Judgments

# Nehayan v Kent

[2018] EWHC 333 (Comm)

**Queen's Bench Division (Commercial Court)**

**Leggatt J**

**22 February 2018**

**Judgment**

**Hefin Rees QC** and **Samar Abbas** (instructed by **Denning Legal**) for the **Claimant**

**David Lewis** and **Jack Dillon** (instructed by **Simons Muirhead & Burton**) for the **Defendant**

Hearing dates: 22-23, 27-30 November and 4, 6, 12-13 December 2017

- - - - - - - - - - - - - - - - - - - - -

**Approved Judgment**

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

.....

LORD JUSTICE LEGGATT

**LORD JUSTICE LEGGATT:**

A. Introduction

1. The story is all too familiar. Two friends go into business together. The business founders, their friendship falls apart and they end up in a dispute on opposite sides of a court-room.

2. The claimant in this case is Sheikh Tahnoon Bin Saeed Bin Shakhboot **Al Nehayan** ("Sheikh Tahnoon"). He is a member of the Royal Family of Abu Dhabi and a resident of the United Arab Emirates. The defendant is Ioannis (or John) **Kent**, a Greek businessman. In 2008 Mr **Kent** set up a hotel business in Greece with the aim of establishing (by lease, purchase or franchise) a brand of luxury hotels under the name of Aquis. In October 2008 Sheikh Tahnoon agreed to invest in the business as an equal shareholder with Mr **Kent**. Their joint venture was later expanded to include an online travel business called YouTravel. It is agreed that Sheikh Tahnoon ultimately contributed a total of €31.1m of share capital to the Aquis and YouTravel companies. The final €6.5m was paid between December 2011 and April 2012 in exchange for equity which increased his share of the group to 70%. By then the business was critically short of cash and on the brink of collapse. In early April 2012, representatives of Sheikh Tahnoon, to whom he had by now delegated his dealings with Mr **Kent**, decided that Sheikh Tahnoon should not support the business any longer and that he should instead separate his interest from that of Mr **Kent**.

3. A scheme was devised to restructure the Aquis and YouTravel companies and to provide for Mr **Kent** to repay to Sheikh Tahnoon part of the capital contribution which Sheikh Tahnoon had made to the business. To implement this scheme two agreements were made between Sheikh Tahnoon and Mr **Kent**, both dated 23 April 2012. The first, described as the Framework Agreement, provided for the demerger of the business and contained certain undertakings and indemnities given by Mr **Kent**. The second was a promissory note by which Mr **Kent** agreed to pay Sheikh Tahnoon a sum of €5.4m in annual instalments between 1 November 2013 and 1 November **2018**. These two agreements are at the centre of the present dispute.

4. In this action, Sheikh Tahnoon claims the value of the promissory note, which remains unpaid, along with further sums allegedly due under the Framework Agreement. The total amount claimed by Sheikh Tahnoon from Mr **Kent** is just over €15m.

5. It is Mr **Kent**'s case that his consent to the Framework Agreement and the promissory note was obtained by unfair means, including threats of physical violence and economic du-

ress, and in breach of fiduciary duties and/or a contractual duty of good faith which Sheikh Tahnoon allegedly owed Mr **Kent**. Mr **Kent** has not sought to rescind the Framework Agreement and ultimately accepted at the trial that the promissory note cannot be separately rescinded and is therefore enforceable. But he denies that any further sum is owed under the Framework Agreement and has counterclaimed for an account of profits or damages which include any amount which Mr **Kent** is held liable to pay to Sheikh Tahnoon under the Framework Agreement and the promissory note.

6. Before I address the issues in more detail, I will give a narrative history of the parties' business relationship. Tracing this history is necessary in order to determine what legal duties Sheikh Tahnoon and Mr **Kent** owed each other and what breaches, if any, of those duties were committed and to what effect – before, at the time of and after the signature of the Framework Agreement and promissory note. In the narrative below I will refer to only a small part of the large amount of evidence adduced at the trial about events which spanned a period of over five years. As well as many bundles of documents, this evidence included lengthy testimony from the parties themselves and other witnesses. Although I have taken account of the whole of the evidence, in the interests of economy I will focus and make findings of fact on those aspects of the history which seem to me most salient for the purpose of deciding the issues in dispute.

7. After giving this factual narrative I will consider in turn the Sheikh's claim and Mr **Kent**'s counterclaim.

B. Factual narrative

8. Mr **Kent** lived and worked in the UK for some 15 years before returning to Greece in 2006. In 2008 he established the Aquis group of companies with a holding company in Cyprus ("Aquis Cyprus") and a Greek subsidiary called Aquis Société Anonyme of Hotel, Tourism and Technology ("Aquis SA"), which was to be the main operating company of the group. At that time Mr **Kent** was already running an online hotel booking service for travel agents and tour operators called YouTravel and came up with the idea of combining this business with a hotel chain. He planned to start by leasing two or three hotels and then expand as quickly as he could. Part of his plan was to upgrade hotels to a higher standard with the assistance of grants available from the Greek government.

9. The first board meeting of Aquis SA was held on 4 June 2008. In addition to Mr **Kent** there were six other members of the board. One of them was Mr Nicholas Kouladis, a lawyer who was a close friend of Mr **Kent** and had also lived in the UK, where he had been a law lecturer at Southampton University and Honorary Consul for Greece in the south of England. Mr Kouladis was a witness at the trial. At the board meeting on 4 June 2008 decisions were made to proceed with renting office premises in Athens and negotiating the lease of two hotels in Corfu.

**The boat trip**

10. Mr **Kent** first mentioned his new business to Sheikh Tahnoon during a boat trip at the end of June 2008. The two men had previously met a few times socially. In June 2008 Sheikh Tahnoon decided to spend a few days with some friends cruising around some Greek islands on a yacht (possibly at Mr **Kent**'s suggestion). Sheikh Tahnoon asked Mr **Kent** to make the arrangements for the trip, which were made through YouTravel, and to join his party. It is common ground that during this trip there was a conversation in which Mr **Kent** explained his business plans to develop a chain of hotels. In their evidence at the trial, however, the two men gave very different accounts about the extent of the interest expressed by Sheikh Tahnoon at this stage.

11. Mr **Kent** said that, when he had explained his plans, Sheikh Tahnoon shocked him by saying that it would be his honour to become Mr **Kent**'s partner if Mr **Kent** would have him. Sheikh Tahnoon then shook Mr **Kent**'s hand. Mr **Kent** said that he was very excited and took the handshake to mean that they had made a legally binding agreement to go into business together. Sheikh Tahnoon denied that any such agreement was made. He recalled the conversation as a brief one with other people present and said that no serious business discussion took place. He did say, however, that he was intrigued by what Mr **Kent** described and was interested in the idea of working with someone who seemed to have extensive experience of tourism and the luxury hotel market.

12. I think it likely that in this initial conversation Sheikh Tahnoon expressed rather more enthusiasm for participating in the Aquis business than he now recalls. But I reject as fanciful Mr **Kent**'s claim that he believed at the time that they had made a legally binding agreement. Mr **Kent** does not suggest that any concrete terms were discussed. Sheikh Tahnoon knew nothing more about the business than he was told by Mr **Kent** and it is inconceivable that such a general discussion in a holiday setting could have been understood to create a binding contract. Nevertheless, I think it likely that Mr **Kent** read more into the enthusiasm expressed by Sheikh Tahnoon than was at that stage warranted – a pattern of misunderstanding which was to recur. My impression of Mr **Kent** is of a man inclined to over-optimism for whom two plus two can readily equal five. Sheikh Tahnoon struck me as a warm-hearted and ingenuous person who may have responded with spontaneous excitement to Mr **Kent**'s grandiose plans without recognising the expectations that he had raised. Although the two men became close friends, their combination of personalities was not a prudent basis for a business relationship.

13. A few days after the boat trip, Mr **Kent** flew to Dubai – I am sure for the purpose for following up the Sheikh's expression of interest in the Aquis business. Sheikh Tahnoon arranged for Mr **Kent** to meet Mr Berney Rozario who worked in his private office and helped to manage his financial affairs. Mr Rozario was a witness at the trial. Arrangements were made for Mr Rozario to travel to Greece to see the hotels which Aquis had already agreed to lease and other hotels which were available to lease or buy. The trip took place in September 2008. Mr **Kent** took Mr Rozario to visit hotels in Rhodes, Crete, Kos and Corfu. Mr Rozario was very impressed and reported back in glowing terms to Sheikh Tahnoon. On 20 September 2008, Sheikh Tahnoon messaged Mr **Kent** on Facebook, writing that “Berney never expected half of w[h]at you showed him” and saying: “thank you for sharing this with me. I hope we both enjoy the outcome”.

**The agreement to invest**

14. On 3 October 2008 Mr **Kent** travelled to the UAE for five days. His trip had a dual purpose. One purpose was, as Sheikh Tahnoon said in evidence, “to thrash out the precise contours of my involvement” in the Aquis business. The other was to introduce Mr **Kent** to some institutions in the UAE which might be willing to invest alongside Sheikh Tahnoon. Mr Rozario arranged a number of meetings with potential institutional investors, including the Abu Dhabi Investment Council, and accompanied Mr **Kent** to these meetings as the Sheikh's representative. In arranging these meetings Mr Rozario presented Aquis as a venture in which Sheikh Tahnoon was involved and sometimes introduced Mr **Kent** as the Sheikh's “partner”. In the event, none of the institutions approached was interested in investing in Aquis.

15. At the suggestion of Mr Rozario, Mr **Kent** had prepared a presentation for potential investors which described at a high level the business plans of Aquis and the investment opportunity. Sheikh Tahnoon read the presentation and was impressed by it. In a conversation which probably took place on 5 October 2008 he and Mr **Kent** made what Sheikh Tahnoon accepts was a binding contract for him to acquire a 50% stake in Aquis Cyprus. The price that Sheikh Tahnoon would pay for his shares was not fixed at this stage, but the agreement appears to have been that Sheikh Tahnoon would pay half the amount that Mr **Kent** had already

himself invested in the business. Mr **Kent** indicated that this was around €9m but that he would get his advisors to check the precise figure. On 20 November 2008 the Greek law firm which advised Mr **Kent** (and Aquis), Kelemenis & Co, reported that they had finished working with the accountants to calculate the exact amount Mr **Kent** had spent so far in relation to his investment in Aquis, which was said to be €9,263,000. No details of this amount were provided but the sum to be paid by Sheikh Tahnoon for his 50% participation was fixed at €4m. Mr **Kent** agreed to reinvest this sum in the business as a loan. A first tranche of €1.9m was transferred from the Sheikh's account to Mr **Kent** on 19 November 2008, though the balance of €2.1m was not paid until April and May 2009.

16. Mr **Kent** asked if Sheikh Tahnoon was prepared to become a member of the board of Aquis, to add prestige and without any expectation that he would play any active part in the management of the business. Sheikh Tahnoon agreed and for a few months became chairman of Aquis SA, until it was decided that it was impracticable for him to occupy this role as he was not available to sign documents or perform any other duties.

**Purchase of the Bella and Silva Hotels**

17. By the time the Sheikh's participation in Aquis was finalised, Mr **Kent** was involved in negotiations for the purchase of three hotels – one in Kos and two in Crete. To finance any of these purchases, substantial bank loans would be required and Mr **Kent** held discussions with Eurobank in Athens. It is common practice in Greece for banks lending money to a company to require personal guarantees from individuals who have a controlling interest in the company, even if the loan is secured by a mortgage over real property. On 23 December 2008 Sheikh Tahnoon came to Athens to meet senior managers of Eurobank. Mr **Kent** was hoping that, if the Sheikh provided a personal guarantee, Aquis would be able to get any loan they wanted. However, Eurobank did not consider that Sheikh Tahnoon was a suitable guarantor as he had no assets in Greece. Mr **Kent** had negotiated terms for the purchase of the Kypriotis Hotel in Kos at a price of €55m. An initial payment of €5m was required before 29 December 2008 and Mr **Kent** was looking to Sheikh Tahnoon to provide this sum. However, Sheikh Tahnoon did not do so and hence the deal did not proceed.

18. Mr **Kent** then focussed his attention on the purchase of the two hotels in Crete – known at the time as the Bella Maris and Silva Maris hotels and renamed Aquis Bella Beach and Aquis Silva Beach after the purchase. Mr **Kent** arranged for the seller, Mrs Metaxas, to travel to Abu Dhabi on 5 January 2009 to meet Sheikh Tahnoon. The visit was a success and Sheikh Tahnoon decided that he would provide a cash sum of €8m which was needed to buy the hotels. In his evidence he explained his decision in this way:

"I met Madam Metaxas, and at that time I really felt – I really liked these two hotels, and they were quite personal, and they looked really nice, and quite pretty, and Mrs Metaxas was a very, very nice lady, and I really wanted to have an interest and make an investment in these two hotels."

19. The transaction was completed at the end of March 2009. It was structured as a purchase by Aquis Cyprus of the shares of Investors SA, the company which owned the Silva Hotel, and a merger with Investors of the company which owned the Bella Hotel. The total purchase price was €35m, of which €8m was paid at the time of purchase, around €20m was financed by bank lending and the balance of around €7m was payable in instalments, with €1.5m due in August 2009, €2m in November and the final instalment of €3.5m due on 30 April 2010. The upfront payment of €8m was funded entirely by Sheikh Tahnoon, with Mr **Kent**'s share of €4m being treated as a loan from Sheikh Tahnoon to Mr **Kent**. The intention was to fund the later instalments of the purchase price of the two hotels from the operations of the business. In an email to Mr Rozario dated 9 April 2009, Mr **Kent** said that he would return the €4m to Sheikh Tahnoon (with interest) once grant funds were received which would enable

Aquis to repay the €4m that Mr **Kent** had lent to the company when the Sheikh acquired his 50% shareholding. (Later, when it became clear that Aquis could not repay the loan made by Mr **Kent**, that loan and the loan of €4m which Sheikh Tahnoon had made to Mr **Kent** were both capitalised.)

**The cash problems begin**

20. On 11 May 2009 Mr **Kent** sent Mr Rozario an email explaining that he had cash problems and that some €7m was needed within the next month to meet payments on cheques provided to lessors, banks, suppliers, construction companies, etc. It is common practice in Greece for payments to be made by cheques which may be post-dated for reasons of cash flow management. Under Greek law, if a cheque is dishonoured, the signatory commits a criminal offence even where the cheque is signed on behalf of a company. In his email to Mr Rozario, Mr **Kent** said that he had explained to the Sheikh "the cheque liability in Greece including personal liability and criminal offence". He asked for help to cover cheques which were about to fall due for payment, with €2.8m due on 20 May, €3m on 30 May and €1.1m on 10 June 2009. Mr **Kent** stated:

"Most of this cash can come back to Sheikh around August and some before depends on: when grant will be ready, when I can achieve a working capital debt from a bank based on tour operators contracts with heavy deposits in the winter, I can even give all back till August but then will have a short in November for Maris payment."

The reference to the "Maris payment" was to the sum of €2m which was payable in November 2009 as an instalment for the purchase of the Bella and Silva hotels.

21. This was to be the first of many such requests for money. It did not meet with an encouraging response. Mr Rozario replied:

"…I am not sure whether we will be able to come up with this sort of money in this short period. By this time you will have an idea how slow everything works here. Please also look for other alternatives and I am sure we will move on."

22. In the event Sheikh Tahnoon did provide €1.8m on 20 May 2009 (as a loan to Aquis). On 30 May 2009 Mr **Kent** sent an email to Mr Rozario outlining two further options which had been discussed on the telephone:

"1) If you give an extra 3m so total of 4.8m together with the previous 1.8, in that case I can return between 2m and 2.5m before the 31st of July with 100% assurance.

2) If you give me an extra 2m instead of 3m in that case I can return the 1.5 or maybe 2m before the 31st of July.

In both cases I can return the balance before the 30 of Sept latest, maybe earlier (depends on grant from the ministry of finance). This grant I repeat is guarantee[d] 100% that we will get it but it is a matter of time."

23. Sheikh Tahnoon transferred a further €2.85m on 15 June 2009 in response to this request, increasing the sum lent to Aquis to €4.65m. To make these funds available, Sheikh Tahnoon had himself borrowed the money from the National Bank of Abu Dhabi as a short-term loan repayable in December 2009. Despite the assurances that Mr **Kent** had given, none of the money was repaid to Sheikh Tahnoon by 31 July 2009 or subsequently.

24. On 29 November 2009 Mr **Kent** emailed Sheikh Tahnoon imploring him for more financial assistance. He wrote:

“Brother, you are my only hope as I cannot get an overdraft from any bank yet (we don't even have one year of trading) and if possible we need the help ASAP as the renovations they are on the way and we have gave cheques to them etc and I am panicking daily as days are getting closer to the payments.

Also tomorrow I have the second instalment of Metaxas-Maris (2 million), I already gave them the first instalment last August of 1.5m from the operations money but this time we are extremely tied.”

Mr **Kent** nevertheless stated optimistically:

“I strongly believe that the business is flying!!!! And is only a matter of cash flow for one more year.”

25. On this occasion Sheikh Tahnoon did not provide further funding. He referred Mr **Kent** to Mr Rozario who arranged an extension of the Sheikh's existing loan from the National Bank of Abu Dhabi on Mr **Kent** agreeing that Aquis would pay the additional cost of approximately €111,000. However, Mr Rozario made it clear that further funds were unlikely to be provided, writing in an email to Mr **Kent** on 6 December 2009:

“John I already mentioned to you before it will be very difficult in injecting more funds to Aquis. Please do not forget the nightmares we went through before and I clearly told you while you were in Abu Dhabi that more funds from here will be very very difficult. Although we will try to do our best it will not be good to rely on Sheikh for more funds.”

Mr Rozario also pressed Mr **Kent** for repayment of the Sheikh's outstanding loan to Aquis of €4.65m. Eventually, in February 2010 it was agreed that Aquis could borrow this sum for a further 1½ years at an annual interest rate of 6%.

26. Notwithstanding the cash flow problems facing Aquis, the business was being rapidly expanded. In addition to the purchase of the Bella and Silva hotels, by the end of 2009 the group had leased five hotels and entered into franchise agreements in relation to another four hotels. The group also acquired the Kiku Restaurant, a Japanese restaurant, in Athens. Mr **Kent** had a plan to install a sushi bar in each of the Aquis hotels. The Sheikh's account in evidence of a party that he attended at the restaurant in October 2009 gives some insight into his character and his relationship with Mr **Kent** at the time:

“Mr **Kent** invited me for dinner and promised a surprise, and we went to this restaurant, Kiku, and the surprise was that he said, 'This your restaurant'. I had no knowledge of when it was bought, or what happened to it afterwards, or how it got bought. But that's what happened.”

27. In late 2009 and early 2010 Mr **Kent** was negotiating the purchase of two further hotels in the Capsis group, one in Rhodes and one in Corfu. The purchase of these hotels was dependent on Sheikh Tahnoon providing funds and Mr **Kent** asked for €5m to secure the purchase of the Capsis Rhodes hotel or €12m to purchase both Capsis hotels. There were discussions about Sheikh Tahnoon borrowing a further €12m from National Bank of Abu Dhabi to fund the purchase.

28. The pattern of communications was that Mr **Kent** was asking Sheikh Tahnoon for funding, Sheikh Tahnoon was asking Mr Rozario to arrange a bank loan and Mr Rozario – either because there was genuine difficulty or, more likely, because he was trying to protect the Sheikh's interests – was keeping Mr **Kent** at bay by saying that he was working on the loan but there were difficulties in obtaining it.

**Acquisition of YouTravel**

29. The Aquis group took on leases of three more hotels in the early part of 2010, bringing the total number of hotels being operated under the Aquis brand to 14. But in the end the purchase of the Capsis hotels did not proceed. The plan that Sheikh Tahnoon would provide funds to assist with this purchase appears to have been overtaken by another project, which was the acquisition of YouTravel. The majority shareholding (of 60%) in Stelow Limited, which in turn held the shares of the two operating companies YouTravel.com Limited and YouTravel.com SA, was owned by Barclays Ventures, a subsidiary of Barclays Bank, with Mr **Kent** holding a minority interest. Barclays decided to close down Barclays Ventures and the opportunity arose to purchase its shares. Sheikh Tahnoon agreed to fund this purchase. As he explained in evidence: "I thought it was a wonderful idea to have YouTravel and Aquis working together to be very profitable".

