

THE TRIBUNAL RESUMED AS FOLLOWS ON TUESDAY,

27TH JULY 2004 AT 10.30 A.M.:

CHAIRMAN: Good morning.

MR. O'NEILL: Good morning, Mr. Chairman, members of the Tribunal. Today marks the resumption of the Carrickmines II and Related Issues Module, which was adjourned on the 13th of February, day 454 and today's business will be concerned with the cross-examination of Mr. Frank Friel, solicitor, by the legal team representing the interests of Mr. John Caldwell.

CHAIRMAN: Now, Mr. Friel.

MR. FRANK FRIEL, PREVIOUSLY SWORN, WAS QUESTIONED AS

FOLLOWS BY MR. FINLAY.

CHAIRMAN: Good morning, Mr. Friel.

Q 1 MR. FINLAY: Good morning, Chairman, members of the Tribunal. Good morning, Mr. Friel.

A Good morning.

Q 2 Mr. Friel, I think you gave evidence to the Tribunal here on the 12th and 13th February, about five months ago, and it's been quite a interval of time since you were last here. And there are just some aspects of that evidence that I'd like to ask you about, but because of the interval of time that's elapsed, if you have any difficulty in recollecting evidence that you gave then or what happened on the day, I would be most obliged if you would let me know, the transcripts are available and you can refresh your mind or we can go back to the passage in the transcript dealing with the topic I am covering at any stage.

10:44:19 1 A Thank you very much.

2 Q 3 Just to mention that at the outset.

3 Before going to your evidence, Mr. Friel, if I could ask you a couple of

4 initial questions. My understanding, both from the transcript of your evidence

10:44:48 5 and also from my personal knowledge of your reputation as a solicitor, is that

6 your practice has predominantly been in the conveyancing area, isn't that

7 correct?

8 A That is correct.

9 Q 4 And I think that during the course of your evidence over those two days on a

10:45:12 10 number of occasions, you expressly mentioned that that was the case, and I

11 think that you mentioned that particularly in the context of issues of company

12 law, which arose during the course of your evidence. You recollect that?

13 A That is correct, yes.

14 Q 5 And I think you were careful to point out to counsel for the Tribunal, that

10:45:42 15 company law has not been and is not your area of speciality or expertise, isn't

16 that correct?

17 A Absolutely, yes.

18 Q 6 You remember you had furnished a statement to the Tribunal before you came to

19 give evidence?

10:46:07 20 A Yes.

21 Q 7 Leaving aside the matters which you dealt with in your statement, had you been

22 told by the Tribunal before you came to give your evidence here, that you would

23 be expected to give your opinion on questions of company law?

24 A No.

10:47:07 25 Q 8 And can I take it from that reply, Mr. Friel, that that being so, you hadn't

26 conducted any particular research into any issues of company law in preparation

27 for your evidence?

28 A None whatsoever.

29 Q 9 And you had no expectation that you would be questioned about legal

10:47:46 30 propositions of company law during the course of your evidence?

10:47:49 1 A No.

2 Q 10 You may recall and if you don't, we can easily find the references but you may
3 recall in general, Mr. Friel, that over those two days, 12th and 13th of
4 February, counsel for the Tribunal asked you to comment on a number of
10:48:42 5 documents, you recollect that?

6 A I do indeed, yes.

7 Q 11 And there were five documents in particular which you were asked about and I'll
8 come to each of those in turn. We'll deal with them in detail in due course.
9 What I would like to do, if I may, is deal with the documents in their
10:49:16 10 chronological order, it's a slightly different sequence from that followed
11 during your examination, I don't think anything turns on that and so what I
12 propose to do is to ask you about those documents in the order in which they
13 are dated.
14 And one of those documents, the first I think in time, is a transfer, a
10:49:55 15 transfer from Mr. Tracey, who had been the registered owner, as you recollect,
16 of the Carrickmines lands with which we are concerned, a transfer from
17 Mr. Tracey to Paisley Park, dated 5th of June 1991. Do you recollect --

18 A I do recollect.

19 Q 12 Broadly that document?

10:50:29 20 A I do, yes.

21

22 MR. O'NEILL: I am not clear whether Mr. Finlay wishes to have the documents
23 put on screen, it might be helpful if he could indicate that and we can ensure
24 that they will be put on screen. This document in question is 1022 in the
10:50:50 25 brief.

26

27 MR. FINLAY: That's most helpful, as we go through them, Chairman, it will be
28 helpful to have a number of documents on screen.

29

10:51:23 30

10:51:23 1 Q 13 MR. FINLAY: So, as you probably recollect, Mr. Friel, that transfer dated the
2 5th of June 1991 is the transfer from Mr. Tracey, from Robert Tracey, to
3 Paisley Park Investments Ltd.
4 A Yes.

10:51:49 5 Q 14 And before coming to the issues that arose in relation to that document, to
6 that transfer, I want to just turn to some general issues which also arose
7 during the course of your examination. I don't know if you recall that counsel
8 for the Tribunal asked you to confirm a legal proposition in relation to the
9 law relating to the winding of up of companies, have you a recollection of
10:52:45 10 that?
11 A Yes, I do indeed.

12 Q 15 And did that proposition put to you by counsel relate to the consequence of the
13 appointment of a liquidator.
14 A It did indeed.

10:53:05 15 Q 16 And before we deal with that in detail, I assume it falls into the category
16 that we have already discussed this morning, namely a proposition of which you
17 had no fore knowledge, is that correct?
18 A I would have a general knowledge of it, yes, in conveyancing terms.

19 Q 17 You would have no fore knowledge you would have been asked about that?
10:53:24 20 A No.

21 Q 18 And it wasn't a proposition in relation to which you had carried out any
22 research before you came to give evidence?
23 A That is correct.

24 Q 19 And the proposition of counsel for the Tribunal which you were asked to
10:53:45 25 confirm, is at question 121 on day 453, and it was put to you in the following
26 way, Mr. Friel:
27
28 "You might just confirm to me that the liquidator of the company on his
29 appointment becomes the actual controller of the company, matters rest solely
10:54:17 30 with him, the directors effectively do not have function?"

10:54:22 1 A Yes.

2 Q 20 That was the proposition that was put to you by counsel for the Tribunal and

3 you were being asked to confirm that as a legal proposition of company law?

4 A Yes.

10:54:34 5 Q 21 And you did so confirm.

6 A I did.

7 Q 22 You can see the question in the transcript. When you were asked that question,

8 Mr. Friel, can you recollect to the company law for which country did you

9 understand counsel's proposition to relate?

10:55:28 10 A The law of this, of the Republic of Ireland.

11 Q 23 The law of the Republic of Ireland. The company law of the Republic of

12 Ireland. And just while we are considering that, you may recollect that later

13 on during the course of your evidence, you were invited by counsel for the

14 Tribunal to apply that proposition or the consequences of that proposition to

10:56:20 15 the circumstances of the liquidation of Paisley Park. Do you recollect that?

16 A I can't recollect it, the detail, what it must have --

17 Q 24 Yes, of course, we will come to all of this and if you have the slightest

18 difficulty, please let me know. We will come to the questions in due course.

19 At this remove, Mr. Friel, can you recollect the corporate nationality, if I

10:57:00 20 can put it that way, of Paisley Park?

21 A I just can't recall offhand, I assume it's Isle of Man.

22 Q 25 Yes, it's an Isle of Man company. I take it that you would agree with me that

23 that being so, it is not governed by the company law of the Republic of

24 Ireland?

10:57:34 25 A That would be so, yes.

26 Q 26 So just to recap then, when you were asked that question or rather when you

27 were asked to confirm that proposition put to you by counsel for the Tribunal

28 in relation to the consequence of a liquidation of a company, you understood

29 counsel to be referring to the company law of the Republic of Ireland?

10:58:06 30 A I did indeed, yes.

10:58:08 1 Q 27 But the company in relation to which you were later invited to apply that
2 proposition is a company not governed by the company law of the Republic of
3 Ireland, isn't that right?

4 A That is correct.

10:58:18 5 Q 28 I take it that, not that you would have had in need to but I take it Mr. Friel
6 that subsequent to giving your evidence in February, you didn't have any
7 occasion to research or check whether the proposition put to you by counsel for
8 the Tribunal was in fact correct?

9 A I didn't, no.

10:59:33 10 Q 29 When that proposition was put to you, Mr. Friel, did you know or did you have
11 an understanding of the species of liquidation to which counsel for the
12 Tribunal was referring?

13 A In the sense of a voluntary liquidation?

14 Q 30 That's correct, yes.

11:00:21 15 A Yes.

16 Q 31 Was it made clear to you by counsel for the Tribunal which species, I use the
17 terms advisedly, which species of terms of liquidation was used in the
18 proposition?

19 A I can't recall if it was specifically raised but it was my understanding all
11:00:41 20 along that it was a voluntary liquidation, a liquidation with the assets being
21 distributed in specie.

22 Q 32 Yes. That's absolutely correct, Mr. Friel. The actual liquidation with which
23 we are dealing in this matter, the liquidation of Paisley Park was such a
24 liquidation. But, if I can just come back to the proposition of principle that
11:01:08 25 was put to you, the proposition of principle, question 121, where you were
26 being asked to confirm:
27
28 "That as a matter of company law, the liquidator of a company on its
29 appointment, becomes the actual controller of the company, matters rest solely
11:01:26 30 with him and the directors effectively do not have a function."

- 11:01:29 1 Do you understand that to be a proposition relating to one or more or all
2 species of liquidation?
- 3 A I took it to be the, a distribution in specie of an Irish company.
- 4 Q 33 So your understanding of that proposition was that it was a proposition
11:01:49 5 relating to the voluntary liquidation of an Irish-registered company?
- 6 A Yes, yes.
- 7 Q 34 And of course we know now it was not the liquidation of an Irish-registered
8 company?
- 9 A That is correct.
- 11:02:12 10 Q 35 I wish to make it absolutely clear before proceeding, Mr. Friel, that my
11 questions are not intended in any way to criticise the evidence that you gave
12 in February. You have already confirmed that you had had no fore knowledge of
13 these questions, that company law is not your expertise and that you had no
14 opportunity whatever to research or consider these legal questions before you
11:02:52 15 came to give evidence in the witness-box.
- 16 A That is correct.
- 17 Q 36 We are aware of that when we go through this. For completeness, it's of some
18 importance for the record of this Tribunal, even though the company in question
19 is unaffected by Irish company law, if Paisley Park had been an Irish company,
11:03:30 20 the relevant provisions of the Companies Act which would have applied to it,
21 would have been those applicable to a voluntary winding up, is that correct?
- 22 A That is correct.
- 23 Q 37 This was a voluntary winding up. And very mindful of the fact that this is not
24 your area, Mr. Friel, are you aware of the distinctions between various species
11:04:08 25 of voluntary winding up, as distinct from a voluntary in contrast to a court
26 one?
- 27 A I would be aware of the difference.
- 28 Q 38 There is a difference.
- 29 A Yes.
- 11:04:20 30 Q 39 So under our company law, Mr. Friel, we have at least three species of winding

- 11:04:34 1 up; we have at least three. We have a winding up pursuant to an order of the
2 court, where a court appoints a liquidator, isn't that correct?
- 3 A That would be correct, yes.
- 4 Q 40 And in that circumstance the court may also appoint a liquidator provisionally
11:04:52 5 before the official liquidator is subsequently appointed. That's one species
6 of winding up. And then we also have a species of liquidator with two sub
7 species, that's a voluntary one. Where the winding up takes place outside the
8 control of the court, isn't that correct?
- 9 A That would be correct.
- 11:05:17 10 Q 41 And in that circumstance, the liquidator is not appointed by the court and a
11 fortiori is not an officer of the court, is that correct?
- 12 A That would be correct.
- 13 Q 42 But as I say, within that category, within that species, there are what I
14 describe as the two sub-species of creditors 'voluntary winding up and members'
11:05:42 15 voluntary winding up, is that correct?
- 16 A That is correct.
- 17 Q 43 And there exists differences between the two, isn't so that?
- 18 A There are, I wouldn't be --
- 19 Q 44 I don't wish in any way you to ask you to give an opinion of an area which you
11:06:03 20 are not familiar with. I'm merely seeking to just identify some problems which
21 exist in relation to the evidence that you gave in February, which are wholly
22 understandable.
23 If we can just look at the nature, without looking at the statutory provisions,
24 just the general nature of those two sub-species of voluntary winding up
11:06:37 25 because they are relevant, as we will see, to what happened in the case of
26 Paisley Park. In broad terms, are you aware -- in broad terms -- that a
27 creditors' voluntary winding up is essentially a voluntary winding up in
28 circumstances of insolvency?
- 29 A I would be.
- 11:07:07 30 Q 45 In broad terms.

11:07:09 1 A Yes.

2 Q 46 And again, in broad terms, and typically, a members' voluntary winding up is a
3 voluntary winding up in circumstances in which there is no insolvency?
4 A Yes.

11:07:26 5 Q 47 There's no excess of liabilities over assets.
6 A Yes.
7 Q 48 And the liquidation of Paisley Park was an example of the latter sub-species,
8 wasn't it?
9 A That is correct, yes.

11:08:04 10 Q 49 It was an entirely solvent winding up, a members' voluntary winding up.
11 A Yes.
12 Q 50 Where no issues of insolvency arose?
13 A That is correct, yes.
14 Q 51 And during the course of your evidence, Mr. Friel, against the background of
11:08:46 15 the proposition that I have just referred to, that was put to you, the
16 consequence of liquidation under Irish law, that general proposition which was
17 put to you by counsel; you were also asked to comment on the concept of a
18 distribution in specie and you were invited to agree that it was unusual in a
19 liquidation and you did so agree and I just want to suggest to you, Mr. Friel,
11:09:23 20 if you would be entirely correct because a distribution in specie is most
21 unusual in liquidations generally, isn't that correct? In liquidations
22 generally?
23 A In liquidation, generally, yes.
24 Q 52 It is indeed and the reason for that is, Mr. Friel, the vast majority of
11:09:41 25 liquidations, be they court liquidations or be they creditors' voluntary
26 windings up, occur in circumstances of insolvency, isn't that so? By
27 definition?
28 A The creditors or members?
29 Q 53 A creditors' voluntary winding up and a court liquidation take place in certain
11:10:03 30 circumstances of insolvency?

11:10:05 1 A Yes.

2 Q 54 And they are the vast majority of liquidations in our jurisdiction --

3 A I wouldn't have the --

4 Q 55 I suggest to you and by definition, if there is an excess of liabilities over

11:10:16 5 assets which is the test for insolvency, there will be and can be no

6 distribution in specie because there's nothing left to distribute to the

7 members after the shortfall of the creditors, isn't that right?

