscribe. In dealing with that, Mr Jenkins said (according to her) that if so, the warrants would have to be "split" between PCP and Qatar as that would be the "rule".

66. At this meeting, Mr Jenkins and Mr Jones gave to Ms Staveley a "strictly private and confidential" document dated 23 October (" the Presentation") and headed:

> "Project Mandolin.
> Presentation to HH Sheikh Mansour Bin Zayed Al Nahyan"

67. The first page sets out a summary of the "investment proposal" as follows:

> "Avocet [i.e. Abu Dhabi] will subscribe for a £3bn capital raising by Mandolin [i.e. Barclays] Bank plc in the following form:
> £2bn Mandatory Convertible Loan Stock ("MCNS"), providing
> Fixed rate cash flows of Libor + [250] basis points until 30 June 2009
> Mandatory conversion on 30 June 2009 in 2 Mandolin shares at a price to be set at a discount to current share price
> If the issue of shares is not approved at an EGM, expected to be on 20 November 2008, the MCLS will be redeemed at [102%] of face value
> £1bn Reserve Capital Instruments ("RCI"), providing
> Fixed rate cash flows of [14%] per annum for 10 years
> Unless call after 10 years, floating-rate quarterly cash flows of Libor plus [1330] basis points".

68. There are three different annotated versions of the Presentation although its own text is the same in each case. The first is the one Ms Staveley had at the meeting. The second is the copy which she says she faxed to Sheikh Mansour and the third is the copy which Ms Staveley gave to Mr Eadie on 24 October. It is not necessary to set out the annotations at this stage. The Presentation itself made no reference to warrants.

69. The meeting at Mr Jenkins' house had finished by about 7 p.m. Subsequently, after Mr Jenkins had contacted the Qataris saying that he "may have something", a meeting with Sheikh Hamad was organised to take place shortly afterwards at the Dorchester Hotel where Mr Jenkins arrived just before 8 p.m. Following further discussions Mr Jenkins emailed Mr Varley, Mr Diamond and others to say that the Qataris wanted to keep the RCI coupon at 14% and have warrants as well, which he

said was too much of a premium over government yield and would be at a 17/18% cost. They had also offered a 20% discount from the current price for the MCNs which is what was being proposed for the EGM. Mr Jenkins then said this:

> "For their efforts on procuring Sheikh Mansour we offer a fee of 4% on the total package of 5b[n] But he isn't there on this proposal"

70. At 9.15 a.m. on **24 October** Mr Jones sent to Ms Staveley separate term sheets for each of the MCNs, RCIs and Warrants. At about 10 a.m., Mr Boath and Mr Abrahams met with the QIA (being Mr Al-Sayed and a Mr Althawadi) and a lawyer from Latham & Watkins ("L&W") which was acting for the Qataris. There was at that stage no resolution to the legal issues which had by then arisen.

71. Later that day, there was a consultation with Michael Todd QC pursuant to instructions given to him by Clifford Chance, acting for Barclays, to consider various matters. The Note of that consultation records, among other things, the following:

> "3. **COMMISSIONS**
>
> 3 .1 **Section 97 of the Companies Act 1985**
>
> Section 97(1) of the Companies Act 1985 provides that it is lawful for a company to pay a commission to any person in consideration for subscribing or agreeing to subscribe for any shares in the company, or procuring or agreeing to procuring subscriptions for any shares in the company provided that certain conditions are met.
>
> The condition set out in section 97(2)(a) of the Companies Act 1985 requires that "the commission paid or agreed to be paid must not exceed 10 per cent of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is the less".
>
> It is proposed that Q would be paid a finders fee for procuring other institutional investors to participate in the bond issue. The applicable exchange ratio under the bonds is expected to be a [20]% discount to the pre-bond issue closing share price. Instructing Solicitors consider that the maximum amount of the finders fee to be paid to Q would be 10% of the price Q paid for its ordinary shares in B as calculated in accordance with the bond exchange ratio.
>
> **Would Counsel be concerned if BB were to pay the commission in respect of the issue of B shares or does Counsel consider that the commission could only lawfully be paid in accordance with section 97 by B itself?**
>
> *Counsel was uncomfortable with BB paying the finders fee to Q. Accordingly, Counsel considered that, the finders fee must be paid by B (as the issuer of the shares) to Q in order to fall within the lawful commission payment provisions of the Companies Act 1985……*
>
> *Counsel stated that great care would need to be taken in determining the quantum of the finders fee. The maximum amount that could be paid as a finders fee or commission in respect of the issue (to Q and/or anyone else) is 10% of the value of the B shares based on the value of the consideration (ie. the market value of the bonds) at the time of allotment of B shares on exchange. Accordingly, it would not be possible to know what figure would constitute the 10% limit at the time of signing binding documents to effect the issue, the time at which it was intended, to agree and pay the fee. Counsel suggested that ensuring that the fees were well within the expected limit would be a practical way forward.*
>
> *Instructing Solicitors proposed that an initial fee that was well within the anticipated limit could be paid, and topped up with the remainder at the time the shares are in fact issued, to the extent required. Counsel agreed that the finders fee could be paid in tranches in this way. Counsel's view was that the "price at which the ordinary shares of B are issued" for the purposes of calculating the 10% limit must be the "value of the consideration" set out in the section 103 report.*
>
> 3.2 **Co-operation agreement**
>
> The Proposal includes BB entering into an agreement with Q on an arm's length basis pursuant to which the parties would agree to further their mutual business interests in a particular region. Instructing Solicitors' views is that, provided the co-operation agreement is on normal commercial arm's length terms and provides a bona fide corporate benefit to BB, it is irrelevant for the purposes of unlawful financial assistance or commissions. **Does Counsel agree?**

> *Counsel agreed that if there were any co-operation agreement between Q and BB on normal commercial, arm's length terms providing corporate benefit to BB this would not be problematic for the purposes of unlawful financial assistance or commissions…*"

72. In the evening, Mark Harding, Barclays' Group General Counsel, spoke to Patrick Sarch of Clifford Chance. According to his manuscript notes, he had told him that there was a proposal to pay the Qataris "£120m approx."…"quite separately and not connected" and "not for the capital raising". In an email to Matthew Dobson, Barclays' Senior Legal Counsel, Mr Harding said that he had spoken to Mr Sarch who was comfortable with a separate fee being paid for:

> "other services rendered or in respect of other transactions on the basis that they would be on a normal commercial basis and not connected with the capital raising (albeit they did result from the overall relationship). I explicitly mentioned that the arrangement fee might be £65m. I also mentioned that the other fees might be at the level of 120m."

73. Meanwhile, and just after 3 p.m. on the same day, Mr Jenkins spoke with Ms Staveley. According to her, he told her that the Qataris were likely to invest less than £3bn but otherwise the deals would be the same in all other respects. This is what PCP characterises as the second occasion on which the SDR was made.

74. A little earlier, the Qataris had told Barclays that they were walking away from the deal. According to Mr Varley, he later telephoned Sheikh Hamad to seek to persuade him otherwise. He also says that he spoke to him again in the evening.

75. On Sunday **26 October**, there was a Barclays Board meeting.

76. On the evening of **27 October**, just before 11 p.m., Mr Dobson sent the following email to Mr Boath, Mr Jones, Judith Shepherd, Barclays' Deputy Group General Counsel and Victoria Hardy, another Barclays' Senior Legal Counsel:

> "There is as yet no mention of commissions in the subscription documents. We probably ought to start putting on paper for the deal teams at the investors what we expect to see in Thursday morning's signed docs. May we go ahead and do that?
> Secondly, we have not seen but will need to review whatever agreement is being produced to deliver Q value for services to be supplied by Q. When can we expect this document, or is it one that we should draft and, if so, can we have instructions during Tuesday, please?"

77. However, at 8.53 a.m. the following day, **28 October**, Mr Dobson sent a further email as follows:

> "Just to clarify, we in group will not draft or review any contracts for services - there will just be the 2% RCI and 4% C-bond commissions plus the £65m arrangement fee (the latter will for Companies Act purposes be classified as an additional element of Quail's equity-linked commission to be disclosed on a Companies House form 97). Any other contract is essentially a BAU [business as usual] matter".

78. In the event, instructions were sent to Jonathan Hughes, BarCap's Global General Counsel based in New York to draft what became ASA 2.

79. On the same day, there was a due diligence meeting at Clifford Chance with representatives of both PCP and the Qataris attending.

80. On **29 October**, Mr Jenkins instructed Mr Jones to prepare loan documentation on the basis of a £2bn loan. Later on, at about 6.30 p.m., he told him that the loan was now to be $3bn and a revised term sheet should be prepared. Mr Jones called Mr Hatton and said that "the bad news is that Varley and Jenkins have agreed that we'll go to $3bn". He later told Mr McDonald the same thing. At 10.33 p.m. Mr Jones sent to Mr Jenkins the updated loan documentation "as requested by you and John Varley. We will endeavour to expedite formal credit approvals tomorrow." The subject line said "State of Qatar: $3bn or equivalent unsecured facility".

81. There was also a telephone conversation between Mr Varley and Mr Jenkins and Sheikh Hamad. He said that the fee he wanted was now £185m and not £120m. Mr Jenkins and Mr Varley then spoke to Ms Staveley later on in the evening.

82. In the morning of **30 October**, Mr Jenkins was told that Dr Hussain was revisiting the numbers agreed with Sheikh Hamad with there now being a need to get to a blended share price of 130p if one took both CR1 and CR2 together, from the point of view of Qatar. There was further contact between Barclays and the Qataris during the day.

83. At one point Mr Al-Sayed emailed Mr Jenkins thus:

> "Roger, just spoke to HE. S Hamad, he asked me to confirm with you that no one including Abu Dhabi will be treated better than QH if not already QH has a better treatment in the terms of the new investment in Barclays bank! Please confirm. Regards, Ahmad"

84. Mr Jenkins replied:

> "That is correct. But we really need to be closed tonite abu dhabi is done and ready to go"

85. In the meantime, there was an issue at BarCap as to the identity of the beneficial owners of the SPVs which, by then, Barclays knew would be the subscribing entities. Mr Eadie had informed Nicola Bush at Barclays' legal department that the SPVs would at the date of signing be wholly-owned by PCP, with an agreement to introduce IPIC into the ownership as part of the arrangements to finance completion. The reaction of Mr Harding to this, copied to Mr Jones and Mr Boath was:

> "Discussed with John/Roger. This does NOT work. We need to push back urgently. For purposes of presentation and certainty of funds, we cannot have this. We need IPIC to be on the hook and named ie signing or committed and therefore presented to the world as the subscriber. Can the appropriate person please push back firmly asap. Roger very clear on this."

86. Mr Jones later left a message for Mr Eadie that the bank needed IPIC to be the named committed subscriber and presented to the world as such. In the afternoon, Ms Bush received an email from Ms Friedman of Forsters LLP, the solicitors advising PCP on CR2. This said that:

> "Just to confirm, the directors for all three are Philip Burgin, Nigel Le Quesne and Amanda Staveley.
> As at signing the three SPVs are owned by Craig Eadie and Amanda Staveley in their capacity as PCP partners. In terms of your question as to whether the SPVs are wholly owned subsidiaries of IPIC or not, the principal finance provider will be introduced into the ownership structure following signing. It may not be IPIC but may be another controlled fund of His Highness's. The person or entity to be named in the announcement is being agreed between principals."

87. This message was passed to Mr Jenkins, Mr Jones, Mr Harding and Stephen Morse, BarCap's Global Head of Compliance, who said that Barclays would need to take a "leap of faith" here. In the event, Barclays requested that there be some assurance or comfort as to the provision of funds from Sheikh Mansour or some other Abu Dhabi sovereign wealth fund, to enable the subscription by the SPVs. What Sheikh Mansour was prepared to do was to permit Mr Jassim to write a letter which has been referred to as "the Jassim Letter" set out below.

88. Ms Staveley spent much of the day at the offices of Allen & Overy ("A&O") going through the details of the deal and making a number of telephone calls to various parties including to Mr Varley and Mr Jenkins, along with Mr Al-Qubaisi and Sheikh Mansour. Mr Jassim attended the offices at some stage. He says that there were calls between Ms Staveley and him on the one hand and Sheikh Mansour on the other to discuss, among other things, what became the Jassim Letter.

89. Meanwhile, at 2 p.m., the BCCC and Barclays' Group Credit Committee ("GCC") approved the Loan now set at $3bn and for 2 years. The period of 2 years (rather than the originally agreed 18 months) had come about just before the 2 committees met. At 1.34 p.m., Mr Jenkins emailed Mr Jones to say "Want two years now!". The minutes provided as follows:

> "Committee was asked to consider a request for a loan to the Government of Qatar of US$3bn (or equivalent in Euros) for a period of 2 years with sell down to a hold position of US$500m to be undertaken on a best efforts basis. The proposal cannot be accommodated within the existing country limits and therefore an increase in country exposure to CLGD£750m was also requested. This level of limit is within Prudential Guidelines.
>
> It was noted that Qatar is a strongly rated country due to the considerable revenues from oil and gas. The loan is being requested due to the significant demands on the State's budget. Heavy investment is being undertaken to expand the country's output of oil and LNG and there is a commitment to recapitalise the Qatar banking system with US$5bn, the adequacy of which is unknown. In addition Qatar is expected to subscribe for additional capital being raised by Credit Suisse and Barclays. Committee agreed that the creditworthiness of the Government of Qatar supported a facility of US$3bn. It was also noted that there is another transaction in the pipeline to a Government owned entity (Project Tinbac) which could increase exposure by a further US$2bn and is on a secured basis.
>
> As the Government of Qatar is considering providing Barclays with additional capital concerns were expressed relating to the compliance issues of providing the proposed loan at such a time. In this respect it was noted that the loan would not permit proceeds to be used to fund the purchase of Barclays shares or any instrument convertible into Barclays shares. Compliance advised that the restriction on the use of funds should be an undertaking which if breached would be an event of default.
>
> Committee enquired who the exact counterparty would be and was advised that this had yet to be decided although it was expected to be the Ministry of Finance with the loan agreement being signed by the Minister. It was noted that the counterparty will not be the Qatar Investment Authority which is the entity expected to subscribe for capital in Barclays.
>
> Committee enquired as to the likelihood of selling the loan down to US$500m and enquired whether the loan could be underwritten with another bank. Global Loans advised that in the current market conditions syndication was not possible particularly for an unsecured facility, although market flex language is to be considered. It was noted that Project Tinbac is being structured as a Pre-Export Finance ("PXF") facility secured on oil revenues which Committee considered to be a preferable structure. Committee therefore agreed that for every US$2bn of funding raised by the PXF, then US$1bn must be applied in reduction of the proposed unsecured facility. Whilst there is a danger that the PXF could be undertaken by another bank to avoid prepayment of the unsecured facility, this was considered unlikely given the advanced nature of discussions which includes a hedging strategy.
>
> The margin on the loan at 225bps was based on a one year facility and is in line with CDS pricing, however Global Loans advised that no discussions have taken place with the client and pricing will need to reflect a two year commitment.

> In conclusion, GCC sanctioned the proposed unsecured loan facility subject to:
>
> Borrower being the Ministry of Finance or equivalent.
> A restriction on the use of funds as an undertaking in the Loan documentation.
> The facility to be reduced by US$1bn with every US$2bn raised with Project Tinbac.
>
> The Committee also provided an agreement in principle to proceed on Project Tinbac for US$2bn."

90. In addition, Mr Forbes gave evidence that there was a telephone conference on the same day between him, Ms Staveley, Mr Jassim, Mr Varley and Mr Lucas together with some Barclays lawyers and representatives of Goldman Sachs. This is disputed by PCP.

91. At about 9 p.m. that evening there was a call between Mr Varley, Mr Jenkins and Dr Hussain. Mr Hughes had by now drafted ASA 2 but with the figures left blank. The outcome of the call was that Barclays agreed to increase the amount to be paid to Qatar to £280m, an increase of £95m from the previous agreed figure. Mr Jenkins later told Mr Abrahams to add the £280m into ASA 2 which duly happened.

92. Finally, Mr Eadie had received a copy of the draft announcement to be made by Barclays the following day. He says that he spotted a reference in it to £66m to be paid by Barclays to QH being a fee for "having arranged certain of the subscriptions in the Capital Raising." At that point, the only potential subscribers apart from the Qataris were Sheikh Mansour or some other Abu Dhabi entity (through the SPVs) and the Libyan Investment Authority ("LIA") although by 31 October the latter was out of the picture. The issue of other potential subscribers forms part of a heavily disputed matter concerning the £66m and the alleged JR referred to above.

93. On **31 October**, there was a meeting at Barclays' offices between Mr Jenkins, Mr Varley, Ms Staveley and Mr Jassim. At one point there was a call between Mr Varley and Sheikh Mansour who was hunting in Kazakhstan at the time. In addition, according to Ms Staveley in her witness statement ("WS"), Mr Jenkins took her aside at some point to tell her that the £66m fee referred to in the draft announcement was in fact money due to the Qataris from Barclays in respect of CR1 (as opposed to CR2) payment of which had been overlooked. In the course of her oral evidence, that particular account changed and the challenge to her evidence on this topic forms part of a more general challenge by Barclays to her credibility. But in addition, Ms Staveley says that as part of her conversation with Mr Jenkins, she asked whether the deal was the same on the other side to which he said "it's the same deal" and this is the third occasion on which the alleged SDR was made.

94. Three critical documents emerged on Friday 31 October. The first was the Announcement. This set out the subscription by the Qataris and the SPVs for the Instruments which I have described above. The subscriber for the RCIs is described as:

> "… Entities representing the beneficial interests of… Sheikh Mansour… A member of the Royal Family of Abu Dhabi (" HH Sheikh Mansour Bin Zayed Al Nahyan")."

95. Thereafter in the Announcement the investor from the Abu Dhabi side is described by reference to the defined description, in short, Sheikh Mansour. The definition of the £66m fee to QH remained as in the draft.

96. A second document is the Jassim Letter dated 31 October 2008, addressed to Barclays and signed by Mr Jassim. It reads as follows:

> "Dear Sirs,
> I understand that Barclays intends to raise in excess of £6.5bn of Tier 1 Capital (as announced by Barclays on 13 October 2008) and that it will announce on 31 October 2008 that it is raising between £7b and £7.5b by way of the issue of Reserve Capital Instruments (RCIs) (to be issued together with Warrants) and of Mandatorily Convertible Notes (MCN5).
> PCP Gulf Invest Limited 1, PCP Gulf Invest Limited 2 and PCP Gulf Invest Limited 3 (together the PCP Vehicles) are newly created vehicles which have been established for the purpose of subscribing for RCIs, Warrants and MCNs, as further described in the announcement to be released by Barclays on 31 October 2008.
> I confirm that HH Sheikh Mansour Bin Zayed Al Nahyan has authorised and instructed me to confirm to you that he will procure that the PCP Vehicles will be fully funded in order to meet their obligations to subscribe for the RCIs, Warrants and MCNs.
>
> Yours sincerely.."

97. The third is ASA 2 signed by Mr Jenkins for Barclays and Mr Al-Sayed for QH, which provides as follows:

> "For the attention of: Mr Ahmad Al-Sayed
> Dear Sirs
>
> Advisory Services Agreement
>
> We are extremely pleased and honoured to be writing to you In relation to an extension of the advisory agreement between our two institutions dated 25 June 2008. This is in recognition of the great success of the agreement to date, and the enormous benefits we have derived from your assistance and introduction to business opportunities.
> The terms and conditions of the 25 June 2008 advisory agreement continue in full force and effect, subject to the variations set out in this letter.
> You agree to continue to provide various services to us as an intermediary, in addition to those set out in the 25 June 2008 agreement. You may provide some or all of these services in association with Challenger Universal Ltd. These services include, though will not be limited to (i) the development of our business in the Middle East; (ii) the furtherance and execution of our Emerging Markets business strategy; (iii) the expansion of our global commodities business; (iv) referral of opportunities in the oil and gas business sectors; (v) introduction of infrastructure advisory and financing opportunities; and (vi) introduction of potential investors, clients or counterparties interested in conducting a variety of business with us. You will provide these services over a period of 60 months from the date of this letter. In return, we will pay you 20 equal quarterly instalments of £14m, the first within three months of the date of this letter, and the last on 31 October 2013.
> We have discussed in detail the type and scale of services that you will provide in order to deliver the additional value to us in exchange for this further fee and we know that these will need to be refined by mutual agreement during the period in which you will provide the services. Both parties will continue to monitor and review this arrangement and act in good faith in connection with the formulation and arrangement of the services to be provided.
> This letter and the arrangements contemplated by it will be governed by English Law."

98. In addition, PCP issued its own press release as follows:

> "31 October 2008
> Issued on behalf of PCP Gulf Invest:
> Investment in Barclays PLC
> Further to the announcement made by Barclays PLC today, PCP Gulf Invest confirms on behalf of His Highness Sheikh Mansour Bin Zayed Al-Nahyan, that His Highness is acquiring a significant investment in Barclays PLC in a personal capacity.
> The following quotations are provided:

> Ali Jassim, an adviser to His Highness Sheikh Mansour Bin Zayed Al-Nahyan, said:
>
> "We are pleased to have been able to secure this strategic investment in a major financial institution."
> Amanda Staveley, Chief Executive of PCP Gulf Invest, added:
>
> "We are delighted in becoming a significant shareholder in Barclays and to be investing in its future growth."
> Goldman Sachs International acted as exclusive financial adviser to PCP and entities representing the beneficial interests of His Highness Sheikh Mansour Bin Zayed Al-Nahyan.
> Goldman Sachs International, which is regulated in the United Kingdom by the Financial Services Authority, is acting exclusively for PCP Capital Partners LLP and no one else in connection with the investment and will not be responsible to anyone other than PCP Capital Partners LLP for providing the protections afforded to clients of Goldman Sachs International nor for providing advice in connection with the investment or any other matters referred to in this announcement.
> Media Enquiries:
>
> Amanda Staveley — David Bick/Mark Longson
> PCP Gulf Invest… — Square 1 Consulting…"

November 2008

99. On **1 November**, Mr Jenkins asked Mr Jones to get the loan "wrapped" that week. The draft mandate letter and term sheet came on the **2 November**. Mr Jones said that it was important that the borrower not be QIA so as to make clear that there was "no connection between the actions of the weekend between QIA and Barclays, and this facility."

100. On **3 November**, Mr Al-Sayed emailed Mr Jenkins to say:

> "Hi Roger,
> Since we closed safely the raise of around £7bn new capital for Barclays, I will suggest to move immediately to the second deal which is the New 3bns facility.
> Can please let someone from your team to start follow with me on this.
>
> Regards, Ahmad"

101. On **5 November**, Ms Staveley had a meeting in London with GSI. Later on, she travelled to Dubai, landing in the morning of 6 November. She spoke with Husnu Okvuran, Managing Director of GSI's Investment Banking Division that day. He reported that Ms Staveley would be seeing "Sheikh Mansour's people in Abu Dhabi on Saturday" which would be 8 November. She had dinner that night with Prince Turki of Saudi Arabia and Mr Al-Hamwah.

102. On **7 November**, she spoke to Wassim Younan, GSI's CEO, Middle East and North Africa. He reported that a meeting "tomorrow" [i.e. 8 November] with Sheikh Mansour had not yet been fixed but she was trying to meet him to discuss a variety of subjects.

103. According to Ms Staveley, she attended a "*Majlis*" reception hosted by Sheikh Mansour at the Royal Palace in Abu Dhabi in the evening of **7 November**. She says that she had a discussion with Sheikh Mansour about the investment in Barclays going forwards and what PCP would receive by way of a fee. Her proposal was that PCP should have a "carried interest" of 10% in each of the 3 SPVs which were subscribing for the 3 different Instruments, alternatively a profit share, being 20% of the net returns after repayment of the initial investment and other expenses. Sheikh Mansour wanted there to be a 5% "hurdle" return on the investments after repayment of the original capital before

PCP's profit share would take effect. PCP was also to raise debt (i.e. loan finance) for 65% of the investment. Sheikh Mansour told Ms Staveley that he liked the proposal and asked her to speak to his lawyer. Barclays denies that any of this happened.

104. Also on **7 November**, Barclays gave notice to shareholders of the EGM to take place on 24 November. It was accompanied by a detailed letter from Marcus Agius, the Chairman of Barclays, recommending adoption by the shareholders of the elements of CR2 set out in the Announcement.

105. On **9 November**, Ms Staveley and Omar Hassanyeh, a consultant to PCP, met with Mr Al-Qubaisi, Mr Forbes, Mr Al-Hashemi (who also worked at IPIC) and Mr Jassim. GSI representatives were at the meeting also.

106. Also, by 9 November, Qatar said that the Loan must be "bilateral", in other words it could not be syndicated by Barclays and so would be a straight loan from Barclays to Qatar. Mr Jones told Mr Lejeune in a telephone call that "fundamentally and strategically" Barclays had to do this and had agreed to. He also said that every time the Qataris spoke, they asked for something more.

107. On **10 November,** Mr Forbes emailed Ms Staveley thus:

> "Dear Amanda and Ali,
> Further to our conversation of yesterday, Khadem has just confirmed that he does not envisage any requirement for PCP to be an equity investor in Project Mandolin.
> Best Regards Dave"

108. On the same day, Mr Jenkins made contact with Ms Staveley. Barclays' institutional investors were expressing some discontent with the proposed deal as set out in the Announcement, which meant that some adjustment to what Qatar and the SPVs were to receive had to be made to appease those investors. The eventual result was that Qatar and the SPVs agreed to release £250m worth of the £1.5bn worth of RCIs which they were each going to take. This would allow £500m worth of RCIs to be offered to institutional investors which is why the SPVs, ultimate investments was £3.25bn, and Qatar's investment was £2.05bn.

109. On **11 November**, Mr El-Khair, an adviser to the Qataris, told Mr Jones and Mr Lejeune that they needed the money from Barclays on Monday 17 November.

110. On **12 November**, Ms Staveley went to the offices of Dr Al-Mehairi of Emirates Advocates, Sheikh Mansour's local lawyer but who had also done work for Ms Staveley previously. She first had a discussion with Dr Al-Mehairi and Abdulazziz Al-Hamwah, CEO of Modern Mining, a Saudi Arabian company founded and owned by Prince Turki, a member of the Saudi Arabian Royal Family. According to Ms Staveley he was willing at that point to invest up to £500m by way of equity in Barclays. She says that she then had a discussion just with Dr Al-Mehairi about her

agreement with Sheikh Mansour which led to the typing up in Arabic of a draft agreement that has been referred to as the Heads of Terms. As translated, it reads as follows:

"**EMIRATES ADVOCATES**

[Logo:] Emirates Advocates & Legal Consultants

DRAFT **Date:** 12/11/2008

Principal terms for the Barclays investment

1) Financing requirements

a) Investment:
£2bn - MCN

£1.5bn - RCI

£1.5bn - bonds

Financing required: £3.5 billion

b) PCP undertakes to obtain debt financing from other parties amounting to not less than 60% of the required financing (£2.1 billion) without recourse.

c) Both the Sheikh / Abu Dhabi will work to provide the balance of3.5 billion (up to £1.4 billion).

2) Fees:

a) Barclays will pay £110m in fees between MCN and RCI.

b) These fees shall be used to settle the deal costs relating to other parties (e.g. Goldmans, lawyers) and the remainder of the fees for the deal will be split by agreement.

3) Exit:

On exiting from the investment, PCP will receive either 10% of the total investment or 10% of the net profits, whichever is greater, as follows:

a) In both cases, bank debt + fees and interest will be settled first.

b) PCP's share will be either:
(i) £350m (10% of the original investment) plus 10% of the profits from the sale of the investment
or
(ii) 20% of the net returns, after settlement of:
- bank debt + interest + fees
- Abu Dhabi's original investment
- Abu Dhabi's previous return on investment at an agreed annual rate (5%).

c) The balance of the returns is for Abu Dhabi.

Note: Abu Dhabi will control the exit procedures in consultation with PCP"

111. Barclays does not suggest that this document is inauthentic in the sense of being constructed by Ms Staveley after the event while purporting to be contemporaneous. Rather, it suggests that even if made on 12 November it was in truth nothing more than a negotiating document which might thereafter be presented to Sheikh Mansour for discussion - it did not in any sense represent an agreement (whether in principle or otherwise) already made or canvassed with Sheikh Mansour.

112. In the afternoon of the same day, Mr Forbes emailed GSI, copied to Mr Al-Qubaisi, as follows:

"I know you are just off a flight but I have some very important, confidential and sensitive news to convey to the GS team on behalf of HE Al-Qubaisi. Would you kindly relay this message (on a strictly need -to -know basis) the relevant GS colleagues (and any other advisers being coordinated by GS) who are working on Mandolin. The key information I have been requested to convey on behalf of HE Al-Qubaisi is as follows:
The sole personal representative of HH Sheikh Mansour Bin Zayed Al Nahyan in connection with Project Mandolin is HE Khadem Al-Qubaisi, IPIC's Managing Director. All press releases, or other information

intended for (or likely to reach) the public domain, which are originated by/contributed to by GS, and which refer directly or indirectly to HH Sheikh Mansour/Mandolin, should be coordinated through the office of HE Al-Qubaisi.

HE Al-Qubaisi will from this point onwards personally lead all further discussions and negotiations on behalf of HH Sheikh Mansour with Barclays' Board and top management. This revised process will be initiated by a conference call intended to be scheduled tomorrow involving the Chairman and CEO of Barclays, and HE Al-Qubaisi on behalf of HH Sheikh Mansour."

113. Meanwhile, back in London, Linklaters were instructed to advise about the Loan because of concerns as to unlawful financial assistance. Later that day, Mr Jones told Mr Lejeune that he needed to tell Mr El-Khair that a representation would be needed that the proceeds would not be used to purchase Barclays shares.

114. There was also that afternoon a further joint meeting of the BCCC and GCC. The minutes record that they were to consider a revised proposal where the borrower was to be the Qatari Ministry of Finance. There was to be no syndication and no partial repayment of the Loan through the proceeds of Project Tinbac. It was noted that the loan would be used for the "general budgetary needs of the Qatari government. The Qatari government has recently committed $5bn to recapitalise its banks and will also need £2-3bn to support a likely bid to acquire Gatwick Airport in the UK". The instruction to Linklaters was noted in the light of the subscription in CR2. It was noted that Linklaters had asked for the following in the "purpose" clause of the loan document, namely that "the Qatari authorities could show that they had an alternative financing source for their subscriptions, that the use of the proceeds was specifically identified within the loan documentation and that the use of the loan would not leave Barclays in breach of section 151…"

115. Linklaters later emphasised the importance of those points to L&W and BarCap.

116. On **13 November**, Linklaters resigned. According to Mr Jones, they had done so "ostensibly on conflict grounds. Clearly very concerned about being able to control where the cash ends up. We are seeking to get CC instructed." Clifford Chance were duly instructed.

117. Also, GSI discussed internally the email from Mr Forbes set out at paragraph 112 above, referring to Ms Staveley as being "sidelined" and now knowing "the new rules of engagement". The following day Mr Forbes sent an email to GSI asking also to include Ms Staveley "of PCP fully in the loop". Quite what was going on here and what was motivating Mr Al-Qubaisi is a matter of dispute between the parties.

118. On **17 November**, the written agreement for the Loan was executed and the $3bn drawn down that day. The Loan contained the following terms:

"**3. PURPOSE**

3.1 Purpose

(a) Subject to paragraph (b) below, the Borrower shall apply al! amounts borrowed by it under the Facility for all or any of the following purposes:

(i) Investing or expenditure in the Qatari banking system or Qatari Financial System or other investments in Qatar;

(ii) investing or expenditure in the oil, gas and petrochemical sectors and energy-intensive manufacturing industries;
(iii) investing or expenditure in the development of the Qatari financial services sector;
(iv) investing or expenditure in Infrastructure, health and education projects in Qatar;
(v) investing In Qatar Foundation projects; and
(vi) such other purposes as may be agreed by the Lenders from time to time.

(b) The Borrower shall not apply any amount borrowed by it under the Facility directly or indirectly:

(i) for the purpose of acquiring shares in, or instruments that are convertible, exchangeable and/or exercisable into shares in, the Original Lender or any Holding Company of the Original Lender;
(ii) for the purpose of reducing or discharging any liability incurred by any person where such liability was incurred for the purpose of a person acquiring shares in, or instruments that are convertible, exchangeable and/or exercisable into shares in, the Original Lender or any Holding Company of the Original Lender; or
(iii) in any other manner which results in any Loan constituting unlawful financial assistance within the meaning of section 151of the Companies Act 1985 or any similar law or regulation in any other jurisdiction.

3.2 Monitoring

No Finance Party is bound to monitor or verify the application of any amount borrowed pursuant to this Agreement."

119. Those terms were not the same as had been mandated by the GCC and BCCC on 12 November. However, the revised terms were approved by the three members of the GCC following an email seeking their approval within 15 minutes mid-morning on November 17, which was duly done, and which therefore enabled the Loan agreement to be executed as drafted.

120. On **18 November**, Ms Staveley met with Mr Al-Qubaisi and Mr Jassim at IPIC's offices. In the course of that meeting, Sheikh Mansour joined by telephone and according to Ms Staveley confirmed the terms of the agreement discussed at the *"Majlis"*, but with the modification to 60% for the debt finance. This account is disputed by Barclays.

121. On **19 November**, Ms Staveley spoke to Mr Al-Qubaisi in the morning and according to her witness statement told him that she was meeting with JP Morgan ("JPM") later and that she was expecting "revised term sheets on the debt and financing offers from a number of banks that day." Later on, Deutsche Bank ("DB"), where Mr Attieh was then working, submitted an "Indicative no recourse financing proposal" in respect of the SPVs' investment ("DB1") and this was amended by the terms of an email sent later the same day following a meeting with Ms Staveley ("DB2"). Ms Staveley had had discussions with DB earlier in November.

122. On **20 November**, Ms Staveley received a call from Mr Al-Qubaisi who she said told her that IPIC had lost confidence in the deal and no longer wanted to invest. The potential value of that investment had decreased with the dropping share price (120p on that day). Later, according to her, Mr Al-Qubaisi said that Sheikh Mansour would not in fact pull out, as there would be too much reputational damage if he did. However, IPIC would now be responsible for funding the investment, but would not do so unless it had 100% ownership of the SPVs. PCP would not now receive its current 10% interest in those circumstances. Later that day Ms Staveley agreed to transfer ownership of the SPVs from PCP to IPIC. IPIC's lawyers, Shearman and Sterling, started that process that night.

123. On **24 November**, the transfer of the SPVs to IPIC was completed pursuant to a Sale and Purchase Agreement made that day ("the SPA"). Ms Staveley says that Mr Al-Qubaisi also said that IPIC would pay PCP a generous fee for the work which it had done.

124. On the same day, at the EGM, the relevant resolutions were passed by 85% of Barclays' shareholders. They had to secure at least 75% of the votes in any event. The support of the institutional investors like Legal & General was critical and in the end Barclays had persuaded them to come on board.

125. On **27 November** completion took place. Part of the subscription made by the SPVs came from recourse finance obtained by IPIC.

126. All £500m worth of the RCIs offered to existing shareholders as part of the "clawback" were taken up. As for the £1.5bn worth of MCNs offered to such shareholders, only £1.25bn worth were subscribed for.

2009

127. Following PCP's departure from the investment, there were negotiations between Ms Staveley, Mr Al-Qubaisi and others in relation to a fee for its work. This ultimately led to the making of a written settlement agreement in March 2009 pursuant to which a payment of £30m was agreed to be paid to PCP ("the PCP Settlement Agreement").

128. It is worth noting here what in fact happened to Barclays' share price at certain points in 2009.

2 January	145.03
30 January	98.01p
27 February	86.28
31 March	136.71
30 April	260.03
29 May	274.81
30 June	261.42
31 July	279.25

129. IPIC exited its MCN investments on 2 June after converting them into the 1.3bn shares. Credit Suisse sold them for IPIC at 265p per share, which was at a discount of 16% to the previous day's closing price. That still represented a profit before deduction of expenses and loan costs of over £1.3bn.

THE ISSUES

130. Part 2 of this judgment deals with liability. While causation and at least some loss are, strictly speaking, required before the tort of deceit is actionable, it is convenient to leave the questions of causation and loss, including the quantification thereof, to Part 3 of this judgment. In their submissions, the parties took essentially the same course. I describe the central issues of liability and then the central issues of causation and loss in Parts 2 and 3 respectively.

THE EVIDENCE

Live Witnesses

131. For PCP I heard from:

(1) Mr Eadie, as noted, a former partner in PCP LLP;

(2) Ms Staveley, as noted, the CEO and beneficial owner of PCP LLP which in turn owns or operates through a number of other corporate entities including PCP International Finance Limited;

(3) Ramez Attieh, now a management consultant based in Dubai, who was in 2008 Director, Corporate Coverage and Structured Finance at Deutsche Bank AG based in London; he later worked as a Managing Director for PCP between May 2009 and March 2011;

(4) Ali Jassim, the owner of an international consulting company called Goldbrook Advisory ("Goldbrook"), and a former adviser to Sheikh Mansour, as already noted; and

(5) Richard Chalhoub, a businessman with extensive interests in Abu Dhabi, Dubai, London and Paris.

132. For Barclays, I heard from:

(1) Mr Varley, Barclays' Group CEO from 2004 until 2010, as already noted;

(2) Mr Jenkins, Executive Chairman of BarCap's Middle East business between April 2008 and April 2009, holding other roles at BarCap before and afterwards, as already noted;

(3) Mr Forbes, a former employee of IPIC, as already noted;

(4) Victoria Hardy, a solicitor in the Barclays' Group General Counsel's office in 2008 and now its General Counsel for Group Centre;

(5) Ben West, an Assistant Director on the Global Convertibles desk at BarCap in 2008; he works now for Barclays Investment Services;

(6) Peter Bulbrook, a Managing Director in the Global Loans Team at BarCap in 2008, as already noted;

(7) Robert Bruce; formerly Barclays' Group Credit Risk Director at Barclays;

(8) Linda King, formerly Chief Credit Officer for BarCap, Chair of its Capital Credit Committee (as already noted) and a voting member of the Group Credit Committee;

(9) Stephen Jones, former Head of BarCap's Financing Solutions Group and Co-Head of Corporate Origination EMEA (Europe Middle-East and Africa), as already noted;

(10) Colin Minns, formerly of Global Financial Risk Management (GFRM) which was BarCap's credit risk department;

(11) Sir Richard Broadbent, Barclays' Senior Independent Director from 2004 and subsequently Chairman of the Board's Risk, Remuneration and Corporate Governance and Nominations Committees. He also attended its Finance Committee meetings from time to time; and

(12) Kenneth Griffin, former President and co-founder of BGR Capital and Trade.

Hearsay Notices

133. PCP served hearsay notices dated 17 April 2020 in respect of Mr Abrahams, Mr Boath and Gay Huey-Evans, Vice-Chairman of Investment Banking and Investment Management at BarCap from April 2008 to October 2010, and a notice dated 1 July in respect of Mr Hughes. Barclays did not apply to cross-examine any of them. The material produced all consisted of extracts from interviews with the SFO, the FCA and, in the case of Ms Huey-Evans, a WS made under the Criminal Justice Act 1967 which is dated 17 March 2014.

Expert Evidence

134. For PCP, I heard from:

(1) Anand Srinivasan, a partner in Delphinus Advisory Limited, a company providing analytic and expert witness support on banking disputes; prior to 2008, he held senior risk management positions in investment banks including Lehman Bros., BarCap, Deutsche Bank, CIBC World Markets and Chase Manhattan Bank; he has a BA in Engineering from the Indian Institute of Technology and an MBA from the Indian Institute of Management. He has produced four reports, dated 22 November 2017 ("AS 1"), 2 March 2018 ("AS 2"), 21 June 2019 ("AS 3") and 14 April 2020 ("AS 4");

(2) Dr Min Shi, a partner in Oxera Consulting LLP, an economics consulting firm which she joined in 2010. She has had teaching posts including at the University of Wisconsin-Madison and Queen's College Oxford, since 2001, holding a BA in International Economics from the University of Beijing and a PhD from Harvard University. She worked at another consulting firm before Oxera from 2005 to 2009; she has produced four reports, dated 22 November 2017 ("MS 1"), 2 March 2018 ("MS 2"), 21 June 2019 ("MS 3"), and 23 January 2020 ("MS 4"), with an Addendum to the latter on 15 April 2020 ("MS 5").

135. For Barclays, I heard from:

(1) Sekhar Bahadur, who owns a financial consulting company called Caranx Limited. He has previously held a number of investment banking positions at Salomon Bros., Johnston

Associates, Bankers Trust, Deutsche Bank and KKR Capital Markets Limited. He has an AB degree in Chemistry and an MBA from the University of Chicago. He has produced five reports, dated 9 October 2017 ("SB 1"), 21 December 2017 ("SB 2"), 2 March 2018 ("SB 3"), 24 May 2019 ("SB 4") and 6 September 2019 ("SB 5");

(2) Duncan Skailes, a partner in the London office of PricewaterhouseCoopers LLP and Head of its Corporate Finance Private Equity Team. He has a BA in Economics from UCL and is an FCA. He has worked in M&A and structuring private equity deals for over 25 years. He has produced seven reports, dated 27 September 2017 ("DS 1"), 22 December 2017, ("DS 2"), 2 March 2018 ("DS 3"), 30 May 2018 ("DS 4"), 25 May 2019 ("DS 5"), 6 September 2019 ("DS 6") and 17 April 2020 ("DS 7").

Particular evidential features of this case

136. There are a number of features of this case which pose particular challenges so far as fact-finding based on the account of lay witnesses is concerned.

137. First, although there are some important and direct disputes of fact between the parties where I have heard witnesses from both sides (most importantly on the discussions between Ms Staveley and Mr Jenkins) there are other disputes where one party has no direct evidence to rebut or deal with the other side's case. Thus, neither Ms Staveley nor anyone else from PCP was privy to Barclays' internal deliberations on and formulation of the ASAs and the Loan. PCP's challenges to them came in the form of cross-examination of the relevant Barclays witnesses and submissions on what could and should be concluded about them by reference to, among other things, a large amount of documentary material and the surrounding circumstances. Equally, Barclays, for the most part, had no witness directly to rebut Ms Staveley's account of what remuneration (if any) she had actually discussed or agreed with Sheikh Mansour. Here, it was Barclays which sought to make good its case by cross-examining Ms Staveley and referring to documents and circumstances. In addition, in each of those cases, the dispute might have been easier to resolve if Sheikh Mansour and Sheikh Hamad had appeared as witnesses.

138. Furthermore, resolution of the issues surrounding the ASAs and Loan on the one hand and Ms Staveley's dealings with Sheikh Mansour on the other is not binary. In other words, it is analytically possible to accept Barclays' case on the former issues and yet Ms Staveley's case on the latter. And vice versa.

139. Next, it does not necessarily follow here that one key witness's evidence will be found to be either consistently reliable or consistently unreliable. There are reasons why it might be reliable in relation to one issue but not another.

140. That is particularly so when it is recalled that this trial took place some 12 years after the events in question. And in the case of Ms Staveley, and some other witnesses for PCP, there was no need to think about those events until some 5 years later. That is when, on PCP's case, Ms Staveley first discovered the matters about which she now complains. It is true that later on, she was interviewed by the SFO in June 2015 and March 2016 but that was in the context of the criminal proceedings; she did not focus there, for example, on the remuneration arrangements which she said she had made with Sheikh Mansour or other matters which go to her claim for damages, for example the position she reached on seeking debt finance. Nor was she a witness at the criminal trial itself. It is, of course, fair to say that Ms Staveley nonetheless has had to consider in some detail her case and her evidence since the claim was first intimated in June 2015 and then amended on a number of occasions between 2016 and 2019. Her first and principal WS was made as long ago as 28 July 2017.

141. As for the Barclays witnesses, Sir Richard Broadbent was interviewed by the SFO in September 2014, and Mr Jones in January 2014 and April 2018. The following witnesses were interviewed by the FCA: Mr Boath in March 2013, Mr Jenkins in April and May 2013 and November 2016, Mr Jones in March 2013 and Mr Varley in October 2014. Those individuals were interviewed in relation to the ASAs and the Loan. In addition, of course, Mr Jenkins, as a defendant, gave lengthy evidence at the criminal trial. Indeed, because his evidence in chief was largely given orally he was in the witness box for some 24 days. His principal witness statement, however, and that of Mr Varley in this case were only made on 12 May and 3 April 2020 respectively.

142. In this regard, I of course bear in mind the observations of Leggatt J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3560, as to the fallibility of human recollection especially where the events concerned happened long ago and where that recollection is then subject to the iterative processes of making witness statements and the effect of preparing for trial. None of that means, of course, that some witnesses, for whatever reason, may not have better (or less fallible) recollections than others.

143. As against the witness evidence, I have a very large body of contemporaneous documents, particularly emails and their attachments, which have proved to be of considerable assistance. However, there is a caveat here because in some cases the writers of the documents may have had reason to mis-state the true position, or at least not describe it fully.

144. Moreover, all of this is in the context of a claim for damages for fraudulent misrepresentation. In that regard I bear in mind that while the standard of proof remains the civil standard, in general terms the more serious the alleged wrongdoing the less likely it is that it took place and accordingly the evidence required to demonstrate the wrongdoing would in general terms need to be more cogent

than what is necessary to prove merely negligent or innocent misrepresentation; see *In Re B (Children)* [2009] 1 AC 11 at paras. 13-15 and *JSC BM Bank v Kekhman* [2018] EWHC 79 at paras. 51-53.

SUBMISSIONS

145. From PCP I received the following written submissions and ancillary documents:

(1) Opening Submissions dated 18 May 2020 ("PWO");

(2) Supplemental Opening Note dated 8 June 2020;

(3) A Note concerning the final part of Ms Staveley's cross-examination on Friday 19 June;

(4) A Schedule of Adverse Inferences which PCP invite the Court to draw against Barclays from the absence of certain witnesses prepared for PCP's closing arguments;

(5) Closing Submissions dated 22 September 2020 ("PWC");

(6) A list of documents obtained by PCP from Barclays following my order of 1 June 2020 dealing with production of documents previously withheld on grounds of privilege;

(7) A List of Evidential References and accompanying email dated 19 October 2020; and

(8) A Note on some recent disclosure from Barclays, dated 9 December 2020.

146. From Barclays, I received the following written submissions and ancillary documents:

(1) Opening Submissions dated 18 May 2020 ("BWO");

(2) Supplemental Opening Note dated 9 June 2020;

(3) A Responsive Note concerning the final part of Ms Staveley's cross-examination on Friday 19 June;

(4) Closing Submissions dated 22 September 2020 (with some reference corrections dated 28 September 2020) ("BWC");

(5) Two Speaking Notes for Oral Closing Submissions (the second in the form of a series of flow-charts);

(6) A responsive Note on recent disclosure dated 10 December 2020.

147. In this judgment, I do not claim to have dealt with every single point made by either side in the almost 800 pages of submissions just referred to, or in their oral submissions made in a period of just over 5 days. It is not necessary for me to do so. I am quite satisfied that I have considered all of the key issues and have of course taken into account all the materials which have been provided to me.

SOME PRELIMINARY FACTUAL MATTERS

Introduction

148. Before embarking on the analysis of the various issues arising in Parts 2 and 3 of this judgment, it is necessary to deal with some general matters that relate to one or both of them. They are as follows:

(1) The general position of Barclays;

(2) The role and abilities of Ms Staveley;

(3) The general credibility of Ms Staveley;

(4) Mr Jassim's business connections with Ms Staveley;

(5) The credibility of Barclays' witnesses including Mr Forbes;

(6) Adverse inferences from witnesses not called;

(7) The Yeltex Invoice, the events of 8 and 9 October and some dealings with Mr Restis.

The general position of Barclays

149. Earlier in this judgment, I posited the issue as to the extent to which (if at all) Barclays was "desperate" to get CR2 done and thereby avoid effective part-nationalisation. In my view, it was desperate, in the sense that it would go to extraordinary and unusual lengths to bring about CR2 although I accept that this does not mean at any cost whatsoever. I also accept that there was the necessary hurdle of 75% of shareholder approval at the required EGM which had to be surmounted. I say this for the following reasons.

150. There was a strong view, exemplified by Mr Varley, that taking government money would be very damaging to the bank and to the country in circumstances where, unlike other banks, a bailout was far from inevitable. That is why Barclays had until 31 March 2009 to achieve CR2.

151. In addition, key players at Barclays had justifiable concerns about their own futures - and bonuses - in the event of a bailout. After all, Fred Goodwin, the CEO of RBS and Johnny Cameron of its investment banking division, were both dismissed. According to Mr Jenkins, in a call with Mr Boath on 14 October, Mr Diamond was "f-ing paranoid" about Barclays being nationalised and being "let go" and Mr Varley was "scared to death that the government turn up tomorrow morning". Mr Jenkins agreed in cross-examination that the loss of jobs and bonuses were in his mind and those of his colleagues. That is unsurprising since, in his case, he had been paid a £39m annual bonus for the last 3 years.

152. There was also an element of personal ego, in my view, so far as Mr Jenkins was concerned. This is important because while he could not himself sanction any particular deal with, for example, the Qataris, he was clearly highly influential at Barclays and was intent on doing whatever he thought

should be done. He was also a risk-taker, in my view. Mr Jones knew him well and said to the SFO that Mr Jenkins worked for himself with a "very big ego and enormous sense of self interest" and that Mr Jenkins behaved like "the king of Barclays"- an image, reinforced no doubt, by his internal appellation of "Big Dog". Mr Jones was not challenged about this in cross-examination.

153. Mr Jenkins himself said that nobody as a bank had any bargaining position of strength in October 2008 and the pool of investors was very very small. Moreover, while Barclays was given a six-month breathing space in order to raise the necessary capital, the fact is that Barclays had just done CR1 in June 2008 which had resulted in the Qataris subscribing for many more shares than they had anticipated because of a lack of interest in the "clawback" part of the deal by other shareholders. Moreover, the Qatari shareholders were now being challenged by the falling share price in October 2008. That explains the change in the Qataris' asked-for blended share price under CR1 and CR2 from 150p to 130p. They therefore had the motive and the bargaining power to demand a high price. Mr Varley identified a possible answer to this which was that if the Qataris did <u>not</u> invest, (and CR2 therefore failed or there was a bailout) it might do even worse in terms of the value of its existing shareholding. So that might have been a restraining factor in the minds of the Qataris although it is not clear from the evidence the extent to which, if at all, that particular card was played or borne in mind. All one does know is that effectively, whatever the Qataris demanded in terms of benefit to them (ultimately £346m and a $3bn unsecured loan) they got.

154. It might be said that Barclays was in a <u>particularly</u> weak position as against the Qataris (as opposed to other potential investors), because of the disappointing history of their earlier acquisition and performance of the shares to date. On the other hand, Barclays never seemed interested in seeking more than around £2bn capital from Qatar and from an early stage, there was (through PCP as I find it) the prospect of a larger investment of around £3bn likely to be funded, one way or another, at least for the most part by Sheikh Mansour or another Abu Dhabi entity. We do know that despite Barclays' apparent protestations to the contrary, Ms Staveley was able, in the course of one meeting (23 October), to secure the issue of £3bn worth of Warrants with £1.5bn worth for the SPVs which had not been on the negotiating table up to that point. It is also worth recalling that despite pressure from Barclays, and an apparent agreement by the Qataris to make available some of the RCIs together with Warrants as a compensatory clawback to other shareholders, Ms Staveley held out against giving up the Warrants. In the end the bank agreed and the votes still went through.

155. On the other hand I do accept that ultimately, the 75% shareholder approval had to be obtained. Sir Richard Broadbent thought that where Barclays had got to in terms of the actual CR2 was close to the limit of what could be justified successfully to existing and in particular institutional shareholders. Mr Varley also said that Barclays was "on the edge" with shareholders and there was

a tipping point and a "red top" notice so that many shareholders would at least think twice before going ahead. That said, Mr Varley also stated in evidence in the context of the counterfactual that in relation to any equal deal proposed for PCP, he would have said "there has to be a pari passu deal as between you and Qataris, let's discuss it". Mr Jenkins said that he would have looked to Mr Varley for guidance on this and if instructed, he would have negotiated terms equal for both sides. Sir Richard Broadbent also said that in the counterfactual world, they would be faced with the choice of either not having Qatar at all unless they were bluffing (i.e. because Qatar's demands were now being rejected or downsized in order to achieve parity with PCP) or PCP would get the same deal as originally agreed with Qatar. These matters go to Issues 3 and 5 on causation and loss. But the present point is that these concessions made in evidence on the counterfactual suggest that in principle and despite worries over the EGM, Barclays was prepared to go a very long way indeed and its bargaining position with PCP was very weak, just as it was with Qatar. Otherwise this evidence would make no sense. After all, Barclays' position here could have been that in truth the deal with Qatar or some equivalent thereof could not be replicated to PCP at all because the money was simply not there or senior management would have not countenanced it - and thus PCP could take it or leave it, without equivalence. But that, in the end, was not Barclays' evidence.

156. All of the above is heightened by the very short time frame in which matters were being negotiated.

The role and abilities of Ms Staveley

157. In my judgment, Ms Staveley, the driving force of PCP, was and is a tough, clever and creative entrepreneur. There was an extent to which Barclays' case sought to disparage her on the basis that she was effectively a lightweight and a "chancer". Indeed, in the concluding part of her cross-examination (referred to in paragraph 674 below), the following was put to her:

> "You were effectively engaged in what might be described as a hustle to try to put yourself in the middle of the transaction so that you could control the flow of information and profit ."

158. She replied that this was an extraordinary suggestion. I agree. (The fact that this was preceded by a suggestion that she was inserting herself into CR2 and engineering a place for herself because of Mr Eadie's connection with Barclays makes no difference, in my view.)

159. The description at paragraph 245 of BWC of her commercial background as a "small-scale restaurateur" was in the same vein. While it is true that the restaurant was her first commercial venture (at the age of 22), the fact is that by 2008, she was acting for the seller of Manchester City. And at the time of this trial, she was acting for Saudi Arabian investment interests in the negotiations to buy Newcastle United.

160. Parts of Mr Forbes' statement also sought (unsuccessfully – see paragraphs 179 - 183) to denigrate the abilities of Ms Staveley.

161. That she was an able negotiator is demonstrated by the fact that she secured an excellent deal for Sheikh Mansour, including getting Barclays to agree the £1.5bn worth of 5 year Warrants, which she then preserved, despite real pressure to yield them up when Barclays was worried about the impending EGM. She was right to refuse and effectively tell Barclays to hold its nerve. And she was right to think that the Barclays share price would recover from its historic lows in November 2008. Although she had to cede control to IPIC, the fact is that it made a profit upon exit of some £1.3bn (see paragraph 129 above).

162. Her refusal to let Barclays obtain direct access to Sheikh Mansour has also been criticised. But I cannot see why. She wanted to remain in control of the negotiations, and while some at Barclays no doubt found that found that irritating, it is hardly unusual or unacceptable in this commercial context.

163. The truth is that this was a case where the corporate investment arm of a major bank facing almost unprecedented pressure had to deal with a persistent and determined counterparty (i.e. Ms Staveley, acting for PCP) who had (and, it seems, continues to have) the trust of some major players in the Middle East business world. This is an important background to some of the dealings between PCP and Barclays which I have to assess.

The general credibility of Ms Staveley

164. The general credibility of Ms Staveley is important because, in relation to certain key matters (in particular the making of the June Representation and the Majlis Agreement) her account is challenged by Barclays. In the case of the June Representation there is a conflict between her evidence as to the conversation which took place and Mr Jenkins'. In the second, there is no witness from Barclays but nonetheless it contends that this was an invention on her part.

165. Barclays contends that, in general, Ms Staveley was thoroughly unreliable, her evidence was inconsistent with documents, she had a flawed recollection and she was guilty of "obvious embellishment and invention".

166. I do not accept that as a general characterisation so that she was essentially an untruthful or unreliable witness. I thought that, for the most part, her evidence was reliable. There were some obvious cases where her recollection was not accurate, particularly over dates. That is not surprising, given that, as already noted in paragraph 140 above, unusually, Ms Staveley had no reason to go over the details of the events of late 2008 until some 5 years later. On occasion, however, what she insisted was her recollection turned out to be correct. See the annotated third copy of the Project Mandolin Presentation which she said she had sent to Sheikh Mansour, now at E107/5575, but which was not originally in the trial bundle. See also her evidence where she said that part of a

transcript of a conversation between her and Mr Jones on 24 October was not correct, and so it proved, when the audio was listened to.

167. I accept that sometimes she may have exaggerated PCP's position in the course of negotiations and may have presented some things as a *fait accompli* when they were not. In addition, her manuscript notes were sometimes unclear and not very organised, although that is hardly unusual in real life. Sometimes, also, she was very keen to emphasise in evidence what she knew were the important elements of her case, for example the SDRs or the role of PCP in introducing Sheikh Mansour. She could sometimes be an advocate in her own cause.

168. However, I do not consider that the above matters affect the essential truth of her evidence on the core matters.

169. Barclays then submits that the fact that she was (according to it) wrong on certain factual issues showed that she was generally untruthful. It refers in particular to her account of the June Representation, the Majlis Agreement, the events of 8/9 October, the Yeltex Invoice and (more briefly) some dealings with Mr Restis. I deal with the first two matters in context, below. They concern major issues in the case. The other matters essentially go to credit only (although the Yeltex Invoice issue has a connection with quantum). That being so, I deal with them as preliminary matters before considering the first substantive liability issue, being the making of the SDRs.

170. I have borne in mind all the above points when assessing Ms Staveley's evidence on the key matters. In my judgment, and as will be seen, I accept the essential truth of what she was saying had happened.

Mr Jassim's business connections with Ms Staveley

171. Mr Jassim's WS, his first, was made on 27 March 2020, in response to Mr Forbes' WS, served on behalf of Barclays, dated 22 January 2020. Mr Jassim had not been involved in or had to give evidence about any of the matters in issue until he made his WS. Indeed he said that he had not been prepared to get involved in this dispute and only did so now with the express permission of Sheikh Mansour.

172. Mr Jassim had met Ms Staveley in late 2007 when she acted for Mr Shinawatra and he represented Sheikh Mansour, in the latter's acquisition of Manchester City FC, although he may have met her a little earlier as well.