30. On 17 May 2010 €8m was transferred from the Sheikh's account to Aquis for this purpose. It must have been agreed that the balance of the €8m could be used to meet other commitments of Aquis. On 30 May 2010 Mr **Kent** sent an email to report that he had finalised the acquisition of Barclays' interest in YouTravel at a price of €4m, with €2.5m payable immediately and €1.5m in July. It appears that, of the €8m transferred by Sheikh Tahnoon, €2.5m was paid to Barclays, €3.5m went to pay the final instalment of the purchase price of the Bella and Silva hotels and the rest of the money was used to pay other debts including sums due to Smili, the contractor carrying out renovation work at the Bella and Silva hotels. Barclays' shareholding in Stelow Limited was acquired by a Cypriot company, Stelow (Cyprus) Limited, in which Sheikh Tahnoon and Mr **Kent** each owned 50% of the shares.

**Personal friendship**

31. Sheikh Tahnoon and Mr **Kent** were by this time very close friends and they remained so throughout 2010 and into 2011. Mr **Kent** had rented a flat in Knightsbridge which he offered to Sheikh Tahnoon as somewhere he could stay when he visited London and the two men met up in London on a few occasions. In June 2010 Sheikh Tahnoon came to the Kiku summer party in Athens. He stayed several days in Greece and went with Mr **Kent** to see the Bella and Silva hotels in Crete and the Miramare hotel which the Aquis group had recently leased in Rhodes. In December 2010 Mr **Kent** stayed at the Sheikh's house in Abu Dhabi. As they had the year before, they also spent New Year together. They rented two houses next to each other in the Greek mountains for five days – one for the Sheikh and his party and one for Mr **Kent** and his guests.

**Financial problems continue**

32. During this period Mr **Kent** was chasing the payment of government renovation grants for which Aquis companies had applied. On two occasions, at Mr **Kent**'s request, Sheikh Tahnoon tried to assist by contacting the Greek Ambassador to the UAE. However, no grant payments were forthcoming.

33. As is well known, Greece was in 2010 in the first throes of the government debt crisis which severely depressed the Greek economy. On 1 May 2010 the Greek government announced a series of austerity measures in order to obtain an international bailout. This led to a national strike and rioting in Athens. These troubles in turn, along with other events including the Icelandic volcano eruption in April 2010 which disrupted air travel, had an adverse impact on tourism. Although some financial effects were felt in 2010, the worst problems occurred in 2011 when many tour operators faced cash difficulties. This had serious consequences for Aquis. For example, in 2010 Aquis received pre-payments from tour operators for the 2011 season of €4.155m but in 2011 this dropped to €548,000.

34. On 27 February 2011 Mr **Kent** sent an email to Sheikh Tahnoon again calling on their friendship and begging for financial help. He wrote:

"My brother, I was thinking all weekend and I want to ask you if you can help me for the last time, if you can trust me one more time! PLEASE!"

The email set out "some options in case you can do any of them", and continued:

"Brother, I swear to my family, I believe that we will come out from the problem in the next 6 months but now the problem of the cash is immediate ..."

The message went on in similar vein. Sheikh Tahnoon did not reply to it and did not provide any funds.

35. Mr Rozario had been regularly chasing Mr **Kent** for repayment of the loan that Sheikh Tahnoon had made to Aquis. But Aquis was plainly in no position to repay the money and in July 2011 the loan was converted into new shares. Other sums that Sheikh Tahnoon and Mr **Kent** had lent to Aquis were also capitalised. In addition, Mr **Kent** contributed his own minority shareholding in Stelow Limited as part of a restructuring which left Mr **Kent** and Sheikh Tahnoon each still owning 50% of the two holding companies, Aquis Cyprus and Stelow Cyprus (hereafter "Stelow").

36. As at 31 December 2010 the consolidated accounts of the Aquis group showed accumulated losses of €15.8m, and during 2011 the financial position of the group continued to deteriorate. Mr **Kent** made further attempts to find outside investors but these attempts were unsuccessful. Aquis terminated the leases of two hotels which were loss-making, but this itself incurred severance costs. To raise money, Mr **Kent** negotiated a bank loan for €3.5m (which he personally guaranteed) in April, secured against grants receivable for renovation work at the Bella and Silva hotels; and in August he negotiated an advance payment of €3.8m from a Russian tour operator on account of three years' bookings, secured by a pledge of the shares of Investors SA (the company which owned the Bella and Silva hotels). To obtain this advance, Mr **Kent** had to offer discounted room rates.

37. Despite these measures, by the autumn of 2011 the cash position of the Aquis group had become critical. In September Aquis SA defaulted on a payment due under a plan agreed with TAPIT (the Greek national insurance contributions agency) to pay arrears of national insurance in instalments. As a result, the bank accounts of Aquis were frozen. So too were the personal bank accounts of its directors, and money was confiscated from the accounts. In order to try to protect the Aquis group from further action by the Greek government a new company, Aquis Hotels Limited ("Aquis UK"), was incorporated in England, with Sheikh Tahnoon and Mr **Kent** each owning 50% of its shares. The group was reorganised so that Aquis UK became the holding company; it also acted as a booking agent for the trading companies and received payments from tour operators into a bank account in London.

38. At the end of September, Mr **Kent** flew with his wife to Rabat in Morocco to meet the Sheikh and plead for more financial help. Sheikh Tahnoon spoke kind words but did not offer any money. On 6 October Mr **Kent** met Sheikh Tahnoon in London and on 27 October 2011 he visited the Sheikh on his private island just off the coast of Abu Dhabi to make further requests for funding. On each occasion he received a similar response. By November 2011 Aquis was facing the prospect of being wound up unless it could obtain an immediate injection of funds. Mr **Kent** flew to Abu Dhabi to make a final attempt to plead for help from Sheikh Tahnoon. Sheikh Tahnoon said that he could not offer any more funding but that he would arrange for Mr **Kent** to meet his longstanding business associate, Mr Ahmed El Husseiny, who

might be able to assist. From this point on, Sheikh Tahnoon effectively cut off personal contact with Mr **Kent** and the two men had no further direct dealings with each other.

39. Mr **Kent** went to see Mr Ahmed El Husseiny who criticised Mr **Kent** for creating a financial problem for Sheikh Tahnoon which he now had to sort out. Mr Ahmed El Husseiny introduced Mr **Kent** to his son, Mr Alexander El Husseiny, and to a business colleague, Mr Huseyin Ozcan. Mr Ozcan was called as a witness by Sheikh Tahnoon at the trial. (Mr Ahmed El Husseiny and Mr Alexander El Husseiny were both due to give evidence, but in the event neither was called as a witness.) Mr Ozcan is an experienced businessman and a director of Commodore Contracting LLC, a major construction company of which Sheikh Tahnoon and Mr Ahmed El Husseiny are the two main shareholders and which undertakes projects in many different countries. Mr Ozcan said that he takes pride in being one of the chosen and trusted advisors of Sheikh Tahnoon and Mr Ahmed El Husseiny for matters of great personal importance.

40. It was agreed that Mr Alexander El Husseiny, Mr Ozcan and Mr Rozario would visit the offices of Aquis in Athens to review the financial condition of the business.

**The visit to Athens in December 2011**

41. The visit took place between 1 and 6 December 2011. Its purpose was to enable the Sheikh's representatives to get an understanding of the business and the problems it faced in order to decide what action was in the Sheikh's best interests. As well as holding discussions with Mr **Kent**, Mr El Husseiny, Mr Ozcan and Mr Rozario spoke to other members of the senior management of Aquis and to its accountants, PwC.

42. The Sheikh's representatives formed the view that Aquis SA was well-run at the operational level, with a strong executive management team, and that the business was viable, although it was critically short of cash. As well as owing money to suppliers and contractors, staff salaries not been paid since September. The discussions focussed on a cash flow forecast for the month of December prepared by the finance department of Aquis. This forecast projected a negative cash balance at the end of the month of €10.8m. It also indicated that the amount of cash needed to meet payments due in December or already overdue could be reduced to €6.5m by rolling over (i.e. deferring until later) certain payments amounting to €4.3m. The Sheikh's representatives agreed in principle to make a cash injection of €6.5m in return for Mr **Kent** transferring 20% of the shares of Aquis UK and Stelow to Sheikh Tahnoon so that Sheikh Tahnoon would own 70% of the shares of those companies. On 5 December 2011, while the Sheikh's representatives were still in Athens, they arranged for €2m to be transferred immediately to Aquis. It was agreed that a further sum of €1.5m would be paid before the end of January and the balance of €3m in early April 2012 (or sooner if necessary). It was also agreed that Mr El Husseiny, Mr Ozcan and Mr Rozario would attend board meetings and play an active role in the executive decision-making of Aquis and Stelow.

**February and March 2012 board meetings**

43. The first board meeting attended by the Sheikh's representatives was held on 6 February 2012. When Mr El Husseiny, Mr Ozcan and Mr Rozario came to Athens for this meeting, they insisted that Mr **Kent** sign a formal agreement to increase the shareholdings of Sheikh Tahnoon to 70% before the next payment of €1.5m was released. Such an agreement was duly signed on 4 February 2012 and the sum of €1.5m was transferred to Aquis. The agreement did not include, as Mr **Kent** had requested that it should, provision for the replacement of his personal guarantees with new guarantees and securities acceptable to the banks to be given by both parties in proportion to their revised shareholdings. However, Mr El Husseiny, Mr Ozcan and Mr Rozario each signed a letter of intent pledging their intention to remove per-

sonal guarantees and securities that had been provided by Mr **Kent** to banks "as payments come through" and to re-negotiate the terms of such securities to the best of their ability.

44. At the board meeting Mr **Kent** raised the possibility of selling the Bella hotel and mentioned two potential buyers. Although not named in the minutes of the meeting, these were the Russian tour operator mentioned earlier which had lent money to Investors SA (Tez Tours) and the contractor (Smili) which had been carrying out renovation works at the Bella and Silva hotels (and was owed substantial sums by Investors). The board agreed that such a sale would be in the best interest of the Aquis group and that the possibility should be explored. Mr **Kent** also explained that Santander had now agreed to provide a £3m overdraft facility to YouTravel but that the delay in obtaining this facility had caused payment difficulties to YouTravel. The board agreed that in these circumstances €1.8m of the planned €6.5m cash injection should be distributed to Stelow instead of Aquis.

45. The next board meeting of Aquis and Stelow, again attended by the Sheikh's representatives, took place on 12 March 2012. At this meeting Mr Ozcan asked whether the final €3m tranche of the €6.5m cash injection would be adequate to sustain the group. Mr **Kent** responded that it probably would but that the survival of the group would involve an enormous effort in "fire-fighting". There was also further discussion of the possibility of selling one or both of the Bella and Silva hotels and it was agreed to take this forward.

**YouTravel and the FTI solution**

46. It was not only the Aquis companies which were critically short of cash in early 2012. The YouTravel companies also faced serious financial difficulties. In March, as the start of the tourist season approached, the problems became acute with hoteliers expecting payment before guests booked through YouTravel began to arrive. On 1 March 2012 Mr **Kent** managed to gain some respite by arranging to borrow around £800,000 on a short term basis from a Turkish tour operator which was 50% owned by a major German tour operator called FTI Touristik GmbH ("FTI"). Mr **Kent** personally guaranteed the repayment of this loan, which was due in mid-April. However, the problems continued to escalate and on 19 March 2012 YouTravel was notified by one of its largest clients, Travel Republic, that accommodation booked through YouTravel was no longer on sale on its sites. Within a day or two YouTravel was receiving calls from anxious hoteliers and other creditors concerned about whether they were going to be paid. The situation threatened to spiral out of control and bring down the company.

47. On 22 March 2012 Mr **Kent** met the chief executive of FTI, Mr Dietmar Gunz, in Munich to discuss whether FTI and related companies would be willing to accept delayed payment of sums owed to them. The discussion at this meeting broadened to the possibility of a wider rescue plan for YouTravel. On 25 March 2012 Mr Gunz formulated a proposal whereby FTI would extend credit of €6-8m to YouTravel in return for two call options: an option to buy the Bella and Silva hotels at a price provisionally set at €40m (less the associated liabilities) and an option to purchase 40% of the shares of YouTravel.com Limited for £1.

48. Mr **Kent** informed Mr El Husseiny, Mr Ozcan and Mr Rozario of his discussions with FTI in an email sent on Monday, 26 March 2012 with the subject "urgent opportunities". In the email Mr **Kent** said that he had only received confirmation that they could arrange a deal with FTI the previous day after long discussions with its CEO and that, if the deal was to go ahead, it would have to be concluded by the end of the week.

49. This message came as something of a bombshell to the Sheikh's representatives. During their visit to Athens in December 2011 all the discussions of a critical cash shortage had focused on Aquis and they had received the impression that the YouTravel business was in good health. Cash flow difficulties encountered by YouTravel had been mentioned at the February board meeting but these had been attributed solely to delay in finalising the new

overdraft facility with Santander. As recently as the board meeting on 12 March 2012, the Sheikh's representatives had been told that YouTravel was expected to make a profit in 2012 of around €500,000. Now they were being informed that the business was in crisis and were being asked to approve in a matter of days an agreement to give FTI a 40% stake in the business, not for any capital injection, but simply for extending temporary credit of up to €8m.

50. A conference call was arranged for Sunday, 1 April 2012 to discuss the FTI proposal. During this call the Sheikh's representatives expressed their unhappiness at, in effect, being bounced into a position where they were being given hardly any time to decide whether to approve a deal to address problems of which they felt that they had not been given proper warning. At one point during the call, Mr El Husseiny senior (who, unknown to Mr **Kent**, had been listening in) intervened to say that this was a "no go" deal and to tell Mr **Kent** to look for different solutions. Mr Alexander El Husseiny and Mr Ozcan were less dismissive and asked to be provided with a formal offer from FTI.

51. Mr **Kent** forwarded such an offer to the Sheikh's representatives on 3 April 2012 in the form of a memorandum of understanding prepared and signed by FTI. The offer was open for acceptance until midday on 20 April 2012. It provided for financial support in a maximum amount of €8m until 31 March 2014, though the exact form that this support would take was vague. As well as the two call options, the memorandum of understanding provided for Aquis UK to give a global guarantee of the liabilities of YouTravel to the FTI Group. Mr Alexander El Husseiny responded at once to Mr **Kent** making it clear that Mr **Kent** was not authorised to sign the memorandum of understanding and did not have the consent of Sheikh Tahnoon to proceed with the FTI deal. The consent of Sheikh Tahnoon was necessary, not least because he now had a controlling beneficial interest in Stelow and Aquis UK.

**Execution of the share transfers**

52. When these discussions took place, the transfer of 20% of the shares of Aquis UK and Stelow from Mr **Kent** to Sheikh Tahnoon had not yet been effected. On 9 March 2012 Mr Kouladis had sent to the Sheikh's representatives a draft shareholders' agreement and detailed articles of association for Aquis UK, prepared by English solicitors, which contained various protections for Mr **Kent** as a minority shareholder. Similar documentation for Stelow was sent on 30 March 2012. In an email to Mr **Kent** on 2 April 2012 Mr Ozcan insisted that the share transfers must be executed without these new conditions being introduced. This was reiterated by Mr El Husseiny the next day. In these circumstances Mr **Kent**, who was desperate to receive the last tranche of the €6.5m cash injection, backed down and agreed to execute share transfers without any protections for his minority shareholding. The final tranche of €3m was transferred in several instalments on 4 and 5 April 2012, and on 6 April 2012 the share transfer documentation executed by Mr **Kent** was sent by his lawyers, Kelemenis & Co, to Mr El Husseiny.

53. An exchange of emails between Mr **Kent** and Mr El Husseiny on 5 April 2012 shows that the two men had very different perspectives on the issues concerning YouTravel and that the Sheikh's representatives had lost confidence in Mr **Kent**. Mr El Husseiny's email ended by suggesting that Mr **Kent** should come to Abu Dhabi immediately "so that we can proceed to discuss potential solutions to guide the companies to safety". Mr **Kent** replied early the next morning to say that he could not travel at the moment as he was constantly dealing with YouTravel matters, speaking and exchanging emails with hoteliers and agents and it was critical that he was available every minute. For that reason and because all the relevant personnel and data were at the offices of Aquis, he asked that the Sheikh's representatives should come to Athens or otherwise speak on a conference call.

54. A conference call took place on Sunday, 8 April 2012. Mr **Kent** explained further why he thought the deal offered by FTI was a good one and asked the Sheikh's representatives to

think again. Mr El Husseiny suggested that he and the other representatives of Sheikh Tahnoon should themselves meet Mr Gunz of FTI. Arrangements were made for Mr Gunz to travel to Abu Dhabi the next day for such a meeting and for the Sheikh's representatives then to come to Athens on 10 April 2012.

55. Mr **Kent** was expecting to join the meeting with Mr Gunz on 9 April 2012 by telephone and a conference call facility was set up for that purpose. In the event, however, Mr **Kent** was not included in the meeting. Mr Ozcan suggested in evidence that there was no deliberate decision to exclude Mr **Kent** and that he was not joined in because the time and venue of the meeting were changed. There is nothing in the documents to support this suggestion. I infer from later documents that at this meeting Mr El Husseiny and Mr Ozcan discussed with Mr Gunz the possibility of an alternative deal under which Sheikh Tahnoon would sell his stake in YouTravel to FTI and that Mr **Kent** was not joined in by telephone because they did not want him to be privy to this discussion.

**The meeting at the Grande Bretagne Hotel**

56. On 10 April 2012 the Sheikh's representatives flew to Athens arriving in the evening. On 11 April they attended a board meeting of Aquis and Stelow. Mr El Husseiny, Mr Ozcan and Mr Rozario then returned to the Grande Bretagne Hotel where they were staying and had a discussion amongst themselves. They were convinced that Mr **Kent** had swindled the Sheikh and discussed how they could extricate Sheikh Tahnoon from his business relationship with Mr **Kent**. The main assets of the Aquis group were the Bella and Silva hotels and they formed a plan that Sheikh Tahnoon should take these hotels plus a promise from Mr **Kent** to pay him some more money and walk away. It was agreed that Mr El Husseiny would go and confront Mr **Kent**.

57. Mr El Husseiny, Mr Ozcan and Mr Rozario had all been due to meet Mr **Kent** for dinner that evening but Mr El Husseiny emailed Mr **Kent** to cancel that arrangement and asked Mr **Kent** instead to meet him at the Grande Bretagne Hotel. The two men met in the hotel lobby at 9.30pm. At Mr El Husseiny's suggestion, they went for a walk to the square opposite and had a long discussion which lasted for about three hours. Mr El Husseiny told Mr **Kent** that they had to find a solution which would enable the Sheikh to exit from the business. He proposed that Sheikh Tahnoon should have the two hotels and that, depending on how much they were worth, Mr **Kent** would also need to pay a further sum as Mr El Husseiny would need to be able to demonstrate to the Sheikh that he was getting all or most of his investment back. According to Mr **Kent**, a figure of €5m was mentioned but Mr El Husseiny said that, as Mr **Kent** knew, Sheikh Tahnoon would never ask him for this money if he did not have it.

58. Mr **Kent** gave evidence that, when they returned to the hotel lobby, Mr El Husseiny said that Mr **Kent** would have to accept the valuation he would be giving to Mr **Kent** the next day otherwise he would take Mr **Kent** to court. Mr **Kent** responded that, if they went to court, Sheikh Tahnoon might not necessarily win. At this, Mr El Husseiny said words to the effect that “if we lose in court, we have other ways to get what we want”. Mr **Kent** said “how?” and Mr El Husseiny replied “by blood”. It was Mr **Kent**'s evidence that he understood this as a serious threat to his life.

59. Although it was Sheikh Tahnoon's case that no such threat was made, he did not call Mr El Husseiny as a witness to dispute Mr **Kent**'s evidence. A witness statement made by Mr El Husseiny was served and he was due to testify but on the first day of the trial the Sheikh's solicitors wrote a letter to say that they had been instructed that Mr El Husseiny would not after all be attending the trial to give evidence. No reason was given and no application was made to rely on Mr El Husseiny's witness statement as hearsay evidence.

60. Mr Kouladis, whom I regard as a more reliable witness than Mr **Kent**, gave evidence that Mr **Kent** told him about his conversation with Mr El Husseiny at the time. His recollection of what Mr **Kent** reported is that Mr El Husseiny had said that "a bad decision could be washed with blood".

61. Most importantly, Mr **Kent** made a note of his conversation. It was typed on his computer with the subject: "Mtg me and Alex night 12/4 for 3 hours". The metadata show that the document was created at 5.50am on 13 April 2012. The note states:

"Find a solution me and you

Played theatre that I was very against it, in order not to understand me

7 points I have to get to you in court and beat you in 8 months max, this is cost money

Tahnoon is all or nothing (blood), if honestly loses there are other ways to beat me…..