8 A That is correct.

9 Q 56 But the situation is radically different, is it not, Mr. Friel, in the

11:10:43 10 circumstances of solvent members' voluntary winding up.

11 A It would be yes.

12 Q 57 And in such circumstances, despite the correctness of your general observation

13 about a distribution in specie being unusual, but in the circumstances of a

14 members' voluntary winding up, solvent members' winding up, I suggest to you

11:11:05 15 that in that unusual event, a distribution in specie would be entirely usual,

16 if you are with my analysis.

17 A I don't know if it would be that, I know it is done but if you take, for

18 example, the books that I would be referring to, Laffoy precedents, I don't

19 know if there's a precedent for a distribution in specie in that, I don't think

11:11:29 20 it's taken as being that common.

21 Q 58 Yes. That's your view?

22 A That's my view, it's totally opinion, that's correct.

23 Q 59 But you understand that in a members' voluntary winding up, a principal issue

24 is how the assets of the company, because the creditors are discharged it's

11:11:47 25 normal to have the assets of the company go to the members of the company,

26 isn't that so?

27 A Yes, that is right.

28 Q 60 And would you agree and if you are not aware please say so, as I say, it's a

29 fairly narrow area of law which one doesn't necessarily come across every day,

11:12:37 30 particularly if you are not doing in company law, would you agree or do you

- 11:12:43 1 know the nature of a members' voluntary winding up is radically different from
2 that of any insolvent winding up, because it doesn't involve the same necessity
3 to protect the interests of creditors because there's no issue as to creditors?
4 A I would be aware of that, yes.
- 11:13:12 5 Q 61 And that as a consequence of that, the role of the liquidator is different from
6 that of the role of a liquidator appointed either in or out of court to protect
7 the interests of creditors in an insolvent winding up?
8 A Yes.
- 9 Q 62 When I use the word in solvent now, I'm using it to cover those two species,
11:13:40 10 creditors' voluntary and court winding up, if you are with me.
11 A Yes.
- 12 Q 63 If I may, I'm just going to read you a sentence from Patrick Usher's book on
13 Irish Company Law and you might see whether you would agree with it, it's page
14 473 of the 1986 edition of Patrick Usher's book.
- 11:14:20 15
16 "In a members' voluntary winding up, the liquidation is predominantly a
17 domestic matter between the liquidator and the members."
18 A Yes.
- 19 Q 64 That would be a statement of the law, I suggest to you that it is correct and
11:14:36 20 it is consistent with what I have just described, the relevant interests of
21 really those of the members in contrast, in contradistinction to an insolvent
22 winding up, where the interest is those of the creditors.
23 A It certainly is.
- 24 Q 65 And in that context, Mr. Usher points out, is evidence from the Act that being
11:15:03 25 members's voluntary, the company appoints the liquidator, whereas that's not
26 the case in either a creditors' voluntary or a court winding up, he is
27 appointed either by the creditors or the court as the case may be, the company
28 fixes his remuneration, the company fills vacancies in his office and he must
29 report to the company, the company of course being the members of the company.
- 11:15:29 30 A Yes.

11:15:29 1 Q 66 And I just want to suggest to you, Mr. Friel, we will come to the relevant
2 provisions in a moment, that because of those fundamental differences,
3 differences of responsibility and obligation, which distinguish a members'
4 voluntary winding up from a creditors' winding up of either kind. The
11:16:33 5 legislation in this country has introduced distinguishing provisions, and I
6 want to come to one of them just in a moment.
7
8 But in particular, I'll just going to suggest to you that in particular, one of
9 the important differences between any form of insolvent winding up and a
11:17:06 10 members' voluntary, is the status of the directors following the appointment of
11 a liquidator. And the reason why I mention that to you is, that brings us back
12 to the proposition with which we started, the proposition of counsel to this
13 Tribunal to the effect "that on the liquidation of a company, the liquidator
14 becomes the actual controller, matters rest solely with him, the directors
11:17:48 15 effectively do not have a function."
16
17 And as we will see in due course, throughout the course of your evidence,
18 counsel returned to that proposition, it was described in various ways which
19 are different but without distinction. The directors were described as being
11:18:09 20 functus officio, which is merely another version of the same proposition. But
21 I just want to suggest to you that now that we have in fact analysed the nature
22 of the liquidation with which we are dealing here which is voluntary, if it
23 were a company, which it's not, governed by Irish company law which is the
24 proposition put to you, the situation would not be as proposed by counsel for
11:18:50 25 the Tribunal because the Companies Act of 1963, section 258, Subsection 2,
26 which relates, as you will see in a moment, Mr. Friel, to a members' voluntary
27 winding up, contains the following provision and if I may just read it.
28
29 "On the appointment of a liquidator, all the powers of the directors shall
11:19:30 30 cease, except so far as the company in general meeting or the liquidator

11:19:43 1 sanctions the continuance thereof."

2

3 Now, that I take from that all the evidence given today, is a provision of

4 which you were wholly unaware until this minute?

11:19:57 5 A Absolutely.

6 Q 67 And which you had absolutely no knowledge of when you were asked to agree to

7 the proposition put to you by counsel for the Tribunal on the 12th of February,

8 isn't that correct?

9 A That is correct, yes.

11:20:07 10 Q 68 But you will see I think, Mr. Friel, just to consider that subsection for a

11 moment, you will see that it is consistent with the principles which we looked

12 at which distinguish a members' voluntary from any form of insolvent winding

13 up. I think the position is this, that in an insolvent winding up, because the

14 interests of creditors are paramount, once the liquidator is appointed, the

11:20:42 15 directors are functus officio and that is so with in solvent liquidation,

16 because of the unique and different nature of the members' voluntary where the

17 interests of the members are principal matter, the Act permits the continuance

18 of the powers of the directors if sanctioned either by the members themselves

19 or the continuing powers of the directors if sanctioned by the members

11:21:12 20 themselves or by the liquidator. So that's the effect of that section of the

21 1963 Act.

22

23 So, can we take it then, Mr. Friel, that if the proposition put to you on the

24 12th of February had been put to you today in the knowledge that is now

11:21:49 25 available, if I can put it that way, you would have qualified your answer in

26 relation to a members' voluntary winding up, in other words the proposition

27 would be correct if we were dealing with an insolvent winding up, but is not

28 correct insofar as we are dealing with a members' voluntary by virtue of the

29 provisions of that section. By the way, Chairman, I should of course say that

11:22:14 30 I have copies of the relevant legislation with me.

11:22:23 1
2 Mr. Friel, I'm most anxious that you are aware that I haven't sought to conduct
3 this analysis merely for some academic reason, some arcane discussion about the
4 niceties of Irish insolvency law, this has a very important purpose and a
11:23:02 5 critical relevance. And the reason why it's important is this: At the end of
6 your examination, or close to the end of your examination on the 13th of
7 February, another proposition was put to you by counsel for the Tribunal with
8 which you were asked to agree and it was this; counsel for the Tribunal
9 referred to several documents, one of which was this transfer, stop me if you
11:23:50 10 are not with me.

11 A I am with you, yes.

12 Q 69 He referred to several documents, one of which was this transfer. And he
13 characterised those documents, each of those documents, including this
14 transfer, as a false document and invited you to agree with that
11:24:17 15 characterisation, determining it was false and you did so agree.

16 A I did, yes.

17 Q 70 And the basis on which he invited you to agree with the characterisation of
18 this document as a false document, related back to the proposition that he had
19 put to you, are you with me?

11:24:43 20 A I am indeed, yes.

21 Q 71 Very good.

22
23 MR. O'NEILL: I'm slow to interrupt my friend but it's incorrect to say it's on
24 that basis of one single answer that that proposition was advanced. What was
11:24:55 25 advanced to the witness for his comment was, that this was a document which
26 ought to have been signed by the liquidator, whereas in fact it was signed by
27 the two directors. What is currently being proposed is that the document
28 obviously is a valid document notwithstanding that it was signed by the two
29 directors and not the liquidator. That is a proposition which can be true in
11:25:21 30 two exceptional circumstances, one of which is, if the company in general

11:25:25 1 meeting resolved that the directors should continue the functions which had
2 been removed from them by reason of the liquidation or secondly, if the
3 liquidator had authorised the directors to perform the function of signing the
4 document. In the absence of those two exceptions, what was put to the witness
11:25:48 5 remains the position. Therefore if Mr. Finlay is saying this document is a
6 valid document, one which was prepared and signed appropriately under company
7 law and for the moment I'm relying on the Irish company law, it follows that
8 there must have been one of two occurrences, one a general meeting of the
9 company.

11:26:11 10
11 Now, no documents have been furnished to the Tribunal to suggest that there
12 ever was such a general meeting. The second is that the liquidator himself
13 authorised specifically the directors to perform this function and again, there
14 is no evidence provided to the Tribunal that that is in fact what took place.
11:26:29 15 On the contrary, there is letter which goes from an experienced solicitor in
16 conveyancing, there Mr. Friel, to the liquidator in which he states, "I note
17 that it hasn't been executed by Paisley Park Investments and presumably it will
18 now have to be executed by Rob Harker as liquidator of the company. Kindly
19 confirm." This is at page 1123.

11:26:54 20
21 There is nothing in the documentation to suggest that Mr. Friel was incorrect
22 in his assumption that from the conveyancing point of view, it was necessary
23 for the liquidator to sign if as is now postulated. It is not correct to say
24 that the liquidator is the appropriate person to sign but that the directors
11:27:17 25 themselves may sign, that should have been confirmed in some way by the
26 liquidator saying I have authorised the directors to sign. There's no such
27 documentation provided to the Tribunal and the evidence of Mr. Friel is that he
28 was never given any indication that the directors had been authorised to do
29 what they did.

11:27:42 30

11:27:42 1 So if my friend is seeking to rely upon an exception, I expect that he will
2 establish that exception, apply it in the particular circumstances and if so,
3 produce to the Tribunal either the documentation that would stand this up,
4 either the authority of the liquidator sanctioning the continuance of the
11:28:02 5 directors acting or the resolution of a general meeting authorising them to
6 act.

7
8 If that isn't done, the proposition still remains and it was validly put to the
9 witness in examination that on its face, this document is false because there
11:28:18 10 was a liquidation which took place prior to the signature of these documents by
11 directors and there is no apparent authority for them having done so and they
12 did so in the, in response to a letter from their conveyancing solicitor in
13 Ireland indicating that the appropriate person to sign was the liquidator and
14 that did not happen.

11:28:43 15
16 MR. FINLAY: With the greatest of respect, I regard that intervention as
17 extraordinary, in several respects, Chairman. First of all it was unwarranted
18 at this point in cross-examination and secondly it's most disturbing.

19
11:29:05 20 CHAIRMAN: Mr. Finlay, I don't quite understand that, the proposition -- the
21 basis of the evidence on the questions put to Mr. Friel on the last occasion
22 was, that because the liquidator didn't execute the document in question, then
23 subsequent documentation is flawed.

24
11:29:25 25 MR. FINLAY: No, no, not flawed. False. I will come to that in due course.
26 The characterisation of this document by Mr. O'Neill was that it is a false
27 document.

28
29 CHAIRMAN: Now you have opened a section of the Companies Act which provides
11:29:46 30 two situations where the directors can continue to act, presumably, including

11:29:53 1 the execution of documents as directors and which the section as you have
2 opened it is quite clear, so presumably you are now going to proceed to
3 establish that in fact the one of those exceptions or one of these provisions
4 did in effect take place.

11:30:19 5
6 MR. FINLAY: Sorry Chairman, there's a fundamental misunderstanding as to what
7 is taking place here this morning. I am cross-examining Mr. Friel as to
8 evidence that he was invited to give by counsel for the Tribunal, ostensibly as
9 an expert witness as to legal opinion in relation to an area of law which of
11:30:40 10 which he had no fore knowledge and which he is not an expert. He has already
11 confirmed and agreed with me this morning, that the proposition which was put
12 to him by counsel for the Tribunal is not correct and he would not have so
13 confirmed that proposition if he had been aware of the law.

11:30:58 15 Now, that has been the purpose of my cross-examination so far this morning and
16 it is critically important, critically important having regard to
17 correspondence which has been exchanged between my solicitor and the Tribunal.
18 So, I wish the Tribunal to be very conscious of what is happening here today.
19 The Tribunal is well aware that in February, Mr. Friel, without any fore
11:31:29 20 knowledge on his part, was invited to give what purports to be expert evidence
21 in relation to areas of law in which he is not an expert and has very fairly
22 confirmed that he is not an expert. He had no fore knowledge of the
23 propositions put to him with which he was invited to agree. We have spent
24 sometime this morning analysing a central proposition, it is crucial that that
11:31:56 25 be done in order to demonstrate that that proposition as put, is not correct
26 and that that proposition formed the basis for the confirmation given by
27 Mr. Friel and that it subsequently formed the basis for his agreement with the
28 proposition that this document is a false document.

11:32:20 30 Now every member of this Tribunal is well aware of the meaning for a lawyer, of

11:32:28 1 the characterisation false in relation to a document. A document which is
2 alleged to be false, is a document which is untrue and intended to be untrue.
3 Untrue. And it is a word which any lawyer must use with great circumspection
4 because of its meaning and I was just coming, before I was interrupted, to the
11:32:54 5 section of Mr. Friel's evidence in which he was invited to agree with the
6 characterisation of this document as a false document. That is an untrue
7 document.

8
9 CHAIRMAN: Well, or a document which purports to do something which it doesn't
11:33:10 10 in effect.

11
12 MR. FINLAY: With great respect, Chairman, there is a fundamental and most
13 important distinction. There are many documents, there are many documents
14 which may or may not be effective, may or may not be effective to achieve that
11:33:32 15 purpose. It does not follow at all that such documents are false. Wholly
16 different matter. And each member of the Tribunal will be aware of that
17 distinction. But what happened here was disturbingly, was that a document in
18 respect of which the allegation or complaint was that the signatories didn't
19 have the capacity exactly, didn't have the capacity to do what they did, and
11:34:08 20 I'll come to that in due course -- didn't have the capacity to do what they
21 did, was therefore a false document.

22
23 Your Lordships will know that that, as a matter of law is a non-sequitur and a
24 very important non-sequitur. If someone signs a document without the capacity
11:34:27 25 to sign, that may or may not depending on the circumstances, depending on
26 facts, affect the validity of the document. But it has, it does not follow at
27 all that ergo that therefore in consequence the document is a false document.
28 It's a very serious characterisation of and a very serious allegation to make
29 and under no circumstances, under no analysis at all, can the allegation
11:34:58 30 against this document, I'm putting it this way, the allegation against this

11:35:02 1 document that by signing this document as named directors, they didn't purport
2 to be something which they weren't, they put their names on this document qua
3 director, Mr. Harker and the other directors, they signed their names as
4 directors. That is true, they were both directors, absolutely true. The
11:35:20 5 complaint is; oh but because post liquidation directors are always functus
6 officio, this document is therefore false. That is as a legal proposition, is
7 with great respect, nonsense.