173. In cross-examination, he was asked whether he was currently working with Ms Staveley. He said that he was not but would do so if a business opportunity came up. An article from the New York Times dated 15 June 2020 (i.e. just before he started to give his evidence remotely) was then put to him. It suggested that he had a role in Ms Staveley's then-current efforts to acquire Newcastle United

from Mike Ashley, on behalf of Saudi Arabia's Public Investment fund. Mr Jassim said that he had been working with Ms Staveley originally on that acquisition but the nature of the deal then changed. He had had an agreement with Ms Staveley whereby he would act as principal along with her and would receive part of any fees paid for success in the acquisition. But he then left because he did not want to be a principal.

174. He said that there was a written agreement with Ms Staveley and after his evidence was completed, PCP produced a copy. As a result, Mr Jassim was recalled on 6 August 2020 to deal with it.

175. The written Co-operation and Exclusivity Agreement was dated 27 February 2019. He was party to it through his company Goldbrook. This agreement did indeed provide for a 25% share of any fees to go to Goldbrook. Mr Jassim said that this agreement had been terminated once he had decided not to stay in the acquisition team as a principal. He agreed that the fee-sharing provisions were expressed by clause 8.5 of the agreement to continue even after termination. However he did not regard himself as having any further rights, since the deal changed, and had not been involved in the transaction since April 2019.

176. It would obviously have been better if Mr Jassim had disclosed this agreement as part of his WS so that he was completely transparent, and in order to avoid any suggestion that he may have some ongoing financial dealings with Ms Staveley. That said, I accept his evidence that as far as he is concerned, he has no further interest in the Newcastle United deal or any monies paid thereunder.

177. I do not consider that this matter means that he is a generally untruthful or unreliable witness. Indeed, his evidence in court was not always helpful to Ms Staveley and he made an appropriate number of concessions.

The credibility of Barclays' witnesses including Mr Forbes

178. I deal with the reliability or otherwise of the accounts given on different issues by Mr Jenkins and Mr Varley in context, below. I would however make just one general observation. It was clear to me that in relation to ASA 1, ASA 2 and the Loan, that their evidence was very carefully expressed in their WSs - almost too carefully - and in their oral evidence they came across as knowing very well the script to which they had to adhere. I have no doubt at all that on the issues as to whether the ASAs were shams and whether the Loan was in fact intended to fund Qatar's subscription, they both felt acutely sensitive. And one can understand why, since such questions were very serious and went to their own personal integrity. But once cross-examination moved to the counterfactual, and in particular the provision or otherwise of AV they were both - almost visibly - much more relaxed. As a result their evidence flowed more naturally and they were much more disposed to make concessions beyond what they had said in their WSs.

179. As for the other witnesses, the only one I would single out at this stage is Mr Forbes. He was, in my judgment, a generally hopeless witness, and his WS was proved demonstrably wrong on a number of occasions. So much so that Barclays sensibly reduced the extent to which it relied upon his evidence. Unlike many of the other witnesses for Barclays, it appears that he had come to the events of late 2008 relatively recently. He did not have to provide a WS at an earlier stage or take part in any interview and that may explain now why his recollection of matters is so poor even though, in his WS, he claimed that it was a good recollection.

180. At paragraphs 40-42 of his WS he gave a graphic and purportedly detailed account of a meeting on 30 October at Barclays Head Office in Canary Wharf. Those present were said to include Mr Varley, Mr Lucas and other Barclays representatives, Mr Jassim, Ms Staveley and someone from GSI. Part of his paragraph 41 reads as follows:

> "Ms Staveley did not say much although I recall a deeply uncomfortable moment during the meeting, which has stayed with me, when Ms Staveley interrupted Mr Varley while he was speaking to the room about the Warrants component of the deal to ask "*what warranties come with the warrants?*". The room fell silent and everyone suddenly found their shoes very interesting. Mr Varley looked surprised, but responded that he did not know what Ms Staveley was talking about. That moment was significant in my recollection because it confirmed beyond doubt to me and I imagine to all present that Ms Staveley did not understand the financial instruments that were the subject of the meeting. I recall remarking in private to the Goldman Sachs representatives after the meeting that IPIC would be taking the lead and that Ms Staveley's role in the transaction would be diminished from that point onwards."

181. In his Errata Sheet, produced the day before he gave evidence on 15 July, he said that he had been mistaken because there was no physical meeting at Barclays' Head Office on 30 October. Rather, he was at A&O's office with Ms Staveley, Mr Jassim and the GSI representative from where he telephoned Barclays whereupon Mr Varley, Mr Lucas and others joined the meeting. After I made some enquiries, it turned out that the Barclays' legal team knew of this error since 9 April, but for some reason left it until the day before to disclose it. That had the practical consequence that the telephone call was not actually put to Ms Staveley, Mr Jassim or Mr Eadie during their cross-examination nor could Mr Varley be asked about the telephone call.

182. In cross-examination, his account of Ms Staveley's questions about the Warrants rapidly fell apart. The question she allegedly asked would in fact have been a perfectly logical one, although probably to Barclays' lawyers not to Mr Varley, since the Warrants <u>did</u> come with their own warranties. Equally important was that even if the question had been asked, there was no reason why Mr Varley should respond by saying that he did not know what she was talking about.

183. As it happens, no one else allegedly present has a recollection of the meeting at all, and Barclays did not rely upon it in the end, including in relation to its argument about when PCP lost control.

Adverse inferences from witnesses not called

184. PCP has produced a schedule of Adverse Inferences to be drawn from the non-appearance as witnesses from Barclays' case of the following: Mr Agius, Mr McDonald and Mr Al-Sayed. I will deal with these (and any similar points) in context, below.

The Yeltex Invoice and the events of 8 and 9 October

The Yeltex Invoice

185. This issue came to prominence following the production of Mr Forbes' WS.

186. On 14 December (i.e. after PCP) had lost control of the investment) Ms Staveley sent an email to Mr Al-Qubaisi which read as follows:

> "…I attach to this email a copy of the invoice for £1 tm which PCP paid for underwriting services some weeks ago. I would be most grateful if you could reimburse these fees as soon as possible - it is causing a substantial amount of tension within my company.
> You kindly informed me that I would be paid the sum of £10m and below are details of my private bank account with in Geneva.
>
> Account Name Tamadot Capital S.A…
> In regard to PCP Capital's fees can you arrange that the sum of £16m (11m repayment of underwriting reimbursement and £5m in fees) be sent to the following account this week:….
>
> I wanted to thank you personally for dealing with this matter - I am most grateful."

187. The invoice, dated 11 December and addressed to PCP, came from a Gibraltar company called Yeltex Limited. It stated as follows:

> "Dear Sirs
>
> **Barclays Bank Plc**
>
> To:
>
> Underwriting services provided to PCP Gulf Invest for the provision of up to but no more than GBP 3.5bn to Barclays Bank Plc as to GBP 2bn of Mandatory Convertible Loan Notes and GBP 1.5bn of Reserve Capital Instruments for the period 31st October 2008 to 27th November 2008. Our fee as agreed - GBP 11,000,000.00
>
> **TOTAL DUE: GBP 11,000,000.00.**"

188. Mr Al-Qubaisi responded thus:

> "Dear Amanda, I have received the copy invoice…from Yeltex Limited in respect of underwriting fees in respect of the Barclays transaction. I regret to inform you that this copy invoice, which is not accompanied by the customary legally binding documentation which would normally accompany a transaction of this scale, does not provide a suitable basis for disbursement of funds. I have never heard of Yeltex Limited, and I am not aware of any Gibraltar based entity which could provide a credible underwriting capability in a transaction of this magnitude. if you have the appropriate definitive documentation (which I presume will have been drafted by legal firm(s) with established international reputations) available for review, I am prepared to consider the matter further. Best regards, Khadem Al-Qubaisi"

189. Originally, only Ms Staveley's covering email was produced on standard disclosure. This was the position at the time of her first WS on 28 July 2017. At paragraph 611 of that WS, she said that by underwriting fees she meant the fees which PCP had incurred while the deal belonged to it and as part of the costs and risk of entering the subscription agreements (at a time when IPIC had not committed anything and had no risk). PCP had engaged a significant number of advisers on the Barclays deal including BGR, Mediatech Capital, David Mellor and Daoud Wardak, which were

fees due from PCP which were left for its account after the transfer of the SPVs, unlike the fees for GSI and A&O.

190. However, on 12 October 2017 PCP disclosed the Yeltex Invoice although saying that it was not relevant to the issues in the claim. Then, in response to Barclays' application for disclosure of documents relating to the Yeltex Invoice, Ms Staveley made her 5th WS. She said that she understood Yeltex belonged to Mr Mellor and he had suggested that fees otherwise payable to the SPVs could be received by Yeltex. She said that Yeltex itself had not provided any services other than to receive the fees.

191. At paragraph 2 of PCP's Further Information dated 26 February 2018, it was stated that the advisers referred to had received some £10m. In PCP's next Further Information dated 25 June 2018, a table set out the advisers and parties which PCP had paid and was obliged to pay. It also said that in the counterfactual, such sums would also have to be paid. The advisers here included those providing UK legal advice, Jonathan Aitken, HE Mohamed Al Badie, Lord Digby Jones, Mr Hassanyeh, Nicholas Hegarty, Intrinsic Media and Square 1. The table describes the services provided, the amount paid and (save in respect of the lawyers) when. This was in addition to sums paid to Mr Mellor and Mr Wardak. It was accepted that there had been no separate payment to Mediatech Capital or BGR by PCP, and Ms Staveley said in evidence that this was because the putative deals which they would have arranged never came about. The total amount of the fees paid according to this Further Information was in fact £8.85m, so less than £10m.

192. What then happened much later was the service of Mr Forbes' WS dated 22 January 2020 along with a letter from Simmons and Simmons to Quinn Emanuel of the same date. According to Mr Forbes, when he (along with Mr Al-Qubaisi) had received an email from Ms Staveley referring to the £11m and the Yeltex Invoice, he became suspicious. He undertook some investigations into Yeltex and enquiries made by his wife revealed that the true owners of Yeltex were Ms Staveley herself, Mr Eadie and Mr Mellor. Mr Forbes said that neither Yeltex nor its owners had been in a position to underwrite an investment of £3.5bn and secure a fee of £11m. His view was that this was a dishonest attempt by PCP to obtain fees. He discussed it with Mr Al-Qubaisi and the result was the rejection of this invoice.

193. On 17 April 2020, Quinn Emanuel wrote in respect of Mr Forbes' WS and Simmons and Simmons letter of 22 January. This letter sets out chapter and verse in terms of the actual payment of those who had been described in the Further Information of 25 June 2018. On the same day, Ms Staveley's

9th WS was served. This did not add any further payees, although in her oral evidence, Ms Staveley said that Mr Maggs, Mr Mellor's business partner, had provided some services.

194. Finally, in the procedural chronology, a revised version of the Further Information was served on 7 June 2020, being the day before the start of the trial. The fees for Mr Al Badie were removed on the basis that his services related exclusively to assisting Ms Staveley in PCP's negotiations for a fee in early 2009, and the same applied to Mr Chalhoub's fee of £250,000 although this had not featured in the Further Information anyway. Together with the fees for Mr Mellor and Mr Wardak, this now produced a total of some £6m. Furthermore, the fees claimed still included legal advice but from other documents from the solicitors, Forsters, they all seemed to relate to PCP's discussions over fees in 2009. I return to these various figures below.

195. Pausing there, two elements of Mr Forbes' account have been shown to be wrong. First, Mark Okes-Voysey, the beneficial owner of Line Holdings, itself the owner of Yeltex, wrote on 18 March 2020 to say that he and no one else was the owner of Line Holdings. Second, Mr Forbes' account of the chronology of his apparent investigations (leaving aside if they happened at all or in the way he suggested) cannot be right because Mr Al-Qubaisi wrote back disagreeing with the invoice, the same day.

196. However, there was still the issue of the underwriting fees and what they consisted of. At this stage, it is necessary to refer to what had occurred in respect of fees for PCP prior to 14 December.

197. On 18 November, in addition to that part of the meeting where Sheikh Mansour had dialled in (see paragraph 119 above) there was a discussion between Mr Al-Qubaisi, Mr Jassim and Ms Staveley once Sheikh Mansour rung off. Ms Staveley retained a note of that meeting, different parts of which had been made by Mr Al-Qubaisi, Mr Jassim and herself. She gave a detailed account of this discussion in her first WS at paragraph 562. She explained further in her 9th WS by reference to the different writing to which she ascribed different numbers for the purpose of explanation. She had said that the discussion centred around how the £110m express commissions due to the SPVs under the subscription agreements should be divided up. The figure 110 appears at the top right. Beneath it is "11m" with an arrow to its left and part of the writing there she thought said "underwriting" followed by something else. There was then written "3.5m" twice in relation to A&O and GSI which would then have left £92m. Beneath that, were two amounts of £500,000 for each of "David" and "Murtadha" , being Mr Forbes and Mr Al Hashemi respectively. There was also a reference to "David" which Ms Staveley said was Mr Mellor although there was no figure against his name.

There is then, to the right, a reference to “Omar” (Hassanyeh), Craig (Eadie) and Daoud (Wardak), with figures against them being 1.2m, 2m and 2m, making £5.2m.

198. Finally, there is a reference to 20.7m each for “the directors” namely Mr Al-Qubaisi, Mr Jassim, Ms Staveley and Said bin Butti, a cousin of Mr Al-Qubaisi whom Sheikh Mansour had asked be paid a fee.

199. The important thing for present purposes is that there was a specific mention of £11m and the word “underwriting”. Ms Staveley said that Mr Al-Qubaisi had referred to third parties engaged by PCP as providing underwriting services. According to her, he also said that IPIC should be invoiced for those services.

200. One then fast-forwards to 14 December by which time the landscape had of course changed. IPIC had taken control of the subscription and I have little doubt that in truth, relations between Ms Staveley on the one hand and Mr Al-Qubaisi (and Mr Forbes) on the other were on any view strained. At that stage, according to Ms Staveley, Mr Al-Qubaisi had agreed to pay PCP £5m, and herself in a personal capacity, £10m, by way of fees. PCP had now lost its 10% carried interest. Hence, according to Ms Staveley, her email of 14th December. It should be noted here that she required the payment of her “personal” fee into her private bank account in the name of Tamadot SA in Geneva, while the fee to PCP of £5m plus the £11m was to go to its Lloyds account in London. That last part seems inconsistent with Ms Staveley’s suggestion in her 5th witness statement that Yeltex was to receive any fees, because in the event the PCP fees were now to go to it, direct. In addition, and as Ms Staveley had to accept in her 9th WS paragraph 84, it was not correct to say that PCP had already paid £11m in fees to other parties as at 14 December, although she also said that £11m had been incurred and would be paid. She was not able to say how this inaccuracy in her email came about.

201. On the other hand, I do find Mr Al-Qubaisi’s response the same day to be a little odd. He does not express surprise at the notion of underwriting services being provided *per se* and the language of his email is almost too formal.

202. I cannot see that Ms Staveley would have, unannounced as it were, made up a claim for £11m that had not even been discussed beforehand. That is especially so when Yeltex would not itself have been a recognised provider of underwriting services in the formal sense namely to guarantee the price of a trade-as opposed to the informal sense used by Mr Al-Qubaisi on 18 November, according to Ms Staveley. She knew that she had to tread very carefully with Mr Al-Qubaisi by 14 December. She had lost her leverage and Mr Al-Qubaisi clearly now had assumed control, or at least influence,

over what fees could be paid. That is why, according to Ms Staveley, she had to engage others like Mr Chalhoub later on, to intervene at levels in Abu Dhabi higher than Mr Al-Qubaisi or even, perhaps, Sheikh Mansour himself. That is why it would make little sense to make reference to a new figure of £11m.

203. It has also to be remembered that this is in a context of a meeting (on 18 November) where those in attendance had agreed - or at least contemplated - how to “divvy up” the £110m fees coming in from Barclays, including £20.7m for Mr Al-Qubaisi and the same for Ms Staveley, personally. Quite how orthodox such an arrangement was is another matter, but it does make plausible the notion that, as between them, they had agreed or contemplated that £11m would go to the SPVs or PCP.

204. I thought that her explanation of the “underwriting” fees which she said were being discussed and contemplated at the 18 November meeting was plausible. I could understand how, at that stage, there were various parties who on the face of it would need paying depending on how the investment actually panned out. At that stage, the parties who would be subscribing were simply the SPVs. And although it was contemplated by then that Abu Dhabi was to be providing the equity, that was not guaranteed and there may have been other investors involved. Indeed, as we know, only two days later, IPIC was intimating that it would pull out altogether, even though this did not then happen.

205. I think Ms Staveley is right, therefore, to say that in essence, she was providing to Mr Al-Qubaisi an invoice for £11m that he had previously requested but he was not now playing ball. She probably did exaggerate the pressure on PCP by reference to payments a few weeks earlier, tensions etc in an effort to secure this payment. I have little doubt that had the deal gone ahead as intended with PCP still in control, Mr Al-Qubaisi would not have objected as he in fact did on 14 December. Of course, in that event, none of the sums discussed as at 18 November may ultimately have been available for payment since they were all to come from the £110m which could be used (and in the event was used) simply to reduce the actual purchase price.

206. However, it remains the case that the position as to the relevant advisers has changed over time and belatedly PCP has had to recognise that, in the event, some of them had never been paid (like BGR) and others could not really be justified because they were there to assist PCP with the fees dispute as opposed to assisting it with CR2. And however one looks at it, it was not correct to say that £11m had actually been paid as at 14 December. There is an extent to which therefore, at the very least, Ms Staveley was being disingenuous.

207. Of course, it should also be said that I do not have any evidence from Mr Al-Qubaisi himself to complete the picture, since he was not a witness, and Mr Forbes’ evidence is unreliable.

208. A further point made by Barclays is that "Mr Al-Qubaisi felt strongly enough about the falsity of the Yeltex invoice that IPIC went out of its way to specify it in the eventual settlement agreement with PCP, unnecessarily, as "a purported liability with which IPIC had nothing to do." (BWC paragraph 235). Mr Forbes did not give evidence to this effect and of course Mr Al-Qubaisi was not called by Barclays as a witness.

209. For what it is worth, I do not agree with this characterisation of the relevant part of the PCP Settlement Agreement. By paragraph 1.4 thereof, PCP agreed, among other things, to indemnify the Abu Dhabi parties (including IPIC and Sheikh Mansour) for any liabilities incurred by the SPVs prior to the execution of the SPA. It then stated that, "For the avoidance of doubt", such liabilities excluded the settlement of the Yeltex Invoice. But paragraph 1.5 then stated that none of the Abu Dhabi parties were liable in respect of it. That does not seem to me to be particularly surprising, since the Yeltex invoice had been produced to Mr Al-Qubaisi. In effect, these provisions simply emphasise that the settlement encompasses all claims made by PCP and therefore there is no separate liability under the Yeltex Invoice. I do not see how this shows anything particular about it or PCP's production of it.

210. I do not think it necessary to explore the Yeltex Invoice matter any further so far as Ms Staveley's credit is concerned. But I do take it into account when assessing her evidence in relation to the substantive issues and will refer again to the payments actually made in the context of quantum.

Events of 8 and 9 October 2008

211. Barclays make the following further point on Ms Staveley's credibility. In paragraph 24 of her WS, she says that she met Sheikh Mansour at the Emirates Palace in Abu Dhabi on 9 October, and discussed her plans to obtain a stake in CR 2. Among other things, according to her, Sheikh Mansour agreed that she should explore investor interest in Barclays, that she would make an initial approach to Barclays and that she could mention his name as an investor to Barclays and other potential investors.

212. In cross-examination, it was put to her that there could not have been a meeting with Sheikh Mansour then, because she was not in Abu Dhabi. Evidence was produced of a hotel booking covering the period from 7 October until at least 9 October at a hotel in Oman. Further, flight documents showed that she left London on the evening of 7 October and arrived in Muscat the following morning, via Dubai. She then took a flight back to London on 9 October. On that basis, Ms Staveley said that the meeting must have taken place earlier in October. There seems to be no documentary evidence of that, for example notebook entries, but that does not mean that the meeting

did not happen. Mr Jassim, at paragraph 17 of his WS, says that following an initial discussion with Ms Staveley, she and he discussed the proposal with Sheikh Mansour in early October. In cross-examination, he said that the meeting was not on 8 or 9 October, but guessed that it was around 12 October. It was not put to him that there was no such meeting at all.

213. In my judgment, while Ms Staveley appears to have got the dates wrong, I accept that there was a meeting along the lines she has suggested. If Barclays challenge the very fact of the meeting (as they do in paragraph 57 of BWC) it can only be because both her and Mr Jassim's recollection of an important piece of background to PCP's approach to Barclays is completely wrong. That seems very unlikely especially as it is hard to see why Mr Eadie would write to Barclays as he did on 12 October without PCP knowing that Sheikh Mansour had expressly permitted such an approach. The only alternative is that Mr Jassim and Ms Staveley have conspired to give false evidence on the point (not in fact put to either of them) but I reject that.

214. Accordingly, there is no reason why I should regard this matter as having a significant bearing on Ms Staveley's credibility as a whole, save that (as in some other instances) her recollection of dates can be faulty.

Some Dealings with Mr Restis

215. A point was taken by Barclays in relation to some dealings between Ms Staveley and Mr Restis. It had been said on PCP's behalf in paragraph 6.6 of its solicitors' letter dated 4 November 2015 that it had borrowed £10m from a contact of Ms Staveley's (which she accepted in evidence was Mr Restis) so as to have cash available in relation to CR 2. This was explored in cross-examination. It was clearly not as simple as that, because the initial email from her dated 9 September 2008 thanking him for the £10m was on the basis that he was putting £10m into a company called Trillium. A chaser from him later in relation to getting documents for this also proceeded on that basis. On 28 April 2009, he emailed to say that he now wanted his money back and noted that it had apparently not gone into Trillium but another entity called Triforium and that there had been a misrepresentation. However, in a letter from Mr Restis dated 14 September 2009, he noted that Ms Staveley had acknowledged receipt of £10m which had been provided as a loan. And while he objected to the deduction of £185,765.25 for administrative expenses, somewhat surprisingly, he did not actually seek the removal of those expenses, as can be seen from the repayment plan set out in the letter.

216. Mr Restis was due to give evidence pursuant to his WS which had been made on 28 November 2017, to corroborate Ms Staveley's account of the Majlis meeting but also to deal with these financial matters. In the end, he did not give evidence.

217. In the absence of hearing Mr Restis on this aspect of the case, I do not think I can draw much from it save that it is clear that from Ms Staveley's point of view the £10m was originally to be advanced as some form of investment, but on the other hand Mr Restis later acknowledged it as a loan. Overall, I do not think it takes matters much further so far as Ms Staveley's general credibility is concerned.

PART 2 - LIABILITY

INTRODUCTION TO LIABILITY ISSUES

218. This part of the judgment will deal with the making and meaning of the representations alleged i.e. the SDR, the JR, and the IR, whether they were relied upon and made with the intention that they should be, whether they or any of them were false, and finally whether they were made, knowing that they were false or being reckless as to their falsity.

219. The central issues of liability are as follows:

The Representations

(1) Did Barclays make the SDR?

(2) If so, what did it mean?

(3) Did Barclays make the JR?

(4) Did Barclays make the IR?

PCP as Representee

(5) If any of the Representations were made, were they made

(a) to PCP as principal, and

(b) intending that they should be relied upon by PCP?

(6) Did PCP rely on or any of the Representations made?

Falsity

(7) Was the SDR false, and if so how?

(8) Was the JR false?

(9) Was the IR false?

Fraudulent Misrepresentation

(10) In relation to each of the Representations made which were false, did Barclays make them, knowing that they were false or not caring whether they were true or false?

THE MAKING OF THE SDR

220. PCP alleges that Mr Jenkins made the SDR on each of 23, 24 and 31 October. If he did, and in the required sense, Barclays does not suggest that it would not bind it and that is its position on all of the Representations alleged.

23 October

221. There is a limited amount of dispute as to whether Mr Jenkins made the SDR at the meeting with Ms Staveley that day. In her witness statement she says as follows:

> "106. I asked what Qatar's position was. More particularly, I asked specifically whether "this" (meaning the proposed investment by PCP and Abu Dhabi investors) would cause a problem to the bank's current largest shareholder, Qatar, who obviously would have the most to complain about if their pre-emption rights were "trampled" over.
> 107. Mr Jenkins' answer was that Qatar were taking up to £3bn of the capital raising, and that we shouldn't worry about Qatar as they were "*getting the same deal*".
> 108. I took him to mean Qatar was committed or close to it and that they had been offered and/or would receive the same terms as PCP. I obviously also understood from this that Qatar had money they were willing or able to contribute as fresh capital. I also understood him to be telling me that the pre-emption rights I had alluded to would be dis-applied given that Qatar was itself making a fresh investment."

222. And then, in the context of her demand at the meeting for warrants, she said:

> "118. Mr Jenkins looked surprised and spluttered, "*but that's, like, an extra billion in value*". I understood him to mean that a five year warrant could potentially be valued at roughly a third of its notional value at the outset (given the very high volatility of the markets) and in fact that is not far off what I had worked out for myself, hence the huge value to PCP in getting warrants included in the deal. I told Mr Jenkins the warrants were key for me because I needed them to help me finance the deal. I said words to the effect of "*without the warrants, this deal will not happen*". Mr Jenkins recovered himself and then said "*well they will have to be split with Qatar- that is the rule*". He then expanded on this explanation slightly and suggested it was "*obvious*" that the terms would have to be the same for all investors.
> 119. I understood his comment to mean that because Qatar and PCP were getting "*the same deal*" that whatever I negotiated for PCP would also have to be offered to Qatar, and vice versa. At this point, I had in mind because of what Mr Jenkins had said earlier that Qatar was committed to £3bn and so I understood Mr Jenkins to be saying that the bank would offer £3bn in warrants in total and these would be split 50:50 between PCP and Qatar. On one hand, I was very pleased that he was entertaining the idea of five year warrants and saw this as a victory. On the other hand I was disappointed about his proposed scale back. I did not take issue with the scale back at the meeting. My view was that I would probably have to accept it given that Barclays were going to give the same terms to Qatar as to PCP but I decided not to comment about it until I had worked out whether £1.5bn in five year warrants would be sufficient for my financing requirements (which also depended on the amount of equity I could raise from my investors)."

223. As to this, Mr Jenkins said as follows in his WS:

> "The allegation that I said the £3bn of warrant issuance would need to be 'split' with Qatar because both parties had to have the "same deal"
> 207. This allegation does not accord with my recollection of the meeting. Based on the factors explained in the preceding paragraphs I think it implausible that the conversation played out in the way Ms Staveley alleges.
> 208. I believe strongly that I would not have referred to "splitting" warrants with Qatar, in the sense of Qatar getting something additional, by reason of the split, which they would not otherwise receive (which is, as I understand it, what Ms Staveley is suggesting). That is because (i) warrants had been part of the commercial discussion with Qatar since my conversation with Sheikh Hamad on 8 October 2008, (ii) the Qataris had repeatedly voiced a preference for that structure, and (iii) in response to the commercial demands made by Dr Hussain on 22 October we were already preparing an updated structure for CR2 which included warrants (albeit that, for the reasons given at paragraph 211 below I would not have shared that fact with Ms Staveley at our 23 October meeting).
> 209. I would never have suggested that Abu Dhabi "split" its warrants with Qatar. That would have been inconsistent with my discussions with Qatar over the prior two weeks, and with the proposal that was already being worked on. Qatar was the lead investor at this point and had arranged the investment by Abu Dhabi, not the other way around.
> The allegation that I referred to all investors getting the "same deal"
> 210. Although I do not specifically recall doing so, it is entirely possible that I did use the words "same deal" in that meeting, since all investors do get the same terms in respect of securities issued in a capital markets transaction,. If I did make such a statement I would have had in mind the commercial terms being offered to all investors in respect of the securities in question. This would have included (in my mind) any commissions, coupons, discounts or other terms of value (such as anti-dilution protection). It would not, in my mind, have covered payments which were unique to one party such as the arrangement fee in fact paid to Qatar Holding. Nor would it, in my mind, have covered any broader commercial arrangements the parties might have agreed

to outside CR2 (such as, for example, Tinbac or the unsecured loan). Indeed, if I had been asked by Ms Staveley for details of any such broader commercial arrangements with Qatar, I believe I would have declined to answer the question as being inappropriate, for the following reasons.

211. By 23 October we were in early discussions with Qatar about Tinbac and the unsecured loan to the State of Qatar but these were obviously confidential matters. I was also made aware by this point that the Board Finance Committee had approved a sizeable arrangement fee to Qatar, but I had not yet raised it with Qatar. I was unaware at this point of any suggestion that Barclays would enter a further agreement for advisory services. Therefore, of the broader commercial arrangements that PCP says I should have disclosed to them, it would not have been appropriate to discuss any of them with Ms Staveley at our meeting on 23 October. At that point in time I was aware that Qatar had made a demand to receive a particular effective entry price across CR1 and CR2, and my understanding was that the Qataris economic "ask" would be met through: (i) commissions, coupons and discount on the MCN subscription, plus commissions and coupons on the RCI subscription, plus warrant value that came with the RCIs (these being elements that Sheikh Mansour would receive on the same terms), plus (ii) an arrangement fee to Qatar only – this was a separate payment for the valuable arrangement of further investors."

224. I deal separately below, in the context of the meaning of the SDR, with Mr Jenkins' evidence about what he would have had in mind, had he made it. Equally, I deal in Part 3 with what Mr Jenkins would have said about the deal with Qatar in the counterfactual which assumes that no misrepresentations were made. But it is convenient to set out all of these paragraphs above at this stage.

225. There are, in truth, two elements to the contention that the SDR was made on 23 October. The first deals with when he is said expressly to have referred to the same deal. The second is when it is said to have been implicit by his reference to splitting the warrants. I consider the making of each in turn.

226. Barclays contends that there were cogent reasons why Mr Jenkins did <u>not</u> in fact make the express SDR at all. It relies on the fact that Ms Staveley did not write down any reference to the words "same deal" in her notebook or in any of the annotations made to her copies of the Presentation. It is also correct that she had said when cross-examined about notes of the 23 October meeting in her notepad that she tended to write down exactly what she was told, although she also said that she used her notepad very erratically. On the other hand, when asked about the SDR, she maintained firmly that Mr Jenkins had used the words "same deal". I do not accept that she had no reason to ask about the position of the Qataris - it seems a perfectly sensible question to have asked.

227. In fact, there are other matters which positively support the case that Mr Jenkins did make the express SDR. First, he accepted that it was indeed possible. Second, he referred in his paragraph 42 to the general principle that investors would obtain the same fees in commercial terms as each other. Sir Richard Broadbent and Mr Varley each accepted this notion in their evidence as well.

228. Third, the Qataris asked for the same reassurance. See the email dated 30 October referred to at paragraph 83 above.

229. Fourth, the express warranties in the subscription agreements themselves include what amount to assurances about the same deal for investors. I refer to these in more detail below.

230. As for the second and implicit iteration of the SDR on 23 October, if (as I have found) the express SDR was made, this further point does not strictly matter. Nonetheless, I deal with it.

231. In my judgment, it is clear that Ms Staveley did raise the question of warrants at this meeting. They were not previously on the table immediately beforehand, at least as far as she was concerned, which is reflected in the fact that they formed no part of the Presentation. And yet, by the following morning, she received a term sheet for Warrants as well as for the RCIs and MCNs. Further, her annotation on the copy of the Presentation which she did not send to either Mr Eadie or Sheikh Mansour refers to "£2 and £1.5bn" which is a reference to the worth of MCNs and RCIs which PCP was proposing to acquire and then next to them, the words "£3bn warrants". Also, on the version faxed to Sheikh Mansour, she had written "Full warrant" then a reference to volatility and pricing and then "£275-300m value". All of this supports the fact that she asked for £3bn worth of Warrants.

232. But on the same copy of the Presentation there is also a reference to "1.5 and 1.5" written on top of each other and separated by a line, and then the words "on the RCI". I accept Ms Staveley's evidence that this was a reference to her noting that Abu Dhabi and Qatar would be getting the same amount of Warrants because effectively, according to Mr Jenkins, they would have to. Although she was cross-examined extensively on these points (Day 6, pp80-130) I did not think that this made any significant inroads into her evidence. Equally, I do not think that this exchange could not have happened because she already knew (she said she did not) that Abu Dhabi and Qatar were already "aligned". Although Mr Jenkins said that by the time of this meeting with Ms Staveley, on 23 October, he had already agreed to give Warrants to the Qataris (but did not want to volunteer them to her), even if that was true, it makes no difference. It would still have made sense to tell her that if Warrants were given, then they should be split and so if she wanted £3bn worth, on the footing that Qatar had not yet got any, they would be split.

233. In fact, it is far from clear that Mr Jenkins had already agreed to give warrants to Qatar prior to his meeting with Ms Staveley on 23 October. I say that because certainly as at 21 October, Barclays' current position was that they were moving towards "an RCI no warrants deal" so far as Qatar was concerned. See the emails from Mr Boath to Mr Kalaris and from Mr Jenkins to Mr Morrice, both dated 21 October. See also the email from Mr Kalaris to Mr Diamond sent in the morning of 23 October which does not refer to any warrants.

234. On the other hand, very shortly after the discussion between Mr Jenkins and Ms Staveley at their meeting on 23 October, a "new" Mandolin PowerPoint was sent from Mr Ollerenshaw to Mr Jones. It referred to "Avocet" i.e. Abu Dhabi receiving £1.5bn of warrants and the same for "Quail" i.e. Qatar. That is wholly consistent with a "split" of warrants having been discussed between Mr

Jenkins and Ms Staveley in their meeting. Further, and again shortly after the meeting, Mr Kalaris emailed Mr Diamond, Mr Lucas and Mr Varley saying that Mr Jenkins was in a meeting but had asked Mr Kalaris to discuss a potential different pricing and structure with them before he later met the Qataris. It is difficult to see what this could be other than the Warrants. At almost the same time Mr Jenkins sent an email saying "I may have something can we meet". The timing of all of this is important because Mr Jenkins was going to meet the Qataris later. Emails from Mr Varley and Mr Jenkins in the course of those later discussions at around 9 p.m. suggest that the Qataris were asking too much, and in particular wanted to keep the coupon on the RCI at 14% and have the Warrants. This does not mean that Barclays were not prepared now to give Warrants to the Qataris; rather, at that stage, they did not want to give them Warrants and such a large coupon on the RCIs. What is clear is that the term sheets for Warrants were indeed produced the following morning.

235. Accordingly, I accept that the second iteration of the SDR occurred on 23 October as well.

24 October

236. I have referred to the SDR said to have been made on this day at paragraph 73 above. Ms Staveley's evidence about it is at paragraphs 142 and 143 of her WS which were essentially unchallenged in cross-examination. Mr Jenkins' evidence was that he could not recall the telephone conversation. The reason for the call and the enquiries which Ms Staveley said she made, in particular about the 5 year warrants, all seem plausible to me, as did the answers she said she received. In that conversation, Ms Staveley says that she emphasised that she needed the warrants to be for 5 years, that Mr Jenkins said this was "fine" and they had to be split with Qatar. In other words, this SDR was implicit in the reference to the split, just like the second iteration of the SDR on 23 October.

237. Nonetheless, Barclays submits that there are cogent reasons for not accepting her evidence. If so, such reasons should have been put to her and they were not. I deal with them nonetheless. Barclays says that her account of the conversation on 24 October could not have been correct because of two emails sent by Mr Boath to Mr Jenkins on 25 and 26 October respectively. In the email of 25 October, he said:

> "Btw Staveley says she wants 5 year warrants and Stephen and I said that it didn't create much additional value and looked horrible for us so no. She didn't seem to fussed."

238. In his email of 26 October, Mr Boath said that in the discussion he had with the Qataris that day, they had asked for 5 year warrants not 3 years as to which:

> "We said no (Staveley asked for same on Friday)."

239. It is correct that the term sheets sent on the morning of 24 October gave an expiry date for the warrants of 2011 i.e. implying 3 years. However Ms Staveley said that this was why she needed to get her requirement for 5 year warrants agreed. First she says she called Mr Jones about it and he

said she should speak to Mr Boath. Her call to Mr Jenkins later on 24 October was to check that the warrants could be for 5 years and makes sense in this context. She says that she then spoke to Mr Boath in the evening and when he suggested that Barclays would not agree to 5 years, she said that this was a deal-breaker for her; he then said he would talk to his colleagues and come back to her. That she spoke to Mr Boath is confirmed by his two emails. However Mr Boath's suggestion that 5 years was clearly rejected and that Ms Staveley did not seem too fussed is unlikely to have been correct, since it is clear that she had been continually insisting on 5 years, and got it. Mr Boath, of course, was not called by Barclays as a witness. So I do not think that either of the two emails relied upon by Barclays cast any real doubt on Ms Staveley's account of her call with Mr Jenkins on 24 October. I accept that account and the iteration of the SDR within it.

31 October

240. Here, PCP alleges first that the SDR was made or could be drawn from the following matters:

(1) a telephone conversation between Clifford Chance, Barclays' legal department and A&O, in which Ms Wolfson of A&O was told that some changes to the subscription agreements were to be made "as a result of the negotiations by other parties" i.e. the Qataris;

(2) an email from Mr Dobson stating that A&O would receive blackline changes to the subscription agreements for the SPVs so as to conform to the subscription agreements for the Qataris;

(3) the Announcement of 31 October together with the draft thereof provided to PCP to sign off.

241. As to the first two instances, I can see how those exchanges are clearly predicated on the basis that Abu Dhabi and Qatar would each get the same deal. It is true that the immediate context was the subscription agreement for the Instruments and not some wider context. Nonetheless the implicit reason <u>why</u> the subscription agreements should be the same was obviously because both investors should be treated equally.

242. However, it would have to be shown at the end of the day that the maker of this SDR (who was not Mr Jenkins) had acted dishonestly. Nor was a case of dishonesty on these matters really put to Mr Jenkins, save to say that he would have known that the lawyers would have made representations to the same effect as the express warranties in the subscription agreements. However, he denied this and said that he had not seen subscription agreements and the matter was not explored any further. The same problem arises, in my judgment, with PCP's point that the SDR was also contained in the Announcement and its draft.

243. PCP also alleges that in the conversation about the £66m fee described below, according to Ms Staveley, she again asked Mr Jenkins if it was the same deal with the Qataris and he said it was the

same deal. I deal with this iteration of the SDR in the context of my analysis of the £66m fee and the JR generally, below.

244. It is of course the case that in any event I have found two occasions on which the SDRs were made, on 23 and 24 October; that is sufficient, especially as Barclays did not suggest that if they were made, they would not be continuing representations so that, provided they became false at some time before they were actually relied upon (not earlier than the signing of the subscription agreement by the SPVs) that would be enough for PCP's purposes. Accordingly, for present purposes, I confine myself to the SDRs made on 23 and 24 October.

THE MEANING OF THE SDR

245. PCP contends that the SDR was a representation to PCP that "the terms of the deal which it was offering to (and which it was proposing to conclude with) the Qatari investors were the same in all material respects as the terms of the deal which Barclays was offering to (and which it was proposing to conclude with) PCP" (see paragraph 31 of the Particulars of Claim).

246. However, Barclays contends that the SDR could only have been intended, and be reasonably understood as, "a representation about the terms and conditions (including commercial terms) attaching to the Instruments" (see paragraph 8, 37 and 68 of the Defence). I shall refer to this (non-pejoratively) as "the Narrow Construction", as it was sometimes referred to in argument. I shall refer to the meaning given to the SDR by PCP as "the Wider Construction".

247. The Narrow Construction means that "the terms and conditions (including commercial terms) attaching to the Instruments" are confined to the provisions of the Instruments themselves. I disagree. If there was, for example, a separate agreement by which Barclays expressly agreed to pay one investor, say £200m, as a fee for entering into the subscription, on the Narrow Construction, another investor, subscribing for Instruments with the same internal terms and conditions but no separate agreement for £200m would still be getting the same deal. That is absurd from a commercial perspective; the whole point of such a representation must be that whether found in one or more instruments or documents, one investor is, among other things, obtaining the same benefit in and for the subscription as another.

248. That this would be the obvious commercial sense of the SDR is supported by the terms of the express warranties to be found in the subscription agreements, not because PCP can invoke them directly - it cannot, because the SPVs, and not it, are the other parties to the subscription agreements. But rather because they give a very clear indication as to the intended meaning of the "terms on which any other investors are to acquire [MCNs]". Thus, in the case of the MCN Subscription Agreement, the warranties about those terms were that:

“(A) There are no further agreements or arrangements entered into between such other investors and any member of the Barclays Group; and

(B) no member of the Barclays Group has agreed to or intend to pay any fees, commissions, costs, reimbursements or other amounts to such investors.”

249. Indeed, Barclays was (through Mr Jenkins and others) particularly aware of the importance of any statement about “the same deal” because Mr Jenkins knew that, on the face of it, a separate fee agreement with Qatar would contravene similar express warranties to be found in the subscription agreements underlying CR1 and also because he knew that if additional fees were offered expressly to one investor, the other investors would want them too. See my discussion of the circumstances behind ASA 1 and ASA 2, below.

250. The fallacy of the Narrow Construction was shown by the concession made by Mr Onions QC in his closing argument on Day 39, when he stated that if I found that ASA 2 was a sham, then there would be a breach of the SDR as construed by Barclays. He said that this is because the “true” agreement would then be a term of the Instruments. But any such agreement was not in fact a term of the Instruments. Or if it was, then the phrase “terms and conditions of the Instruments” is apt in principle to cover something found in a quite separate agreement. Indeed, on a fair reading of the Narrow Construction of the SDR, the words “commercial terms” are not confined to the terms of the Instruments anyway but could cover all elements of the “price” which Barclays was paying for the subscriptions. If that price was in truth referable to consideration other than the commission expressly provided for in the Instruments, then it would surely follow that such other consideration would as a matter of principle be included.

251. The obvious sense of the SDR as contended for by PCP is, again, emphasised by the email from Mr Al-Sayed for the Qataris to Mr Jenkins seeking to ensure that Abu Dhabi was not getting “better treatment” in relation to the investment - see paragraph 83 above.

252. I now deal with some further arguments made by Barclays on this issue. First, it says that Ms Staveley herself only understood the SDR in its Narrow Construction form. Accordingly, this is some evidence of what a reasonable person in her position would have understood the SDR to mean. This point is partially bound up with the issue of the £66m arrangement fee discussed in detail below. However, for present purposes, Barclays’ contention is that Ms Staveley accepted that if the arrangement fee had been a reward for the Qataris’ introduction of the Libyans to the capital raising and getting them to subscribe (which they did not) it would be unobjectionable and not part of the “deal” for the purposes of the SDR. In truth, she did not go quite that far. She said that it depended on what the fee was for (Day 7/74) and her later remarks in the context of Libya and the Announcement (Day 7/94) did not take the matter much further in my view. Nor do I consider that because, at one point in her evidence, about the same terms, she referred to different percentages on

the express commissions in relation to the equity investments, it follows that in and to her mind, the SDR was limited to its Narrow Construction (Day 6/119). It rather goes back to the point made in paragraph 250 above that if the Narrow Construction really was the correct one, even a sham ASA 2 would strictly fall outside the SDR (even though conceded to be within it) since it was not part of the terms of the Instruments.

253. Next, I do not accept in this context that because there is no note of the SDR being made by Ms Staveley on 23 October that this counts significantly against the Wider Construction. The argument here is that she would surely record what she would have appreciated was a "far wider representation". But that rather assumes that the Wider Construction is somehow unusual or unorthodox. In my view, it is not.

254. Next, I do not accept that since the second iteration of the SDR on 23 October arose in connection with Ms Staveley's demand for warrants, at least this iteration can only be understood on the basis of the Narrow Construction. It is correct that in cross-examination, Ms Staveley said at one point (Day 6/120) that Mr Jenkins' explanation of the need for a split was because the deals had to be the same and that this was "the regulatory position", that one could not have "a disjointed deal" and that the market required Barclays to do the deals equally. But she later said that there was a concern that PCP and Qatar could be treated as concert parties. Overall, I do not consider that this shows that this second iteration of the SDR (which Mr Jenkins denies in its entirety) is confined to the Narrow Construction. It was not put to her in this context that she therefore understood that the SDR here was made solely in the context of the particular terms of the subscription agreements for the Instruments.

255. Barclays also relies upon part of Ms Staveley's interview with the SFO on 17 June 2015 where she recounted that Mr Jenkins had said, in connection with the warrants on 23 October, that "the deals had to be the same… He made it almost as if it were a legal thing." However, first, I do not think that this shows that he could only have been speaking (and been understood to be speaking) in a Narrow Construction sense. Second, this point ignores the fact that Ms Staveley said that her reaction to this was that she was pleased and that this was what they would have wanted (to which, on her account, Mr Jenkins did not demur**)** and her earlier emphasis on parity between investors (page 126 of the same interview).

256. Nor do I consider that when, on Ms Staveley's account, Mr Jenkins said that it was "obvious" that the terms should be the same, this, for her, could only have been understood in the Narrow Construction sense. She may not have been a skilled banker, but as her interview with the SFO (for example) shows, she knew and understood perfectly well the need for parity between investors.

257. Points are made in paragraphs 269-270 of BWC as to the "strikingly uncommercial" nature of the Wider Construction of the SDR. I consider that they have been very overstated. As for the initial pleading point, if there was anything truly in it then no doubt Barclays would have at the outset objected to PCP maintaining its Wider Construction case which is an important part of the claim. But it did not. Moreover, the competing constructions are essentially set out at Issue 10 of the List of Issues. As to the substance of these points, if the Wider Construction meant that the "deal" includes, for these purposes, whatever is paid to or done for an investor as the price for investing, as opposed to some entirely coincidental arrangement or agreement that just happens to have taken place at the same time, there is nothing odd about that. It is a matter of commercial common sense. It is also, as noted above, effectively reflected in the Express Warranties discussed above, which would surely not have been given by Barclays if they were themselves strikingly uncommercial. It may be that a particular transaction and its context would have to be scrutinised carefully to see if it falls within the "deal" contemplated by the Wider Construction or not. But that is not an argument against the obvious sense of the Wider Construction.

258. In my judgment, the clear objective meaning of the SDR in this context is to capture whatever package of benefits, whether in terms of fees or otherwise, and whether in the subscription agreements or otherwise, is being provided to the investor in return for undertaking the subscription.

<u>THE MAKING OF THE JR</u>

259. It will be recalled that the JR is a representation that the £66m fee referred to in the Announcement was in connection with QH's earlier investment in Barclays in the context of CR1. In the Announcement it was described as a fee to QH for "having arranged certain of the subscriptions in the Capital Raising". It is also to be found in paragraph 6.4 of QH's RCI subscription agreement as a sum payable "in consideration of [QH] having procured subscriptions for the instruments of the Issuer and Barclays Bank plc under agreements dated the date hereof."

260. Ms Staveley says that the JR was made to her by Mr Jenkins on 31 October during the meeting with Barclays referred to in paragraph 93 above. In her main WS she put it thus:

> "335. What happened next was a little unusual. Mr Jenkins took me aside (away from Mr Jassim and Mr Varley) and said there was a point on the press release that he just needed to explain. He did not have a copy of the draft RNS announcement with him. He said there was a reference to a payment of £66m to Qatar. He then said words to the effect of: "*We have had to pay Qatar another £66m, but don't worry it relates to the June fund raising and it has been overlooked by mistake*."
>
> 336. I was surprised by this revelation. I stepped out of the room to telephone Mr David Bick who was PCP's public relations consultant who had been on stand by for the close of the deal. The call I made to Mr Bick was at 6.40am. I asked him to find anything in the press release about £66m and read it out to me. He took a little time to find the passage (on about page 6 of the press release) and read it out to me. I suppose Mr Bick was reading from the draft of the press release that we had received on the previous night from Barclays because I am not sure if anyone had sent him the final version by this stage. I cannot now be sure what he read out to me but it was just one line. I set out below what the final (issued) press release said about the £66m:
>
> *"In addition, Qatar Holding will receive a fee of £66m for having arranged certain of the subscriptions in the Capital Raising."*

337. I went back into the office to confront Mr Jenkins. I felt a little rattled, this being just before the deal was to be announced to the market and before I had seen or signed off on the wording of the press release insofar as it related to PCP and Sheikh Mansour. I asked Mr Jenkins why this was the first I had heard of any fees to be paid to Qatar. Mr Jenkins was very cool and said it was "*no big deal*" and had to be included in the press release because of a "*genuine mistake*" that was made in June. In other words, he was telling me the £66m was solely to do with Qatar's investment in June. He seemed genuine and very reassuring. I had no reason to disbelieve him but I did ask "*Is the deal the same on the other side?*" and he said "*Amanda, it's the same deal*". I took him as his word. I then spoke by telephone to Mr Eadie who had noticed the £66m and asked me about it. He was a little concerned about it but, ironically, I reassured him and said it was nothing to do with the deal we were doing and told him not to worry about it. When I thought about it a little more later, I assumed that Qatar must have introduced the Chinese investors who took a significant stake in Barclays in the June 2008 capital raising and the fee must be for arranging that. I never studied the definitions in the press release and never appreciated that "Capital Raising" was defined to mean the October 2008 capital raising. I did not believe Mr Jenkins would tell me a lie and so I was not looking for anything to prove or disprove what he had said about the payment being in relation to the June capital raising."

261. I discuss below her oral evidence and a later WS about this which departed in some respects from that contained in her first WS at paragraphs 336-337. However, what is effectively a summary of the latter evidence is to be found at paragraphs 53 and 80 of the LBA. At this stage, there was no allegation that this representation was false.

262. In addition, paragraph 92.3 of the LBA asked Simmons and Simmons for an explanation as to what subscriptions QH was said to have arranged (per the Announcement) and how they did so. Simmons and Simmons responded in a letter dated 17 September 2015. The making of the JR was denied but in addition the following was stated at paragraph 13.1 (c):

"Representatives of Qatar Holding (to which the fee was paid) assisted Barclays by arranging Sheikh Mansour's participation in the October 2008 capital raising. An explanation for the fee was given to PCP Capital ahead of that same explanation being announced to the market."

263. It is not suggested that the "explanation" of the fee which was given to PCP at the time was any more than the "explanation" given in the Announcement; in other words this is simply a reference to the draft of the Announcement.

264. Ms Staveley says that she was shocked when she saw this letter because the explanation given was untrue. Neither QH nor Sheikh Hamad had any role at all in arranging or procuring the subscription made by the SPVs by which Sheikh Mansour/IPIC made the subscription.

265. On Ms Staveley's case two things flow from this:

(1) The JR was false because, even on Barclays case, the £66m fee was nothing to do with a fee in respect of CR1;

(2) The £66m fee rendered the SDR false because it was a fee to Qatar in return for subscribing in CR2.

266. At this stage, I am dealing solely with the question as to whether the JR was made at all. Barclays says that it was not. Here, Barclays is not merely challenging Ms Staveley's account on the basis that it was confused or mistaken, and that Mr Jenkins' evidence on the topic should be preferred.

Barclays goes further and says that the JR allegation is a deliberate construct on the part of Ms Staveley, invented prior to the sending of the LBA, for the following reason: Ms Staveley was aware that she had never challenged the £66m arrangement fee at the time it was disclosed, before and in the Announcement, as giving the Qataris a different deal. As she knew, the lack of any such challenge demonstrates that she was not troubled by the fact of a disparity between Qatar's deal and the SPVs deal - at least to the extent that Qatar was getting another £66m by way of a fee which was not explained in any real detail, while the SPVs were not. She appreciated that this would be very damaging to her case on the SDRs generally because if she was not troubled by the £66m fee, then she would find it very difficult to show that she had relied on the SDRs to begin with, even if made. Accordingly, she devised the story of the JR so that she could explain why it was that she did not react to the reference to the £66m fee at the time. It also follows that she has deliberately maintained this false story throughout this litigation and in her evidence on oath.

267. I will comment on the plausibility or otherwise of Barclays' thesis below, but first I need to consider the evidence about the JR which she gave in court.

268. An initial point made by Barclays is that Ms Staveley's account could not be true because it would be illogical and highly risky for Mr Jenkins to have made the JR at all. That is because he could quickly be proved wrong. I do not agree; it would not be easy for Ms Staveley, for example, to somehow test out the truth of the JR by reference to what had or had not been agreed between Qatar and Barclays concerning fees due in respect of CR1 - in which PCP played no part. And the proof of the pudding is in the eating. Had it not been for the FSA and SFO investigations, started in 2012, which set Ms Staveley on her train of enquiry, it would not have come to light. Indeed, it could be argued that it is positively plausible for Mr Jenkins to have made the JR because he may have been aware that Ms Staveley would or might question the £66m arrangement fee as shown in the Announcement and in order to avoid that enquiry, he effectively put her off the scent. But in any event, I do not accept that the notion that he should ever make the JR is itself wholly implausible. Also, it could be said, on the basis that the £66m fee was raised one way or another, that Mr Jenkins did not have many options: he could not say that it was a fee for introducing Sheikh Mansour because Ms Staveley would never have accepted that. Nor could he say that it was a simple fee for subscribing, because she would not have accepted that either.

269. However, some other evidential points made by Barclays have more potential force. First, in cross-examination Ms Staveley said that she had not read in detail the draft of the Announcement in the evening of 30 October and she was focused on the references to " Abu Dhabi Funds" and it would have been very burdensome to flick through the whole document, the reference to the arrangement fee being at the top of page 7. However I do not think it is so unlikely that Ms Staveley would have

concentrated on the issue of how to describe the SPVs' investors and the references to the Abu Dhabi Funds, for the reasons which she herself gave at paragraphs 309-316 and 326-328 of her WS. And as she said in evidence, the focus in the hours prior to the publication of the Announcement was very much on getting PCP's name in and using a single descriptor, rather than simply naming Sheikh Mansour as the ultimate beneficial owner of the SPVs which in fact he was not at the time. Moreover, it must be remembered that from Ms Staveley's perspective at least, she was not seeking to check whether Barclays (through Mr Jenkins) was being "tricky" with her. On her case, they had to date been straight talking about the SPVs getting the same deal.

270. On 1 November, the day after the Announcement, Mr Sikhtian of GSI sent an email which said among other things:

> "we have not seen the Qatar agreement, you are getting the same terms as abu dhabi but as you know Qatar is getting an additional fee of 66m gpb for "having arranged certain of the subscriptions in the capital raising""..

271. So GSI had themselves picked up the point.

272. In fact, a month before the trial started, and in her 10th WS dated 11 May 2020, Ms Staveley now said as follows:

> "3. I make this tenth witness statement because, in the course of revisiting my evidence in preparation for trial, I realised that I have omitted a discussion with Mr Eadie late on the evening of 30 October 2008 about Barclays' draft press release, and I therefore wish to make an addition to my evidence in that regard in my first witness statement dated 28 July 2017 ("**Staveley 1**").
>
> 4. I set out my evidence on Barclays' draft press release at paragraphs 309 to 316 of Staveley 1. In addition, I had a brief discussion with Mr Eadie by telephone late on the evening of 30 October 2008 about the draft press release. I recall Mr Eadie had been at Allen & Overy's offices with me from the afternoon but had left by then. Mr Eadie had reviewed Barclays' draft press release and raised with me the £66m fee referred to in it. I do not believe he read out to me any part of the draft press release. Mr Eadie asked me whether I knew to what the fee related. I told him that I did not know, and he said that in that case I would need to raise it with Barclays. I told him that I would do so the next morning, as I was meeting Mr Jenkins then.
>
> 5. It remains my clear recollection that Mr Jenkins took me to one side to discuss the issue of the £66m fee during my meeting at Barclays' offices early on the morning of 31 October 2008, in the manner I described in paragraphs 335 to 337 of Staveley 1. At this remove of time, it is now not possible for me to recall precisely whether I raised the issue first and Mr Jenkins then took me aside to discuss it, or whether he raised it first."

273. This is an important change, because Ms Staveley was now saying that she had been alerted to the £66m fee letter the night before her meeting with Barclays, and that she in fact intended to raise it at that meeting. In oral evidence, she accepted that Mr Eadie's raising of the matter was important because the fee suggested that Qatar and Abu Dhabi might not be getting the same deal. She added that, knowing that it related to a subscription agreement, it was probably a reference to Qatar getting the Libyans to subscribe, on the basis that Mr Jenkins (although not she) was sure at that stage that the Libyans would come in. But either way, she would need to check. However it was not as if she (or GSI) were saying that it must be a fee for introducing Sheikh Mansour. It was put to her that it could not have been a fee for introducing the Libyans by that time because she had become aware by late evening on 30 October that the Libyans were not investing. Ultimately, she said that she had

a fair idea that they would not invest but was not 100% sure (Day 7/74). In fact, the notion that the Libyans might still be investing as late as the evening on 30 October or very early on 31 October is not implausible. Mr Varley emailed Mr Jenkins at 5.38 a.m. on 31 October headed “Lia” (in other words Libyan Investment Authority). He said there that it was important to get them in a big way and important that Sheikh Hamad should keep the pressure on them that day. It was only later, at 9.12 a.m. when Mr Kalaris emailed Mr Diamond to say that the Libyans would not be taking any action that day and would speak to him tomorrow i.e. Saturday 1 November. Then, in an email from Mr Jenkins to Mr Kalaris on 1 November, the former said that the Libyans had missed the deadline for the subscription the day before, but Sheikh Hamad was “ok” with this.

274. It is also a fair point to observe (as Ms Staveley accepted) that to the extent that the £66m set alarm bells ringing, although she later said that she thought that would be an explanation, she did not ask A&O to look into this. She had been with Ms Wolfson of A&O on the evening of 30 October. At this stage in her evidence, I would agree that Ms Staveley did indulge in some speculation about why Ms Wolfson had not raised the point; at one stage, she said that perhaps Ms Wolfson thought it referred to the Libyans as well, although by then, at least, A&O had ceased to act for them. Later on, she said that in fact she had discussed the matter with Ms Wolfson in the early hours of 31 October but said that she would raise it herself with Barclays at the meeting to take place at 6.15am the following morning; that meeting, after all, had been set up to discuss and agree the Announcement and so it would be a matter between principal and principal. This is not a very satisfactory account of events; some of it is inconsistent and some of it sounded confused.

275. When it came to the meeting itself, she said that she left at 7 a.m. (she was not sure how much if any sleep she had got beforehand) but she did not raise it at the outset. Although she maintains that she did raise the matter first, rather than Mr Jenkins volunteering it towards the end of the meeting, I do not think that much turns on that. She still maintained, on the basis that she had raised it somehow, that Mr Jenkins then took her to one side and made the JR. Barclays suggests that it is “bizarre” that Ms Staveley should maintain that part of the story but I do not agree. She did say that she did not relay the JR to Mr Glenn Earle of GSI because she did not think that in the event he was actually at the meeting although he had plans to be. She accepted that she did not relay it to Mr Jassim, she said, because she did not need to.