Really wants exit now !!!!!!!!!!!!!!!!!!!!

If later on you don't go well Tahnoon will never ask you for the 5m extra and you know that John as you know Tahnoon very well but let's close it now like that

Valuation

Bank acceptance

FTI is important to close well for both sides even if we split

Me promissory note (otherwise threat)

Tsala [a reference to the owner of Smili] court and not pay her"

62. Although some attempts were made by counsel for Sheikh Tahnoon to cast doubt on the reliability of this note, I see no reason to regard it as anything other than a broadly accurate record of the substance of what was said by Mr El Husseiny. The very fact that Mr **Kent** made this aide-memoire signifies the importance that he understandably attached to the discussion. In particular, I am satisfied that in the discussion that took place on the night of 11/12 April 2012 Mr El Husseiny:

(i) made it clear that an agreement had to be reached for Sheikh Tahnoon to exit from the business;

(ii) indicated that the basis of the agreement should be that Sheikh Tahnoon would take the two hotels and that Mr **Kent** should agree to pay a further sum which would probably be €5m or thereabouts in the form of a promissory note;

(iii) threatened that, if Mr **Kent** did not agree to the Sheikh's terms, they would take him to court, which would cost money; and

(iv) further threatened that, if Sheikh Tahnoon did not win in court, there were other ways of defeating Mr **Kent**, involving bloodshed.

63. I see no reason to doubt Mr **Kent**'s evidence that he was badly shaken by Mr El Husseiny's threat of physical violence and took it seriously. Counsel for Sheikh Tahnoon relied on the fact that at 00.52 on 12 April 2012, which must have been not long after their meeting had

ended, Mr **Kent** sent Mr El Husseiny an email message saying "remember to discuss on top of everything else the Russian security on investors". This was a reminder to Mr El Husseiny who was due to have a further meeting with Mr Gunz of FTI on 13 April to mention the pledge of the shares of Investors SA which had been given to the Russian tour operator in return for making an advance payment on account of future bookings. It was suggested that the ordinary nature of this email indicates that there had been nothing untoward about the meeting which had just ended. I do not accept this. It is certainly the case that Mr **Kent** carried on discussing business with Mr El Husseiny without pause after their meeting on the night of 11/12 April – including the possibility of a deal with FTI which Mr **Kent** regarded as vital if the business was to survive. He had very strong reasons to do so. But I do not see this as inconsistent with Mr El Husseiny having made a threat during their discussion which frightened Mr **Kent**.

**The terms of separation are developed**

64. The Sheikh's representatives travelled back to Abu Dhabi on 12 April 2012. On 13 April Mr **Kent** had a conference call with Mr El Husseiny and Mr Ozcan in which the terms of the Sheikh's exit from the business were further discussed. Mr **Kent** agreed to instruct his lawyers, Kelemenis & Co, to prepare a summary of the structure of the proposed deal. An initial outline was prepared and circulated that evening, followed by a more detailed summary the next day. This identified various share transfers which would achieve the desired outcome that: (a) Investors SA (which owned the two hotels) would be 100% ultimately owned by the Sheikh; (b) the other Aquis companies would be 100% ultimately owned by Mr **Kent**; and (c) Stelow (and hence the YouTravel business) would be 100% ultimately owned by Mr **Kent**.

65. Under the heading "financial aspects of the deal" the summary recorded that "the Sheikh is looking to be left with a value of €25m" and that "the value of Investors SA is calculated at €42m". It is common ground between the parties that the Sheikh's key commercial condition of exit was that he should receive €25m net and that the Silva and Bella hotels (which were the main assets of Investors) should be transferred to his sole beneficial ownership. It was Mr **Kent**'s evidence, which I accept, that the value of €42m which was attributed to the hotels was set by Mr El Husseiny. It is unclear, however, how this figure was arrived at. It was, as I will indicate later, probably significantly more than the hotels were in fact worth. I think it likely that Mr El Husseiny was content to adopt a generous valuation of the hotels in the interest of being able to present the deal to Sheikh Tahnoon as one under which the Sheikh was getting back most, if not all, of his investment in the Aquis and YouTravel businesses.

66. To reach the target figure of €25m, there were first subtracted from the amount of €42m the liabilities of Investors, which were said to stand at €29m. The amount of the government grant receivable by Investors, which was said to be €4.3m, was then added, leaving a shortfall of €7.7m. The deal summary stated that, of the liabilities of Investors, the amount of €6.5m was owed to suppliers and the national insurance and tax authorities and that Mr **Kent** had agreed to negotiate (on behalf of Investors) the settlement (including timing of payment) of such debts. On the basis of the payment schedule that would be agreed between Mr **Kent** and the various creditors, Mr **Kent** would be responsible for clearing these debts by making back-to-back payments to Investors when the relevant payments were due. This would leave a remainder of €1.2m which would be paid from 2016 onwards. Other aspects of the proposed deal outlined in the summary were that Aquis would lease the Silva and Bella hotels from Investors before the hotels opened for the season at the beginning of May and that Sheikh Tahnoon would undertake to provide the banks which had lent money to Investors with alternative security so as to procure the removal of the personal guarantees given by Mr **Kent**.

67. The deal summary was discussed in a further conference call on 16 April 2012. Following this call the document was revised. The revised draft, which Mr **Kent** sent to Mr El Husseiny and Mr Ozcan later that day, contained two substantive changes. First, there was

removed from the amount of €6.5m owed by Investors to suppliers etc. the sum owed to the contractor for the renovation works (€4.2m), leaving €2.3m to be paid by Mr **Kent** through back-to-back payments to Investors. This left a remainder of €5.4m, which was to be paid by Mr **Kent** from November 2013 onwards in six annual instalments. The second substantive change was to include an undertaking by Mr **Kent** to assist the Sheikh and Investors to obtain payment of the grant payable to Investors by the Greek state (the amount of which was said to be approximately €4.3m) and an agreement by Mr **Kent** to pay to the Sheikh the amount of the grant or any portion of it that was not paid to Investors for reasons that could be attributed to wrongful acts of the management of Investors prior to the execution of a memorandum of understanding of the deal between Sheikh Tahnoon and Mr **Kent**. I infer from the nature of these changes that both were made at the insistence of the Sheikh's representatives.

**The meeting in London**

68. At the request of Mr El Husseiny, Mr **Kent** instructed Kelemenis & Co to draft an agreement to give effect to the revised deal summary. This was sent to Mr El Husseiny for his review on the evening of 18 April 2012. Mr El Husseiny forwarded the draft agreement to someone called Fred Holc, who appears to have been a lawyer who assisted Mr El Husseiny on an informal basis. Mr Holc prepared a revised draft of the agreement and also a draft promissory note.

69. On 20 April 2012 Mr El Husseiny and Mr Ozcan were due to be in London on other business. Mr **Kent** arranged with Mr Ozcan that he would meet them in London with a view to finalising the agreement. In an exchange of messages in which this arrangement was made, Mr Ozcan told Mr **Kent** that the Sheikh's representatives would bring the final version of the agreement with them to London and that Mr **Kent** would have to take it or leave it. When Mr **Kent** objected to this, Mr Ozcan wrote:

"You do whatever you want to do my friend, you come don't come, come with lawyers [or] without, sign or not sign, but I can assure you you'll have exact deal what agreed between us. Again see you tomorrow if you are coming otherwise I was pleased to know you John and good luck to you personally. I'll make whatever possible to stay away because Sheikh will take our hands off anyway." [punctuation added]

From reading the exchange of messages as a whole, I accept Mr Ozcan's explanation in evidence that his remark that the Sheikh "will take our hands off anyway" was not a reference to a form of punishment for thieves but meant that, if Mr **Kent** did not sign the agreement as presented, the Sheikh would take the matter out of the hands of Mr Ozcan and Mr El Husseiny and put it in the hands of his lawyers instead.

70. On the morning of 20 April 2012 Mr **Kent** flew to London with his lawyer, Mr Kelemenis. They met Mr El Husseiny and Mr Ozcan and were provided, in hard copy and by email, with the draft promissory note and the revised version of the draft agreement (now entitled "Framework Agreement") prepared by Mr Fred Holc (and subsequently amended by Mr El Husseiny). The basic financial terms of the Framework Agreement were similar to those embodied in the draft agreement prepared by Kelemenis & Co but additional indemnities from Mr **Kent** and fewer protections for him had been included. Mr **Kent** claimed in evidence that, as foreshadowed by Mr Ozcan the day before, the Framework Agreement and the promissory note were presented to him on the basis that they had to be signed in that form without any changes. In fact, the documentary record shows that some changes were made to the Framework Agreement which were evidently discussed and agreed at the meeting after Mr **Kent** and Mr Kelemenis had reviewed the draft agreements. One change requested by Mr **Kent**, however, was refused by the Sheikh's representatives. Mr **Kent** asked for some words to be included to make it clear that he could negotiate and agree a deal with FTI. Mr El Husseiny refused this request. He did not give any substantive reason for this refusal but said that he and Mr Ozcan were in a

hurry, had another meeting to go to and did not have time for this. Mr El Husseiny and Mr Ozcan then walked out of the meeting.

**Mr Kent's attempt to negotiate**

71. Mr **Kent** and Mr Kelemenis returned to Athens. That evening they sent to the Sheikh's representatives scanned copies of the Framework Agreement and the promissory note signed by Mr **Kent** together with a marked up version of the Framework Agreement (in the form signed by him) showing the changes agreed at the meeting and two further additions requested by Mr **Kent**. The first and main addition was the inclusion of some words to clarify that Mr **Kent** was free to negotiate and agree the FTI deal. The other addition was to specify when the rent for the Silva and Bella hotels was payable (something said to have been previously agreed but which Mr **Kent** and Mr Kelemenis had noticed after the meeting was not in the draft agreement).

72. The response of Mr El Husseiny was to send an email addressed to Mr Rozario and copied to Mr Ozcan, Mr **Kent** and Mr Kelemenis which stated:

"After careful [consideration] of John's email and all its content, I insist that Sheikh Tahnoon does not proceed with the agreement.

Kindly introduce John to the new representatives of Sheikh Tahnoon from S&S and E&Y.

Please be informed that we are no longer authorised to deal with matters relating to YouTravel and Aquis."

"S&S" was a reference to the US law firm of Shearman & Sterling and "E&Y" to the accountants Ernst & Young. The message was plainly intended to give the impression that the matter had now been handed over to the Sheikh's litigation lawyers and forensic accountants.

73. Around the same time as Mr El Husseiny sent this email, Mr Ozcan called Mr **Kent** on his mobile phone. Following the call, Mr **Kent** made a note on his computer which (despite Mr Ozcan's denials), I accept as an accurate record of threats made to him by Mr Ozcan in this conversation. Although Mr Ozcan must have spoken in English, Mr **Kent** recorded the first sentence of his note in Greek as "Tha ehew poly ashimo telos" (Θα έχω πολύ άσχημο τέλος), which means "I will have a very bad end". Mr Ozcan also told Mr **Kent** that his career was finished and said: "You cannot imagine what can happen to you from now on". Again, I accept that Mr **Kent** was shaken by these threats and was left fearing that it was possible that they were genuinely meant and that, if he did not sign the agreement, he might indeed meet a violent end.

74. Despite the strong arm tactics of the Sheikh's representatives, Mr **Kent** did not believe that his former friend, Sheikh Tahnoon, would himself want to see Mr **Kent** harmed. On 21 April 2012 he sent a long email directly to Sheikh Tahnoon addressed "Dear brother", making a last impassioned plea to the Sheikh to sign the version of the agreement sent by Mr **Kent** containing the additional words which would authorise Mr **Kent** to negotiate and agree a deal with FTI. Mr **Kent** pleaded that this was vital because the FTI deal was his only hope of keeping the business alive. In the email Mr **Kent** gave an account of his discussions in the previous days with the Sheikh's representatives which included the following passage:

"When I realised that Alex [El Husseiny] and Huseyin [Ozcan] don't want the FTI deal and at the same time they offer no other alternative which could keep the business alive, I indicated a 2nd option, i.e. whether you would like to exit now. Then Alex said that this has been your side's intention for some time now but was not sure how to structure it. He said that you could exit at a valuation of €25m in assets, receivables and cash from me over a period of time. I

> fully understand that this is a safer option for you and keeps open your prospect of recovering the full amount of your investment and perhaps even having a return on it. At the same time, this 2nd option would allow me to try and secure the survival of Y[ou]T[ravel] and Aquis (without, of course, Silva and Bella) through the FTI deal."

Counsel for Sheikh Tahnoon relied heavily on this email and particularly the above passage as indicating that Mr **Kent** was a willing participant in the Framework Agreement and indeed that the demerger was his idea in the first place. Even if it were right that the option of the Sheikh exiting the business was suggested by Mr **Kent**, the email makes it clear that he saw no other alternative which could keep the business alive and also that it was the Sheikh's representatives who dictated the key terms of the agreement including the requirement that the Sheikh should receive €25m in assets, receivables and cash. But I am in any case satisfied on the evidence – including the evidence of Mr Ozcan about his discussion with Mr El Husseiny before Mr El Husseiny's meeting with Mr **Kent** at the Grande Bretagne Hotel and Mr **Kent**'s note of that meeting – that it was in fact the Sheikh's representatives who decided and informed Mr **Kent** that the Sheikh had to exit the business. I accept Mr **Kent**'s explanation that he wrote his email in the terms that he did – giving a somewhat sanitised account of events – because he believed that it was the approach which had the best hope of appealing to the Sheikh.

**The agreements are signed**

75. Mr **Kent**'s plea directly to Sheikh Tahnoon, however, fell on deaf ears. On 22 April 2012 Mr Rozario (at Mr Ozcan's dictation) informed Mr **Kent** that he (Mr Rozario) was still representing the Sheikh in relation to Aquis and YouTravel and that he did not think that the Sheikh would continue with the agreement but would confirm this the next day. The next day Mr Rozario sent a fresh copy of the Framework Agreement to Mr **Kent** saying that the Sheikh had asked him to send this agreement and that "this is the only agreement he will accept. The other one he will not sign." The attached copy of the Framework Agreement included the addition which Mr **Kent** had requested to specify when the rent for the hotels would be payable but not the words authorising him to negotiate and agree a deal with FTI. Mr **Kent** replied saying that, although he still could not understand why they could not make an addition that was simply meant to clarify what he thought was an agreed point, he would proceed to execute the Framework Agreement and the promissory note and would send scanned copies.

76. Arrangements were made for Sheikh Tahnoon and his advisors to go to Athens on 25 April 2012 in order for Sheikh Tahnoon to sign the agreements and to attend various meetings relating to his taking control of Investors. It appears that the two agreements, although dated and signed by Mr **Kent** on 23 April 2012, were executed by Sheikh Tahnoon on 26 April 2012.

**The terms of the Framework Agreement**

77. For present purposes the key terms of the Framework Agreement were to the following effect:

(i) It was agreed that, immediately after signing the agreement, the parties would execute share transfers as a result of which: (a) Sheikh Tahnoon would become the sole shareholder of Aquis Cyprus and its subsidiary, Investors SA, and (b) Mr **Kent** would be become the sole shareholder of Aquis UK, which would continue to own the other companies in the Aquis group (clauses 2.1 and 2.2);

(ii) Sheikh Tahnoon agreed to transfer to Mr **Kent** any remaining shares in Stelow once the "YouTravel solution" was concluded with FTI (clause 2.7);

(iii) Mr **Kent** agreed to provide Sheikh Tahnoon with a promissory note for the amount of €5.4m (clause 2.3(a));

(iv) Mr **Kent** undertook to pay the "Operational Debts" (as defined) in a total amount of €2,337,251 to Sheikh Tahnoon at least five business days before they became due to the respective creditors, until such time as all the Operational Debts had been paid (clause 2.3(b));

(v) The parties agreed to enter into lease or management agreements for Hotels Bella and Silva under which Mr **Kent** or his nominee would rent the hotels from Investors on specified terms (clause 2.3(c));

(vi) Mr **Kent** represented that the Greek government had agreed to provide a grant to Investors of approximately €4.3m for the renovation of the Bella and Silva hotels and agreed to indemnify Sheikh Tahnoon for any part of the grant that was not received by Investors for any reason attributable to an act or omission of Mr **Kent** (clause 2.4);

(vii) Sheikh Tahnoon agreed to procure the removal of the personal guarantees given by Mr **Kent** to Eurobank and Post Bank in connection with loans to Investors (clause 2.5);

(viii) Mr **Kent** agreed to indemnify Sheikh Tahnoon against all debts and liabilities of Investors and Aquis Cyprus, other than debts in an approximate amount of €29,032,000 defined as the "Investors' Debts", existing at the date of the agreement "or which may arise in the future in relation to activities undertaken by such companies before the date hereof" (clause 4.1).

**Double dealing with FTI**

78. I have referred to some of the communications, including Mr **Kent**'s long email message to Sheikh Tahnoon on 21 April 2012, which show that Mr **Kent** could not understand why the Sheikh's representatives would not agree to his request – to which they appeared to have no substantive objection – to include in the Framework Agreement some words which authorised Mr **Kent** to negotiate and agree a deal with FTI. The real reason for the refusal, concealed from Mr **Kent** at the time, was that the Sheikh's representatives were themselves conducting their own negotiations with Mr Gunz of FTI to sell the Sheikh's majority shareholding in Stelow to FTI instead of transferring it to Mr **Kent**, as Mr **Kent** expected.

79. Following their meeting in Abu Dhabi on 9 April 2012 (see paragraph 55 above), the Sheikh's representatives had a further meeting with Mr Gunz on 13 April 2012. On 14 April 2012 Mr Gunz sent an email to Mr Ozcan, Mr El Husseiny and Mr Rozario entitled "preliminary roadmap" summarising their discussions in which they had agreed the outline of a proposed deal under which Sheikh Tahnoon would sell his 70% interest in YouTravel to FTI for a consideration of €6m. This figure explains why the value that Mr El Husseiny was looking to receive from Mr **Kent** was set at €25m, as the combined total of €31m represented the full amount of the Sheikh's investment in the Aquis and YouTravel businesses. Mr **Kent** was aware of the meeting between the Sheikh's representatives and Mr Gunz on 13 April 2012 but it is plain that he was not told anything about the plan that was being discussed to sell the Sheikh's shares to FTI.

80. The structure of the proposed deal was set out in a non-binding letter of intent dated 17 April 2012. The parties agreed to instruct the accounting firm Deloitte to prepare a financial statement of Stelow and its subsidiaries as at 30 April 2012, and the price of €6m for which FTI intended to purchase the Sheikh's shares was conditional on this financial statement showing an at least neutral or positive net balance across Stelow and its subsidiaries.

81. The Framework Agreement was drafted by the Sheikh's representatives in terms that allowed them to conclude their intended agreement with FTI without revealing that intention. Clause 1.10 of the Framework Agreement stated:

"TBS hereby agrees to transfer any remaining shares in Stelow to IK once the YouTravel Solution is concluded with FTI."

The "YouTravel Solution" was defined as an arrangement whereby FTI would "acquire equity in Stelow and/or its subsidiaries and provide financial relief". So far as Mr **Kent** was concerned, the intention was still to conclude the deal which he had discussed with Mr Gunz under which FTI would be granted an option to acquire a 40% stake in YouTravel for a nominal consideration in return for extending credit to the business. Mr **Kent** thus expected that he would end up owning a 60% interest in YouTravel. He did not know that what the Sheikh's representatives in fact planned to do was to sell all of the Sheikh's shares in Stelow to FTI so that there would be no remaining shares to transfer to Mr **Kent** once the "YouTravel Solution" was concluded.

82. On 17 April 2012 (the same day as the letter of intent with FTI was signed) Mr El Husseiny sent an email to Mr **Kent** in which he said that the Sheikh was insisting that the formalities of the share transfers giving him 70% of the business must be completed (which had not yet happened) before he would discuss the Framework Agreement. This was duly done, although Kelemenis & Co observed that it seemed pointless in circumstances where on the execution of the Framework Agreement all shares in Aquis UK and Stelow were to be transferred to Mr **Kent**. They and Mr **Kent** did not know that Mr El Husseiny had an ulterior reason for insisting that the Sheikh's 70% shareholding in Stelow be perfected. In the same email, Mr El Husseiny encouraged Mr **Kent** to "keep Germans [a reference to FTI] cold till we finish our agreement". I infer that he did not want Mr **Kent** to have any further discussion with Mr Gunz while the Sheikh's representatives were seeking to conclude their own deal with FTI.