8
9 In some circumstances, in particular facts, it might be, it might be, that it
11:35:47 10 might be but it isn't here. It might be that the signing in the capacity that
11 they signed could affect the validity of it, could affect the validity of the
12 document.

13
14 In no circumstances, in no circumstances can those facts amount to the falsity
11:35:59 15 of the document. They cannot, Chairman. As a matter of law, with great
16 respect. With great respect.

17
18 CHAIRMAN: All right. I can understand the point, I mean your criticism or
19 part of your criticism is that the word "false" should have been used instead
11:36:14 20 of the word "invalid".

21
22 MR. FINLAY: Absolutely, Chairman. But I'm very -- I would be most concerned
23 if any member of this Tribunal thought that that was a trivial distinction, I
24 would be greatly concerned, it would be a matter of extreme concern if the
11:36:30 25 distinction between an ineffective document and a false document was considered
26 to be of no importance in a legal context.

27
28 CHAIRMAN: Well I think, I don't know, my understanding was that the point
29 being made when Mr. O'Neill was cross-examining Mr. Friel was to the effect
11:36:52 30 that the document was invalid. I can understand the distinction that you make

11:36:57 1 but that was my understanding, I don't know --
2
3 MR. FINLAY: That's completely correct, Chairman, your understanding is
4 entirely correct. The complaint, if I call it that, I characterise it as a
11:37:07 5 complaint, the complaint against this document was that because of its status
6 of the signatories, it was invalid or ineffective document.
7
8 JUDGE KEYS: It didn't do what it purported to do.
9
11:37:19 10 MR. FINLAY: But the point is this, Chairman, critically, that at the end of
11 Mr. Friel's examination, in consequence of that complaint, he was invited to
12 agree that the document in consequence was false.
13
14 CHAIRMAN: All right. Well perhaps it's better if you continue to
11:37:44 15 cross-examine --
16
17 Q 72 MR. FINLAY: I would have thought so, Chairman. I take it, Mr. Friel, you
18 agree with the distinction between a document which may not be effective and a
19 document which is false?
11:37:59 20 A I do agree with the difference but I think if I was asked by a person is it
21 effective or is it false, I would -- it's -- if I was just asked by somebody
22 well is it effective or is it false, I wouldn't see a difference in that. I
23 wouldn't be as precise.
24 Q 73 It's a matter of precision, isn't it?
11:38:22 25 A It would be, yes, but I would say it's a distinction without a difference with
26 which I'm personally concerned, I mightn't be precise as a lawyer as other
27 people would be, but I wouldn't say hold on a second, false and ineffective, I
28 would be hearing them in the same terms. I would agree with, if I was asked
29 the same question again, is it false or is it ineffective or if I was asked
11:38:50 30 them in different ways, I would say yes to the --

- 11:38:55 1 Q 74 Let's put it this way, that's very helpful, when you were invited by counsel
2 for the Tribunal to characterise this document as false, what you meant by that
3 was that it was in your opinion it was not effective, is that correct?
4 A Yes, that is correct. It didn't carry out what it was intended to carry out.
- 11:39:15 5 Q 75 Yes. Can you recollect what it was intended to carry out, the document?
6 A It was intended to transfer the property from Robert Tracey to Paisley Park.
7 Q 76 Yes and in that circumstance, who is the transferor? Who is doing the carrying
8 out?
9 A Robert Tracey.
- 11:39:38 10 Q 77 Exactly. We are dealing of course, with all of this, with registered land,
11 aren't we?
12 A We are, yes.
- 13 Q 78 So, in relation to registered land, Mr. Friel, when the registered full owner
14 of the land executes and delivers a transfer, when the registered full owner of
11:40:22 15 the land executes and delivers a transfer, that is effective to transfer a
16 registrable interest in that land to the transferee, isn't that correct, as a
17 matter of law?
18 A It is an instrument that could transfer that land but might not do it if
19 certain things -- there are other formalities that have could be complied with.
11:40:54 20 If, for example, the transferee, the immediate one that jumps to mind in this
21 particular instance, is that if the transferee would have a certificate in the
22 deed saying he was a qualified person, but he wasn't a qualified person, it
23 wouldn't be effective.
24 Q 79 Yes, but as between the transferor and the transferee?
- 11:41:16 25 A Well it couldn't -- I hope I'm not missing the point and being stupid but if
26 the transferee doesn't have the consent of the Land Commission, his certificate
27 is invalid.
28 Q 80 Indeed and we'll come to that in due course, that's one of the documents you
29 were asked about?
11:41:41 30 A Right. Well then the transfer -- if that was the situation, the transfer, no

11:41:41 1 interest will vest in a person who hasn't goes the consent. So even if there
2 was a transfer executed, it wouldn't be sufficient because --

3 Q 81 Because it isn't registered yet?

4 A It's any land, it doesn't matter if it's registered or unregistered.

11:41:57 5 Q 82 Yes, but in the case of registered land?

6 A It's still essential to comply with the Section 45, if you have that
7 certificate.

8 Q 83 Yes, and we'll come to Section 45 in a moment, Mr. Friel.

9 A I thought you were asking me to say that transfers is effective to pass that
11:42:16 10 interest in land.

11 Q 84 A registrable interest was the language I used, in other words once the
12 transferor, the registered full owner of the land has executed and delivered a
13 transfer in the form required by the land registry rules, that is effective to
14 transfer to the transferee a registrable interest?

11:42:36 15 A No.

16 Q 85 You don't follow that?

17 A I disagree with you.

18 Q 86 You disagree. A registrable interest, it hasn't been registered yet, do you
19 follow?

11:42:46 20 A I do indeed.

21 Q 87 So what more does the transferor to do to transfer the registrable interest --

22 A When it comes to dealing with the land registry, they wouldn't register it
23 unless you lodged the Land Commission consent with it. I'm only giving this as
24 one example.

11:43:02 25 Q 88 Indeed, I am talking only about the transferor?

26 A I beg your pardon, they would, the only thing they'd ask from the transferor is
27 the family home declaration.

28 Q 89 Exactly. I have only been talking about the transferor transferring his
29 interest?

11:43:17 30 A Right.

11:43:17 1 Q 90 And as far as the transferor is concerned, when he has executed and delivered
2 the transfer --
3 A Once it's signed sealed and delivered.
4 Q 91 Exactly. So back to the circumstances of the present case, Mr. Friel, I just
11:44:36 5 want to suggest to you that -- and I don't expect you to have any knowledge of
6 this -- I just want to suggest to you that in a members' voluntary winding up
7 in the Isle of Man, similar statutory provisions exist, provisions similar to
8 those that I have opened to you in section 258.2 of the Irish Companies Act and
9 there's a similar provision under Section 220 of the 1931 Companies Act,
11:45:24 10 obviously you would have no knowledge of that.
11 A Yes.
12 Q 92 But if we can then come back to what happened here, we have a transfer which we
13 saw earlier and it's still on screen and if we could just look at the second
14 page of that document, if possible, sorry the letter is on screen, the transfer
11:46:26 15 of the 5th June 1991, which I think is was on screen earlier.
16
17 MR. O'NEILL: 1023.
18
19 Q 93 MR. FINLAY: What we are looking at here, Mr. Friel, is the second page of the
11:46:42 20 transfer of the 5th June 1991, you see it there?
21 A I do indeed, yes.
22 Q 94 And what we see there is in relation to the execution by Paisley Park, two
23 signatures?
24 A Yes.
11:46:54 25 Q 95 And they are those of Mr. Bullock and Mr. Harker, isn't that correct?
26 A That is correct, yes.
27 Q 96 And both are expressed to sign in their capacity as directors?
28 A That is correct, yes.
29 Q 97 And of course we know that in addition to being a director, Mr. Harker was also
11:47:20 30 the liquidator, isn't that correct?

11:47:22 1 A That is correct.

2 Q 98 And I must now ask you to make an assumption because you have no direct
3 knowledge of it, but assuming for the moment that the law in the Isle of Man is
4 as it is here in relation to a members' voluntary winding up, you would, I take
11:47:51 5 it you would agree that it was clearly open to Mr. Harker, as liquidator to
6 sanction himself or himself and/or any other directors to execute any document
7 on behalf of the company by virtue of the provisions of the section that I
8 opened to you?

9 A I presume so.

11:48:13 10 Q 99 Mr. Friel, if I could ask you about another document which is one of the five
11 documents touched on by Mr. O'Neill in February, it's possibly the second in
12 time in the chronology to which I refer and it's a declaration to Mr. Harker of
13 20th May 1993. I'll just get the reference to that Chairman, so it might
14 perhaps be on screen. I'm instructed it's 1112.

11:50:08 15

16 MR. O'NEILL: There was a declaration in May of 1993.

17

18 MR. FINLAY: Sorry I meant to read out the 20th May 1993.

19

11:50:17 20 MR. O'NEILL: That's 1318.

21

22 Q 100 MR. FINLAY: I had the wrong reference there I apologise for that. 20th May
23 1993. Do you see that document, Mr. Friel?

24 A I do indeed, yes.

11:50:44 25 Q 101 What that is, is a declaration of that date, just read it if I may, "I Roderick
26 Peter Harker of his address being the liquidator of Paisley Park Investments
27 Limited, do solemnly and insincerely declare, that as liquidator of the
28 Company and with the sanction of the extraordinary resolution of the members of
29 the company passed on the 13th May of March 1992 and at the specific of the
11:51:19 30 holders of 1560 A ordinary shares and 372 B ordinary shares, I have today

11:51:23 1 resolved to distribute in species to Jackson Way Properties Limited the whole
2 of the companies interests in the lands at Carrickmines County Dublin."

3
4 And that's the relevant part what I want to refer you to. And you may
11:51:38 5 recollect being asked some questions about that document back in --

6 A I, yes.

7 Q 102 Back in February, Mr. Friel. I just want to remind you of some of the
8 questions that were put to you in relation to -- I'm very sorry -- I need to
9 now, if I may, ask you to look at another declaration made on the 12th of May
11:53:03 10 1992, which I believe appears at page 1112. I'll come back to this one in a
11 moment but they need to be looked at together. 1112 I think is the brief page
12 reference number and this is an earlier declaration, Mr. Friel, do you see that
13 one?

14 A I do, yes.

11:53:27 15 Q 103 It contains the same recital until the fifth line and then it continues:

16
17 "Today I resolve to distribute in specie to the majority shareholder Iris
18 Development Company the whole of the company's interest in the lands at
19 Carrickmines, County Dublin."

11:53:42 20 A Yes.

21 Q 104 "So that the remaining shareholders in due course will receive only a cash
22 distribution." You may recollect some discussion of that document in
23 February.

24 And if I may, I fist of all want to ask you about that document and its
11:54:12 25 consequences. You were asked on day 453, I might just read four questions and
26 their answers starting at number 223.

27
28 You were asked, "What did you understand that declaration to mean?"

29 Answer: That Iris Developments being the larger shareholder were going to take
11:54:44 30 the distribution in specie.

11:54:47 1 Question 224: And that the other shareholder?
2 Answer: Would be paid in cash.
3 Question 225: Would be paid cash? This was sent to you in support of the
4 instruction which you had perceived to proceed to register Iris ultimately as
11:55:03 5 the owner of these land, isn't that correct?
6 Answer: That's correct.
7 And question 226: And was this evidence to you of the ownership of the lands
8 by Iris Development company incorporated.
9 Answer: It would be."
11:55:25 10
11 I want to refer you to that sequence of your evidence, Mr. Friel, and in
12 particular to question 226. Where you are asked "Was the declaration that we
13 have just seen evidence to you of the ownership of the lands by Iris
14 development incorporated, company incorporated." Do you see that?
11:55:55 15 A Yes.
16 Q 105 And this was the declaration of the liquidator resolving to distribute in
17 specie. And this topic arises again, we'll come to it in a moment, what I want
18 to suggest to you is this, Mr. Friel: That this declaration of the 18th of May
19 1992 --
11:56:45 20
21 JUDGE FAHERTY: That the 12th May?
22
23 MR. FINLAY: I'm so sorry, judge, Faherty, I missed that.
24
11:56:52 25 JUDGE FAHERTY: Is it the 12th May? I thought the declaration was the May.
26
27 MR. FINLAY: It is, of course, it's me that's responsible for the confusion.
28 It is of course the 12th of May.
29
11:57:05 30 JUDGE FAHERTY: Yes.

11:57:06 1

2 Q 106 MR. FINLAY: Thank you for that. I just want to suggest to you, Mr. Friel,
3 this declaration of the 12th of May 1992, in fact did nothing to effect any
4 change in the ownership of the Carrickmines lands.

11:57:36 5 A That declaration in itself didn't, no.

6 Q 107 Yes, yes. And that is so because it is no more than a resolution to distribute
7 in specie, isn't that correct?

8 A That is correct.

9 Q 108 So the ownership of Carrickmines lands remained the same the day after that
11:58:03 10 declaration as it had been on the day before, isn't that correct?

11 A That is correct, yes.

12 Q 109 But it might be seen, I suggest to you, as evidence of an intention to alter
13 the ownership of the Carrickmines lands.

14 A Well that's what I would have taken it to be.

11:58:30 15 Q 110 Yes. I always, I understood that that's what you intended but with the very
16 greatest of respect, I just wanted to clarify the precise intention of that
17 answer that you gave at 226. Was this evidence to you of the ownership of the
18 lands, I'm sure as a lawyer you could be see that that could be taken to mean
19 that you regarded this as evidence of ownership but not evidence of ownership,
11:59:10 20 isn't that correct?

21 A That is correct.

22 Q 111 Very good. And of course dealing as we are with registered land, there could
23 never be a change in the ownership from that of Paisley Park until Paisley Park
24 transferred its registered title to another party to a transfer, isn't that
11:59:42 25 right?

26 A And that person was registered.

27 Q 112 And that person was registered as the new registered owner, is that right?

28 A Yes.

29 Q 113 We'll come to all of that in due course. And then again on a similar theme in
12:00:01 30 a similar vein, this is for the purpose once again of clarifying the answers

12:00:15 1 that you gave, at question 350 on the same day, the 12th February, day 453 you
2 were asked the following question by Mr. O'Neill: Perhaps it's going to come
3 up on screen. 350 on day 453.

12:00:40 5 "So that as of this date of the 21st of January 1993, as far as you were
6 concerned the owners of this property, that is the lands at Carrickmines, were
7 Iris Development company incorporated, and its ownership route of title was the
8 fact that it was the recipient of a distribution in specie from the duly
9 appointed liquidator, Mr. Harker, isn't that right?"