276. A point was taken about Ms Staveley contacting David Bick, PCP’s PR consultant, after Mr Jenkins had made the initial JR. Barclays questioned why she would do that, since he would not have been an appropriate person to contact. But I cannot see why not, if Mr Jenkins was explaining the £66m fee to her when he did not have the draft Announcement in front of him. Mr Bick could remind her

of what it said. In any event, it is hard to see why she would invent this reference to Mr Bick, whatever else might be said about her evidence.

277. Overall, while her account, as it ultimately became, had deficiencies and there was undoubtedly some confusion on her part, it has to be remembered that all of this was happening at absolutely the eleventh hour, no-one had had much sleep, and there were still important points to discuss, like how the Abu Dhabi interests, and PCP, were to be portrayed in the Announcement. Taking her evidence as to what happened at the meeting overall (in particular see Day 7/88-100) and as a whole, I do not regard it as so unsatisfactory that it should be rejected. Indeed, when it was finally put to Ms Staveley that all of this was an invention on her part to try and defuse the significance of her not challenging the £66m fee at the time as showing a different deal for Qatar, she responded by saying that she was "absolutely furious" at that suggestion. Moreover, her changed account that she did in fact raise the point first could be said to be more plausible than Mr Jenkins volunteering the JR entirely unprompted although as I have said, that is not wholly implausible either. I am quite satisfied that this was not an invention. And if not an invention, it would certainly be difficult to see that she got the JR into her head, and articulated it at least since May 2015, as the result of a bizarre confusion.

278. I do not accept either that, having been given the JR, Ms Staveley or Mr Eadie would have been likely to probe its correctness afterwards and then expose it, the possibility of which is said by Barclays to be a reason why Mr Jenkins would never have made the JR in the first place.

279. A further point was that Mr Jenkins had no reason to make the JR anyway because the £66m fee was a perfectly genuine fee for the introduction by Sheikh Hamad of Sheikh Mansour to the subscription. However that begs the question as to whether this was the case, which I deal with below.

280. Mr Eadie also gave evidence about the £66m fee. In his first WS dated 28 July 2017 he said this:

> "73. When I read the draft announcement later that evening, I was very surprised to see that on page 7 (page 160) it said "In addition, Qatar Investment Authority will receive a fee of £66m for having arranged certain of the subscriptions in the Capital Raising", This was entirely contrary to my understanding of the deal. I had understood throughout and PCP were investing on the same terms and receiving equivalent
> 74. I raised this fee in a conversation with Ms Staveley as my only material issue with the draft announcement. I do not now recall when the conversation took place but it was either that evening or the following morning. Either in the same conversation or in a subsequent one, Ms Staveley informed me that she had spoken to Mr Jenkins and that the fee — Mr Jenkins had told her that it was a fee owed to Qatar from the June 2008 and they wanted it paid so it had to go in this announcement. It was October financing.
> 75. I was reassured by this explanation. It did not occur to me at the time that Mr Jenkins might be misleading Ms Staveley about the nature of the £66m fee. He was a senior executive of a global bank, acting on a hugely significant transaction and the point was a clear cut factual issue involving a substantial sum of money. In those days I considered that it was inconceivable that such a person would lie on a major point of this kind. I took him at his word and saw no need to ask for written confirmation. I recall considering whether in the light of his explanation the reference to the £66m in the RNS was misleading, but I took the view that it could have been justifiable in light of a novation of the original fee agreement or something of that nature and that as it was Barclays' statement they and their advisors could be relied on to get it right in the absence of manifest error."

281. However, and as with Ms Staveley, he put in a further WS on the point on 11 May 2020. This read:

> "4. I make this witness statement because I wish to clarify part of my first witness statement dated 28 July 2017 relating to the timing of discussions with Ms Staveley regarding Barclays' press release.
> 5. At paragraph 74 of my first statement, I explained that, upon reviewing Barclays' draft press release in the evening of 30 October 2008, I queried the reference to a £66m fee in a conversation with Ms Staveley, and that this conversation took place either that evening or the following morning. I also explained that, either in the same conversation or in a subsequent one, Ms Staveley informed me that she had spoken to Mr Jenkins, who had told her that the fee was owed to Qatar from the June 2008 capital raising and that they wanted it paid so it had to go in this announcement.
> 6. I wish to clarify that, having revisited the evidence in my first statement in relation to my review of the draft press release in preparation for the trial of these proceedings, I believe there were in fact two discussions with Ms Staveley regarding the £66m fee. The first discussion took place following my review of the draft press release in the late evening of 30 October 2008, after I had left Allen and Overy's offices, where I had attended meetings that day. During that discussion, I mentioned the reference to the £66m fee in the draft and said that we needed to raise it with Barclays. Ms Staveley said that she was meeting Mr Jenkins early the next morning and would speak to him about it then. The second discussion took place after Ms Staveley had spoken to Mr Jenkins, and my recollection of that discussion remains as set out in paragraph 74 of my first statement."

282. Broadly speaking, therefore, Mr Eadie provides some corroboration for the making of the JR in his WSs although not directly, of course, because he did not hear it at first hand but only from Ms Staveley herself. It is suggested by Barclays that, in reality, Mr Eadie has unintentionally adopted a false construction of events because of the time he spent reading and absorbing Ms Staveley's evidence and thinking about these matters repeatedly. Barclays claims to be supported in this analysis by what Mr Eadie had told the SFO in interview on 29 May 2015 when, it was said that he candidly accepted that he could not be sure of what he had been told by colleagues [i.e. PCP] about why the fee was not a problem. That is not a fair criticism however. At page 200 he said that he knew "what we were told it [i.e. the fee] relates to" and that "I know precisely what we were told it relates to" but he then invoked privilege at this point because of the preparations for this claim against Barclays by then underway. He said that he had some recollection of the point going back to 2008. He did later say that it was difficult to say whether his understanding was remembering what he was told at the time or came from what he had been told "in the preparation". The privilege invoked (rightly or wrongly) seems to have been in connection with his witness statement and/or that of Ms Staveley which were being prepared for the purpose of the claim. That is because he went on to say that if he remembered clearly what he was told then (in 2008) it would not be privileged; and he believed this was the case because he was told about it in a non-privileged situation and referred to 2008 as when "I was told what it was for".

283. In my judgment, the thrust of all of this is not that he cannot remember what he was told in 2008 but that he was not prepared (rightly or wrongly) to spell it out there and then, although he did say that the SFO could write to him later. When asked about all of this in cross-examination, he accepted that the privilege concern was because he might mix what Ms Staveley had said about the matter with his own recollection. However he rejected a suggestion that he had simply been persuaded that Ms Staveley's account was correct while having no clear recollection himself. He maintained that

he did have a clear recollection as to what Ms Staveley had told him about the £66m at the time. See Day 3/127-130. He added that from what she had told him at the time, he did not think there was anything to worry about.

284. It is true that Mr Eadie also suggested that the statement about the fee in the Announcement could be squared in his mind with there being some sort of novation of the original fee agreement from June 2008, and so a reference to the October subscription might be justified. He thought that, whatever the explanation, Clifford Chance, as Barclays' lawyers, would have satisfied themselves about it. I do not think much turns on this. I do not see any reason to disbelieve his evidence that he was prepared to accept the explanation which Ms Staveley had relayed to him at the time. It is noteworthy that Mr Eadie's account has always been that he raised it with Ms Staveley first. That was not Ms Staveley's evidence in her first WS and their two substantive WSs were produced at around the same time. But that sort of inconsistency is not untypical. If Mr Eadie had really just absorbed her evidence from presumably before her first WS was produced, the accounts would have been entirely consistent. But they were not.

285. In my judgment having considered all the evidence, the JR was made, and I so find.

<u>THE MAKING OF THE INVESTOR REPRESENTATION</u>

286. This is pleaded as an implied representation at paragraph 33A of the Particulars of Claim to the effect that, namely in the October capital raising exercise:

(1) The Qatari Investors intended to invest their own money in Barclays and/or money that they would raise (or had raised) from third parties; and

(2) More particularly, Barclays did not intend to lend the Qatari Investors (or their principal or an affiliate or associate) money (a) for the Qatari Investors to invest in the bank; or (b) so as to facilitate their investment in the bank.

287. As to that, Barclays admitted at paragraph 70B.1 of the Defence that it impliedly represented that its intention at all times was that it would not be "investing its own money" but would be raising "fresh capital" from the Qatari investors. The rest of the pleaded representation was not admitted. Effectively, as Barclays put it at paragraph 414 of BWC, it was admitting that there was an implied representation that it did not know or intend that the Loan would be used to fund the capital raising and that it intended to raise "fresh capital". The pleaded and admitted representation is therefore as to Barclays' intention.

288. As with the £66m arrangement fee, the Loan is relevant for two reasons:

(1) It is said to be another reason why the SDRs were false;

(2) It is said to have rendered the IR false.

289. Since the wider representation as to Barclays' intention, namely that it did not intend to lend money to Qatar to facilitate Qatar's investment, is not admitted, I have to decide whether there was such a further implied representation. I agree with Barclays that there was not. The admitted representation has the virtue of effectively reflecting the position under section 150 of the Companies Act 1985 dealing with unlawful financial assistance; in that sense it is obvious that a bank in the position of Barclays would be impliedly representing that it did not intend that an offence under that section take place. But the word "facilitate" is simply too wide. It could include for example providing money for the borrowers' general use or for some other specific use which ultimately might mean that other funds could be released to purchase the shares. But if so, almost any lending to a prospective investor would fall within the representation. There is no necessary or obvious reason why such a representation should be implied, nor was there any real or sustained argument put forward by PCP to justify it.

290. Accordingly, the Investor Representation is limited to that which I have described as Barclays admitting.

PCP AS REPRESENTEE (1): INTENTION THAT REPRESENTATIONS SHOULD BE RELIED UPON BY PCP

Introduction

291. In its Defence, Barclays contended that PCP needed to establish that the representations were made to it in the capacity of a prospective investor rather than as a representative of Sheikh Mansour. At paragraph 8.5 thereof, Barclays denied that it had any intention to induce PCP to rely in any way on any of the alleged representations because at no time did it consider PCP to be a prospective investor. Finally, at paragraph 68.1, Barclays contended that the SDRs, if made, were not intended to and could not reasonably have been understood by PCP to be statements directed to PCP. Rather they were directed to Sheikh Mansour as the potential investor.

292. Although at various stages Barclays had contended that PCP was simply the agent of Sheikh Mansour, whether, in a strict contractual sense, that was (or was not) true is itself irrelevant to a claim in misrepresentation (as opposed to one in contract). The issues to which that sort of argument might go would be the required intention to induce the representee to act on the representation, reliance, and possibly in relation to causation and loss. At this stage, I am dealing only with the first of those matters. By the time of BWC it was somewhat unclear what, if any, point on this argument was being maintained by Barclays, as distinct from other issues such as whether, in the counterfactual, Barclays would have dealt with PCP at all. See paragraphs 421 (1) and 446 of BWC.

293. In oral closing, Mr Onions QC said that Barclays was not alleging that PCP was an agent in the strict sense of the word, but rather that, prior to 31 October, Barclays perceived the role of Ms Staveley/PCP to be uncertain and that by 31 October, it saw PCP as an adviser. He also said that while the SPVs were the parties to the subscription agreement, they would still have to fund the subscriptions at completion and needed Sheikh Mansour to do this.

294. At paragraph 60 of PWO a number of legal principles were cited which Barclays did not seek to challenge, nor could it in my view, having regard to the authorities and textbooks referred to. Those principles are as follows:

(1) If there has been a fraudulent misrepresentation, there is a presumption of fact that the representor intended the representee to rely on it; there is therefore an evidential burden on Barclays to disprove it;

(2) Whether the representor intended the representee to act on the representation in one particular way (as opposed to another) is irrelevant, once the intention that it should be acted upon is established;

(3) The necessary intention is established either where there is a positive intention that the representation be acted upon or where it is foreseeable that the representee will act upon it.

Analysis

295. The starting point is that PCP (through its wholly-owned companies, the SPVs) was going to be the subscriber. Even as at 30 October, PCP had confirmed that it was and would be the legal beneficial owner of the SPVs until after completion, when the principal investor would be introduced into the ownership structure. This is what led to Mr Morse's "leap of faith" email of 30 October and the Jassim Letter. Next, the substantive negotiations with Barclays were being carried out by Ms Staveley i.e. PCP and there were separate advisors engaged for PCP, being GSI. Finally, one has to bear in mind that since the SDRs and JR were made by Mr Jenkins, it is his intention to induce that needs to be considered. However, his own evidence on the point only goes so far because he has no recollection of the first iteration of the SDR, and otherwise denies the other alleged SDRs and the JR.

296. On the face of all of those matters, it is hard to see how there could <u>not</u> have been any intention that PCP should rely on the representations, whatever or whoever else may have been involved.

297. Although Barclays says that it is not suggesting that in some strict sense PCP was merely an agent so as (somehow) to disentitle it from being able to rely upon the representations, it still emphasises the fact that the Presentation was itself addressed to Sheikh Mansour. That, of course, is true and in the subscription details, it refers to the subscriber as "Avocet" i.e. Abu Dhabi. It is also true that,

according to Ms Staveley, she faxed a copy of the Presentation to Sheikh Mansour herself although Barclays does not admit that this happened.

298. On the other hand, if one looks at the contemporaneous documents, they do not show, in my judgment, that PCP had some role which placed it outside that of any reasonably foreseeable representee.

299. In his email of 24 October Mr Jones was reporting (to Mr Jenkins and others) that they still did not know who they were dealing with. In his call to Jonathan Mellor at A&O, whom he had suggested PCP use, he referred to an "Abu Dhabi-led Consortium" which Ms Staveley was "fronting". In paragraph 45 of his WS, Mr Jones referred to the first part of that sentence but not the second, despite the reference to Ms Staveley "fronting" it. Despite his explanation that it had been left out because there was still uncertainty over her role for the purpose of the WS, I think this was a disingenuous omission. But whatever the position, Mr Jones agreed that such a description was wholly inconsistent with Ms Staveley or PCP having a role as a mere adviser.

300. By 24 October, Barclays was already drawing up a Non-Disclosure Agreement ("NDA") for PCP to sign. It provided that the material it referred to should be disclosed no further, including to "Advisers". On 25 October, Mr Eadie emailed Ms Bush at Barclays' Legal Department about it. He said, among other things that:

> "… PCP are not advisors. We are principals. Can we say in the NDA that PCP is one of the prospective investors, is leading the negotiations on their behalf and wishes to be able to report to the other investors?"

301. Ms Bush duly actioned this the following day.

302. Then, in his conversation with Stephen Morse, Barclays' Global Head of Compliance, on 27 October 2008, Mr Jones said that Ms Staveley (whom he had by now met) ran "an outfit called PCP Capital Partners and there is a question in terms of whether or not they are an investor or whether they are an advisor. And we're not entirely clear at the moment… And if they're an investor, obviously we need to know what is their money and if not, who they're acting on behalf of in subscribing."

303. One then has Mr Morse's email, referred to in paragraph 295 above, which was sent because of the desire to show Abu Dhabi/Sheikh Mansour as in some way providing the funds for the SPVs subscriptions.

304. Finally, on 31 October, Mr Latif of GSI said that Barclays had said that PCP is "really" an adviser or at best a nominee. That said, when Mr Jones was interviewed by the SFO on 13 April 2018, he said this:

> "My assumption was that she was an arranger not an investor… I suspect - in fact I know she sought -she purported to represent herself as I think as an investor in part of a consortium, although we didn't believe that.

> We didn't believe that she was - that probably that she was there fronting for someone else… and we were trying to establish… as an investor in the capital raising.… I think when she purported to present PC capital partners as an investment vehicle with a number of investors behind it. The identity of those investors was not clear… Our assumption was - but I can't recall whether she confirmed this explicitly or it was implicit, was that the capital that she representing was Sheikh Mansour's capital…"

305. I should add that in this context, Mr Eadie was cross-examined about the fact that on 13 January 2009, the FSA wrote to PCP, questioning whether PCP was acting as an intermediary or was arranging investments, which were regulated activities and required to be licensed. Mr Eadie responded that PCP acted as principal in its own right. When asked to give an example of its activities he referred to CR2. His detailed letter setting out the role of PCP there, dated 19 March 2009 reflects PCP's characterisation of its position in this claim. But I do not think there was anything odd or inappropriate in the content of that letter at the time. Although it was suggested by Barclays that PCP was putting itself forward as a principal in order to disguise the fact that it was really acting as an adviser or engaging in some other regulated activity, I see no basis for that suggestion. I do not think that this matter, dealt with by Mr Eadie in cross-examination, assists Barclays.

306. In the light of all the evidence referred to above, and even with some uncertainty at different times as to what its role was, there can be no doubt that PCP was significant for the deal, being the owner of the subscribing SPVs even if there was a need to be funded, mainly, perhaps exclusively, by other investors. In those circumstances it is quite impossible to suggest that when the SDRs and JR were made, there was no intention that PCP should rely on them. I am quite satisfied that the SDRs and the JR were made intending that they should be relied upon by PCP.

307. As for the IR, given that this is an implied representation which (to the extent I find it exists) is admitted by Barclays, it is difficult to see why there should not be a concomitant intention that it be relied upon by the owner of one of the subscribers which had been conducting negotiations with Barclays. In my judgment, there was.

PCP AS REPRESENTEE (2): RELIANCE BY PCP

308. PCP's principal case (and Ms Staveley's evidence) is that it relied upon all the relevant Representations by entering into the subscription agreement by its wholly owned SPVs. Or to put it another way, by causing the SPVs to enter into the subscriptions.

309. Indeed, the Representations which I have found to exist are such that it is very hard to see how the representee would not be relying upon them, once given.

310. Subject to the challenge from Barclays (see paragraphs 313 to 315 below), the above action would be quite sufficient to show reliance, in my judgment.

311. I add, however, that Ms Staveley said that PCP also relied upon the Representations in agreeing that the £3bn worth of warrants should be split with Qatar, which agreement occurred during the 23 October discussions with Mr Jenkins. On the basis of what I have found as to those discussions, that must be correct because in the absence of the SDRs given that evening, there would have been no basis to simply agree that Qatar should have any of the warrants.

312. Finally, it is also said that PCP relied upon the Representations because, in their absence, Ms Staveley would not have agreed to give up control of the SPVs as she did by 24 November.

313. As to those acts of reliance, Barclays first makes the overriding point in relation to the SDRs that there was no reliance because in truth (on PCP's case) Ms Staveley knew that the £66m arrangement fee referred to in the Announcement and the draft thereof meant that the SDRs were false - and yet PCP proceeded to subscribe through the SPVs. Therefore, it is said that whether the SDRs were true or false did not matter to PCP and so there was no reliance. There is nothing in this point having regard to the factual findings I made on the £66m arrangement fee (and indeed the JR) in paragraphs 259-285 above. On the basis of those findings, Ms Staveley did not know that the arrangement fee rendered the SDRs false and as to her concerns, these were allayed by the JR. In fact (though this is unnecessary in the light of my factual findings), even if she had concerns or suspicions over the £66m fee which were not allayed, this would not mean, without more, that she did not act on the SDRs as alleged.

314. Barclays then contends that since the decision by the SPVs to subscribe was taken by Mr Burgin, the independent director from Jersey Trust Company, who knew nothing of any representations, but who signed the Subscriptions, there could be no actual reliance based on the subscription. That is a hopeless suggestion. The issue is the reliance of PCP, and the reality is that unless the owner of the SPVs, namely PCP, wanted them to invest in the Subscriptions and so informed Mr Burgin, the subscriptions would never have happened. And it must be remembered that the act of reliance is that of PCP as representee, not the SPVs separately. Nor does it matter that Mr Eadie dealt with Mr Burgin, not Ms Staveley. Her (and PCP's) act of reliance was to allow the subscriptions to go ahead. That would not have happened absent the Representations and patently, Ms Staveley would not have permitted Mr Eadie to instruct or direct otherwise. In relation to the suggestion that because Mr Eadie told Mr Burgin that he could take comfort from the Jassim Letter in relation to funding, Mr Burgin was the relevant "actor" for the purposes of reliance, that misses the point which is that it would have been up to PCP to decide whether or not to proceed at all, had the Representations not been made.

315. As to the warranty split act of reliance, Barclays points out that this could only have been made in relation to two of the SDRs. That is true but irrelevant. Barclays also says that there is no evidence that the reliance here led to a loss. That is a different point and will be considered in Part 3 of this judgment. It does not affect the prior issue, being whether there was reliance in the first place.

316. As to reliance based on the agreement to give up control of the SPVs, I do not think that this is really a question of reliance. Ms Staveley's evidence, that in the counterfactual she would have resisted giving up control because by then there was AV and/or AW, which could be used to assist funding, is really a causation point. The key act of reliance (discussed above) occurred much earlier and the counterfactual begins with the putative discovery of the misrepresentations, the alleged seeking of AV, AW and/or AT are dealt with below. But it does not matter that there is not this residual act of reliance. The key acts, discussed above, are more than sufficient.

317. Moreover, as a general point, it would be very odd if the SDRs were made and yet not then acted upon by the party who wanted and expected the same deal. The same applies to the JR and IR.

318. Barclays accepts that establishing reliance is a relatively low bar and, in my judgment, it has been easily surmounted here for the SDRs, JR and IR, even putting to one side the question of reliance in relation to the giving up of the SPVs to IPIC.

<u>FALSITY OF THE SDR (1): BY REASON OF ASA 2</u>

Introduction

319. As noted above, PCP's primary case so far as ASA 2 is concerned is that it rendered the SDR false because it was a sham and in truth was a simple agreement to pay an additional fee of £280m. I deal with this primary case first. I will then turn to the secondary case.

Sham – the Law

320. If a document made or actions taken by the relevant parties are found to be a "sham" the legal consequence is that they do not have the legal effect which they purport to have. In contractual terms, neither side has the intention of creating the legal relations which they have purported to create.

321. The classic statement as to the requirements of a sham remains that of Diplock LJ (as he then was) in *Snook v West Riding* [1967] 2 QB 786 at 802:

> "As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities….that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.'

322. Then, as elaborated by Arden LJ (as she then was) in *Stone v Hitch* [2001] EWCA Civ. 63:

> "64. An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.
> 65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
> 66. Second, as the passage from Snook makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
> 67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
> 68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: …
>
> 69. Fifth, the intention must be a common intention: see Snook's case, above."

323. Further, the motive for the transaction is not itself determinative of whether it is a sham or not. As Megarry J put it in *Miles v Bull* [1969] 1 QB 258 at 264:

> "…. A transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it.… After all, some genuine transactions within the family are carried out at low prices; and some genuine purchasers fail to discharge their obligation to pay the full purchase price, if the vendor is incautious enough to make this possible. Mere circumstances of suspicion do not by themselves establish a transaction as a sham; it must be shown that the outward and visible form does not coincide with the inward and substantial."

324. That, of course, does not mean that motive, along with all the other circumstances cannot be considered when assessing whether or not the parties intended to create a pretence in the sense of *Snook*.

325. These points are well reflected in the observations of Neuberger J (as he then was) in *Nat West v Jones* [2001] 1 BCLC 98 at paragraph 39:

> "Accordingly, while the palpable, and freely admitted, artificiality of the agreement in the present case cannot be doubted, it certainly does not follow that, as a result, the agreements must be shams. However, in my judgment, the fact that a particular transaction is palpably artificial is a factor which can properly be taken into account when deciding whether it is a sham. Indeed, it would seem to me to require very unusual circumstances before the court held that a transaction which was not artificial was in fact a sham. I add this. If the court were to conclude that a transaction was artificial, in circumstances where the party relying on it was contending that it was not artificial, then that might be a further reason (although certainly not a conclusive reason) for deciding that the transaction was a sham, given that a sham transaction involves a degree of dishonesty on the part of the parties involved. That is not the position here."

326. It is obviously a strong thing to find that there is a sham. It necessarily entails finding that both parties were dishonest because they created a pretence in order to deceive others, for example the court or other persons concerned to assess the legitimacy of the transaction or elements of it. Again, as Neuberger J observed in *Jones*:

> "… there is obviously a strong presumption, even in the case of an artificial transaction, that the parties to what appeared to be perfectly proper agreements on their face intend them to be effective and that they intend to honour and enjoy their respective obligations and rights. That this is so is supported by the fact that an allegation of sham carries with it a degree of dishonesty and the court should be slow (but not naïvely or unrealistically slow) to find dishonesty."

327. Finally, I also accept (and PCP does not deny) that it is for PCP to prove the sham not for Barclays to disprove it.

The parties' cases on sham

328. PCP's case, as it has to be here, is that:

(1) Neither Qatar nor Barclays intended to be bound by or rely upon the provisions whereby Qatar was to render the services contained in ASA 2 and Barclays was entitled to call for them;

(2) Those provisions were intended by both sides to be a pretence so that the Court or other interested party be misled into thinking that this was a genuine agreement for the provision of those services whereas in truth, the real agreement was a simple one whereby Barclays agreed to pay £280m to Qatar in exchange for it subscribing for the shares;

(3) PCP adds however that the parties did at least intend that Barclays should pay the £280m in the time stipulated. However that does not make a difference in principle. The concept of a sham does not require the parties in reality to have made no agreement at all - rather that they did not make the one they purported to make.

329. In response, Barclays contends that:

(1) There was a substantial interest on the part of both sides to be bound by and rely upon ASA 2;

(2) It is true that ASA 2 was commercially connected with the Qataris' intended subscription in CR2 and indeed was there to bridge the value gap which would otherwise exist in the price Qatar sought for its participation; however, that is no more than the motive or commercial object which does not itself render ASA 2 a sham;

(3) The services described in ASA 2 might be better characterised as giving Barclays "preferred provider" status in connection with future work for the bank but that does not deprive ASA 2 of its genuine character;

(4) There is the evidence of both Mr Jenkins and Mr Varley that although £280m is a very large amount of money, it was well within the range of what Barclays might decide to pay in order to secure potentially extremely lucrative business or even in the hope that it might do so; since both Mr Jenkins and Mr Varley had given evidence that they believed that ASA 2 conferred real and demonstrable value, I would have to find that they were lying on this point if I was to decide that it was a sham.

ASA 1 – Key Facts

330. Although ASA 1 is not directly in issue in relation to the allegation of falsity, it is nonetheless relevant. This is because PCP contends that ASA 1 was itself a sham and if so, it must follow, almost inevitably, that ASA 2 was also a sham. Its alternative contention is that even if ASA 1 was not a sham, ASA 2 still was, despite or perhaps because of the non-sham nature of ASA 1. The latter is also relevant because its genesis in June 2008 provides an important background to what happened in October.

331. By May 2008, Barclays was looking to raise £4bn of Tier 1 capital, codenamed Project Heron. It had to do so because of increased Tier 1 capital being required by the FSA. As with CR2, the clear view of Barclays was that it did not want a government bailout, which it saw as amounting to part nationalisation. There is no real dispute about who at Barclays was involved with Project Heron. The BFC had been established for the purpose of CR1. Senior management i.e. Mr Varley, Mr Diamond and Mr Lucas reported to the BFC and the Board on this. Mr Jenkins was involved as the negotiator with one source of investment, namely Qatar. Robert Morrice, the Chairman and CEO of Barclays Asia Pacific was to negotiate with investors from the Asia Pacific area including the China Development Bank ("CDB") and Temasek Holdings Ltd ("Temasek") a Singaporean sovereign wealth fund. At the operational level, Mr Boath was involved along with a number of Barclays' in-house lawyers including Judith Shepherd, then Deputy Group Legal Counsel and Matthew Dobson, Senior Legal Counsel. Mr Kalaris was also involved.

332. As to the form of investment, a rights issue was considered not to be an option. It would have entailed a large discount on the current share price and would also be seen as a sign of weakness. Instead, it was decided at an early stage that Barclays would seek from major investors either a firm placing i.e. an unconditional agreement to purchase shares of a certain value, or a conditional placement where the investor would commit to purchase up to a certain value of shares; how many would depend on the extent to which those offered shares were taken up by Barclays' existing shareholders. Those not taken up or "clawed back" would be purchased by the investor which was therefore underwriting the subscription to the maximum value agreed.

333. To all the major investors, Barclays offered the shares at a discount (which could not exceed 10%) and commission of between 1.5% and 2%. Ultimately the commission agreed across the board was 1.5%.

334. All through these negotiations, the Qataris played "hardball". Mr Jenkins met with Dr Hussain on 24, 25 and 28 May. On 2 June, Barclays sent a proposed term sheet to the QIA which included a 9% discount to current share price and a fee of 1.5%.

335. At a meeting at Claridges on 3 June between Mr Jenkins, Mr Kalaris, Mr Boath and Dr Hussain, the latter said that the QIA wanted a 3.75% fee. This was at a time when the fee offered to other investors was 1.5%. The Qatari position was reported back to Mr Varley who said that he could "live with 3.5%" and the next day, he was given calculations of the cost of commissions at 1.5%, 3.25% and 3.5%. In a telephone call with Mr Kalaris, Mr Boath asked whether the fee for the Qataris would apply across the whole transaction i.e. to all the major investors or would it be a "side deal" i.e. just for the Qataris. Mr Kalaris said that it would have to be "on the side". By 5 June, Barclays had agreed with the Qataris that the latter would invest £2bn and receive a fee of 3.25%.

336. It is common ground and appears from the contemporaneous documents that Barclays' position remained that it was not going to offer the 3.25% to any other investor. By 11 June, Mr Boath, Mr Kalaris, Mr Jenkins and Mr Lucas were all involved in exploring how the additional fee element of 1.75% could be paid. If it was an express fee of the whole 3.25% (as opposed to 1.5% for the other investors) it would have to be disclosed and the other investors would see that they were getting a lower fee.

337. Mr Boath said that whatever it was, it could not be linked to "this transaction" i.e. the subscription. Various suggestions were floated but by the evening of 11 June, Mr Kalaris said that he and Mr Jenkins had found a way to do it which was an agreement to pay the Qataris the cash value of the extra 1.75% in exchange for advice and a joint venture. However, Mr Kalaris and Mr Boath were aware that there were risks in this. In their conversation on 11 June, they said the following, among other things:

> "**Kalaris**: *Yeah and I'm, you know, I'm incredibly sensitive, I ran this by <> Morse as well, you know, so you know, we're going, I mean it's going to get signed off by John* [i.e. Varley] *and by Bob* [i.e., Diamond] *everything right so you know <> stuff it's going to be internally we're going to be incredibly transparent. You know we need to think about what are the worst case scenarios right. The worst case scenario is somebody says well it's not economic and I say bullshit, you know, you know we're paying this amount of money, in this relationship, with these guys, we're delighted to do it.*
>
> **Boath**: *Yeah, I mean there's obviously the jeopardy is that you know we're rumbled and people say well that was bullshit, you know this is just a fee in the backdoor and –* […]
>
> **Kalaris**: *That would be the – for you and me that's the safe – well for all of us, because I mean this is one of the things where you know, if you go down the whole place goes down with you, right?*
>
> **Boath:** *That's correct, we're all going for the ship – we'll all be going for the shit food and the bad sex. That's not what I want.*
>
> **Kalaris:** *Nor do I, so stay, it's important that you – by the way don't think I think you're wimping out on this stuff, it's actually important that you're < > in the cell, because if you're not we probably are going to be.*
>
> **Boath:** *Well no, fine. I'm going to continue to, you know, that's I'm going to continue to spot, try and spot at least the jeopardy and that me strikes that in the context of all of this is one of the most dangerous aspect of the whole transaction, so, okay."*

338. On 12 June, Mr Boath produced a first draft of what was to become ASA 1 which was sent to Ms Shepherd as follows:

> "Further to our recent conversations I have pleasure in confirming the understanding we have reached regarding the provision of advisory services by [QIA] to Barclays Bank.
>
> We are delighted and privileged that you have agreed to advise us on a range of issues that will enable Barclays to further develop its business and footprint in the Middle East. I believe that this cooperation between our organisations will lead to many opportunities for both of us to benefit in the years to come.
>
> The terms of the engagement will be contained in a letter to be signed in mid July. The letter will describe in more detail the precise nature of the engagement and the roles and responsibilities of the parties involved. A draft of this letter will be made available to you in the coming days.
>
> In return for these services Barclays will pay [QIA] advisory fees totalling [mn]. These will be paid in three equal instalments commencing in mid July and in two quarterly payments thereafter. The exact dates of these payments will be set out in the engagement letter.
>
> It is a great honour for Barclays to be entering into this agreement with QIA and I am looking forward to working with you and your colleagues in the years to come."

339. I am prepared to accept, as PCP contends, that by that stage, there had been no discussion with the Qataris as to the particular nature of the services to be provided. It is also correct to say that this letter appeared to be no more than an "agreement to agree", with the "terms of the engagement" to be contained in a letter to be signed later, in July. There was a space in the letter for the amount of the fee to be inserted but no more detailed description of the services. PCP also points to Mr Boath's annotation on the document that it could not be binding. In addition, I agree that on the face of it, this document was a vehicle by which the Qataris could be paid their additional 1.75%. However, whether such a feature of ASA 1 (at this stage) entails that it must be regarded as a sham is another matter, as discussed below.

340. By 13 June, Mr Al-Sayed had become involved. He was the Managing Director and CEO of QH and Secretary to the Board of the QIA. He said that he needed Mr Jenkins and Mr Boath's "guideline in regard of what is best way to deal with the additional fees and the private investment so I can prepare it with the lawyers."

341. A memo was then circulated on 13 June by Mr Jenkins who said that Ms Shepherd had assisted him. Ms Shepherd, of course, was not called as a witness. The memo read:

> "Following my meetings in Doha with Sheikh Hamad and Dr Hussain, we discussed a different approach to the proposed Project Heron transaction.
>
> Upon reflection the QIA through, Qatar Holdings, would be content with the fees of 1.5% for their £2bn commitment to the conditional placing with claw back.
>
> Given the increasing strategic content of our discussions and the development of our relationship we agreed we should enter into a memorandum of understanding ("MOU"). This MOU would become the framework under which we would operate in the future. The basic tenets of the MOU are as follows:
>
> With my recent appointment as Executive Chairman of IBIM in the Middle East I have asked the QIA to advise IBIM on the development of our strategy and contacts in the region. This would be in addition to the engagements we have with HRH Prince Turki for the Kingdom of Saudi Arabia and the engagement of Dr Al Muhairi for Abu Dhabi.
>
> QIA is an active investor in the GCC and emerging markets and will as appropriate, at their sole discretion, offer Barclays Capital co-investment opportunities as they arise.

Barclays agreed to pay an advisory and introductory fee per quarter of £______ in advance. In addition, Barclays will provide secondments to assist QIA with the development of the infrastructure administration and investment review processes."

342. Ms Shepherd emailed Mr Jenkins and others, saying, among other things:

> "This reflects:
>
> - The acceptance by Quail that the placing commission is 1.5% only and that additional value must be provided for any additional payment
> - The advisory services agreement will be for 36 months at a fee of £1m per month payable in advance
> - Quail will deliver value for money by providing introductions, connections, local cultural advice etc to facilitate expansion of our business in the ME. We believe real and valuable opportunities will arise as a result. There will also be secondments and other items which may deliver more direct value back to us as well.
>
> If anyone disagrees with any of the above or the description of the arrangement is not accurate please let me know. When all is agreed I will then arrange for the wording to be dropped into the prospectus."

343. Mr Boath later referred to an agreement to keep fees/advisory fees "secret between us for now" following a meeting with Mr Al-Sayed on the morning of 14 June. Mr Dobson was asked to and did produce a new draft agreement based on the memo.

344. Barclays wanted all the deal terms agreed with the various investors by close of business on 17 June. Mr Al-Sayed emailed Mr Boath that day to say:

> "I am still waiting to hear from you on how we will deal with the following: ·• Fees arrangement as agreed between both parties+ related party"

345. There was an internal discussion as to whether Barclays could pay the whole £35m (as it was then, being 1.75% of £2bn) within 12 months, as Qatar had requested. Ms Shepherd said that she did not agree with this because it would be "a bit smelly".

346. Mr Dobson had said that in the prospectus, the agreement for general advisory services would have to be disclosed but not the fee. As far as Barclays was concerned, and according to a conversation between Mr Jenkins and Mr Boath, Mr Lucas would tell the Board it was a three-year contract without disclosing the amount payable, but if he had to, he would give the impression (or not deny the assumption) that the payment would be spread over the whole 3 year period, as opposed to being made in the first year.

347. Mr Dobson then produced a further draft. As to what he should say in the covering email to the Qataris, Ms Shepherd said that:

> "In everything you write, you must make sure that the paper – and I'm (inaudible) you must make sure that nothing implied that this advisory agreement is anything other than a separate arrangement – you know, that (inaudible) for money's worth. Be careful when you package these things up that you just say, "We've now reached terms on the advisory agreement without implying in any way that it's in exchange for any other concessions.."

348. The further draft stated that the counterparty to Barclays would be QIA/QH would provide the following services for the fee of £36m payable within the first year:

> "1.1.1 advice as to social, political and economic issues affecting the Middle East in general and Barclays' plans for that region, as disclosed to you by Barclays (at its discretion from time to time.
>
> 1.1.2 offers of introductions to persons of influence in respect of business opportunities that could reasonably be expected to be of interest to Barclays or which Barclays indicates to you would be of interest; and
>
> 1.1.3 all reasonable support and assistance requested by Barclays to enable it to pursue any business opportunity introduced by you including but not limited to, as applicable: (i) sending your representatives to meetings between Barclays and third parties, (ii) facilitating further meetings with persons of influence; (iii) assisting with negotiations and other discussions; (iv) sharing your due diligence findings and other analyses with Barclays and its advisers, and (v) recommending Barclays to third parties.
>
> 1.2 You agree to perform the services to a reasonable professional standard, taking account of the knowledge and influence which you could reasonably be expected to have, and the fees for the services."

349. There was then a discussion about a separate question which was whether there should be a separate fee to Sheikh Hamad, or payment of part of the agreed fee to him, on the basis that he might make a personal investment as well (ultimately done through Challenger). This got as far as Mr Dobson being instructed to draft another ASA, although it is clear that there was real doubt as to what services Sheikh Hamad could be providing personally as opposed to those being provided by QIA/QH. In the end, no separate agreement was made.

350. L&W, acting for the Qataris, then sent a revised draft. This removed most of the detail from the services set out in the previous draft. Ms Shepherd observed that they had removed:

> "a whole raft of services they're going to provide for us until in the end they're providing us nothing more than cultural awareness."

L&W had added a termination provision that: "if Barclays terminates this agreement for any reason whatsoever, the balance of the total fee will become immediately payable." They had also added an interest provision calculated on a 'LIBOR plus' basis.

351. I agree with PCP that in effect, the draft ensured that the obligation to pay would subsist even if for example, Qatar did not render any services despite Barclays asking it to do so and as a result Barclays then sought to terminate the agreement for that reason. Also, as Mr Dobson observed, an interest provision was not consistent with an agreement to provide services.

352. By 19 June, there was, and was agreed to be, a single ASA. There was a further draft from Mr Dobson which was apparently produced to the BFC because it was noted in a list of 57 documents produced. The full minutes of the BFC make a brief reference to it but there appears to have been little if any discussion about it. The minutes of the Board meeting which immediately followed the BFC meeting with the same participants made a similar reference to that draft. On the face of it, there is no evidence that the BFC or the Board was told that there had been an additional 1.75% fee agreed with Qatar or that the ASA was the means by which it would be paid.

353. On 22 June, Mr Dobson sent a revised draft to L&W following some earlier discussions. It provided that the following services would be rendered:

"Advisory services, fees and expenses

1.1 You agree to provide the following services to Barclays throughout a period of 36 months from the date of and on the terms set out in this letter in order to assist in the development of our business:

> 1.11 advice as to social, political and economic issues affecting the Middle East in general and Barclays' plans for that region, as disclosed to you by Barclays (at its discretion) from time to time;
>
> 1.1.2 offers of introductions persons that Barclays may reasonably request to persons of influence in respect of business opportunities that Barclays indicates to you would be of interest; and
>
> 1.1.3 all reasonable support and assistance reasonably requested by Barclays to enable it to pursue any business opportunity in relation to the Middle East including but not limited to, as applicable: (i) sending your representatives to meetings between Barclays and third parties, (ii) using reasonable endeavours to facilitate further meetings by Barclays, and/or you and your representatives on behalf of Barclays. with persons of influence, (iii) assisting with negotiations and other discussions, (iv) sharing your views and opinions with Barclays and its advisers in relation to Barclays' plans generally in relation to the Middle East and specific transactions in the Middle East and (v) providing references iii relation to Barclays to third parties.

You will in performing the services leverage the knowledge, contacts and influence of His Excellency Sheikh Hamad Bin Jassem Bin Jabor Al-Thani, whom you confirm will assist you throughout the 36 month period. Barclays acknowledges and agrees that it has no right under this agreement against H is Excellency whether in tort, contract or otherwise.

1.2 You agree to perform, and procure the provision of, the services to a reasonable standard, taking account of (i) the knowledge and influence which you, and persons performing services for you, have, and (ii) the fees for the services. It is acknowledged and agreed that you, and persons performing services for you, will be under no obligation to disclose to Barclays any information received subject to an obligation or duly of confidence or any information relating to a third party which is commercially sensitive. It is further acknowledged and agreed that you, and persons performing services for you, will have no obligation to do or omit to do any act or thing which would or might reasonably be expected to prejudice, damage or harm the commercial or, as applicable, political interests or reputation of you or any person performing services for you.

1.3 For the services referred to in paragraph 1.1, Barclays agrees to pay you a total of £[amount in figures] 36m Amount). This fee is:

> 1.3.1 payable during the first 12 months of this agreement in 4 equal quarterly instalments…"

354. There then followed further payment provisions including an obligation to pay the entire sum if Barclays terminated without cause, other termination provisions, provisions for the rendering of other services, detailed provisions as to confidentiality and clauses dealing with "no partnership", governing law and jurisdiction. It was, overall, a detailed four-page service agreement.

355. However, this elicited a severe reaction from Mr Al-Sayed, who called Mr Boath who reported their conversation to Ms Shepherd. He said that Mr Al-Sayed was "spitting" about the agreement and wanted "a nice soft short letter". His telephone conversation with Ms Shepherd included the following exchange:

> "**Shepherd:** *I do know what he's getting at but he's got to grow up. This is not how it's going to be, he is going to have to give the services in exchange otherwise you are going to end up in front of the Fraud Squad explaining why.*
>
> **Boath:** *No. I'm not.*
>
> **Shepherd:** *Well I think you and I are on the periphery of it and knowing what everyone else is like it's going to be you and me.*
>
> **Boath:** *No I've got a house in Brazil, there's no extradition treaty, I'm off.*
>
> **Shepherd:** *Okay can I come and stay with you sometime?*
>
> **Boath:** *Absolutely*

> **Shepherd:** *But you know we've got to have something that looks as if on the face of it, it works.*
>
> **Boath:** *He hates it.*
>
> **Shepherd:** *I don't care at this moment. (Laughter)*
>
> **Boath:** *[Laughter] We do have an awful lot at stake here.*
>
> **Shepherd:** *I know we do but in the end there's a limit beyond what I'm prepared to go. Now I will go a long, long way and I will try and make it work but - "*

356. The upshot was a much shorter letter agreement circulated by Ms Shepherd which, according to PCP's submissions, reduced the contractual content to a (legally worthless) "agreement to agree". On its face, it did not contain any commitment to supply any particular services at all. Following amendments from L&W, a final version was produced.

357. On 23 June, Guy Norman at Clifford Chance emailed internally to say that he did not like the lack of detail in the agreement which was now "an agreement to agree the services", yet contained detailed payment provisions. He had discussed with Barclays that this could expose them to suggestions that it represented disguised commission in relation to the placing, but was assured that the services which were being agreed were genuine and valuable and the payments being made were justified by the benefits received. He said that Judith Shepherd had received firm assurances on this from the BarCap negotiators, as they had emphasised the need for this to be appropriate remuneration for the relevant services. Of course one recognises this concern and it was focused on value. But if in fact there was no true agreement as to the services to be provided, then the whole agreement (including the obligation to pay) would fail for uncertainty. However, that does not make it a sham. If there is in truth no binding agreement at all for that reason, it cannot be a sham.

358. On 24 June, Mr Al-Sayed agreed to release the subscription agreements signed by the Qataris in exchange for the signed advisory services letter. Ultimately, Mr Varley signed a version of ASA 1 in blank with no figure inserted and which Mr Dobson later inserted as £42m, the figure having changed because of the slightly increased subscription from the Qataris. It was subsequently countersigned by L&W on 28 July.

359. Mr Diamond was aware of ASA 1 at the time, to judge from the handwritten notes, made by a Barclays employee, of a meeting with analysts on 25 June 2008 which referred to "QIA are going to advise us on our whole business strategy in the Middle East".

360. To recapitulate, the executed version of ASA 1 read as follows:

> "We are extremely pleased and honoured to be writing to you in connection with a new advisory agreement between our two institutions.
>
> You agree to provide various services to us, as an intermediary, in connection with the development of our business in the Middle East. You will provide these services over a period of 36 months to a total value of £42,000,000 [handwritten]. In return, we will pay you the sum of £42,000,000 [handwritten] in four equal instalments, the first within two weeks of signing, the second on 1 October 2008, the third on 1 January 2009 and the last on 1 April 2009. Although it is intended that the services provided will not be ones that are subject to Value Added Tax, if we agree to include services on which VAT is payable then we will pay the fee plus the applicable VAT. In addition, if we terminate this agreement without cause we will continue to pay you the fee In the manner agreed above.

> We have discussed the type and scale of services you will provide to deliver value in exchange for this fee and we know this will need to be refined by mutual agreement as our relationship develops further.
> Both parties will monitor and review this arrangement and act in good faith in connection with the formulation and arrangement of the services to be provided.
> We are not creating a partnership or agency arrangement and neither party may make any commitment on behalf of the other without express instructions from the party Intending to be bound.
>
> This letter and the arrangements contemplated by it will be governed by English law."

361. The Announcement for CR 1 made reference to ASA 1 but not the size of the fee.

ASA 1 – Analysis

362. It is important to recall the key requirement of any sham which is that (in this context) neither party intended to be bound by or perform or receive performance of the written agreement concerned.

363. There is a fundamental conceptual difficulty in PCP's case here, however. As it has pointed out this was a virtually worthless piece of paper, save for the payment of the £42m and on the face of it was probably not legally enforceable. Moreover, it was the product of negotiations between lawyers and principals. When Barclays sought to turn it into the sort of agreement that one might have expected, it was rejected. Whatever else these features may be, they are not the hallmarks of a sham. There was in truth no need for the parties to intend not to be bound by the agreement because Qatar barely had to do anything to perform it and while Barclays had the obligation to pay, it did not have much if anything by way of entitlement under the agreement anyway. And to the extent that it did have an entitlement, it was hardly disadvantageous to it to use it.

364. There is no reason why the parties should not have been prepared to be bound by ASA 1 even if it turned out to be legally unenforceable. There is no evidence of any express agreement between Qatar and Barclays not to enforce it. Nor in the circumstances should any such agreement be necessarily implied.

365. PCP's case would have been stronger, had what purported to be a fully detailed service agreement, with ordinary commercial terms for payment, been signed. But it was not and indeed the Qataris were absolutely opposed to it.

366. The agreement, as executed, may well be regarded as uncommon or artificial or even perhaps reflective of a breach of fiduciary duty on the part of those who were involved in its production on Barclays' side including, perhaps, Mr Varley who signed it. It might be regarded as a transaction at an undervalue. On any view the whole process looked "smelly" or "dodgy". But none of that meant that the parties each intended not to be bound by what they signed. To illustrate this, in *Jones* itself, Neuberger J found that the impugned transaction was not a sham but it was a transaction at an undervalue for the purposes of s423 Insolvency Act 1986. Here, the only clear obligation in ASA 1 was to pay the money and Barclays certainly intended to be bound by that.

367. Nor did the fact that, as is manifestly the case, this was adopted as a way to conceal from other investors that Qatar was in effect receiving a higher fee and that ASA 1 was clearly part of the package deal for Qatar along with the subscription agreement. Concealment is not, without more, the same as a sham.

368. None of this episode casts Barclays (or indeed the Qataris) in a particularly attractive light. The reactions of the lawyers are not surprising. But that does not mean that there was a sham which is a highly specific and narrow doctrine.

369. Put another way, the fact that a party who wishes to be paid X is prepared to be paid that money pursuant to a separate agreement under which it has to do little or nothing to earn it, or at a cost which is minimal, does not mean that the separate agreement is itself a sham.

370. I would further reject the suggestion that there was no discussion with the Qataris about the setting up of ASA 1. I see no reason for Mr Jenkins not to have discussed it with the Qataris when he spoke to them on 11 June. In the context of an advisory agreement which would cost them little or nothing, there was no risk in speaking to them and the later negotiations and exchanges of drafts show that they were involved with it.

371. But insofar as ASA 1 was legally enforceable, it was not necessarily unorthodox to have it in such a simple form when the type of service offered was in reality advice about the provision of business opportunities in the context of how things were done in the Middle East. As Mr Jenkins put it in paragraph 30 of his WS (which was not challenged), everything was built on trust so far as the Qatari approach to business was concerned. In that culture the handshake is more important than the language in a documented deal. He added that insisting on lengthy legal documents could give the impression of a lack of trust or even ran the risk of being slightly insulting. In addition, in evidence, Mr Eadie accepted, when being asked about the consultancy agreement between PCP and Mr Chalhoub, that "if the services weren't particularly specific, that wouldn't be unusual with people in the Middle East who were helping to introduce you to people or whatever that sort of service was". But if that is the correct analysis then that does not show that ASA 1 must be regarded as a sham, either.

372. As to the specific question of value, assuming that ASA 1 was legally enforceable, I would agree with PCP that the documents do not appear to have received much if any detailed consideration at the time in terms of what particular services would be offered and how they could be valued at £42m over 3 years. However, while I think that there has undoubtedly been some *ex post facto* justification, both on the part of Mr Jenkins and Mr Varley (here in the context of ASA 2) I do nonetheless accept that Mr Jenkins especially would have appreciated the value of something that

could lead to the possibility of Barclays bidding for (and then, on the merits, obtaining) Qatari business opportunities. The latter could be extremely lucrative given the size of Qatar's assets and its dealings. Mr Jenkins' area of responsibility was Qatar. He said in evidence that if Barclays could get in a position whereby it would have a "first look" at loans being requested from Qatar, probably in the region of $15bn over 3 years or bonds, foreign exchange hedging and other opportunities one could easily arrive at these being worth between £100m and £150m. He knew the business well so he could establish the numbers rapidly. On that basis, it is not as if it is simply implausible to enter into an agreement of this kind on the basis that it could lead to some extremely lucrative work. It is worth noting that in his presentation to the IBIM Middle East team on 8-9 September 2008, Mr McDonald made a specific reference to a "Strong QIA/Sheikh Hamad relationship and advisory agreement…" The fact that ASA 1 came about only as a reaction, as it were, to the need to find some further remuneration for the Qataris, as opposed to having a freestanding genesis, does not alter the position.

373. While it is possible to overemphasise the role of the lawyers who, at the end of the day made clear that they had to rely on individuals like Mr Jenkins and Mr Boath to assess and confirm the value of the agreement, the fact is that there was in truth nothing from them to support the notion that ASA 1 was not to be regarded as legally binding in the first place. Or that the parties should pretend to be bound when in fact they intended the opposite. Again, concerns over value in any event do not themselves indicate a sham although they might well flag up other problems with the transaction.

374. I agree that it is somewhat odd if (as Mr Varley accepted was possible) he did not actually spell out to the Board the connection between ASA 1 and the 1.75% fee. But there can be little doubt that at the end of the day, the Board knew that there were co-terminous signed agreements being negotiated.

375. I would agree with Sir Richard Broadbent's assessment that it was not good process not to give the Board more detail than it was given. But it was never suggested in the early discussions between Mr Kalaris, Mr Boath and Mr Jenkins, for example, that the reason Barclays could not agree a straight fee of 3.25% with Qatar was because the Board would not agree in that amount. After all, Mr Varley had himself said they could run to 3.5%. The issue was rather to avoid this being part of the subscription agreements, in which case all the other investors would demand the same.

376. I do not agree that extensive modelling and research was necessary in connection with an agreement of this type with Qatar. Assessments of value in this context are, to a significant extent, subjective matters and Mr Jenkins was well placed to make those judgments.

377. As for the position after the making of ASA 1, there is at least some, though not much, evidence of seeking to log activities by reference to it. So, for example, Mr Jenkins did say on 4 July that there should be a "plan for all QIA, a process for advisory fee." There was also an email from Paul Emney, Barclays' Group's Chief Operating Officer who was later seconded to the QIA, to various people about making a log for ASA 1 in September. It does appear that this activity tailed off later although Mr Jenkins came back to the issue in October 2009. But again, this does not mean that both parties to ASA 1 did not intend to be bound by it at the time it was made.

378. A further point is made about the lack of express reference to ASA 1 (and for that matter ASA 2) following its making. I agree that there is no real evidence of either ASA being invoked by name. But I am not sure that in the actual context, that would have been necessary. I think there is at least some force in Mr Jenkins' evidence that "you wouldn't say to the Qataris: this is the ASA please give me the business." PCP alleges that where there were the odd references from the Qataris about giving Barclays more business, that could be explained, not by reference to ASA 1 (or ASA 2), but simply because Qatar became the largest shareholder in Barclays and would therefore wish to pass on business to it anyway; that was so, especially in the aftermath of ASA 1 where the Qataris found to their disappointment that they had to subscribe for many more shares than they had expected because of the limited take-up by other shareholders. But this is really speculation and cannot possibly be a foundation for finding necessarily that any reference to further business could not be attributable to ASA 1.

379. In its Schedule of Adverse Inferences, PCP notes that Mr Agius, a witness for the Prosecution in the criminal proceedings, said that he was not aware that the genesis of ASA 1 was the Qataris' demand for a 3.25% fee. However, he also said that there was nothing unusual about the concept of a "most-favoured-nation agreement" or a side agreement generally. Such things were commonplace, he said, and this is how ASA 1 was put to the Board. I do not think that what he says here is of any real assistance to PCP on the issue as to whether ASA 1 was a sham.

380. PCP also relies upon Ms Huey-Evans' statement. She said there that she did not do much work on Qatar and did not regard it as Barclays' largest sovereign wealth fund investor although it was important to Barclays as a shareholder. She added that the lack of growth in increased revenues from Qatar was frustrating because she wanted to open up the relationship. She had not seen or heard of ASA 1 at the time and wished that she had, because she would have tracked what services Qatar was providing.

381. However, she must have been aware of it, even if only in general terms, because of an email sent from Peter Gresford of Barclays Structuring to Mr Jenkins dated 2 October, which enclosed a briefing note on Qatar from "Gay's team". Among other things, it said that:

> "As part of the capital raising Barclays entered into an agreement for the provision of advisory services by Qatar Investment Authority to Barclays in the Middle East."

382. In addition, when asked about ASA 1 in her interview with the SFO she said that some people must have been aware of it but it was not expressly brought to her attention. She then said, as with the statement, that she wished she had known about it at the time because she would have pushed Mr Jenkins on the services to be provided.

383. I do not think that the material from Ms Huey-Evans on ASA 1 (or ASA 2, for that matter, which she also says was not brought to attention at the time) takes the matter much further. Mr Varley said in his evidence that he thought that Ms Huey-Evans was not told about it explicitly because Mr Jenkins did not want to involve her with Qatar although he went on to say that even if Mr Jenkins was the "gatekeeper" for Qatar perhaps Ms Huey Evans should have been told.

384. Finally, in this context, PCP contends that Barclays could have called Mr Al-Sayed to deal with the Qataris' understanding of ASA 1 (and ASA 2), what services it anticipated providing and what services it did provide. I can see that, although of course Mr Al-Sayed was hardly in the control of Barclays in terms of providing evidence. But the overall position of Qatar in relation to the criminal proceedings includes this part of a letter sent on its behalf by Stephenson Harwood to the FSA on 1 June 2012:

> "The Advisory Agreements were, and are, commercial agreements pursuant to which services have been, and will continue to be, provided. Pursuant to the Advisory Agreements, fees were, and continue to be, payable for advisory services provided during the remaining term of the October 2008 Advisory Agreement. Of course, when deciding whether to make any or all of these arrangements with Barclays in June and October 2008, QH took into account, and was properly entitled to take. into account, all of the prevailing economic circumstances. This included the overall economic benefit to QH of all the arrangements being made with Barclays, being the investment arrangements and the Advisory Agreements. This approach is how commercial decisions are made in practice."

385. At the end of the day (and this applies to ASA 2 as well) I do not consider that PCP's submissions on the adverse inferences to be drawn from the absence of Ms Huey Evans, Mr Agius or Mr Al-Sayed go very far, and to the extent that any inferences against Barclays can be drawn, they do not make any material difference to PCP's case on sham.

Conclusion on ASA 1 as a sham

386. For all those reasons, I do not find that ASA 1 was a sham.

ASA 2 – Introduction

387. PCP contended that, if ASA 1 was a sham, ASA 2 would have been, also. There is much force in that and indeed Barclays did not seek to distinguish the two if the first was a sham. However the

question now is whether ASA 2 was a sham where I have found that ASA 1 was not. PCP's key point is that even if so, there could be no possible justification for paying £280m for extending ASA 1 from 3 years to 5 years, even with a wider geographical scope. Accordingly, neither party in fact intended to be bound by it. This is essentially a value-based argument.

The genesis of ASA 2

388. I have already referred to some key dates and events here in paragraphs 60, 71, 78, 82, 91 and 97 above. I now set out some further facts.

389. By 21 October, discussions with Qatar about their investment and their demand for a loan had been taking place. But the first substantive discussion on the question of the fees they would seek came on 21 October at the dinner at Mr Jenkins' house. Although no particular figures were discussed on that occasion, Mr Jenkins did not doubt that the Qataris' subscription would come at a cost.

390. At the meeting on 22 October, Mr Jenkins had gauged the total "ask" of the Qataris at about £570m, being what was necessary overall to give them a "blended price" of 150p to cover both CR1 and CR2. By that stage, fees of £120m had been offered which was "laughed at" by the Qataris. This latter figure appears in the manuscript notes of the later BFC attended by Mr Varley and Mr Diamond among others. Mr Jenkins had updated them following the earlier meeting. Those notes put the Qataris' overall "ask" at £600m. The BFC approved an increased payment of £325m which was derived from commissions of 3% on the RCIs and 5% on the MCNs and the rest being by way of "arrangement fees".