83. On the evening of 19 April 2012 (the day before Mr **Kent** was due to meet the Sheikh's representatives in London with a view to signing the Framework Agreement) Mr Gunz sent an email to Mr Ozcan saying that he did not know what their plan was for the meeting with Mr **Kent** but "if the sale of the 70% from Sheikh to FTI is going to be a subject, please present it as a new idea which just came up and which you are planning to offer to FTI". As it was, Mr Gunz need not have been concerned as Mr Ozcan and Mr El Husseiny did not say anything to Mr **Kent** at their meeting in London about their discussions with FTI.

84. On 24 April 2012 (the day after Mr **Kent** had executed the Framework Agreement in the form required by the Sheikh's representatives) Mr Ozcan emailed Mr Gunz to confirm that his side was now ready to proceed with the share purchase agreement as per the letter of intent. Mr Ozcan also said:

"Please be advised that in order not to disrupt your due diligence process we have kept John unaware of our discussions with FTI. We intend to disclose this on conclusion of our SPA."

In the event, no share purchase agreement was concluded. After completing their due diligence process, FTI substantially revised their offer. Under the revised terms, instead of receiving €6m for his shares, Sheikh Tahnoon would be required to inject €2m of further funds into YouTravel and to sell his 70% share for €1 with an earn out provision under which he stood to recover a maximum of €2.3m if and when YouTravel made annual profits of more than €2m. The Sheikh's representatives took the view that a deal on these terms was not worth pursuing. Mr **Kent** was never told about the discussions which had taken place and only learnt of the proposed sale of the Sheikh's shares to FTI from documents disclosed by Sheikh Tahnoon in these proceedings.

85. Mr **Kent** ultimately concluded an agreement with FTI on 13 May 2012 under which he transferred 85% of the shares in YouTravel to FTI for a nominal consideration. He later transferred his remaining 15% interest in YouTravel to FTI on 30 September 2014 for the sum of £3.

**Subsequent events**

86. Sheikh Tahnoon in fact obtained little, if any, benefit from acquiring the beneficial ownership of the Bella and Silva hotels. Mr Panayiotou, who gave evidence at the trial, and other new directors of Investors appointed by Sheikh Tahnoon found the company to be in even worse financial condition than had been realised. In July 2012 Sheikh Tahnoon had to inject approximately €2m of working capital to pay down arrears owed to the banks, the contractor responsible for the renovation works and various administrative expenses. Relations with Aquis deteriorated and in May 2013 Investors terminated the agreement under which Aquis was managing the Bella and Silva hotels (and leasing the Bella hotel). In June 2013, Mr El Husseiny and Mr Ozcan negotiated a preliminary agreement to sell Investors for a sum of €32m (the value attributed in the agreement to the two hotels) less the liabilities of the company. The sale was ultimately completed on 1 January 2014. The purchaser was Kori SA, a company owned by Mr Kaloutsakis, who gave evidence at the trial. The net purchase price was agreed to be €3m payable over a period of 14 years in annual instalments.

C. The dispute

87. Sheikh Tahnoon began this action in July 2013 claiming that Mr **Kent** had failed to pay sums owed under the Framework Agreement. After Mr **Kent** made it clear that he would not make any payments under the promissory note, a claim under the promissory note was added. The total sum claimed by Sheikh Tahnoon under the Framework Agreement and the promissory note is just over €15m.

88. Mr **Kent** resists the claim on two bases. First, he denies that any sum has become payable to Sheikh Tahnoon under the terms of the Framework Agreement. This raises questions about the correct interpretation of the Framework Agreement and also questions of fact. Second, Mr **Kent** has advanced a counterclaim alleging that Sheikh Tahnoon owed him fiduciary and/or contractual duties of which the Sheikh was in breach and also that he was induced to enter into the Framework Agreement and the promissory note by duress which is actionable in tort. As mentioned at the start of this judgment, Mr **Kent** has not ultimately sought to rescind the Framework Agreement or the promissory note but seeks an account of the profits made by Sheikh Tahnoon from the agreements or alternatively damages.

89. In the next part of the judgment I will consider the claim made by Sheikh Tahnoon under the Framework Agreement and the promissory note and will determine what, if any, sum Sheikh Tahnoon is entitled to be paid by Mr **Kent** under those agreements, subject to Mr **Kent**'s counterclaim. I will then consider Mr **Kent**'s counterclaim in part E of the judgment.

D. The Claim

90. The Framework Agreement and the promissory note are both expressly governed by English law and the meaning of these agreements is therefore to be established by applying the well known principles of contractual interpretation summarised by Lord Neuberger in *Arnold v Brittan* [2015] UKSC 36, [2015] AC 1619.

91. The Sheikh's claim under the agreements has four elements, which I will take in turn.

**(i) The promissory note**

92. Under the promissory note, Mr **Kent** promised unconditionally to pay to Sheikh Tahnoon the sum of €5.4m in six instalments. Five instalments of €1m each were payable annually starting on 1 December 2013, followed by a final instalment of €400,000 on 1 December **2018**.

93. Mr **Kent** made it clear from at least the time when his defence in these proceedings was served in August 2013 that he was not going to pay any sum claimed under the promissory

note. By his amended particulars of claim served on 23 January 2014, Sheikh Tahnoon accepted this renunciation by Mr **Kent** of his contractual obligations under the promissory note as bringing that contract to an end. In accordance with the principle established by *Hochster v De La Tour* (1853) 2 E&B 678, Sheikh Tahnoon is therefore entitled to claim as damages all the sums which would subsequently have become payable under the promissory note. To allow for the fact that the final instalment would not have fallen due until 1 November **2018**, the amount of that instalment would need to be discounted to the date of judgment at an appropriate rate of interest.

**(ii) The Operational Debts claim**

94. Recital (I) of the Framework Agreement states:

"TBS understands from IK that Investors SA, a wholly owned subsidiary of Aquis Cyprus, has debts to various creditors in an approximate amount of twenty nine million thirty two thousand Euros (EUR29,032,000) (the "**Investors Debts**"), including the following operational debts:

(a) five hundred forty four thousand two hundred eighteen Euros (EUR544,218) owed to trade suppliers;

(b) six hundred seventy six thousand four hundred six Euros and ninety six cents (EUR676,406.96) owed to other suppliers;

(c) three hundred twenty thousand thirty two Euros (EUR320,032) owed in unpaid tax; and

(d) seven hundred ninety six thousand five hundred ninety four Euros and forty one cents (EUR796,594.41) owed for NIC and TAPIT,

in a total amount of two million three hundred thirty seven thousand two hundred fifty one Euros (EUR2,337,251) (together the "**Operational Debts**")."

Clause 2.3(b) of the Framework Agreement provides:

"IK unconditionally undertakes to pay the Operational Debts (or parts thereof) to TBS, at least five (5) business days before such Operational Debts (or part thereof) become due to the respective creditors, until such time as all the Operational Debts have been paid. The parties shall keep each other informed, with sufficient notice, as to the amounts of the Operational Debts falling due and the respective due dates."

95. The Sheikh's pleaded case is that under clause 2.3(b) he is owed the full amount of the Operational Debts as defined in recital (I) of the agreement, i.e. €2,337,251.

96. One of the many difficulties in making sense of the Framework Agreement is that the Operational Debts are defined as sums which were already owed to various creditors at the date of the agreement and yet clause 2.3(b) is drafted as an undertaking to make payments at least five business days before "such Operational Debts (or part thereof) become due to the respective creditors". It was obviously impossible for Mr **Kent**, after the Framework Agreement had been concluded, to make payments at least five days before debts became due which had already fallen due before the Framework Agreement was concluded.

97. Another difficulty in construing clause 2.3(b) is that it is framed as an undertaking to pay the Operational Debts "to TBS". As the Operational Debts were not owed to Sheikh Tahnoon, these words cannot on any view be read literally and must be intended to require the payment of amounts of money which correspond to the amounts of the Operational Debts. But there is also no apparent sense in requiring such payments to be made to Sheikh Tahnoon personally

since Sheikh Tahnoon had no personal liability to pay the Operational Debts or any sums corresponding to them.

98. To give a sensible meaning to clause 2.3(b), it is necessary to identify the underlying purpose of the clause and how it would reasonably have been understood by someone in the position of the parties when the Framework Agreement was made. Clause 2.3(c) of the Framework Agreement provided that the two hotels owned by Investors SA were to continue to be managed by Mr **Kent** or his nominee after the agreement had been executed and Sheikh Tahnoon had become the sole beneficial owner of Investors. In addition, part of the background to the Framework Agreement was that Mr **Kent** had, to the knowledge of the Sheikh's representatives, been attempting to negotiate revised payment dates with suppliers and other creditors of Investors. Against this background, the evident commercial intention of clause 2.3(b) was that, when Sheikh Tahnoon owned all the shares of Investors, Mr **Kent** should nevertheless remain responsible for agreeing revised payment dates for the Operational Debts with the relevant creditors of Investors and should ensure that Investors was put in funds to make the requisite payments on those dates without any cost to Sheikh Tahnoon.

99. This is how the arrangement was in fact understood and operated in practice. Under what was referred to as the “back to back agreement”, when a sum which had been identified as an Operational Debt in the Framework Agreement became due for payment by Investors to a third party creditor, arrangements were made for Aquis to remit a corresponding amount into Investors' account to enable it to make the payment to the third party.

100. The Finance Director of Aquis, Ms Lucy Simha, in a witness statement relied on by Mr **Kent** as hearsay evidence, explained that, after the Framework Agreement had been made, a reconciliation between the books of Aquis and Investors was carried out by her on behalf of Aquis with two accountants from PwC acting on behalf of Investors. The result of this reconciliation, which was completed in February 2013, was that the amount of the Operational Debts as at the date of the Framework Agreement was agreed to have been €2,298,183.74 (slightly less than the sum stated in the Framework Agreement). Ms Simha also produced 12 schedules of payments said to have been made by Aquis on various dates into the account of Investors to enable Investors to pay its creditors sums which formed part of the Operational Debts. This evidence, which Sheikh Tahnoon did not contest, showed that by 31 December 2013 the outstanding amount of the Operational Debts had been reduced to €1,014,147.55. On 1 January 2014 Sheikh Tahnoon sold Investors to Kori SA, the company owned by Mr Kaloutsakis. Thereafter, on 28 March 2014, an agreement was made between Investors (now controlled by Mr Kaloutsakis) and Aquis SA for the settlement of disputes between them under which any outstanding liability of Aquis to pay the Operational Debts was discharged.

101. It cannot reasonably have been intended that, if Investors paid the Operational Debts having received from Aquis the funds required to do so, Sheikh Tahnoon could nevertheless claim the amount of the Operational Debts from Mr **Kent** on the ground that the payments had not been routed through him personally, even though the aim of ensuring that the Operational Debts were paid at no cost to Sheikh Tahnoon (or to the company which he owned) had been achieved. Equally, it could not reasonably have been contemplated that Mr **Kent** would remain responsible to Sheikh Tahnoon for funding payment of the Operational Debts (let alone for making any payments in respect of the Operational Debts to Sheikh Tahnoon) following any sale or disposal of Investors SA by Sheikh Tahnoon. After Sheikh Tahnoon had disposed of his interest in Investors by selling the company, it made no financial difference to him whether or not the Operational Debts were paid.

102. In these circumstances, to make sense of the clause, the reference in clause 2.3(b) to “TBS” must in my view be understood in this context, as in some other places in the Framework Agreement, as a reference to Investors while it was owned by Sheikh Tahnoon. Thus, as I construe the clause, Mr **Kent** undertook to Sheikh Tahnoon to procure payment of sums equiv-

alent to the Operational Debts to Investors while that company was owned by Sheikh Tahnoon at least five business days before such dates as were agreed with the relevant creditors as revised dates by which the debts would be paid, until such time as all the Operational Debts had been paid. If it be said that this construction involves some fairly muscular manipulation of the wording, it is no less than is necessary in my opinion if the contractual language is to be given a sensible meaning. Alternatively, if I am wrong and the clause on its true construction required payments to be made to Sheikh Tahnoon personally, I think it clear that Sheikh Tahnoon waived the requirement by accepting, through his representatives, during the period that he owned Investors payments made under the "back to back agreement" as performance of Mr **Kent**'s obligation under the Framework Agreement. That acceptance was expressed in correspondence which fulfilled the requirement of clause 7.3 of the Framework Agreement that a waiver of any right under the agreement be given in writing.

103. The evidence of Lucy Simha indicates that all payments of the Operational Debts made during the period when Sheikh Tahnoon owned Investors were funded by Aquis. Certainly, it has not been shown that during that time agreement was reached with any creditor to pay any Operational Debt on a particular date without Aquis making a corresponding payment to Investors to enable Investors to discharge the debt. Accordingly, Sheikh Tahnoon has failed to show that there was any breach of the undertaking given in clause 2.3(b).

104. In their closing submissions, counsel for Sheikh Tahnoon asserted that, while the Operational Debts were being paid down, Aquis was incurring new liabilities to Investors and that in these circumstances Mr **Kent** "failed to deliver to Sheikh Tahnoon any of the value envisaged by the Framework Agreement in this regard". This reliance on other alleged liabilities, however, has not been pleaded, was not raised until closing submissions and in any event does not seem to me to have any bearing on whether there was a breach of the Framework Agreement. At most, it would have given rise to a claim by Investors against Aquis which was amongst the matters compromised by the settlement agreement between those companies dated 28 March 2014.

**(iii) Other debts**

105. As defined in recital (I), the Operational Debts formed part of the "Investors Debts", the latter being defined as debts of Investors SA "to various creditors in an approximate amount of … EUR29,032,000". Clause 4.1(a) of the Framework Agreement provided:

"IK takes full responsibility for and shall, forthwith on demand, indemnify and hold harmless Sheikh Tahnoon against:

(a) all debts and liabilities of Investors SA and Aquis Cyprus, other than the Investors Debts, existing at the date of this Agreement or which may arise in the future in relation to activities undertaken by such companies before the date hereof; …"

106. Sheikh Tahnoon claims a sum of €3,040,803 under this clause on the basis that Mr **Kent** has failed to indemnify him in relation to debts which are described as follows in the re-amended particulars of claim:

(i) €2,199,295 employee social security and tax liability;

(ii) €209,000 interest rate protection contract fee due to Eurobank;

(iii) €220,267 VAT penalty paid in 2013 due to the lease agreement for Bella hotel;

(iv) €38,234 property taxes for years 2009-2011;

(v) €150,673 municipality taxes for years 2008-2011 for hotels Bella and Silva;

(vi) €276,000 for legalisation of various building permit violations that had been identified at Bella and Silva hotels.

107. In English law a promise of indemnity is a promise to prevent someone from suffering a loss. Thus, no obligation to pay arises unless and until a loss is suffered. At that point the indemnifier is in breach of contract for failing to hold the indemnified person harmless against the relevant loss and is liable in damages: see *Firma C-Trade SA v Newcastle P&I Association (The Fanti and the Padre Island)* [1991] 2 AC 1, 35-6 (Lord Goff). Although at common law nothing less than payment would suffice to prove loss, under equitable doctrine which prevails over the common law it is sufficient (in the absence of an express condition of prior payment) to show that the indemnified person has incurred a liability the existence and amount of which have been established by agreement or by a court judgment or arbitration award: see e.g. *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957 (applying this principle in the context of liability insurance).

108. In construing clause 4.1(a) of the Framework Agreement, difficulty again arises from the reference to "TBS". Mr **Kent** could not hold Sheikh Tahnoon harmless against liabilities which were not the Sheikh's liabilities but were liabilities of Investors or Aquis Cyprus. Nor, as in the case of clause 2.3(b), can it sensibly have been intended that Mr **Kent** should continue to take responsibility to Sheikh Tahnoon for any debts and liabilities of Investors following any subsequent sale of Investors to a third party. In my view, to make sense of the clause, it has to be understood as a promise by Mr **Kent** to pay Sheikh Tahnoon the amount of any additional debt or liability of Investors (or Aquis Cyprus) which, while he owned the company, was found to have existed at the date of the Framework Agreement or which during that time arose in relation to an activity undertaken by the company before the date of the Framework Agreement.

109. Accordingly, in order to found a claim under clause 4.1(a), it is necessary for Sheikh Tahnoon to show (i) a debt or ascertained liability of Investors SA or Aquis Cyprus, which (ii) either existed on 23 April 2012 or arose subsequently in relation to an activity undertaken by the company before that date, (iii) was not included in the Investors Debts and (iv) was discovered or arose while Investors SA or Aquis Cyprus was owned by Sheikh Tahnoon.

110. A further difficulty with this head of claim is that the definition of the "Investors Debts" in the Framework Agreement is wholly unspecific. There is no list of such debts attached to the Framework Agreement or referred to in it. Nor have the representatives of Sheikh Tahnoon produced any list of debts which they say can be taken to have constituted the "Investors Debts".

111. In support of his claim Sheikh Tahnoon relied on evidence from Ms Rigaki, one of the accountants employed by PwC who carried out with Ms Simha the reconciliation of the books of Investors with the books of Aquis as at 30 April 2012. Ms Rigaki produced an analysis which she had sent to Mr Panayiotou, the CEO of Investors, on 4 December 2013 of all the liability balances of Investors as at 30 April 2012. This showed total liabilities at that date of €31,231,294.68.

Employee social security and tax liability

112. The first sum claimed in the re-amended particulars of claim, of €2,199,295, is in fact the difference between the total liabilities of Investors as at 30 April 2012 as calculated by Ms Rigaki and the figure of €29,032,000 mentioned in the Framework Agreement. One way of formulating a claim under clause 4.1(a) might have been to argue that it amounted to a promise to pay any amount by which the debts and liabilities of Investors falling within the description in the clause exceeded the amount of €29,032,000. Such an interpretation does not fit the

wording of the agreement, however, which treats the “Investors Debts”, not as a sum of money, but as a set of particular debts the amount of which is not precisely specified since the figure of €29,032,000 is described as “an approximate amount”. In any event, the claim made by Sheikh Tahnoon has not been formulated in this way. (Nor does the figure of €31,231,294.68 relate exactly to the date of the Framework Agreement.) Rather, the claim has been advanced as a claim to be paid the amount of certain specific debts or categories of debt, of which the first is described as “employee social security and tax liability”.

113. The analysis prepared by Ms Rigaki showing total liabilities of €2,199,295 includes many categories of liability which do not match that description. In answer to a request for further information, Sheikh Tahnoon took the opportunity to “clarify” that the sum claimed includes employees' salary as well as social security and tax liabilities. The figures in Ms Rigaki's analysis which appear to correspond to these categories of liability are as follows:

Payroll: €223,599.40

Social security funds: €885,019.85

Taxes: €329,085.99

Ms Rigaki's evidence contained no explanation of how, if at all, these sums compare with the amounts recorded in the books of Investors as at 23 April 2012, if that is what was meant by the “Investors Debts”.

114. At the trial, Sheikh Tahnoon sought to maintain a claim under this head in a sum of €309,431.60. This figure was based on an email dated 6 March 2003 sent to Mr Panayiotou by Petros Tegopoulos, a senior manager at PwC, which contained amounts for “payroll”, “taxes surcharges” and “social security funds surcharges” adding up to this sum under the heading “old liabilities (not included in the Agreement)”. However, Mr Tegopoulos did not give evidence at the trial and Ms Rigaki, who did give evidence, did not address this topic. Nor did Mr Panayiotou, who neither mentioned the figure of €309,431.60 in his witness statement nor, when asked about it, appear to have any knowledge or recollection of it. This head of claim has neither been properly pleaded nor has it been proved that any specific amounts of salary, employee social security liabilities or tax liabilities existed at the date of the Framework Agreement which were not included in the “Investors Debts”.

Interest rate protection contract fee

115. No documentation at all was provided to support the claim for an interest rate protection contract fee said to be due to Eurobank in a sum of €209,000. Mr Panayiotou said that the contract in question was made as part of a hedging programme to protect Investors against increases in interest rates. He said that the contract was structured so that a fee or premium of €209,000 was payable by Investors in semi-annual instalments over the five year term of the contract and that, if the contract was terminated early, Investors was obliged to pay all remaining instalments. Mr Panayiotou did not identify when the contract was made nor when the five year term began beyond saying that he believed that it was in 2009.

116. I am not prepared to rely on the evidence of Mr Panayiotou about the obligations of Investors under this contract without sight of the contractual document, which has not been disclosed by Sheikh Tahnoon. There is also no evidence to show that this liability, to the extent that it existed at the date of the Framework Agreement or arose subsequently while Sheikh Tahnoon owned Investors, was not included in the Investors Debts.