12:01:06 10 And your answer was: "That is correct."

11
12 Now once again this is a variation on the same proposition. And can I take it
13 that your answer is the same, namely that you accept now that as of the 21st
14 January 1993, Iris was not the owner of the Carrickmines lands.

12:01:34 15 A Yes.

16 Q 114 And Mr. Friel, isn't it correct Iris has never been, to your knowledge -- I put
17 it to you the other way, you have no knowledge that Iris was ever the owner of
18 the lands at Carrickmines, isn't that correct?

19 A That is correct.

12:01:51 20 Q 115 And perhaps I can put it in the positive rather than the negative, the evidence
21 available to you in relation to this registered land is that the registered,
22 the registered owners in relation to the period with which you have been
23 concerned with this land, have been three, Mr. Robert Tracey, Paisley Park, and
24 Jackson Way.

12:02:20 25 A Well I wasn't involved when Mr. Tracey was --

26 Q 116 Absolutely, all I am saying to you is the evidence available to you, the
27 evidence you have seen, I am not suggesting you had any involvement with
28 Mr. Tracey and nothing turns on that, but that the evidence from the conveyance
29 you have seen, the document you have seen, the transfer were Mr. Tracey to
12:02:42 30 Paisley Park, you have seen that. That clearly indicates to you he was the

12:02:44 1 registered full owner of the land, that subsequently Paisley Park were the
2 registered full owner of the land and subsequent to that, Jackson Way became
3 the registered full owner of the land, is that true?
4 A They were the only registered owners, is that correct.

12:02:56 5 Q 117 Exactly. But Iris was never the owner of this land.
6 A It was never the registered owner.
7 Q 118 It was never the owner of this land, Mr. Friel?
8 A Well, the only thing I have on my file is a letter at one stage from the
9 liquidator stating that it was going to be distributed to Iris.

12:03:19 10 Q 119 Absolutely. Oh without doubt and that's clearly there, we have seen all that
11 in detail and there's no issue I think but that in 1992, there was an intention
12 to distribute in specie to Iris and in fact it goes further than that, I seem
13 to recollect seeing documentation where you were to have a possible role in
14 relation to preparing the documentation which might transfer the title to Iris,
12:03:46 15 do you recollect that in 1992?
16 A Well the initial instructions I was receiving from the liquidator was Iris.
17 Q 120 Exactly. That's the point.
18 A Yes.
19 Q 121 So, you were in receipt of instructions in 1992 which could, if they had been
12:04:04 20 followed through or implemented or whatever, could have led to a change in
21 ownership in favour of Iris?
22 A That is correct.
23 Q 122 But that never happened?
24 A That is correct.

12:04:14 25 Q 123 And then again, Mr. Friel, at question 380 on that same day, the 12th February,
26 day 453, what's happening here just to remind you, we'll perhaps see it in a
27 moment is that Mr. O'Neill is asking you about correspondence from Mr. Harker
28 to you. And you may look at that in some more detail later but for present
29 purposes, I'm sticking with the same issue. At question 380, Mr. Friel, you
12:05:32 30 were asked the following:

12:05:33 1
2 "But now he was telling you" -- you may take it there Friel that's a reference
3 to Mr. Harker writing to you -- "But now he was telling you that there had
4 never been a distribution to the a Panamanian company, it was only ever to be a
12:05:51 5 suggestion which was never implemented and yet you had before you the
6 documentation which satisfied you that the distribution in specie had taken
7 place and that the original shareholders had no further function, isn't that
8 right?
9 Answer: That is right."

12:06:08 10
11 Now, for the moment I'm simply concerned with the ownership of the land, we'll
12 deal with other issues later and if we can just analyse the various aspects of
13 that question. Now he was telling you that there had never been a distribution
14 to the a Panamanian company, first of all I think you can take it Mr. Friel
12:06:29 15 that's a reference to Iris?
16 A Yes.
17 Q 124 Now, he was telling you there had never been a distribution to a Panamanian
18 company, that in fact was correct because the distribution which had been
19 intended or fore-shadowed back in 1992 had never in fact taken place, isn't
12:06:46 20 that correct?
21 A That is right, yes.
22 Q 125 So Mr. Harker was correct in so informing you, isn't that so?
23 A That is right.
24 Q 126 It was only ever to be a suggestion which was never implemented, that was also
12:07:00 25 correct, isn't that so?
26 A That is right, yes.
27 Q 127 And then the following is put to you "And yet you had before you the
28 documentation which satisfied you that the distribution in specie had taken
29 place".
12:07:17 30 And you agreed but I think for the reasons we have just seen and the reasons

- 12:07:21 1 you have just given, you accept now today that the distribution in specie had
2 not taken place?
- 3 A Yes.
- 4 Q 128 All that had ever occurred was a resolution but the distribution had never
12:07:34 5 taken place and of course because we are dealing with registered land, the only
6 way that the distribution in specie could take place was by means of a transfer
7 of the registered title, isn't that so?
- 8 A That is right.
- 9 Q 129 And I think it would be fair to say, correct me please if I am wrong, in
12:08:16 10 considering this aspect of your evidence, there may have been some slight
11 confusion between the, between an intention to distribute in specie and the
12 actual event which would be necessary in order ever to achieve that, isn't that
13 correct? Because the event would be the actual registered transfer under the
14 ordinary rules applying to the transfer of registered land, suspect that so?
- 12:08:50 15 A That is so.
- 16 Q 130 And just while we are there, Mr. Friel, I take it of course that the same
17 principle applies when one comes to the case of Jackson Way. We'll see in a
18 moment, we'll go into it in some detail, we'll see in a moment a resolution to
19 distribute to Jackson Way, that's the resolution in 1993, but for the reasons
12:09:27 20 you have just given and we have just seen, I take it you would agree that
21 equally that resolution did not distribute anything in specie to Jackson Way,
22 that the way in which that was to be effected was by the transfer from Jackson
23 Way from Paisley Park to Jackson Way which we will deal with later on, isn't
24 that correct?
- 12:09:56 25 A That is right.
- 26 Q 131 And so if you are looking to see whether someone has acquired title to
27 registered land, you can't say oh, they have acquired title because I have
28 found a decision or a declaration to distribute in specie to them, that is
29 neither here nor there in terms of conveying the title, is that correct? In
12:10:40 30 terms of transferring title?

12:10:42 1 A Transfers the legal interest but we are getting into an area where I mightn't
2 have any great knowledge or a lot of people mightn't, if there's a note or
3 memorandum in writing in relation to registered land, the beneficial interest
4 might have transferred to whoever that person was. But no --

12:11:02 5 Q 132 Indeed but in terms of the transfer of registered title to land, the legal
6 title?
7 A The legal title wouldn't have been but if I was -- can I only give this
8 example. If I was a shareholders in Iris and I saw a resolution there, surely
9 that would be a lovely note or memorandum in writing for me to come before a
10 court to say there was a resolution here to sell the company to me setting out
11 what we call the three P's, the property, the price and the parties.

12 Q 133 Yes, what I'm concerned about solely at the moment, we'll come to that in due
13 course, what I'm concerned about solely at the moment, Mr. Friel, is the
14 transfer of legal title to registered land and just to be clear, a declaration
15 to distribute in specie cannot effect that, is that correct?
16 A It cannot, is legal title most important, is beneficial ownership most
17 important.

18 Q 134 We are concerned at the moment with legal title?
19 A But legal title might be very little, but what you are saying is if you want to
20 see who the legal owner is, the only way of seeing that is looking up the folio
21 in the land registry.

22 Q 135 Correct.
23
24 JUDGE FAHERTY: I want to clarify something Mr. Finlay. Mr. Friel, what you
12:12:27 25 are saying as a conveyancing solicitor obviously, you would deal with
26 transfers?
27 A Yes.
28
29 JUDGE FAHERTY: Every day of your professional life. And normally in the
12:12:36 30 ordinary way, when there's a sale of land, there's a precursor to a transfer,

12:12:41 1 namely the contract for sale.

2 A Absolutely.

3

4 JUDGE FAHERTY: As I understand what you are saying to Mr. Finlay, are you

12:12:48 5 making an analogy here by way of precursor between a contract for sale and the

6 declaration and the resolution?

7 A Well --

8

9 JUDGE FAHERTY: I'm trying to follow what you are trying to respond.

12:13:02 10 A I'm trying to respond because there isn't a transfers there, the contract would

11 be a far more important document than the subsequent transfer.

12

13 JUDGE FAHERTY: There may be a note to satisfy the statute of fraud if the

14 absence of a contract.

12:13:15 15 A Exactly.

16

17 JUDGE FAHERTY: And that might be enough if there was never a contract. A

18 transfer might occur on the basis of an oath for the statute of fraud.

19 A Exactly. That would be far better, what we say is the legal ownership and the

12:13:27 20 beneficial ownership. And the beneficial ownership is far more important than

21 legal ownership. In fact the land registry don't allow, in certain areas,

22 beneficial ownership to be noted, if I was a trustee of land for a third party,

23 I would be --

24

12:13:41 25 JUDGE FAHERTY: That's not reflected on the land registry.

26 A I might have no beneficial interest in the property yet you go down to the land

27 registry and you are seen as Frank Friel as the registered owner.

28

29 JUDGE FAHERTY: I just wanted to follow your line of thought in response to

12:13:55 30 Mr. Finlay.

- 12:13:56 1
- 2 Q 136 MR. FINLAY: Not at all, you have merely clarified it, you have touched on an
3 issue judge, I was just about to come to, it follows from where we were.
4 Isn't that the point, Mr. Friel, as a conveyancer dealing in this case
12:14:11 5 exclusively with registered land and the rules at which I apply to registered
6 land and both the land registry rules and rules of registration, that the
7 system is concerned with and only with the registration of and the record of
8 the registration of legal title.
- 9 A That is correct.
- 12:14:38 10 Q 137 And that the, as we will see in a moment or shortly, that the conveyancers,
11 where there's a matter of rule and practice, are positively encouraged, if not
12 required, to keep trusts, other forms of beneficial ownership and I use the
13 expression advisedly of the title, isn't that correct, in the case of
14 registered land?
- 12:15:07 15 A Well you can't put it on.
- 16 Q 138 Precisely, precisely. It forms no part of the statutory system of the
17 registration of land in this country, is that correct?
- 18 A That's correct.
- 19 Q 139 And for the avoidance of any doubt, what I'm concerned with in this line of
12:15:27 20 questioning or examination, is to do with the transfer of legal title to these
21 lands and if you are in any doubt about that, I apologise but that is what I
22 have been inquiring into for some time. And it's for that reason that if you
23 are looking at the title to registered land, which we are here, those
24 declarations in specie did not affect that title, that legal title, I think you
12:16:03 25 confirmed that earlier, isn't that right?
- 26 A Yes, unless you know, back to it again, unless there's fraud or something like
27 that in relation to --
- 28 Q 140 Yes.
- 29 A I forgot the other reasons, subject to areas where it can be set aside as one.
- 12:16:18 30 Q 141 Yes. Yes. And following Judge Faherty's points, you would and in

12:16:29 1 circumstances should when approaching the transfer and registration of
2 registered land, ignore trusts, other aspects of beneficial ownership which
3 were not the legal title, is that correct?
4 A That is correct.

12:16:47 5 Q 142 So if we could, we have been looking at I think, Mr. Friel, at the first
6 declaration, that's the 1992 declaration, indicating an intention to distribute
7 to Iris. And then as we had seen, there was that second declaration sent to
8 you dated the 20th May 1993, which was on the screen earlier.
9

12:17:51 10 MR. O'NEILL: 1318.
11

12 Q 143 MR. FINLAY: Thank you very much. Yes. And there we have a resolution to
13 distribute in specie to Jackson Way, isn't that correct?
14 A That is right, yes.

12:18:47 15 Q 144 But once again, that declaration alone had no effect in terms of any change in
16 the legal title to the land.
17 A Yes.

18 Q 145 As we have already seen. Now, you may recall, Mr. Friel, that and we are going
19 to come to in due course, that subsequent to this, there was then the actual
12:19:18 20 transfer from Paisley Park to Jackson Way and I think you had an involvement in
21 that and we will look at that in due course.
22 And you may recall in the context of that transfer, you raised some queries
23 with Mr. Harker in relation to the shareholding, in relation to the number of
24 shares held by Maskani and Renzenbrinck, do you recollect that?
12:20:10 25 A I do indeed.

26 Q 146 We will as I say come to that in its chronology because it's the next document
27 after this one. But for the moment, I just want to keep the sequence of events
28 as clear as I can. And what I want to do is to refer you to a letter which was
29 contained in your files, a letter of the 21st of January 1993, Chairman.
12:20:41 30 And --

12:20:42 1
2 CHAIRMAN: That's 1230. Thank you.
3
4 Q 147 MR. FINLAY: Do you see that, Mr. Friel?
12:21:12 5 A I do indeed.
6 Q 148 It's a letter from Mr. Harker to you of the 21st January 1993. Re: Paisley
7 Park. "I apologise for the delay in replying to your letter of the 20th
8 November 1992, and I now enclose a duplicate certificate of incorporation.
9 It's anybody's guess what might have happened to the original. According to
10 your letter of the 22nd October 1992, I had already sent with my letter of the
11 4th September a copy of the Memorandum and Articles of Association as amended
12 by special resolution of the 22nd November 1988. I can confirm that Paisley
13 Park Investments Ltd does not intend to carry on business in the Irish state.
14
15 I trust you will now be in a position to proceed with the registration of the
16 lands in the name of Paisley Park Investments Ltd.
17
18 I refer to the final paragraph of your letter of the 22nd October 1992 and
19 enclose certified copies of two declarations I made on the 12th May 1992. As
12:22:13 20 at the 12th May, Iris was the holder of 1,560 A shares and was the owner of
21 1660 A shares as Martin and myself had no beneficial interest in the shares
22 registered in our names.
23 Does this explain the apparent contradiction? This is all academic at present
24 as I am still awaiting instructions from the principals. If you have any
12:22:44 25 query, please do not hesitate to contact me."
26
27 I'm just reminding you of this letter, I'm sure you wouldn't recollect it at
28 this remove in time. Those were the terms in which Mr. Harker wrote to you in
29 January. So what I suggest to you was he was here indicating to you as of May
12:23:07 30 1992, Iris was the holders of the shares that he identifies but by January