391. After various meetings on 23 October, the understanding was that Mr Jenkins had offered a 20% discount from current share prices so far as the MCNs were concerned, a 14% coupon on the RCIs and then a £200m arrangement fee based on 4% of the entire expected £5bn capital raise from Qatar, Abu Dhabi and Libya.

392. The result of Mr Todd QC's advice on 24 October, however, was that an arrangement fee of £200m would have been unlawful. This is because it would have clearly exceeded the permissible maximum of 10% of the equity being offered.

393. Later that day, Mr Harding discussed the fee structure with Patrick Sarch at Clifford Chance, according to his note. Apart from commissions of 2% and 4% respectively, he said that Qatar would also get a £65m arrangement fee and noted that Mr Sarch agreed that this was within the 10% of capital which Mr Todd QC had agreed was acceptable without amounting to financial assistance. The note says that Mr Harding also explained that

> "quite separately and not connected, in recognition of the overall relationship between B and Q, we would pay Q £120m approx. This would be a commercial trans'n and not for the capital raising.
> - You agreed this was fine and had been confirmed by Counsel

> • you thought it helpful that we were not producing an equity prospectus so we did not need to consider whether the separate trans'n need to be disclosed, as we had done in Heron with the Q advisory ag."

394. His email to Mr Dobson at 7.01 p.m. summarised his discussion with Mr Sarch.

395. None of that suggests that a sham had been proposed. From Mr Sarch's point of view, he was saying that there should be no connection with the capital raising. In the sense that there was nothing in the subscription agreement which mandated what became ASA 2, this was correct; but of course the commercial reality was that there was such a connection.

396. There is also a note of a telephone call which Mr Harding had with Mr Varley and Mr Lucas earlier on, about CR2. In relation to fees, his note of that conversation said that there would be a 2% commission on the RCIs and a 3% commission on the MCNs with an "introductory fee to be defined" and "any other payment to Q would be for other commercial services + at mkt."

397. Mr Varley had a telephone call with Sheikh Hamad at around 7.30 p.m. on 24 October. He says that he cannot recall the details but refers to the email he sent afterwards. It read:

> "I believe we have a deal. I had a thorough run through with hammad. I played back: he played back. We are properly triangulated. He will ring me tomorrow to tell me what working process he wishes to adopt:…"

398. On the basis of the email, Mr Varley says that he would have discussed the key elements of the deal which would have included the provision for the arrangement fee and a separate agreement for services. That evidence makes sense given what he had been told. Equally, there is no reason to say that the two of them were agreed on the structure, if they were not. There is certainly nothing to suggest that they agreed to have a services or other commercial agreement simply as a pretence.

399. On the face of it, the suggestion of a further advisory agreement (or as it became, an extension to ASA 1) only arose about after Mr Todd QC had said that a fee of £200m in exchange for the subscription could not be paid as such.

400. At the Board meeting of 26 October, the fees were discussed. Mr Varley attended and though he has no independent recollection of it, his interpretation of the manuscript notes, which stated:

> "Fees broader arrangement contemplated with Q – recog we will find Value Max = all Q = £250m", and to "Q fees – 2 unconnected forms of comp = £135m fee:-also co-operative actions – pay them a further £115m for that reality – recognising we are paying fees in adv".

was that a total fee package of £250m was discussed and agreed. Of that, £70m would come in the subscription commissions, £65m was the arrangement fee and the balance of £115m was for "co-operative actions" which would become ASA 2.

401. PCP also relies here upon Mr Agius' evidence in the criminal proceedings in the context of ASA 2. He said that he did not know of the £280m fee, how it was calculated or agreed and he thought that it could all have been covered by ASA 1. He thought it was a deception because it was just a way of delivering more fees to Qatar and was outrageous. It is the case that he was not informed of ASA

2 at the time, once made. On the other hand, he did chair the Board meeting of 26 October 2008, just referred to. There is no reason not to take the notes of it at face value. If so, Mr Agius must have been aware that of the total fee stated to the Board of £250m, £115m was for "co-operation actions". It does not appear as if Mr Agius questioned that at the time. Obviously he has become hostile to Barclays and gave evidence at the criminal trial. In those circumstances it is perhaps not surprising that Barclays decided not to call him, assuming that he would have been prepared to give evidence. Again, I do not think this particularly assists PCP on the argument as to whether ASA 2 was a sham.

402. Mr Varley also thought that he would in fact have discussed the increase in fees from £120 million demanded by the Qataris, in conversations with Mr Agius. However he had no recollection of informing him about the final figure of £280m.

403. A further Board meeting on 27 October referred to the "QIA Agreement".

404. However, on 29 October, Sheikh Hamad said that he now wanted £185m in terms of the other fees (i.e. not £115m) and this was agreed in a call with Mr Jenkins and Mr Varley. But then, late on 30 October, a yet further increase of £95m, bringing the total to £280m, was sought. The reason for this was probably that the Qataris were simply tough negotiators and they knew that the position of Barclays was very weak; also because they saw the falling share price which had them now seeking a blended share price of only 130p. There does not appear to have been any discussion internally at Barclays as to how such an increased value could be delivered. Nor does there seem to have been any detailed negotiation with the Qataris on this basis, at least so far as the services element was concerned. Nonetheless the increased amount was agreed. This was apart from the commissions expressly payable on the RCI and MCN subscription, and apart from the £65m "arrangement fee".

405. As with ASA 1 it is convenient to reproduce again here ASA 2 as executed.

The Text of ASA 2

406. This was as follows:

> "For the attention of: Mr Ahmad Al-Sayed
> Dear Sirs
> Advisory Services Agreement
> We are extremely pleased and honoured to be writing to you In relation to an extension of the advisory agreement between our two institutions dated 25 June 2008. This is in recognition of the great success of the agreement to date, and the enormous benefits we have derived from your assistance and introduction to business opportunities.
> The terms and conditions of the 25 June 2008 advisory agreement continue in full force and effect, subject to the variations set out in this letter.
> You agree to continue to provide various services to us as an intermediary, in addition to those set out in the 25 June 2008 agreement. You may provide some or all of these services in association with Challenger Universal Ltd. These services include, though will not be limited to (i) the development of our business in the Middle East; (ii) the furtherance and execution of our Emerging Markets business strategy; (iii) the expansion of our global commodities business; (iv) referral of opportunities in the oil and gas business sectors; (v) introduction of infrastructure advisory and financing opportunities; and (vi) introduction of potential investors, clients or counterparties interested in conducting a variety of business with us. You will provide these services

> over a period of 60 months from the date of this letter. In return, we will pay you 20 equal quarterly instalments of £14m, the first within three months of the date of this letter, and the last on 31 October 2013.
> We have discussed in detail the type and scale of services that you will provide in order to deliver the additional value to us in exchange for this further fee and we know that these will need to be refined by mutual agreement during the period in which you will provide the services. Both parties will continue to monitor and review this arrangement and act in good faith in connection with the formulation and arrangement of the services to be provided.
> This letter and the arrangements contemplated by it will be governed by English Law."

The Benefits by then of ASA 1

407. The benefit or otherwise of ASA 1 at this point is important because ASA 2 was ultimately put forward as an extension to ASA 1 which was said to have conferred "enormous benefits".

408. In the context of what had been proposed as CR1.5 in early October, Bill Castell wrote to Mr Emney on 6 October. He was now in Qatar and was Mr Jenkins' "right-hand man". He was specifically asked about services which had been provided under ASA 1. He replied:

> "To date QIA have provided us with the following assistance:
> - helped with our application to open a branch in Doha are by agreeing with the regulator an extension to our opening date
> - facilitated an introduction to Qatar Telecom in connection with a potential transaction
> - discussed with us a potential row on a transaction involving a UK listed company
> -helped with our understanding and strategic thinking as we look to expand our franchise in the Middle East region."

409. In cross-examination, Mr Jenkins accepted that it was "manifestly clear" that the email from Mr Emney did not show any value being obtained from ASA 1 and that according to that document, there had been no services provided under ASA 1. However he added that he thought Mr Emney was just giving examples and his list was knowingly incomplete for some reason. For his part, Mr Jenkins in his WS sought to add 8 particular benefits from ASA 1, labelled A to H. His paragraph 78 begins thus:

> "… In my view, these opportunities represented ASA 1 "in action" and the benefits the Bank was already seeing from having "favoured nation status" under the agreement. While I knew Barclays would have three years to fully monetise our £42m investment under ASA 1, these examples show me that Qatar was already directing valuable deal flow to Barclays by July, shortly after signing of the agreement. It was then down to Barclays to capitalise on these opportunities."

410. In cross-examination, he accepted that none of the cited benefits had made any reference to ASA 1. For my part, it is not clear to me that they necessarily should have done. What would have been important would be performance, not a reference to the agreement. But he also agreed that while he had personal knowledge of items A, D and E, the other items would have been researched for him to put into his WS. He also accepted that none of items B to G inclusive came to anything. He made the point that he could only speak to the position up to April 2009 when he left Barclays. He produced a list of names of those who could have spoken to the benefits conferred by ASA 1 (and presumably ASA 2) for the period afterwards but apart from Mr Jones and Mr Varley, none was called as a witnesses by Barclays. And in the case of Mr Jones, his evidence was that he was not in a position to say.

411. As to item A, on Tuesday 15 July 2008, Silvana Chamieh of Barclays' Wealth in Dubai emailed Mr Jenkins about an offer to quote for the financing of an investment by a consortium of Qatari entities which included the Qatar Investment Bank in the purchase of 5% of a company called Suez Environment. Other banks had quoted for this but Mr Chamieh added that:

> "Because shk Jassim [the son of Sheikh Hamad] clearly indicated that no transaction should be done without involving Barclays we are involved and Jean Marc [Lejeune] needs our feedback before 3.00 Doha time."

412. Mr Jenkins thought that this might generate about £4.5m in fees for Barclays. There is little other evidence about the deal. He thought that Mr McDonald had actually executed the financing on behalf of Barclays although there was also some email feedback that QIB was unhappy with the Sharia structure being documented. The only other email is from Mr Chamieh on 5 August who had met Mr Lejeune recently and who had told him that:

> "..he appreciated our prompt response to arrange the leveraged for the Suez Environment transaction although QIB did not participate in it.…"

413. This may or may not indicate that in the event the deal did not happen so far as Barclays were concerned; but that does not mean that it was not offered the opportunity.

414. Item H was Project Tinbac. According to Mr Jenkins, this was an opportunity first presented by Sheikh Hamad on 12 October. It would involve Barclays financing part of Qatar's oil production and would be secured against the actual oil flow produced, with a hedge executed on the oil price. Mr Jenkins thought that this was a huge deal and this is reflected in his emails of 12 October. He calculated that the financing over 4 years would be $8bn on the basis that Qatar requested financing of 4% of its production which in total was about $50bn per year. He says that the deal could have brought Barclays profits of more than $250m in the first year alone. The internal "Client Commitment Proposal" dated 18 October 2008 contains a detailed discussion of the opportunity and the revenue which it could generate. Under the heading "Business Case", it stated that:

> "As a result of our strong relationships across the Government, we expect to be given access to various potentially remunerative opportunities with QP as well as its subsidiaries. We expect several opportunities to materialise across M &A, advisory financing, acquisition finance, risk management… And commodities hedging."

415. There is no reference to ASA 1 in that passage, but the view expressed would certainly be consistent with it.

416. Mr Jenkins also referred to an email exchange with Mr Jones and Mr Lejeune on 12 November. This appears to be in the context of the Loan but Mr Jenkins said that:

> "I saw Hamad and he really wants us to win the tinbac deal so can we make sure we reopen that."

417. Mr Jones responded that Mr El-Khair had said that Tinbac was "complicated" and they needed to get the Loan out of the way first. The Qataris may well have now been using Tinbac as leverage to get the Loan completed; nonetheless this exchange does support the notion that the Tinbac

opportunity had been presented to Barclays. It was revisited in a further "Client Commitment Proposal dated 17 December 2008.

418. In the event, Barclays did not get the Tinbac deal. Mr Jenkins told the FCA that it went to GSI and JPM. In his WS, however, he said that it did not proceed in 2008 because of declining oil prices. The latter may be true although it does not appear to be in doubt that Barclays did not get the Tinbac deal as such at any stage. Apparently Barclays did get some other oil-related work from Qatar, but in 2011. But again, it was nonetheless put to Barclays as an opportunity.

419. Nonetheless, it is very difficult to see how it can be said that by 31 October, ASA 1 had been a "great success to date" or that Barclays had obtained" "enormous benefits". As at 31 October it had not gained any actual benefit in terms of completed deals.

420. The language of "great success" is taken directly from the draft of ASA 1.5 dated 3 October. In cross-examination Mr Jenkins accepted that such language there was untrue then (but not by 31 October) and it was just the use of lawyers' language. I did not find that explanation very convincing.

421. When the opening paragraph of ASA 2 was put to Mr Varley he said that the language of the Gulf is unduly flowery and it was typical of the way in which a respected counterparty was paid respect. However he was not prepared to accept that the statement was simply untrue. He said that the "relationship had intensified" and the language put to him as being untrue was "open to subjective interpretation". It took several questions before Mr Varley was prepared to admit, as was the case, that there had not been a single agreement executed with Barclays by 31 October. I consider that his evidence here was evasive.

422. Others at Barclays nonetheless took the view that in connection with a proposed extension to ASA 1, a logical reason for doing it would be that ASA 1 had been successful. Hence Mr Castell's questions to Mr Emney on 6 October.

423. In my judgment, although Barclays does not accept it, the language of "great success" and "enormous benefits" was obviously used to create the impression that an extension to ASA 1 was fully justified. It was a way of suggesting that there was significant value in the extension.

424. ASA 2 also stated that "we have discussed in detail the type and scale of services that you will provide in order to deliver the additional value…" That would also appear to be untrue insofar as Mr Varley did not recall particular detail of the services in his discussion with Sheikh Hamad on 24 October. There is then a reference to the need to have the type and scale of services to be provided "to be refined by mutual agreement during the period which you will provide the services." That does not appear ever to have been done.

Barclays' Perception of Future benefits under ASA 2

425. As with ASA 1, Mr Varley said that the real benefit of ASA 2 was that Barclays would be given "most-favoured-nation" or "preferred provider" status even though he accepted that on the face of it ASA 2 did not say that. At paragraphs 237-242 of his WS, Mr Varley explains how he said he thought about ASA 2 at the time. He said that he could take a legitimate "commercial bet" on the development of business with the Qataris such that Barclays could earn more than the £56m per annum it would be paying over 5 years. Moreover this was money invested in the bank's future for perhaps decades. That said, it is odd that he did not inform Mr Agius about it immediately.

426. In his interview with the FCA, Mr Varley essentially denied that there was any connection between ASA 2 and CR2, even a commercial one. That was not only absurd, but was not really maintained in his evidence at trial. He accepted that the nature of the commercial consideration was to give the Qataris what they were asking for. It cannot be questioned that without ASA 2, the Qataris would not have done the deal. It was part of the price for their investment. By the same token, of course, the rise in the fees payable under ASA 2 directly followed from the increased fees demanded by the Qataris. Mr Varley accepted that as the figure went up, he did not discuss what additional services would be provided. He accepted that ASA 2 did "plug the gap" so that Qatar could reach its desired blended share price of 130p. This is in contrast to his interview with the FCA at G/10/63 at page 69 when he said that he saw the gap being plugged by other means, including the warrants and coupon on the Instruments. He said he was "certainly not" aware of ASA 2 plugging the gap. In other places, he said that the ASAs were freestanding agreements albeit made concurrently and while he said in cross-examination that he had said in the interview that they were connected, neither he nor the court was ultimately taken to any such passages.

427. As for Mr Jenkins, I have already referred to the position as he saw it concerning the success or otherwise of ASA 1. As to further possible opportunities, he deals with these in paragraph 301 of his WS. He placed particular emphasis on Project Tinbac in the context of ASA 2 as did Mr Varley who had accepted that he was probably much influenced by it. It is correct, as PCP points out, that this opportunity had arisen before ASA 2 was even thought of and so if anything, it should be attributable to ASA 1; indeed that would be so if it arose at any stage within 3 years of 25 June 2008. However, I am not sure how precise or rigorous one can be with these sorts of arrangements. I can see how those in the position of Mr Jenkins and Mr Varley at the time would still take the prospect of a huge deal into account when it came to assessing the worth of ASA 2.

Post-ASA2 Benefits

428. Barclays has adduced some evidence of later events which it says support the notion that ASA 2 was a genuine agreement.

429. Thus, Mr Varley wrote to Mr Agius on 14 October 2009, following a meeting with the Qatari Prime Minister to say that:

> "… The Qataris are going out of their way to put business to us. They have their own, unique way of ensuring that the value terms or equitable, but we are treated as a favoured partner…"

430. On the same day, Mr Vitalo wrote the following after a meeting which included Dr Hussain, Mr Al-Sayed on the one hand and Mr Varley and Mr Jones on the other reflecting what Mr Varley had said. Mr Vitalo stated that Mr Al-Sayed had said that:

> "… He was trying to do more work with BarCap but we keep coming back conflicted all the time (an apparent reference to recent situations).…"

431. It is true that there is no reference to ASA 2 in either of these emails but nonetheless, the references to favourable treatment for Barclays cannot be discounted entirely in my view. If the point of ASA 2 was to get more business for Barclays, that is what the email says is being contemplated. And it is not as if the reason for a lack of business being the result of conflicts is odd or unreasonable.

432. As for the opportunities set out in paragraph 309 of Mr Jenkins' WS, as he accepted, all of them would have fallen, it seems, under ASA 1 anyway. In addition, he could only speak directly to items A-C (and G - see below) because the others came up after he had left in April 2009. And as with ASA 1, there must have been others at Barclays who could have spoken to these items from personal knowledge, and yet none was called. And again, as noted above, Mr Jones was not in fact able to assist. Item C appears to be the only project which actually delivered fees to Barclays at around $2m, although the net profit is likely to have been considerably less. As for items D to H, Mr Jenkins thought either that they did not lead to deals or he was unable to say whether they did or not. And as for item G, this was an opportunity which in fact had come to him in his personal capacity and which he then directed to Barclays.

433. It is also correct that there is no evidence of anyone at Barclays specifically invoking ASA 2 to receive the benefits which Qatar purported to offer. That does not in itself prove much because that might have appeared too legalistic or indeed not necessary. I agree that any business sought from Qatar might in any event be put down to Barclays simply seeking business as it would do anyway. This does not mean that ASA 2 did not play a role or, more importantly, that Barclays did not intend to take benefits under it when it was made.

ASA 2 - Analysis

434. While, of course, it is possible to infer intent (or the lack of it) on the part of contracting parties in all the circumstances, it is telling that there is no evidence here of any actual agreement between them to use ASA 2 as a non-binding pretence only.

435. As to what can be drawn from the evidence that is before the Court, first, and notwithstanding the deficiencies in his evidence I am not prepared to find that Mr Varley did not think that the ASA 2 was a legitimate commercial bet. I do not accept that he intended Barclays not to be bound by it or, more importantly, since there was a clear obligation to pay the £280m, that he intended that Barclays would not take the services being offered to it, or seek them out. I take the same view of Mr Jenkins' position. Their evidence that in truth ASA 2 was all about "preferred provider status" was criticised, but in fact it is not obvious to me that this appellation was wholly outwith the description of the services given in ASA 2.

436. So far as Qatar was concerned, while of course it wanted £280m one way or the other in any event, the fact was that it had done business with Barclays previously and that it would cost it little or nothing to perform such obligations as there were under ASA 2. There was therefore no reason for the Qataris to intend not to be bound by ASA 2 at the time. Indeed, Qatar's solicitors L&W were sent a copy of ASA 2. While it is not clear that they then analysed it for the client, it might be regarded as odd to send it to L&W if in truth neither side intended to be bound by it and it was a pretence only.

437. It may be that others should have been shown ASA 2 who were not, for example Mr McDonald, if what he said in his SFO interview was correct to the effect that he had not seen it and was shocked and frankly thought that there was no value in it. I have already made reference to Mr Agius not being apprised of it at the time.

438. On the other hand, the evidence cited above shows that the BFC and the Board were made aware of it. As with ASA 1, there is of course the point that more could have been spelled-out to others, as a matter of good process. But that does not turn ASA 2 into a sham.

439. Further, it seems to me that any reticence to disclose or refer to ASA 2 may just as well have been because in truth it was part of the price required by Qatar - even if genuine on its own terms - and yet not disclosed as such. As Mr Sarch had observed, if equity prospectuses had been required on this occasion, the issue of whether disclosure of the intended other commercial arrangement was required would have come up. After all, the position of Barclays earlier in this litigation was to the effect that there was no connection at all.

440. PCP also relies upon the fact that Mr Dobson appears to have done a *volte-face*. He had said that he wanted to review ASA 2 and would draft it if necessary but the following morning, he effectively said that he did not want to have anything to do with it and that this was a simple Business As Usual matter. I suspect that Mr Dobson had indeed become reluctant to deal with this and in the end it was

the entirely separate Mr Hughes in New York who was asked to and did draft it. But again, that does not really show that ASA 2 was itself a sham.

441. At a very late stage, on 3 December 2020, Simmons and Simmons provided by way of disclosure a letter from 31 May 2019, intimating a claim against Barclays by Ms Shepherd. In the unredacted parts of the letter which I can see, her solicitors say that the dishonesty of senior employees of Barclays in making ASA 2 was concealed from her. The claim is for substantial damages for breach of contract and duty. By its letter of response dated 30 September 2019, Simmons and Simmons denied the claim on behalf of Barclays. I have not been told if any claim was actually made. The decision to disclose this material came after a reconsideration of it on or about 17 November 2020. I agree that this material was disclosable. It should have been disclosed earlier, given the role which Ms Shepherd played (albeit that she was not called as a witness) and given Barclays' general point about the numerous lawyers being involved in ASA 2 so as to rebut the suggestion of a sham.

442. That said, as can be seen from the solicitors' correspondence, there is an issue between Ms Shepherd and Barclays as to whether the extent of her knowledge at the time was as limited as she now contends.

443. I do not consider that this claim, or the correspondence surrounding it, really takes the question of sham any further from PCP's point of view. As will be seen, however, from the discussion above, the fact of the lawyers' involvement is not central to my analysis anyway.

444. Moreover, and as with ASA 1, this was not a case where Barclays would never have considered paying Qatar a fee of £280m on top of the commissions of 2% and 4% in exchange for its subscriptions in CR2. Nor does PCP suggest this. Rather, and as all the contemporaneous documents show, had there been no legal obstacle to paying the £280m as a straight fee for the subscriptions, Barclays would undoubtedly have done so. So by using ASA 2, it was not thereby damaging its commercial position as compared with paying a straight fee. Indeed, even if only a commercial bet, Barclays would be in a better position than paying a straight fee where there would be no possible benefits at all. So one would have to ask, rhetorically, why Barclays should not intend to enter into this agreement and equally, since it would not really cost them anything, why Qatar should not intend to be bound by it. The fact that ASA 2 was clearly designed as a mechanism to enable Qatar to obtain their blended entry price of 130p and that Barclays was originally coy about this does not make ASA 2 a sham. It might make it plain that ASA 2 should be regarded nonetheless as part of the same deal (see below) but that does not require proof that it is a sham.

Conclusion

445. I have found the assessment of the sham challenge to ASA 2 far from easy. However, I am not persuaded that it did amount to a sham. While some of Barclays' evidence on this is unsatisfactory or disingenuous, it does not alter the fundamental reasons why, in my judgment, it is not a sham, as set out above. As with ASA 1 (see paragraph 366 above), there may have been other challenges which could have been made to it, but that is irrelevant here.

446. As will be seen below, however, my conclusion on sham does not prevent PCP from being able to prove misrepresentation.

Falsity: ASA 2 as connected to CR2

447. Even if not a sham, ASA 2 is clearly part of the package offered to the Qataris. That is not only because of its genesis from a straightforward demand for further fees, but because, in truth, it would cost Qatar little or nothing to provide the services in question. The best evidence of this is that Qatar was prepared to be paid the £280m in this way. If ASA 2 had imposed onerous and extensive obligations on Qatar in return for its £280m, it may have taken a different view. This is probably one of the reasons why Mr Al-Sayed rejected the detailed version of the draft of ASA 1 sent to L&W on 22 June 2008.

448. Nor can the fact that ASA 2 was a separate agreement make any difference. It is now common ground (and if not, I would find) that ASA 2 was part of the mechanism to deliver to Qatar the blended price of 130p per share which it required before entering into the subscription. Mr Varley, while accepting this proposition, maintained that this was not the same as "legal interconditionality". But if all this means is that the making of ASA 2 was not a term mandated by the subscription agreements, that is obviously true but irrelevant. Any realistic appraisal of the events leading up to 31 October must conclude that the making of ASA 2 was a real and absolute condition of Qatar entering into the subscription agreements for CR2. If ASA 2 had not been made and there was no other mechanism to pay the £280m, the Qataris would not have invested, as Barclays well knew.

449. It follows that the making of ASA 2 rendered the SDR false. It is true that when the SDR was first made on 23 October, ASA 2 had not been made or even drafted. Arguably, the SDR was already untrue at that stage, since there was at least an agreement in principle to pay a substantial fee (which, as at 23 October, was being put at the level of £200m). PCP does not rely on this as constituting falsity. However, this does not matter because if, as I have found, the SDR was a continuing representation, it was rendered false later on and in any event was repeated on 24 and (to some extent) on 31 October.

FALSITY OF THE SDR (2): BY REASON OF THE £66M FEE

Introduction

450. Paragraph 47 of the Particulars of Claim pleads that while the £66m payment was made known to the market, it rendered the SDR false because it was "a fee paid to Qatar Holding but not to PCP…". That allegation is denied in paragraph 83 of the Defence which also stated that the Announcement made clear that the fee was to be paid to QH for its role in arranging that Sheikh Mansour would invest in Barclays in the Capital Raising. The Announcement did not, of course, specifically identify Sheikh Mansour or indeed any other subscriber.

451. There was some debate before me as to whether the fee, which Barclays says was genuine and which PCP says was not, was to be analysed as an "arrangement" or an "introduction" fee. One of the reasons for this dispute is probably that there could be a difference between a party which made an original introduction and a party which arranges or secures in some way the ultimate subscription. However, it needs to be remembered at this point that the issue is not whether there was some other representation that it was an arrangement fee; rather, the issue is whether, whatever it was, it rendered the SDR false.

452. In fact, the language used about this fee did vary. The Announcement and the QH Subscription Agreement referred to "arranging" the subscription. On the other hand, for the purposes of the conference with Mr Todd QC on 24 October, the proposition was that "Q would be paid a finders fee for procuring other institutional investors to participate in the bond issue" and it is referred to later in the note of consultation as a "finder's fee". Following that consultation, Mr Harding's note of discussions with Mr Lucas and Mr Varley referred to an "introducer fee" to be defined, and his note of his call the same evening with Mr Sarch was to an "arrangement fee". Mr Castell's email of 24 October also called it an "introducer fee". Going back a little earlier, the BFC minutes of 22 October speak of Qatar referring "to the possibility of introducing another strategic investor, Avocet..." Barclays' broad point was that this was a simple agreed payment for Qatar's assistance with the subscription to be made by or related to Sheikh Mansour. But if so, and depending on how much assistance there was, that is not quite how Barclays put it either publicly or internally in the documents just cited.

453. A further preliminary point is obviously that one can only analyse what Qatar did or did not do for the purposes of Sheikh Mansour's subscription up to 31 October, which is when the subscription took place and when the fee itself was announced.

454. Finally, although there has been reference in this context to the £66m fee being a "sham", this puts the dispute too high, in the sense that there was not here some stated terms of an agreement yet to be performed. Instead the £66m fee was simply paid as part of the completion of the subscription

without any associated paperwork, as far as one can tell, other than what appeared in the Announcement and the QH Subscription Agreement.

Analysis

455. I begin with some broad points. First, and on any view, it was PCP who introduced Sheikh Mansour to Barclays following Mr Eadie's letter of 12 October. That much Mr Jenkins admitted in cross-examination. He accepted that Qatar had not introduced Sheikh Mansour/PCP to Barclays (Day 20/150-151). That admission is itself inconsistent with the statement in the letter from Simmons and Simmons dated 27 September 2015, saying that Qatar had "arranged Sheikh Mansour's participation in the capital raising…" Mr Jenkins also accepted that Qatar had not arranged or produced the Jassim Letter which was very important as far as Barclays was concerned; it was written on the basis of an assurance as to funding given by Sheikh Mansour through Mr Jassim. Mr Jenkins further agreed that Qatar had not arranged the brief call between Mr Varley and Sheikh Mansour on 31 October. This was in a context where there was otherwise no direct access or contact between Barclays and Sheikh Mansour; Mr Jenkins had sought it on a number of occasions and Ms Staveley, acting as "gatekeeper" as it were, always refused.

456. There is no evidence that Qatar ever asked for an arrangement or introductory fee as such in respect of any other investor. As already stated, the question was what fees, overall, they required for investing themselves.

457. It seems that the first time the notion of an arrangement fee came up, so far as Mr Jenkins was concerned, was on 23 October. At that stage, the Qataris' economic ask was much more than Barclays had been prepared to offer. In addition, Qatar had a major concern which was that the proposed CR2 by then was something around £4.5bn being (according to Mr Jenkins) £2bn from Qatar and £2.5bn from Abu Dhabi interests. However, that was still short of the £6.5bn announced for CR2. It was also far short of what the Qataris said the UK Government had said was needed for Barclays which had been put at £13.5bn. The Qataris' point was that on this basis, there might well have been the need for a further capital raise in 2009 which could include a rights issue or other subscription; but this would have the effect of diluting the value of the shares now to be acquired by Qatar. That is, unless some anti-dilution protection was introduced into the subscription agreements.

458. By the evening of 23 October, according to Mr Jenkins, he was contemplating £2.5bn from Qatar, £3.5bn from Abu Dhabi and £0.5bn from Libya which amounted to £6.5bn, together with a further £1bn of investment offered to institutional shareholders but which would be underwritten jointly by Qatar and Abu Dhabi. This amounted to £7.5bn. According to Mr Jenkins (and it is recorded in his email following this meeting) this led him to propose to Qatar a total fee of £200m which would

equate to 4% of the total subscription just referred to other than Qatar's firm subscription of £2.5bn, in other words the further £5bn. Mr Jenkins said he had authority from BFC to go to £250m if necessary. He described it in the email being "For their efforts on procuring sheikh mansoor we offer a fee of 4 per cent on the total package of 5 b". He said that in the meeting he had offered Sheikh Hamad the £200m calculated as 4% on the "£5bn which Qatar was to arrange and/or underwrite under the new proposed structure we were working on." But that offer was not accepted by Sheikh Hamad in that meeting.

459. The £200m proposed fee then became the £66m finder's fee (to use the language of the consultation with Mr Todd QC) and the balance would have to be found from the agreement for "commercial services". Following the consultation, £66m emerged as a figure considered to be safely within the 10% of equity limit. Mr Jenkins did not deny that this fee was a response to Qatar's "economic ask", whatever else it may have been. So Mr Jenkins had not proposed the £66m fee as such.

460. However, in truth, there is no evidence that Qatar had "arranged" the other £5bn subscription, certainly by 31 October, and of course the numbers for the total subscription had changed by then. All that emerged was the £3.25bn investment made by the SPVs and there is on the face of it no evidence of any "arrangement" of the latter investment, still less of the introduction of Sheikh Mansour in the first place.

461. However, Barclays relies on a number of documents from which it says it can and should be inferred that Qatar did arrange for Sheikh Mansour's subscription at least to the extent that Mr Jenkins could honestly think that Barclays could and should pay a fee of £66m.

462. First, there is the reference, already cited above, to the introduction by Qatar of another investor, in the BFC minutes of 22 October. However, so far as that is concerned, the fact is that the introduction had been made sometime earlier by Mr Eadie's letter to Mr Varley on 12 October. Ms Staveley then spoke to Mr Jenkins about Sheikh Mansour on 14 October and shortly after she held a meeting with Mr Al-Qubaisi and Mr Forbes. Later on 23 October as recounted above, she met with Barclays and in particular Mr Jenkins about the SPVs' investment. Qatar was simply not involved in any of this at all.

463. It is true that on 26 October Mr Jenkins emailed Mr Varley to say that Sheikh Hamad was trying to push the other investors for a Tuesday/Wednesday announcement and that he was going to "speak to Mansoor". Mr Jenkins also said that he had spoken to Sheikh Hamad on that day to "get him to convince mansoor to use abu dhabi govt entity". Then on 29 October, Mr Jenkins reported that Sheikh Hamad wanted an announcement before the weekend and said that he will call "his Highness".

464. I see all of that. However, the fact that Sheikh Hamad and Sheikh Mansour were sometimes in contact or that their positions became aligned as they progressed their respective putative investments does not in my judgment mean that Qatar arranged the subscription or found Sheikh Mansour or introduced him. Nor is there any real evidence of material assistance in the process, if that were relevant.

465. In truth, this was just a fee for the Qataris' subscription. And once it became £66m, there was no need for any further discussion about it from Barclays' side. Nor is there any real evidence of discussion about it from the Qatari side. It is true that Mr Varley says that he must have mentioned it as something agreed in his "triangulation" call with Sheikh Hamad on the evening of 24 October but that does not really take the matter any further.

466. Since in truth this was a simple fee for the subscription, it would, in my judgment, clearly fall within the "commercial terms" part of the Narrow Construction of the SDR proffered by Barclays assuming the SDRs had been made.

467. However, that finding is strictly unnecessary because on any view, the £66m was plainly part of the price payable to Qatar for its subscription and, in this case, it was entirely retrospective in the sense that it was simply said to be a fee for what Qatar had or had not already done. It therefore fell within the ambit of the Wider Construction of the SDR which I have found to be correct.

468. Accordingly, it rendered the SDR false.

FALSITY OF THE SDR (3): BY REASON OF THE LOAN

Introduction

469. PCP alleges that the Loan constituted a breach of the SDR and also breach of the IR. The context here is only the former, but I will deal with all factual matters in this section.

470. On the facts, PCP contends that (a) the Loan was in fact used, and intended by Barclays to be used, to fund the Qataris' subscription ("the Funding Point") but (b) even if that is not so, the granting of the Loan was clearly part of the price or the consideration for the Qataris' subscription ("the Consideration Point").

471. In either event, the Wider Construction of the SDR which I have found will be rendered false. It is not alleged that if (contrary to my finding) the Narrow Construction advanced by Barclays was the correct one, the Loan would have rendered that version of the SDR false.

472. This means that strictly, it is unnecessary for me to decide the Funding Point at least in this context. However, as it is relevant to the alleged falsity of the IR (as I have found it to be) and because it has been argued at length, I will deal with it. That said, I shall deal first with the Consideration Point.

The Consideration Point

473. It is not suggested by PCP (or at least there is no evidence before me) that there was an express agreement whereby the Qataris required the Loan as a part of the price for investing. Nor is there any document recording or evidencing such an agreement and there is no reference to a “fee” in the context of the Loan, as there had been as part of the genesis of both ASA 2 and the £66m arrangement fee. However, PCP alleges that there is a powerful circumstantial and inferential case that the Loan was indeed part of the price, as required by Qatar. The determination of that allegation is necessarily highly fact-sensitive.

474. I first consider the question of timing and context. While there were, before October, various discussions about finance between Barclays and Qatar in their discussions about Project Tinbac, it is the case that when Mr Jenkins first reported after his meeting on 18 October with Sheikh Hamad and Dr Hussain, he referred not only to Qatar’s interest in investing but also its wish to raise $4bn from Barclays and Credit Suisse. By the following day it was clear to Mr Jenkins that Qatar would be seeking a $2bn loan from Barclays.

475. The dinner meeting on 12 October and the meeting the following day in Doha clearly discussed not only CR2 but also the request for the Loan. Mr Jones’ email of that day and his later telephone conversation about the meetings show that the Loan was regarded as a priority, despite the general reluctance to make unsecured loans at that time, especially if to be drawn down by the year-end. See paragraphs 45 and 48-50 above. In my judgment, the fact that the Doha meeting may have been planned some time before, as part of general client discussions, makes no difference. On any view, the government announcement on 8 October led to a need to discuss CR2 and the specific request for the Loan only arose at the same time.

476. Following the early approval of the first iteration of the Loan by ELOC on 17 October (see further at paragraph 488 below), Mr Jenkins wanted an offer in time for his dinner meeting with the Qataris on 21 October. This was sufficiently important to convene the BCCC at short notice to approve a £300m firm loan. But by the time of the dinner meeting, it had become, one way or another, an offer to lend the whole $2bn if necessary, i.e. to underwrite the entire Loan. The contemporaneous discussions between those who had some knowledge of these matters (see paragraph 56 above) shows how unorthodox and fast moving this was. The Loan was obviously discussed on 21 October, otherwise there was no point in Mr Jenkins seeking an offer letter which he could present on that occasion or the changed scope of Barclays’ commitment under the Loan shortly before. In cross-examination, Mr Jenkins maintained that he thought that the Loan was not in fact discussed at the 21 October dinner or the discussion the following day. However, he added that he had sent a note to Sheikh Hamad or Dr Hussain saying that they would deal with the capital raising at dinner, the

pre-export financing the following day and maybe the Loan after that, which is how they were trying to "choreograph" it. However I consider that to be highly implausible, given what he was doing preparatory to the dinner. 21 October was therefore another congruence of discussions about CR2 and the Loan.

477. It is equally inevitable that the Loan came up in the lunchtime meeting with the Qataris on 23 October because Mr Jenkins was chasing for a price at around the same time (see paragraph 64 above).

478. Next, on 29 October, the day when Sheikh Hamad had upped the requested fee from £120m to £185m (see paragraph 81 above) there was in the course of that day an uplift in the requested loan amount from $2bn to $3bn. That can only have arisen because Qatar requested it. It was obviously not volunteered by Barclays. It also corresponded with Qatar's agreement to invest £2bn, at the time worth about $3bn. Mr Jenkins asked Mr Jones to prepare an offer letter in respect of the Loan that day; he said he wanted to be able to deliver it that night to the Qataris at their lawyers' meeting or later in the evening, and that it should be in the form of a legally binding offer letter. He wanted the offer to be $2bn underwritten by Barclays (which it was not at the time) and said then that "They want to have—because they're just—we're trying to close up all the capital, right." On the face of it, the latter would appear to be a reference to the capital raise, which he accepted in cross-examination. It is also reflective of his acceptance that he wanted a legally binding loan offer before the subscription agreements were signed, subject only to any caveats about unlawful financial assistance. He also said that they wanted to get the loan done, along with CR2, on Friday 31 October. He said that he and Mr Varley "immediately agreed" to the increase to $3bn, and that they expected credit approval to be a formality. Although he went on to say that he still did not see the Loan as part of the overall deal or a *quid pro quo* for CR2, I do not accept that. In fact, at one point he came quite close to accepting this because he said that they were working fast on the Loan (as with other things) because Qatar was to be the arranger of the very important CR2. In the telephone conversation with Mr Ritchie shortly afterwards, Mr Jones said that Mr Jenkins wanted to be able to show a firmly committed term sheet that night. Mr Jones wanted something to get to them, even a term sheet which was subject to certain final approvals. He then said:

> "… I mean, in the context of just the capital raising it all, sort of, coming together into a confluence of strategic investors in a market transaction which, you know, has got 1m moving parts at the moment and this is just one of them."

479. In response, Mr Ritchie was against any underwriting of the whole $2bn. He then thought it was fine if "Bob and John Varley are a yes", but then they needed to go into it with their eyes open because it was not likely that Barclays was going to end up only committing to a small part of the $2bn.

480. On 30 October, Barclays both agreed the uplift of the fees to £280m, and also through the BCCC and GCC, the Loan now at $3bn. Shortly before this happened, Mr Jenkins' email to Mr Jones stating "want 2 years now!" is telling – as is Barclays' reaction immediately to agree to it.

481. In evidence, Mr Jones accepted that there was a linkage "in some way" between the Loan and the capital raise. He also accepted that the increase of the Loan to $3bn happened at about the same time that the Qataris agreed to subscribe in an amount of about £2bn. This was a concern and these were "parallel numbers" according to Mr Jones, which was a "red flag". There had been no particular explanation as to why the Loan was to be $3bn. Mr Jenkins gave evidence to substantially the same effect. Nor do the minutes of the GCC and BCCC meetings on 30 October show any consideration or explanation for the increase. Mr Jones' take on this was that the individuals at the meeting were sensible but "functionaries" relative to the senior management making the commercial decision to proceed with the Loan. And in this context, there is no necessary inconsistency between what Mr Varley and Mr Jenkins (and Mr Diamond) directed and the performance of the members of those committees. That is because, at the end of the day, the latter were concerned essentially with credit risk and not the business case for making the Loan in the first place. Compliance was, however, something with which they were concerned; but as events showed, they were content to change the anti-financial assistance provisions in accordance with what Qatar wanted. From this perspective, they may have felt comfortable at the end of the day that there was still sufficient protections for Barclays but it does not alter the fact that the changes sought by Qatar were adopted.

482. I also agree that there was a congruence of the decision-makers, or decision-drivers, as between CR2 and the Loan i.e. Mr Jenkins and Mr Varley in particular, even if there still had to be approval by the GCC and BCCC.

483. In this regard, I need to consider some aspects of Mr Varley's evidence. Here, he sought to downplay his role, saying that as CEO he was disabled from agreeing or approving a loan and was not involved in it and "it scarcely touched me". I do not accept that evidence. It is contradicted by Mr Jenkins who referred to "we" in the email he sent on the afternoon of 21 October (see paragraph 55 above). It appears not only from paragraph 351 of his WS but also his cross-examination that the "we" certainly included Mr Varley. This is also reflected in Mr Jones' comments in the McDonald/Ardalan telephone conference the same day. It is further confirmed by Mr Jones' call with Mr Hatton on 29 October and his email to Mr Jenkins referring to the request from Mr Jenkins and Mr Varley (see paragraph 80 above).

484. In my judgment, Mr Varley's evidence on this point was disingenuous and was an attempt to distance himself from the Loan which, on any view, was seen as a very sensitive issue for Barclays

from a compliance point of view. Whereas Mr Jenkins' evidence as to the actual position concerning Mr Varley is corroborated by contemporaneous evidence.

485. Next, I agree with PCP that this was not a "Business As Usual" transaction. While Qatar may well have been better placed than perhaps many other or all other state borrowers to secure a loan, the Loan was still agreed at a very volatile time. It appears to be unchallenged that as at 2010, it had been the single largest loan by Barclays to a sovereign entity. And while it was not made at a loss, Mr Bulbrook agreed that the discounted price for the bilateral loan would not have been used if the Loan was a stand-alone transaction designed to make a profit. Rather, there had to be a relationship benefit for Barclays to make it work.

486. In fact, the contemporaneous emails show that Mr Bulbrook was distinctly unenthusiastic about the Loan. See his email to Mr McDonald on 10 October saying that this was a "very tough ask now", that caution should be advised, and that the outcome might be a polite "no". He was also involved in the drafting of the final version of Mr McDonald's email back to Mr Jenkins on 10 October, in particular on the pricing required. It is worth pointing out that Mr Bulbrook's evidence became unsatisfactory when he was asked to deal with particular documents. He took some time in cross-examination to accept that it was indeed important to discover the particular identity of the borrower and the purpose of the Loan which had both been left in square brackets in the presentation document for the BCCC meeting on 21 October. Yet his reluctance and concerns were clearly evidenced in his emails to Mr Hatton on 21 October saying that Qatar "don't know what they need and then ask us to tell them" and that he doubted that the proposal would "fly" with the other banks who would form part of a club deal. He then said:

> "experience tells me that i dont think the qataris will go with any of this - i would be very very surprised (structures, pricing, benchmark implications, complexity, lack of clarity of timing and execution success etc i think we just need to say what we are being told to and take the marketing risk, that appears to be the game here at the top level."

487. In cross-examination, Mr Bulbrook said that "the top-level" referred to Qatar not Barclays. That is plainly wrong. He then accepted that the marketing risk was one which Barclays' management had told him to take. And in his telephone conference on the same day with Mr Jones and others, he said that he had not yet seen a "credible story on what the purpose for funding is and I honestly don't know what to say to these guys". When asked about his later comments that "we made a decision because we had to" and "we've got no choice" he said that the "no choice" was not because of a directive from senior management but because of the commercial necessity of doing the agreement for a Loan for Qatar. I reject that; it is obvious from the contemporaneous documents that Mr Bulbrook (and others) felt that the Loan had to be made because it was what Mr Jenkins and Mr Varley had directed. He may, as he said, have had a vested interest in the commercial relationship with Qatar, but that is not why he had no choice here.

488. It is convenient at this point to refer to the minutes of the ELOC meeting on 17 October which read as follows:

> "Global Loans is confident that we can find other banks to participate in this facility.
> • We have a clear understanding of how this facility will be used
> • Client wants to raise this fund as working capital management facility as they see good buying opportunities in current market condition .
> • GFRM is supportive but raised concern over ring fencing any asset that is purchased with proceeds from this facility. IBD will discuss this issue with client next week and revert back to GFRM
> • This facility is likely to be drawn.
> • Portfolio is supportive as long as this facility is guaranteed by a rated entity.
> Approved (3:0)"

489. The statement about Global Loans being confident that it can find other banks was clearly wrong in the light of the concerns expressed by Mr Bulbrook and others. In evidence he said that it was "wrong" and "not quite correct" but said that other banks could be brought in if Qatar got them. This rather missed the point, since he was dealing with Barclays' ability to "sell" the Loan. Equally, the second bullet point was obviously wrong and the third was merely an assumption. He agreed that he never questioned this email after it came out. In my judgment, all of this shows just how unorthodox the granting and the process was, at least up to that point.

490. In addition, there was no documented detailed consideration of the commercial merits of the loan as distinct from (for example) the minutes of GCC and BCCC meetings on 30 October which dealt with the ostensible purpose of the Loan and the credit risk position.

491. After 30 October Qatar said that they wanted the Loan to be purely bilateral (so there was no possibility of syndication by Barclays even if this was realistic) and no tie-in with Project Tinbac. It seems that Barclays almost immediately agreed, albeit that there was a further GCC meeting on 12 November to approve the Loan on those modified terms which in truth were more onerous for the Bank than before.

492. Further, the changes to the purpose clauses were made and approved at high speed, on 17 November. There seems to have been no opposition to this. Indeed, although there were various anti-financial assistance provisions, it was still unclear what the Loan was for, despite this having been raised by Mr McDonald as a concern at the outset. There was no imminent transaction for which the Loan might have been needed as a matter of urgency, Qatar's subscription in Credit Suisse having taken place already. That was what, at one stage, Mr Jenkins thought the purpose was, but as he said in evidence the Qataris kept changing their mind as to the purpose and "flip-flopped".

493. It may be, as Barclays has contended, that the Qataris were "lovers of leverage" and used loans to expand the extent of their investments, rather than because they needed the cash. But that does not explain why the Loan was needed at this time, to be sought and approved with such great haste.

494. The truth is that regardless of the quality of Qatar as a credit risk (the key function for the GCC and BCCC), at every stage, Barclays agreed to Qatar's increasing demands - just as it had done on ASA 2.

495. I now deal with the essential counter-arguments put forward by Barclays. First it is said that the timing and alignment of discussions on CR2 and the Loan were – or at least could have been - purely coincidental and mere parallel timing does not prove much. I disagree. Here, the sequence of events as already recounted is such that it is wholly unrealistic to suggest that these discussions were not commercially linked especially having regard to the urgency which the Loan generated.

496. Secondly, it is said that even if Barclays had thought (as they might for commercial reasons) that they should make the Loan to Qatar because of its support in CR2, this does not mean that the Qataris were insisting on it as part of the price for investing. As a matter of logic, that is obviously correct but on these facts, it is again unrealistic. The only common sense conclusion is that Barclays knew, because of the timing and Qatar's continued moving of the goalposts (as with the fees), that all of this had to be agreed as part of the subscription deal. There is no other reason why Barclays felt the need to act so quickly. Nor is there in fact any real evidence that Barclays simply intended to agree this Loan as a form of goodwill gesture to the Qataris for their investment. Even less so when, on any view, there were very serious concerns being expressed about the possibility of unlawful financial assistance. It is hard to see why Barclays would go to all of this trouble unless it absolutely had to, for the sake of CR2.

497. In this context, even if (which we do not know) the Qataris never expressly said that the Loan was part of the price for the investment, the strong probability (as I find) is that if Barclays did not grant the Loan, Qatar would not invest. And Barclays knew that. Its actions are wholly consistent with the Loan being part of the price for the deal and are not really consistent with any other scenario.

498. Barclays also relies on Mr Al-Sayed's email of 3 November (see paragraph 100 above) to show that there were two distinct deals: the subscription and then the Loan. I disagree. Mr Al-Sayed's email came hard on the heels of the completion of the subscription and is equally consistent with in effect saying: "we have subscribed - now deliver on your promise to make the Loan" in the sense that it was part of the subscription deal. Indeed, that is the preferable interpretation, in my view. It must also be remembered that the subscription was not due to complete until 27 November. Of course, if the Qataris failed to complete without good legal reason, they would be in breach of contract but I am sure that they were still seen as having some leverage prior to completion.

499. It is true that Mr Varley said in general terms that the Loan would help to cement the underlying business relationship and the prospect of future revenue to be earned from Qatar. However, I think

that this is simply *ex post facto* reasoning again, especially if, as Mr Varley also said, Barclays had already agreed to pay £280m to do just that. In addition, I consider that Mr Varley's evidence in relation to the Loan has to be treated with some caution, given the matters referred to in paragraphs 483-484 above. I do not accept, as Mr Onions QC suggested in closing, that these matters should be looked at "holistically".

500. I do accept, as Barclays pointed out, that in some of the discussions concerning the Loan, Project Tinbac also featured. However that does not mean that Qatar did not seek the Loan (which in many respects was a much more straightforward transaction than Project Tinbac) as part of the price. It may have done so opportunistically, given the very strong position it found itself in as against Barclays, but that does not matter.

501. Another point made by Barclays is that the references that Mr Jones made internally to the "Bob Diamond override" (see paragraphs 48 and 50 above) simply referred to the provision of an additional capital allocation from Barclays Group to BarCap so that the latter could make the Loan, which it otherwise might not have been able to do because of its own divisional capital limits. It is correct that Mr Jenkins referred to this in his evidence. But he also said that because Group i.e. Barclays (which in this context must have been a reference to Mr Diamond and Mr Varley) wanted the Loan to happen, it had to ensure that there was sufficient capital to allow BarCap to do it. None of that helps Barclays. First, it shows how unusual the transaction was because it would exceed BarCap's normal limits. Secondly, it emphasises the significance of the directions coming from Mr Varley and Mr Diamond. So while the "override" did not necessarily mean that they were consciously overriding a decision of someone else, that is irrelevant. The point is that they were steering and enabling the Loan to be made in the first place.

502. It is, of course, true as Barclays have pointed out, that no actual loan agreement was made prior to 31 October and indeed not until 17 November. However, I have no doubt that on the basis that it had been agreed, though not documented as such, and then approved on 30 October, both the Qataris, Mr Jenkins and Mr Varley would be acting on the basis (as Mr Al-Sayed later expected) that it would indeed be completed. That is evidenced by the fact that (a) once Qatar said that the Loan had to be drawn down by 17 November, it was, and (b) when Qatar sought to change the terms, Barclays immediately agreed. That latter point is also relevant to the argument that the final approval, as it were, did not come until 12 November (leaving to one side the swift approval of a change to the purpose clause on 17 November). That is true, but that was to implement changes which the Qataris required following the original approval on 30 October which, in its own terms, was effective from Barclays' internal point of view.

503. In my judgment and for the reasons given, it is incontestable on the facts that the Loan formed part of the price or consideration for the subscription which the Qataris sought and obtained. This means that it rendered the SDR false.

The Funding Point

504. A considerable amount of time was taken with this issue at trial. From Barclays' point of view, this is understandable because a finding that the Loan was used or to be used to fund the subscription with Barclays' knowledge would be a very serious matter indeed. It was its principal concern with the question of the Loan in my view.

505. In the end, however, I can take this matter quite shortly. First, and despite the highly suspicious confluence of dates, especially the drawdown on 17 November, the speed of the transaction and its unorthodox features in particular a lack of knowledge as to the actual purpose of the Loan, I cannot be satisfied on the balance of probabilities that this is what the Qataris intended, still less what Barclays intended or knew. Mr Jenkins and Mr Varley, and others, may well have suspected that this was what was going on so far as the Qataris were concerned. Indeed, Barclays might have been well advised to prevent any drawdown in 2008 (as it originally wished) so as to eliminate this risk. The resignation of Linklaters was itself a serious warning sign. But that does not equate to intention or knowledge on the part of Barclays. And it did at least manage to procure an agreement for the Loan which expressly addressed the issue of purpose and unlawful financial assistance even if it did not go as far as it might have done.

506. Secondly, I cannot safely conclude on the balance of probabilities that the Loan was in fact used to fund the subscriptions, which would be the starting point. There is no direct evidence of any flow of money to that effect. In the criminal proceedings, the SFO produced a statement from David Webb, an accountant and SFO investigator dated 26 October 2017. He concluded that the Qatar National Bank ("QNB") London account at JP Morgan Chase ("the Account") received the Loan monies on 17 November 2008 drawn for the benefit of the Qatari Ministry of Finance as borrower and that the same account was the source of the monies paid on completion on 27 November. The Account had a pre-existing credit balance of $1.4bn.

507. However, on 17 December 2018, the Defendants produced a report from Robert Mason, a Forensic Analyst. That report disagreed with Mr Webb's conclusions, showing that there was a great deal of co-mingling of various sums in their accounts, that the movement of the monies was much more complex than Mr Webb had assumed and that much of Mr Webb's detailed analysis was wrong. It is not necessary to say more about these reports (not formally adduced as evidence by either side), since after seeing it, the SFO dropped its allegations of financial assistance.

508. This is not the more usual case of a financial assistance challenge where it may be possible to show the offending cash-flows directly, and where it is clear that without the funding, the borrower could not have afforded to enter into the relevant transaction. Here, Qatar was, in truth, cash-rich.

509. Accordingly, there is no falsity of the SDR on the basis of the Funding Point. In the event, this does not matter because I have found that there was falsity on the basis of the Consideration Point.

Footnote: Unlawful Financial Assistance

510. Although PCP alleged that there was unlawful financial assistance here, it also said that it was not a directly relevant allegation although it might assist on the issue of dishonesty. In my judgment, in the light of my findings on the Funding Point and in relation to the IR (see paragraph 512 below) this could not be established even if it did arise as an issue. I therefore say no more about it.

<u>THE JR - FALSITY</u>

511. If the JR was made, it was clearly false because the £66m fee had nothing to do with any fees that might have been due to Qatar in respect of CR1. Barclays does not contend otherwise. The real question here was whether the JR representation had been made in the first place and I have found that it had been.

<u>THE IR - FALSITY</u>

512. On my interpretation of the IR (see paragraphs 286 - 290 above), this could only be rendered false if Qatar intended to use the Loan to fund the subscription and Barclays either intended it also or at least knew of Qatar's intention. In my judgment, that cannot be made out on the evidence before me for the reasons already given. Accordingly, there was no misrepresentation in relation to the IR.

<u>DISHONESTY</u>

513. In the light of my findings above, I am concerned now with the SDR and the JR but not the IR.

The Law

514. There is no disagreement about the relevant law in this context. It is well summarised in paragraph 5-18 of "Misrepresentation, Mistake and Non-Disclosure" (5th Edition, 2019) by John Cartwright, as follows:

> "There can sometimes be disagreement about the meaning of a representation. Before a representee can found his claim in deceit upon a representation, particularly one where the meaning is disputed, he must establish the sense in which he understood it and acted upon it; and in determining the meaning of the representation a court may consider how it would reasonably be interpreted: its objective meaning. However, in addition, before the representor can be held to have been fraudulent it must be shown that the representor knew the falsity, or was reckless as to the truth, of the statement in the meaning that he intended to be understood or knew that it would or might be so interpreted. The objective meaning of the representation may well be relevant evidence as to whether the representor can be believed in his claim that he did not realise that his words would be so interpreted. But the test of fraud is subjective: the interpretation of the representation within the test of fraud is therefore also subjective."

Analysis

515. The only person alleged to have made the relevant Representations, knowing that they were false or being reckless as to whether they were false, is Mr Jenkins. Dishonesty, for these purposes, is not alleged against Mr Varley. It is not denied that if dishonesty is made out against Mr Jenkins, it can be attributed to Barclays here.

The SDRs

516. Mr Jenkins' position in relation to the SDRs is somewhat difficult, since he cannot recollect making the SDR on 23 October (but accepts the possibility that he did) and denies making it on 24 and 31 October anyway. What he says is that if (which he cannot recall/denies) he did make the SDRs, he only understood that he was making them on the basis of the Narrow Construction. I find it difficult to see how, realistically, he can give such evidence, even as an admitted reconstruction, as Barclays put it. But even if he can, this account in any event makes no sense. Given the commercial context here (and before, on ASA 1 and indeed ASA 1.5) he could only have understood the SDR in the sense contended for by PCP. After all, he spent much time previously trying to find a way to give the Qataris the "deal" they wanted which included (on my findings) ASA 1 (previously), ASA 2, the £66m fee and the Loan. One asks, rhetorically, why he should think that the "deal" meant something different when telling Ms Staveley that PCP was getting the "same deal"? Mr Jenkins was making a deal and looking at matters commercially rather than concentrating on legalities. In this context, the objective meaning of the SDR is in my view relevant evidence going to what intention Mr Jenkins actually had, particularly bearing in mind the commercial common sense behind that interpretation. Indeed, the very purpose of ASA 1 (in which Mr Jenkins was involved) was so as to find a way not to have express fees which would need to be disclosed to other investors.

517. In my judgment, Mr Jenkins knew perfectly well that PCP was not getting the same deal in the required sense. He was prepared to make the SDR nonetheless; first, because Barclays was under very considerable pressure to deliver to Qatar what it had asked for whereas PCP made no similar demand, and secondly because there was at least a reasonable chance that this would go unnoticed by PCP since it was not made aware of it. That was a risk he was prepared to take. Indeed it did go unnoticed for several years until (fortuitously for PCP) it emerged as a result of the original FCA investigation.