VAT penalty

117. Mr Panayiotou explained that the "VAT penalty" of €220,267 was an obligation to pay VAT on the cost of renovation works to the Bella Hotel carried out by the previous owners (the Metaxas family) before the hotel was acquired by Investors. He said that under Greek law there is an exemption from paying VAT on such works if the property in question is owner-managed. That condition was fulfilled until Investors and Aquis became separately owned and the Bella Hotel was leased by Investors to Aquis. At that point Investors became liable to pay the VAT.

118. The lease of the hotel to Aquis which triggered this liability was entered into pursuant to clause 2.3(c) of the Framework Agreement, by which the parties agreed that Hotel Bella would be rented by Mr **Kent** or his nominee starting on 1 May 2012. The liability to pay VAT was therefore not one which existed at the date of the Framework Agreement. Nor did it arise in relation to any activities previously undertaken by Investors (or Aquis Cyprus) – but rather in relation to activities undertaken by the former owners before Investors became part of the Aquis group and the company which originally owned the Bella Hotel merged with Investors (see paragraph 19 above). Accordingly, this sum is not covered by clause 4.1(a).

Property taxes and municipality taxes

119. The figures of €38,234 and €150,673 which are claimed, respectively, for property taxes and municipality taxes were not supported by the evidence of Mr Panayiotou (or any other witness). Mr Panayiotou in his witness statement gave figures of €55,000 for property taxes for the years 2009-2011 and €81,241 for municipality taxes for the years 2008-2011. He described the latter sum as "evolving due to ongoing negotiations of Mr Kaloutsakis with the municipality", implying that the amount of €81,241 may be or may have been reduced. In his oral evidence, Mr Panayiotou could not explain the discrepancies between the amounts given in his witness statement and the amounts claimed in the re-amended particulars of claim. No documents were put in evidence to support any of the figures stated. Nor was any attempt made to show that these alleged liabilities were not included in the Investors Debts. Again, therefore, these items must be rejected for want of proof.

Legalisation of building permit violations

120. The final amount claimed of €276,000 was said by Mr Panayiotou to have been estimated by a consultant who was appointed to review the hotels and who identified various violations of building permit regulations and gave an opinion on what fees would be payable to the authorities for a waiver of these violations. A document included in the trial bundle which I take to be the consultant's report states that the calculations given in it "are indicative and can be used only for rough estimations". Mr Panayiotou went on to say that he understood that subsequently Mr Kaloutsakis reviewed the calculations and estimated a lower number (though Mr Panayiotou could not say what this lower number was). This evidence indicates that no amount had been agreed with the Greek authorities as a liability while Investors was owned by Sheikh Tahnoon (nor, so far as the evidence shows, has any amount since been agreed). Moreover, an email dated 3 April 2013 from an individual who I take to be the consultant mentioned by Mr Panayiotou quoting for his firm's services indicates that the relevant breaches of building regulations related to a law enacted in 2011. Mr Kouladis was asked about this and said that the relevant law was introduced in 2011 and took effect at some time in 2012 – he thought in the spring but was not sure.

121. In these circumstances, Sheikh Tahnoon has failed to prove that a liability of the kind described existed in any ascertained amount at the date of the Framework Agreement or arose while Sheikh Tahnoon owned Investors in relation to activities undertaken before 23 April 2012.

122. I conclude that the claim under clause 4.1(a) of the Framework Agreement fails in its entirety.

**(iv) The grant claim**

123. The final head of claim is based on clause 2.4 of the Framework Agreement which states:

"IK represents that the Greek Government has agreed to provide a grant to Investors SA of approximately four million three hundred thousand Euros (EUR 4,300,000) for the renovation of the hotels owned by Investors SA (the "Grant"). In the event that the Grant is not received by Investors SA for any reason attributable to an act or omission of IK (past or present) then IK shall indemnify TBS in full for any part of the Grant that has not been received by TBS from the Greek Government."

124. A similar difficulty arises in interpreting this clause as in interpreting clauses 2.3(b) and 4.1. As worded, clause 2.4 requires Mr **Kent** to indemnify Sheikh Tahnoon for any part of the grant that "has not been received by TBS from the Greek Government". It was, however, never expected that Sheikh Tahnoon would personally receive any grant payments from the Greek government. As the earlier part of the clause indicates, the prospective recipient of the grant was Investors. A further difficulty in interpreting the clause is that it does not specify any date by which, if the grant has not been received, the obligation to indemnify Sheikh Tahnoon arises.

125. To make sense of clause 2.4 the second reference to "TBS" must again, in my view, be read as meaning Investors while in the ownership of Sheikh Tahnoon. As for the timing of the indemnity, in circumstances where no date is mentioned it seems to me that the clause is capable of applying at any date after the agreement was signed on which it can be shown that the failure to receive the grant (or some part of it) by that date was attributable to an act or omission of Mr **Kent**. On general principles of causation this would ordinarily require Sheikh Tahnoon to prove, as a minimum, that, but for the relevant act or omission, the grant (or part of it) would have been received by the date in question.

126. Sheikh Tahnoon relied on evidence given by Mr Kaloutsakis and Mr Panayiotou of their understanding of requirements which, under the relevant Greek law, must be met before grants will be paid. For example, there were said to be requirements (amongst others): (1) that equity had been injected into the company seeking the grant in an amount at least equal to the costs of construction which were not covered by the grant (being, in the case of the Silva Hotel, 70% of the costs); and (2) that at the time of applying for disbursement of the grant the applicant company had positive working capital. It was said that these and other requirements were not fulfilled, with the result that Investors was not in fact eligible to receive the grant.

127. One of the problems with this claim is that no documents have been disclosed relating to the application for the grant. Mr Panayiotou and Mr Kaloutsakis both confirmed that a grant file exists. Mr Panayiotou said that it had been handed over to Mr Kaloutsakis when Investors was sold. Mr Kaloutsakis was asked whether he had handed over the file to the solicitors acting for Sheikh Tahnoon (Mr Kaloutsakis being one of the custodians named for the purposes of the Sheikh's disclosure). He replied that he thought they already had the file. For whatever reason, however, the grant file has not been disclosed.

128. Presumably the grant file would, amongst other things, have shown the conditions which had to be met before the grant would be paid. Nevertheless, assuming that those conditions are accurately described by Mr Kaloutsakis and Mr Panayiotou, it is by no means self-evident that, say, the fact that Investors had a negative working capital can be said to be attributable to an act or omission of Mr **Kent** as opposed to simply being a consequence of the

parlous financial state of the Aquis group. Even if it was attributable to an act or omission of Mr **Kent**, it does not follow that the non-receipt of the grant while Investors was owned by Sheikh Tahnoon was also attributable to that act or omission. For one thing, the two deficiencies that I have mentioned could have been remedied by injecting sufficient equity into the company and reversing its working capital deficit.

129. Another reason identified by Mr Kaloutsakis which meant that the grant could not be recovered was that the number of employees of Investors working at Bella Hotel was reduced as a result of the lease of the hotel to Aquis. He explained that the lease had the automatic consequence that employees were transferred from Investors to Aquis. Since the lease of the hotel was provided for in the Framework Agreement itself, the lease and its consequences cannot be regarded as a reason attributable to an act or omission of Mr **Kent**.

130. A further set of issues which, according to Mr Kaloutsakis and Mr Panayiotou, were a bar to disbursement of the grant related to a dispute with the contractor, Smili. They gave evidence that there were numerous problems including invoicing by the contractor for work not done, failure to invoice for work which had been done, discrepancies between work done and the plans approved in connection with the grant application and failure of the contractor to prepare various technical reports which were needed in order to obtain payment of the grant. It is again far from clear that these matters can be said to have been attributable to acts or omissions of Mr **Kent**.

131. More fundamentally, it has not been shown that, even if all of the legal requirements for disbursement of the grant had been met, the grant (or any part of it) would have been paid in the period that Sheikh Tahnoon owned Investors. Mr **Kent** said in evidence that, whereas before the Greek government debt crisis the average time between approval and payment of grants was 12 months, since the crisis began in 2010 the payment of grants has essentially dried up. I regard that statement as exaggerated, since it is a matter of record that during 2011 grant payments were made in respect of renovation works carried out at the Agios Gordios and Pelekas Beach hotels in Corfu (the first two hotels which Aquis had acquired). Nevertheless, there is objective evidence that the grant process has been subject to long delays. Notably, Mr Kaloutsakis said that he had submitted an amended grant application for the Bella and Silva hotels in February 2016 and since then has been waiting for the Ministry inspectors to visit the hotels to inspect the works undertaken. When he gave evidence at the trial, some 21 months after the amended grant application was lodged, Mr Kaloutsakis was unable to give any indication of when the application is likely to be dealt with. In these circumstances, even if the grant application made by Investors before the Framework Agreement was concluded in April 2012 had been fully compliant with the grant conditions, I am unable to say that it is more probable than not that any grant payment would have been received by the beginning of 2014 when Sheikh Tahnoon sold Investors. It is no doubt possible that in such a situation the price for which Mr Kaloutsakis agreed to buy the company would have been higher, but there was no evidence to that effect and Sheikh Tahnoon did not seek to quantify any claim on that basis.

132. For all these reasons it has not been shown that the non-receipt of grant for the renovation of the Bella and Silva hotels while Sheikh Tahnoon owned Investors was attributable to an act or omission of Mr **Kent**.

133. The real complaint of Sheikh Tahnoon, as I see it, is that the representation recorded in the Framework Agreement that the Greek government had agreed to provide a grant to Investors of approximately €4.3m for the renovation of the hotels was untrue. Mr **Kent** agreed in evidence that €4.3m was a maximum figure for the amount of grant that could be claimed and that the amount actually payable depended on the cost of the works undertaken. In order to receive €4.3m in grant, it would have been necessary to show expenditure of some €14.2m. At the time of the Framework Agreement, the amount which had been spent on renovation work was only around €8.5m. This meant that, even if the grant application had been perfectly

in order and there had been no delay in payment, the most that could have been received in grant was around €2.6m.

134. Mr **Kent** and Mr Kouladis maintained that this was explained to the Sheikh's representatives who were therefore aware of the position when the Framework Agreement was signed. I am doubtful about this as the documents tend to suggest otherwise. But it is not necessary to decide the point as the re-amended particulars of claim do not include any claim based on any alleged misrepresentation. The only claim made is for a breach of clause 2.4 and it cannot be said that misrepresentation of the amount of grant receivable was a cause of the grant not being received. For the reasons given, I have found that no breach of clause 2.4 has been established.

**Conclusion**

135. I conclude that, subject to the counterclaim, Sheikh Tahnoon is entitled to be paid as damages the value of the promissory note but has not made good his claims based on clauses 2.3, 2.4 and 4.1 of the Framework Agreement.

E. The counterclaim

The starting-point for Mr **Kent**'s counterclaim is his case that Sheikh Tahnoon owed him fiduciary and contractual duties. He alleges that, but for breaches of these duties by Sheikh Tahnoon, he would not have entered into the Framework Agreement and promissory note. Mr **Kent** has also pleaded that he was induced to enter into the agreements by misrepresentation, duress and/or undue influence. These allegations were narrowed in the course of closing submissions. Mr **Kent**'s case was confined to duress and the arguments based on alleged misrepresentation and undue influence were not pursued. Mr **Kent** also abandoned his claim to rescind the promissory note, having at an earlier stage of the proceedings made and then later withdrawn a claim to rescind the Framework Agreement. But he has maintained that the duress to which he was allegedly subjected is actionable in tort and gives him a claim for damages in the same amount as any damages which he is liable to pay Sheikh Tahnoon under the Framework Agreement and the promissory note. A parallel claim is made for damages for breach of contract. Further and in the alternative, Mr **Kent** claims an account of the profits made by Sheikh Tahnoon under the Framework Agreement and the promissory note. The claim for an account of the profits depends on establishing a breach of fiduciary duty.

I will address Mr **Kent**'s arguments in the following order. I will first consider the nature of the parties' legal relationship before the Framework Agreement and the promissory note were concluded and in particular (i) whether Sheikh Tahnoon owed fiduciary duties to Mr **Kent** and (ii) what relevant contractual duties he owed to Mr **Kent**. I will then examine Mr **Kent**'s allegations that he entered into the Framework Agreement and the promissory note as a result of breaches of such duties and/or under duress. Finally, I will consider whether Mr **Kent** is entitled to damages for breach of contract or in tort. Because I conclude below that Sheikh Tahnoon did not owe any fiduciary duties to Mr **Kent**, Mr **Kent**'s claim for an account of profits falls away.

136. Although the Framework Agreement and promissory note are expressly governed by English law, there was no prior agreement between the parties that English law should regulate any of their dealings. Those dealings had little connection with England and Wales and were most closely connected with Greece. Neither party, however, has sought to rely on Greek law nor on any other foreign law in these proceedings. When I raised this point at the start of the trial, both parties agreed that the whole of their dispute should be decided by applying English law, which I shall do.

**Nature of the parties' legal relationship**

137. Mr **Kent**'s pleaded case is that, from 2008 onwards, he and Sheikh Tahnoon were in a partnership together, or alternatively in another form of joint venture in which they owed each other fiduciary duties. Mr **Kent** further claims that Sheikh Tahnoon owed him contractual duties (i) to provide funding which was reasonably required, (ii) not to terminate the joint venture except with reasonable notice and on reasonable terms, and (iii) to act in good faith. Sheikh Tahnoon denies the existence of these duties. It is his case that he was merely an investor in the Aquis and YouTravel companies and that he owed no fiduciary duties and no relevant contractual duties to Mr **Kent** before the Framework Agreement and promissory note were concluded.

**Terms expressly agreed between the parties**

138. In assessing the nature of the parties' relationship and Mr **Kent**'s contention that Sheikh Tahnoon owed him fiduciary as well as contractual duties, the starting-point must be to identify what was expressly agreed between them. As Mason J observed in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97:

"That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

See also Kelly v Cooper [1993] AC 205, 215; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 205; *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567, para 30.

There are two important points to notice here. First, what the parties have contractually agreed may determine whether their relationship is of a fiduciary nature – for example, whether they have entered into a partnership or whether one has agreed to act as agent for the other. Second, where the parties are in a fiduciary relationship, the scope and content of the fiduciary duties owed by one to the other will be shaped and may be circumscribed by the terms of the contract between them.

139. It is common ground in this case that Sheikh Tahnoon and Mr **Kent** entered into an oral contract in October 2008 under which Sheikh Tahnoon agreed to invest in the Aquis business and to become a beneficial owner with Mr **Kent** of the Aquis group of companies on a 50-50 basis (later altered in December 2011 to increase the share of Sheikh Tahnoon to 70%). A key point of dispute, however, is whether Sheikh Tahnoon made a contractual commitment to provide future funding for the business or whether there was simply a series of separate agreements subsequently made on particular occasions when Sheikh Tahnoon agreed to invest more money.

140. Mr **Kent** contended that it was an express term of the agreement made in October 2008 that Sheikh Tahnoon would make available to, and invest in, Aquis such sums as Mr **Kent** advised that Aquis reasonably required from time to time with a view to achieving the business objective. The basis for this contention was a conversation said to have taken place in the Sheikh's home in Abu Dhabi on 5 October 2008 when Mr **Kent** returned from a meeting with the Abu Dhabi Investment Council. According to Mr **Kent**, in this conversation Sheikh Tahnoon stated that, if funding could not be obtained from an institutional investor, he (the Sheikh) would make available the funding required to grow the business. It is Mr **Kent**'s case that this statement was made against the background that Mr **Kent** had explained, both in discussion and in the investment presentation which Sheikh Tahnoon had read, his ambitious

plans for expanding the business and purchasing hotels and the fact that the investment opportunity was a long term one with a time frame of at least five years before any possible exit. It was submitted on behalf of Mr **Kent** that, in agreeing in this context to invest in the business and to provide funding if it could not be obtained from a third party, Sheikh Tahnoon was committing himself to provide whatever funds were reasonably required to achieve the objectives set out in the presentation.

141. I regard this contention as wholly unrealistic and inconsistent with the history of the business dealings between Mr **Kent** and Sheikh Tahnoon set out in part B of this judgment. In the first place, the statement said to have been made by Sheikh Tahnoon in a conversation on 5 October 2008 on which this edifice is based is not evidenced in any document. Not only was it not recorded or mentioned in any email or other communication at the time but there is no reference to it in any later communication between Mr **Kent** and Sheikh Tahnoon or any of the Sheikh's representatives. I am prepared to accept that Sheikh Tahnoon may have made a statement along the lines that Mr **Kent** asserts, but I cannot begin to accept that any such statement was in fact understood or would reasonably have been understood by Mr **Kent** as anything more than an expression of general intent which was not intended to have contractual force. Had Mr **Kent** thought otherwise, I am sure that he would have made some reference to this alleged commitment at some later point in his dealings with Sheikh Tahnoon, which he never did.

142. It was said by Mr **Kent** and on his behalf that the Sheikh is a man of importance and the fact that Mr **Kent** was deferential and respectful in his dealings with him should not be taken to indicate that Sheikh Tahnoon did not make a contractual commitment. I do not find this argument persuasive. It would have been perfectly possible for Mr **Kent** to show respect and even deference towards Sheikh Tahnoon but yet, when financial problems arose, to remind his close friend in the most polite – or even, if he chose, obsequious – terms of the commitment which the Sheikh had made and which Mr **Kent** was counting on. I have no doubt that Mr **Kent** would have done this if he had believed that the Sheikh was under any obligation to provide funding – particularly when Mr **Kent** started to become desperate and the business was on the brink of collapse. However, in his communications (from some of which I quoted earlier) Mr **Kent** always approached Sheikh Tahnoon as a supplicant begging for help and never once suggested that the Sheikh had made any commitment to make any funds available beyond those he had already advanced.

143. On two occasions Sheikh Tahnoon agreed to provide funds for the purpose of particular transactions. These were, first, the purchase of the Bella and Silva hotels and, second, the purchase of the majority shareholding in YouTravel from Barclays Ventures. It was suggested on behalf of Mr **Kent** that, in approving the purchase of the Bella and Silva hotels, Sheikh Tahnoon implicitly agreed to fund not just the upfront payment of €8m payable at the time of purchase but also the later instalments of the purchase price. However, the correspondence shows otherwise. It shows, first of all, that the intention was to pay the later instalments out of operating profits. It also shows, importantly, that there was no expectation that Sheikh Tahnoon would provide funding on a unilateral basis; rather it was understood that Mr **Kent**, as an equal shareholder, was obliged to contribute 50% of any capital injection. That was achieved in relation to the €8m payment by treating half of it as a loan to Mr **Kent**. Similarly, although Sheikh Tahnoon provided all the cash required to buy the majority shareholding in YouTravel, the purchase was followed by a capital reorganisation in which the principle of equal ownership and equal contributions was maintained. All other funds made available by Sheikh Tahnoon in response to Mr **Kent**'s requests for assistance were provided either as loans to Aquis (which were later capitalised) or, in the case of the cash injection agreed in December 2011, as a purchase by Sheikh Tahnoon of additional equity in the companies.

144. In sum, the history of financial dealings between Sheikh Tahnoon and Mr **Kent** clearly shows the understanding between them to have been that: (i) Sheikh Tahnoon had no con-

tractual obligation to make funds available for investment other than when on particular occasions in particular amounts and on particular terms he agreed to do so; and (ii) while the intention was that Sheikh Tahnoon and Mr **Kent** would each own equal shares of the companies which carried on the Aquis and YouTravel businesses, that required Mr **Kent** to contribute an equal share of any equity investment.

145. I would add that, even if Sheikh Tahnoon had undertaken a contractual obligation to make available to, and invest in, Aquis such sums as were reasonably required to achieve its business objectives, any such obligation could not sensibly have been understood to require the Sheikh to go on putting money into the business without limit. On any view, the sum of over €31m which he invested over a period of some 4½ years was a very substantial amount of money. I do not consider that Sheikh Tahnoon can be criticised for deciding in April 2012 that he had provided all the funding that could reasonably have been asked of him, and more, and that to make any further funds available would be to throw good money after bad.

**Partnership**

146. In closing submissions, Mr **Kent** abandoned his case that there was a partnership between himself and Sheikh Tahnoon. I am sure that he was right to do so.

147. Although Mr **Kent** could point to a number of documents in which he or Mr Rozario referred to Sheikh Tahnoon and himself as "partners" (mainly in the context of trying to attract investment in Aquis from third parties), the use of the term "partner" in ordinary speech is wider and looser than its meaning as a concept of English law. The fact that the parties referred to themselves as "partners" therefore does not determine the nature of their legal relationship. (Still less does the fact that they expressed love and friendship towards each other and called each other "brother".) In its legal meaning partnership is "the relation which subsists between persons carrying on a business in common with a view to profit": see section 1(1) of the Partnership Act 1890. Other general characteristics of a partnership are: (i) mutual agency whereby each partner has authority to represent and bind the other(s), and (ii) joint liability for the debts and obligations of the partnership business.