12:23:17 1 1993, he is already clearly indicating to you that this is academic as he is
2 awaiting instructions from his principals. Do you see that?
3 A I do indeed, yes.
4 Q 149 I am not sure this was a letter that you dealt with in your previous evidence,
12:23:34 5 I simply can't --
6
7 MR. O'NEILL: It was in full, line by line.
8
9 Q 150 MR. FINLAY: Excellent. Excellent. So, what Mr. Harker is clearly saying to
12:23:48 10 you here that they were at that point in time shareholders, Iris was rather, a
11 shareholder, but that that situation is academic at present as he is awaiting
12 instructions from the principals.
13 Now, I recollected something which I had overlooked a moment ago, you were in
14 fact asked about that letter in the course of your evidence in February and one
12:24:19 15 of the points which arose when you were asked about that letter, is the
16 reference to awaiting instructions from the principals and I think it was
17 suggested to you, I can come back to the specific questions later on, I don't
18 have them just here now but --
19 A It was just basically you know they weren't principals.
12:24:53 20 Q 151 Precisely. The gist of it was this is most unusual, what's Mr. Harker doing
21 talking about principals, he is a liquidator, he has no principals. You may
22 recollect that.
23
24 MR. O'NEILL: Question 347.
12:25:07 25
26 MR. FINLAY: A liquidator doesn't have.
27
28 MR. O'NEILL: The question is 347.
29
12:25:15 30 Q 152 MR. FINLAY: Yes, so what was suggested to you at this point was the following,

12:25:25 1 Mr. Friel. We'll just wait for it to appear. So the question is as follows
2 Mr. Friel:
3
4 "Here we see, Mr. Friel, the first reference to there being principals behind
12:26:17 5 Mr. Harker. Normally I take it that where a liquidator is carrying out the
6 functions of a liquidator under the Companies Act, he does not have principals,
7 he is the principal and he is administering the function as he is obliged to do
8 under the act, independently and not as an agent for anybody. And you answered
9 "Certainly that's correct, yes.
12:26:36 10 Question: Did it occur to query him here as to what he was saying in the
11 context of principals being involved in this.
12 And your answer is I'm afraid to say no. He didn't."
13
14 But I just want to suggest to you, with respect, Mr. Friel, that the opinion
12:26:57 15 that you there expressed in relation to liquidations generally, would be very
16 apt in the context of an insolvent liquidation but is not appropriate in the
17 context of a members' voluntary winding up for the reasons that we discussed
18 earlier this morning and it might be of some assistance, again Mr. Usher,
19 Patrick Usher in the book that I referred to this morning at page 474 states
12:27:45 20 that in a voluntary winding up such as this and I quote "The liquidator
21 represent the company as its agent."
22 "The liquidator represents the company as its agent."
23
24 And in that same vein, Mr. Friel, in the 23rd edition of Palmer, obviously
12:28:06 25 dealing with the English act but you might assume for present purposes that the
26 relevant provisions are, for present purposes, the same in the English act.
27 Paragraph 86.55 of the 23rd edition of Palmer, "The liquidator in a voluntary
28 winding up is not, strictly speaking, a trustee either for the creditors or the
29 contributories, he is more rightly described as the 'Agent of the company'."
12:28:37 30

12:28:37 1 And that's a reference of the case of Knowles V Scott 1891, 1 Chancery 717,
2 page 723. So again, Mr. Friel, I am fully cognizant of the fact that it's not
3 your area but one again goes back to the question at 347 and the query as to
4 reference to principals. Perhaps you would agree that a different concept
12:29:04 5 applies in a members' voluntary winding up for the reasons we have seen now and
6 earlier this morning and that in fact as the authorities indicate in a members'
7 voluntary, he is in fact the agent for the company, the company being its
8 members, and that that being so, it would not be unusual in the special or
9 exceptional circumstances of a members' voluntary, which I believe to be for
12:29:34 10 the minority of liquidations, for the liquidator to seek instructions as agent
11 from his principals who are the members, would you agree with that analysis?

12 A Yes, I would agree, yes.

13 Q 153 And then, Mr. Friel, in sequence, I think, trying to maintain that sequence,
14 the next document which arose in your earlier evidence was the transfer to
12:31:19 15 which I have referred, that's the transfer of the 30th of July 1993 from
16 Paisley Park to Jackson Way.

17

18 MR. O'NEILL: Page 1383.

19

12:31:53 20 Q 154 MR. FINLAY: Thank you. And you recollect that document, Mr. Friel?

21 A I do indeed.

22 Q 155 I think you had some personal involvement in its genesis, isn't that correct?

23 A That's correct.

24 Q 156 And just to be clear, Mr. Friel, at the date of this document, this transfer or
12:32:49 25 rather I should say immediately before its execution, Paisley Park was the
26 registered full owner of the Carrickmines lands.

27 A That is right yes.

28 Q 157 And you drafted this transfer or had a role in the drafting, perhaps you might
29 confirm which?

12:33:23 30 A I drafted the --

- 12:33:24 1 Q 158 That was my recollection from your evidence. And there are only three parties
2 to this transfer, isn't that correct?
- 3 A That is correct.
- 4 Q 159 And the parties are the registered owner with transferor, Paisley Park, the
12:33:49 5 transferee, Jackson Way, and the liquidators of the transferor acting in that
6 capacity, he is not a separate party, he is there to, as the liquidators of the
7 transferor, isn't that correct?
- 8 A That is correct.
- 9 Q 160 And the operative part of that deed of transfer, Mr. Friel, is paragraph 1 at
12:34:51 10 the bottom of the second page, isn't that correct?
- 11 A That's correct, yes.
- 12 Q 161 And if we go to the second page, if we may, we see at the end of the second
13 page, that is the operative part of the transfer.
- 14 A That is correct, yes.
- 12:35:13 15 Q 162 And the operative part is preceded by a number of recitals, isn't that so?
- 16 A That's correct, yes.
- 17 Q 163 And I think as a conveyancer you would agree, Mr. Friel, that in the case of
18 unregistered land, it is common to have recitals, isn't that correct?
- 19 A It is, yes.
- 12:37:17 20 Q 164 I just want to suggest to you that in the case of registered land with which we
21 are dealing here, and it's not my suggestion, it's Professor Wiley's suggestion
22 and I quote:
23
24 "The general view is that recitals are not necessary nor indeed appropriate for
12:38:06 25 documents dealing with registered land and there is no mention of them in the
26 prescribed forms in either part of Ireland".
27 That's just a sentence at paragraph 16026 of the 1980 reprint of Professor
28 Wiley's book on Irish conveyancing law. So, his view, you are familiar of
29 course with Professor Wiley and his book.
- 12:38:39 30 A Yes, indeed.

12:38:40 1 Q 165 No doubt, but Professor Wiley's view is that the general view is that recitals
2 are not necessary nor indeed appropriate for registered land documents?
3 A That's his view.
4 Q 166 And would you agree that in the event of any conflict between a recital and the
12:39:35 5 operative part of the deed, it is clear that the operative part of the deed
6 must prevail?
7 A Absolutely, yes.
8 Q 167 So if the recitals are in any sense at odds with the operative part, the
9 recitals are to be ignored and the operative part must take effect, isn't that
10 so?
12:40:40 10
11 A Yes, that's so.
12
13 JUDGE FAHERTY: Can I ask you Mr. Friel why did you put in the recitals, you
14 draft the document?
12:40:47 15 A I drafted the deed.
16
17 JUDGE FAHERTY: In the light of what Mr. Finlay is putting to you, I am not
18 that awfully familiar with Mr. Wiley's recommendations but why did you put in
19 the recitals?
12:40:57 20 A Mr. Wiley would be far more respected than I would.
21
22 JUDGE FAHERTY: Yes, indeed. Absolutely
23 A I wouldn't necessarily agree with him, that in certain registered dealings, you
24 would have to actually put in recitals to avail of, for example, no stamp duty,
12:41:17 25 say for a transfer between husband and wife, it doesn't attract stamp duty
26 because of their relationship and you would have to recite that fact that the
27 husband and wife --
28
29 JUDGE FAHERTY: I know there are certain recitals, yes my question to you and I
12:41:32 30 hope Mr. Finlay doesn't mind my interjecting. On the document on page 1384 on

12:41:41 1 the second page of the transfer, you recite a number of matters, there's the
2 recital at paragraph H, where you talk about the declaration to distribute in
3 specie from Jackson Way, from Paisley Park to Jackson Way. Now as I understand
4 it, you have agreed already with Mr. Finlay in earlier cross-examination that
12:42:01 5 that itself doesn't constitute a transfer of the lands?

6 A That is right.

7
8 JUDGE FAHERTY: And equally you had agreed that the earlier declarations from
9 Paisley Park to Iris developments similarly didn't, you say, I think amount in
10 answer to Mr. Finlay, constitute a transfer, but I just ask you since you put
11 this one in, why didn't you put in, recite the earlier declaration that was
12 made, because it seems to me the one at H had, was on the same level, if I
13 could put it like that, maybe I am expressing myself badly, as earlier
14 declarations and I am wondering why you isolated this one for inclusion and not
12:42:51 15 the earlier two.

16 A I can only say --

17

18 JUDGE FAHERTY: If you can understand the question?

19 A I can only suggest the reasons recitals are there, they are a narrative saying
12:43:02 20 what has happened, Mr. Finlay quite rightly says, that they are not usually in
21 land registry, they are not there but in certain transfers you would put them
22 in for the purpose of getting the deed.
23 This deed, as far as I can recall, wasn't stampable, it may I might stand to be
24 corrected on that, it's for that reason and I went to the Revenue
12:43:25 25 Commissioners, they would be looking for various parts of this narrative that I
26 put in there and they would have been supported by whatever I'm saying there,
27 they would have asked for copies of them. And it will actually come to it at
28 some point.

29

12:43:41 30 JUDGE FAHERTY: All right.

12:43:42 1 A I can't -- like I agree with the broad thrust of what Mr. Finlay is saying
2 there, usually in land registry, you don't put in recitals but in certain areas
3 you do and even it could be argued, that in the standard transfer in the land
4 registry rules, it's incorrect in that it doesn't use the words as beneficial
12:44:03 5 owner and a person that might be known to the more older members practising on
6 the Bar, but not the newer ones. It was Mr. Noel garland who would have
7 advised in that regard, he would have told me in that respect, that one should
8 always put them in even though they are not in the precedent form 19 and that
9 sort of thing. He would have been the person who was a strong advocate of
12:44:32 10 putting them in.

11

12 JUDGE FAHERTY: Sorry Mr. Finlay for having interrupted you.

13

14 Q 168 MR. FINLAY: Once again Judge Faherty not at all. I think that that is most
12:44:42 15 helpful because as you have clearly explained Mr. Friel, in response to Judge
16 Faherty's observations, the recitals are merely a narrative, isn't that right?

17 A Yes.

18 Q 169 And that's why they are not usually to be found in documents transferring the
19 legal title to registered land, isn't that right?

12:45:09 20 A Not usually, but -- yes. Not --

21 Q 170 You mentioned the revenue and we will come to them later on but what, in this
22 case, isn't it correct that one of the aspects in which the revenue were
23 interested, you mentioned the revenue, was the issue of a trust, do you
24 recollect that?

12:45:35 25 A I recollect that very clearly.

26 Q 171 And in fact I think subsequently there was a declaration of trust and we'll see
27 that as a later document?

28 A My recollection is it had to be sent back to England to be adjudicated even.

29 Q 172 I think that's the case, but in relation to that aspect of the deed, the trust
12:46:14 30 aspect if you like, once again would you agree that, that is not something

- 12:46:17 1 which should appear in a deed of transfer of registered land?
- 2 A It wouldn't appear, yes.
- 3 Q 173 Because isn't it correct that the broad principle is -- in fact the statutory
4 principle is that notice of a trust shall not be entered in the register.
- 12:46:50 5 A That is correct.
- 6 Q 174 And that I think arises under Section 92.1 of the Registration of Title Act
7 1964. So, for the purpose of the transfer of legal title to registered land,
8 you should -- you need not and should not include any reference to a trust,
9 isn't that correct?
- 12:47:28 10 A That is correct, yes.
- 11 Q 175 So it follows from that, Mr. Friel, that any reference in these recitals or in
12 this deed to a trust, are matters that need not be and in fact as you have just
13 indicated, should not be a part of the deed of transfer of registered land.
- 14 A Well I say you know, like going back to it they were putting in for the purpose
15 not of affecting the transfer but for the purpose of stamping of the deed.
- 12:48:04 16 Q 176 Yes. So they are irrelevant to the transfer of the legal title?
- 17 A Yes.
- 18 Q 177 Yes. And the issue of a trust in the case of registered land as indeed
19 happened subsequently in this case should be dealt with separately by means of
20 a separate document, a separate declaration of trust.
- 12:48:46 21 A That is correct.
- 22 Q 178 While there is a reference to the trust in this deed of transfer, it was
23 neither required nor relevant to the actual transfer of the legal title, isn't
24 that correct, and does not affect the transfers of the legal title in any way?
- 12:49:15 25 A That is right.
- 26 Q 179 If we could just then look in a little more detail at some discussions or
27 exchanges that took place between you and Mr. Harker in relation to the
28 drafting of the deed of transfer. If we could see perhaps a memo, a short memo
29 which appears on your own file, Mr. Friel, unfortunately, I don't have a date
12:50:15 30 but I have a reference number for it, it's page 2281. And -- yes thank you,

12:50:49 1 you see that reads as follows, Mr. Friel:
2
3 "Rod Harker is to confirm the shareholding in recital H. I say that there are
4 1600 A shares and 380 B shares issued to Renzenbrinck and Maskani. He says
12:51:07 5 1560 A shares and 372 B shares are issued to these companies. He is leaving
6 out Martin Bullock's and RP Harker's shares as nominees for these two
7 companies."
8
9 So, do I understand correctly Mr. Friel, at this point in time, you were in
12:51:28 10 discussion with Mr. Harker about recital H?
11 A Yes.
12 Q 180 And that the issue was the precise allocation of the shares as between
13 Renzenbrinck and Maskani or between Renzenbrinck and Maskani and the two
14 nominees for some of their shares, namely Mr. Bullock and Mr. Harker?
12:52:00 15 A Yes, they were the shareholders.
16 Q 181 Yes, but would you agree that it seems that clear from your memo of discussions
17 with Mr. Harker and indeed your subsequent drafting that both you and
18 Mr. Harker were proceeding on the basis that Renzenbrinck and Maskani were the
19 shareholders, either wholly or in part through the two named nominees.
12:52:32 20 A Yes.
21 Q 182 Mr. Bullock and Mr. Harker.
22 A Yes.
23 Q 183 If we look at recital H and see a reference to in the sixth last line I think,
24 the request of the nominees of 40 A ordinary shares and -- we'll see that
12:53:35 25 perhaps at the moment, back to the second page of the deed of transfer of the
26 30th July 1993. Recital H. Sixth last line, there's a reference there in your
27 drafting, Mr. Friel, to the request of the nominees of 40 A ordinary shares and
28 8 B ordinary shares to Jackson. And can I take it that is a reference to
29 Mr. Bullock and Mr. Harker?
12:54:04 30 A Yes.