518. Moreover, in the light of my findings above, there is no basis for distinguishing between the three different aspects of falsity (i.e. ASA 2, the £66m fee, and the Loan) because in my judgment, Mr Jenkins knew full well that they were all part of the economic ask from Qatar. But in this regard, the fact that, on my findings, the suggestion that the £66m fee was in consideration of the Qataris

introducing Sheikh Mansour was itself untrue shows that Mr Jenkins was prepared to be dishonest. And equally so for the JR, dealt with below.

519. I should also deal here with questions of timing. As at 23 and 24 October, there was no ASA 2 or £66m arrangement fee. That does not matter because the SDRs were, by their nature, continuing representations and Barclays did not argue to the contrary, nor could it.

520. The SDRs of 23 and 24 October were clearly false in those respects by 31 October and the SDR of 31 October was false when made. So far as the Loan is concerned, there were offer letters to the Qataris on 21 and 29 October and there was formal approval on 30 October. That the terms subsequently changed does not matter, nor does the fact that the actual agreement was only signed on 17 November, the date of drawdown. Barclays was in truth committed to it by 21, alternatively 29, alternatively 30 October. The SDRs were thus false in this respect either at the outset or by 30 October at the latest.

521. For the purposes of dishonesty, the reality is that Mr Jenkins knew the SDRs were in substance false from the outset anyway – or that they were bound to become so. That is because, as at 23 October, Mr Jenkins knew that there would be a Loan for at least $2bn and that there would be very substantial fees. That in itself would have made the SDRs false in any event when made although PCP does not put its case that way. But the important point here is that Mr Jenkins' dishonesty was in reality always present from 23 October. It did not really change once the fees had morphed into ASA 2 and the £66m arrangement fee because both were (at the very least) still part of the effective purchase price payable to the Qataris. The same goes for the Loan, if it is to be regarded as arising only on 24 or 31 October.

522. At no point did Mr Jenkins tell Ms Staveley that the position had changed in terms of the SDRs. That in itself was dishonest.

523. So in my view, at the end of the day, the timing nuances of the SDRs and their falsity does not affect the question of dishonesty. To be fair to Barclays, it did not really suggest that they did. Barclays did submit substantively that there was no Loan at all until 17 November. It also submitted that there was no reliance by PCP. But those are different points, which I have already rejected.

The JR

524. If (as I have found) the JR was false, it must have been knowingly false at the time it was made, because there is no other explanation for the falsity. Dishonesty is therefore established here, as well.

Generally

525. In reaching these conclusions I have, of course, borne in mind that it is a serious thing to allege and establish dishonesty. It does not follow from my findings that Mr Jenkins was or is a generally dishonest person. But that does not need to be proved. I am only concerned with his actions and intentions in what was on any view a highly unusual and stressful set of circumstances where the stakes for Barclays (and at least to some extent his own financial position) could not have been higher. I am also entitled to, and do, take into account that there were aspects of his evidence which were clearly unsatisfactory and implausible.

<u>CONCLUSION ON LIABILITY</u>

526. For all the reasons given above, it follows that Barclays did make fraudulent misrepresentations to PCP.

PART THREE – CAUSATION AND LOSS

INTRODUCTION TO CAUSATION AND LOSS

527. In its closing submissions, Barclays set out the issues which have to be resolved on causation and loss in a sequential form. This sequence was similar, though not identical to, how Barclays put it in oral opening. PCP has helpfully sought to adopt this approach although there have been some minor variations. Taking into account all of that, I set out below the sequence of issues which I shall employ.

528. The totality of these issues has been referred to by both sides as "the Counterfactual". This refers to the overall point of the exercise in determining what, if any, loss has been suffered by PCP by reference to what would have happened had the misrepresentations not been made. But in deciding what ultimately would have happened, there are certain issues which depend directly on what did (or did not) happen (for example the alleged agreement on remuneration between Ms Staveley and Sheikh Mansour). In addition, the analysis of these issues will often be informed by other actual events or more generic issues like, for example, Barclays' overall negotiating position and the impact of its desire to obtain private capital raising rather than a government bailout, dealt with at paragraphs 149-156 above.

529. Finally, in the case of each issue there is the question as to whether PCP's case needs to be established on the balance of probabilities or whether it is to be assessed on a loss of chance basis. For the most part, that is agreed between the parties but there is one issue of law between them which I shall resolve below. I make further observations about loss of chance calculations below.

CENTRAL ISSUES IN CAUSATION AND LOSS

530. These are as follows:

(1) In the counterfactual world, would Barclays have dealt with PCP at all?

(2) Had the Representations not been made, what would PCP have discovered?

(3) In the counterfactual world, would PCP have obtained more value from Barclays in return for the SPVs' subscriptions and if so, how much? This is the Additional Value ("AV") issue;

(4) In the counterfactual world, would PCP have obtained more time from Barclays to complete the subscription i.e. beyond 27 November? If so, how much more time? This is the Additional Time ("AT") issue;

(5) Whatever Barclays would have been prepared to give by way of AV and/or AT, would the shareholders (whose consent was necessary at an EGM) have agreed with the requisite majority of 75%?

(6) In the counterfactual world, would Sheikh Mansour and/or IPIC have been prepared to invest through PCP i.e. with PCP maintaining control of the SPVs at completion?

(7) What remuneration would PCP have agreed with Sheikh Mansour and/or IPIC in the counterfactual world?

(8) Would PCP have been able to raise the debt finance required and if so, how much?

(9) Would PCP have been able to raise sufficient funds overall for the subscription? This has sometimes been called the Funding Sufficiency issue.

(10) What, if any, loss has PCP suffered in the light of the foregoing?

531. Most of these issues will entail an analysis of a number of sub-issues which I shall address in context.

<u>OVERARCHING LEGAL ISSUES</u>

532. A number of general points arise which can conveniently be considered at the outset. Others will be dealt with in context.

The Law on balance of probabilities as against loss of chance assessment.

533. It is common ground that insofar as a claimant's case on causation of loss depends on the actions of one or more third parties, the claimant must prove there was a "*real and substantial chance*" of each third party taking the relevant action. That proposition derives from the leading case of *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602.

534. However, the parties are not agreed as to the position where the Court is being asked to decide what would have happened hypothetically between the claimant and the defendant, or in the case of the defendant alone. PCP says that this involves the usual loss of chance principles because for these purposes the defendant must be regarded as a "third party". On the other hand, Barclays submits that the analysis in relation to a defendant falls outside the ambit of loss of chance and must be determined on the usual binary basis of balance of probabilities. This issue arises acutely under Issue 3. (It would technically have arisen on Issue 1 but there, the outcome is plain on the balance of probabilities anyway - see paragraphs 291-306 above and 574-577 below).

535. I should add, however, that PCP contends that even if this issue is subject to proof on the balance of probabilities, PCP can discharge that burden anyway. Nonetheless, as this is a legal point of difference between the parties I should decide it.

536. PCP argues first that the decision of the Supreme Court in *Perry v Raleys* [2019] 2 WLR 636, supports its position. *Perry*, however, was not concerned to resolve the issue which faces me here and there was no need to consider the position of the defendant as opposed to "other" third parties. Nonetheless, PCP relies on paragraph 40 of the judgment of Lord Briggs when he said this:

> " It is unnecessary to express a concluded view about that analysis. A rigid application of the Allied Maples test, namely whether the fact in issue was something that the claimant rather than a third party would have done, might lead to the opposite conclusion."

537. PCP submits that since Lord Briggs refers to third parties as parties in distinction to the claimant, third parties must include the defendant. I do not think that this follows, especially where Lord Briggs was not addressing the point in issue. There is certainly no basis for elevating his observations here to a statement of general principle so far as a defendant is concerned. Yet in truth, this is the high point of PCP's case, so far as the authorities are concerned.

538. In *Petromec v Petroleo Brasilio* [2007] 1 Lloyds 629 at paragraph 95, Gloster J (as she then was) addressed the current issue but at paragraph 125 she declined to decide what she called this "unresolved issue of law" because it would be academic in her case, since she had found that the relevant misrepresentations had not been made anyway.

539. However, in *Hirtenstein v Hill Dickinson* [2014] EWHC 2711, Leggatt J (as he then was) did consider the issue directly and said this:

> "85 When a court has to decide what people would have done in the absence of professional negligence, the standard of proof differs according to whose actions are under consideration. Where the question is what a party to the proceedings would have done, the matter is decided on the balance of probability. Thus, if the court considers that it is more probable than not that the claimant would have acted in a particular way, the court will proceed on the basis that the claimant would indeed have acted in that way; while if that burden is not met, the court will proceed on the basis that the claimant would not have done so. The same all-or-nothing approach applies where the question is what the defendant would have done. By contrast, where the question is what a third party would have done, to the extent that there is a substantial doubt about the matter the approach of the court, as established by cases such as *Allied Maples v Simmons & Simmons [1995] 1 WLR 1602* and many others, is to assess the chance that the third party would have acted in the relevant way and to award damages which reflect that chance."

540. That statement clearly supports Barclays' position. However PCP says that this particular point was not argued. Perhaps, but it is nonetheless a clear statement of principle. PCP also says, if necessary, that this statement is "clearly wrong" because one cannot derive it from *Allied Maples.* I disagree. The first part of this paragraph was not expressed to be drawn specifically from *Allied Maples*. Moreover, this statement of principle has not been overtaken by *Perry* on my view of what Lord Briggs was saying.

541. In the Court of Appeal case of *North Sea Energy v Petroleum Authority of Thailand* [1999] 1 Lloyds Rep 483, it is clear from the judgment of Waller LJ that he considered that the loss of chance analysis, as explained in *Allied Maples*, applied to third parties <u>other than</u> the defendant. All PCP could say about this is that it did not matter in the end because the claimant there could not prove what otherwise had to be shown on the balance of probabilities anyway. But that is hardly an answer to the statement of principle set out.

542. For its part, Barclays contends that the decision of the Court of Appeal in *BCCI v Ali* [2002] EWCA Civ 82 supports its case by reason of what Robert Walker LJ (as he then was) said at paragraphs 60

and 72 but for my part, I do not think that his observations really assisted on the current issue which he did not address directly.

543. In the case of *Feltham v Freer Bouskell* [2014] PNLR 2, the current issue did not arise, but at paragraph 111, the Deputy Judge said this:

> "It is true that if the claimant is deceased, and the proof is effected by his personal representatives, the logic of requiring the claimant to prove what he would have done becomes distinctly blurred. But the logic justifying the difference between category (2) and (3) is between matters which should be, in principle, within the knowledge of the claimant, and therefore capable of proof by the claimant, and matters which depend on the act of a third party, where the basis of the hypothesis is more uncertain and not capable of proof in the same way. The claim by the disappointed beneficiary is a claim where the claimant can give evidence as to what he or she would have done, but where what the testator would have done is very much dependent on an assessment of what a third party to the litigation would have done and in my judgment should be treated that way."

544. I agree that this certainly suggests that the third-party is someone other than the defendant although the point did not arise directly for determination. It is also not as explicit, in its apparent support for the loss of chance approach in relation to a defendant, as the decision of Leggatt J was, the other way round.

545. In *Gregg v Scott* [2005] 2 AC 176, Lord Hoffmann observed at paragraph 83 of his judgment as follows:

> "But the true basis of these cases [*Allied Maples* and others] is a good deal more complex. The fact that one cannot prove as a matter of necessary causation that someone would have done something is no reason why one should not prove that he was more likely than not to have done it. So, for example, the law distinguishes between cases in which the outcome depends upon what the claimant himself.. or someone for whom the defendant is responsible.. would have done, and cases in which it depends upon what some third party would have done. In the first class of cases the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of the chance that the third party would have so acted. This apparently arbitrary distinction obviously rests on grounds of policy. In addition, most of the cases in which there has been recovery for loss of a chance have involved financial loss, where the chance can itself plausibly be characterised as an item of property, like a lottery ticket. It is however unnecessary to discuss these decisions because they obviously do not cover the present case."

546. I agree that Lord Hoffmann there clearly thought that a defendant was not a third party for these purposes, although he also thought that the whole distinction was arbitrary and this was an issue for another day.

547. It is also clear from the first instance judgment in *Clef Aquitaine v Laporte* [2001] 1 QB 488, that the Judge determined the alleged counterfactual better deal with the defendant on a balance of probabilities basis. See paragraph 562 below.

548. Both sides made reference to the very recent decision of the Court of Appeal in *Assetco v Grant Thornton* [2020] EWCA Civ. 1151. While it is an interesting example of how the first instance Judge approached a counterfactual with a large number of different contingencies, and while at paragraph 151 of his judgment, David Richards LJ made reference to *Perry*, he was not addressing the current issue. On this point I do not think that *Assetco* takes the matter any further.

549. Finally, in *Moda v Gateley LLP* [2019] PNLR 27, Freedman J observed as follows in the context of a somewhat different point, namely whether the loss of chance principle still applies when (as in his case) the (non-defendant) third-party had actually given evidence at trial:

> "176 In the light of the authorities and the textbooks and applying legal principle, I conclude that even where a third party has given evidence, the Court should prefer the analysis that loss of chance damages apply for the following reasons, namely
> (1) The distinction in case law is founded not on whether the Court has all the evidence that it requires, but upon a difference between what the claimant proves about its conduct and the putative actions of a third party. That is what was decided in *Allied Maples* and in cases referred to above until and including *Perry v Raleys* without this distinction having been made. Further, and in any event, such distinction as has been made has generally not been qualified by reference to whether evidence from the third party was adduced or could have been adduced. On the contrary, the principle as summarised by Floyd LJ in *Wellesley v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch. 529 at [99] is that "in those cases the court does not demand that the claimant establish his case of causation on the balance of probabilities: see the *Allied Maples* case, at p.1611A–C. All the claimant has to show in such cases is that the chance is a real or substantial one."
> (2) Although the cases referred to above do not deal directly with the question as to what is to happen when he third party has given evidence, they do, in my judgment, provide some steer. That is to say that when it comes to cases about the future and the counter-factual, there are cases where the Court does not require the all or nothing approach. The reasoning cited from Lord Briggs in *Perry v Raleys* above indicates a pragmatism where it is impracticable to have a proof of all or nothing as opposed to a loss of a chance.
> (3) There is an important distinction between the level of engagement of a third party and a party in litigation: only the latter has to give disclosure, and although disclosure might be sought against a third party, the Court is usually much more restrictive about applications against third parties. Further, as in the instant case, the third party's involvement generally may be far more reluctant and less committed than in the case of a party. Thus, the notion that the Court has all the evidence that it could expect in the event that the third party had been a party to the action is usually not correct;
> (4) If the distinction depended upon the third-party evidence having been provided, then it would follow that the same distinction should be made where the third party would be expected to have given evidence and did not: this would be very difficult to appraise. Further as McGregor opined "it would be unfortunate if decisions should turn on the availability or otherwise of witnesses which would generally be fortuitous and could be tactically arranged."
> 177 For these reasons, I have come to the view that the decision should not depend on whether a third party has given evidence. However, the fact that a third party has given evidence may be relevant to the assessment of the chance."

550. Yet again, the current issue was not before Freedman J. That the application of loss of chance principles is not to depend on the availability of evidence or otherwise might be said to support PCP's position. On the other hand, he then went on to draw a distinction between the position of a party to the litigation and a third party because of the full level of engagement (in particular with regard to disclosure) that would be required of a defendant in any event.

551. In my judgment, the fact still remains that the only express consideration of the issue was that of Leggatt J in *Hirtenstein* and this favours Barclays. For my own part, I would also accept that there is a difference of principle where the counterfactual involved concerns what the defendant would have done because that party is exposed to the full rigours of the litigation regime and is likely to (and here did) provide full evidence on the counterfactual, as its witnesses saw it. It is difficult to see why, if what the claimant would have done has to be established on the balance of probabilities, the same should not apply to the defendants. While of course, in any given case, the distinction might seem arbitrary (as Lord Hoffmann observed) there still needs to be, in my view, a clear dividing line rather than one which depends on the availability of evidence in any given case.

552. Moreover, the textbook writers favour the same approach. *McGregor on Damages* (21st Edition, 2021) seems to reflect this at paragraphs 10-65 and 10-66, and does not suggest at paragraph 10-62 that *Perry* has changed anything in that regard. Further, the commentary at paragraph 13-79 of Adam Kramer's *The Law of Contract Damages* is explicit:

> "In contrast with past facts and the hypothetical behaviour of the claimant and defendant, the hypothetical behaviour of third parties is to be determined on a loss of chance basis (unless the parties concede otherwise)."

553. In my judgment, the correct approach is that summed up by *Kramer* and Leggatt J. Accordingly, when the hypothetical actions of the defendant are in issue, the claimant must prove its case in relation to them on a balance of probabilities. Therefore Issues 1 – 4 must be determined on the latter basis. Issues 5 - 9 fall to be assessed by reference to loss of chance.

A more than 10% Threshold?

554. Barclays argued in passing that if the relevant chance was 10% or less, then it would be negligible and not real and substantial. In *Thomas v Albutt* [2015] EWHC 2817, at paragraph 461 of his judgment in a barrister's negligence case, Morgan J said, in respect of loss of chance, that:

> "… The cases also say that if I thought that the prospects were 10% or less, then I should regard them as negligible."

555. He went on to say that as the chances of the relevant contingency were between 5% and 10%, that would be negligible and should be disregarded.

556. This approach was cited with approval by Proudman J in *Harding Homes v Bircham Dyson Bell* [2015] EWHC 3329 at paragraph 167 of her judgment. She went on to find the relevant chance was negligible.

557. However, *McGregor* (supra) questions this by saying that:

> "… The better approach is that a "negligible" prospects should be assessed in light of the circumstances. For instance, a 10% prospect of succeeding in relation to a transaction with billions of pounds might not be negligible for the same company compared with one which is worth thousands."

558. That comment was cited with approval by Veronique Buehrlen QC, sitting as a Deputy High Court Judge in *John v Lucasfilm* [2018] EWHC 624. At paragraph 151 of her judgment, she held that there was a 10% chance of a particular contingency arising which she said was real and substantial.

559. I have to confess that I disagree with the idea that whether a 10% chance is real or not depends on the circumstances of the case and in particular the quantum sought. While I accept that 10% (or even 1%) of £1bn or £100m is a very large amount, I fail to see what that has got to do with the assessment of the chance itself. The "real and substantial" threshold does not go to the ultimate outcome, it goes to the size of the chance and that does not depend on anything else. For my own

part, I have difficulty in seeing how anything less than 11% can be regarded as a real and substantial chance (following Morgan J in *Thomas*).

560. *McGregor* (supra) refers to the decision of the Court of Appeal in *Ocean Outdoor v Hammersmith & Fulham* [2019] EWCA 1642. This was a public procurement case in which the unsuccessful tenderer claimed damages. The trial judge had found against the claimant on liability but went on to find that in any event this was not a case where the breach was sufficiently serious to permit an award of damages and there was no causal link between the breach and the loss. In dealing with an argument on appeal that this was a case where a loss of chance analysis could or should have been adopted, Coulson LJ said this:

> "91. So in public procurement cases, the loss of chance principle… Can be applicable because of the uncertainties caused by the number of hypothetical variables in play. But it will not apply where, even taking into account all those uncertainties, it is plain that the claimant's bid would have been rejected in any event.
>
> 92. This is manifestly this case, here, on the preferred basis of a 10-year lease, Ocean were outbid on a scale of 1 to 3…. In other words, Ocean underbid so comprehensively that they can be no uncertainty as to the hypothetical outcome of a lawful competition: Ocean would still have lost. In those circumstances, the loss of a chance mechanism would never have been applicable.."

561. I follow all of that but I fail to see how anything can be inferred from those paragraphs as to the existence or otherwise of a 10% threshold where loss of chance is engaged. In my judgment, following *Thomas* and *Harding*, and as a matter of logic, there must be a threshold which is more than 10%. One could argue that it would be better stated as 10% itself, so that anything less is negligible. However, nothing turns on this for present purposes.

The Approach to Quantification

562. There is then a related issue as to the approach to quantification. In a simple counterfactual case where loss of chance does not apply, both the establishment of the fact of the loss and the quantification thereof will be determined on a balance of probabilities. Thus, in *Clef Aquitaine*, the counterfactual was whether, absent the misrepresentation, the claimant would have obtained a better deal from the defendant (in respect of the pricing of its products) than the one the claimant actually got, and if so, how much better. It is plain from the language of Bell J cited at page 493 C-H of the judgment of Simon Brown LJ (as he then was) that the Judge had decided that the claimant would, in the hypothetical negotiations with the defendant, have achieved a further discount of 17.5%. Both the fact of the better deal and the extent of it were clearly subject to the balance of probabilities. Simon Brown LJ recognised this at page 494 A. It is not the case, as PCP appeared to contend at one stage, that once the fact of <u>some</u> better deal is established, the calculation of what it would have been is always subject to some other principle.

563. *Clef Aquitaine* was of course a straightforward case and one in which the trial judge did the best that he could on the materials before him to arrive at the extent of the counterfactual deal.

Loss of Chance as alternative to Balance of Probabilities

564. The next preliminary point concerns a possible interrelation between a balance of probabilities and a loss of chance assessment. What is clear, in my view, is that in relation to any particular counterfactual contingency it has to be decided whether that is to be assessed on a balance of probabilities or a loss of chance basis. What the Court cannot do, in a case requiring balance of probabilities is to provide a fallback loss of chance argument if the balance of probabilities cannot be established (cf paragraph 308 of PWC). It is either one approach or the other.

Mixed Questions

565. A more difficult point arises if the assessment of one particular contingency requires an analysis of, for example, what the defendant <u>and</u> a third party would have done or decided in relation to the claimant. Fortunately, this does not arise for determination in this case. It is correct that in the context of Issue 3 (AV), for example, there could arise a question as to how Qatar would have reacted to a changed deal scenario being proposed by Barclays. But this is still firmly in the context of what, ultimately, Barclays would have provided by way of AV and overall still remains a balance of probabilities exercise.

566. In this context however, PCP called in aid part of the judgment of Toulson LJ (as he then was) in *Parabola v Browallia* [2010] QB 477 at paragraph 23 when referring to the Court "making the best attempt it can to the evaluate chances, great or small" so as "to make a reasonable assessment". If this is meant to suggest some freestanding reasonableness approach, it is not correct. It is clear from the whole of paragraphs 22-24 of his judgment that all Toulson LJ was saying was that where the issue is a lost opportunity to do X (which by definition did not happen) the Court has to assess the chance of it happening whether it be great or small, unless insignificant. That is a reflection of *Allied Maples* which is specifically referred to. In fact, as it seems to me, the assessment of the trial judge there, Flaux J (as he then was), was made on the balance of probabilities anyway - see the extract quoted at paragraph 17 of the judgment of Toulson LJ. In other words, if this is what PCP is suggesting, there is no "third way".

567. Equally, in the decision of the Court of Appeal in *Assetco*, it is clear from the judgment of David Richards LJ that he saw the case of *Davies v Taylor* [1974] AC 207 (itself cited by Toulson LJ in *Parabola*) as a loss of chance case which is how it had been seen in paragraph 207 of *Allied Maples*.

The "Fair Wind" Principle

568. A yet further point arises concerning PCP's invocation of the so-called "fair wind principle". In *Browning v Brachers* [2005] EWCA Civ 753, Parker LJ referred in paragraph 204 to the well-known case of *Armory v. Delamirie* (1722) 1 Stra 505 and then stated as follows:

> "… the Chief Justice directed the jury that unless the defendant produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did."
> 205. It has been recognised in subsequent authorities that in so directing the jury the Chief Justice was applying a general principle to the effect that, in a case where the defendant has wrongfully deprived the claimant of property of value (be it an item of physical property or a chose in action), the court will, save to the extent that it is persuaded otherwise by the defendant, assess the value of the missing property on a basis which is generous to the claimant….
> 207. Similarly, in Mount and Sharif Simon Brown LJ refers to Armory v. Delamirie as establishing a principle to the above effect (see the passages cited by the judge in the course of his judgment).
> 208. In Mount , Moore-Bick J (giving the first judgment in the Court of Appeal) rejected a submission by Mr Mount (who appeared in person) that, in the passage in his judgment in Allen v. MacAlpine quoted above, Diplock LJ was referring to the legal, as opposed to the evidential, burden of proof. Simon Brown LJ took the same view. Having stated (proposition 1 at p.510D) that the legal onus is on the claimant to establish that he has lost something of value, Simon Brown LJ went on to say this (proposition 4 at 511B-C, dealing with the evaluation of what the claimant has lost): "Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. *To my mind it is rather at this stage that the principle established in* Armory v. Delamirie … *comes into play* ." (Emphasis supplied)
> 209. To the same effect is paragraph 39 of Simon Brown LJ's judgment in Sharif (quoted earlier).
> 210. I respectfully agree that the principle in Armory v. Delamirie is not directed at the legal burden of proof; rather it raises an evidential (i.e. rebuttable) presumption in favour of the claimant which gives him the benefit of any relevant doubt. The practical effect of that is to give the claimant a fair wind in establishing the value of what he has lost."

569. I see that, because it can be said that but for Barclays' fraudulent misrepresentation, PCP would at least have had the opportunity of seeking AV and so on. So it could be said that where the analysis is to ascertain the particular chance lost, a "fair wind" should apply. But I do not think that much weight can be placed on that factor here. It would become more powerful if, as in *Armory v. Delamirie*, Barclays had in some way deprived PCP of evidence that would assist its own and the Court's assessment of the chance. In such a case, the defendant would only have itself to blame. In other cases, a degree of caution is necessary. See the observations of Peter Smith J in *Rosserlane v Credit Suisse* [2015] EWHC 384. In this case, I do not think that the principle really adds anything.

Loss of Chance and Multiple Sequential Contingencies

570. The next point concerns multiple contingencies. The position is that if a sequence of independent events needs to be established and they all involve loss of chance assessment (because they depend on the actions of third parties) then in general, one should multiply the chances together to come to a final percentage chance. This has been called the Mathematical Approach. It is how PCP has modelled its case in quantum, in part. However, the Mathematical Approach does not apply where the contingencies are not independent. In other words the outcome of one is determined in whole or in part by the same factors that apply to another one. This is particularly true of Issues 6 and 8/9 here. How all of this plays out I shall examine below.

Loss of Chance where more than one positive outcome to the contingency is a real possibility

571. Many loss of chance cases are binary in nature. That is to say that, for example, there is a missed opportunity to bring a claim (because the negligent solicitor overlooked the limitation period). If one assumes that it is a simple money claim, then either the putative claim would have succeeded

on the merits or it would have failed. If the value of the claim is £X, then the chance of success is applied to that figure.

572. In some cases, however, it may be that the contingency is not binary. In other words, the relevant outcome could be for example, a 40% chance of recovery of £X, but a 20% chance of recovering £Y and a 40% chance of recovering nothing. At that stage, the court needs to take into account the outcomes of each chance. That is because the outcome is not binary. It would not be fair to limit the outcome to the 40% chance where there is a further positive outcome in the remaining 60%. How the court combines the two separate outcome chances may differ. It might simply add them together or blend them in some other way for example using an average. See the approach of Jack J in *Earl of Malmesbury v Strutt and Parker* [2007] EWHC 999 (QB) at paragraph 149, and that of the Court of Appeal in *Browning* at paragraphs 122 and 212.

573. However, all that arises in the context of a loss of chance assessment. It is not relevant where (for example as in Issue 3) the task is to find one outcome (if any) which can be established on a balance of probabilities. Often where there are several postulated outcomes in such a context, the Court might fix on what it considers to be the highest figure that can safely be shown on the balance of probabilities.

ISSUE 1: IN THE COUNTERFACTUAL WORLD, WOULD BARCLAYS HAVE DEALT WITH PCP AT ALL?

574. It is not clear that this issue remains live if, as I have found in Part 2, Barclays did intend PCP (as opposed only to some other entity or person) to rely upon the Representations. See paragraphs 291 - 306 above.

575. On that basis, it is then very difficult to see why Barclays should take a different view as to who it was dealing with, in the counterfactual world (cf paragraph 41(1) of BWC). Nothing, counterfactually, would have changed in this regard.

576. Indeed, this issue was not really addressed orally by Mr Quest QC in his closing arguments on the various stages.

577. In my judgment, it is plain that Barclays would have dealt with PCP (as opposed to anyone else) on the question of AV and/or AT. The real question is what, if anything, by way of AV and/or AT would have been agreed and this is covered in Issues 3 and 4 below.

ISSUE 2: HAD THE REPRESENTATIONS NOT BEEN MADE, WHAT WOULD PCP HAVE DISCOVERED?

578. Paragraph 73 of the Particulars of Claim alleges that if the Representations had not been made “PCP-LLP would have insisted on being told the terms upon which Qatar Holding and Challenger had

agreed to invest in Barclays and would have discovered that Qatar Holding and/or Challenger were to receive additional fees totalling £346m".

579. In response, paragraph 117 of the Defence denies the relevance of paragraph 73 on the basis that PCP's claim in deceit requires it to prove what would have happened had the alleged Representations not been made. I think there is a confusion here, because the precursor to paragraph 73 was paragraph 72 which is predicated on what would have happened had the Representations not been made. Otherwise, Barclays put PCP to proof in respect of all of paragraph 73. Paragraph 73 of the Reply alleges that:

> "If the Representations had not been made (as they were made, in response to a direct question for Ms Staveley), then the answer to her question would have been an honest answer and PCP-LLP would have discovered the true position."

580. Accordingly, on the statements of case, there was no positive allegation from Barclays that something other than the truth emerging would have resulted.

581. However, and although not pleaded, at paragraph 210 of his WS, Mr Jenkins said that if he had been asked by Ms Staveley for details of any broader commercial arrangements with Qatar he would have declined to answer the question as being inappropriate for the reasons given in paragraph 211. At paragraph 211, among other things, Mr Jenkins said that he was not aware as at 23 October of any suggestion that Barclays would enter into a further agreement for advisory services although he knew that the BFC had approved a sizeable arrangement fee. Therefore, he said, of the broader commercial arrangements that PCP said should have been disclosed by him, "it would not have been appropriate to discuss any of them with Ms Staveley at our meeting on 23 October."

582. In addition, Barclays contended at paragraph 447 of BWC that if ASA 2 was a sham and Mr Jenkins was concealing it from the Board and there were improper arrangement fees, it is not plausible that Mr Jenkins would have disclosed ASA 2. That was not something which Mr Jenkins actually gave evidence about. The paragraph goes on to say that the likelihood is that Mr Jenkins would have said that the dealings with Qatar were confidential and he could not discuss them; PCP's choice then would have been either to walk away or negotiate without regard to the terms of ASA 2 because it would not have known about it. Paragraph 448 says that if ASA 2 was genuine (i.e. not a sham) but still rendered the SDRs false because it was part of the consideration (as I have found), then Mr Jenkins would still have said it was confidential and not disclosed it; and even if he had, that would not have put PCP in a position to seek equivalent value. That last point is of course not related to this issue but the issue of AV.

583. I do not agree that the various elements of Qatar's consideration would not have emerged, as Barclays has contended, for the reasons set out below.

584. The first point is that, as the actual events of October 2008 show, Ms Staveley was a persistent and tough negotiator and if she, like any investor in the position of PCP, was told, in answer to her questions about the same deal as Qatar, that Barclays would not tell her, she would not just accept that. In cross-examination she said that if Mr Jenkins would not tell her about the Qataris' position, she would have gone to his superiors which would include Mr Varley.

585. For his part, Mr Varley said in cross-examination that if Mr Jenkins had asked him what to say, he would have told Mr Jenkins to be open and transparent and then they would have negotiated from there. And for his part, Mr Jenkins said that if asked on 23 October about the Qatari deal, he would in fact have gone to Mr Varley first (contrary to paragraphs 210 and 211 of his WS cited above). And if Mr Varley told him to disclose the various elements of the deal with Qatar, he would have done so.

586. To disclose the truth about the Qatari deal may well have been undesirable or inconvenient for Barclays; but the fact was that it needed PCP's investment through the SPVs (with its knowledge of the involvement of Sheikh Mansour), especially since the proposed investment was £3bn, being £1bn more than that offered by the Qataris. Had Barclays not disclosed the Qatari deal at all (in fact contrary to Mr Jenkins' and Mr Varley's actual evidence) the almost certain outcome would be PCP's withdrawal which Barclays could not afford. One only has to see how quickly Barclays agreed to the ever-changing demands from the Qataris (sometimes in the course of the same day) to appreciate this.

587. Although I have not found that ASA 2 was a sham, it is worth saying something about it here, if it had been. Had it been a sham, I do not accept that this would have made its disclosure any less likely. First, the putative lack of its disclosure still contradicts the actual evidence of Mr Jenkins and Mr Varley. Second, Barclays would still have felt bound to disclose it for the reasons given in the previous paragraph. Third, while in theory disclosure might run against (on this hypothesis) the concealment of the true purpose of ASA 2 from others at Barclays, I doubt whether Ms Staveley would have been particularly interested in the detail of that. What she would have been interested in is what the deal represented for Qatar. And in that sense, the position would be the same whether ASA 2 was an actual sham or simply part of the Qatari price. Either way she would know that the bottom line was that Qatar was getting £280m for its subscription. Thus, to be clear, whether ASA 2 rendered the SDRs false because it was sham or because it was part of the price in any event makes no difference to this issue. Indeed, Mr Jenkins did not give evidence to the effect of paragraph 447 of BWC anyway, as noted above.

588. As with the question of timing and falsity addressed in paragraphs 519 - 523 above, no point was taken by Barclays to the effect that the revelation of the true position would differ, depending on any particular dates. That is obviously correct because, for example, on the hypothesis that any Representation might have been true at one stage but became false later, prior to 31 October, Mr Jenkins would, in the counterfactual world, be deemed to have revealed what the truth was, then.

589. Although not focused on by either party in relation to this issue (as compared to the AV issue, for example) the disclosure of the true deal with Qatar would necessarily have included the Loan. As it happens, PCP does not make much of that in terms of the later AV issue, but for what it is worth, it would have highlighted to PCP the total benefit to Qatar.

590. Accordingly, in my judgment, it is hopeless to suggest that in the counterfactual world Ms Staveley would not have discovered, prior to 31 October, the existence of ASA 2, the true £66m arrangement fee and the Loan. The real question, in my view, is what would have happened next.

<u>ISSUE 3: IN THE COUNTERFACTUAL WORLD, WOULD PCP HAVE OBTAINED ADDITIONAL VALUE FROM BARCLAYS AND IF SO, WHAT?</u>

PCP's pleaded case

591. The second part of paragraph 73 of the Particulars of Claim alleges that in the counterfactual, PCP:

> "would have insisted on receiving equivalent value to that received by Qatar Holding and Challenger whether by payment of additional fees *pari passu* with those paid to Qatar Holding or by revising the terms upon which the MCNs, RCIs and/or Warrants were to be assumed."

592. Paragraph 117 of the Defence puts PCP to strict proof of such matters.

593. On 16 January 2020 Barclays served a Request for Further Information on PCP. This was answered by PCP's Further information dated 20 March 2020. In respect of paragraph 73, there were the following Requests and Responses:

> "Requests
> 1. Please explain in respect of each of (i) the MCNs, (ii) the RCIs and (iii) the Warrants:
> 1.1. Whether the Claimants in fact contend that PCP-LLP would have sought revisions to the terms of those instruments in any counterfactual scenario relevant to these proceedings;
>
> 1.2. If so, (a) the circumstances in which PCP-LLP would have done so; and (b) precisely what revisions it would have sought to those terms;
>
> 1.3. How any such revisions, if agreed, would have generated the equivalent additional value referred to by the Claimants;
>
> 1.4. Whether the Claimants contend that the same revisions would have been made to the instruments insofar as the Qatari Investors … was also to invest; and whether (and if so how) they contend that, following any revisions made to the instruments, the "same deal" would have been available to all parties participating as investors in the Capital Raising.
>
> Responses
> 1.1 Yes.
>
> 1.2 These matters are well and sufficiently pleaded. The circumstances in which PCP would have insisted upon revising the terms of the Instruments are pleaded in paragraphs 73 of the Particulars. It is not necessary

for Barclays to know "precisely" what revisions that PCP would have sought to the terms of the Instruments and that request is, in any event, irrelevant to the issues in dispute.

1.3 This matter is obvious. By discounting the conversion price of the MCNs and/or increasing the coupon payable prior to their conversion and/or delaying their conversion date, the MCNs would have become more valuable to their holder, PCP. Likewise, by increasing the coupon payable in respect of the RCIs and/or delaying their call date, the RCIs would have become more valuable to PCP. By decreasing the strike price of the Warrants, they would have become more valuable to PCP.

1.4 This request is misconceived. PCP responds as follows:

(a) No. PCP does not contend that the same revisions would have been made to any instruments for which the Qatari Investors had subscribed.

(b) …If (which is denied), the Qatari Investors did so invest, and if Barclays were to have revised the terms upon which the Instruments were to be issued so as to provide value equivalent to that received by the Qatari Investors, then the same deal would have been available to PCP-LLP and the Qatari Investors. This is because:

(i) The Qatari Investors would have received a total of £346m in fees through (i) the Secret Payment (of £280m); and (ii) the £66m Payment. Paragraph 44 of the Particulars is repeated; and
(ii) PCP would have received value equivalent to £346m through revisions of terms of the Instruments…."

Barclays' Preliminary Objection

594. It is clear, subject to some nuances, that PCP's essential case is that whatever AV would have been agreed, it would have been delivered essentially through a change in the terms of the Instruments. See, for example, the statement by Mr Weekes for PCP at Day 41 line 17. The question of such changes is considered in detail below, but for present purposes, it can be assumed that Mr Jenkins and Mr Varley agreed that extra value to PCP could have been given in that way.

595. However, Barclays contends that, even on that basis, PCP cannot succeed on Issue 3 at all unless it can establish what particular changes to the terms of the Instruments would have been agreed, so that the precise mechanism of delivering the AV can be seen. Put another way, PCP's Further Information in that regard was insufficient because there were still no particulars of how exactly the AV would be arrived at through the Instruments. Barclays contends that, in and of itself, this is a bar to any success under Issue 3.

596. I disagree. It seems to me that whether the route to a figure for AV requires me to conclude on the balance of probabilities exactly how it would be reached is a fact-sensitive question.

597. Barclays contends that the determination of the precise mechanism may have a knock-on effect when it comes to, for example, funding sufficiency. I see that, and this issue will have to be addressed below. But it is no bar to my finding at this stage, that an AV of a particular value would be achieved through a change in the Instruments without determining precisely how that would be achieved.

Interrelation between Issue 3 and Issue 5

598. Finally, by way of preliminaries, I deal with the interrelation between Issue 3 and Issue 5. There is some overlap between them to this extent: in the context of the counterfactual negotiations with PCP, it is said that Barclays would be affected, at least to some extent, by its own perception as to whether the relevant elements of the deal would be approved at the EGM. If, for example, Barclays took the view that the delivery of the relevant AV beyond £X would never be passed, it would not offer it. The existence and impact of any such perception is discussed below.

599. Separate, however, is the question of whether the putative AV as agreed by Barclays (if any) would in fact be approved at the counterfactual EGM. That is the subject matter of Issue 5 which needs to be considered separately.

The Scenarios now pursued by PCP

600. The Scenarios, so-called, are all concerned with possible outcomes in terms of AV putatively agreed between Barclays and PCP in the counterfactual world.

601. PCP's final position is that it contends for 6 possible scenarios, namely A-D and F-G. I will explain below why E and H have fallen away.

602. I describe each of the Scenarios briefly below; they all involve a basic assumption which is that PCP would get a value at least equivalent to that obtained by Qatar ("Equivalent Value"):

(1) Scenario A: This assumes that the £66m fee is allocated entirely to the RCIs, since that is how it was made contractually payable to Qatar. As for the £280m payment from ASA 2, first, a Net Present Value (NPV) of £249m has been attributed to it, as agreed by the experts. This is then allocated as a further commission, *pro rata* to the commissions expressly payable of 2% and 4% in respect of the RCIs and MCNs respectively. Those figures are then increased to reflect PCP's increased subscriptions for the MCN; on this basis, PCP would receive AV of £615m as compared with £350m (using the NPV of £249m) for Qatar; see paragraph 353.1 of PWO;

(2) Scenario B: This is the same as A but it does not spread the £249m payment across the RCIs and MCNs *pro rata*. Instead, it is attributed wholly to the MCNs. This is on the basis that its underlying purpose, as expressed by Qatar, was to achieve a blended entry price for the shares across CR1 and CR2. In other words, it was all about the equity investment. Because PCP invested £2bn in the MCNs as opposed to Qatar's £800m, it significantly uplifts the AV figure to £1.063bn;

(3) Scenario C: This is the same as Scenario A except that part of the AV is provided by way of Additional Warrants (AW); so the amount is the same, namely £615m;

(4) Scenario D: This is the same as Scenario B except that part of the AV is provided by way of Additional Warrants (AW); so the amount is the same, namely £1.063bn;

(5) Scenario E: This contains no adjustment to Qatar's total fees of £315m and is therefore in the same amount;

(6) Scenario F: The AV here consists solely of AW.

All of the above Scenarios assume that Qatar remains an investor ("Qatar-in")

(7) Scenario G: This assumes that PCP invests £3bn in MCNs and receives £3bn worth of Warrants with a net value of £3bn;

(8) Scenario H: This assumes that PCP invests £3.5bn and receives Warrants with a net value of £3bn, £3.3bn or £3.5bn.

Both of these Scenarios assume that Qatar is not now an investor (Qatar-out).

603. PCP has effectively dropped Scenario E on the basis that if it was still to represent Equivalent Value for PCP, it would mean that all £315m would have to be viewed as commission on the RCIs since it is only there so that PCP and Qatar each subscribe for the same amount. PCP says that this is unrealistic in the light of the evidence about the counterfactual which shows that the principal mode of delivering AV would be through changing the terms, mainly of the MCNs. But if so, (and on the premise that any AV must be *pro rata* to PCP's investment as compared to Qatar's) PCP would obtain more than £315m anyway. Accordingly, I am not now required to consider this as a possible outcome because it is unrealistic. See paragraph 366.1 of PWC.

604. As for Scenario H, PCP says that it is not necessary to explore this Scenario further in the light of PCP's points about the Qatar-out scenarios (see paragraph 522 of PWC).

Implications of the Balance of Probabilities assessment on Issue 3

605. Because Issue 3 must be decided on the balance of probabilities, I have to come to a view about which Scenario, if any, would arise in the counterfactual world on a balance of probabilities. For its part, PCP says that this is somewhere between the £615m under Scenario A and the £1.063bn on the Scenario B. PCP further says that it will probably be closer to B than A. This is because the delivery of the AV focuses on the MCNs which is where any changes to the Instruments would mainly occur. I am not sure that there is much in that point because it would be possible to agree how much AV PCP should get, and then decide how to deliver it through the Instruments, if necessary mainly through the MCNs.

606. As for the other Qatar-in Scenarios, PCP contends that, while it is most likely that the AV would be delivered principally through alterations to the terms of the Instruments, there was (only) "some

chance" that it might have been effected in part by the issue of AW. Hence the existence of Scenarios C and D or, in the case of Scenario F, the provision of AW only. However, I consider it extremely unlikely that PCP would have received AW (see paragraphs 612-614 below).

607. PCP contends that there is a 90% chance of one of the Qatar-in Scenarios arising.

608. As for the Qatar-out Scenarios (now only Scenario G), PCP says that there is a small but real chance of it occurring put at 10%. However, since this assessment is not loss of chance but balance of probabilities, I can and should reject the Qatar-out Scenarios at the outset because even PCP assesses their likelihood at only 10%.

609. Accordingly, the real question for me is whether it can be shown on the balance of probabilities that (a) Barclays would have negotiated with PCP some AV and if so, (b) that it would be somewhere between £615m and £1.063m. Now that Scenario E has been taken out of the picture, there is no other option for me to consider.

The Evidence

610. It is in my view clear from the evidence of Mr Jenkins and Mr Varley (see paragraphs 155 and 585 above) that in the counterfactual world Barclays would have been willing to offer the same deal to PCP.

611. Given that there were different basic commission rates for the RCIs and the MCNs and that, overall, PCP was investing around £1.2bn more than Qatar in the MCNs, I consider that Ms Staveley would have sought, and the parties would have agreed, an AV that was in some way proportionately higher than Qatar's. The more the AV was to be delivered through changes to the Instruments, the more obvious that outcome would be.

612. As for the provision of AW, at paragraph 638 of her WS Ms Staveley said that in the counterfactual world she would have "insisted on" getting (or retaining) £3bn worth of Warrants and additional fees of £346m. In cross-examination, she said that in truth, she would have been able to hang onto all £3bn worth of Warrants that she had originally asked for, and Barclays would have obliged. In addition, Mr Jassim said at paragraph 28 of his WS that he knew that the warrants were important to Ms Staveley and in paragraph 100 that she was "steadfast" in her refusal to give up the £1.5m worth of Warrants in the clawback negotiations. That, of course, was also clear from her own evidence and what actually happened.

613. I note also that reliance is placed on Mr Varley's oral evidence (Day 16/148-150) in terms of how Barclays could have delivered Equivalent Value to PCP. It is true that at one stage he accepted that it may have been possible to structure the Equivalent Value by PCP receiving more Warrants than Qatar and Qatar receiving more arrangement fees etc so that both would still end up getting the same

deal, *pro rata*, as it were. He said that such an arrangement would be unusual but not unheard of. In my view, this evidence does not take the issue as to whether PCP would have succeeded in obtaining more Warrants very far. The important underlying point of his evidence here was that there would have been a number of different ways to provide the Equivalent Value.

614. In my judgment, if Ms Staveley had fought for more Warrants in the counterfactual negotiations I do not think she would have succeeded. Although, for the purpose of the clawback (i.e. in order to get CR2 passed at the EGM, as Barclays saw it), Qatar had contemplated giving up its Warrants at one stage, I do not think for one moment that it would have agreed to let PCP have all £3bn worth of Warrants without it getting any. After all, Qatar, like Ms Staveley, had stated the need for equal treatment. Furthermore, to replace the Warrants given up by Qatar simply with yet more fees would, had Barclays acted properly, probably run into difficulties with the 10% cap. Indeed, on a balance of probabilities assessment (which this is), AW are clearly ruled out. PCP itself only says that there was "some chance" of obtaining them and at paragraph 569.4 of PWC it puts that chance at 20%.

615. Rather, the far greater likelihood would be, as Mr Jenkins and Mr Varley said, that Barclays would provide the AV to PCP (and the value agreed with Qatar) essentially through changes to the terms of the Instruments, which Mr Jenkins said could be achieved quite quickly. Some additional fees would still be available in cash, as it were. All of this could have been done on a consistent basis. One therefore returns to the underlying issue as to whether in the counterfactual Barclays would have agreed to provide AV. In my judgment it obviously would, not merely because of the difficulties it was in and its desire to avoid part-nationalisation, but because Mr Jenkins and Mr Varley effectively admitted that it would have done so. While of course Barclays would not have agreed to just anything, so as to avoid part-nationalisation at any cost, I do not think that the tipping point would have been reached, certainly in the case of Scenario A. Yet again, one has only to recall the speed with which Barclays agreed to the ever-increasing demands of Qatar which was of course the junior investor here, compared with Sheikh Mansour.

616. As for the amount, there would have been strong grounds for Ms Staveley to seek *pro rata* equivalence. While she did not put it quite like that at paragraph 638 of her WS, if she was not to get AW then it would be logical to seek more than the £346m worth of value because of PCP's greater investment. Moreover, that would be a proposition with which, logically, Barclays and indeed Qatar could agree. In very broad terms, one would expect an investor putting in £3.25bn rather than £2.05bn to receive a larger reward for so doing.

617. As to the reasons why Barclays might still <u>not</u> have agreed, I note that Barclays does not suggest that for example a further £615m of value was simply unaffordable or that, even if affordable,

Barclays would have simply refused it. This is an important point because while Sir Richard Broadbent pointed out that questions of dilution in the light of revised terms of the Instruments would be a matter of concern for the Board, there was no specific case raised by Barclays that Scenario A (or Scenario B, for that matter) would have been rejected in any event. Objections of this kind could easily have been taken without knowledge of the particular nature and extent of the changes to the Instruments in the form of increased coupons or lower MCN conversion prices. And the reality is that those who were intimately involved in the negotiations namely Mr Jenkins and Mr Varley clearly thought it was do-able.

618. Equally, it was open to Barclays to make a positive case that it could not have afforded any of these scenarios whether paying in cash or by changes to the Instruments. That point could have been made (and evidenced) easily because the individual AVs are given for each Scenario.

619. It is correct that PCP's case here is effectively unsupported by expert evidence. But in my judgement, it was not necessary to have such evidence and certainly not in the light of the concessions made by Mr Jenkins and Mr Varley.

620. A point was also taken as to how far the MCN conversion price might have to drop in order to produce a particular value in the AV context. This was not part of the instructions to Dr Shi or Mr Skailes. However, in cross examination, Dr Shi was asked to adjust the parameters in a spreadsheet she had produced for the purpose of valuing the MCNs in the context of Scenario C. By using the "Goal Seek" function, the spreadsheet showed that if an added value of £997m was required from the MCNs, the new conversion price would have to be 107p not 153p as it in fact was. The £997m comes from Scenario B, not A.

621. It was then argued in BWC that such an extensive discount would have caused significant dilution problems for shareholders. I do not think I can take much account of this. While it was an interesting use of the spreadsheet function, it was not a subject which the experts were asked to consider for these purposes. Further, and in the event, the effect would be less of course in relation to Scenario A.

622. Obviously, Barclays would have to consider what the shareholders were likely to make of it at the EGM and whether the deal as a whole would pass. See the references to Sir Richard Broadbent's evidence about Barclays being "on the edge" at paragraph 155 above. On the other hand, if the terms of the Instruments were changed across the board, this would benefit the institutional shareholders as well. The latter would clearly not receive separate fees but they would be getting the Instruments at even more attractive prices.

623. I do not think that any concerns over the EGM would have stopped Barclays from agreeing a deal that would work for both sides as at 31 October along the lines of Scenario A. After all, although in terms of the actual deal (prior to clawback) Barclays had concerns over the EGM, they still went ahead and agreed it. When the clawback issue arose, after 31 October, Barclays then sought to appease the institutional shareholders. It should be noted that even here, Ms Staveley refused to give up any Warrants. She thought (correctly as it turned out) that at the end of the day the shareholders would approve, as they did. She took the risk of an adverse EGM as indeed did Barclays. I do not think the position would have been any different in the counterfactual if Scenario A had been agreed in principle.

624. I therefore find that on the balance of probabilities Scenario A, at least, would have been agreed.

625. I need then to consider if I could go further and be satisfied that Scenario B would have been agreed. I do not think that I can. Scenario A has the merit of strict logic. The argument that PCP should get more than Scenario A because of its increased subscription for MCNs and that Qatar's concern over the blended entry price means that AV should be calculated *pro rata* only to the MCN subscriptions is a subjective one. I doubt it would have satisfied Barclays or indeed Qatar. And after all, in the counterfactual, whatever Ms Staveley may have known about the actual value proposed to be delivered to Qatar she would not have known why, and in particular anything about the blended share price issue. Accordingly in the counterfactual negotiations she would not have made that argument to increase PCP's AV, anyway.

626. Nor, in my view, is there any basis for coming to some "halfway house" between Scenarios A and B, as PCP have left open for consideration. Again, any such figure would depart from the strict logic and merit of Scenario A and it is not suggested that, for example, Ms Staveley would have refused to accept anything less then some particular figure which was above that inherent in Scenario A.

Conclusion on Issue 3

627. Accordingly, I find that in the counterfactual negotiations PCP would have secured an AV deal as set out in Scenario A. Going forwards, therefore, no other Scenario is now relevant.

ISSUE 4: IN THE COUNTERFACTUAL WORLD, WOULD PCP HAVE OBTAINED ADDITIONAL TIME FROM BARCLAYS AND IF SO, HOW MUCH?

Introduction

628. Again, this is an issue to be tried on the balance of probabilities. By the end of the trial, there were really two aspects to it. First, in the original (counterfactual) negotiations for AV, would Barclays have given PCP more time, and if so why? I refer to this as "Original AT". The second is whether Barclays would have given PCP more time if the need arose later, in the context of seeking or

completing the necessary debt finance (supplemented by any further funding to "bridge the gap") which, on PCP's case, was required of it. I refer to this as the "Later AT". I deal with each in turn.

Original AT

629. In fact, Ms Staveley asked for this in the real world. But Barclays declined to provide it and she accepted that situation. She did not, for example, threaten to walk away from the deal.

630. One then has to ask why the original AT scenario would have been any different in the counterfactual. All that happened was that PCP obtained AV. That could not itself have made any difference. Ms Staveley did not say to Barclays prior to 31 October that the subscription date or the intended completion date should be extended so that, for example, she could obtain the necessary debt finance. Indeed, on her own case, that requirement did not arise in any way relevant to her remuneration until after the alleged agreement with Sheikh Mansour which was no earlier than 7 November.

631. She did however say at paragraph 643 of her WS that if she had been made aware of the elements of Qatar's deal, she would have insisted on more time so that she could negotiate and finalise terms with the other investors (i.e. other than Abu Dhabi) she had approached. She would have insisted on delaying the Announcement and completion dates by at least a month i.e. until 30 November and 27 December respectively. I do not think that Barclays would have agreed to such an extension on such an open basis. After all, by late October, it was reasonably clear that Qatar and Abu Dhabi would invest all of the necessary subscription monies. I cannot see that Barclays (or for that matter Qatar or Abu Dhabi) would have agreed such an extension simply to facilitate PCP's search for other investors when the existing putative investors were ready to go. Neither of them had expressed a desire or need to sell down their interests in advance. I accept that an "unscheduled delay" of this kind might very well send a wrong message to the market, as Mr Varley thought (see paragraph 307-309 of his WS). In the real world, either she did not seek an extension on this basis at the outset or if she did, she was unsuccessful and did not challenge it.

632. It is, however, possible that in the counterfactual world it would have taken a little more time to put in place the necessary AV arrangements which would include changes to the terms of the Instruments, and taking some further legal advice as to the 10%, for example, given what Mr Todd QC had said on 24 October.

633. In fact, and as already noted, Mr Jenkins' evidence was that changes to the terms of the Instruments could have been done quite quickly but if, in the context of making those changes, it looked like all sides were running out of time as 31 October approached, I consider that Barclays would have extended time for a short period to complete the agreement which in principle everyone had made.

To that extent (but only to that extent) I would agree that Barclays would not put CR2 at risk. But if this Original AT was given, it does not really have any impact beyond that just stated. It does not take PCP's case further than establishing that the AV would indeed have been put in place if agreed to. While it can be said that in the counterfactual, Ms Staveley might have been in a stronger position than in the real world because of her discovery of the deal with Qatar, that would only have relevance, in my judgment, in the context here, of any short extension needed to finalise the AV.

Later AT

634. In my judgment, the only reason why a request for AT later on would have arisen from PCP's point of view was because Ms Staveley appreciated that she could not raise the necessary debt finance in good time for a 27 November completion or possibly a 24 November EGM. That this is the central relevance of AT was confirmed by PCP in oral closing.

635. PCP says that in this event (which was bound to have arisen in my view, having regard to what actually happened) PCP would have sought and obtained a three-week extension from 27 November to 18 December which, if granted, it says would have been sufficient on any view to raise the necessary finance.

636. In cross-examination, Mr Varley accepted that an extension for a week or so could have been granted without a major problem, but not more. In fact, that evidence was given in the context of a delay to the subscription date and the Announcement so as to allow for the coming counterfactual negotiations on AV to finish, and not in relation to the completion date of 27 November. See Day 16/118. So it is not accurate to say, as PCP does, at paragraph 375 of PWC, that in those circumstances all that was required was another 13 days.

637. There was in fact no evidence as to Barclays' reaction if it had been asked at some point after 31 October whether completion could be deferred to allow it to raise debt finance. Barclays' first argument against this is to say that making such a request at that point would have been impossible because the parties were by then contractually committed to 27 November. I do not accept this. If Barclays was otherwise agreeable to granting an extension, a simple contractual variation could and would have been agreed.

638. The only conceivable circumstance in which PCP would have asked for AT in my judgment is if Ms Staveley needed it in order to obtain debt finance. In other words, this contingency does not arise in any event in the same way that, on the counterfactual, Issue 3 does.

639. What this means is that this question arises for consideration (still on the balance of probabilities) only if I find that (a) there is at least a real chance that PCP would have procured the relevant debt finance <u>provided that</u> (b) it obtained Later AT. If, on the other hand, I were to find that there was in

any event no real chance of obtaining debt finance regardless of any Later AT, the latter question simply does not arise. For those reasons, it makes sense to defer consideration of the granting of any Later AT, until I have considered the issue of debt finance which arises later, under Issue 8 and the funding shortfall, under Issue 9. At that point, insofar as is necessary, I will have to revisit this Issue 4.

ISSUE 5: WHATEVER BARCLAYS WOULD HAVE BEEN PREPARED TO GIVE BY WAY OF AV AND/OR AT, WOULD OTHER SHAREHOLDERS (WHOSE CONSENT WAS NECESSARY AT AN EGM) HAVE AGREED WITH THE REQUISITE MAJORITY OF 75%?

640. On the basis that the AV consists of Scenario A in a Qatar-in context, any contention that some shareholders might have refused to permit it which is based on a Qatar-out scenario is irrelevant.

641. The narrow issue is whether the other Barclays shareholders would have passed the revised subscription agreements at the EGM that would occur in the counterfactual world.

642. PCP contends that the necessary 75% vote would have been secured because the alternative would have been part-nationalisation which Barclays and at least most of its shareholders would wish to avoid. That argument only goes so far. After all, it looked as if Barclays' actual efforts to avoid part-nationalisation were going to founder at EGM level until institutional shareholders were appeased by the clawback of £500m worth of RCIs. In addition, I take Barclays' general point that though the actual EGM passed the subscriptions at 87%, it only needed two institutional shareholders (for example Legal and General and Axa) to change their minds and it would have failed. Sir Richard Broadbent said that the discussion with institutional shareholders had been "extremely robust" and they were concerned not to set a precedent of inevitably approving recapitalisation efforts by other companies in which they had invested. He added that some institutional shareholders had focussed in particular on the question of dilution as a consequence of CR2 and whether, indeed, part-nationalisation was necessarily such a dire alternative.

643. On the other hand, what can be said is that if, in the counterfactual world, the terms of the Instruments were changed so as to provide substantial extra value to Qatar and the SPVs as investors, they would be that much more attractive to other shareholders who would still (on this analysis) be getting the opportunity to take up to £500m worth of RCIs as well. There would of course be some fees which can properly be paid, not to the other shareholders but only to Qatar and the SPVs; but a balance could have been struck by Barclays and no doubt would have been, to give the greatest possible chance of success.