148. It is clear that the legal relationship between Mr **Kent** and Sheikh Tahnoon was not of this character. They did not themselves carry on any business in common – or for that matter individually – having chosen a corporate structure in which the relevant businesses were carried on by Aquis SA and other companies established for that purpose. The involvement of Mr **Kent** and Sheikh Tahnoon was as shareholders who contributed capital to holding companies which were themselves established to own shares of the companies which carried on the business. In addition, Mr **Kent** was a director and manager of the trading companies and both men made loans at various times to Aquis SA. Although there are no doubt cases where parties may be regarded as carrying on a business as partners notwithstanding their use of corporate vehicles, Aquis SA and the other trading companies were far from being creatures of their beneficial owners. Although Mr **Kent** was the driving force in the business, there were other directors (such as Mr Kouladis) who played an important part in decision-making. I see nothing in the facts of this case to suggest that any business was being carried on by Mr **Kent** and Sheikh Tahnoon over and above the business of Aquis SA and the other group companies. Furthermore, there is no suggestion that Mr **Kent** was authorised to enter into contracts which bound Sheikh Tahnoon or vice-versa, nor that there was any intention that Sheikh Tahnoon or Mr **Kent** should be jointly liable for debts incurred or obligations undertaken by the other. In short, the allegation that there was a partnership between them was untenable.

**Fiduciary duties**

On behalf of Mr **Kent**, Mr Lewis submitted that, even if they were not in partnership, Sheikh Tahnoon and JK engaged in a joint venture in which they owed each other fiduciary duties. He accepted that, as has often been noted, the term "joint venture" is not a term of art and does not have a precise legal meaning, being a term that can be used to describe a variety of different possible arrangements: see e.g. *BBC Worldwide Ltd v Bee Load Ltd* [2007] EWHC 134 (Comm), para 103; *Winton v Rosenthal* [2013] EWHC 502 (Ch), para 77; *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910, para 34. He also emphasised that the existence of a fiduciary relationship is not an all or nothing question and that fiduciary obligations may arise which are tailored to the context of the particular relationship. As Lord Browne-Wilkinson cautioned in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 206:

> "The phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case."

> Mr Lewis submitted that joint venturers may owe fiduciary duties to one another, albeit that the questions of whether such duties are owed, and if so what duties are owed, are fact-specific. In the words of Lloyd LJ in *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910, para 34:

> "Each relationship which is described as a joint venture has to be examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature."

Mr Lewis relied particularly on two cases to illustrate how fiduciary duties may arise between parties to a joint venture which is not a partnership. In *Murad v **Al**-Saraj* [2004] EWHC 1235 (Ch) the claimants, who were two sisters living in Bahrain, agreed to buy a hotel with the defendant (Mr **Al**-Saraj), an Iraqi businessman living and working in England. Etherton J (as he was) found that, as Mr **Al**-Saraj was well aware, the claimants were wholly dependent upon him for his advice and recommendation in relation to the decision to purchase the hotel and for negotiating and arranging the transaction on their behalf. The judge held that the relationship between the parties was "a classic one in which the claimants reposed trust and confidence in Mr **Al**-Saraj by virtue of their relative and respective positions" and that Mr **Al**-Saraj owed fiduciary duties to the claimants: see para 332. Mr **Al**-Saraj was found to be in breach of those duties in not disclosing the fact that part of his own financial contribution to the purchase of the hotel consisted, not of cash, but of commissions owed to him by the vendor. The significance of this finding was that it enabled the claimants to obtain an account of the profits made by Mr **Al**-Saraj from the transaction in circumstances where they had suffered no loss as the hotel had been re-sold at a price which resulted in a profit to them. This decision was upheld on appeal: see *Murad v **Al**-Saraj* [2005] EWCA Civ 959.

> 149. The second case relied on by Mr Lewis was *Ross River Ltd v Waveley Commercial Ltd* [2012] EWHC 81 (Ch), which involved a joint venture between two companies (Ross River and WCL) to develop some properties. Under the joint venture agreement WCL was solely responsible for managing the development, negotiating its sale (at a time of WCL's choosing) and distributing the profits. Morgan J found that Ross River reposed a high degree of trust in WCL to operate the joint venture for the benefit of both parties and that, in the circumstances, WCL owed a fiduciary duty to act in good faith in relation to Ross River's entitlement to receive its share of the net profits and not to do anything in relation to the handling of joint venture revenues which favoured itself to the disadvantage of Ross River's entitlement to receive that share. The judge also found that the individual who controlled WCL and managed the development personally owed a similar fiduciary duty to Ross River. This decision was also upheld on appeal: see *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910.

> 150. On behalf of Mr **Kent**, Mr Lewis submitted that, as in these cases, the parties in the present case were joint venturers who reposed a high degree of trust and confidence in each other. He argued that this was the foundation of the relationship between Mr **Kent** and Sheikh Tahnoon. Mr **Kent** was responsible for the day-to-day management of the business and Sheikh Tahnoon trusted him to manage the business for their mutual benefit. For his part, Mr **Kent** relied on Sheikh Tahnoon to provide funding when it was reasonably required. Further-

> more, Mr **Kent** not only invested his own savings in the business but, as Sheikh Tahnoon knew, undertook personal liability by guaranteeing repayment of bank loans and other debts of Aquis SA and other group companies. Mr Lewis submitted that these facts gave rise to fiduciary duties on each party: (i) to act in good faith, (ii) not to place himself in a position where duty and personal interest might conflict; (iii) not to make any personal profit from the joint venture other than that agreed with the other; (iv) not to make a personal profit from the trust reposed; and (v) not to abuse the trust reposed.

In considering this submission, I bear in mind that it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship. The paradigm case of a fiduciary relationship is of course that between a trustee and the beneficiary of a trust. Other settled categories of fiduciary include partners, company directors, solicitors and agents. Those categories do not include shareholders, either in relation to the company in which they own shares or to each other. While it is clear that fiduciary duties may exist outside such established categories, the task of determining when they do is not straightforward, as there is no generally accepted definition of a fiduciary. Indeed, it has been said that a fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary": see Finn, *Fiduciary Obligations* (1977), p2, cited with approval by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18. If this is right, it simply begs the question of how to determine when a person is subject to fiduciary obligations if not by analysing the nature of their relationship with the person to whom the obligations are owed.

Despite saying in the *Mothew* case that a fiduciary is defined by the obligations to which he is subject and not the other way round, Millett LJ did give a general description of a fiduciary as "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence": see [1998] Ch 1, 18. This description has often since been cited with approval, including by the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250, para 5. To similar effect, in another much quoted statement, Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96-97, said:

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."

Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith, "Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as the "distinguishing obligation of a fiduciary". Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position.

These principles explain the two cases on which Mr Lewis particularly relied. In *Murad v **Al**-Saraj* the claimants entrusted the defendant with extensive discretion to act on their behalf and in their interests in selecting a suitable property for investment and in negotiating and arranging the transaction for them. Similarly, in *Ross River Ltd v Waveley Commercial Ltd* the control which WCL had over all aspects of the management of the joint venture project, and over the disposal of the funds arising from it and of the assets comprised in it, and the control which its director was able to exercise over WCL and what it did in these and all other respects, was held by the Court of Appeal to justify the judge's conclusion that both company and director were under the identified fiduciary duties.

By contrast, in the present case Sheikh Tahnoon did not undertake to act for or on behalf of Mr **Kent** in any way, let alone in any managerial capacity. The main decisions that Sheikh Tahnoon was required to make were decisions about when, for what purposes and how much money to invest in the companies which Mr **Kent** was responsible for managing. I have already found that Sheikh Tahnoon did not make any open-ended commitment to provide funding and had no continuing obligation to do so. His motive for investing was obviously the hope of making a profit and Mr **Kent** could have had no legitimate expectation that Sheikh Tahnoon would subordinate that interest to the interests of Mr **Kent** or those of the companies in which Sheikh Tahnoon had invested. The relationship was a commercial one in which Sheikh Tahnoon was entitled to decide whether to make further funds available on the basis of a judgment about what would be in his own best financial interests.

I agree with the submission of Mr Rees QC that, if there was any fiduciary duty in this case, it was owed by Mr **Kent** as the party in charge of managing the business to Sheikh Tahnoon as his co-venturer. Suppose, purely for the sake of argument, that while Sheikh Tahnoon and Mr **Kent** were co-owners of the Aquis group of companies an opportunity had arisen to lease a hotel on particularly favourable terms and Mr **Kent**, instead of arranging for one of the Aquis companies to lease the hotel, had entered into the lease on behalf of another company of which he was the sole beneficial owner. In such a situation it might have been arguable that, apart from any fiduciary duty owed by Mr **Kent** as a director of the Aquis companies, Mr **Kent** was in breach of a fiduciary duty owed to Sheikh Tahnoon personally. No question of that sort, however, has arisen.

> 151. Counsel for Mr **Kent** placed heavy emphasis on the close personal relationship between Mr **Kent** and Sheikh Tahnoon and on the evidence that, for most of the period at least of their business association, they reposed a high degree of trust and confidence in each other. But the existence of trust and confidence is not sufficient by itself to give rise to fiduciary obligations. In the first place, the question whether one party did in fact subjectively place trust in the other is not the test. As Dawson J said in the *Hospital Products* case (1984) 156 CLR 41 at 71:
>
> "A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability."
>
> The inquiry, in other words, is an objective one involving the normative question whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other.

It is also necessary to identify more precisely the nature of the trust and confidence which is a feature of a fiduciary relationship. There plainly are many situations in which a party to a commercial transaction may legitimately repose trust and confidence in another without the other party owing any fiduciary duties. Thus,

in *Re Goldcorp Exchange Ltd (In Receivership)* [1995] 1 AC 74, the Privy Council rejected an argument that a company was a fiduciary because it had agreed to keep gold bullion in safe custody for customers in circumstances where the customers were totally dependent on the company and trusted the company to do what it had promised without in practice there being any means of verification. Lord Mustill said (at 98):

> "Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences …. It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies."

Mutual trust and confidence between parties dealing with one another can be of different kinds. At a basic level any contracting party is entitled to rely on the other party to perform its contractual obligations without having to monitor performance or even if (as in *Re Goldcorp Exchange Ltd*) it is unable to monitor performance. The kind of trust and confidence characteristic of a fiduciary relationship is different. As discussed above, it is founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal.

> 152. For the reasons given, the nature of the relationship between Mr **Kent** and Sheikh Tahnoon in the present case did not give rise to any legitimate expectation on the part of Mr **Kent** that Sheikh Tahnoon would put aside his own self-interest and consider only what was in the best interests of the companies or of Mr **Kent** in making decisions about whether to increase or liquidate his investment. Accordingly, while I accept that Mr **Kent** and Sheikh Tahnoon can be described as participants in a joint venture, I think it clear that Sheikh Tahnoon did not owe any fiduciary duties to Mr **Kent**.

**A duty of good faith**

It does not follow from the conclusion that he did not owe any fiduciary duties to Mr **Kent** that the Sheikh's entitlement to pursue his own self-interest was untrammelled. I have previously suggested in *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB), at para 142, that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.

Although the observations that I made in the *Yam Seng* case about the scope for implying duties of good faith in English contract law have provoked divergent reactions, there appears to be growing recognition that such a duty may readily be implied in a relational contract. For example, in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) the parties agreed to collaborate to produce training manuals for pilots. The claimant provided the content for the manuals and the defendant converted the content into an electronic application, which the parties jointly published and marketed. The parties fell out. Anticipating the end of their joint venture, the claimant secretly accessed the defendant's database and downloaded material. After the contract was terminated, the claimant used the downloaded material to continue selling the electronic training manuals. One issue was whether the secret download was a breach of contract. There was no express term of the contract which prohibited it. But Mr Richard Spearman QC, sitting

as a deputy High Court judge, characterised the joint venture agreement as a relational contract and held that there was an implied term of the contract requiring good faith in its performance. The defendant had breached that term by engaging in conduct that "would be regarded as commercially unacceptable by reasonable and honest people" (para 196).

In *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) a private contractor had agreed to dispose of cars for a police authority. The police authority gave instructions for one particular vehicle to be completely crushed; but they later found out that, instead of sending it to be crushed, the contractor had re-built the car, transferred the number plates from a different vehicle, and was using it in the contractor's own fleet. Dove J described the contract as "a relational contract *par excellence*" and held that it was an implied term that the contractor would perform the contract in good faith or – as he preferred to put it – with honesty and integrity. The judge concluded that, even if the contractor had not been deliberately fraudulent, there had been a breach of the implied term which amounted to a repudiatory breach of the contract.

There are other cases in which the implication of a duty of good faith has been rejected on the ground that the contract in question was not a relational contract. For example, in *National Private Air Transport Services Co v Windrose Aviation Co* [2016] EWHC 2144 (Comm), at paras 133-136, Blair J found (unsurprisingly) that an aircraft lease was not a relational contract and that no duty to act in good faith was to be implied into an obligation to redeliver the aircraft. But the judge also rejected an attempt to cast general doubt on the approach suggested in the *Yam Seng* case. Furthermore, in *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2016] 1 CLC 712 at para 67, Beatson LJ in the Court of Appeal endorsed the view that, in certain categories of long-term contract of the kind mentioned in the *Yam Seng* case, courts may be more willing to imply a duty of good faith – which he characterised essentially as a duty to cooperate.

In the *Yam Seng* case I mentioned that examples of such relational contracts might include some joint venture agreements and the *Bristol Groundschool* case is such an example. Of particular relevance to the facts of the present case, in *Elliot v Wheeldon* [1992] BCC 489, referred to in *Murad v **Al**-Saraj*, the Court of Appeal showed willingness to accept that a duty to act in good faith may arise in the context of a joint venture between shareholders. Nourse LJ, with whom the other members of the court agreed, said (at 492) that:

> "where A and B enter into a joint venture for the carrying on of a business through the medium of company C, with A as the continuing guarantor of C's liabilities, it must at the least be arguable that B owes a duty to A to conduct himself as a director of C in such a way as not, except in good faith, to increase A's liabilities under his guarantee."

*Hewitt on Joint Ventures* (6th Edn, 2016) at paras 11-09 to 11-17, a book edited by practitioners who specialise and have extensive experience in this area of commercial activity, contains a lengthy and helpful discussion of duties of good faith between joint venture parties. I note with interest the authors' conclusion that "'good faith' and 'fair dealing' are concepts that at root seem entirely appropriate to very many joint venture relationships" and that:

> "If findings of fiduciary duties in the fullest sense between joint venture parties will continue to be rare, principles relating to 'good faith' seem to fit a relationship between parties to a joint venture where mutual trust and commitment are crucial to the success of the venture …"
>
> See *Hewitt on Joint Ventures* (6th Edn, 2016), para 11-17.

I have held that Sheikh Tahnoon did not agree to provide funding on an open-ended basis and did not owe any fiduciary duties to Mr **Kent**. But I think it clear that the nature of their relationship was one in which they naturally and legitimately expected of each other greater candour and cooperation and greater regard for each other's interests than ordinary commercial parties dealing with each other at arm's length. When Sheikh Tahnoon agreed to become an equal owner of the Aquis business with Mr **Kent**, the two men entered

into a joint venture agreement which was intended to be a long-term collaboration, in which their interests were inter-linked and which they saw, commercially albeit not in law, as a partnership. Their collaboration was formed and conducted on the basis of a personal friendship and involved much greater mutual trust than is inherent in an ordinary contractual bargain between shareholders in a company. Although day to day management of the businesses was left to Mr **Kent**, strategic decisions which would involve further capital investment, such as whether to purchase a hotel or the decision to acquire the majority stake in YouTravel, were (of necessity) taken jointly and could only be reached by consensus between them. The pursuit of the venture therefore required a high degree of co-operation between the two participants. They did not attempt to formalise the basis of their cooperation in any written contract but were content to deal with each other entirely informally on the basis of their mutual trust and confidence that they would each pursue their common project in good faith.

In the circumstances the contract made between these parties seems to me to be a classic instance of a relational contract. In my view, the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations and satisfies the business necessity test which Lord Neuberger in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742, [2015] UKSC 72 at paras 16 to 31 reiterated as the relevant standard for the implication of a term into a contract. I would also reach the same conclusion by applying the test adumbrated by Lord Wilberforce in *Liverpool City Council v Irwin* [1976] AC 239 at 254 for the implication of a term in law, on the basis that the nature of the contract as a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith.

It is unnecessary and perhaps impossible to attempt to spell out an exhaustive description of what this obligation involved. There is a considerable body of Australian authority on the subject which has informed the interpretation by English courts of express contractual duties of good faith: see *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), paras 91-97; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch), paras 240-246; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC), paras 89-91. In *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the *caveat* that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people: see *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), para 295, referred to above; and *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), para 98. In the *Paciocco* case (at para 290) Allsop CJ also made the important point that:

> "The standard of fair dealing or reasonableness that is to be expected in any given case must recognise the nature of the contract or relationship, the different interests of the parties and the lack of necessity for parties to subordinate their own interests to those of the counterparty. That a normative standard is introduced by good faith is clear. It will, however, not call for the same acts from all contracting parties in all cases. The legal norm should not be confused with the factual question of its satisfaction. The contractual and factual context (including the nature of the contract or contextual relationship) is vital to understand what, in any case, is required to be done or not done to satisfy the normative standard."

For present purposes it is sufficient to identify two forms of furtive or opportunistic conduct which seem to me incompatible with good faith in the circumstances of this case. First, it would be inconsistent with that standard for one party to agree or enter into negotiations to sell his interest or part of his interest in the companies which they jointly owned to a third party covertly and without informing the other beneficial owner. Second, while the parties to the joint venture were generally free to pursue their own interests and did not

owe an obligation of loyalty to the other, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder of the companies to obtain a financial benefit for himself at the expense of the other.

**Alleged duty to give notice of termination**

153. Mr **Kent** also contended that it was an implied term of the contract that neither party would terminate the joint venture except with reasonable notice and on reasonable terms. As there was no partnership to be dissolved, the only means of exit from the venture available to either party was to sell his shares in the holding companies to a third party or to separate his interests from those of his co-venturer through a corporate demerger. I have held that it was an aspect of good faith that either party should inform the other of an intention to sell any of his shares to a third party. No notice was required before arranging a demerger as that could not be effected unilaterally but only by agreement between the joint venture parties.

**Duress**

154. As described in part B, the parties in this case agreed to a demerger by entering into the Framework Agreement and the promissory note. The next issue to consider is whether the consent of Mr **Kent** to these agreements was obtained by means which breached the duty owed by Sheikh Tahnoon to act in good faith or as a result of duress. Before addressing this issue, I will first identify the legal requirements for establishing duress.

155. A contract is made under duress if it is entered into as a result of pressure which the law regards as illegitimate: *Universe Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel* [1983] 1 AC 366, 384 (Lord Diplock), 400 (Lord Scarman); *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck (No 2)* [1992] 2 AC 152, 165-6 (Lord Goff). It has long been recognised that harm or threats of harm to the person or to property may constitute duress. In modern times it has also come to be accepted that economic pressure may do so. In determining whether pressure is legitimate, it is relevant to consider both the nature of the pressure and also the nature of the demand which the pressure is applied to support: see *The Universe Sentinel* [1983] 1 AC 366, 401 (Lord Scarman); *R v Attorney-General of England and Wales* [2003] UKPC 22, para 16 (Lord Hoffmann). Unlawful action or a threat of unlawful action is one form of illegitimate pressure. But a threat to do an act which in itself is perfectly lawful may also amount to illegitimate pressure if it is coupled with an unjustified demand. The classic illustration, given by Lord Scarman in *The Universe Sentinel*, is blackmail. As Lord Atkin said in *Thorne v Motor Trade Association* [1937] AC 797, 806:

"The ordinary blackmailer normally threatens to do what he has a perfect right to do – namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money."

For the purposes of the criminal offence of blackmail, the question whether a demand was justified involves a subjective test. Under s.21 of the Theft Act 1968 a person commits the offence "if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces." For this purpose "a demand with menaces is unwarranted unless the person making it does so in the belief: (a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand."