- 12:54:05 1 Q 184 And as the nominee of those 20 and 4 and 20 and 4 respectively?
- 2 A Yes.
- 3 Q 185 Isn't that the position?
- 4 A Yes.
- 12:54:13 5 Q 186 And as well as being nominees for Renzenbrinck and Maskani, Mr. Friel, were you
6 aware that Mr. Bullock was also a director of Iris?
- 7 A I can't say I was off the top of my head. It might have been disclosed to me
8 at the last hearing of the Tribunal but not in 1992 or 1993.
- 9 Q 187 But looking again at this recital number H you would agree I take it, Mr.
10 Friel, that that recital which as you say is a narrative, does not affect the
11 operative part of the deed in paragraph 1, is that correct?
- 12 A That is correct, yes.
- 13 Q 188 And I take it that without prejudice to your last answer, if you had any reason
14 to believe at the time that Renzenbrinck and Maskani were not shareholders, you
12:56:45 15 wouldn't have proceeded to draft recital H in the terms in which you did, isn't
16 that correct?
- 17 A I wouldn't take it off my own bat to do anything, no.
- 18 Q 189 Yes.
- 19 A Certainly not, I wouldn't, it would have been on the basis of information
12:57:01 20 received.
- 21 Q 190 Exactly. And the instructions on which you proceeded on the basis of your
22 discussions with Mr. Harker, were that Renzenbrinck and Maskani were the
23 shareholders?
- 24 A Exactly.
- 12:57:16 25 Q 191 And the request to which you allude in your recital, the request for the
26 nominees which we looked at a moment ago, relates -- I should say sorry for the
27 purpose of this question, Mr. Friel, I'll ask you to assume, just assume for
28 the purpose of this question, that Mr. Bullock at the time was a director of
29 Iris, if you just assume that.
- 12:57:54 30 The request which you recite in your recital, the request to the nominees

12:58:00 1 relates in relation to one of the nominees to Mr. Bullock, who you may assume
2 was a director of Iris, isn't that correct?

3 A Yes.

4 Q 192 And Mr. Harker was the liquidator and had written to you in January referring
12:58:25 5 to the fact that in 1992, Iris had been the shareholder but this was all
6 academic as of January 1993 as he was awaiting instructions from his
7 principals?

8 A That is correct.

9 Q 193 In those circumstances, Mr. Friel, if by the time you came to draft the
12:59:10 10 transfer, the transfer of July 1993, if Mr. Harker who was giving you the
11 instructions and Mr. Bullock, who was the nominee whose request you recite in
12 recital H, if Mr. Harker and Mr. Bullock had reason to believe that Iris was
13 still the shareholder as it had been in May 1992, do you think that it is
14 probable, do you regard it as probable, that you would have received the
12:59:59 15 instructions as you did to proceed on the basis that Maskani and Renzenbrinck
16 were now the shareholders?

17 A I think --

18

19 MR. O'NEILL: Before the witness answers this question, I think we have to
13:00:15 20 refer back to what the actual situation was as far as we can judge it from the
21 documentation which has been circulated in the brief. And the documentation
22 which is circulated in the brief, which deals with the issue as to the interest
23 of Iris in its relationship with Renzenbrinck and with Maskani is not as might
24 be suggested by Mr. Finlay here, that there is in some way a restructuring of
13:00:49 25 events after Iris had taken the shareholding, which is accepted and that as a
26 result of that restructuring, the shareholding of Iris went back to
27 Renzenbrinck and Maskani.
28

29 It's clearly stated in the letter which was on screen of the 25th May 1993,
13:01:08 30 that's at page 1322, that the shareholders of Paisley Park as of the 13th of

13:01:15 1 March 1992 were Mr. Bullock, Renzenbrinck, Harker, Maskani and Xenon. It then
2 goes on to say:

3
4 "Please note the shareholders remain unchanged. The principals have withdrawn
13:01:28 5 their suggestion that they would transfer their shareholdings to a Panama
6 company."

7
8 So this is not a situation of there being a restructuring of the Iris
9 shareholding. There is a statement here from the liquidator that there was
13:01:46 10 never a transfer to Iris and I think that any questioning the witness has to be
11 on the basis of the facts rather than postulating a situation which might have
12 arisen in the event that Mr. Bullock was a director of Iris, which is not a
13 matter that is apparent from the brief. We have circulated in the brief the
14 document which shows the directors of Iris at page 1873 of the brief, from the
13:02:16 15 information that we received, the directors were Elida de Cohen, Marisa
16 Vallerino, and Marcela De Lombardo.

17
18 So, I think that it's not helpful to postulate a situation for which the brief
19 appears to suggest that is not the factual situation. I hope that my
13:02:42 20 submission clarifies the questions for the benefit of the Tribunal and for my
21 friend.

22
23 MR. FINLAY: It certainly doesn't clarify the position for me and I regard it
24 as distinctly unhelpful particularly coming at the point and no doubt was
13:02:57 25 intending to come during my cross-examination.

26
27 MR. O'NEILL: I couldn't know of it until a moment ago, it's not planned. It
28 nonetheless is a fact.

29
13:03:07 30 MR. FINLAY: Chairman the position is the postulation here has at all times

13:03:12 1 come from counsel for the Tribunal and I will deal -- it's one o'clock,
2 Chairman, perhaps I should deal with this afternoon.

3

4

CHAIRMAN: All right.

13:04:41 5

6

THE TRIBUNAL THEN ADJOURNED FOR LUNCH.

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THE TRIBUNAL RESUMED AS FOLLOWS AT 2.00 P.M.:

13:04:49 1
2
3 MR. FINLAY: Thank you very much, Chairman. Chairman, just before you rose for
4 lunch, you recollect that Mr. O'Neill had intervened at a very particular point
14:10:55 5 in my cross-examination and then made a submission to the Tribunal. I had just
6 begun to address that when we rose for lunch and Mr. O' Neill's submission,
7 though unfortunately it interrupted my cross-examination at an important point,
8 throws up a critical aspect of this whole episode, these matters, these
9 transactions and in particular, the entire evidence of Mr. Friel. I don't mean
14:11:42 10 just today, I am talking about February's as well, judges. And I think it's
11 very helpful at this stage to perhaps pause and look at what Mr. O'Neill has
12 said and look at what one is dealing with here.

13
14 What happened in February and by the way, what happened in February is the only
14:12:07 15 reason I'm here today, I wouldn't be here today if it hadn't, what happened in
16 February is that critically, Mr. Friel, amongst other matters, was invited to
17 comment on a number of documents and events to which he himself was a stranger;
18 events and documents which occurred and were generated without his involvement
19 and between parties with which he was not involved, and outside this
14:13:01 20 jurisdiction. And the witnesses who would, in the ordinary course of events,
21 provide the evidence in relation to those transactions are not before the
22 Tribunal.

23 So, with the greatest of respect and of course one fully understands why this
24 might be the situation but with the greatest of respect, it is -- on any legal
14:13:39 25 view a highly unsatisfactory manner in which to have to proceed, it would never
26 be permissible in the High Court or never be permissible in any court of law
27 because of the rules of evidence which would apply. So what the Tribunal is
28 doing is looking at documents generated long ago by persons who are not here
29 and will not be here and inviting other persons who are here, such as
14:14:15 30 Mr. Friel, to comment on those documents, inviting them to draw certain

14:14:19 1 conclusions or inferences from those documents.
2
3 Now the relevance of all that to this, where we are now, is particularly the
4 following: And this relates to the declaration of '93 and also relates to the
14:14:46 5 transfer of July 1993. Mr. O'Neill's hypothesis, and I use that term very
6 advisedly before I'm set upon and told that Mr. O'Neill doesn't have a
7 hypothesis, I use that term very advisedly, the propositions which were put by
8 Mr. O'Neill to there Friel and the hypothesis which under lies them, depends
9 critically on the following: That when you look at such documentation as is
14:15:26 10 available to the Tribunal, such documentation is available to the Tribunal.
11 If a document isn't there, a document isn't there to evidence some happening or
12 event or transaction or decision, if that document isn't there, you
13 automatically assume, automatically assume, that the event or decision or
14 circumstance never occurred.
14:16:09 15
16 Now, with the greatest of respect, that is both highly unsatisfactory way in
17 which to proceed and a highly unsafe way in which to proceed. And it is
18 central to the hypothesis or hypotheses or some of them put to Mr. Friel in
19 February and it's partly why I'm here today. And one of the excellent examples
14:16:40 20 of that is the following: And it was raised in lights even this morning. When
21 as a result of my cross-examination this morning it became clear that the law
22 in relation to windings up insofar as we are concerned here, is not as was
23 originally thought at the time of Mr. Friel's evidence in February, because of
24 the nature of the winding up and the provisions of the acts applying to such a
14:17:14 25 winding up. Mr. O'Neill's immediate response when he intervened -- Mr.
26 O'Neill's immediate response to you, the three members of the Tribunal -- was
27 is Mr. Finlay going to produce a document to demonstrate the sanction by the
28 liquidator to permit the directors to sign the transfer to Paisley Park from
29 Mr. Tracey. That was his response, that's what he said this morning.

14:17:50 30

14:17:50 1 Now, that, in my respectful submission, underlines the fundamental problem of
2 this approach, because it is not of course for me to produce any document
3 evidencing a decision of the liquidator in 1992 or whenever it was, sanctioning
4 the directors to execute that particular transfer to Paisley Park; in any event
14:18:20 5 of course, one of the glaring aspects of that, is that one of the directors was
6 himself -- the members will immediately realise the anomaly of a liquidator
7 sanctioning himself to sign the document qua director. There's nothing in the
8 relevant legislation which requires that sanction to be in writing or in any
9 particular form, nothing whatever. But yet Mr. O'Neill's first response is
14:18:50 10 where is the document, is Mr. Finlay going to produce the document, that's what
11 he said to the Tribunal. I am not going to produce any document. But the
12 point is -- the point is -- that it has all the characteristics of a case being
13 made unless I, the defendant, produce the document to evidence the sanction by
14 the liquidator of his own signature to the deed of transfer, the document is
14:19:21 15 false. That's the proposition that's been put to the Tribunal, to the witness,
16 through counsel. Unless I can produce the document executed by Mr. Harker,
17 evidencing his sanction under the Companies Act of his own authority to sign
18 this document qua director, the document is a false document.
19
14:19:46 20 Now that logic or rather lack of logic, in my respectful submission, underlies
21 all of this and it was the basis of the examination of Mr. Friel in January.
22 I'm dwelling on this because it's of fundamental important to the Tribunal,
23 with the greatest of respect and it led at the end of Mr. Friel's examination
24 on the afternoon of the 13th February to the proposition, that because the
14:20:14 25 signature to the -- the signatures to the deed of transfer, for example, to
26 Paisley Park were not those of the liquidator, it was a false document.
27
28 Now, I would accept that we since clarified that Mr. Friel didn't enforce in
29 the legal sense of the word, in effect of that but it remains Mr. O'Neill's
14:20:34 30 case and I put it, I use that word advisedly, it remains Mr. O'Neill's

14:20:40 1 submission that because I don't produce, called on me to produce the document,
2 because I can't not produce Mr. Harker's document evidencing his sanction under
3 the subsection of the relevant act, that first of all the assumption, he is
4 asking you the members of the Tribunal to assume that that event never
14:21:03 5 occurred. He is asking you to assume that Mr. Harker never sanctioned, as he
6 was perfectly entitled to do, without any form being followed, any written
7 document coming into existence, the execution by himself and Mr. Bullock of
8 the -- and I give that as an example. I give it only as an example because it
9 underlines all of this and the relevance of that flawed approach in terms of
14:21:34 10 proof and how the case, how the inquiry should be conducted rather than the
11 case being presented, the relevance of that to what we were dealing just before
12 lunch is very similar, and if I mention it, the Tribunal will immediately see
13 and it may shorten matters.
14

14:21:55 15 In relation to Mr. O'Neill's hypotheses concerning the declaration in 1993, the
16 second declaration, that's the distribution in specie to the majority
17 shareholders, and the subsequent deed of transfer of the 30th of July, his
18 hypotheses put to Mr. Friel in February and reiterated just before lunch today,
19 is that unless the Tribunal can find a document, once again a document, not
14:22:45 20 evidence but a document, unless the Tribunal can find a document evidencing the
21 transfer back of the shares from Iris to Maskani and Renzenbrinck, there is a
22 problem, he will decide whether there is a problem, he will have heard what
23 Mr. Friel has had to say about the transfer and recitals and the relationship
24 about those, the hypotheses being put up to the members of the Tribunal, the
14:23:19 25 hypotheses is this, that unless there's evidence of a reconstruction as
26 described by lunch, then you must make an assumption.
27

28 Now, once again, unless the document is there, you must assume that an event
29 never occurred and what I want to say to your Lordships and members of the
14:23:33 30 Tribunal is this: In fact insofar as you are going to infer anything at all

14:23:46 1 from the state of the evidence, the evidence suggests the contrary for this
2 reason and I am responding directly to the documents referred to by Mr. O'Neill
3 as before lunch.
4

14:23:57 5 You will have heard me this morning going through with Mr. Friel the letter of
6 the 21st of January 1993 in which Mr. Harker expressly states and confirms that
7 as of the 12th May 1992, Iris had that -- states that openly to Mr. Friel in
8 clarification and response to an inquiry by Mr. Friel. That's quite clear.
9 But critically he goes on to say however, that is academic at present as I'm
14:24:42 10 awaiting instructions from my principals. Mr. Friel agreed this morning that
11 clearly he was anticipating a change in that shareholding situation.
12

13 Now, what Mr. O'Neill relies on -- I mentioned it before lunch for his
14 hypotheses, is the subsequent letter of the 25th May and critically the words
14:25:11 15 "Please note to the shareholders remain unchanged." The only possible,
16 sensible construction, if you are to try to construe this correspondence, the
17 only possible sensible construction of that later statement in the light of the
18 letter of January, has to be that the shareholding does remain unchanged in the
19 sense that it has reverted to what it was before the transfer to Iris which has
14:25:36 20 been expressly acknowledged in the earlier letter of January. It would be a
21 nonsense and a nonsense for Mr. Harker to write that letter of the 25th of May
22 and intend to say that there was never a transfer to Iris in the light of his
23 letter of only a couple of months earlier expressly detailing the shareholding
24 of Iris as at the 12th May 1992.