644. While it is true and obvious that there would come a point when, if CR2 was going to cost too much and/or was rejected by the EGM, Barclays would have to have taken the government bailout, that was seen as a long way down the road. Indeed, once Lord Myners' offer of a bailout on 12 October

was rejected, it was likely that the cost of a government bailout to Barclays later on would go up. Mr Varley accepted that when he was shown the minutes of the Board meeting of 14 November in which it had been reported that a government spokesman said that the cost of the bailout would now be comparable to the cost of the Qatar and SPVs' subscriptions. Of course, one way or another, the AV would come at a cost to Barclays.

645. For understandable reasons, no one's evidence addressed the extent of the likelihood of passing the EGM for each of the postulated Scenarios. Furthermore, no witness for Barclays positively said that the shareholders <u>would</u> have vetoed Scenario A (or any other scenario) - it was just the risk. In oral closing, that is how Barclays put it, that the risk of failure at the EGM must be factored in.

646. All that said, the outcome obviously was not certain. In my judgment, looking at all the factors, there was a 60% chance of the counterfactual AV in Scenario A being passed.

ISSUE 6: IN THE COUNTERFACTUAL WORLD, WOULD SHEIKH MANSOUR AND/OR IPIC HAVE BEEN PREPARED TO INVEST THROUGH PCP I.E. WITH PCP MAINTAINING CONTROL OF THE SPVS AT COMPLETION?

Introduction

647. It will be recalled that on 20 November, Ms Staveley agreed to transfer the ownership of the SPVs to IPIC and this process was completed on 24 November. See paragraph 122 above. After that, PCP had no control of or any interest in the SPVs' investment. If the same thing would have happened in the counterfactual world, there would, again, be no investment in CR2 through PCP. Accordingly, on this issue, PCP must show that there was at least a real chance of things turning out differently. In order to assess that possibility, it is necessary to determine, if one can, the reason why she lost control in the real world.

Why did PCP lose control?

648. Mr Al-Qubaisi of course did not give evidence. The only direct witness on this is Ms Staveley herself and it is useful to start with the account as set out in her WS:

> "583. Later that afternoon, I received a telephone call from HE Al-Qubaisi and as soon as I answered I sensed that something was not right. The tone of his voice was downbeat and he asked me if I had seen Barclays' share price which had hit a new low of around 120p that day. He said the he was extremely concerned as the market was so volatile that and there was no telling when the share price would stop falling. I had been tracking Barclays' share price almost every hour and I too was very concerned that it had fallen sharply in the last 24 hours. I told HE Al-Qubaisi that the upcoming vote at the EGM was creating high levels of uncertainty, that this was the cause of the recent fall in the share price, and after the EGM it would recover.
>
> 584. HE Al-Qubaisi then explained that IPIC had lost confidence in the deal and they no longer wanted to invest in Barclays. He said that the fall in share price had reduced the value of the Warrants and the MCNs and this in turn had a direct impact on the levels of debt which could be raised. He was particularly concerned about the MCNs as the share price had fallen to 117p, well below the subscription price of 153p. This meant that, on 27 November 2008, we would be paying £2bn for the MCNs, when the underlying shares were only worth around £1.5bn, thereby resulting in a paper loss of £500m on day one.
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> 585. I was in complete shock and horrified at the thought that I would not be able to fund the deal. I rapidly tried to think of solutions to keep IPIC as an investor. Up to this point, my main focus was on raising non-

recourse debt (i.e. with no other collateral other than the Instruments), as this structure was more attractive to my investors, and this is what I had agreed to deliver to Sheikh Mansour. Moreover, I knew that IPIC would be reluctant to give a guarantee as this would affect their credit rating and the cost at which they could borrow money. However, as I mentioned earlier in this statement, a number of the banks including Credit Suisse, RBS and Morgan Stanley had suggested to me that they could offer a higher level of debt or a bridging loan if we could get a guarantee from an Abu Dhabi state entity. I viewed this as a fall-back measure in the event that our primary funding arrangements were not in place before completion. I told HE Al-Qubaisi that a number of the banks had suggested that we could raise a higher level of debt for the investment if we could offer a guarantee from IPIC or an Abu Dhabi state guarantee. HE Al-Qubaisi said that a guarantee of this size would require approval from the Chairman of the Department of Finance of Abu Dhabi. I told him that PCP's lawyers, A&O, could work on a structure for this type of guaranteed loan, and after the call I asked Ms Mills to send an him an email attaching the contact list for A&O's banking team so that IPIC could contact A&O directly with any legal questions. Later that day or the following day, I also spoke with Mr Petitgas at Morgan Stanley again on the telephone and I asked him to prepare a revised term sheet for a loan for the full £3.25bn or the highest amount of debt they were prepared to offer for the investment, on the basis that the loan would be guaranteed by IPIC the Abu Dhabi state.

586. After my call with HE Al-Qubaisi, I spoke with Mr Jassim on the telephone and I told him that IPIC wanted to pull out of the deal. He said that HE Al-Qubaisi was panicking and he was afraid of the repercussions from within the Abu Dhabi ruling family if the investment in Barclays lost money. Mr Jassim reminded me that Abu Dhabi were already nursing heavy losses following ADIA's investment of USD $7.5bn in CitiBank in November 2007, and since then Citi Bank's share price had fallen as a result of its exposure to the sub-prime mortgage crisis in the United States. Mr Jassim said that Sheikh Mansour still wanted to proceed with the investment if we could get a suitable funding package in place. I told Mr Jassim that if IPIC or the Abu Dhabi state could give a guarantee then the banks would be willing to offer more debt to fund the investment. However, Mr Jassim said that a guarantee from IPIC or the Abu Dhabi state was not within Sheikh Mansour's gift, as it required approval from senior members of the Abu Dhabi Government, and this would come at a cost. He explained that this was one of the reasons why Sheikh Mansour wanted non-recourse financing to fund his position.

588. At the Atlantis opening party, I spent much of evening on the telephone, speaking with colleagues and advisers working with me on the Barclays deal. During the evening I received another call from HE Al-Qubaisi who told me that the situation with the Barclays deal had been escalated within the Abu Dhabi ruling family, above his head and that of Sheikh Mansour, and the Crown Prince, His Highness Sheikh Mohamed bin Zayed Al Nahyan, had become involved. He told me that a major concern was the reputational damage to Abu Dhabi if they did not fund the deal, given Sheikh Mansour's name was so closely associated with it and he had been mentioned in Barclays' press release. He told me that they were trying to get the funding in place using whatever resources they could and it was likely an Abu Dhabi state guarantee would be required. He said that if IPIC was going take over responsibility for funding the deal, then PCP could no longer retain a carried 10% interest. HE Al-Qubaisi said that even Sheikh Mansour was going to lose some of his position, which I understood to mean that IPIC or someone would need to provide a greater share of the equity funding required than originally contemplated or agreed. He said that PCP would be reimbursed in full for all of the fees and expenses we had incurred on the deal, and that IPIC would pay me a generous fee for the work I had done.

591. I was committed to investing £3.25bn in Barclays and I realised that I was not going to be able to get the funds in place in time to save my position on the deal... Having certainty that the deal would be funded was of paramount importance to me, and even though I had used three SPVs to sign up to the Subscription Agreements, I never considered not funding the deal. I always felt that it was my reputation on the line, and it was my responsibility to fund the deal. Although I had no obligation to transfer the Gulf Invest Companies to IPIC, if I refused the investment would fail and I would get nothing. It would also damage my relationship with Sheikh Mansour because his name was mentioned in Barclays' press release and he would be associated with the inevitable fall-out if we did not fund."

649. To judge from that evidence as a whole, while the dropping share price was clearly relevant, at the end of the day, at least according to Mr Al-Qubaisi, and as recalled by Ms Staveley, the substantial investment from Sheikh Mansour/IPIC was going to go ahead anyway. That is because of the reputational damage which would be suffered by them, had they pulled out. The Abu Dhabi interests had of course been set out in the Jassim Letter and in the Announcement. However, on the basis that the Abu Dhabi investment would continue, they would need to arrange the funding. No funds had

in fact yet been put in place by Ms Staveley. And while she had obtained some indications from DB among others (dealt with below), whatever she had obtained by way of possible interest from banks was not enough ammunition to enable her to fight against PCP's exclusion or to persuade Mr Al-Qubaisi to reconsider.

650. On the basis of Ms Staveley's evidence, PCP says that as at 30 October, when the share price was 205.25p the paper value of the subscription for the SPVs was £4.5bn or a net realisable value of £4.236bn. On 7 November, the realisable value was £3.976bn which means that the investor paying £3.25bn would have made just under £750m. By 18 November, that realisable value had decreased to £3.623bn. By 20 November, when the share price had dropped to 127.7p, the paper value of the investment had fallen to £3.266bn, just slightly more than the initial cost. Accordingly, this would present a very bleak view to an investor who might well assume the continuation of a downward trend in the share price. PCP makes these points to show that Mr Al-Qubaisi was not lying when he told Ms Staveley about the lack of confidence in the deal because of the falling share price. However, the difficulty with this is that it ignores what Mr Al-Qubaisi told Ms Staveley the following day.

651. Moreover, it must be remembered that according to Ms Staveley, Mr Al-Qubaisi had initially said that the falling share price caused IPIC to lose confidence in the whole deal so that it did not want to invest in Barclays at all. But in fact, it did. It does not assist PCP's case that Mr Al-Qubaisi said that there had been a direct impact on the ability to raise debt because, after all, on her case, Ms Staveley had agreed to procure the funding and had not done so.

652. At paragraph 502 of BWC, Barclays suggested reasons why Ms Staveley lost control at that point. The first was a concern in the Abu Dhabi ruling family that PCP had not raised any funds. The second was dissatisfaction with the remuneration structure proposed by PCP as the share price fell. The third was irritation in Abu Dhabi because of Ms Staveley's efforts to get publicity for the deal, and the fourth was a desire by Mr Al-Qubaisi to take control from Mr Jassim.

653. PCP said that this paragraph should be rejected entirely as speculation. However, it is important that I try to find out what the key reason for Ms Staveley's loss of control was, for the purpose of the counterfactual. In doing so, I shall consider paragraph 502.

654. I do think that the lack of finance, as at 20 November, played a real and essential part in PCP's loss of control because, on the basis that Mr Al-Qubaisi had said that IPIC would take over the financing effort, the Abu Dhabi interests were clearly not going to give any more time to Ms Staveley. That is hardly surprising. It was now 20 November, the EGM was on 24 November and completion, for which the funds would be needed, was 27 November, just a week away.

655. As for the second reason, that depends in part on what I find was discussed and/or agreed between Ms Staveley and Sheikh Mansour previously about remuneration. On her case, she had made an agreement already, so dissatisfaction with her proposed remuneration would not arise. Further, the alleged dissatisfaction is illogical – if there was only a remuneration proposal, not yet agreed, which did not now appeal to Sheikh Mansour, all he had to do was reject it - not remove the deal as a whole from PCP. So I discount this factor.

656. As to the courting of publicity by Ms Staveley, while the evidence shows elements of this which might not go down well in Abu Dhabi, I doubt it was the essential reason for PCP's exclusion.

657. As to the power struggle between Mr Al-Qubaisi and Mr Jassim, I accept that this might have been so. However, if PCP was otherwise performing well, I doubt that Mr Al-Qubaisi would simply have sought to eject PCP for his own purposes. Moreover, part of the evidence for this suggested power struggle came from Mr Forbes who was not a generally reliable witness, as stated above.

658. On PCP's own case, the failure by Ms Staveley to come up with solid funding arrangements by 20 November was plainly likely to cause concern because she was obliged to raise 60%. On PCP's case, without it, it would get nothing at all under the remuneration agreement made with Sheikh Mansour. According to paragraph 588 of her WS, Mr Al-Qubaisi specifically made the point that if IPIC arranged the funding, PCP would not get its 10% carried interest. And logically, the reason why IPIC wanted to do the funding was because she had not delivered it by then. That, in my judgment, is the essential reason why PCP lost control when it did.

659. On that footing, the counterfactual position has to be examined by reference not to how the share price drop might have been viewed differently - because there was now, say, £600m of AV available to offset the effect of the price drop - but rather by how that putative AV could have enabled Ms Staveley to raise the proposed finance, either by 20 November or later, if AT was also granted.

660. I should add here that Barclays makes a further point in relation to 18 November, which is when PCP says Sheikh Mansour agreed the remuneration package on the telephone. This is because by 18 November, the deal was already looking a lot less attractive than as at 7 November and so why, rhetorically, would Sheikh Mansour have agreed the remuneration deal then? Especially if, two days later, Ms Staveley felt that she had to give up control. I deal with this point below but should record here simply that in the end, 20 November was not the last straw for IPIC because of a drop in share price. Rather, Abu Dhabi stayed with the deal.

661. As a postscript to this part of Issue 6, I should add that it was Mr Forbes' evidence that IPIC had in fact been in control of the subscription (as opposed to PCP) since late October and that this was always the intention at the Abu Dhabi end. However, like much of his evidence, this was plainly

wrong and paragraphs 284-301 of PWC contain a comprehensive rebuttal of this suggestion. In the event, Barclays wisely placed no real weight on much of Mr Forbes' evidence including on this point. The reasons why Barclays said that PCP lost control, as set out in paragraph 502 of BWC, did not include the suggestion that PCP had never been in control by then anyway. There is therefore no need to explore this point further.

The Counterfactual Position

662. PCP has to show that there is a real chance that in the counterfactual, it would not have lost control of the investment by 20 November. PCP's core point is that there would have been AV of between about £600m - £1bn (I have found it to be no more than about £615m) and as a consequence, an investor making a £3.25bn investment would not see just a very small paper profit (or indeed a loss on a realisable value basis) but at least another £600m. If so, it is said that Sheikh Mansour/IPIC would not have lost confidence in the deal (which in fact they did not) and PCP would have been in a much stronger position to resist giving up its role, retain the existing remuneration agreement or agree a different one. Ms Staveley, it is said, could and would have held onto PCP's ownership of the SPVs and the power, in effect, to shut Abu Dhabi out, which it would have exercised if necessary. I doubt that last point very much. Despite what Ms Staveley has said in paragraphs 640-641 of her WS, paragraph 591 makes clear that she would not have wanted the investment involving Sheikh Mansour to fail.

663. The real point, in my judgment, is how the putative extra value of £600m could affect the raising of finance under PCP's remuneration agreement with Sheikh Mansour, either with or without AT. I agree with Barclays that unless PCP can show a real chance of being in a better position to secure the debt finance in the counterfactual world, PCP would be in no stronger position to resist giving up control to IPIC.

664. What this means is that merely because AV of £615m was available counterfactually, this does not mean *per se* that the question of relinquishing control to IPIC would necessarily have been any different. Barclays does not contend that the counterfactual position could never, in any circumstances, be different. Rather, it says that it all depends on the question of debt finance and funding sufficiency, either as at 20 November, or - if Barclays agreed to give more time <u>and</u> Abu Dhabi (and Qatar) were prepared to wait - by a later date.

665. Accordingly, one cannot decide Issue 6 in a vacuum once I conclude, as I do, that the mere availability of AV of £600m without more does not entail the counterfactual position contended for by PCP. Issue 6 must therefore be revisited in the context of my findings on Issues 8 and 9 below.

<u>ISSUE 7: WHAT REMUNERATION WOULD PCP HAVE AGREED WITH SHEIKH MANSOUR AND/OR IPIC IN THE COUNTERFACTUAL WORLD?</u>

Introduction

666. Four different Remuneration Bases feature in PCP's case on causation and loss. They are identified in the Joint Statement between Dr Shi and Mr Skailes, and as set out at paragraph 356 of PWO as follows:

(1) Remuneration Basis 1: PCP receives a 10% interest in the investment together with 10% of the profits realised from it; this comes from paragraph 3 (b) (i) of the H/T;

(2) Remuneration Basis 2: PCP receives 20% of profits after Sheikh Mansour has been repaid equity, plus a 5% return on the investment; this comes from paragraph 3 (b) (ii) of the H/T;

(3) Remuneration Basis 3: PCP is remunerated by a fixed 10% interest in the SPVs; this was taken from what PCP says was agreed at the Majlis on 7 November; and

(4) Remuneration Basis 4: PCP receives 50% of the Warrants.

Remuneration Basis 1

667. PCP contends that in the real world, and as a matter of historical fact, there was at least an agreement in principle as to remuneration, made between Ms Staveley on behalf of PCP and Sheikh Mansour, which is reflected in or evidenced by the H/T. As for the counterfactual, PCP's primary case is that this remuneration agreement would have governed. However, if, for any reason, it did not, then it says that Ms Staveley would have made a different remuneration agreement with Sheikh Mansour. I deal with these further remuneration possibilities below. But first, I deal with what PCP says actually happened.

The Remuneration Agreement allegedly made: PCP's case

668. PCP contends that in the course of the Majlis at the Royal Palace in Abu Dhabi on the evening of 7 November, Ms Staveley discussed with Sheikh Mansour and agreed in principle the terms on which he (or another Abu Dhabi entity) would invest in PCP's syndicate, along with PCP's remuneration. I refer to this alleged agreement as "the Majlis Agreement". Its essence was that PCP would raise by way of debt finance 65% of the subscription cost and PCP would be remunerated in one of two ways. Either it would obtain a 10% "carried interest" in each of the SPVs (and thus in each of the relevant Instruments) or 20% of the net returns on the investment after repayment of the original subscription cost, repayment of the debt financing and any other expenses. Sheikh Mansour wanted, as an extra condition for the 20% profit share, an initial "hurdle" of a 5% return on the investment. Ms Staveley accepted that. Sheikh Mansour said that he liked the proposal and asked her to take it forward with his lawyer Dr Al-Mehairi. It is not in dispute that Dr Al-Mehairi was a trusted adviser

to Sheikh Mansour and had acted for the Abu Dhabi Royal family for over 20 years or that Ms Staveley already knew him from her previous work on an earlier investment deal for the Abu Dhabi Royal family and latterly on the Manchester City acquisition where Dr Al-Mehairi acted for Sheikh Mansour. Dr Al-Mehairi had also recently advised PCP itself on some business interests in the UAE.

669. On the above basis, there was no concluded agreement but there was an agreement in principle to be taken forward.

670. Then, on 12 November, Ms Staveley attended Dr Al-Mehairi at the offices of his firm, Emirates Advocates. After a discussion, his assistant Ms Deena Hammam, typed up a draft Heads of Terms in Arabic. It was translated (orally) for Ms Staveley by Dr Al-Mehairi at the time. Ms Staveley sought a few changes and then an amended version was produced. Dr Al-Mehairi said that he would deliver a copy to Sheikh Mansour personally that evening. I refer to this as the H/T. The H/T referred to a commitment to raise only 60% and not 65% debt finance, which was Ms Staveley's request made at the meeting.

671. Finally, on the evening of 18 November, Ms Staveley met Mr Al-Qubaisi and Mr Jassim at IPIC's offices in Dubai. Sheikh Mansour joined the first part of the meeting by telephone. It is said that while on the telephone, he agreed the principal terms of the H/T and agreed to the request that PCP was to raise only 60% debt finance and not 65%. I refer to this as "the 18 November Agreement".

672. The only direct evidence as to the making of the Majlis Agreement and the H/T comes from Ms Staveley. Mr Jassim's evidence, however, supports the making of the 18 November Agreement and also the existence of the H/T as a result of later discussions he had with Sheikh Mansour.

The Remuneration Agreement allegedly made: Barclays' case

673. Barclays' position is that no remuneration agreement was made. Its position as to the Majlis Agreement in particular has shifted. Originally, in its Defence, it made no admissions (unsurprisingly since it had no actual evidence to contradict it) but it then denied it in BWO.

674. In cross-examining Ms Staveley on the substance of her account, discrepancies or inconsistencies in her evidence were put to her, but it was not suggested that she had made up her account. However, at the very end of the cross-examination, characterised by Barclays as putting its case to her (but which had at least in part the appearance of a closing speech as I said at the time) it was suggested to her that she had invented it. I received both oral and written submissions as to whether this form of putting the case was appropriate or even valid. As I remarked in oral closing (Day 38/114) it seemed to me to be an unusual way of doing things, but I do not intend to explore this matter further. That is because in respect of the many matters put to Ms Staveley in this final 29 minute section of her very long cross-examination, she denied them. A number of them had not been explored earlier,

in context, so the only evidence about them from her consisted of her denial. On any view, therefore, Barclays' case in respect of some of the matters put was undeveloped. As PCP pointed out in closing, the proposition that Ms Staveley made up the Majlis Agreement is hardly tested by putting that to her for a simple yes or no answer. Nonetheless, I shall deal with these points, just as PCP has done in PWC. I now turn to consider in detail PCP's factual case and Barclays' challenge to it.

The Majlis Agreement

675. A principal challenge made by Barclays is that Ms Staveley's own evidence has been inconsistent and unreliable. It points out that neither the Majlis Agreement nor the H/T were mentioned in the LBA. That is true, although the 18 November Agreement (or a version of it) was set out in paragraph 69 of that letter. This was then reproduced in the original Particulars of Claim at paragraph 59; but the Majlis Agreement and the H/T were only pleaded in the Re-re-amended Particulars of Claim served on 17 November 2017 at paragraphs 57A-G, and 59A. However, by that stage, Ms Staveley's first and principal witness statement had been served on 27 July 2017 which referred to all of the alleged agreements in detail. Moreover the H/T was produced to Barclays as part of PCP's standard disclosure on 24 April 2017.

676. As to the Majlis Agreement, Ms Staveley said that it was originally not mentioned because there had been no disclosure at that point and she could not recall the detail of the 20% profit share elements.

677. As for the H/T, she said in evidence that she was not given a copy of it at the time. As it was in Arabic, I do not regard that as particularly surprising. According to Quinn Emanuel's letter of 4 June 2020, the original H/T and the English translation thereof (itself dated 7 April 2017) were not in PCP's possession when the claim was originally served. The original version was only provided to PCP by Emirates Advocates on Sheikh Mansour's instructions in early 2017. Barclays has suggested that this is an odd explanation, since Emirates Advocates had not, prior to disclosure in April 2017, been identified as a custodian. I do not think much turns on this. One way or another, there was clearly a request or search for the H/T at PCP's end and the H/T were produced. Since Barclays does not deny their authenticity as a document, it is not is if it can say that the H/T were a recent invention. Accordingly, there is no basis for me to find that the H/T were not made at around the time they purported to be, namely 12 November 2008. It may be unsatisfactory that Ms Staveley did not make mention of them earlier or that she did not recollect them or their precise terms earlier but that is as far as it goes. The reality is that the H/T made their appearance over 3 years before the trial.

678. Another point made by Barclays is that Ms Staveley's account of the actual discussion at the Majlis given in cross-examination was not the same as in her WS. There, she had said that she discussed

the deal with Sheikh Mansour in the room where everyone sat on sofas and were rotated until they ended up next to him. It was there that they had the discussion to which I referred above. She said she made some notes on her notepad.

679. However, in her oral evidence, she said people sat on chairs not sofas and that in fact there were breakout rooms where people were able to continue their discussions with Sheikh Mansour. She also said that she had a PowerPoint presentation which she gave and a lot of documents in her bag.

680. A further point centred on the involvement or otherwise of Mr Restis. Ms Staveley's WS did not refer to his presence at the Majlis. However, a WS was then served from him saying that he was there, but in the event he was not called as a witness. In cross-examination Ms Staveley maintained that he had been there and thought that he had flown into Abu Dhabi by private jet with Shaksin Shinawatra. However, according to an article in the Guardian on 8 November, Mr Shinawatra was in China at the time. As for Mr Restis, he sent a text on 3 November indicating that he was in Athens. On 12 November Mr Forbes emailed Mr Restis, referring to the latter's recent visit to IPIC's offices together with Ms Staveley and Mr Jassim. Mr Forbes proposed a visit to Mr Restis's company HQ in Athens on 17 and 18 November. Mr Restis replied that he would be away from 13 to 23 November but that they could meet later. Barclays rely on this email as some evidence that Mr Restis was still in Athens from 3 to 12 November, but I do not see that. Indeed there is a reference to his recent visit to IPIC.

681. Another matter concerns the date of the Majlis. Originally, according to Ms Staveley, it was going to take place on Saturday 8 November but was then brought forward to the Friday. This was in a context where documents showed that she certainly planned to see Sheikh Mansour on 8 November. Mr Okvuran of GSI reported that she would be seeing Sheikh Mansour's "people" on 8 November. On 7 November Mr Younan of GSI spoke to her at about 6 p.m. and said that her meeting with Sheikh Mansour had not yet been fixed. She had apparently wanted to meet him to discuss a variety of subjects. So it is not as if there is no contemporaneous evidence that Ms Staveley intended to meet Sheikh Mansour at least around the time of the Majlis.

682. However, Barclays submits that her account of the changing dates for the meeting could not be correct because if Mr Younan was correct, then even as late as 6 p.m. on the Friday, Ms Staveley was due to be seeing Sheikh Mansour the following day. Yet, according to her, she would have gone to the Majlis on 7 November at about 7 p.m. or 7.30 p.m. and moreover in Mr Restis's car. But that would only allow about an hour to change her plans, get ready to attend on that night and let Mr Restis know. Also, by reference to her phone records, it seems that she made calls during the Majlis

itself. She said that this was culturally normal although she also said that at a big state Majlis, people would not.

683. I agree that the matters referred to above cast some doubt on the accuracy of her evidence; but they do not render it impossible in my view.

684. However, Barclays' overall submission is not that Ms Staveley was simply confused or mistaken about the Majlis discussion and the Majlis Agreement. It is that she never attended a Majlis then at all and the Majlis Agreement was an invention. In my view, that is unlikely. The suggestion (though not put to her in the context of her substantive cross-examination) is that this was done to embellish the existence of an agreement in principle. If that were so, then, since it was a fiction, it must also follow that she had got Mr Restis to produce a WS to corroborate her story which she (and he) knew to be false. She would have to have arranged this before he gave his account of matters to PCP's solicitors. Mr Restis could hardly have volunteered a false account of the Majlis meeting, merely coincidental with hers.

685. Furthermore, there was a degree of corroboration (though not direct), from Mr Jassim who was well qualified to speak of matters such as Majlis meetings. He said that he recalled her mentioning the terms of the Majlis Agreement in the days following it. He also corroborated her evidence that she had in fact attended many Majlis meetings and that she had very high level contacts in Abu Dhabi. He said all of this in the context of rebutting Mr Forbes' evidence to the effect that it was highly unlikely that she would have attended the Majlis. However, as for Mr Forbes, he is an unreliable witness as already noted. In any event, according to Mr Jassim, he was not aware that Mr Forbes had himself ever attended a Majlis.

686. In cross-examination, Mr Jassim said that he knew that Ms Staveley was originally going to the Majlis on 8 November and then it got moved to the previous day. He would have attended on 8 November himself but could not do so on 7 November because he had a charity event to go to. On Barclays' case, he must have made all of this up too, presumably at Ms Staveley's request, or because he knew that he should support her false story. I think that this is unlikely.

687. Mr Jassim, however, agreed that the Majlis was not the place for a long detailed meeting of say 30 minutes or an hour and normally, conversations with Sheikh Mansour would only last 5 or 10 minutes. But he rejected the idea that Sheikh Mansour could not have agreed something in principle like PCP's remuneration at such an event. This is because he said Sheikh Mansour liked to make decisions quickly. He said it was something that could have been discussed in 10 or 15 minutes and that people did bring documents into a Majlis.

688. It is worth noting that on Ms Staveley's account, she was going to raise 65% of the finance, but this was later changed to 60%, as it appeared in the H/T. If she was truly concocting the Majlis Agreement it would surely have made more sense to have 60% as the initial commitment in the Majlis Agreement and then there would be no need to explain any later change. This counts against the Majlis Agreement being an invention. Indeed, there is another aspect of the debt financing requirement which is important here. It would be very strange for PCP to have invented this as a term of the Majlis Agreement or H/T, as Barclays effectively alleges. This was because Ms Staveley knew, at the time she had discovered Barclays' fraud against PCP and enunciated its claim, that in the real world she did not in fact deliver on the debt financing. She would know that she would have to prove that she could have delivered in the counterfactual world. As we shall see, that imposes a heavy burden. So if she was going to make up a remuneration package, there were far easier packages to invent for the purposes of making a claim.

689. Of course, Barclays also relies on its contention that Ms Staveley is a generally unreliable and often dishonest witness (for example by reference to the Yeltex Invoice and June Representation). However, I do not accept that characterisation and I have dealt with those matters above.

690. Despite the undoubted discrepancies, Ms Staveley maintained the essence of her account of the Majlis Agreement, as did Mr Jassim to the extent that he could corroborate it. It must also be remembered that the contemporaneous documents show that she intended to meet Sheikh Mansour on that visit. Further, it seems to me to be unlikely that she would simply go to Dr Al-Mehairi's office and ask him to draw up the draft H/T without any knowledge of whether they would be acceptable to Sheikh Mansour or not.

691. Having noted the various points referred to above, I reject the suggestion that Ms Staveley simply made up the Majlis Agreement and indeed her visit to a Majlis on 7 November. I think it much more likely that she has an imperfect recollection of the detail of it which is not wholly surprising, given that she had no cause even to think about it after the event in any detail until 2013, some 5 years later. The fact that she had discussions over a fee, culminating in the £30m payment in April 2009 does not mean that the Majlis Agreement should have been raised as a significant point. First, on her case, it was then embodied in or evidenced by the H/T (see below). And second, she had not delivered on the H/T anyway.

692. There was, however, a separate overarching point that the very terms of the Majlis Agreement (or H/T) were wholly uncommercial, such that Sheikh Mansour would never have agreed them in the first place. I deal with that point below in the context of the H/T themselves, but at this stage, all I

need to say is that I do not think that this point is a strong one such as to cast separate and significant doubt on Ms Staveley's account.

693. Accordingly, in my judgment, Ms Staveley did attend a Majlis on 7 November and she did have a discussion with Sheikh Mansour. Further there was an agreement in principle which included PCP's right to a 10% carried interest and an obligation to raise 65% of the subscription price by debt finance, along with a 20% profit share after a 5% hurdle as an alternative, as she described.

The Emergence of the Heads of Terms

694. The essential difference between PCP's and Barclays' cases on the H/T is that PCP contends that they arose out of and, save in one respect, put into writing the terms of the Majlis Agreement, while Barclays contends that the H/T were no more than a negotiating document to be put before Sheikh Mansour at some point, there having been no prior agreement or discussion at all.

695. I have already recited some elements of Ms Staveley's evidence as to what happened on 12 November at Dr Al-Mehairi's office. As already noted, she says that the first part of her visit was to meet with Mr Al Hamwah. According to her, Mr Al Hamwah confirmed that Prince Turki wished to invest £500m in the subscription. At that stage, Dr Al-Mehairi was acting for PCP. Barclays did not dispute this part of Ms Staveley's account. Once Mr Al Hamwah left, Ms Staveley and Dr Al-Mehairi discussed the Majlis Agreement and reduced it into the H/T, according to Ms Staveley. The one change concerned the amount of debt finance to be obtained by PCP. According to her, she suggested it be reduced to 60% from 65%. She said that she thought it would otherwise be too high and she wanted to lower it to ensure that she could deliver on it. Dr Al-Mehairi agreed to make the change in the H/T.

696. Much of Barclays' challenge to the H/T as arising from the Majlis Agreement relates to its core terms which are discussed separately below. But otherwise, Barclays suggests that it would be very odd for Dr Al-Mehairi, in his capacity as Sheikh Mansour's lawyer, to agree to reduce the required debt financing. It is said that this supports the view that the H/T were no more than a negotiating document. I do not agree. First, as it was a change and the H/T were themselves described as a draft, it was a proposal that could be accepted or rejected. Second, it is unlikely that Dr Al-Mehairi was acting exclusively as PCP's lawyer when he was also the counterparty's lawyer anyway. I suspect that (as Barclays recognised might be the case in paragraph 166 of BWC) he had a rather ill defined role anyway, wearing two hats. Further, as already noted, it is hard to see why Ms Staveley should make up this account. It would have been much easier if she invented the Majlis Agreement with 60% as the agreed required finance from the start.

697. Then it is said that it is odd that her attendance at Dr Al-Mehairi's office was diarised as far as Mr Al Hamwah was concerned but not in relation to the H/T. I do not think there is anything in this point especially as she was not meeting anyone else in relation to the latter (apart from Dr Al-Mehairi himself). In any event, Barclays accepts that she probably did discuss the H/T with Dr Al-Mehairi that day and that they were produced as a document. The only question is why.

698. It is then said to be strange that Dr Al-Mehairi would agree to put into the H/T a hurdle of only 5% before PCP would get anything on the 20% profit share, whereas for Prince Turki (where Dr Al-Mehairi clearly was acting for PCP) it was a much higher 15%. I do not accept that. If Sheikh Mansour had suggested a 5% hurdle at the Majlis and it was agreed, there is no reason why Dr Al-Mehairi should not reproduce it, regardless of the terms of a different agreement with a different counterparty.

699. As to how the document emerged in these proceedings, I have dealt with this above. It is here said that it was very odd, again, that Ms Staveley did not keep a copy. Given that it was in Arabic, I do not think that this is very surprising. But it is also said to have been odd that she did not tell Mr Eadie about it then. Perhaps, but on the other hand, after 20 November, just 8 days later (and only two days after the meeting of 18 November – see below) the deal as a whole fell away, as far as PCP was concerned. There was then no point in taking the H/T further. Equally, since on any view PCP had not raised the 60% finance, as noted above, I do not myself find it surprising at all if the H/T were not relied upon in any serious way in the later negotiations for the fee. Everything had changed and PCP's leverage had disappeared.

700. As for Mr Jassim, he candidly states that he has no specific recollection of Ms Staveley's meeting at Dr Al-Mehairi's office on 12 November although he noted that according to Ms Staveley, she told him about it the evening before. That, incidentally, is not the hallmark of someone who, according to Barclays, had assisted Ms Staveley in concocting a false story about the Majlis Agreement. What he can say is that he would have been told about the H/T at some point because Ms Staveley kept him regularly informed. He also recalls at least discussing the H/T with Sheikh Mansour in the context of the later negotiations. He agreed that he would have had to advise Sheikh Mansour on the terms, and in particular the 10% "carry" (though not necessarily the H/T document itself) but apparently did not do so prior to the 18 November meeting. I do not think much turns on that.

701. It is also correct, however, that Mr Jassim said that he could not recall specifically if Ms Staveley had told him that she was going to have a meeting to draft heads of terms that she wanted to propose to Sheikh Mansour but that it was possible. I do not think that evidence really helps Barclays. That

is because Mr Jassim remained clear that he was aware of the terms agreed at the Majlis meeting. Had it been put to him squarely that the H/T were no more than the opening piece in a round of negotiations about PCP's remuneration yet to take place, he clearly would have disagreed.

702. I should add that Barclays also makes the point that if there had been the Majlis and/or H/T agreements, then Ms Staveley would have been actively seeking finance much earlier than she did. I do not think there is much in this. As will be seen when I deal with Issue 8, GSI had produced an initial financing paper for PCP on 30 October and by 7 November, Ms Staveley wanted GSI to revise its terms because she had understood by then that Sheikh Mansour wanted partially to finance the subscriptions. By 13 November, JPM had been contacted by her and DB were likewise contacted on the same day. All that fits in with the Majlis Agreement and her subsequent meeting with Dr Al Mehairi on 12 November.

703. Once more, Barclays relies upon the alleged uncommerciality of the terms to support its contention that they were never more than a negotiating document. But as I have rejected the commerciality point below, it makes no difference here.

704. In my judgment, and although in draft form, the H/T were produced as a consequence of and essentially to reflect, the Majlis Agreement. They were not simply an initial proposal from Ms Staveley.

The 18 November Agreement

705. Ms Staveley's account of the meeting is at paragraphs 558-560 of her WS. It took place at IPIC's offices and present were Mr Al-Qubaisi, Mr Jassim and, for part of the time, Sheikh Mansour, by telephone. Ms Staveley says that Mr Al-Qubaisi dialled Sheikh Mansour in and they then talked via a loudspeaker on the table. Mr Al-Qubaisi and Mr Jassim spoke in Arabic and English and when in Arabic, Mr Jassim translated for her. She says that Sheikh Mansour confirmed that he/IPIC would invest the whole subscription amount of £3.25bn without the need for any equity contribution from PCP. Ms Staveley said that around £2bn worth of debt finance would be needed to meet the 60% requirement. Sheikh Mansour said that PCP would be rewarded with a 10% interest in the overall deal or a 20% profit share and that he wanted her to manage the investment going forwards. On the basis of that evidence, PCP contends that a concluded agreement for PCP's remuneration was made.

706. At paragraph 102 of his WS, Mr Jassim essentially confirmed Ms Staveley's account of the meeting, recalling the specific discussion about PCP's remuneration. He says that Mr Al-Qubaisi did not disagree with anything said by Sheikh Mansour. In cross-examination, Mr Jassim said that he recalled a reference to the H/T in the discussion, although he accepted that he did not actually see a copy of them himself.

707. It is suggested at paragraph 201 of BWC that the main point that Mr Jassim took away from the meeting (other than the fees discussion) was that Ms Staveley would carry on seeking to raise debt. But he did not accept the underlying proposition (which I am not sure he fully understood) to the effect that, while he could remember something about Ms Staveley seeking to raise debt, he could not recall any discussion of terms to the effect that PCP would get a 10% carry in return for raising 60% of the debt. In other words the discussion was limited to questions of raising debt. When he said he recollected that this was part of it, I do not think he was saying that he did not recollect the 10% carried interest point which he had just referred to earlier in his evidence. Moreover, it would have been very odd for Ms Staveley to have agreed a commitment to get 60% of the funding with nothing in return.

708. It is correct that in her WS, Ms Staveley did not say that the H/T were actually mentioned in the discussion. However, she did say in her WS (and maintained in cross-examination) that she had actually spoken several times to Sheikh Mansour and Mr Jassim between 12 and 18 November and although she could not clearly recall the contents, her recollection of them was consistent with Sheikh Mansour having read and approved the H/T. She added that since Sheikh Mansour agreed on the telephone to the 60% debt financing requirement this meant that he must have seen the H/T because this was the document that identified the 60% as opposed to the 65% debt financing which had been agreed at the Majlis. Of course, again, Ms Staveley could have made all of this up to embellish her story but I do not think that she did.

709. Despite the inconsistencies between the recollections, Mr Jassim recalling some reference to the H/T in the telephone conversation and Ms Staveley not, I do not think this means there was no reference to the key terms of PCP's remuneration, in particular the requirement for 60% debt, the 10% carried interest and the 20% profit share alternative.

710. It is true that Ms Staveley's notes of the meeting do not make reference to this, as opposed to a later discussion about how to divide up the £110m commission expressly payable as part of the subscription. That does not, to my mind, mean that there was not the earlier discussion with Sheikh Mansour. Moreover, the 10% carried interest at least has always been present in PCP's claim, commencing with the LBA at paragraph 69. Barclays says that the reference there to a 10% interest in each of the three Instruments is not the same thing, but I do not think this is material, insofar as there is a distinction.

711. In addition, though perhaps only a small point, Ms Staveley's account of the call with Mr Al-Qubaisi on 20 November (see paragraph 122 above) does refer to him saying that PCP would not now get its 10% carried interest. So Mr Al-Qubaisi seems to have been aware of an agreement to this effect.

Of course, Ms Staveley could have made up that part of her recollection in order to preserve the consistency of her story, but in my view it actually fits in with what really happened. Without any carried interest, and quite apart from the debt raising, there was no basis for PCP retaining control of the subscription going forward.

712. Finally, of course (unlike the Majlis meeting and the 12th November visit to Dr Al-Mehairi's office) there is a witness to support directly Ms Staveley's account. It is hard to see how Ms Staveley and Mr Jassim got it all so wrong by mistake. Accordingly, the only realistic possibility is that they invented it, which I reject.

713. In addition, the consequence of Barclays' case here is that by 20 November there was no agreement, not even in principle, as between Sheikh Mansour and PCP regarding remuneration notwithstanding that (whether successful or not) Ms Staveley was undoubtedly by then seeking to raise finance. The latter efforts are more consistent with PCP being under some obligation to do so than it taking a speculative punt to do so and hoping to get some reward for those efforts later on.

714. In my view, the anchor for Ms Staveley's case is the very existence of the H/T and their production on 12 November which Barclays accepts. It makes no sense at all to suppose that they were (a) merely a negotiating document which (b) was then never used or shown to Sheikh Mansour. That is Barclays' case, however; it makes no alternative case to that which says that Ms Staveley invented both the Majlis Agreement and the relevant call with Sheikh Mansour on 18 November.

715. In my judgment (but again subject to the commerciality argument), Sheikh Mansour did participate in the meeting on 18 November by telephone and there was a discussion about PCP's remuneration. Further he did expressly agree that if PCP procured 60% of the debt finance, it would obtain a 10% carried interest or a 20% profit share. On the footing (which I accept) that Sheikh Mansour had indeed received a copy of the H/T and had spoken about it with Ms Staveley prior to 18 November, I consider that his agreement of those elements was an acceptance of the H/T themselves. The fact that there was no reference to all of the terms in the call does not prevent there being such an agreement. Nor, if it be the case that the H/T were not referred to at all, does it prevent such an agreement where what was said referred to the main points.

716. The above is a matter of historic fact and so the balance of probabilities applies. In one sense, however, the assessment of what Ms Staveley says was agreed is not purely a matter of historic fact. That is because in the counterfactual, of course, she would have been negotiating with Sheikh Mansour with the benefit of another £615m worth of AV being provided to the SPVs. On that footing, there was an additional, strong reason why Sheikh Mansour should agree to the H/T. Since I have found, anyway, that he did so, it would be wrong in my view not to preserve the essential

nature of this finding as historic fact rather than loss of a chance. It is not as if PCP contends that Ms Staveley would have agreed some other remuneration basis as opposed to the H/T. I accept that Ms Staveley said that had matters proceeded, and PCP have not lost control, there would have been a formal and more detailed written agreement. But in my judgment, the terms of the H/T (as construed above) were themselves clear and sufficiently workable.

717. However, if I was wrong and there was only an agreement in principle I would find that there was an 80% chance that the H/T would be actually agreed shortly afterwards, especially because (a) there was no objection to them and (b) because PCP had achieved a further £615m worth AV.

718. In fact, for reasons which will appear, it does not much matter whether the agreement on 18 November actually included an agreement to all of the H/T terms or not.

The Uncommerciality Argument

Introduction

719. A major plank of Barclays' rejection of the existence of a remuneration agreement along the lines of a 10% carried interest in exchange for raising 60% of the finance, alternatively a 20% profit share, relates to the commerciality or otherwise of these terms, properly construed. In particular, it contends that the basic 10% carried interest created such an imbalance in PCP's favour that it could not ever have sensibly formed part of a remuneration package. That point goes first, to the question of historic fact i.e. whether in truth there was the Majlis Agreement and whether in truth the H/T were any more than a very ambitious ask by PCP. Second it is also invoked to say that in the counterfactual, such an agreement would never have been made.

The Meaning of the Terms

720. It is first necessary to explore the detail of the key terms. They all appear in the section of the H/T headed " 3) Exit". There was an obvious error in the first line which says that PCP will receive "either 10% of the total investment or 10% of the net profits." The second 10% must read "20%" and that is not controversial. One then comes to sub-paragraphs (a) and (b) which are, to recapitulate:

> "a) In both cases, bank debt + fees and interest will be settled first.
> b) PCP's share will be either:
>
> (i) £350m (10% of the original investment) plus 10% of the profits from the sale of the investment
>
> or
>
> (ii) 20% of the net returns, after settlement of:
>
> - bank debt + interest + fees
> - Abu Dhabi's original investment
> - Abu Dhabi's previous return on investment at an agreed annual rate (5%)."

721. The drafting is clearly imperfect because sub-paragraph (a) is redundant as far as sub-paragraph (b) (ii) is concerned, since the latter already expressly refers to the payment of bank debt, interest and

fees. It is more pertinent to (b) (i) which makes no such reference. Basis (b) (i) is now said to be PCP's Remuneration Basis 1 and (b) (ii) is Remuneration Basis 2.

722. The important question arising here is whether, although not stated, the payment of the 10% carried interest in Remuneration Basis 1 comes after repayment of the original investment (as it does for (b) (ii)), or not.

723. It would certainly seem commercially odd if the 10% carried interest (put at £350m but which would become £325m after the clawback) was not subject to a condition that it only became payable once Sheikh Mansour's original investment of £3.25bn had been returned. Otherwise, if the investment went sour and loss-making and, for example, produced a value on exit of only £2.5bn, or £500m after repayment of the debt, PCP would still get its £325m after which there would only be £175m left for Sheikh Mansour. The commercial logic was surely that on any view, the investment cost, whether in terms of debt or the balancing payment made by Sheikh Mansour must be returned first. Mr Skailes' view was that it would be normal to have the original equity repaid first. And in fact, in the Joint Statement of Dr Shi and Mr Skailes at paragraph 3 (c), they both agree that the relevant "waterfall" for both sub-paragraphs (b) (i) and (ii) of the H/T was repayment of Sheikh Mansour's equity first (along with the debt).

724. Ms Staveley effectively said in her 9th WS that she agrees with this analysis. And on the basis that the original intention was that the H/T would be replaced in due course by a formal written agreement, it was a point that was bound to have been picked up.

725. I am sure that this is what the H/T were meant to reflect, since even if they were only a negotiating document it would have been absurd to suggest that Sheikh Mansour would ever agree to a term which did not provide for the repayment first of the investment. That is especially so since Ms Staveley knew Sheikh Mansour. In my judgment, therefore, the true meaning of Remuneration Basis 1 (i.e. (b) (i)) is that before any payment to PCP, the initial investment must be returned along with the other costs. It is on that basis that I consider the uncommerciality points.

<u>The Uncommerciality Points in detail</u>

726. However, the fact remains (as Ms Staveley accepted in evidence) that if, for example, there was only £300m worth of profit on exit, that is to say, after repayment of debt and interest, initial equity and fees, then PCP would get all of it. This is because it would form part of (and not exceed) the carried interest of £325m. In evidence, Mr Jassim said that Sheikh Mansour liked a "sweet deal". In cross-examination he said that if the deal had ended up being "where she was the only one to make money, it would not be a sweet deal". However, that proposition could be understood as referring to what in fact happened. Of course, it would then not have been a sweet deal for Sheikh Mansour

in the circumstances which occurred. Mr Jassim then said that "a deal where I envision that there was only £300m of profits and he wouldn't get any of it" would not be a sweet deal. However, again, that suggests that Mr Jassim is envisaging a deal where in the event, there is only £300m of potential profit. All of this ignores the possibility that it might well be that the net return was very much higher than £300m, for example, £1bn, in which case there would be £675m for Sheikh Mansour (less the 10% profit pursuant to the second limb of Remuneration Basis 1). In that case, one would have thought that it was a sweet deal. What was not put to Mr Jassim in terms was that he would not advise Sheikh Mansour to agree this remuneration package where there was any risk that the net profit would end up being less than £325m. So I do not think that Mr Jassim's evidence here adversely affects PCP's case on the commerciality or otherwise of the terms.

727. Further points made by Barclays here focus on the expert evidence. But before going to that, one can look at some simple figures. The total subscription investment was £3.25bn. Let it be supposed that after a year, when the MCNs matured, and the Warrants were exercised, all the acquired shares were sold along with the RCIs. Suppose there was a net profit of £1.3bn.

728. Using Remuneration Basis 1, after repayment of the subscription sum of £3.25bn (most of which was funded by debt finance) £325m goes to PCP. That leaves £975m. If the 10% profit share is applied, this means that PCP obtains an additional £97.5m making its total return £422.5m, with Sheikh Mansour obtaining £877.5m. In real terms, then, they share the net returns 1:2. If the return is higher than £1.3bn, the proportion rises in favour of Sheikh Mansour and if it reduces, it rises in favour of PCP. That is a simple function of the fact that PCP's principal entitlement is fixed in cash terms - i.e. £325m - and is not affected by the size of the net return, unless the latter is less than £325m.

729. Of course, there could be "Armageddon" such that after repayment of the original investment, the net return is somewhere between £0-325m in which case PCP makes a return but Sheikh Mansour does not. If the investment only breaks even or makes a loss, PCP gets nothing.

730. What this demonstrates is that much depends on the extent of the return and a perception of what it would be in say a year's time, as at 7 or 18 November. Ms Staveley's own view was that the very low share price would bounce back very significantly which is why the strike prices for the MCNs and the Warrants made this such a lucrative deal, provided that one was prepared to take the risk of Armageddon. In reality, the share price did bounce back very considerably.

731. On the example I just gave, if Remuneration Basis 2 was used, the result would be as follows. After the return of the £3.25bn, Sheikh Mansour gets the 5% hurdle which is £162.5m. This comes out of the net return of £1.3bn, leaving £1.1375bn to be distributed 20:80. This gives PCP £227m and

Sheikh Mansour £910m. At that point, then, Remuneration Basis 2 is clearly more favourable for Sheikh Mansour than Remuneration Basis 1.

732. If the gain was £2bn, then, on Remuneration Basis 1, PCP gets £325m plus £167.5m which makes £492.5m. Sheikh Mansour would receive £1.508bn. On Remuneration Basis 2, Sheikh Mansour gets £100m as the 5% hurdle with £1.9bn left. The latter is then divided 20:80 such that PCP gets £380m and Sheikh Mansour gets £1.71bn.

733. I accept that under those two examples, using the higher level of return, Remuneration Basis 1 would still be operative if one applied the "whichever is the higher" term of the H/T. It does show that Remuneration Basis 1 is very favourable for PCP.

734. However, by itself, I do not think that this is such an absurd or implausible outcome that no reasonable investor - or rather, no reasonable investor in the position of Sheikh Mansour - could possibly have agreed it. In other words, this factor does not in my view tip the scales, having regard to the actual evidence as to the making of the Majlis Agreement, the H/T and the 18 November Agreement, so as to entail the consequence that those agreements were not in fact made.

735. That said, there are further commerciality points advanced by Barclays.

736. First, there is expert evidence on the question of what sort of remuneration package would be usual or conventional for a company in the position of PCP to secure. The reason why this arose at all - since it does not go to the factual question of what was or was not agreed (and there is no claim for a "reasonable fee") - is as follows.

737. The Reply pleads as follows, among other things:

> "14.4 g) As Barclays would at all material times have been aware, it is a conventional and expected part of a private equity transaction where a private equity firm (such as PCP-LLP), raises capital from an investor or investors, that the firm will (1) be compensated by equity participation in the transaction; and/or (2) will raise equity or loan capital so as to participate in the transaction in its own right…
>
> 73B.1 PCP-LLP would (plainly) have been lawfully entitled to enter into arrangements with equity investors which involved PCP-LLP having a different equity interest or different terms as to compensation than another investor or investors. Indeed, the structure of a conventional private equity fund involves the general partner receiving an interest and/or remuneration that is distinct from that of the equity investors (or limited partners)."

738. Furthermore, Ms Staveley says, albeit in general terms as opposed to dealing with remuneration as such, that her plan was to use the "classic" private equity model, that PCP was a private equity firm and that she planned to advise Sheikh Mansour on making the investment as a general partner (GP) advises investors who are limited partners (LP) in a private equity fund. See paragraphs 127 and 128 of her WS.

739. Accordingly, Issue 3 within the List of Issues was described as follows:

> "is a conventional and expected part of a private equity transaction where a private equity firm raises capital from investors, that the firm will (i) be compensated by way of free equity participation in the transaction;

> and/or (ii) will raise equity or loan capital so as to participate in the transaction in its own right? If so, would or should Barclays have been aware of this at the material times?"

740. It is true that this was very much in the context of how Barclays did or should have regarded PCP from the point of view of dealing with it as "principal" as it were i.e. Issue 5 in Part 1.

741. But the outcome was that the experts did make some comments on the Remuneration Bases claimed, particularly Mr Skailes, from the point of view of whether the 10% carried interest agreement would be a usual or conventional one for a private equity partnership to make with investors. Ultimately, for the reasons given below, I was not really assisted by this evidence.

742. Dr Shi stated in cross-examination that she had been asked about conventional parts of private equity transactions and that this was a question about practice in the private equity market, broadly defined. That, however, was not specifically related to remuneration arrangements. When she was asked about typical remuneration arrangements she said that:

> "Nothing in the current transaction is a typical one for us to think about what would a typical remuneration be. In fact, Mr Skailes and I agree PCP's investment or role in this is not as typical as that of typical PE firms. So therefore it doesn't really make sense to then look and see what a typical remuneration arrangement in that setting would be." (Day 33/131).

743. While Dr Shi's evidence here would contradict Mr Skailes' evidence that this was a "classic PEP" (private equity partnership) deal, her key point was that the whole situation was not typical and as such there is no utility in comparing the claimed Remuneration Bases with "typical" PEP remuneration arrangements. Broadly speaking, I agree with that. If anything is apparent from what I have already recounted in this judgment it is that this was a very fast moving, unusual situation stemming from a virtually unprecedented capital raise as far as Barclays was concerned. So when one considers Mr Skailes' evidence as to why he says Remuneration Bases 1 - 3 are untypical or excessive, one can see why the exercise of comparisons did not really assist.

744. I should add that Dr Shi sought to support the legitimacy of the H/T (as construed by her) by reference to remuneration arrangements negotiated for founders of SPACs (Special Purpose Acquisition Company) and the placement agents of PIPEs (Private Investment in Public Equity). Mr Skailes did not see the relevance of this, on the basis that the activities of SPAC founders were different from those of PCP here. And in relation to PIPEs, the placement agents tended to be paid by the issuer of the Instruments. In the event I did not find the references to SPACs or PIPEs to be of any real assistance in my determination of the commerciality or otherwise, or construction, of the H/T.

745. Mr Skailes' essential thesis concentrated on Remuneration Basis 1, where all of Sheikh Mansour's capital investment had to be repaid first. He said that it was unbalanced in favour of PCP, especially given that PCP contributed no capital itself and Sheikh Mansour assumed all of the risk of his

putative £1.3bn equity investment. Mr Skailes took a Net Present Value (NPV) approach to the investments on Day 1, as it were. He used a 15% discount to arrive at the NPV of the returns which would in fact come later. See paragraphs 2.2.3-2.2.5 of DS2. According to him, if one ignored the presence of any AV as at 18 November, the returns would be allocated 50:50 between PCP and Sheikh Mansour. As at 23 November (with a reduced current share price) Sheikh Mansour would have 29% and PCP 71% of the returns. See his Table 2.1.

746. The first thing to note is that those sorts of figures did not correspond at all to the sort of proportions referred to in the simple examples I gave in paragraphs in 727-732 above. Much time on this was spent with Mr Skailes in cross-examination, re-examination, questions from me and further questions from Counsel, dealing with his methodology. In the end, I am not sure that we were any the wiser than at the beginning. Undoubtedly, however, the use of an NPV with a discount rate of 15% made the position look very much worse. This was evident from Mr Collins' cross-examination on Day 35/24-48 and 130-131. The essential point being made was that, when analysing Remuneration Basis 1, Mr Skailes used the NPV with the 15% discount to arrive at the percentage result. However, when analysing his comparator (which he said was typical for a PEP), namely the return of the investment, then an 8% hurdle for the investor and then 20% of the profits for the PEP, he did not use any NPV. If the NPV had been used, it would produce some very odd results. With an investment of say £100m yielding a gain of £13m after a year, the simple figures would show that the investor gets £12m of the gain and the PEP gets £1m, in other words a ratio of 12:1. It was this that he compared with the percentages shown in Table 2.1. But if one applied the NPV analysis to the "typical" remuneration, one would end up with the NPV of the investment being less than £100m which seems to make no sense at all, even though Mr Skailes agreed with the maths. The point was that Mr Skailes was on any view comparing apples with oranges. He essentially agreed with that at Day 35/37, pointing out that he had not said that they <u>were</u> apples and apples. Part of the reason for the odd figures was that Mr Skailes was, in my view, taking the NPV of the whole investment - not just the anticipated gain. But because of the discount, this had a dramatic effect on the portrayal of the loss. Although at some points, he said that it was only discounting the gain, I was far from persuaded that this was so. Indeed, at points in his cross-examination and re-examination he said that he was taking the NPV of everything - see Day 35/134 and 142.

747. There was a separate issue as to why Mr Skailes adopted a 15% discount figure rather than 10% which would produce different NPV results, but I do not think it necessary to explore that.

748. In the end, as it seems to me, Mr Skailes was really making the same point which I made in paragraphs 727-732 above, although in an unnecessarily complex and convoluted way. That this was his key point, Mr Skailes seemed to accept on Day 35/19 with "things getting exacerbated as

time differences and discount rates come into play" even though he did not apply those elements to his computation of the remuneration based on 20% profits after a 5% hurdle.

749. As for PCP's contribution, it is of course correct that it contributed no capital. On the other hand, it had effectively brokered the investment opportunity for Sheikh Mansour, negotiated a very attractive underlying deal and before it could earn the 10% carried interest, it would have to have obtained the 60% funding since Sheikh Mansour would only be putting in 40% by way of equity. On any view, that was not a "zero contribution" from PCP in real terms.

750. In my judgment, whether PCP's role here was a "classic" or "conventional" one for a private equity firm, or not, and whether remuneration was typical for a private equity firm having the sort of role taken by PCP is essentially irrelevant. That is, unless it can be said that Remuneration Bases 1-3 were all so absurd and so weighted in favour of PCP that in truth no rational investor in the position of Sheikh Mansour could possibly have contemplated it. And thus, on the facts, he did not do so. In my judgment, that is a hopeless contention and I reject it.

751. Accordingly, despite the amount of time taken on this topic, the expert evidence in truth took the matter no further. To repeat, this is all about, in the first instance, what in fact was agreed. It is not about a claim for a reasonable fee.

Conclusion on Remuneration Basis 1

752. By reason of the above, therefore, what was agreed as a matter of historic fact was the content of the H/T (as construed above), alternatively there was an 80% chance of this being agreed.

Remuneration Basis 2

753. This was originally said to apply only if there were other investors than Sheikh Mansour. For the reasons set out below, I dismiss this possibility so Remuneration Basis 2 can be ignored for that purpose. Nor would it apply in the counterfactual on the basis that it formed part of H/T. This is because the application of paragraph 3 (b) (i) would produce a higher figure than paragraph 3 (b) (ii).