In civil as well as in criminal law, the state of mind of the defendant is naturally a relevant consideration where the question is whether the defendant has acted wrongfully. But the factors which render a contract defective and make it just to require contractual benefits to be restored are not limited to cases where the defendant has acted wrongfully. They include, for example, cases where a party lacks capacity or where one party is under the undue influence of the other, even though such influence may not involve any wrongdoing. They may also, in principle, include cases where the defendant has exploited a position of extreme vulnerability on the part of the claimant to induce the claimant to agree to a wholly unreasonable demand. There is no reason why, in this context, the availability of relief should depend on the defendant's own perception of whether his conduct was justified. On the contrary, as in other cases where the law sets limits to freedom of contract by requiring the parties to observe certain minimum standards of behaviour, the appropriate arbiter of those standards is the independent judgment of the court.

In a number of cases courts have recognised that making a lawful threat to press an illegitimate demand may constitute duress and that the measure of legitimacy for this purpose is not the defendant's self-assessment but prevailing standards of morality and commercial propriety. In *CTN Cash and Carry v Gallaher* [1994] 4 All ER 714 at 719, Steyn LJ suggested that:

> "Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant *bona fide* considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'."

> Steyn LJ thus declined to accept that the defendant's state of mind was conclusive and also emphasised that "the critical inquiry is not whether the conduct is lawful but whether it is morally or socially acceptable". In a judgment in the Supreme Court of New South Wales in *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40, referred to by Lord Goff in *The Evia Luck (No 2)*, McHugh JA (at 46) said that "[p]ressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct". In *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, 637-8; [1999] CLC 230, 250-2, Mance J (as he was) cited these authorities and identified the rationale of the law's intervention as being to "prevent unconscionability". In *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718, the Privy Council set aside a settlement agreement as having been obtained through duress consisting of "unconscionable conduct". Under the agreement the liquidators of a company had agreed not to sue the defendant (a shareholder accused of misappropriating assets of the company) in return for his agreement to withdraw his opposition to a scheme of arrangement which was needed to raise funds for the liquidation. There was a background of unlawful conduct as the defendant had previously used forgery and provided false evidence in opposing the scheme. But neither the demand to which the liquidators agreed (to drop claims against him) nor the accompanying threat (to vote against the scheme) was unlawful.

These and other authorities were surveyed in *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm), [2012] 1 Lloyd Rep 501, at paras 20-35 by Cooke J, who concluded that, although it is unusual particularly in a commercial context for lawful acts to constitute duress, the courts are willing to apply a standard of impropriety rather than technical unlawfulness in deciding whether conduct amounts to illegitimate pressure.

According to the editors of *Chitty on Contracts* (32nd ed), vol 1, para 8-046:

> "there can be no doubt that even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes substantially beyond what is normal or legitimate in commercial arrangements."

> Amongst other illustrations, a test of this nature may explain cases involving a threat of prosecution if a demand is not met, where the prosecution would be justified: see *Williams v Bayley*

> (1866) LR 1 HL 200; *Kaufman v Gerson* [1904] 1 KB 591; *Mutual Finance Co Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389. It may also explain a series of old salvage cases in which agreements made by masters of ships in distress to pay an exorbitant fee to a rescuer have been set aside on the ground that they were made "under compulsion": see *The Mark Lane* (1890) 15 PD 135, 137; *The Medina* (1876) 1 PD 272, affirmed (1876) 2 PD 5; *The Port Caledonia and the Anna* [1903] P 184.

This formulation stated in *Chitty* was recently endorsed and applied by Warren J in *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch) at paras 253 and 259-263. In that case an airline exercised a right to terminate on notice agreements with travel agents who sold flight tickets in return for commission. The airline offered to enter into new agreements with the travel agents on less favourable terms which also required the agents to give up accrued claims for commission – some of which in the judge's view were clearly valid. To increase pressure on the travel agents, during the notice period the airline reduced the number of tickets allocated to the agents (as it was contractually entitled to do) and promised to restore the allocations if the new agreement was signed. The travel agents, whose business depended critically on selling tickets for the airline, signed the new agreement. The judge declined to find that the airline had acted in bad faith in requiring the agents to give up their claims for past commission. But, applying the test stated in *Chitty*, he held that the agents had been induced to enter into the new agreement by illegitimate pressure and were entitled to rescind it.

The decision in the *Times Travel* case has been criticised in a note published in the Law Quarterly Review whose authors seek to explain the case on the basis that the threat made (in effect to terminate the agency unless the claimants gave up accrued rights to commission), though lawful in itself, was inextricably linked to previous unlawful conduct (not paying commission due under the old agreements). The authors also argue that, even then, treating lawful conduct as amounting to duress is questionable, as "there is a clear difference between lawful and unlawful behaviour and no good reason has yet been given why lawfully applied pressure, even if closely connected to unlawful conduct, can be 'illegitimate'": see Paul S Davies and William Day, "'Lawful Act' Duress" (**2018**) 134 LQR 5, 10.

This is a difficult area of the law. But for my part I see no reason to doubt the correctness of the approach adopted in the *Times Travel* case. Whereas the distinction between lawful and unlawful behaviour may be critical in determining whether the defendant's conduct is actionable in tort, I see no reason why it should be decisive of whether the defendant can retain money or other benefits demanded from a claimant in a situation of extreme vulnerability. For this purpose it is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour. To the complaint that this makes the law uncertain, I would give two replies. First, as the authorities have emphasised, the standard of unconscionability is a high one and it is only in cases where the demand made and means used to reinforce it are completely indefensible that the courts will intervene. Second, no apology is needed for intervening in such cases, as the enforcement of basic norms of commerce and of fair and honest dealing is an essential function of a system of commercial law. As Mance J said in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, 637-8; [1999] CLC 230, 251:

> "The law has frequently to form judgments regarding inequitability or unconscionability, giving effect in doing so to the reasonable expectations of honest persons. It is the law's function to discriminate, where discrimination is appropriate, between different factual situations …"

It does seem to me, however, that the test suggested in *Chitty on Contracts* could be made more precise by transposing into objective requirements the elements of the offence of blackmail. On this basis a demand coupled with a threat to commit a lawful act will be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand.

156. It used to be said that, to amount to duress, pressure had to overcome or overbear the will of the person concerned so that they did not truly consent to whatever they had apparently agreed to do. The better and now generally accepted view, however, is that the doctrine is based not on lack of consent but on showing that a party's consent was obtained in circumstances which make it unjust to allow the other party to enforce the agreement. Just as – contrary to what is often said – fraud does not vitiate consent (see *Whittaker v Campbell* [1984] QB 318), nor does duress. As Lord Scarman stated in *The Universe Sentinel* [1983] 1 AC 366, 400:

"Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him."

The fact, therefore, that the decision to enter into a contract involved an exercise of rational and independent judgment or was taken with the benefit of legal advice does not preclude a finding of duress. What is necessary is that the illegitimate pressure caused the claimant to enter into the contract.

157. The test of causation differs according to the nature of the duress. Where the illegitimate pressure involves a threat of violence, it is sufficient that the threat was "a" reason for entering into the contract, even if the person threatened might well have entered into the contract without the threat: see *Barton v Armstrong* [1976] AC 104, 119. On the other hand, in cases of economic duress the ordinary test of causation applies which generally requires the claimant to show that he or she would not have entered into the contract 'but for' the defendant's act: see *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep 620, 636.

It is sometimes said to be a further requirement of economic duress that the claimant had no reasonable alternative to giving in to the illegitimate pressure. The alternative view, which is preferred in *Chitty on Contracts* (32nd Edn, 2015), vol 1, para 8-033, and was accepted by Christopher Clarke J in *Kolmar Group AG v Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 (Comm) at para 92, is that the absence of any reasonable alternative is not an absolute requirement but rather is very strong evidence of whether the claimant was induced by the threat or other illegitimate pressure to enter into the contract. It is also, as it seems to me, a relevant factor in determining whether use of pressure was illegitimate in cases where the defendant has not acted or threatened to act unlawfully and the allegation of duress is based on exploitation of the claimant's situation to make an unjustified demand.

**Financial condition of Aquis and YouTravel in April 2012**

158. In determining whether Mr **Kent** executed the Framework Agreement and the promissory note as a result of duress or conduct which breached the duty owed by Sheikh Tahnoon to act in good faith, it is necessary to consider the circumstances in which the agreements were made. Critical factors are the financial condition of the Aquis and YouTravel companies, the implications of their predicament for Mr **Kent** and what options were available to him.

159. The parties adduced evidence from expert accountants concerning the financial condition of the Aquis and YouTravel companies at the time of the Framework Agreement. Although the evidence was admitted in connection with Mr **Kent**'s counterclaim for an account of profits, it was necessary for that purpose to consider the value of the companies immediately prior to the Framework Agreement and the accounting evidence was therefore of broader relevance.

160. I think it clear that in April 2012, when the Framework Agreement was made, both the Aquis group and YouTravel had no or virtually no value as going concerns. Neither business had any record of profitability. The Aquis group had made losses every year since its incep-

tion and as at 30 April 2012 its management accounts showed net liabilities of €9.1m. The YouTravel companies had also been consistently loss-making and as at 30 April 2012 had net liabilities of €9.25m.

161. The fact that the YouTravel companies, as well as being critically short of cash, were of no substantial value is confirmed by the terms which FTI was ultimately prepared to offer to acquire the companies. Although FTI initially indicated that it might be willing to pay €6m to purchase the Sheikh's 70% interest in YouTravel, this was subject to due diligence. The revised offer made by FTI after the accounting firm Deloitte had investigated the financial condition of YouTravel provided for a maximum payment of €2.3m, but this was conditional on the future performance of the business and on Sheikh Tahnoon making an immediate capital injection of €2m (see paragraph 85 above). Accordingly, the offer attributed no significant net value to the YouTravel business. Despite this, and despite the overwhelming evidence that the companies were effectively insolvent, the Sheikh's accountancy expert, Mr Jeffrey Davidson, expressed the opinion that YouTravel UK could have had a value in April 2012 of between €5.5m and €8.5m. This opinion was based on wholly unsupported and fanciful assumptions, ignored the objective facts and seemed to me only to serve to undermine Mr Davidson's credibility as an independent expert.

162. The only substantial assets of either business were the Bella and Silva hotels. The value of those hotels in April 2012 was a matter of controversy at the trial. Mr **Kent** argued that the valuation of €42m adopted for the purposes of the Framework Agreement was appropriate in circumstances where the hotels had been purchased in early 2009 for €35m and had subsequently undergone substantial renovation. He also relied on the fact that the terms offered by FTI in the memorandum of understanding dated 3 April 2012 contained an option to purchase the hotels which valued them at €40m. This was, however, only a provisional figure. On behalf of Sheikh Tahnoon reliance was placed on professional valuations of the hotels obtained by Aquis in May 2012 which estimated the market value of the hotels as at 26 April 2012 at €25.5m. However, the reasons for obtaining these valuations and the assumptions on which they were based were not explored at all in evidence. I also note that the same valuers had valued the hotels some 15 months earlier at €37.6m and, even allowing for market fluctuations, the extent of the discrepancy seems surprising. Another indication of value is that at the board meeting on 12 March 2012 when the possibility of selling the hotels was discussed Mr **Kent** suggested that the contractor (Smili) could buy the Bella hotel for approximately €14m and proposed an approach to sell the Silva hotel to the Russian tour operator (Tez Travel) at an asking price of €19.5m. This put a combined value on the hotels of €33.5m, but that valuation may be regarded as optimistic since neither prospective purchaser turned out to be prepared to make an offer.

163. What is a matter of record is that in June 2013 Mr Kaloutsakis agreed to purchase Investors at a price which valued the two hotels at €32m. It was suggested on behalf of Mr **Kent** that Mr Kaloutsakis took advantage of the desire of Sheikh Tahnoon's representatives to extricate the Sheikh from his investment by making a “low ball” offer. However, any sale of the hotels in April 2012 would have been from an equally weak or weaker bargaining position. It is also important to note that any valuation of the hotels depended on estimates of future revenue which were sensitive to the strength of the tourist trade. As mentioned earlier, the low point for tourism in Greece was 2011, after which the market gradually improved. This suggests that the value which a purchaser or seller would place on the Bella and Silva hotels would have tended to increase between April 2012 and the time when Mr Kaloutsakis made his offer to buy the hotels a year later.

164. While recognising that there is room for a range of views about the market value of the Bella and Silva hotels in April 2012, I consider it unlikely that the hotels could have been sold at that time for more than (at the very most) €32m. Against the purchase price there would need to have been set the liabilities of Investors which as at 30 April 2012 – as ascertained when the

books of Investors were reconciled with those of Aquis – stood at €31.2m. The reality was, therefore, that, when account is taken of their associated liabilities, the hotels had no substantial value.

165. Mr **Kent**'s accountancy expert, Mr Neil Ashton, having originally expressed the view that the net asset value of the Aquis group immediately prior to the Framework Agreement was nil, subsequently revised his opinion to arrive at a value of €9.45m. However, this figure was based on assumptions (i) that the group could expect to receive government grants amounting to €9.45m and (ii) that the value of Bella and Silva hotels was €42m. In the light of the evidence about the grant position in respect of the Bella and Silva hotels referred to earlier (see paragraphs 127-132 above), it seems to me optimistic to attach any significant value to expected government grants. In any case, any positive value attributed to such grants is outweighed by the downwards adjustment required to reflect my finding that the value of the hotels was at most €32m.

166. Although my finding that the Aquis group and YouTravel (and hence the Sheikh's shareholdings in the two holding companies) were worth nothing or next to nothing in April 2012 is based on the evidence of their financial condition at that time, it is consistent with subsequent events. As mentioned earlier, the YouTravel companies were sold to FTI for a nominal consideration. Sheikh Tahnoon effectively made a nil return when he sold Investors (taking account of the further €2m which he injected into the company). The Aquis group has continued to make losses each year (save in 2013, when there was a small profit). The most recent available audited accounts of the group, which are for the year ended 31 December 2015, show net liabilities of €27m and were qualified by the auditors who expressed significant doubt about the group's ability to continue as a going concern. Even now, therefore, it is uncertain whether the Aquis group can survive in the long term.

**Mr Kent's options at the time of the Framework Agreement**

167. As described in part B of this judgment and as the above analysis confirms, both the Aquis and YouTravel businesses in early April 2012 were in a parlous financial state and on the brink of collapse. Although the focus of concern when the Sheikh's representatives visited Athens in December 2011 had been Aquis, this had since been overtaken by the crisis at YouTravel which faced the imminent prospect of bookings being cancelled because it could not pay hoteliers. Without a further substantial injection of funds or extension of credit, it is likely that the YouTravel companies would soon have failed. This in turn would probably have led to the Aquis companies being wound up. In that event, Mr **Kent** faced the prospect of being made bankrupt himself as a result of the personal guarantees he had given in connection with loans to Aquis. He (and Mr Kouladis) were also at risk of criminal conviction as a result of the non-payment of post-dated cheques which they had signed on behalf of the companies.

168. Sheikh Tahnoon was unwilling to make any further funds available to Aquis or YouTravel. I have already held that he had no obligation to do so and was entitled to take the view that he wished to cut his losses. It is also evident that Aquis and YouTravel had by this time exhausted all potential sources of third party credit, with the exception of FTI. No other potential source of finance was identified by the Sheikh's representatives at the time and no suggestion was made on his behalf at the trial that any other source of finance was realistically available. Accordingly, Mr **Kent**'s hope of saving the businesses from collapse (with potentially disastrous consequences for himself in that event) hinged on negotiating a deal with FTI.

**Conduct of the Sheikh's representatives**

169. Sheikh Tahnoon was certainly not obliged to accept the offer from FTI contained in the memorandum of understanding dated 3 April 2012. His representatives were entitled to inves-

tigate whether there was any other means of avoiding the collapse of the business and consequent loss of his investment. Had they done so openly, I also see nothing wrong with the Sheikh's representatives holding their own discussions with FTI and attempting to negotiate a deal which would involve selling the Sheikh's 70% interest in YouTravel to FTI. There are two respects, however, in which the conduct of the Sheikh's representatives was inconsistent with the duty of good faith which I have held that Sheikh Tahnoon owed to his co-venturer.

170. The first is that the Sheikh's representatives did not deal openly and honestly with Mr **Kent**. As described at paragraphs 79-85 above, they concealed from him the fact that, at the same time as they were discussing the Framework Agreement with him, they were conducting their own negotiations with FTI. The aim of those negotiations was to sell the whole of the Sheikh's 70% interest in YouTravel to FTI instead of transferring it to Mr **Kent**, as Mr **Kent** expected. This double dealing by the Sheikh's representatives clearly amounted to bad faith. However, I accept the points made by counsel for Sheikh Tahnoon that this breach of duty cannot give rise to any claim for relief, first because it does not form part of Mr **Kent**'s pleaded case and secondly because it did not cause him any loss. No loss was caused because the negotiations between the Sheikh's representatives and FTI ultimately came to nothing. Thus, the Sheikh's interest in YouTravel was not in fact sold to FTI and was transferred to Mr **Kent** pursuant to the Framework Agreement.

171. No such points can be made in relation to the second breach of the duty to act in good faith which has been made out on the evidence. I have indicated that Sheikh Tahnoon was not bound to agree to the deal described in the memorandum of association which Mr **Kent** had negotiated with FTI. But what, in my view, the Sheikh's representatives were not entitled to do was to use his position as a co-owner of YouTravel as a lever to block the deal with FTI unless and until Mr **Kent** agreed to make payments to the Sheikh (under the promissory note) which he had no right to demand. That was a form of opportunistic behaviour inconsistent with the duty of good faith which I have held that Sheikh Tahnoon owed to his co-venturer. It was also, as I will discuss next, a form of illegitimate pressure which amounted to duress.

**Nature of the demands**

172. As discussed earlier, in judging whether pressure is legitimate, it is relevant to consider not only the nature of the pressure used but also the nature of the demand which the pressure is used to support. The avowed aim of Mr El Husseiny in formulating the terms of the Framework Agreement was to recover from Mr **Kent** a substantial part of the Sheikh's investment. This aim is expressly reflected in recital (H) of the Framework Agreement, which states:

"TBS has, over a number of years, contributed an amount of approximately thirty one million one hundred and seventy five thousand Euros (EUR 31,175,000) to the Companies (the "Capital Contribution"). IK wishes to repay part of such an amount by transferring Aquis Cyprus and Investors SA to TBS …"

It was also common ground, as mentioned earlier, that the key commercial condition of exit demanded by the Sheikh's representatives was that he should receive cash and other assets to a value of €25m.

The Sheikh's representatives did not in any of their discussions with Mr **Kent** leading to the execution of the Framework Agreement and the promissory note identify any basis on which Mr **Kent** had – or allegedly had – any legal liability to repay to Sheikh Tahnoon any part of the Sheikh's capital contribution. Mr El Husseiny, Mr Ozcan and Mr Rozario had apparently formed the view amongst themselves that Mr **Kent** had "swindled" the Sheikh. But there is no evidence that they made any allegation or had any basis for believing that Mr **Kent** had deceived or misled Sheikh Tahnoon in any way or had acted dishonestly in any of his dealings with the Sheikh. Nor has any such case been advanced by Sheikh Tahnoon in these proceedings. It has not

been suggested on his behalf that there was any ground on which his representatives were entitled to claim repayment from Mr **Kent** of any sum which he had invested in Aquis and Stelow. Nor has it been argued that there was any commercial justification for seeking a payment of over €5m from Mr **Kent** in return for transferring to him Sheikh Tahnoon's shares in Aquis UK and Stelow after hiving off Investors. It is clear in any case from my earlier findings that there was not since I have found that the shares transferred were of no more than nominal value.

> 173. A separation of the parties' interests whereby Sheikh Tahnoon acquired 100% of Investors and Mr **Kent** acquired the entire ownership of the rest of the Aquis and YouTravel businesses cannot in itself be considered unreasonable. Even if this arrangement had resulted in Sheikh Tahnoon making a profit from acquiring sole beneficial ownership of the two hotels – which I have found that it did not – that would have to be balanced against the benefit to Mr **Kent** of Sheikh Tahnoon undertaking to procure the release of the personal guarantees that he had given in connection with sums borrowed by Investors. Whatever points might be made about the indemnities given by Mr **Kent** in clauses 2.4 and 4.1(a) of the Framework Agreement, it is difficult to see any possible legal or commercial justification for his undertaking in clause 2.3(b) to be personally responsible for payment of the "Operational Debts" owed by Investors to creditors. But there was, above all, no basis for requiring Mr **Kent** to execute the promissory note. The Sheikh's representatives did not identify any ground at the time, and none has been suggested in these proceedings, on which the Sheikh was allegedly entitled to payment or could legitimately request payment of €5.4m, or any sum, from Mr **Kent**.