14:26:05 25
26 So if you are being asked to draw inferences, which you are, from documents,
27 the authors of which are not here and in relation to transactions, the parties
28 to which are not here, I just want to say because you have only heard one
29 possibility, that in my respectful submission, the only sensible possibility is
14:26:26 30 that the reference to the shareholders remaining unchanged means that yes, the

14:26:32 1 shareholders are unchanged in the sense that they are now back to what they
2 were before the transfer to Iris, which I have expressly referred to in my
3 earlier -- and members of the Tribunal, that is against the background in
4 which -- the point at which I was interrupted which is equally relevant to put
14:26:54 5 to the members of the Tribunal as to Mr. Friel is this: If Mr. Harker, who is
6 the liquidator, had referred to all of this, authorised the transfer to Iris in
7 the first place in '92, is it conceivable that Mr. Harker in '93 would have
8 gone through the process of subsequent declarations and the transfer to Jackson
9 Way based on the shareholding now being with Maskani and Renzenbrinck unless it
14:27:30 10 had reverted back. It would have been anomalous, in the light of this
11 correspondence, it would have made no sense. So that the hypotheses is all
12 constructed on the absence of a document. There is not before this document
13 this Tribunal a document evidencing the transfer back of the shares from Iris
14 to Maskani Renzenbrinck. There is not such a document.

14:28:01 15
16 JUDGE FAHERTY: You are saying the letter of -- the letter of the 25th May,
17 what you are saying I think and I just want to -- that responds to Mr. Friel is
18 Mr. Harker saying that the shareholding as of the 25th of May 1993, is as it
19 was pre-the Iris distribution of the shareholding in specie.

14:28:24 20
21 MR. FINLAY: Yes.

22
23 JUDGE FAHERTY: Which took place on the 12th of May 1992. That's what you are
24 contending in that letter.

14:28:31 25
26 MR. FINLAY: Exactly, judge. What he is doing, he is saying that it is
27 unchanged from the shareholding as at the 13th March 1992. That appears just
28 above that sentence and the reason why I say that, is expressly because of the
29 preceding letter where he is expressly refers to --

14:28:48 30

14:28:48 1 JUDGE FAHERTY: I understand where you are coming from. Can I just ask you,
2 just in relation to the declaration that was made on the 12th of May 1992, this
3 was where the shareholding in Maskani and Renzenbrinck is being distributed in
4 specie to Iris. That's document 1111.

14:29:11 5
6 MR. FINLAY: Whereby the assets representing that shareholding are to be
7 distributed in specie?

8
9 JUDGE FAHERTY: Yes.

14:29:19 10
11 MR. FINLAY: Yes? That's the 1992 declaration.

12
13 JUDGE FAHERTY: The shares, yes. And that says that Iris developments is the
14 holder of the shareholding.

14:29:29 15
16 MR. FINLAY: Yes.

17
18 JUDGE FAHERTY: As of that date.

19
14:29:33 20 MR. FINLAY: And that is of course entirely consistent, judge, with the letter
21 of the 21st January.

22
23 JUDGE FAHERTY: Absolutely, I see where you are coming from but my point is
24 this. I just want to ask you, Mr. Finlay, this was a declaration made under
14:29:45 25 oath.

26
27 MR. FINLAY: Yes.

28
29 JUDGE FAHERTY: Of an event and it's actually a certification under oath that
14:29:53 30 as of the date of the 12th May 1992, the shareholding formerly, as I understand

14:30:00 1 it, held in Paisley Park by Maskani and Renzenbrinck is now vested in Iris
2 Development, is that correct?

3

4

MR. FINLAY: That's correct, judge, absolutely.

14:30:10 5

6

JUDGE FAHERTY: And it's reiterated as I understand it, in your contention in a
7 letter from Mr. Harker to Mr. Friel in January of 19 --

8

9

MR. FINLAY: Of the 21st, exactly judge. Precisely.

14:30:19 10

11

JUDGE FAHERTY: You are now saying as I understand it in a letter of the 25th
12 of May of 1993, he is actually, if you like, undoing that or resiling from that
13 proposition.

14

14:30:33 15

16

MR. FINLAY: It's not a proposition, it would appear to be a fact but the point
17 is this, judge -- what I'm saying is this, that against the background of his
18 own correspondence to the same person, it's not as if this information had been
19 kept from Mr. Friel and Mr. Friel was being in some way given a different
version events. This is correspondence to Mr. Friel in January where
20 Mr. Harker has expressly referred to the holding of Iris, as of the 12th May
21 1992 and what I'm saying is this: All of this Tribunal can do and the benefit
22 of this is immensely questionable in any event, all that the Tribunal can do is
23 to seek to construe or draw inferences from documents which have never been
24 proved in the sense of their authors.

14:31:00 20

21

22

23

24

14:31:28 25

26

So if one is trying to do that and the value of that in any event and I
27 understand why is an immensely questionable exercise, if one is trying to do
28 that, I'm simply pointing to the fact that the expression "Please note that the
29 shareholders remain unchanged" that can be wholly consistent with the transfer
to Iris of May 1992. If what he means by that is and I suggest it's equally

14:31:46 30

14:31:53 1 valid inference, what he means by that is that the shareholding is again as it
2 was on the 13th March 1992 at a particular --

3
4 JUDGE FAHERTY: Mr. Finlay, you have described Mr. O'Neill's matters he put to
14:32:09 5 Mr. Friel as hypotheses.

6
7 MR. FINLAY: Yes.

8
9 JUDGE FAHERTY: But surely what you are saying, because if you read that
14:32:16 10 sentence that you have just said, there is another sentence in brackets that
11 refers to that, it says "The principals have withdrawn their suggestion that
12 they would transfer their shareholding to a Panama company". But it would
13 appear again, only on a document, we don't have anybody in the witness-box to
14 swear up a document but we have a document of the 12th May 1992 stating that in
14:32:37 15 fact, Mr. Harker is certifying on that date, that as of that date, there has
16 been a transfer of the shareholding in Maskani and Renzenbrinck to Iris.

17
18 MR. FINLAY: Yes oh yes when that event is borne out by his own letter of the
19 21st January. He states expressly as of the 12th May that Iris was the
14:32:58 20 shareholder.

21
22 JUDGE FAHERTY: Just as observation that those events insofar as they are
23 documented by the paper trail that we have, would seem to be more than a
24 suggestion has referred to by Mr. Harker in the letter of the 25th May.

14:33:12 25
26 MR. FINLAY: Clearly the reference to a suggestion would appear to be
27 inaccurate given what he himself wrote earlier in the year. All I'm saying is
28 this, judge, Mr. O'Neill's hypotheses, by that I mean absolutely don't mean
29 anything adverse or improper or inappropriate but the hypothesis, as with the
14:33:37 30 earlier hypothesis about the transfer from Tracey to Paisley Park depends for

14:33:42 1 getting off the ground at all, depends on the absence of a document -- the
2 absence of a document -- a document which no witness here can deal with as to
3 its absence or presence as to the event or the non-event. I merely wish the
4 Tribunal to be very conscious of that in looking at all of this.

14:34:08 5
6 CHAIRMAN: Mr. Finlay, I understand the points you make, but the Tribunal is
7 obliged to examine the title and the chain of title leading to the registration
8 of Jackson Way as the legal owner for the purposes -- not for the purposes of
9 determining whether the title is good or bad or whether it was properly
10 registered but for the purposes of assisting it, the Tribunal, it in
11 determining the beneficial ownership of the property. That's the essential
12 focus or thrust of the inquiries of the Tribunal.

13
14 Now, part -- and for that reason we must look at the title and see how the
14:34:54 15 title progressed down to the point where it's registered in the name of Jackson
16 Way.

17
18 MR. FINLAY: How the title progressed down to the registration by Jackson Way.

19
14:35:06 20 CHAIRMAN: Yes, how Jackson Way end up owning the property. Or the chain of
21 ownership.

22
23 MR. FINLAY: Well the chain of ownership is very simple. There were three
24 owners. Tracey --

14:35:19 25
26 CHAIRMAN: I'm just saying this is what the Tribunal is looking at this whole
27 issue, it's to assist it in determining who the beneficial owners of the lands
28 are. Now, so in order to look at this chain of ownership, it is clearly
29 necessary for the Tribunal to call witnesses, one or more witnesses, to explain
14:35:46 30 how the chain of ownership progressed from start to finish.

14:35:51 1
2 MR. FINLAY: Yes.
3
4 CHAIRMAN: The obvious or at least one of the obvious witnesses was Mr. Friel,
14:35:57 5 who was intimately involved in that chain, in that chain of ownership or at
6 least in relation to the preparation of documentation which establishes that
7 chain of ownership, do you follow?
8
9 MR. FINLAY: Yes.
14:36:16 10
11 CHAIRMAN: He is an essential witness. Mr. O'Neill examined him on the last
12 occasion and brought him through the various documents on the basis that he was
13 an expert and is an expert in conveyancing.
14
15 MR. FINLAY: Yes.
16
17 CHAIRMAN: And is the individual or is the expert who was intimately involved
18 in the preparation of a lot of the documents. The reason for examining
19 Mr. Friel was to get explanations as to the effect and meaning of these
14:36:45 20 documents.
21
22 MR. FINLAY: Yes.
23
24 CHAIRMAN: There is, based on what you say and what in fact probably may well
14:36:56 25 be the case, there may be a document or one or more documents missing, these
26 are the documents in relation to the shareholding from the re-transfer possibly
27 of the shareholding from Iris. You emphasised the fact that the Tribunal is
28 perhaps reading too much in the fact that there may be one or more documents
29 missing.
14:37:27 30

14:37:27 1 MR. FINLAY: Yes.

2

3 CHAIRMAN: But the fact that one or more documents may be missing and the fact
4 that there is a gap in this chain of ownership as apparent from the

14:37:37 5 documentation is a matter which Mr. O'Neill quite rightly pursued with

6 Mr. Friel on the last occasion.

7

8 MR. FINLAY: Well, well --

9

14:37:45 10 CHAIRMAN: And equally is a matter that you, on behalf of an interested party,

11 is entitled to pursue and as part of that pursuit, submit to the Tribunal that

12 the absence of one or more documents should not be taken as necessarily meaning

13 that there is a flaw in the title.

14

14:38:05 15 MR. FINLAY: Yes.

16

17 CHAIRMAN: But I'm just trying to explain to you the reasons for the inquiry

18 as it has been conducted by Mr. O'Neill on behalf of the Tribunal.

19

14:38:17 20 MR. FINLAY: Well thank you very much, that's -- I hear that.

21

22 CHAIRMAN: So it's not so much that Mr. Finlay and we certainly haven't had

23 the impression from the evidence last February Mr. O'Neill has set out to in

24 some way disrupt or destroy your question to title of, he is simply using the

14:38:40 25 witness or with the aid of a witness who was intimately involved in the

26 preparation of a document, highlighted the chain of ownership, highlighted the

27 documentation that arose in that particular chain and it's a matter then for us

28 ultimately to decide the relevance or otherwise of missing documentation or

29 possibly missing documentation. But I mean I don't understand Mr. Finlay to

14:39:11 30 have made the case, to set out to make a case that there was a flaw in the

14:39:17 1 title or in the chain of ownership. He simply brought the Tribunal through the
2 evidence as it exists based on the documentation which is available to the
3 Tribunal.

14:39:29 5 MR. FINLAY: Well then --

6
7 CHAIRMAN: Now, one of the consequences of doing that was that potentially
8 insofar as the ownership of the property is concerned, potential difficulties
9 arose in relation to the transfer and the question of the liquidator, this was
14:39:53 10 now before you dealt with the subject this morning. That was one of the issues
11 that was left as it were, in the air last February.

12
13 MR. FINLAY: Yes.

14
14:40:02 15 CHAIRMAN: And the other was the question of the shareholding of Iris and
16 whether it was transferred to Iris and/or transferred back from Iris to another
17 party. These were issues that arose as a result of the examination of
18 Mr. Friel on the last occasion. And you are here to, if you like, provide
19 possibly with the assistance of Mr. Friel, an explanation as to why these
14:40:41 20 aren't necessarily difficulties in the chain of ownership.

21
22 MR. FINLAY: Well indeed chairman, one of the reasons I'm here as I hope the
23 Tribunal will have seen this morning, is to clarify and I put that at its
24 lowest, to clarify the correctness of certain propositions that were put, in
14:41:06 25 evidence that was given in relation to matters of law, critical matters of law
26 on the last occasion. I have tried as delicately as I can, to have done that
27 this morning. I believe that's to be of importance to the Tribunal given the
28 evidence that stood on the transcript until half past ten today.

29
14:41:22 30 But, Chairman, I am concerned about one observation which you just made and

14:41:27 1 it's this: You have referred several times to the chain of title and to the --

2

3

CHAIRMAN: The chain of ownership.

4

14:41:38 5 MR. FINLAY: The chain of ownership. Well, well really to avoid us operating
6 at cross purposes and we going down roads which I shouldn't go down, I have a
7 particular concern, one of the reasons I'm here today, relating to what appears
8 to the reader, and what appeared to probably a very large number of readers
9 after the last hearings in February, to be a fundamental undermining of the

14:42:16 10 legal title, the legal title of Jackson Way to the lands at Carrickmines. I
11 use those words most advisedly, because you will recall not only the
12 propositions that were put to Mr. Friel about that issue, the title of Jackson
13 Way to the lands and the answers that he give in response to that and I did, I
14 think, emphasise this morning and I'm sure you will remember that I was

14:42:54 15 specifically concerned with the legal title to these lands, the legal title to
16 these lands. Not the beneficial ownership, not trusts, not that aspect. I am
17 concerned and I have been attempting to deal with in my cross-examination this
18 morning, the movement of the legal title to these registered lands.

19

14:43:18 20 And I have sought, through the questioning of Mr. Friel, to distinguish between
21 matters which are relevant to the transfer of the legal title to these lands
22 and matters which are not relevant to the transfer of the legal tie with these
23 lands. And that has been a primary objective of this cross-examination for
24 reasons that must be clear.

14:43:52 25 And so when, Chairman, you talk about the chain of ownership, I hope I am not
26 at cross purposes, I have been looking at the sequence of owners of the land,
27 of owners of the land and reverted to Mr. Friel. I thought it had been quite
28 clear before lunch from Mr. Friel's evidence, but maybe there's some doubt
29 about that. He has confirmed that Iris was never the owner of this land as it
14:44:22 30 could never have been.

14:44:22 1
2 CHAIRMAN: Yes, but the purpose, the main focus of our investigation is to
3 determine who were the beneficial owners of the property.
4

14:44:30 5 MR. FINLAY: I fully understand that.
6

7 CHAIRMAN: That involves as of necessity, looking at the legal chain of
8 ownership/title.
9

14:44:40 10 MR. FINLAY: Yes.
11

12 CHAIRMAN: All right? As a result of evidence given by Mr. Friel --
13

14 MR. FINLAY: Yes.

14:44:48 15

16 CHAIRMAN: Under examination from Mr. O'Neill on the last occasion, there was
17 a question mark left in the air as to the title of Jackson Way.
18

19 MR. FINLAY: Absolutely.

14:45:04 20

21 CHAIRMAN: And what's what understandably concerns you and your client and as
22 I understand the focus of your cross-examination today, is to deal with
23 whatever flaws appeared to be evident as a result of the examination on the
24 last occasion.