754. However, in paragraphs 498.1 and 524.1 of PWC, it now seems to be postulated as a possibility where Sheikh Mansour remained the investor but PCP could not obtain the 60% finance. I will deal with this (as I do with Remuneration Basis 4) in the section on PCP's Residual Case on Loss, at paragraph 966 below.

Remuneration Basis 3

755. This is on the footing that effectively, the discussion and agreement between Sheikh Mansour and Mr Staveley did not in any binding sense progress beyond 7 November. On my findings, this is not correct. Of course, if it were, the amount of debt finance, logically, should be 65%, since that is

what Ms Staveley said was initially agreed. In fact the experts, and the parties' submissions have all been directed to 60% only. I do not, therefore, consider this any further.

Remuneration Basis 4

756. This is said to apply in all counterfactual situations where the AV consisted of AW. It is also said to be applicable in the event that (a) investors other than Sheikh Mansour, if relevant, did not make a remuneration agreement with PCP on the basis of Remuneration Bases 1, 2 or 3, or (b) PCP failed to obtain the 60% non-recourse finance. As for where the AV consists of AW, this Remuneration Basis must in any event be irrelevant since I have found that the AV would <u>not</u> have consisted of AW. As for (a), as will appear, I do not consider that there would have been any other relevant investors in place of Sheikh Mansour. As for (b) paragraph 498.2 of PWC posits the use of "available Warrants" under Remuneration Basis 4, which might apply even if no AW were obtained. I shall deal with this invocation of Remuneration Basis 4, again, in the section on PCP's Residual Case on Loss, at paragraphs 956 - 965 below.

Conclusion on Issue 7

757. Issue 7 is strictly a loss of chance matter because it asks what the remuneration basis would be in the counterfactual world. But I have found that the H/T were actually agreed, on a balance of probabilities, with no reason to suppose that they would fall away because of something unconnected with the raising of debt finance – rather, the contrary. It therefore seems to me that the proper approach here is to say that the H/T remuneration agreement existed. But if that was wrong, there is an 80% chance that Remuneration Basis 1 would have been agreed.

758. The real question, to my mind, is whether, in a counterfactual world PCP could have collected the H/T, and that all relates to Issues 8 and 9.

<u>ISSUE 8: WOULD PCP HAVE BEEN ABLE TO RAISE THE DEBT FINANCE REQUIRED AND IF SO, HOW MUCH?</u>

Introduction

759. PCP contends that there was a real and substantial chance that it could have secured at least 60% debt finance for the MCN subscription and 50% debt finance for the RCIs. Leaving aside the assessment of the percentages for those chances, these figures make clear that on any view, there would be a funding shortfall. In monetary terms, this putative finance amounts to £1.825bn (£1.2bn for the MCNs and £625m for the RCIs). 60% finance across the board would have been £1.95bn. Accordingly, there is a funding "gap" of £125m, assuming that no more than 40% equity would be provided. And it follows that if, in truth, debt finance could never have been obtained in the percentages claimed by PCP, then the funding gap would correspondingly increase.

760. The size of any funding gap and how it might be addressed is the subject of Issue 9. The ultimate question of whether, by a combination of debt finance and other measures to fill the funding gap, the subscription could be funded to the tune of 60% (or perhaps less if the 40% equity contribution was increased) is relevant because it affects what if any remuneration PCP would have achieved in the counterfactual world.

761. PCP then contends that the chances of obtaining the 60% debt finance for the MCNs were about 65%, whereas the chance of obtaining the 50% finance for the RCIs was 50% (see paragraphs 463.3 and 463.4 of PWC). In respect of the MCNs, PCP breaks down the 65% chance to a 40% chance that DB or another bank could have sourced all of the shares required for the hedge in the borrow market but if not, a 25% chance that the necessary bridge finance could be obtained from the bank or the investors. I explain the references to the hedge and bridge finance below.

762. The experts who address Issue 8 for the most part (and at very considerable length) are Mr Srinivasan for PCP and Mr Bahadur for Barclays. Mr Srinivasan concluded that debt finance of 62.5% could have been obtained in respect of the MCNs (i.e. £1.25bn) and 50% for the RCIs (i.e. £625m) making a total of £1.875bn so that the shortfall on these figures is £75m. This differs slightly from how PCP put it in paragraph 463.3 of PWC, but only because PCP confines itself to saying that there was the chance of obtaining "at least" 60% finance on the MCNs which is why, on that basis, the shortfall would be higher.

763. Mr Bahadur concluded that it would not be possible to raise finance against the RCIs at all. Financing of the MCNs was in theory possible but there were a number of significant obstacles. Barclays contends that in the light of the evidence, there was no real chance of obtaining any debt finance against the MCNs.

764. Both experts agree that it would not have been possible to raise finance against the Warrants which is why they confine themselves to the MCNs and the RCIs.

The Bank Disclosure

765. As there had been in the real world at least some communications from JPM, GSI and DB in respect of prospective debt financing, both PCP and Barclays, unsurprisingly, saw the sense in obtaining some third party disclosure from them. As for JPM, PCP made an application leading to a consent order dated 20 November 2017. As for GSI, the scope of the disclosure order was agreed between PCP and Barclays (and not objected to by GSI); see the letter from Simmons and Simmons of 3 December 2018. The order was made on 11 December 2018. As for DB, Barclays had applied for a disclosure order against DB on 14 December 2017 and an order was made on 21 December 2017. PCP was not consulted on that application in advance. However, in its letter of 10 January 2018

Quinn Emanuel said that it was considering with its clients and Mr Attieh, the scope of disclosure and the list of custodians contained in the order, and that it would revert in due course. In fact it did not do so and the matter was left there.

766. I refer to the entirety of the disclosure given in respect of these three orders as "the Bank Disclosure". There were also, of course, the communications from banks in the possession of PCP anyway and which were disclosed in the usual way.

767. Two points arise from this. First, in its closing submissions (see for example paragraph 401 of PWC), PCP occasionally complained that the Bank Disclosure was incomplete and that Barclays should have sought further disclosure. However, if that was the case, PCP had ample opportunity either to require Barclays to increase the scope of the disclosure sought or to make its own application. As it did not do so, it can hardly complain now.

768. Second, while the Bank Disclosure was provided to Mr Bahadur, it was not provided initially to Mr Srinivasan. This is because he had been instructed that commenting upon it (or indeed the extant bank communications) would be outwith his role as an expert. That was unfortunate. While of course it was not for the experts to opine on what did or did not happen as a matter of historic fact, or what could be inferred from particular documents as a matter of fact, the actual correspondence as to the possible provision of debt finance in the real world was surely relevant as context. It could also inform their view as to what DB, for example, would have been prepared to countenance in the counterfactual world by reference to the particular structures it was suggesting. In the end, Mr Srinivasan agreed to the inclusion in the revised Joint Statement of 23 April 2020 of Mr Bahadur's comments on the Bank Disclosure. It also appears that by the time of the trial, he had seen at least some of the Bank Disclosure and extant documents, although he was not very clear on the point.

769. It should be noted that Mr Srinivasan had seen Ms Staveley's WS and made certain references to it in his report.

The Witness Statements of Ms Staveley and Mr Attieh on DB Debt Finance

770. As will be seen below, the structure posited by Mr Srinivasan on MCN debt finance in the counterfactual differed in some significant respects from DB2 (set out below). However, Ms Staveley did not address in her WSs what PCP's position would have been in relation to it, particularly in connection with a block sale of shares by DB to facilitate the delta hedge referred to below. Equally, Mr Attieh's WS was essentially limited to the history and explanation of DB1 and DB2. It did not engage at all with the putative DB proposal suggested by Mr Srinivasan, although he was asked some questions about it in cross-examination.

771. The above matters mean that there is something of an evidential gap in PCP's case.

The Nature of the Issue 8 Exercise

772. The truth is that the assessment of the chance of obtaining non-recourse debt finance under Issue 8 involves an assessment of where this finance had got to in the real world and (informed by that matter) an assessment of a mixture of factual and expert evidence as to what would have happened in the counterfactual world. Since there was no direct factual evidence from PCP addressing the counterfactual posited by Mr Srinivasan, one is left with what can be inferred from the circumstances and the documents.

The Experts

773. While I deal in context below with the detail of their evidence, I should make some general observations here about Mr Srinivasan and Mr Bahadur as expert witnesses.

774. Mr Srinivasan generally addressed the matters within his expertise. He had 38 years' experience in the banking industry, holding senior risk management positions in a number of investment banks including DB (2001-2003) and Barclays (2003 2005). As to the latter, he worked with Ms King and knew Mr Jones as well as Mr Boath. At Barclays, he had been Chair of the BCCC and a member of the GCC and also Managing Director and Global Chief Credit Officer at BarCap. What he did not say in his report but disclosed in cross-examination was that he was "pushed out" of his job at Barclays by Ms King because they had a "difference of opinion" and did things differently. He accepted that it was an error (but no more than that) not to have disclosed this initially. The fact that Barclays must have been aware of this in any event is not to the point.

775. Mr Srinivasan's essential banking expertise lay in credit and market risk, broadly described as working in the "markets division".

776. Notwithstanding that, overall, I did not find him a satisfactory witness at all. Quite apart from his lack of engagement with available documentary material, even when dealing with it in cross-examination, he was over-confident as to his own views, in my judgment. For example, when it was put to him what those at DB thought about what debt finance could be done (from the contemporaneous documents) he simply speculated that there could have been others with a more sympathetic view (to his model) even though there was no evidence to this effect. Further, he sometimes became confused. And sometimes, for example on the question of DB's percentage profit, it was not clear to me if he was just being somewhat obtuse or was deliberately avoiding the question. He often did not pay attention to the evidence in front of him and some of his analyses were clearly sloppy and wrong. See for example his regression analysis in respect of the MCN finance and his probability table on the RCI finance. I also took the view that he was partial.

777. As for Mr Bahadur, he had worked in major investment banks from 1983 to 2012. In particular he worked at DB from 1999-2012, so over the period of DB1 and DB2. However, he did not recall having discussions about them at DB at the time and said that he was not consulted about the proposals in them. He was Head of DB Financial Sponsor Group 1999-2000, Co-Head of Leveraged Financing 2000-2004 and Managing Director and Vice-Chairman of Investment Banking, Financial Sponsor Group 2005-2012.

778. However, as PCP has pointed out, Mr Bahadur's banking experience was mainly structured and leveraged finance, not equity derivatives-based finance such as here. While he would seek particular proposals from colleagues in the markets divisions of the banks where he worked, he did not himself have to make detailed decisions about structure pricing and risk. Indeed, he accepted at paragraph 2.1 (b) of the revised Joint Statement that the MCN proposals would have been most appropriately covered by the markets division. And while he thought, on balance, that the investment banking division would have been more likely to consider any RCI-based finance, he also agreed that generally, recourse securities lending and recourse repurchase agreements (repos) were taking place in November 2008 through banks' markets divisions.

779. All of that said, both experts agreed that the distinction between divisions of large banks are fluid and can significantly overlap, and it is not always easy to categorise a transaction as falling into one category or another.

780. In the end, Mr Bahadur was cross-examined on all aspects of his reports. Nonetheless, I was invited by PCP to reject some or all of his evidence wholesale, on the basis that it was outside his expertise and inadmissible. In this regard, PCP referred me to the decision of the Court of Appeal in *R v Pabon* [2018] EWCA Crim. 420. This was an appeal against conviction in a LIBOR-rigging case based on defects in the expert evidence given for the prosecution. It was a fairly extreme case, can be seen from the following paragraphs of the judgment:

> "58. Put bluntly, Rowe signally failed to comply with his basic duties as an expert. As will already be apparent, he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly. He obscured the role Mr O'Kane had played in preparing his report. On the material available to us, he did not inform the SFO, or the Court, of the limits of his expertise. He strayed into areas in his evidence (in particular, STIR trading) when it was beyond his expertise (or, most charitably, at the outer edge of his expertise) – a matter glaringly revealed by his need to consult Ms Biddle, Mr Zapties and Mr Van Overstraeten. In this regard, he was no more than (in Bingham LJ's words) an "enthusiastic amateur". He flouted the Judge's admonition not to discuss his evidence while he was still in the witness box. We take a grave view of Rowe's conduct; questions of sanction are not for us, so we say no more of sanction but highlight his failings here for the consideration of others.
> 59. All this said, it remains the case – as HHJ Leonard QC aptly observed in the summing-up in the retrial – that Rowe did have "a general expertise in banking and finance and that many of the issues he dealt with involved basic matters which are not in dispute". With both Rowe's significant failings and a careful assessment of his true significance to the trial in mind, we turn to address the safety of the Appellant's conviction."

781. In the event, the Court of Appeal still found the conviction to be safe.

782. For my part, while I have taken on board the lack of experience of Mr Bahadur as indicated above, I cannot conclude that in relation to his duties as an expert he was clearly speaking to matters outside his expertise or acting as no more than an "enthusiastic amateur", so that I should simply disregard his evidence as inadmissible. The sensible approach is to examine his methodology, logic and general approach and take into account any lack of relevant experience as a matter of weight.

783. I should add that it turned out that the largest and indeed only client of his present consultancy (which provides expert witness services) was Barclays, which did not emerge from his reports. However, I do not think much turns on that.

784. Generally, he certainly appeared more impressive and was less prone to obvious errors than Mr Srinivasan although he still made some (for example in respect of ratings for the RCIs). Finally, and as with Mr Srinivasan, I thought that his approach, on some occasions, was partisan. All of that said, he was clearly a better witness than Mr Srinivasan.

The Debt Financing Position in the Real World

785. The only bank which came close to offering debt financing on a non-recourse basis was DB, pursuant to its letter and email of 19 November, referred to in paragraph 121 above. However, it is necessary here to describe in more detail the debt financing exercise. I do this principally by reference to the contemporaneous documents.

GSI

786. By 24 October, GSI was querying internally whether PCP had any financing in place or "does she need it from us?". On 26 October, Mr Okvuran emailed to Mr Younan the view of Simon Watson (on GSI's lending side). Later communications show that GSI was not very confident of obtaining debt finance.

787. However, at the meeting at A&O's offices on 30 October, GSI produced a "Financing Mandolin Position" paper. It suggested that PCP could potentially raise financing of up to 50-60% of the notional value of the MCNs and approximately 30% of the notional value of the Warrants which would give it financing of up to £1.55bn. This would be done by PCP purchasing a Put Option and GSI monetising the value of the Warrants. This would be non-recourse to PCP with no ongoing margin calls and allow it to have the full "upside" on the MCNs i.e. in terms of gains.

788. On 3 November, Mr Forbes emailed Ms Staveley saying that Mr Al-Qubaisi wanted confirmation that 80% of the £3.5bn subscription would be arranged as debt finance through PCP and he wanted to know the terms. He also needed confirmation that the loan funding would be in place by 27 November. On that basis, it seems as if Ms Staveley had indicated that debt finance of 80% was possible.

789. There was a further meeting between Ms Staveley and GSI on 5 November but this concentrated on the different topic of FX hedging.

790. According to Mr Younan's email to Mr Earle of 7 November, he had just spoken to Ms Staveley, principally on FX. But she also said that Sheikh Mansour may want to partially finance the subscription and asked GSI to refresh the lending terms previously produced. Later on, in the evening, a revised proposal was circulated internally. It had not materially changed, but Mr Sikhtian commented that he was not to be taken as recommending the execution of this structure if PCP had access (otherwise) to attractive banking. The document was forwarded to Ms Staveley on 8 November and she met with GSI again on 9 November. The FX hedge was again discussed but so was debt financing. Mr Sikhtian said in an internal email the following day that:

> "They would like to proceed with the FX hedge but clearly can't do that now given what is happening at this point and the fact that there is a small probability that the transaction does not go through
>
> They have £1.5bn on hand and will fund the deal all equity for the time being and will look to refinance their position over time – won't do it now, as per our advice to yesterday."

791. In evidence, Ms Staveley suggested that there was a confusion here because the £1.5bn referred to the total of the intended 40% equity contribution and £100m in fees; so there was still to be a non-recourse debt finance element. Possibly, but in that case, it would have been odd for GSI to refer, as it did, to refinancing after the event rather then borrowing now, which had indeed been their advice. Further, Ms Staveley told the QIA two days later that they would seek to leverage the RCIs at some stage in the future. Ultimately, it does not really matter because the documents indicate what finance was being proposed and by whom. The GSI proposal itself was not taken any further.

JPM

792. JPM first came on the scene on 13 November having been asked to contact Ms Staveley about "structuring a financing" which they did, in a call with Mr Forbes as well, on 15 November. An internal JPM email on the same day shows that it understood that DB was by then working on a £2.25bn proposal (implying a 64.3% LTV) to be presented on 18 November. But JPM were at that point concerned with a specific PCP proposal for short-term finance of only £513m to be available at completion. This echoed an email from Mr Forbes to Mr Al Hashemi, IPIC's Finance Director, in which Mr Forbes suggested that he pursue the short term loan while PCP dealt with the DB finance. Mr Al Hashemi responded by saying that he would prefer to have "the 60%" of the acquisition.

793. By 18 November, JPM produced a proposal now to lend 30% LTV on a recourse basis. Internal emails show considerable concern or scepticism that this deal could or should be done. Staff were told to be totally non-committal when presenting the paper. Following a meeting on 19 November, JPM reported that "the financing transaction secured by Barclays securities is not being considered

any more". Ms Staveley says that she was in fact handed a term sheet by JPM for non-recourse financing against the RCIs. However, it has never been produced and does not appear to have been referred to in any other PCP or JPM document. Also, unless JPM changed its mind, it had been against non-recourse finance at the outset according to the internal email of 17 November. I think that Ms Staveley is simply mistaken about this.

794. In the meantime, on 13 November, Mr Hassanyeh sent DB a copy of the GSI Financing Position paper. Mr Attieh enquired about making a recourse and a non-recourse proposal. A recourse proposal was worked up, but vetoed by Mr Jain, the CEO, on the basis that it was too close to the end of the financial year. Some internal emails at the time showed scepticism about the proposal to raise 70% LTV.

795. DB (including Mr Attieh) met with Ms Staveley on 18 November. A proposal for non-recourse debt finance was put forward along with proposals on FX hedging.

796. Two DB proposal documents emerged on the following day. I shall refer to the first as "DB1" and the second as "DB2". DB1 was then presented to Ms Staveley on the morning of 19 November. It was a revised version of the proposal put to her the previous day to take account of changes required by Ms Staveley.

797. The relevant parts of DB1 read as follows:

> **"Executive Summary**
>
> We have revised the non recourse financing structure we discussed with you yesterday to reflect the key issues you raised in the meeting:
>
> 1. You do not wish to convert the MCNs until June 2009, therefore you will not be able to provide the underlying shares to DB for the purpose of establishing our initial delta hedge
> 2. You do not wish to monetise more than 1 year of the 5 year maturity of the call options you own
> 3. You do not want the delta hedge execution to impact the share price negatively
>
> Taking these issues into account we have amended the proposal to one that better fits these restrictions, and the main impact is to restrict the size of the transaction to 55% of the MCNs, which fits the delta hedge restrictions and the current value of the warrants better
>
> A key sensitivity is the share price - as the warrant exercise price is fixed, a fall in the share price reduces the value of the warrants and has a direct impact on the LTV. This proposal is based on a share price of 154p, opposed to our analysis ahead of yesterday's meeting which was at a higher share price
>
> To increase the financing amount you could either sell additional calls over and above the warrants (these new calls would be over the MCNs), or inject additional cash upfront, or on a running basis
>
> **delta hedge execution**
>
> The execution of the initial delta hedge for the non recourse financing structure will be key and Deutsche Bank has significant experience in dealing with transactions with a significant delta requirement
>
> We estimate that for this proposal (over 55% of the MCNs) the initial delta hedge requirement is c. 70%.

That means that we need to source from the stock borrow market approximately 500m shares, which is about 6% of the current shares outstanding. Barclays trades around 91 m shares a day, which means that the hedge is about 5.5 days volume of average trading.

We do not propose to place the delta hedge on a single trading day as this would clearly drive the share price down, and our interests are aligned in not wanting this to occur

To minimise the impact of the delta execution we would guarantee execution at VWAP and restrict the selling of shares to no more than 20%-25 of the average daily volume of 91m shares. This means that in theory the delta execution would take place over c. 25 trading days. However, given our position in the market we should be able to exploit market flows to execute more quickly We are a major trader (top 3) of the Blue shares and have managed many similar delta executions before, and typically we can take advantage of daily flows to execute the delta hedge more rapidly than the c. 25 days outlined above (e.g. Blackstone/Deustche Telekom)

Indicative Non -recourse financing proposal

Blue MCNs

Conversion price (discount)	£153276 (22.5%)
Shares underlying MCNs	1,304,835,721
Notional of MCNs	£2,000m

Blue warrants

Exercise price	£1.97775
Shares underlying warrants	758,437,618
Notional of warrants	£1.500m

Indicative financing terms

Maturity	1 year
Current spot price	£1.54
Current value of MCNs	£2,011m
Value of MCNs DB lends against	£1,106m (55% of total MCN notional)
Put strike	£1.08 (70% of spot price)
LTV	67% (Present Value of Put strike)
Financing amount	£741m
Number of warrants purchased by DB	758,437,618
Current implied strike of warrants purchased	128%
Spread (per annum)	150bps PIK
Dividends	We have assumed zero dividends for the pricing, implying that PCP will be required to pass through dividends received on the underlying shares
Stock borrow above this	Assumed at 60bps, with protection from PCP
Structuring fee	100bps”

798. In bold, and to the left of those details, the following rubric appeared (reformatted):

“This non -recourse financing proposal is subject to internal Deutsche Bank approvals, including Market risk management, Credit risk management, legal, compliance, and regulatory

Final terms will depend upon the share price, volatility, and other variables on the day of execution, and most importantly the available stock borrow from the market which will determine the amount of MCNs that can be financed

This structure has no share price linked margining does not cap the upside on MCNs at all and provides robust downside protection can be documented quickly and efficiently via a Long Form confirmation

799. At the meeting to discuss DB1, Ms Staveley wanted some changes to be made. In particular, she wanted DB to provide finance for the whole MCN investment, not just 55%. Second, she did not now want DB to monetise any element of the Warrants because they “offered great upside potential”, and she wanted to keep all of that upside. See paragraphs 571-573 of her WS.

Accordingly, DB worked up a revised proposal at some speed which was presented by email later that day, as follows (i.e. DB2):

> "(1) Financing
> We have revised the proposal in order to:
> i) equalise the number of calls to the number of puts
> ii) assume conversion of sufficient MCNs to supply sufficient borrow for financing over full MCN notional
> Spot price - 154p
> Maturity - 1 year
> Number of MCNs/shares financed via puts - 1.305m
> Number of MCNs converted for borrow - circa 400-500m (30-40%)
> Number of call options purchased by DB - 1.305m
> Call strikes - average call strike at l9Op (l6Op. l9Op. 22Op) = 123% strike from spot price assumed of l54p
> Put strike - c. 67 - 73%
> Financing raised -1.3 -1.4bn
> Spread - il 50bps] PIK
> Structuring fee - 100bps
> This structure is fully non -recourse as before with no share price related margining
> This structure does not rely on a pledge of the RCIs or the warrants for this structure We are happy to discuss at your convenience this proposal tonight. let us know
> Terms are subject to final DB internal approvals"

800. It is appropriate here to explain the key features of DB1 and DB2, not only to understand fully what DB was proposing, but because the core elements of this financing were what both experts concentrated on when considering what if any offer of debt finance would have been available in the counterfactual. I do not believe the description below to be controversial.

801. The key features of DB1 were as follows:

(1) The financing was non-recourse. This meant that the only assets which DB could look to in order to repay the financing were assets actually financed i.e. the MCNs. There was no personal liability on the borrower and no separate security offered, like a guarantee;

(2) This type of financing was different from a traditional loan with security. It operated, rather, as a derivative trade. Investment banks were using such structures to finance transactions in 2008;

(3) In DB1, the proposal was to finance 55% of the MCN subscription which amounted to £1.106bn, the subscription price being £2bn. One then had to work out the LTV percentage to see how much of the £1.106bn would actually be provided. It was at that point anticipated that another bank would come in to finance the balance of the subscription;

(4) The "lending" element consists of the financing which DB provided to the "borrower" to acquire the relevant proportion of MCNs. The amount to be provided here was £741m. Provided that the shares following conversion were worth more than 70% of the current share price (about 154p, coincidentally being just above the contractual strike price for the MCN conversion) the borrower could repay the £741m. But if they fell below, there would

be a shortfall. It, and DB, needed to be protected against this, since DB could not look to any other assets. This "downside protection" was achieved by DB granting a Put Option over the shares so that the borrower could require DB to buy them at a fixed strike price if they fell in value. The strike price of the Put Option of £1.08 here was calculated as 70% of the current spot price;

(5) The Put Options would be paid for by the borrower by giving to DB some of the Warrants which it could then "monetise" within the first year of their existence;

(6) The amount of the financing of £741m was expressed to be an LTV of 67% (of the subscription value of the relevant portion of the MCNs, being £1.106bn); however, the value generated by the exercise of the Put at a strike price of £1.08 would be more, because it was 70%, thus something in the order of £775m. The latter would be the "repayment" amount and it is more than the "cash advance" because the latter is after deduction of DB's underlying financing costs;

(7) The financing was for one year which would expire some months after the MCNs had to be converted into shares;

(8) While the Put Option effectively financed by DB provided certain protection to the borrower, in terms of repayment of the financing, the borrower would remain exposed to any fall in the share price of the 55% of the shares financed, between 154p and 108 and was fully exposed to drops in the share price of the remaining shares not the subject of the Put Option;

(9) As for DB, its downside risk was that it could end up with shares worth less than £1.08 and this would be a real loss because the value thereof would be less than the amount advanced. That downside risk would be compensated by a "delta hedge". It is common ground that such a hedge was necessary. However there are acute differences between the experts as to whether it was in fact achievable in the counterfactual at all. I will refer below to DB's delta hedge requirements or wishes, as they appeared in the contemporaneous documents;

(10) As for the "upside" the borrower would be able to take the full value of any gain due to increases in the value of the shares. In those circumstances however, DB would gain too, because of its ability to trade the Warrants.

802. The key features of DB2, insofar as they differed from DB1, were as follows:

(1) The first key difference is that DB was now financing the acquisition of all the MCNs, not just 55% thereof. At an LTV of 70%, the financing would be £1.4bn. DB2 refers to financing

at £1.3bn-£1.4bn because movement in the share price (considerable at the time) would have an effect on the amount that could actually be provided;

(2) Secondly, this was now a clear "collar" arrangement with both a "floor" and a "cap". The floor was represented by the Put Option strike price. But now there was a Call Option at various points in the price of the shares acquired, with a median strike price at 190p. So if the share price rose above, say 190p, DB could and would require the borrower to sell the shares to it which would then allow it to make a profit on any upside above 190p. This Call Option effectively replaced the trade in the Warrants which was part of DB1 and which served the same function. Now the Warrants would not feature at all. Instead, the borrower had to give up some part of its potential profits on the underlying shares already purchased. The Put and Call Options were equal in the sense that both applied to the whole of the shares purchased; on the other hand, the borrower had the full benefit of the Warrants;

(3) The cost to the borrower of the Put Options granted to it by DB was its grant to DB of the Call Options. It is true that at the outset, this was at "zero cost" to the borrower, in the sense that it was not paying cash for the Put Options. However, it is agreed that the overall value of the Call Options exceeded the value of the Put Options so there was a gain by DB in any event.

803. As it happened, of course, DB2 did not go any further as far as PCP was concerned, since it lost control the following day. There was a suggestion that Ms Staveley could or should have moved DB along in the intervening period, consistent with the speed at which it had just moved. I do not think that this is realistic because she did not know, on 19 November, what was coming from Mr Al-Qubaisi on the following day, albeit that the timescale was going to be tight in any event.

The Counterfactual (1): Non-recourse financing in relation to the MCNs

804. The use of put and call options to form a collar and the need for a delta hedge formed part of both experts' analyses and projections as to what if any non-recourse debt finance could have been obtained in respect of the MCNs, in the counterfactual world.

Introduction to Mr Srinivasan's Model

805. PCP's case in relation to the finance here centres upon the counterfactual model put forward by Mr Srinivasan on the one hand, and the objections to it raised by Mr Bahadur on the other. Mr Srinivasan's model can be seen in summary form in the useful comparative diagram at N1/1 ("the Comparison"). The first column represents DB2. The second column is Mr Srinivasan's principal model. The third and fourth columns do not matter because they are variants catering for Scenarios G and H which are no longer relevant.

806. The first and most fundamental difference is in the execution of the necessary delta hedge. DB's proposed delta hedge would be affected by the short sale of Barclays shares over a period of up to 42 working days. Hence it has been referred to as a "dribble" hedge.

807. However, Mr Srinivasan's model does not utilise a dribble hedge. Instead, he postulates an immediate "block sale" of all the shares that DB would need to sell short in the market, in order to hedge its downside risk on the Put Options. This model would require the sale of 950m shares. It will be recalled that the number of shares to which the MCNs related was 1.306m.

808. Unlike a dribble sale, a block sale would necessarily mean that because of the volume of shares to be sold at the same time, the share price would be affected. Mr Srinivasan's view is that they could be sold at once at a 7.5% discount to the spot price. The required discount (at whatever level) has been referred to as the "Block Discount".

809. The next difference flows from that fact. In DB1, with no block sale, the "reference" price for the Put Option was stated to be the then spot price of 154p. In the Comparison, in the DB column, this has been replaced by the VWAP (Volume Weighted Average Price) which is the spot price for shares weighted by the volume of trading. That is because, when DB1 dealt with the delta hedge, it said that the price at which each daily segment of shares would be sold would be set by reference to the relevant VWAP on that particular day, which will obviously change. However, the key point is that, essentially, the reference price for the Put Option would be set by using the current spot price. Mr Srinivasan's model, in contrast, sets the reference price at spot less 7.5%. This is to mirror his proposed Block Discount.

810. Then, rather than use DB's range of 67-73% for the Put Option strike price, Mr Srinivasan fixes it at 75%, 72% or 70% of the (discounted) spot price. So the Put Option strike price would be somewhat lower than DB's while the Call Option strike price was retained by Mr Srinivasan at a fixed 190p.

811. Finally, as for the shares that had to be borrowed for the execution of the delta hedge, DB had posited that it could obtain 500m shares from the "borrow market" and a further 400-500m shares from the MCNs to be acquired by PCP and converted after completion.

812. I now turn to a detailed consideration of Mr Srinivasan's model.

A Block Sale in Principle?

813. The first and most obvious point is that neither DB nor PCP wanted to use a block sale. DB1 expressly stated that

> "We do not propose to place the delta hedge on a single trading day as this would clearly drive the share price down, and our interests are aligned in not wanting this to occur"

814. There is no evidence from Ms Staveley (or indeed Mr Attieh) that, for some reason, this would now become acceptable, where it was not before, save in paragraph 46 of AS 9. There, she says that in relation to a block trade, she was confident that any downward share price pressure could have been kept within reasonable bounds through certain structures involving the banks. But that simply contradicts her stated position through DB 1 and DB2 where a block trade had already been considered - and rejected.

815. I take the point that DB1 and DB2 were not set in stone; after all, there had been no concluded agreement by 19 November and in theory PCP and DB could agree what they wanted, subject to them both being prepared to do so and the outcome suiting both. But it is hard to see why their aligned interests should change so dramatically on this point.

816. Further, Mr Srinivasan pointed out that there would be uncertainty in the ultimate financing provided, or at least its cost, where a dribble sale was employed, which is why DB would hardly be likely to fix (i.e. underwrite) the delta hedge price at the outset for the whole period. But the question is not how those particular problems could be overcome. That is because Mr Srinivasan has not proposed a revised DB2, still using a dribble hedge. Rather, he has fixed on the block trade and as confirmed in closing argument for PCP, he had no alternative or fallback position. Accordingly, if the block trade form of delta hedge would not work, that is the end of his proposed structure.

817. In cross-examination, Mr Srinivasan made the point that a block trade was the only option because a dribble trade would not in any event meet the time constraints. He agreed that PCP had not suggested it and that its evidence did not contemplate it, but effectively said that it was up to PCP to decide whether to take it or not. However there is no evidence that it would, and there is positive evidence that it would not. This does show, in my view, the disconnect between PCP's factual and expert evidence here.

818. Equally, since DB said that it also would not do a block trade, there is no evidence as to why it would change its mind. Its position against a block trade made sense in the context of it already being a significant Barclays shareholder and the prospect of a block trade depressing the share price. Mr Attieh said in cross-examination that neither PCP nor DB would wish to drive the share price down. He also accepted that he was not aware of any assessment at DB as to what the effect on the market would have been by a block sale of 500m shares.

819. It is true that DB was obviously considering the proposed finance at high speed and at a high level. But by itself, this but does not mean that it would have reversed out of its resistance to a block trade. And the reason for avoiding a block trade - adverse effect on the share price - would have been as present in the counterfactual as it was in the real world.

820. Another issue raised here is whether DB would even wish to take the market risk of undertaking a block trade where, for example, it has agreed what the Block Discount (and hence the reference price of the collar) would be and then it goes into the market and has to sell the borrowed shares at what turns out to be a greater discount. Mr Attieh thought that DB might have contemplated it in a context where the market knew that £5.5bn worth of capital was about to be injected into Barclays. And depending on the discount, institutional investors might have been keen to buy, depending on exactly how the discount was set. But he agreed that a decision to undertake a Block Trade of nearly 1bn shares would have to be taken at the highest level. This evidence is necessarily speculative and limited since in the event DB did not have to consider the point. In my judgment, the overarching point is the view which had already been taken not to undertake a block trade in the first place.

821. Furthermore, and as Mr Srinivasan accepted in cross-examination, the cost to PCP of financing involving a block trade as opposed to a dribble trade would be greater. This is because, in principle, the collar would move down as the reference price moved down. It took Mr Srinivasan a considerable time to accept this proposition (see Day 31/4-12) and at times he seemed simply to be obfuscating. Critically, however, it was later put to him that if, on the figures produced by Dr Shi for the cost of unwinding the Call Options in the case of a block hedge, the total cost of the financing was £300m for 7 months, and if one took the MCN financing at £1bn, then on an annual basis, the cost of financing would be 50%. He agreed that on the basis of those figures it was probable that no rational investor would have contemplated it in the first place. He later agreed that on the basis of a 30 June 2009 unwind, where the agreement was effective on 20 November 2008 with a loan of £1.075bn, the total repayment cost including the unwind would be £1.336bn (by reference to Appendix G to AS1). Again, he took some time (and prompting) to get into focus and answer the question. Yet (implausibly in my view) he did not accept that this structure would have been extremely expensive for PCP.

822. In addition, and as Mr Attieh accepted, any dribble hedge or block trade that could not be completed before completion of the subscription would require bridging finance. But there is no real evidence of the availability of bridging finance even over a day or two. Mr Attieh said that DB had not considered it. He did say that he had had a chat with someone about what the position would be if they needed to bridge a block trade and was told it would have to be considered internally, which in the event did not happen. However, later, he said that the necessary bridging loan could have been made available by taking security over both the MCNs and the Warrants. Using the MCNs alone would not achieve anything. He did not know if DB would have wanted some (other) security before agreeing to a one-week bridging loan. All this is very thin speculation. The truth is that bridging

finance generally was not really explored or covered in the evidence. There might have been more evidence to adduce on this topic but in the event there was not.

823. Accordingly, for all those reasons, it is hard to see how the block trade posited by Mr Srinivasan would have been agreed.

Availability of borrow shares to effect the block trade

824. It is common ground that DB would need to borrow 950m Barclays shares for the block trade. Had it been done on a dribble basis, they would not have been needed all at once. Hence DB considered that it could have made use of the 500m shares available in the borrow market and in subsequent days make use of 400-500m shares available from PCP once completion had taken place. The latter shares could not have been available prior to or at completion because PCP did not yet own them. That would be one practical obstacle to the utilisation of those shares for an immediate block trade.

825. In fact, Mr Srinivasan’s position is that DB would not, indeed could not, borrow shares from PCP, even absent a timing problem, because in his view, PCP would refuse to convert at such an early stage, thereby losing the 9.75% coupon for a start. So his model assumes that DB could and would borrow all the shares from the borrow market and existing institutional shareholders.

826. However, DB’s view at the time was that only 500m shares could be made available from the borrow market. It is hard to say why one should just assume that this figure could be increased. One reason given by Mr Srinivasan as to why existing shareholders would be prepared to lend shares to DB was that they would know that the alternative was part-nationalisation. But that rather ignores the fact that while a failure to obtain debt finance would have been fatal to PCP’s contractual right to remuneration, it would not be fatal to CR2. That is a matter of established fact because in the real world, non-recourse debt finance was not obtained by PCP and IPIC still subscribed, in the event using recourse finance. As stated above, Sheikh Mansour had decided that he was reputationally committed to subscribe by reason of the Jassim Letter. So, avoiding the prospect of part-nationalisation would have been less of a driver for shareholders to lend shares than it was for them to vote in favour of CR2. Some of the shareholders still voted against CR2 in any event.

827. Accordingly, the notion that Barclays shareholders would have provided the necessary borrow shares because they had a substantial vested interest to protect is misplaced because that protection did not depend on the availability of DB (or any bank) offering non-recourse debt finance.

828. PCP suggests that it would in any event have been a good time for institutional shareholders to lend. One reason given was that no final dividends would be payable on their shares and they would earn lending fees. Mr Bahadur responded that this would not be very attractive where the shares would be sold (in the block trade) at a discount of (at least - see below) 7.5%. Further, he said that the

appetite for shares sold in a block trade might be limited since the MCNs were available with a conversion price of spot less 22.5%. The experts also disagree as to whether the block trade would itself communicate negative information to the market, or the opposite. Mr Bahadur thought the former, while Mr Srinivasan thought the latter on the basis that it would be understood to be part of a strategy to support the subscription of a major new investor. I do not find it necessary to make a finding on these points and indeed it is difficult to do so, as there is considerable speculation involved, including what prospective buyers may have been aware of. I did not think that the experts were of much assistance here. However, it is clear that a significant plank of Mr Srinivasan's argument as to the availability of institutional shareholders shares was the threat of part-nationalisation (see, for example, paragraph 5.3 (rr) of the Joint Statement). But that is not a good point for the reasons given above.

829. Mr Attieh's brief evidence on this point in cross-examination was that he thought 500m shares was an initial assessment of what could be borrowed and he thought it was conservative. I do not think that this adds anything. Later, he seems to assume that 400m shares would come from an early conversion of PCP's MCNs. PCP itself puts that forward at PWC at paragraph 440. However, that is inconsistent with Mr Srinivasan's own position and assumes that bridging finance could be used to solve the time problem.

830. For all the above reasons, there must be considerable doubt as to whether, in the event, DB could have obtained the necessary 950m borrow shares to effect an immediate block trade, even if both it and PCP were prepared to do it in principle.

The Size of the Block Discount

831. Mr Srinivasan's opinion is that the block trade could have been done at a 7.5% discount to market. Mr Bahadur's opinion is that it would have to be significantly more, at least 18%. The size of the Block Discount is important because it affects the reference price of the shares and thus (at least) the Put Option strike price. But the lower the latter, the lower the amount of finance that could be provided. Any prospect that the Block Discount would exceed 7.5%, therefore, affects the viability and cost of any debt financing otherwise available and acceptable.

832. Mr Srinivasan employed two methods to arrive at the 7.5% figure. First, in respect of a large number of historic trades, he carried out a regression analysis. According to him, this showed that for the sale of 1,025m shares (being the delta hedge amount before a discount of 7.5%) the average discount would be 2.79%. He says that a regression analysis of this kind would be employed by a bank considering what discount to use.

833. The second method was to extract four particular trades from the statistical data used in the regression analysis. They are shown in the Addendum to AS1 ("the Four Trades"). He said that they revealed an average discount of 4.92%.

834. Using the figures from those two methods and adding a margin of error to ensure that the chosen discount was conservative and reasonable, he arrived at 7.5%. The latter has been criticised as arbitrary, but it is not as if it is simply plucked out of the air. All Mr Srinivasan has done is to provide a buffer or cushion on top of the average discount figures he used. The real question is whether such figures are themselves reliable.

835. It is appropriate to consider the strengths and weaknesses of Mr Srinivasan's model first, before turning to Mr Bahadur's counter-figure of 18%. I do not, of course, have to make a concluded finding as to what the actual discount figure would have been. Rather, the reliability of Mr Srinivasan's figures (or not) feeds into the overall loss of chance assessment of the provision of the 60% non-recourse debt finance.

836. I do not need to spend much time on the regression analysis. Even before trial, Mr Srinivasan had effectively downplayed its importance for his position. Moreover, in cross-examination, it was shown to be inaccurate and misleading such that Mr Srinivasan himself accepted that it was meaningless. He said that the dataset was very small and there was no discernible pattern to be derived from the graph he produced. Further, the conclusions reached in cross-examination rendered his description of the analysis at paragraph 2.1.2 (a) of AS2 simply wrong. In truth, he should never have put the regression analysis forward at all, or if he did, he should have abandoned it before trial. The fact that, according to him, a regression analysis is used by banks in this context makes no difference if his own regression analysis was meaningless.

837. One therefore returns to the Four Trades. A simplified version of the relevant page of the spreadsheet in the Addendum is shown below.

Issuer Name	**Transaction**	**Date**	**Discount %**	**Deal value**	**Shares as proportion of all %**
Natixis SA	Rump placement secondary offering	25.9.08	5.82	€157.54m	1.97
Lloyds Bank	Rump placement, primary share offering	19.9.08	5.51%	£767.88m	5
Deutsche Bank	Accelerated Bookbuild, primary share offering	22.9.08	4.98	€2.2bn	7.54

Issuer Name	Transaction	Date	Discount %	Deal value	Shares as proportion of all %
Barclays PLC	Accelerated Bookbuild, primary share offering	18.9.08	2.44	£700.6m	2.7

838. Mr Bahadur makes the point first, that all of these transactions were significantly smaller than a putative block trade of 950m shares representing 12.25% of all issued shares. The transaction values were also significantly smaller, save in the case of DB. Mr Srinivasan says that the size of the trade does not matter here, but I prefer Mr Bahadur's view that the larger the transaction, the more discount that might be required. After all, we do know from DB1 and DB2 that where the shares were to be sold in smaller amounts over a period of time, there was no discount at all.

839. Secondly, Mr Bahadur says that in relation to the Barclays trade on 18 September 2008, the true discount was actually 8.8% and not 2.44%. In cross-examination, Mr Srinivasan accepted that by the time the offer at 310p opened at 10.30 a.m., the spot price was 340p, which implied a discount of 8.8%. He agreed those figures and that this is what the putative purchaser would be faced with when deciding whether or not to participate in the offering on the day. On the other hand, if one was looking at the position the day before, the percentage would have been 2.44%. Thus a DB Presentation dealing with this capital raise stated that the discount was 2.4% to the previous day's closing price. Mr Bahadur accepted that 2.4% was stated in DB document, but said that while there is a convention for overnight trades to be priced by reference to the closing price of that day, trades offered at the commencement of the trading day would be priced by reference to that day's opening price. In his view, it was somewhat disingenuous for DB to have referred back to the previous day's closing price rather than that day's opening price.

840. He thought it had been used to support a suggestion by DB that it had done well with the placement (because of a low discount). It does seem to me that there is at least a valid question- mark as to whether the appropriate discount for this block trade should be regarded as 2.44% rather than 8.8%.

841. Of course, in the actual subscription for the £1.5bn worth of MCNs offered to existing shareholders, only £1.25bn worth was taken up even with a discount of 22.5% to market. Mr Srinivasan found it hard to accept that this failure to take up at least part of the offer suggested that it was not regarded as sufficiently attractive, even at that discount. He suggested that potential shareholders had not been properly briefed, but that seems to me to be highly speculative. The position with this offer of the MCNs seems to me to be relevant to the question of the size of the Block Discount.

842. I then turn to the data relied upon by Mr Bahadur. An important comparator, in my view, was the sale of IPIC's own investment in June 2009, referred to above. The block sale was placed for it by Credit Suisse with an effective discount of 16%. Mr Srinivasan thought that it was not relevant, as it post-dated the time at which the putative finance would be considered. However, I can see no reason why it should not be used at least as some evidence of what might have been thought of as an appropriate discount at the time, especially on the basis that the market by June 2009 was somewhat quieter than it had been in November 2008. Moreover, and somewhat prophetically in a sense, in Mr Forbes' email to Mr Al-Qubaisi of 5 November 2008 he assumed a discount of 15% for an immediate block sale of all of the relevant shares following their conversion.

843. I also do not consider that IPIC's trade is an inappropriate comparator on the footing that there might have been less interest in the shares (and hence the need for a larger discount) because that trade would itself be communicating a discouraging message about Barclays. The fact that an investor (as predicted by Mr Forbes) would want to exit as soon as possible to realise a healthy profit if it arose does not necessarily say anything negative about the underlying shares at all.

844. Mr Bahadur also pointed to DB's own assessment as at 17 November 2008. The email from Andrew Moore at DB's Credit Risk Management dated 17 November to Khuram Yousaf referred to any sale of the shares which was necessary as requiring a 20% discount although he questioned if 20% was, at the time, a good proxy to sell any asset.

845. Mr Bahadur also referred to an earlier GSI email from Mr Earle to Mr di Stasi which stated that the sale of the shares would require an estimated discount of 7.5%. Mr Bahadur points out that GSI's actual proposed funding at that point was not in respect of 1.3bn shares but rather 500m-1bn shares i.e. "less than half". I do not accept this point in full because only if there were 500 to 600m shares sold would that be less than half.

846. There was also the sale of 1.4bn shares in CR1 which were at a discount of 9.3% to the previous day's closing price, when only 267m shares were bought. Although the financial crisis was there in June, it did not have quite the same impact for present purposes, in my view, as it did by November 2008 when the share price had fallen considerably and the market was now extremely volatile.

847. Mr Bahadur also relied upon Credit Suisse's own capital raise in October 2008 where the shares were sold to investors at 25.36% to market. He also relied on the block sale of shares in Sampo, a Finnish insurance company, at a 20% discount. This latter example is, however, less relevant since it was not a bank and moreover could be regarded as outside "West Europe" which Mr Bahadur said was his focus although he quibbled later about what that description covered. However, even disregarding Sampo, the data used by Mr Bahadur did suggest to me that the actual discount for the

putative delta hedge block trade of the 950m shares could quite easily have exceeded 7.5% by at least some percentage points. And Mr Bahadur has had at least some experience of overseeing block sales.

Profitability for DB

848. Mr Srinivasan's model assumes a 2.29% profit for DB, being just over £38m. If the profit requirement by DB (in the context of financing by a derivatives transaction such as this) was higher, then this would have an effect on the economics of the transaction and one way or another would be more costly for PCP. That would then inject at least a doubt as to the viability in the counterfactual world of Mr Srinivasan's model.

849. For his part, Mr Bahadur calculated that the implicit profit for DB in DB2 was itself 9.8% (recalculated from his original figure of 9.5%). Mr Attieh at paragraph 21 of his WS stated that investment banks favoured collared transactions rather than traditional lending as methods of providing finance because "in normal conditions the profits the banks make are usually quite high (up to 3% of the Transaction)…" At paragraph 3.1 of SB2, Mr Bahadur suggested that in the counterfactual, the profit needed to be about 6.25%, being the midpoint between 3% on the one hand and 9.5% on the other.

850. The Bank Disclosure here is important in my view. On 14 November, a "Project Blue" memorandum was circulated internally at DB. The covering email from Mr Yousaf stated that:

> "The trade is very share price dependent, due to the fixed strike of the warrants. At 188p the P&L seems to be sufficient to make this uninteresting deal, and at say 200p it looks compelling. However, at current lower levels (closed yesterday at 158p) there is not sufficient P&L in the trade to make it fly. On the basis we make it a condition of execution that share price is above a certain minimum level, say 185p, or we incorporate more calls over the MCN shares, this does feel like something worth pursuing in more detail with the client…"

851. The underlying memorandum assumes that this would be financing for 5 years and it was drawn up having had sight of the GSI proposal. This was contemplating something like what became DB1. It assumed a share price of 188p, as the GSI proposal had. The document said that the gross value between the puts and the calls was £245m. The put strike would be 70% and the gross value or "edge" was then said to be £218m or 8.9%. The document ended with the sentiment expressed in the email but adding that DB would not want to execute at current share price levels.

852. This shows that the profit margin was calculated by reference to the difference in value between the Put and Call options (the latter at this stage contemplated through the monetisation of the Warrants). According to Mr Bahadur's calculation the profit margin implicit in a deal executed when the spot price was the stated minimum of 185p would be 8.6%.

853. In cross-examination, Mr Attieh accepted what DB had been saying in respect of the edge, and the reasoning of the 14 November document. He had had no real input into DB1 or DB2 although he

was aware of them. He accepted that contrary to paragraph 22 of his WS, he did not in fact prepare them. He said in re-examination that he was not aware that anyone at DB had said that it would only do the finance at (not less than) 8.9%. But in my view, that does not amount to very much since he was not really involved in the proposals or the thinking behind them where the share price minimum of 185p was clearly set out. (It is of course true that DB1 and DB2 were proposals made when the share price had dropped to 154p. However, they were framed in such a way that edge was still in the same region, in fact somewhat more – see paragraph 849 above.)

854. On 17 November (at a time when DB was still considering both recourse and non-recourse finance) there was an internal document which referred to fees in the total amount of 3% and Mr Attieh was asked about this. However, as he pointed out, this was a recourse loan document with guarantees to be taken from IPIC and Sheikh Mansour, as well as collateral security in the form of the Instruments. So that is not directly relevant.

855. In fact, in cross-examination, it became clear that Mr Attieh's view was that it was the net profit he was talking about and in fact said on these transactions it was "always north the 3-4%". He went on to say that the edge would obviously be higher. He said that it could be 8.6% which was the "line in the sand" or it could be 7%. What this makes clear is that one cannot in any event compare Mr Attieh's net profit figure and the edge-which would always be significantly higher. He also said (for the first time) that he was actually told in relation to this transaction that there was something between 4 and 5% net profit. If that is right, it is very unclear why he did not put this into paragraph 21 of his WS. This is where he made the general point that the profits made by banks on these transactions are usually "up to 3% of the transaction". But the result is that if anything, Mr Attieh's evidence now tends to support Barclays' position rather than Mr Srinivasan's.

856. Mr Bahadur subsequently changed his position to say that the minimum required by DB would have been 9.5%. That seems to me to put the matter too high. He did say in evidence that in his view 3% would be "light" and/or that there would be no real chance that it would be acceptable, and that 9.5% would be the "upper limit". He suggested that in this instance the DB disclosure was more significant than his own experience and I am inclined to agree. If PCP thought that further disclosure from DB might have revealed more in terms of internal calculations of profit and was potentially available, it could have made its own further application. Equally, it could perhaps have obtained further evidence from Mr Attieh insofar as he was able to take the matter further.

857. A major point made by PCP is that the 14 November document assumed a 5-year period of financing. That is correct, although both DB1 and DB2 proceeded on the basis of one year. PCP submits that the required profit margin for one year must be proportionately less than 5 years. Mr

Srinivasan said in evidence that one should simply divide the earlier figure by 5. I do not accept this. These are not traditional loans based on some annual profit, for example by reference to an interest rate, even though DB would obviously have to manage its risk for 5 years, not one. Moreover, the fact remains that DB2 presupposed an edge still in the region of 9%. I agree that some account should be taken of the length of the financing but one must bear in mind that the underlying periodic financing costs were not where DB was going to make its money. After all, the edge is determined by comparing the value of the puts and calls.

858. Of course, prior to the making of any concluded agreement, DB could decide to take a lesser edge by, for example, increasing the upside or reducing the downside for the borrower by adjusting the put and call strike prices. That is effectively what Mr Srinivasan's model has done, because it stayed with a call strike price of 190p but under his model, the call was then fixed at 140% of the underlying (discounted) reference price. Equally, as Mr Bahadur accepted, if the put price was 73% and not 70%, it would be more favourable to PCP, for the purpose of the finance. Nonetheless, the actual edge explicitly stated was around 9%.

859. For his part, Mr Srinivasan did accept that in the context of these transactions the edge is the comparison between the value of the Put and Call options and not, for example, any possible profit that DB might achieve from the delta hedge. That said, he again took time to accept the latter relatively simple proposition which is clear enough from the 14 November document. He later said that the gross profit was a "moving target" and that the difference between 2% on the one hand and 9.8% on the other could be due to market volatility. He ended up by saying that the profit should be 2-3% because it would be fairer. None of that evidence was very persuasive.

860. In my view, and not least because of the DB documents and still noting that this was a one-year financing, the edge sought would be significantly higher than 2-3%.

861. There is a related point which arises here. That is the effect (if any) on the structure of a lower current share price. The figures in DB2 are based on a percentage of the then reference (spot) price being 154p. By the time of any finance agreement, the spot price might have decreased (as it did here). Further, and in any event, if a Block Trade could have been done, the reference price would become the spot price less 7.5% (on Mr Srinivasan's model) or 18% (on Mr Bahadur's model).

862. Mr Bahadur opines that on the basis of his knowledge of such lending and the Block Discount, DB would have adjusted any financial proposal in the light of a changed spot price by changing the reference price and with it the Put and Call Option strike prices because the percentage relationship between them all should remain the same. On that basis, assuming still a spot price of 154p, a reduced reference price of 135.51p (i.e. with the 7.5% reduction) or 120.13p (with an 18%

reduction) would make the structure much less attractive to the borrower; this is because the potential upside would be reduced and to keep the downside protection, the amount of funding would reduce as well, as this was based on the Put Option strike price. See in particular paragraphs 4.12 - 4.17 of SB4. Mr Bahadur therefore says that this adds a further difficulty for the putative MCN financing.

863. All of the above assumes that the lender would shift the collar once set, proportionate to any later move in the spot price. That is not apparent from DB1 (although Mr Bahadur originally said that it was) but it is apparent from DB2. This does assume that the structure is essentially based on a percentage of the reference price, albeit that the actual figures are given on the basis of the then spot price of 154p. On that footing (which therefore impliedly keeps the profit for DB at around 9%) any decreased reference price would have adverse consequences for the size and attractiveness to PCP of the debt finance.

864. Mr Srinivasan's approach is not only based on an assumed acceptable profit of 2-3%, but also the notion that there is no reason why DB should not have departed from the existing percentage relationship of the Put and Call Option strike prices to the spot price. That is what his model does; it retains an absolute figure for the Call Option strike price as an average of 190p, the effect of which is to make the average Call strike price now 140% and not 123% of the reference price. There are also changes to the Put Option strike prices. On Mr Bahadur's calculation, to structure the deal in this way (which operates in favour of PCP) would cost DB about £137m in lost profit.

865. In my judgment, that is an additional real problem, where the share price decreases, both in terms of attractiveness of the finance to PCP and the amount of it.

Other Points

866. One further point concerns the appetite in the market for providing finance of this kind. On the one hand, only one reasonably concrete proposal had emerged by the 19 November. On the other hand, this might not be the complete picture in the counterfactual since the process had effectively stopped the day after. It is also right to say that while in general the market was severely stressed, Mr Bahadur accepted that, while banking and leveraged finance divisions were closed, the markets divisions and securities and repo financing were still open. But at the end of the day, one has to focus on DB's position as both experts did.

867. There were further points on the timing of any available finance generally, i.e. whether it could in any event have been done by completion on 27 November and if not, how any AT could assist. There were yet further points on the banks' internal approval processes for the finance. These are better addressed as general matters after I have dealt with the issue of RCI financing.

The Counterfactual (2): RCI financing

Introduction

868. The RCIs cost £1.25bn. Mr Srinivasan's position was that they could have been financed to the extent of 50% i.e. £625m. PCP submits that there was a 50% chance of achieving that. Mr Bahadur opines that there was no real chance of obtaining any significant finance in respect of the RCIs.

869. The RCIs differed from the MCNs in that they were not shares or instruments convertible into shares. Further, as a matter of contract, Barclays had the right to defer payment of the coupon and it had no right to call for (and thereby redeem) the RCIs until 2019. In addition, it is common ground that in practice there was no liquid market in which to trade the RCIs.

870. That said, they proved popular with existing shareholders in CR2 who took up all of the £500m worth offered; this was no doubt at least in part because of the very attractive coupon.

871. The RCIs were considered junior liabilities and would be next in line to absorb losses after equities.

Real World information on any RCI Financing

872. None of DB's proposals involved funding the RCIs.

873. As for GSI, it produced a discussion paper presented to PCP on 20 October. Under "Financing Considerations, it said that "pref shares on their own would be difficult to leverage in the current environment" and financing "would be an implicit credit decision on Barclays deeply subordinated preferred" and "could require a substantial haircut". On 26 October, the "near final view" of Mr di Stasi was that there could be "no lending against pref." i.e. the RCIs. On 29 October he said that in relation to the RCIs, "No leverage can be provided in current markets."

874. I accept Barclays' submission that GSI's lack of enthusiasm for financing the RCIs is important. It is hard to see why that view would change in the counterfactual. Mr Srinivasan seemed reluctant to accept the relevance of this evidence even if not a complete answer to his opinion. Again, he obfuscated. When it was put to him that GSI had a negative view, he said it depended on what was meant by "a substantial haircut". When it was put to him that GSI was not keen, he said "define keen". All he could then say was that while he accepted that, having started to consider the matter in October, GSI never showed any interest, he did not know why not. The only reason he could think of was that GSI did not see the RCIs as financeable whereas he did.

875. One then turns to the position of JPM. In his first report, Mr Srinivasan noted that there was no formal proposal from JPM but said (in paragraph 2.1.11) that according to paragraph 574 of Ms Staveley's WS, JPM had offered at the meeting on 19 November to provide non-recourse finance against the RCIs with an LTV of 50%. Mr Srinivasan in evidence then characterised this as the (necessary) "haircut". He said that her evidence supported his own analysis.

876. However, as noted above, there is no documentary evidence before me of that JPM proposal and it is soundly contradicted by other contemporaneous documents obtained in later disclosure. The emails on 18 November show a distinct lack of interest in any non-recourse finance on the basis that the only buyers of the instruments would be the government.