I think it clear that the Sheikh's representatives had no reasonable grounds for making the demand that Mr **Kent** should undertake to pay Sheikh Tahnoon a sum of €5.4m pursuant to a promissory note. Whether they believed that they had such grounds is harder to determine. I accept that they formed a view in discussion amongst themselves that Mr **Kent** had "swindled" the Sheikh. But there is no evidence to suggest that this view was based on anything more than an emotional response to a situation in which the Sheikh had made an investment of over €31m in the businesses managed by Mr **Kent** which was now worth nothing. In circumstances where no attempt at all was made in evidence to explain why the Sheikh's representatives believed, if they did, that they had any reasonable grounds for demanding that Mr **Kent** agree to execute the promissory note, I infer that they had no such belief. On any view, therefore, the demand that Mr **Kent** should execute the promissory note was illegitimate.

Furthermore, as I am about to discuss, the demands made on Sheikh Tahnoon's behalf were reinforced by threats of litigation and threats of physical violence. Whatever may be said about the former, the making of the latter threats was plainly not a proper means of reinforcing their demands. Nor can the Sheikh's representatives have believed that it was. Accordingly, I would if necessary find (applying the civil standard of proof) that the pressure applied by the Sheikh's representatives amounted to blackmail.

**Threats of litigation**

> 174. During the discussions which led to the conclusion of the Framework Agreement and the promissory note the Sheikh's representatives threatened to take Mr **Kent** to court if he did not agree to their terms. In particular, such a threat was made on 11 April 2012 when Mr Alexander El Husseiny first told Mr **Kent** that he wanted to arrange for the Sheikh to exit the business. And on 20 April 2012, when Mr **Kent** was trying to hold out for an amendment to the draft agreement to permit him to negotiate a deal with FTI, Mr El Husseiny told him that he, Mr Ozcan and Mr Rozario were no longer authorised to negotiate and that the matter was now being put in the hands of the Sheikh's litigation lawyers and forensic accountants.
>
> 175. A party is of course perfectly entitled to bring or threaten to bring legal proceedings to vindicate his rights. But it is unlawful to abuse the legal process by using it for an ulterior and improper purpose: see *Grainger v Hill* (1838) 4 Bing (NC) 212. Accordingly, a threat to bring legal proceedings for such a purpose may constitute duress. The same applies if a person

takes or threatens to take legal action which is known to be unfounded: *Gulf Azov Shipping Co Ltd v Idisi* [2001] 2 Lloyd's Rep 727.

176. No basis in law for any claim by Sheikh Tahnoon against Mr **Kent** was identified at the time and it has not been suggested in these proceedings that there was any valid basis for bringing a lawsuit against Mr **Kent** nor that Mr El Husseiny actually believed that there was. Yet the prospect of having to defend litigation and to incur costs in doing so when the companies were in a financial crisis and on the brink of insolvency, even if the claim made was unfounded, must have been a forbidding one. The evidence suggests that the threats of litigation were made purely as a means of bringing pressure to bear on Mr **Kent** and were therefore illegitimate. However, as this was not part of Mr **Kent**'s pleaded case, I make no finding of duress on this basis.

**Physical threats**

177. In addition to threats of litigation, threats were made of a more sinister kind. I have found that on two occasions during the discussions which led to the execution of the Framework Agreement and the promissory note the Sheikh's representatives made threats which implied that Mr **Kent**'s life would be at risk if he did not comply with their demands. On 11 April 2012 when Mr Alex El Husseiny first told Mr **Kent** that he wanted to arrange for the Sheikh to exit the business, Mr El Husseiny said words to the effect that, if his demands were not met by agreement or by defeating Mr **Kent** in court, blood would be shed if necessary. Then on 20 April 2012, when Mr **Kent** was trying to hold out for an amendment to the draft agreement to permit him to negotiate a deal with FTI, Mr Ozcan told Mr **Kent** that he would come to a very bad end and that he could not imagine what could happen to him from now on.

178. Mr **Kent** said in cross-examination that he did not believe that these threats were coming from Sheikh Tahnoon himself or that his friend would want him to suffer physical harm but said that he nevertheless feared what the Sheikh's representatives might do. Given his lack of other options, it may very well be that Mr **Kent** would still have entered into the Framework Agreement and promissory note on the same terms even if these threats had not been made. But I am satisfied that these threats were intended to and did frighten and disturb Mr **Kent** and contributed to his willingness to conclude the agreements. They were a reason why he did so.

In their closing submissions and in a supplementary note counsel for Sheikh Tahnoon emphasised that it has not been alleged that Sheikh Tahnoon had any knowledge of the threats made by his representatives or authorised them to make such threats and that Mr **Kent** never believed that the threats were coming from the Sheikh himself. It follows, they submitted, that the threats of violence which I have found were made by Mr El Husseiny and Mr Ozcan were not made on behalf of Sheikh Tahnoon. I entirely accept that Sheikh Tahnoon did not authorise Mr El Husseiny or Mr Ozcan to threaten Mr **Kent** with violence and I am sure that Sheikh Tahnoon would never have countenanced or condoned the making of such threats. It does not follow, however, that the Sheikh is not responsible for the conduct of his representatives. The relevant question is not one of authority but of vicarious liability. It was formally admitted by Sheikh Tahnoon in response to a notice to admit facts that at all material times Mr Rozario, Mr Alexander El Husseiny and Mr Ozcan acted as his agents. It is well established that a principal is vicariously liable for intentional wrongdoing of an agent committed without the authority (or knowledge) of the principal provided only that the wrongdoing was committed in the course of the agent's employment: see e.g. *Armagas v Mundogas* [1986] 1 AC 717, 743-745 (Robert Goff LJ); *Dubai Aluminium Ltd v Salaam* [2003] 2 AC 366. The threats made by Mr El Husseiny and Mr Ozcan were clearly made in the course of their employment as the Sheikh's representatives in negotiating terms of separation on his behalf. He is therefore liable in law for their conduct. Nor has any case to the contrary been pleaded in Sheikh Tahnoon's statements of case.

**Consequences of duress**

179. The consequence of finding that Mr **Kent** entered the Framework Agreement and the promissory note under duress is that Mr **Kent** was entitled to rescind those contracts. As mentioned earlier, however, he has not ultimately sought to do so.

180. In his original defence in these proceedings served in August 2013, Mr **Kent** did not allege that the agreements were voidable, whether on account of duress or for any other reason. Furthermore, he made a counterclaim in which he positively sought to enforce the Sheikh's undertaking in clause 2.5(i) of the Framework Agreement to procure the release of the personal guarantees given by Mr **Kent** in connection with the loans made by two banks to Investors SA. It is at least arguable that Mr **Kent** thereby affirmed the Framework Agreement and lost the right to rescind it.

181. When the defence and counterclaim was amended in March 2014 to allege (amongst other things) that the Framework Agreement and the promissory note were entered into under duress, the amendments included claims that both agreements were void or voidable and that the transactions purportedly effected by them should be set aside. Later, however, Mr **Kent**'s statement of case was re-amended to delete the claim for rescission of the Framework Agreement and confine it to the promissory note. This was how Mr **Kent**'s case stood at the start of the trial.

182. In closing submissions Mr Rees QC on behalf of Sheikh Tahnoon argued that Mr **Kent** cannot on any view rescind the promissory note alone. Mr Rees cited *Molestina v Ponton* [2001] CLC 1412 for the proposition that a contract which forms an inseparable part of a larger transaction cannot be separately rescinded. In the face of this authority, Mr **Kent** abandoned his claim to rescind the promissory note. It think it plain that he was right to do so. The promissory note was not a freestanding agreement but was an inseparable part of the overall transaction by which the interests of Mr **Kent** and Sheikh Tahnoon in the Aquis and YouTravel companies were demerged pursuant to the Framework Agreement. Its ancillary nature is demonstrated by the fact that clause 5.2 of the Framework Agreement provided for the issue of the promissory note. It seems to me impossible to separate the benefits which Mr **Kent** received in return for entering into the promissory note from the totality of the benefits that he received under the Framework Agreement, which included the transfer to him of the shares held by Sheikh Tahnoon in Aquis UK and Stelow. Mr **Kent** could not restore those benefits without rescinding the Framework Agreement. In any event, even if it were possible to rescind the promissory note without rescinding the Framework Agreement, doing so would not free Mr **Kent** from liability, as it would leave clause 5.2 of the Framework Agreement in effect and would simply place Mr **Kent** in breach of that clause, giving rise to a liability in damages equivalent to the value of the promissory note.

183. Mr **Kent** is therefore left with, at best, a claim for damages. Whether he has a right to damages depends, in part, on whether duress is not only a ground of rescission and restitution but also gives rise to a claim in tort.

**Is duress a tort?**

184. Different views have been expressed about whether duress is a tort. In the *Universe Sentinel* [1983] 1 AC 366, 400, Lord Scarman said:

"It is, I think, already established law … that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss…"

By contrast, in the same case Lord Diplock said (at 385):

> "The use of economic duress to induce another person to part with property or money is not a tort *per se*: the form that the duress takes may, or may not, be tortious."
>
> Similarly, Lord Goff in *The Evia Luck (No 2)* [1992] 2 AC 152 at 169 said that conduct does not have to be tortious to constitute duress for the purpose of English law.

In neither of these authorities (nor in any other authority cited) did the question whether duress is actionable as a tort actually arise for decision and in *Berezovsky v Abramovich* [2010] EWHC 647 (Comm), para 191, Colman J described this as "a difficult but developing area of law". The editors of *Chitty on Contracts* (32nd Edn, 2015), vol 1 at para 8-056 note that duress renders a contract voidable and not void and suggest that this "makes it all the more necessary to recognise that damages may be recovered for duress; for otherwise … the plaintiff who has lost his right to avoid will be left without any remedy for a wrongful act." In *Ruttle Plant Hire v Secretary of State for the Environment and Rural Affairs* [2007] EWHC 2870 (TCC), para 85, Ramsey J saw force in this argument. But it seems to me to beg the question of whether duress does necessarily involve a wrongful act.

The doctrine of duress has developed as a ground for rescinding a contract and for claiming restitution based on unjust enrichment. In principle, as mentioned earlier, the circumstances in which a contract may be rescinded and the defendant required to restore a benefit received from the claimant may not coincide with those in which the claimant is entitled to recover damages for loss caused by a wrongful act of the defendant. It therefore seems to me with respect that the view expressed by Lord Diplock and Lord Goff must be correct that conduct amounting to duress will not necessarily give rise to liability in tort. I agree with Sales J when he said in *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch) at para 122:

> "The primary object of a plea of economic duress in relation to a contract is to avoid the contract, which is a legal consequence significantly different from establishing a cause of action in damages. So far as a cause of action in damages is to be made out, I can see no proper basis in principle why it should be on any basis other than a pleading of facts and matters sufficient to establish a cause of action for the tort of intimidation."
>
> I would simply add that there may, depending on the facts, be other bases for claiming damages than the tort of intimidation (nor do I understand Sales J to have been suggesting otherwise).

In the present case I am nonetheless satisfied that each of the three bases on which I have found that Mr **Kent** would have been entitled to rescind the Framework Agreement and the promissory note does also give rise to claim for damages.

**Breach of contractual duty of good faith**

185. In the first place I have held that Sheikh Tahnoon owed a contractual duty to Mr **Kent** to act in good faith and that Mr **Kent** was induced to enter into the Framework Agreement and promissory note by conduct which breached this duty. This breach of contract gives rise to a claim for damages whether or not the conduct in question is also actionable in tort.

**Intimidation**

186. I have also found that Mr **Kent** was induced to enter into the Framework Agreement and promissory note by illegitimate pressure which involved exploiting Mr **Kent**'s position of extreme vulnerability by withholding consent to a deal with FTI unless and until he agreed to comply with unwarranted demands. Although my conclusion that the pressure used was illegitimate did not depend on it, I have found that on the facts the conduct of the Sheikh's repre-

> sentatives was unlawful in that it amounted to blackmail. Not all conduct which is contrary to the criminal law is also a tort, but where a victim of blackmail succumbs to the blackmailer's demand and thereby suffers loss, it would be a serious defect in the common law if it did not afford a civil remedy in damages. The basis on which Mr **Kent** claims damages under the common law is the tort of intimidation.

The existence of the tort of intimidation was firmly established by the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129, which also held that the tort comprehends not only threats of criminal or tortious acts but threats of breaches of contract. In *Berezovsky v Abramovich* [2011] EWCA Civ 153, [2011] 1 WLR 2290, at para 5, Longmore LJ summarised the essential ingredients of the tort as: (i) a threat by the defendant to do something unlawful or "illegitimate"; (ii) the threat must be intended to coerce the claimant to take or refrain from taking some course of action; (iii) the threat must in fact coerce the claimant to take such action; (iv) loss or damage must be incurred by the claimant as a result. The possibility that the threat may be to do something "illegitimate" was included in this summary only because it was assumed, without deciding, for the purpose of an interlocutory appeal in the *Berezovsky* case that the action threatened need not necessarily be unlawful – the example relied on being that of blackmail.

There is another, simpler – and in my view better – way to explain why blackmail is covered by the tort of intimidation, which is to recognise that the tort encompasses actual unlawful conduct by one person to another, as well as threatened unlawful conduct. That proposition was accepted by the Court of Appeal in *Godwin v Uzoigwe* [1993] Fam Law 65 in upholding an award of damages to a young person who had been coerced into working without pay for two and half years by bullying and violence. Steyn LJ said:

> "The tort of intimidation covers both two-party and three-party intimidation. The present case falls in the former category. While the actionability of two-party intimidation is not in doubt, there is very little guidance in the decided cases on the requirements of this tort. Nevertheless, it seems tolerably clear that coercion is of the essence of the tort. It is true of course that assaults and threats of assault constitute independent torts. But in the circumstances of this case those torts must be regarded as subsumed under the tort of intimidation. After all, in 1992 we must proceed on the basis that England has a coherent, just and effective law of tort."

Conduct which amounts to blackmail is plainly both coercive and unlawful, even if what the blackmailer has threatened to do is not. If it be said that blackmail is unlawful under the criminal rather than the civil law, this only strengthens the case for treating it as a form of unlawful means. As Lord Walker said in *Revenue and Customs Commissioners v Total Network* [2008] 1 AC 1174 at paras 90-91:

> "The man in the street, if asked what an unlawful act was, would probably answer 'a crime'. He might give as an example theft, obtaining money by false pretences, or assault occasioning actual bodily harm. He might or might not know that each of these was also a civil wrong (or tort) but it is unlikely that civil liability would be in the forefront of his mind.
>
> The reaction of a lawyer would be more informed but it would not, I suggest, be essentially different. In its ordinary legal meaning 'unlawful' certainly covers crimes and torts (especially intentional torts). Beyond that its scope may sometimes extend to breach of contract, breach of fiduciary duty, and perhaps even matters which merely make a contract unenforceable, but the word's appropriateness becomes increasingly debatable and dependent on the legal context."
>
> In other words, as Lord Walker observed, conduct which constitutes a crime is at the top of the scale of blameworthy conduct, and the relevant question in deciding what amounts to unlawful means is not whether criminal conduct is unlawful but how far down the scale to go.

The House of Lords in the *Total Network* case was concerned with the tort of conspiracy to injure by unlawful means and held that criminal conduct constitutes unlawful means for this purpose. But the same reasoning

in my view applies equally where unlawful means are used, not by two or more people in combination to cause harm to another, but by one or more persons to coerce another to act to their detriment.

I have in any case found that the demands made by the Sheikh's representatives were coupled with threats of violence and that these threats were themselves a reason why Mr **Kent** entered into the agreements. There is no doubt that threats of violence can constitute intimidation. The only question is whether the third ingredient of the tort is satisfied in circumstances where I have found that the agreements might well have been made on the same terms without those threats. This depends on whether the same test of causation applies for the purposes of the tort of intimidation as for the purposes of the doctrine of duress.

So far as I am aware, there is no authority on this point and it was not the subject of any argument. Dealing with the question as one of principle, however, it seems to me that the same test must apply. I reach that conclusion because the justification for applying a weaker test of causation than the ordinary 'but for' test in cases of physical duress is one of policy. It is the policy of English law to impose more extensive liability on intentional wrongdoers than on careless or other less culpable defendants: see e.g. *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 279-280 (Lord Steyn). By the same standard, where physical threats are made, the interest of the law in deterring violence and the grave nature of such wrongdoing justifies setting a low threshold for inferring that a threat of violence has adversely affected the claimant. This policy is equally applicable where the issue is whether the defendant's conduct has caused damage to the claimant as where the issue is whether the conduct has caused the claimant to enter into a contract which has conferred a benefit on the defendant. Thus, considerations both of policy and consistency require that the test should be the same in each case. The analogy with deceit supports this conclusion.

I conclude that to the extent that Mr **Kent** has suffered loss as a result of entering into the Framework Agreement and promissory note he has a claim for damages.

**What loss has Mr Kent suffered?**

187. As a result of entering into those agreements, Mr **Kent** incurred a liability to pay the sums specified in the promissory note (which, following his renunciation of the promissory note, has been replaced by a liability to pay damages). *Prima facie*, therefore, any sum paid by Mr **Kent** to discharge this liability would be a loss caused by the tortious conduct and breach of contract which, as I have found, induced Mr **Kent** to execute the Framework Agreement and the promissory note.

188. Mr **Kent** has not shown that he suffered any other loss as a result of entering into the Framework Agreement. The claims made by Sheikh Tahnoon that he is owed money by Mr **Kent** under the Framework Agreement have failed. Equally, Mr **Kent** has not shown that he suffered any loss by transferring to Sheikh Tahnoon pursuant to the Framework Agreement his 30% stake in Investors. If the parties had not entered into the Framework Agreement, I think it most likely that the Bella and Silva hotels would sooner or later have been sold – as was already in contemplation if and when a buyer could be found. I see no reason to infer that a better financial outcome would have been achieved than that which Sheikh Tahnoon did in fact achieve when he sold Investors to Mr Kaloutsakis at a price which was just sufficient to cover the liabilities of Investors without returning any profit. Even if a profit had been made from the transaction, it would merely have gone to reduce the accumulated losses of the Aquis group and there is no basis for concluding that Mr **Kent** would personally have received any quantifiable benefit.

189. It has also not been shown that Mr **Kent** made any gain from acquiring the Sheikh's 70% share of the rest of the Aquis business and of the YouTravel business pursuant to the Framework Agreement. I have found that both businesses were effectively worthless. The

likelihood is that ownership of the YouTravel business would sooner or later have been ceded to FTI for a nominal sum come what may, as this was the only practical means of preventing the collapse of that business and with it the collapse of Aquis. In so far as it was suggested that Mr **Kent** was harmed by the delay in his ability to negotiate with FTI while such negotiations were blocked by Sheikh Tahnoon, I agree with the analysis of counsel for Sheikh Tahnoon that the deal which Mr **Kent** ultimately negotiated with FTI was no worse for him in terms of the loss of his equity than the deal originally offered under the memorandum of understanding dated 3 April 2012. The Aquis companies are still trading, but nearly six years on they are still loss-making and there remains significant doubt about whether they are a going concern. I accordingly do not consider that there is any identifiable financial benefit which Mr **Kent** obtained from entering into the Framework Agreement for which credit must be given in calculating damages.

190. I conclude that the transactions effected by the Framework Agreement were loss-making for Mr **Kent** to the extent but only to the extent that he was required to execute the promissory note. In circumstances where the sums payable under the promissory note, if paid by Mr **Kent**, would have been recoverable as damages, the principle of circuity of action applies to give Mr **Kent** a defence to the claim: see e.g. *Post Office v Hampshire County Council* [1980] QB 124.

F. Conclusion

191. In summary, my main conclusions on the disputed issues in this case are as follows:

(i) Sheikh Tahnoon has failed to show that any sum is due from Mr **Kent** under the Framework Agreement.

(ii) Sheikh Tahnoon is entitled to damages in the amount which would have been payable under the promissory note if Mr **Kent** had not renounced it.

(iii) However, the Framework Agreement and the promissory note were entered into by Mr **Kent** as a result of conduct on the part of the Sheikh's representatives which, as well as amounting to duress, was a breach of a contractual duty of good faith owed by Mr **Kent** to Sheikh Tahnoon as his co-venturer and is also actionable in tort.

(iv) In these circumstances, although Mr **Kent** has suffered no other loss, any payment by Mr **Kent** under the promissory note would give rise to an equal and opposite liability of Sheikh Tahnoon so that the claim under the promissory note fails for circuity of action.

192. In the result, neither party is entitled to recover any money from the other.