877. A memorandum produced on 18 November for use the following day said that "We remain underweight on Barclays", and that even if it avoided government intervention, it would have de-leveraged its balance sheet and run off some of its BarCap business. It went on to say that "the proposed transaction" was "recourse equity finance with a three-year maturity… And… LTV… Of 30%". The loan would be syndicated and while the collateral would include the RCIs valued at 2bn ordinary shares for these purposes, there would be the guarantees from IPIC and Sheikh Mansour. Somewhat bizarrely, Mr Srinivasan commented in the first Joint Statement at paragraph 7 (3) (b) that this document "was an incomplete draft for internal discussion purposes only". It was removed from the revised Joint Statement, apparently on the instructions of Quinn Emanuel (see their letter of 3 August 2020). In cross-examination he obfuscated yet again on the fairly obvious point that none of the documents disclosed by JPM showed any consideration of non-recourse stand-alone RCI financing (Day 30/34-60). At one point, he speculated that there may have been another competing department at JPM which might have looked at the same trade, seeing whether there was a better way to do it. I thought that Mr Srinivasan's evidence here was very unsatisfactory and partial.

878. The difficulty which Mr Srinivasan found himself in was, in my view, due in part to him being eventually provided with the Bank Disclosure and yet being instructed not to comment on it. Yet he had commented on the 18 November document and was prepared to take support from Ms Staveley's evidence. This was not a helpful way to proceed, in my view.

879. However, the upshot is that on any fair reading of the Bank Disclosure, there was no evidence of any bank involved to any extent in considering debt finance being remotely interested in non-recourse debt finance for the RCIs.

880. Of course, it is possible in theory that with more time the banks might have changed their minds or another bank may have come along but there is no logical basis to suppose that in my view. This is not about altering some figures here or there or making adjustments. It is about contemplating in principle doing finance which they had never thought appropriate before or had positively disavowed.

RCI Financing in the Counterfactual

881. One therefore turns to Mr Srinivasan's own evidence as to why in fact the RCIs were highly financeable. He accepted that any lending bank considering providing such finance would have to assess the market risk of the price of RCIs falling below the level of the loan during its one-year period.

882. That is obviously important if there was no recourse to anything other than the RCIs. He dealt with this at paragraphs 5.4.1 to 5.4.11 of AS1 in what he called his "Scenario Analysis". He used three probability variables as the context for different possible outcomes. The most favourable to the lending bank was the "Base Case", the median was the "Stress Case" and the worst was the "Extreme Stress Case". However, on his variable outcomes, he said that (at best) there was only a 20% prospect of all bonds being redeemed on time. There was a 30% chance of coupons being deferred for 10 years and a 5% chance of deferral for 20 years on the Base Case, and the position was worse for the other Cases. He also assumed a 20% (chance (at least)) of a Barclays bankruptcy before the first referral. This led to an NPV of 81.1% for Base Case, 59.2% for Stress Case and 52.8% for Extreme Stress Case. While no doubt this would explain a predicted "haircut" basis for an LTV of only 50%, with those risks, it simply would have been unsuitable as loan collateral in the first place.

883. Mr Srinivasan accepted that his table at his paragraph 5.4.9 was wrong and he had realised this before starting to give evidence that day, but did not seek to correct it. He accepted that overall, his table showed a deferral risk of 40% in which case no lender would contemplate lending. Paragraph 5.2.18 of his report said that the probability of deferral was "low" but that was contradicted by his table.

884. Mr Srinivasan also sought to adjust the table to avoid the startling figures in the lowest line concerning the probability of an early bankruptcy. He seemed initially to be confused as to how to redistribute the part of the percentage which was too high but in the event it did not help. This is because the percentages for the deferral risk would then simply increase. Nothing of any value could be gleaned from this part of his evidence.

885. Mr Srinivasan also undertook a market risk assessment based on how the value of the RCIs might vary in the one-year term of the loan - see his Stressed Value Analysis at paragraphs 5.4.2 to 5.4.6. He concluded that the value would not go below 67.8% over that period. However the data on volatility he used in order to make that prediction covered not only 2008 but 2007. If, instead, he concentrated on the more recent volatility figures the picture would be very different. In that event, he accepted that it was "possibly right" that there was no basis for an LTV of even 50%. He agreed

in any event that a volatility rate or assessment over 2007-2008 would not have been reliable as at November 2008.

886. As to the lack of a liquid market for RCIs, the point was made to Mr Srinivasan that if it was necessary for the lending bank to sell the RCIs because of a borrower default, that would suggest that the market at the time was distressed (hence the default) but if so, there would then be a problem in recovering a reasonable price for the RCIs.

887. He did not accept that just because the borrower defaults, it means that there is no or a bad market for the RCIs. To that extent, he was disagreeing with the analysis of Mr Stott at JPM who made that point. He thought Mr Stott was being too conservative. In the abstract, I can understand Mr Srinivasan's point, but here, there was really no data going the other way. Again, Mr Srinivasan said that there may have been others taking a different view but in truth, I think that he simply thought that he knew best.

888. Overall, Mr Srinivasan's evidence here left a great deal to be desired.

889. I now turn to Mr Bahadur and his approach. He considered that the 14% coupon on the RCIs should itself be regarded as showing how high-risk they were as instruments; in other words, an attractively high component was required so as to offset or compensate for the risk of deferral or default. As it happens, we know that the coupon was the subject of negotiation, in particular with the Qataris who obviously wanted to make it as high as possible. I take Mr Bahadur's point that the perspective of a lending bank looking at the value of the RCIs as collateral in a default situation may be different from the perspective of an investor at the outset. However, I do not think that the "14% coupon" point is as strong as he suggested.

890. In addition, I think that Mr Bahadur's evidence on ratings for the RCIs was flawed. It was wrong to say that shortly after completion, they were already classed as non-investment-grade. In cross-examination he accepted that at the time they would have been seen, by reference to the ratings, as "investment-grade". As he went on to say, his real point was that he thought they were overstated at the time. To some extent, this is a mirror image of Mr Srinivasan's opinion which appeared to go against the contemporaneous grain.

891. Furthermore, in terms of market value, Mr Skailes had computed the estimated realisable value of the RCIs over the period 31 October to 24 December 2008 and in each case, the values were above par (i.e. £1.25bn). See paragraphs 5.3.7 of DS1 and Appendix 11 thereto, using Bloomberg models and data. Mr Bahadur agreed that the market view implied a lower risk than he said was implicit in the 14% coupon. It was put to him that the market data, the Barclays view and the enthusiasm of institutional investors for the RCIs and the ratings would show to a bank considering lending that

"these were suitable instruments to provide as collateral or as security for a loan." He accepted that these would be "positive signals".

892. Overall, I think that Mr Bahadur put the case against the RCIs too high. On the other hand, PCP's case is much weakened by the contemporaneous evidence (or lack of it) and the defects in Mr Srinivasan's own evidence. Although, therefore, I could not conclude that RCI financing would have been impossible, it would have been very difficult.

The Counterfactual (3): The impact of any AT

893. At paragraphs 634 - 639 above, I dealt with the possibility of Later AT. I now return to that issue.

894. As it so happens, both experts agreed, as follows, at paragraph 9.1 of the Joint Statement:

> "a) Once the MCNs, RCIs and Warrants had been issued, their terms could not have been altered by Barclays in lieu of the Additional Value.
> b) Additional Value was unlikely to have been used to vary the terms of the RCI financing but could have been used to vary the terms of a derivative collar based MCN financing, subject to risk management and hedging considerations.
>
> c) It is impossible to predict the market conditions that would have existed had the date of signing of the Subscription Agreements been extended until 30 November 2008 and the Date of Completion been extended until 27 December 2008. For the avoidance of doubt Mr Bahadur does not believe that a dramatic recovery would have been viewed as a likely prospect. Mr Srinivasan stands by his view that it is impossible to predict market conditions during the 30 November 2008 to 27 December 2008 period.
>
> d) Accordingly, both Experts agree that it is not possible to quantify the impact of such a change in the debt financing of the MCNs."

895. So far as AT and RCI finance was concerned, the experts disagreed in this way, at paragraph 9.2:

> "a) Mr Srinivasan is of the view that provided the market, and the market perception of Barclays, had stayed stable, the additional time that PCP would have had to negotiate the proposed financing could have allowed other lending banks to provide financing to PCP and this might have led to an increase in the tenor of the loan, a higher amount of debt financing, or lower interest rates and fees (AS1 8.1.10). Mr Srinivasan also believes that, provided the market remained stable, a longer period may have enabled other banks to come into a syndicate that would have allowed the terms of the financing to be improved (AS1 2.1.22).
> b) Mr Bahadur disagrees with both statements on the grounds that there would have been, in his opinion, no realistic prospect of any, let alone multiple banks prepared to offer standalone non-recourse RCI financing. Mr Bahadur does not believe additional time would have materially improved the likelihood of raising suitable RCI financing. Mr Srinivasan disagrees as per above at 9.2 (a)."

896. Though not stated explicitly in paragraph 9.2 (a), Mr Srinivasan was there dealing with RCI finance not finance generally, as appears from paragraphs 2.1.22 and 8.1.10 of AS1.

897. I do not think that this disagreement on RCI finance and AT matters much, where both experts agreed that it was impossible to form a view about the impact of any extension of time in respect of MCN finance.

898. This is no doubt why Mr Srinivasan has made the assumption that the financing which he proposes would have to be ready to go by 24 November so as to be provided in time for completion on 27 November. See paragraph 4.4.8 of AS1 and paragraph 3 (zz) of the Joint Statement. However, I consider that timeline to be utterly unrealistic for the following reasons.

899. First, both experts agreed that any approvals process here would be detailed and rigorous and would involve senior management of the bank. They differ about which particular division would deal with it, but I do not think that much turns on that debate. The real question, as it seems to me, is timing.

900. This has to be looked at first, by reference to where Ms Staveley had got to in the real world. It is not clear that in the counterfactual, the position would have been any different as at 19 November. Nonetheless, Mr Srinivasan believes that once the transaction design and hedge issues had been resolved DB could decide whether to execute or decline the MCN finance in a relatively short timeframe and if agreed, it could be executed within 2 or 3 days. Mr Srinivasan obviously took the view that there was already a considerable degree of commitment on the part of DB through the submission of DB 1 and DB2. He added that to "walk away" thereafter would cause reputational damage. I do not see that, where DB 1 and DB2 were very carefully phrased as indicative proposals and where there would have to be major changes to transform them into the Block Trade arrangements contemplated by Mr Srinivasan and a significant reduction in profit.

901. After all, Mr Attieh thought that it would take 5-7 days for DB to finalise and decide on the DB2 proposal had PCP wished it to go forward. That is on the basis that it had already been discussed and where the economics for DB were "very attractive" - see paragraph 36 of his WS. So even if, for example, PCP had come back on 20 November to ask DB to progress DB2, a deadline of 24 November would obviously be missed. Indeed, there would need to be presumably at least one or two days more than Mr Attieh's estimate to actually execute the financing. How much more so, therefore, in the case of Mr Srinivasan's version of the financing, not thus far considered. On any view, AT would have been necessary, going into December (up to 18 December according to PCP).

902. If so, then there are real problems for Mr Srinivasan's financing structure ever working, simply because of the timing, quite apart from its general viability or otherwise.

903. Furthermore, even if PCP sought AT from Barclays, here, presumably after 31 October, it is very hard to see why Abu Dhabi (or for that matter Qatar) would support such an extension when both were ready to go. This was in circumstances where Abu Dhabi did not actually need the 60% debt finance to be arranged for it by PCP, and in fact did "pull the plug" on 20 November anyway. I can see no prospect of AT being granted for long enough to have DB approve and put in place that structure, even if it were viable, whether on the balance of probabilities or otherwise.

904. In any event, as already noted, the prospect of the grant of any limited Later AT is essentially irrelevant here, given the experts' position on it. Later AT does enter the picture again, in the context of Other Investors under Issue 9.

Conclusion

905. When one adds together all the doubts and difficulties about raising debt finance which I have discussed above, it is quite impossible to conclude that in the counterfactual, there would have been a real and substantial chance of securing it in anything like the sorts of amounts that Mr Srinivasan or Mr Bahadur were referring to. I deal below with the implications of this finding, at paragraphs 948 - 955, after I have considered Issue 9.

ISSUE 9: WOULD PCP HAVE BEEN ABLE TO RAISE SUFFICIENT FUNDS OVERALL FOR THE SUBSCRIPTION? ("THE FUNDING SUFFICIENCY ISSUE").

Introduction

906. As described, Issue 9 encompasses Issue 8, insofar as the funding involved the obtaining of non-recourse debt finance which I have already dealt with. That being so, in my view, Issue 9 should be taken to deal with the following questions:

(1) If Sheikh Mansour decided in the end not to subscribe for all of the instruments, would PCP have been able to find alternative investments and if so whom? ("The Other Investors Issue");

(2) How could the gap between the debt finance that could be raised, and 60% of the cost of subscribing for the Instruments (being £1.95bn), be filled? ("The Shortfall Issue");

(3) Sale of the RCIs at the outset (" The Sale of the RCIs Issue").

907. The first and third questions do not involve expert evidence, but the second does, along with factual issues.

The Other Investors Issue

Relevance

908. Paragraph 467 of PWC postulates a scenario in which Abu Dhabi preferred not to provide all of the (40%) equity. In such a case, other providers of equity would have to be found. The availability of such other investors is what this issue (also referred to as G5) is about. See also paragraph 365 of PWO which makes the point that while some other investors may have wanted non-recourse debt finance to be provided by PCP, others might not.

909. However, in the light of my findings above, this is now an unreal hypothesis. On the basis of my findings in respect of remuneration, Sheikh Mansour had committed to provide 40% of the total subscription price. Moreover, by reason of the Jassim Letter and what actually happened when PCP lost control, Abu Dhabi took the view that it was committed to subscribing for the whole £3.25bn worth of Instruments referred to in the Announcement. To reiterate, Abu Dhabi had the necessary wherewithal to put in 40% by way of equity and indeed more, if necessary. So it is very hard to see

why, in the counterfactual, the position would have been any different. Indeed, there would now have been the AV of £615m.

910. Paragraph 75 of the Particulars of Claim puts it thus:

> "Further or in the alternative, if PCP-LLP was not able to obtain investment from Sheikh Mansour and/or IPIC on terms that PCP-LLP retained 10% of the Instruments, then PCP-LLP would have instead sought to fund the transaction with equity and debt provided by a combination of other parties from among those who had expressed an interest at the time (including in particular CIC and/or Prince Turki). It would have structured the transaction with those other parties on terms which ensured that PCP-LLP retained a substantial equity interest in the transaction on similar terms to those originally offered by Sheikh Mansour and/or IPIC. PCP-LLP would have been able to negotiate such terms (i) in the period prior to the original date for Completion (27 November 2008); or alternatively (ii) in the period prior to the extended date for Completion that Barclays would have allowed."

911. That postulates a situation where Sheikh Mansour wanted to put in equity but did not or would not have agreed the remuneration package sought by PCP, as a result of which, PCP would putatively have decided to work with a different investor. But equally, this last scenario does not arise in the light of my findings because I have already held that Sheikh Mansour did make the H/T agreement with PCP.

Substance

912. However, I think that I should in any event say something about the availability of other investors who could effectively take the place of Sheikh Mansour.

913. One such investor relied upon by PCP was Prince Turki. It will be recalled that Ms Staveley said that when she attended the offices of Dr Al-Mehairi on 12 November she first had a meeting with Mr Al-Hamwah of Modern Mining, a company controlled by Prince Turki; Mr Al-Hamwah agreed that Modern Mining would invest £500m and PCP would obtain 60% LTV non-recourse debt finance in return for a 20% profit share after a 15% hurdle.

914. However, by 18 November, PCP had its agreement with Sheikh Mansour, in which case Ms Staveley would not have been pursuing Prince Turki as well. Indeed, in cross-examination she said that her dealings with Prince Turki were really a fallback, in case the investment by Sheikh Mansour was not possible (Day 8/63). That reflects what she said in her WS to the effect that she hoped that the prospect of Prince Turki's involvement would encourage Sheikh Mansour to move quickly on the terms of his own investment. In the event, of course, he did. It is also reflected by the evidence of Mr Jassim. He could not say anything specific about any agreement between PCP and Prince Turki but he does make clear that Sheikh Mansour was conscious of Prince Turki's interest and wanted to make sure that it was he, Sheikh Mansour, who got the deal - see paragraphs 55 and 60 of his WS.

915. So if PCP had tried to raise the finance for Sheikh Mansour and then failed, and Sheikh Mansour for some reason did not invest, it is extremely difficult, if not impossible to see how PCP could have

got Prince Turki on board in time anyway. In any event, his total leveraged investment appeared not to be £3.25bn but £1.2bn.

916. Otherwise, as the documents make clear, for example emails to Mr Al-Hamwah on 7 and 8 November from Ms Mills of PCP and Ms Staveley herself, the investment offer was clearly put as a syndication or selling down of Sheikh Mansour's investment; that would not be the case if Sheikh Mansour was not now investing.

917. A second candidate was the China Investment Corporation ("CIC"). Its interest came through Porter Bibb, of Mediatech Capital Partners, based in New York. He was a contact of Mr Griffin who was at the time President of BGR Capital and Trade ("BGR"), a boutique investment bank which undertook M&A and capital raising assignments in the US, Europe and the Middle East. BGR's role here was to suggest possible investors in CR 2, having been contacted by Ms Staveley. The thrust of Mr Griffin's evidence was that PCP was seeking to interest other investors to take a share of Abu Dhabi's part of the subscription, in other words, again, it would be sold down to them.

918. This is reflected in Mr Griffin's email to Ms Staveley dated 6 November following his discussion with her. It refers to BGR are being allocated 50% of Sheikh Mansour's intended investment. BGR would then "sell on" portions of that share to interested investors.

919. Mr Bibb emailed Mr Griffin on 21 November to say that CIC was interested in taking down "the entire available amount", adding that "Barclays (and Mansoor) could not have a better partner." As far as Mr Griffin was concerned this was on the basis that CIC would take a portion of Sheikh Mansour's investment, hence his email to Mr Bibb referring to "re-syndication of a portion of the investment". On 24 November, Mr Bibb emailed Mr Griffin to say that CIC wanted to invest £400-500m worth of the RCIs (with warrants) but not the MCNs.

920. Although, in evidence, Mr Griffin accepted that he was not aware of the precise details of any syndication or joint investment, he was clear that CIC's interest was only in investing alongside Sheikh Mansour in some way or other.

921. In his email of 26 November to Ms Staveley, copying her in on the email to him from Mr Bibb on 25 November, Mr Griffin made the point that CIC had initially indicated interest at £1bn plus when the MCNs were "above water" i.e. the MCN conversion price was less than the current price. Mr Griffin thought that with a rising current share price, there was a "strong possibility" they could get CIC's interest back up. In cross-examination it was put to him that this must have meant £1bn worth of MCNs, and I can see the logic of that since it was the MCNs which would be affected by a drop

or rise in the share price. In fact, however, that may have been a misinterpretation of Mr Bibb's email of the previous day. While that said that MCNs were now looking attractive, it went on to say that if CIC chose to invest only in the RCIs, they could acquire £400-500m worth or up to the full £750m worth (the latter is 50% of the RCIs to be taken by Abu Dhabi before the clawback).

922. In the event none of this went anywhere. Following Ms Staveley's conversation with Mr Zhou on 4 December, at which time, there had been no confirmation of any deal for CIC, he wrote to her to express his frustration. His email makes clear that CIC's aim had been to have a strategic relationship with its counterparts in the Gulf. It also suggests that what CIC had been offered was the whole allocation of £750m worth of RCIs. It made no reference to an offer on the MCNs. Subsequently, on 14 December, Ms Staveley wrote to say that she had been unable to persuade Sheikh Mansour to syndicate part of his investment to CIC. Of course, she had lost control of his investment by 20 November although that would not stop any attempt to get him to agree to syndicate all or part of it. There were later attempts to try and make a portion of Qatar's investment available to BGR but nothing emerged.

923. In the light of all that, the fact is that CIC came on the scene relatively late and it was only interested in some form of syndication of Sheikh Mansour's investment or possibly a co-investment but effectively in partnership with him. To suggest that CIC in some counterfactual would still have invested without the involvement of Sheikh Mansour is complete speculation.

924. Other potential investors like Mr Immerman and Swedish and Kuwaiti investment funds appear to have been looking at modest amounts and in any event only in the context of a sell-down.

925. In relation to all of these potential investors, the question of time is highly relevant. This AT would obviously be needed to get these investors in place even if they wished to come on board in their own right, either with sufficient equity or with non-recourse debt finance so as to cover the whole £3.25bn.

926. There is in my view no prospect of such further time being granted for that purpose. There is no reason why Sheikh Mansour (or Qatar) should support it especially where, on my findings, Sheikh Mansour remained committed to making his own investment.

927. In this situation the probable outcome is not that Barclays would have waited for PCP, hopefully to put into place new investors; rather it would surely have been apprised of the situation by Sheikh Mansour or IPIC and dealt with them, one way or another, instead. I can see no basis in which Barclays would have granted AT here. This is relevant to Issue 6, as revisited below.

The Shortfall Issue

Introduction

928. Put very broadly, this question arises in four ways, with increasing levels of severity:

(1) Assuming Mr Srinivasan is correct on the existence and level of finance for the MCNs and the RCIs (a total of £1.87bn), then there would still be a shortfall of £75m (or £125m if one sets the debt finance figure at 60% for the MCNs); however, the amount of finance assumed to be available depends on the day at which it is assessed; the shortfall of £75/£125m is correct only on a "best case" scenario so far as timing is concerned; the variable figures here given by Mr Srinivasan and as adopted by Dr Shi are set out in his table at paragraph 4.7.2 of AS1;

(2) Assuming MCN and RCI debt financing was available, but on the basis of the figures used by Mr Bahadur and as adopted by Mr Skailes (see paragraph 5.2.2 of DS 2). Among other things, he assumes an 18% figure for the Block Discount;

(3) Assuming there is MCN finance but no RCI finance; and finally

(4) Assuming there is no or no significant debt finance obtained at all.

929. The question then is whether any of the Warrants to be acquired, or the AV, could have been used to close the gap, whatever the funding gap was.

930. The experts dealing with this issue are Dr Shi and Mr Skailes using, where appropriate, the underlying figures on debt finance supplied by Dr Srinivasan and Mr Bahadur respectively. Dr Shi and Mr Skailes have agreed to assess this issue on the assumption that the relevant date is 21 November for the purpose of the spot share price. This is conservative in the sense that an assessment on other days around the same time would have the advantage of a higher share price. The date seems to have been chosen in fact by reference to PCP's case that 21 November was when Sheikh Mansour/IPIC had lost confidence in PCP because of the falling share price. In the light of my findings above, that is not a correct assumption but it does not matter because the experts have agreed the assessment date as 21 November.

931. Dr Shi has used an available debt finance figure for her analysis as at that date of £1.533bn. This uses Mr Srinivasan's 20 November figure of £950m plus £625m on the RCI financing which gives £1.575m. £22m is then deducted for structuring fees, giving the net figure of £1.553bn. See MS 1 at paragraphs 6.38-6.40. The funding gap is therefore £397m.

932. For his part, Mr Skailes calculates that the level of debt finance for the MCNs would be £889m as at 21 November. He assumes £613m for the RCIs, being just less than Mr Srinivasan's figure of £625m. His funding gap is therefore £450m.

933. So far as Scenario A is concerned both experts take the amount of the AV as £615m. Both experts agree that for this scenario, and with its AV, and largely as a matter of maths, the funding gap could be bridged. They also agree that if RCI debt finance was not available the gap could not be bridged. The key question is how, if at all, the funding gap could in reality have been bridged by the use of Warrants, AV or the involvement of Other Investors.

Use of Warrants

934. As for the use of Warrants, I have rejected the possibility that PCP would have obtained more than 1.5bn worth of Warrants in the first place, which is why Scenario C was ruled out (see paragraphs 537-539 above). So we are concerned here with the possible use of the to-be-acquired Warrants in the total amount of £1.5bn to fill the funding gap.

935. I do not think there is any real chance of that happening. First, I cannot see why Sheikh Mansour/IPIC would countenance it. After all, part of the reason why this was such an attractive deal was because of the 5 year warrants and the prospect of large gains as a result of a significant increase in the share price over that period. In cross-examination, Mr Jassim said that Sheikh Mansour realised that the Warrants had value and would have wanted them for himself. It is true that this point was put in general terms to Mr Jassim, rather than by reference to any use to be made of the Warrants for the purpose of finance. Nonetheless, if the funding really could not be achieved without the use of the Warrants, I think it far more likely that Sheikh Mansour/IPIC would simply take over the funding themselves, just as they could and did in the real world. After all, the need to close a funding gap was essentially PCP's problem, not theirs.

936. The likely retention of the Warrants is also reflected in why Ms Staveley herself did not want them used to obtain the underlying debt finance, which led to DB1 being replaced by DB2 - see paragraph 720 above. And as at 21 November, the Warrants' value had decreased significantly because of the fall in the share price. In addition, Ms Staveley had held out against making any of the Warrants available to institutional shareholders at a time when Barclays was concerned that CR2 would not get through the EGM without some further concessions to the shareholders.

937. In addition, the Warrants (or rather the right to them) would have to have been sold prior to 27 November so that the proceeds were available for completion. Both experts agreed that if a bank purchased them, it would need to create another (on this hypothesis) hedge by short-selling Barclays

shares. See paragraph 10 (1) (e) of the Joint Statement of Mr Srinivasan and Mr Bahadur. This creates another obstacle in the way of using the Warrants.

938. Although in paragraph 28 of her 4th WS, Ms Staveley said that if necessary PCP would have looked to monetise the Warrants to complete the funding, that contradicts her earlier view and anyway it was not simply up to PCP.

939. In my judgment, there was no real chance of Warrants being available to close the funding gap. I therefore turn to the AV.

Use of AV

940. Dr Shi's revised table 3.1 at paragraph 3.6 of MS 2 adds the £1.553m assumed debt finance to the AV of £615m which produces a funding figure of more than 60%, such that Abu Dhabi would now not need to provide as much as 40% equity. Only £1.082bn would be required rather than £1.3bn. As a matter of maths, that is obviously correct. But it assumes that there was, in effect, £615m of cash, or assets convertible into cash, available. In reality, we know that this was not likely to be the case since the AV in Scenario A would be delivered through changes in the terms of the Instruments. Indeed, at paragraph 544 of PWC, PCP positively relies on AV being provided in this way so as to say that the issue of the 10% cap is now academic. That this is PCP's essential case on how the AV would be delivered was confirmed in oral closing argument (Day 41/18-19).

941. However, if that were so, it is very difficult to see how AV could contribute to the funding shortfall. In cross-examination, Dr Shi accepted that her model would not work if £615m was not available in cash on day one, i.e. prior to and in time for completion on 27 November.

942. It is, of course, true that if the conversion price on the MCNs was reduced as part of the way to give AV through changes in the Instruments, the subscription price paid for the MCNs would yield more putative shares. This would have a positive effect on the available MCN finance which would be calculated by reference to the Put Option strike price multiplied by the number of shares. On the other hand, an increased number of shares would require there to be a larger block trade than the 950m shares envisaged which would be likely to adversely affect the lending position or its cost. On that basis, I doubt whether the ultimate lending position would be that much different and in any event I do not have any specific figures to work on.

943. Even if (which is now effectively contrary to PCP's own case) there were some cash fees potentially payable, over and above the existing commissions, there seems little chance that they could be used to bridge the funding gap. First, assuming such cash fees were to be regarded as analogous to the

£110m, under the H/T, such fees would be used to settle deal costs and then be split by agreement. In the alternative, such fees could have been netted off against the subscription price so as to reduce what had to be paid to Barclays. In fact, this is what Ms Staveley assumed actually happened in the real world; see paragraph 26 of her 4th WS. It is very hard to see why, in the counterfactual, Abu Dhabi would be prepared to let such fees be used to bridge the funding gap. The latter was PCP's problem, not Abu Dhabi's.

Conclusions on the Shortfall Issue

944. It follows that in my view, where on PCP's best case there was in fact a funding shortfall of some £400m, I cannot see how it could be filled. It is of course tempting to say that if there is AV worth £615m, then there must surely be a strong chance of it assisting one way or another to bridge the gap. However, on a careful analysis, that does not really follow, as I have explained above.

945. The position is *a fortiori* if in fact no significant debt finance could be obtained anyway. It also follows if no RCI finance could be raised, because both experts agree that in that event, the gap could not be bridged.

The Sale of the RCIs Issue

946. As a further point, Ms Staveley said in cross-examination (though it is not prefigured in her WSs) that the RCIs could simply have been sold (or more accurately pre-sold) at the outset. Then finance would not be needed for them. She said that Blackrock would probably have taken them. But that is as far as the evidence goes. There was going to be a meeting with Mr Fink of Blackrock but it was cancelled. The notion of selling the RCIs (on the assumption it was simply up to PCP) is contradicted by Ms Staveley's own view that they should be retained until maturity because of their attractive coupon (see paragraph 645.2 of her WS). Moreover, and as with the Warrants (which attached to the RCIs) it was hardly just up to her. If Abu Dhabi was providing 40% of the equity and expected PCP to provide 60% by way of financing, it is somewhat unrealistic to expect that Abu Dhabi would agree to sell the RCIs at the outset simply to solve the funding problem.

Conclusion on Issue 9

947. It follows from what I have said that in my view there would have been no real chance of filling the funding gap even assuming (contrary to my findings above) that there was a real chance of the provision of debt finance in respect of the MCNs and RCIs.

ISSUES 8 AND 9 TAKEN TOGETHER

948. In the light of all the matters addressed under Issue 8 and Issue 9, it is necessary to assess whether there was a real chance of PCP obtaining 60% non-recourse debt finance, whether or not assisted by AV and/or AT. It must follow from what I have said that there was not.

949. That is why I said earlier at paragraph 718 above that it does not in fact matter whether PCP made the remuneration agreement as per Remuneration Basis 1 as a matter of historic fact or that there was simply an 80% chance of that happening.

ISSUE 6 REVISITED

950. In the light of my findings on Issues 8 and 9, I can now determine Issue 6.

951. In my view, the loss of chance issues under Issues 8 and 9 (obtaining finance/funding to the tune of 60%) on the one hand, and Issues 6 (PCP remaining in control in the counterfactual) are directly connected. The chances of obtaining sufficient funding and the chances of remaining in control will be the same because they turn on the same key factor, namely the provision of debt finance.

952. In dealing with this issue, I have considered whether, even in the absence of the 60% debt funding, Ms Staveley may have retained control of the investment on the footing that, on any view, she had obtained AV of £615m and that fact would have softened the position of IPIC and Mr Al-Qubaisi in particular. However, I do not think this would have happened. After all, once the provision of the 60% debt finance fell away, there was no basis for PCP holding a 10% or any interest in the investment. Further, IPIC would need to control the investment, as it was now going to be the "borrower" for the purpose of obtaining financing itself. Where the AV obtained would have been of more assistance to Ms Staveley was at the stage of her negotiations with Sheikh Mansour on the remuneration arrangements. I have already discussed this above.

953. Of course, PCP could have refused to cede control of the SPVs, against the wishes of IPIC/Sheikh Mansour in any event. But without any clear replacement investor, that would have been extremely foolhardy for Ms Staveley and she would not have done it. It would have spelt the end of her association with Sheikh Mansour and would cause enormous reputational damage to PCP if the outcome then was that the SPVs could simply not complete on the subscription.

954. Therefore, the chances of PCP retaining control in the counterfactual (in contrast to what happened in the real world) are the same as the chances of obtaining the 60% funding. As there was no real chance of obtaining the 60% debt finance (whether or not assisted by supplemental funding), there was no real chance of PCP being able to retain control of the investment in the counterfactual.

955. Accordingly, in this counterfactual, PCP would have been in effectively the same position as it was after losing control in the real world. In paragraphs 956-965 below, I deal with PCP's residual case in this regard which invokes Remuneration Basis 4.

PCP'S RESIDUAL CASE ON LOSS

Remuneration Basis 4

956. As noted above, one of the scenarios in which Remuneration Basis 4 comes into play is where PCP has failed to deliver the 60% debt finance, so that it cannot earn its remuneration under the H/T.

957. Ms Staveley's 7th WS puts it thus:

> "36. If for some reason it was not possible for a deal with Sheikh Mansour and CIC consistent with the terms he and I discussed at the Majlis or reflected in the Draft Heads of Terms to become effective (for example, because PCP were for some reason unable to obtain the necessary debt funding, so that it became necessary for Sheikh Mansour and CIC to raise any debt funding required to complete their subscriptions), the availability of additional warrants with a notional value of up to £2bn to supplement the notional £1.5bn of warrants which Barclays actually issued to Sheikh Mansour/IPIC would have made it likely that PCP's remuneration would have been based on an allocation of warrants to PCP for no up-front consideration, as opposed to only being paid the fee which PCP in fact received. In the interests of simplicity, I believe that such an allocation would have been agreed on the basis of an equal split so that, regardless of the precise value of the consortium's total subscription and the corresponding notional value of any warrants issued, Sheikh Mansour and CIC on the one hand, and PCP on the other, would ultimately have received warrants with an equal notional value. I believe it is likely that Sheikh Mansour would have agreed to such an arrangement because he and I had a good relationship. He had long been interested in investing in a UK bank (paragraph 15) and was keen in investing in Barclays in particular (paragraph 24). In this counterfactual, there would also have been substantially more value in the deal; and because the warrants would have been issued for nominal consideration, there would have been no up-front costs for Sheikh Mansour to fund in respect of the warrants, aside from the subscription amounts on the MCNs. These factors taken together would have made such an arrangement commercially justifiable.
>
> 37. Finally, in the light of my evidence in paragraph 36 of this witness statement, I have been asked to consider further the evidence I gave in relation to the counterfactual scenarios involving the Qatari Investors described at paragraphs 635 to 644. On reflection, I am confident that in those counterfactual scenarios, it would also have been the case that if for some reason it was not possible for a deal with Sheikh Mansour consistent with either the agreement reached at the Majlis on 7 November 2008 or the Draft Heads of Terms to become effective (including because PCP was unable to raise the necessary debt funding), I would have sought to agree with Sheikh Mansour that PCP's remuneration should be based on an allocation of warrants to PCP for no up-front consideration. Such an arrangement would also have been based on an equal split of the warrants available to Sheikh Mansour in these counterfactual scenarios so that, if agreement with Sheikh Mansour had been reached, PCP and Sheikh Mansour would each have received warrants with a notional value of £750m. Again, I believe that Sheikh Mansour would have agreed to such an arrangement because he and I had a good relationship; he was keen to invest in Barclays; and the additional value available to PCP' s consortium in the counterfactual, combined with the fact that the warrants would have been issued for nominal consideration, would have made the arrangement commercially justifiable."

958. Paragraph 36 clearly contemplates the situation where there were AW so that the SPVs would now get £3bn worth rather than £1.5bn worth of Warrants. As already noted, this counterfactual can go nowhere because I have already held that there would not be AW anyway.

959. However, Barclays makes the point that paragraph 37 seems to suggest that there would be the same outcome even if there were no AW. That also seems to be contemplated by paragraph 498.2 of PWC which refers to PCP receiving half of the "available warrants". See also paragraphs 379.2 and 384 of PWO and paragraph 569.3 of PWC.

960. Ms Staveley was briefly cross-examined on this point. She gave a general answer as to why Abu Dhabi would have agreed to give up half the Warrants when PCP had not delivered the finance. This

was because it was "an exceptionally good deal with an incredibly high coupon when they were already getting the warrants." She also made the point that it would not have been nonsensical for Sheikh Mansour to give PCP half the Warrants because, after all, in the clawback discussions, Abu Dhabi was prepared to give up £250m worth of the warrants as well as £250m worth of the RCIs to help the deal go through. It was Ms Staveley who held out against the release of the Warrants. All of that is true. She then goes on to say that in the counterfactual Abu Dhabi would equally have been prepared to release Warrants to PCP.

961. However, I think that this is something of a non sequitur. What happened in the clawback is not a useful guide as to what would have happened in the different scenario where PCP had failed to discharge its obligation under the H/T and was then asking for some other remuneration nonetheless.

962. Furthermore, insofar as Ms Staveley's evidence was in the context of there being AW, her point that Abu Dhabi would readily have given up some of the Warrants because it had now gained another £1.5bn worth obviously does not run where there are no AW.

963. In addition, on PCP's case, half the £1.5bn worth of Warrants would have had a value at the time of exercise and sale of £365m (or £328m according to Barclays). That is more than Remuneration Basis 3 would produce, a basis still postulated on the provision of 60% finance. It is in my judgment absurd to suggest that when the finance was not obtained, PCP should still receive remuneration of this order even though, depending on the Assumptions, the reward under Remuneration Basis 1 would have been significantly more. After all, in the real world, where Abu Dhabi had nonetheless been provided with an extremely good deal, in the end, PCP only received a £30m fee. Indeed, Ms Staveley did not even ask for any Warrants at that stage although it would have been technically an easy thing to do, and in circumstances where, according to her, she still had a very good relationship with Sheikh Mansour.

964. For the sake of completeness, I should add that even if there were the extra £1.5bn worth of Warrants (valued by PCP at £730m and by Barclays at £689m) I still see no realistic basis on which Abu Dhabi would have agreed to relinquish that additional element to PCP in the absence of finance being raised. In this scenario, the reward for PCP would exceed Remuneration Bases 1, 2 and 3.

965. For all of those reasons, there is no real and substantial chance that Remuneration Basis 4 would have come about.

Remuneration Basis 2

966. In paragraph 754 above, I referred to the fact that this appears to have been invoked in PWC as a yet further residual case. However, and unlike Remuneration Basis 4, no actual evidence has been adduced in support of it. In any event, and for reasons similar to those set out in respect of Remuneration Basis 4, I can see no real chance of PCP obtaining remuneration from Sheikh Mansour along these lines where it has failed to discharge its obligation under the H/T to provide the required finance.

A Final Alternative

967. At one stage in oral closing (Day 38/25-27) PCP posited a sort of halfway-house whereby in the counterfactual, it could not raise the 60% debt finance but perhaps could raise a significant amount of finance nonetheless. If by this is meant that it could still recover under Remuneration Basis 1, that might be a possibility if it raised very nearly 60%. But that is not what I have found. Nor is it, in reality, a scenario advanced in Ms Staveley's evidence which is tied very firmly to Remuneration Basis 4. This final tentative alternative can thus be discounted.

CONCLUSIONS ON CAUSATION AND LOSS

968. It follows from the above, that while PCP has succeeded on liability, it has failed on causation and loss with the result that the overall claim fails.

969. I can understand why this outcome will be a serious disappointment to PCP, especially after I have found Barclays to be guilty of serious deceit towards it. However it is an outcome that must follow, on my application of the relevant legal principles and on the basis of the materials before me.

970. Nonetheless, in case this matter goes further, and because all points have been argued, I will proceed to determine a relevant figure for Remuneration Bases 1 and 4 under Issue 10.

ISSUE 10: WHAT, IF ANY, LOSS HAS PCP SUFFERED IN THE LIGHT OF THE FOREGOING?

Introduction

971. PCP's model for assessing quantum is set out at paragraph 569 of PWC. It is not, for the most part, a useful model now. That is principally because there is only a need to consider Scenario A.

972. Had I found that this was a viable claim, the relevant loss of chance calculations would apply.

973. The calculation of that putative interest has been done by both Mr Skailes and Dr Shi. Mr Skailes put it at £405m while Dr Shi puts it at £771m. The reason for the difference lies in the assumptions they have made, and in particular (but not exclusively) the relevant underlying findings made by Mr Bahadur on the one hand and Mr Srinivasan on the other. At this stage in the process, I have to determine what is the appropriate figure for that interest by reference to the correctness or otherwise

of the assumptions made ("the Assumptions"). The Assumptions, and the experts position on them, are set out at Section 6 of the Joint Statement.

974. Some of the Assumptions are effectively determined by my earlier findings (e.g. Assumptions 5 (a) and (b)). Others involve issues arising for the first time at this quantification stage (e.g. Assumption 6). Others concern issues that formed part of my assessment as to the chances of there being debt finance (supported by any additional funding) i.e. Issues 8 and 9. But they arise again at this stage because, whether the actual debt funding available was for example £1.03bn on the MCNs (as Mr Bahadur says) or £1.25bn, as Mr Srinivasan says, now affects the underlying costs of the debt finance. That is important, because such costs have to be factored in to the computation of the ultimate value of PCP's putative interest.

975. This involves a somewhat artificial exercise because it may involve assuming that, for these purposes, the available debt funding had a particular feature, even though the likelihood of that feature existing was previously considered as non-existent or very low. That said, however, I have to do the best I can on the materials before me. It might, on occasion, be appropriate, for the purposes of estimating PCP's putative interest at the end of the investment, to take a mid-way position between those of the experts, even if logically, it should be one or the other of the Assumptions.

976. I should add that it was not suggested by either side that I should leave for another day some part of the assessment of damages.

977. As noted above, Mr Skailes has assessed PCP's interest on the basis of Remuneration Basis 1 at £405m. To this should be added back the £30m actual fee which should not have been deducted at all at this stage. Therefore, the correct figure would here be £435m. (The correct stage at which to deal with the £30m is once the ultimate damages figure is reached, at which point credit must be given for either the whole or part of the £30m, depending on each side's argument.)

978. Dr Shi's assessment of PCP's putative interest under Remuneration Basis 1, is £771m. This means that the midway point between the respective experts' positions is £603m. *Prima facie*, it seems to me that, taking into account the relative materiality of the Assumption in question, if, for the most part, Dr Shi "wins" on the Assumptions, the putative interest should be somewhere between £603m and £771m. If the converse is the case, it will be somewhere between £435m and £603m. If I were to conclude that overall, the contest on the Assumptions between the experts was a "draw" then the logical figure would be £603m.

979. I now turn to the individual assumptions. They are set out in the Joint Statement of Mr Skailes and Dr Shi at Section 6. Assumptions 1 - 8 are said to be the most important for the assessment of damages (Dr Shi describes them in her Table 4.3 of MS 4 as being able to affect damages by more than £100m). Assumptions 9-16 are said to be "material" assumptions (according to Dr Shi, able to affect damages by 10-£100m), and finally Assumptions 17-25 which could affect damages (in the amount of less than £10m according to Dr Shi).

980. I do not deal with any agreed Assumptions, nor any which do not relate to Scenario A and my findings in relation to it.

The Assumptions

Most Important Assumptions

Assumption 4: Split of the warrants

981. This is disputed but is now irrelevant in the light of my findings as to the non-availability of Warrants.

Assumption 5 (a): Definition of "profit" for Remuneration Basis 1 and Assumption 5 (c): Definition of "carried interest" for Remuneration Basis 3

982. Both of these Assumptions, not agreed between the experts, raise the same point which depends upon the correct interpretation of paragraph 3 (b) (i) of the H/T. In the light of my findings above, the correct Assumption is the one applied by Mr Skailes.

Assumption 6: RCI Exit Date

983. The RCIs were in fact realised by Abu Dhabi on 2 June 2009. Mr Skailes has used this as the counterfactual exit date. Dr Shi has used 15 June 2019. Although at one stage it seems to have been contemplated by Mr Forbes that they would hold onto the RCIs (see MS 1 paragraph 3.31) the most recent evidence remains what happened. Although Ms Staveley says that she would have retained the RCIs, under the H/T it was not in fact up to her and in any event, again, we know what in fact happened. This Assumption has an impact on the overall returns under the RCIs because of the difference in amount of coupons payable as between Mr Skailes' Assumption and Dr Shi's Assumption. I resolve this issue in favour of Mr Skailes.

Assumption 7: Amount of Block Discount share price

984. This has already featured prominently under Issue 8. But on the basis that (somehow) MCN debt finance was available and used, there remain two questions: first, which Block Discount would be used and second, any adverse effects of the Block Discount on pricing of the funding or on the underlying share price so that it would be less than it actually was as at June 2009.

985. One must of course be careful to avoid double counting, as it were. I think that for the purpose of this Assumption, one must assume that there was at least a real prospect that the Block Discount would be significantly more than 7.5%, if undertaken. I also think that there was a real chance that there would be a negative effect on the share price. This would push the dispute more in favour of Mr Skailes than Dr Shi.

Assumption 8: Cap on additional fees

986. Both experts agree this Assumption. They provide alternative calculations depending on whether the 10% is applied or not. In the event, since PCP proceeds upon the basis that the AV will be delivered by changes to the terms of the Instruments, the alternative scenario here disappears.

Material Assumptions

Assumption 9: Amount and terms of MCN debt financing

987. Both experts assume (and must assume) that the relevant debt financing (and any supplemental funding) has been obtained. Without that assumption it would be impossible to calculate the ultimate interest of PCP under Remuneration Basis 1. However, they differ as to the amount of underlying debt financing available for the MCNs. Mr Skailes uses Mr Bahadur's calculation that in the event that the debt financing could be secured it would be £1.03bn as at 24 November 2008, when the share price was 146.5p. Dr Shi takes Mr Srinivasan's equivalent figure which is £1.25bn for the same date. There is something of a disconnect here because, of course, when the experts were considering funding sufficiency (dealt with in Issue 9 above) they assessed the availability of debt financing and any consequent shortfall, as at 21 November, when the share price was 133.2p. However, I have to proceed upon the basis of the expert figures put before me. On Mr Srinivasan's figures, the required 60% debt finance would (almost) be obtained. On Mr Bahadur's figures, there would be a significant shortfall. So, for the purpose of assessing quantum, Mr Bahadur has assumed the conversion of 500m MCNs at the time of completion. The difference of approach between the experts is relevant at this stage because it affects the underlying costs of the debt finance and also the available return on the investment which affect the profits for the purpose of Remuneration Basis 1. In addition, the hypothetical debt financing assumed by Mr Skailes uses Mr Bahadur's average call strike price of 148.2p. It will be recalled that this was significantly lower than in DB2 because the share price had dropped and Mr Bahadur said that the collar would "move" with the reference price. On the other hand, Mr Srinivasan maintained the Call Option strike price contained in DB2 being 190p. In this context, PCP makes the point that the Assumption made by Dr Shi is the correct one because in fact it could not in the counterfactual world ever accept debt finance on Mr Bahadur's model because, for example, a Call Option strike price of 148p would be less than the MCN

conversion price of just under 154p. So it would be bound to make a loss. I see that, but if, in the counterfactual, the MCN conversion price was itself reduced as part of the AV, this scenario might not arise. In this admittedly artificial analysis, it seems to me that the right approach would be to say that the correct Assumption as to the extent and nature of the debt financing should be somewhere between the respective positions of the experts.

Assumption 11: Treatment of £30m cash fee received by PCP in April 2009

988. The experts differ as to whether PCP must give credit for the entirety of the £30m fee received in March 2009 or only the profit element thereof which PCP says is £19m. However, in my judgment, I should not deal with this issue at this stage, when considering Assumptions. First, in truth it is an issue of fact. Second any deduction should logically be made once the ultimate loss of fee is calculated. It is then simply a matter of giving the appropriate credit for such fee as in fact had been obtained. I deal with this later.

Assumption 12: Treatment of costs associated with the collar financing

989. Both experts agree that the costs associated with the collar financing should be included as a cost, which will affect the net returns at the end of the day. However, Mr Skailes, following Mr Bahadur, says that this is a distinct item which needs to be added - see paragraph 3.7.12 and table 3.3 of DS 2. Dr Shi disagrees and says that this cost is already included within the collar structure itself. She relies upon Mr Srinivasan's report at AS4 paragraph 6.2.1 and 6.2.2.

990. As Mr Skailes accepted in cross examination, his "Derivatives Cost", which is the subject of this Assumption, is the same as DB's "edge" and he was asked questions about it in the context of the DB Profitability Issue (see paragraphs 848 - 865) above. It has also been referred to as the reason why the collar was not in truth at zero cost because of the fact that the Call Option was worth more to DB than the cost to it of granting the Put Option.

991. However, I fail to see why the profit for DB inherent in the collar structure should be regarded as a separate cost for the purpose of calculating PCP's interest at exit. It is not a further sum actually payable so as to reduce the profit in the transaction.

992. Accordingly, I think that Dr Shi is correct about this Assumption.

Assumption 13: Ongoing cost of RCI loan

993. Both experts agree that the cost of maintaining the RCI loan must be taken into account. However, Mr Skailes (following Mr Bahadur) says that the correct rate would be LIBOR + 10% spread and 2% structuring fee, whereas Dr Shi (following Mr Srinivasan) says that the spread element should

only be 3%. In the JPM proposal, a 6% spread was quoted but this was a recourse loan and therefore less risky and also only at 30% LTV and with a margin trigger and syndication. In cross-examination, Mr Srinivasan simply said that JPM's pricing was unfair and usurious, but I do not think such comments go very far in the context of the volatile financial markets in November 2008. Accordingly, I think that Mr Skailes is right on this Assumption.

Assumption 15(a): Volatility assumption to arrive at the Theoretical Value of warrants and Assumption 15 (b): Volatility assumption to arrive at the Realisable value of warrants

994. These Assumptions do not arise here either. They relate, first, to Issue 34 which concerns the value of £1.5bn worth of AW - but I have found that there would not be any. Second, they relate to further instructions to the experts in the contexts of Scenarios G and H which similarly do not arise.

Assumption 16: Availability of MCN Commissions to contribute to the funding of the Subscription Amount

995. Dr Shi has calculated the funding costs, taking into account that the MCN Commissions would be available to bridge the funding gap. Mr Skailes has not proceeded on that basis. Rather, he has been instructed to assume that the MCN Commissions would not be available.

996. Both experts, however, have proceeded on the basis that the to-be-acquired Warrants could be monetised at the outset to make up the funding gap ("the Warrants Assumption"). See paragraph 5 (b) of the joint statement.

997. Although, as I have pointed out, there is some artificiality in the quantification exercise anyway, it seems to me that the simplest Assumption here is to use the Warrants Assumption only, because it is very hard to see, on the evidence, how the relevant additional fees would have been available in cash terms under Scenario A, or even if they could, that they would be used to make up the funding gap, as opposed to being used to reduce the net subscription price or otherwise used by Abu Dhabi directly. This means that here, it is Mr Skailes' position under Assumption 16 which is the correct one.

<u>Other Assumptions with potential effect</u>

Assumption 17: Exercising or unwinding the collar financing arrangement

998. This is whether, for the purposes of costing the investment, one should assume that the Call Options would be exercised by the bank at the appropriate time, rather than by the SPVs paying to unwind the collar. Both experts here simply follow the opinions given by Mr Srinivasan on the one hand and Mr Bahadur on the other (largely in the context of discussing the suitability or otherwise of the collar). However, for these purposes only, it seems to me to be a more straightforward exercise to

use Mr Skailes' model rather than trying to predict the cost of a consensual unwind. Accordingly, he is right here.

Assumption 20: Ex-post discount on Warrants' realisable value

999. This is relevant to Remuneration Basis 4 only, which in fact I have held would not arise. I deal with it, anyway, however.

1000. There are two reasons why the experts differ on the value of the Warrants following their exercise which is now proceeding on the basis of the date when IPIC did indeed exercise them and sell the shares thereby acquired. The basic value is computed simply by multiplying the difference between the current price and the Warrant strike price of 197.775, multiplied by the number of shares.

1001. The first reason is because from his figure, Mr Skailes deducts the £30m fee received by PCP. I have already resolved this matter in favour of PCP under Assumption 11 above. I deal further with the £30m in paragraph 1012 below.

1002. The second reason is because Mr Skailes has deducted 1% for fees which he assumes were payable- see paragraph 6.3.3 (j) of DS 2. Dr Shi's opinion, on the other hand, is that any such fees would be nominal on a straightforward sale like this. In my view, the burden here is on Barclays to produce some cogent evidence to show that a 1% fee would have been required and not merely an assumption made by Mr Skailes. Accordingly, I resolve this point in favour of PCP as well.

1003. Therefore, the correct figure for the realised Warrants for the purpose of Remuneration Basis 4 is £365m.

Assumption 21: Date of conversion of MCN to Barclays shares

1004. This dispute no longer arises in the light of my conclusion on Assumption 17.

Assumption 23: Application of the Capital Preference term at the global vs fund level

1005. This is a timing point. The question here is whether Sheikh Mansour should first get all of his equity back before the SPVs get anything. That is Mr Skailes' "global" position. Dr Shi looks at it from the individual "SPV level", which would allow earlier returns to the SPVs. Given that Remuneration Basis 1 is looking at the entire picture, I think that Mr Skailes is correct on this.

Assumption 24.1: The source and sequence of funding for subscribing to the Instruments for Scenarios A-F

1006. This assumption relates to the ultimate cost and/or profit of the investment. The difference between the experts is that Mr Skailes was instructed to ignore the use of MCN commissions for the purposes of funding sufficiency while Dr Shi included them. Since there would be no material extent to which fees, as cash, could be used, or would be made available (see above) for what it is worth, Mr Skailes is correct on this issue.

Conclusion on the disputed Assumptions and the ultimate figure

1007. In the event, in the vast majority of cases (and all of them in the Most Important category) I have resolved the disputed Assumptions in favour of Mr Skailes. In addition, I have given effect directly to the question of the £30m which features in Assumption 11. Assumption 20 favours Dr Shi but it is only relevant for Remuneration Basis 4 anyway.

1008. It follows that the ultimate figure would be very much closer to Mr Skailes' rather than Dr Shi's and it is a figure which will be significantly below the midway point between them of £603m. I assess the ultimate figure at £500m.

1009. Had PCP been successful in the damages claim, whatever figure is reached, once percentage chances were applied, would then fall to be reduced by whatever is the appropriate credit figure in respect of the £30m fees. I now turn to that matter.

Credit in respect of the £30m fee.

1010. Barclays says that PCP must give credit for the whole of the £30m fee which it received. PCP responds that it need give credit only for the profit element. It puts this at £19m, on the basis that £11m consisted of expenses which Sheikh Mansour would have paid anyway under the H/T just as the expenses of A&O and GSI were indeed separately paid for.

1011. In fact, however, the actual figure now effectively claimed in respect of such expenses is just over £6m – see PCPs revised Further Information dated 7 June 2020.

1012. I would accept the reduced figures claimed by PCP in this regard save for the sums claimed in respect of legal advice. It is not known what this is for, and in the absence of any explanation those sums should not be included. That then reduces the sum claimed here to almost exactly £6m, and £6m is the figure I shall use. This means that credit has to be given for the balance of the fee which is £24m.

<u>OVERALL CONCLUSION</u>

1013. In the event, and as stated in paragraph 969 above, this claim must fail.

1014. I am greatly indebted to all Counsel for their extremely helpful oral and written submissions. Indeed I am most grateful to all members of the legal teams, and indeed the witnesses and court staff, for helping to ensure that this long trial proceeded as smoothly and efficiently as it did, and on time, notwithstanding the substantial challenges posed by the Covid 19- related restrictions.

Table of Abbreviations used in the Judgment

Abbreviation	**Full Name**
A	
ADIC	Abu Dhabi Investment Council
The Announcement	The announcement about the subscriptions issued on 31 October 2008
A&O	Allen and Overy
AS 1	Anand Srinivasan report dated 22 November 2017
AS 2	Anand Srinivasan report dated 2 March 2018
AS 3	Anand Srinivasan report dated 21 June 2019
AS 4	Anand Srinivasan report dated 14 April 2020
ASA 1	Advisory Services Agreement dated 25 June 2008
ASA 2	Advisory Services Agreement dated 31 October 2008
AT	Additional Time
AV	Additional Value
AW	Additional Warrants
B	
BarCap	Barclays Capital Investments
Barclays	Barclays Bank Plc
BCCC	Barclays Capital Credit Committee
BFC	Board Finance Committee
BGR	BGR Capital and Trade
BWC	Barclays' Written Closing

Abbreviation	**Full Name**
BWO	Barclays' Written Opening
C	
CDB	China Development Bank
Challenger	Challenger Universal Limited
CIC	China Investment Corporation
CR 1	Capital Raising in June 2008
CR 2	Capital Raising announced 13 October 2008
D	
DB	Deutsche Bank
DB 1	"Indicative no recourse financing proposal" submitted by DB on 19 November
DB 2	Revised proposal sent later on 19 November by DB
DS 1	Duncan Skailes' report dated 27 September 2017
DS 2	Duncan Skailes' report dated 22 December 2017
DS 3	Duncan Skailes' report dated 2 March 2018
DS 4	Duncan Skailes' report dated 30 May 2018
DS 5	Duncan Skailes' report dated 25 May 2019
DS 6	Duncan Skailes' report dated 6 September 2019
DS 7	Duncan Skailes' report dated 17 April 2020
E	
ELOC	European Loans Operating Committee
EMEA	Europe Middle-East and Africa

Abbreviation	Full Name
F	
FCA	Financial Conduct Authority
FSA	Financial Services Authority
G	
GCC	Group Credit Committee
GFRM	Global Financial Risk Management
GP	General Partner
GSI	Goldman Sachs International
H	
H/T	Heads of Terms
I	
IBIM MENA	Investment Banking and Investment Management for the Middle East and North Africa
IPIC	International Petroleum Investment Company
IR	The Investor Representation
J	
JPM	JP Morgan
JR	The June Representation
L	
LBA	Letter before action sent by PCP's solicitors on 30 June 2015
LIA	Libyan Investment Authority

Abbreviation	Full Name
LP	Limited Partners
L&W	Latham & Watkins
M	
MCNs	Mandatorily Convertible Notes
MS 1	Dr Min Shi's report dated 22 November 2017
MS 2	Dr Min Shi's report dated 2 March 2018
MS 3	Dr Min Shi's report dated 21 June 2019
MS 4	Dr Min Shi's report dated 23 January 2020
MS 5	Dr Min Shi's Addendum to MS 4 dated 15 April 2020.
N	
NDA	Non-Disclosure Agreement
NPV	Net Present Value
P	
PWC	PCP's Written Closing
PWO	PCP's Written Opening
Q	
Qatar	QH and QIA
QH	Qatar Holding
QIA	Qatar Investment Authority
QNB	Qatar National Bank

Abbreviation	Full Name
R	
RCIs	Reserve Capital Instruments
Repos	Recourse Repurchase Agreements
RNS	Regulatory News Service
S	
SB 1	Sekhar Bahadur’s report dated 9 October 2017
SB 2	Sekhar Bahadur’s report dated 21 December 2017
SB 3	Sekhar Bahadur’s report dated 2 March 2018
SB 4	Sekhar Bahadur’s report dated 24 May 2019
SB 5	Sekhar Bahadur’s report dated 6 September 2019
SDR	Same Deal Representation
SFO	Serious Fraud Office
SPVs	Special Purpose Vehicles
T	
Temasek	Temasek Holdings Limited
V	
VWAP	Volume Weighted Average Price
W	
WS	Witness Statement