14:45:21 25

26 MR. FINLAY: In relation to the legal title.
27

28 CHAIRMAN: In relation to the legal title.
29

14:45:25 30 MR. FINLAY: Yes, Chairman, that's correct.

14:45:26 1
2 CHAIRMAN: And any other issue that arises.
3
4 MR. FINLAY: Yes.
14:45:33 5
6 CHAIRMAN: But it was never the intention and we didn't understand the purpose
7 of Mr. O'Neill's cross-examination on the last occasion to be, for the purposes
8 of proving or attempting to prove that there was a flaw in the legal title.
9 This is evidence that became apparent in the course of his examination of this
14:45:52 10 essential witness. Do you follow?
11
12 MR. FINLAY: Well, I'm not certain that that is so, with the greatest of
13 respect. I had understood that the issue as to whether Jackson Way had title
14 to the property was not an issue proposed by Mr. Friel, it was expressly raised
14:46:20 15 by Mr. O'Neill. He was the person who first raised the question of the Jackson
16 Way's title.
17
18 CHAIRMAN: Yes but in order for the Tribunal to determine the issue of
19 beneficial ownership, it must look at the chain of, or the legal ownership and
14:46:43 20 the chain of title or the chain of ownership. That does not mean that it's out
21 to establish that there's a flaw in the title, it simply has to deal with that
22 by questioning witnesses who were intimately involved in the preparation of
23 that title and that ownership.
24
14:47:05 25 MR. FINLAY: Indeed and I think it goes further than that, with respect.
26
27 CHAIRMAN: Now, as a result of that on the last occasion, flaws or
28 difficulties in relation to title appeared to arise, all right? There was no
29 determination made as to whether or not there was in fact a problem with the
14:47:26 30 title. You are entitled to cross-examine and you can if you like deal with any

14:47:34 1 of those flaws that appears to have arisen.

2

3 MR. FINLAY: Yes.

4

14:47:39 5 CHAIRMAN: So I don't know whether that helps.

6

7 MR. FINLAY: It does indeed Chairman, if I might clarify one further point.

8 You very properly say there's been no determination on that point but I think

9 it does go further because I think the Tribunal has confirmed that not only has

14:47:54 10 there not been, but there will not be, it is not be a matter for this Tribunal

11 to determine whether or not the legal title to the land at Carrickmines is

12 valid or not. I think that has been expressly confirmed in response to an

13 express request from us. I proceeded on that basis. That's ostensibly

14 referred to.

14:48:13 15

16 CHAIRMAN: Except that flaws that might appear in the legal title insofar as

17 they may be relevant to assisting the Tribunal and in determining the

18 beneficial ownership, they are --

19

14:48:27 20 MR. FINLAY: Obviously that's a separate matter.

21

22 CHAIRMAN: So, if the flaws that appear in the legal title are such that

23 assist the Tribunal in some way in determining the direction of beneficial

24 ownership as that chain of title progressed, then they are matters of relevant

14:48:46 25 for the Tribunal.

26

27 MR. FINLAY: Yes that may well be so.

28

29 CHAIRMAN: There's going to be no declaration at the end of the day by the

14:48:55 30 Tribunal as to who the legal owner of the property is.

14:48:58 1
2 MR. FINLAY: Absolutely and that's what I was merely wishing to have confirmed
3 because I think the Tribunal has already indicated --
4

14:49:04 5 CHAIRMAN: Do you want to say anything, Mr. O'Neill?
6

7 MR. O'NEILL: Yes sir, if I may. Firstly I think a considerable amount of the
8 time of the Tribunal in the course of the examination which has taken place
9 today has centred upon the registered legal owner of the property, as opposed
10 to the owner property without there being a distinguish, a proper
11 distinguishing of those two entities.

12 I appreciate that Mr. Finlay's line of approach is to endeavour to focus upon
13 the legal title of the property and to that extent, there is very little
14 dispute between the parties as to what the current registered legal ownership
14:50:02 15 of the property is, because one merely has to take an extract from the land
16 registry folio and look amount it and on it you will see three names which
17 record the movement of the property from Mr. Tracey to Paisley Park to Jackson
18 Way. So if we were only concerned with the registered legal title to this
19 property, there is no issue at all, as far as I can see.

14:50:24 20
21 What does arise though from the point of view of the Tribunal is the
22 examination of the beneficial ownership of the property. The reasons for that
23 have been explained on a number of occasions and they are to establish whether
24 or not certain people who are named as being the amongst the ranks of the
14:50:43 25 potential beneficiaries from the development of these lands, include certain
26 named individuals. That's the relevant point. But as regards the examination
27 itself, in looking at the beneficial ownership of the property, one goes to the
28 conveyancing solicitor in Ireland as the obvious source of information that may
29 lead to the establishment of the beneficial ownership.

14:51:11 30

14:51:11 1 And when one does, that is Mr. Friel, one obtains Mr. Friel's file and one sees
2 from that file, that the person instructing him is a Mr. Harker who regrettably
3 is a gentleman outside this jurisdiction and not compellable to attend before
4 the jurisdiction.

14:51:32 5
6 That is not to say that Mr. Friel's evidence is not of the strongest ranking in
7 evidential terms, because he is the person who is receiving the instructions
8 from Mr. Harker, through correspondence, the correspondence of which is on his
9 file and it represents the instruction with which he moves forward to deal with
10 the lands. So one would expect that if there are any ambiguities in
11 instruction and any lack of clarity which would allow him from performing the
12 task which he is appointed to do, they would be demonstrated in the
13 correspondence.
14

14:52:10 15 And it's for that reason that the correspondence has been examined at some
16 length with Mr. Friel. And upon the examination of that correspondence, one
17 establishes the existence of entities who are not named on the simple land
18 registry folio legal title to the property, but who are involved in the
19 beneficial ownership of the property. And amongst the names we see on this
14:52:36 20 file are a Panamanian entity called Renzenbrinck, an Isle of Man entity called
21 Maskani, and a second entity in Panama called Iris.
22

23 And the role which they have, we must take as a matter of course, to be that
24 which is given to that particular entity in the instruction which is received
14:53:04 25 by Mr. Friel. So, when we look at the company Paisley Park Investments, we see
26 that it's an Isle of Man company and that its shareholding is held by three
27 companies, Xenon, Maskani and Renzenbrinck. And those are the members of the
28 company Paisley Park. Paisley Park then, we see, as a company deals through
29 company meetings and through the decisions or resolutions which are taken
14:53:45 30 before a company. And this particular company held a resolution to decide

14:53:53 1 whether or not it should wind itself up and the majority of the shareholders
2 who represented, I think 1890 shareholders, decided that the company should be
3 wound up.

14:54:04 5 And it should be, in other words, a members' winding up, but it's important to
6 note that the majority of members can make a decision at a company meeting, it
7 becomes a company decision, but those members themselves in combination cannot
8 make decisions, they are not the company's decisions. Maskani and
9 Renzenbrinck, in other words, were never in a position to make a decision other
14:54:31 10 than if it went to a company resolution, to decide how the company would be
11 managed. It is a decision for the company itself, all the shareholders,
12 including Xenon, would have to be a party to it.

14 14 Now, we can see from the documentation which is on file, that as the
14:54:51 15 conveyancing solicitor, Mr. Friel would have to be satisfied that he had the
16 authority to act on behalf of the company Paisley Park. He received that
17 assurance because he received the resolution of the company appointing
18 Mr. Harker as the liquidator. And Mr. Harker therefore was the appropriate
19 person to communicate with him. Mr. Harker did in fact communicate with him to
14:55:15 20 give him instructions, firstly to register Paisley Park, as the owner of the
21 property because that had not been completed before the company went into
22 liquidation. And secondly, he received instructions to register Iris as the
23 succeeding owner from Paisley Park.

14:55:35 25 But there is a change in those instructions and the change in those
26 instructions takes place in 1993, when Jackson Way Properties, as a nominee
27 acting for Renzenbrinck and Maskani, is registered as the owner of the property
28 on foot of Mr. Harker's instructions.

14:55:57 30 That situation was pre-dated by the two resolutions which had been considered

14:56:07 1 this morning, sorry, one of which was considered this morning. That was the
2 decision to distribute in specie to Iris. And as I understand the submissions
3 which are made to you, it is common case and accepted by Mr. Finlay, that as of
4 the date of that resolution, the 12th of May 1992, Iris became the majority
14:56:33 5 shareholder of the shares in Paisley Park Investments and the person entitled
6 to receive the land assets of Paisley Park Investments Ltd, because it was the
7 majority shareholder.

8
9 Now, it is true to say that at that point in time; until the conveyancing
14:56:56 10 solicitor had implemented the appropriate registration of the title by means of
11 a transfer which would be a transfer from him as liquidator to Iris
12 Developments Limited, the legal owner would remain Paisley Park. But in fact,
13 Paisley Park had disposed of the entire of its ownership in these lands to
14 Iris. It had done so because the owners of Paisley, who were Maskani and
14:57:33 15 Renzenbrinck, had disposed of their interests to Iris.

16
17 Now, I don't think there's any dispute or conflict in that issue. Where we
18 fell into dispute just before lunch was that it was being proposed that
19 firstly, the owners of the land were not Iris.

14:57:53 20
21 Now, the owners of the land were Iris. They were not the legal owners of the
22 land because the transfer to them of the shares and the decision to distribute
23 in specie had not been completed, and I use the word "completed" advisedly, but
24 the instruction had been given by the liquidator to effect the legal transfer
14:58:15 25 of what was already in the ownership of Iris, namely the lands at Carrickmines
26 which had been the subject of the company resolution to distribute in specie.

27
28 So, that situation obviously changed and it's equally common case that it seems
29 to have changed because if one looks at the register today, one sees Jackson
14:58:40 30 Way Properties as the registered owner of the property.

14:58:44 1
2 That could only happen in the event that the company, Iris, which was at that
3 point in time the owner of the shares transferred those shares back to Iris and
4 Renzenbrinck, the companies from which it had received the shares.

14:59:05 5
6 Now, it is equally apparent from the documentation that the liquidator in
7 authorising the -- in sanctioning the transfer of the shares, sanctioned the
8 transfer of the shares from Renzenbrinck to Iris. That is evidenced by a
9 statutory declaration which was sworn by him for the purpose of the
10 liquidation. There is no evidence of a similar sanction being given by the
11 liquidator to Iris to transfer back to Maskani and Renzenbrinck, the
12 shareholding which he had already sanctioned in the transfer to them.

13
14 Now, this is something that the Tribunal can consider in the light of the steps
15 which were actually being taken by the liquidator. He had an obligation to
16 file the statement of the liquidation on an annual basis. He did so. There
17 was nothing ever recorded in that documentation which is in the brief to record
18 that there was subsequently a transfer back of the shares from Iris to
19 Renzenbrinck. That puts -- obviously the Tribunal on inquiry in establishing
15:00:27 20 who the owners might be. Including who the legal owners are, as well as who
21 the beneficial owners are, to establish how it is that there is an apparent --
22 and I say apparent -- breach in or break in the route of title which leads to
23 the ultimate registered owner, Jackson Way, being on the title.

24
15:00:52 25 Because whilst it's true to say that the title, the folio is conclusive, it is
26 only conclusive to the extent that the documentation which led to the
27 registration being made, is itself valid documentation. And obviously if there
28 is a query about the legitimacy or validity of documentation which has had the
29 effect of apparently giving the legal title to Jackson Way, that is a matter
15:01:21 30 which the Tribunal must look into. Not for the purpose of pronouncing on title

15:01:27 1 but in an effort to establish whether or not they can ascertain who the
2 ultimate beneficiaries and owners of these lands are by reference to all of the
3 parties whose names appear in the dealings which ultimately resulted in the
4 registration of Jackson Way as the owner of the property. And it's in that
15:01:51 5 context that one looks at what appears to be an apparent conflict between what
6 Mr. Harker is instructing the conveyancing solicitor of these lands to do in
7 relation to the lands and in particular, in relation to the shareholding, to a
8 date in January of 1993, which is evidenced by the letter of the 21st of
9 January 1993, he is saying the holders of the shares of Paisley Park
15:02:25 10 Investments are Iris.
11 What that means is that the beneficial owner, the Carrickmines lands in
12 January, 1993, was the company Iris. It had yet to be registered but it was
13 the owner of the lands because it owned the shareholding in Paisley Park to
14 which as a result of the resolution, the assets had been distributed in specie.
15:02:53 15
16 Now, that situation apparently changes in May. In May, we see the letter in
17 May which indicates that the shareholders of Paisley Park at the 13th of March
18 1992 --
19
15:03:13 20 JUDGE FAHERTY: 1322.
21
22 MR. O'NEILL: Page 1322. The shareholders as of that date, and why that date
23 is picked is somewhat curious because that was one year and two months before
24 this letter, were the following and it breaks down the shareholdings, both the
15:03:31 25 nominee shareholders and actual shareholdings between Mr. Bullock,
26 Renzenbrinck, Mr. Harker, Maskani and Xenon. It then goes on to say:
27
28 "Please note that the shareholders remain unchanged." And Mr. Finlay argues
29 or suggests that the Tribunal should read that as meaning that the status quo
15:03:53 30 ante has always been that that these companies never in fact lost that

15:04:08 1 shareholding.
2
3 MR. FINLAY: No, that was not my submission, that the shareholding had returned
4 to what it was before the transfer to office.
15:04:15 5
6 MR. O'NEILL: Very good, that it did go to Iris, but has left Iris and come
7 back and that that is accurately stated in the sentence which says "Please note
8 that the shareholders remain unchanged."
9
10 Now, what the Tribunal must look at is the entire of that letter, including
11 what is contained been within the brackets and that is "The principals have
12 withdrawn their suggestion that they would transfer their shareholdings to a
13 Panama company."
14
15:04:49 15 Now, one looks to the documentation and asks where has there been a withdrawal
16 of a suggestion that they would transfer their shareholdings to a Panama
17 company. One doesn't see any withdrawal but one does see that there was in
18 fact a transfer. There was a transfer of the shares of Iris and -- sorry, of
19 Renzenbrinck and Maskani to Iris, which was recorded in the statutory
15:05:19 20 declaration of the same date, i.e. the 12th May.
21
22 JUDGE FAHERTY: 1111.
23
24 MR. O'NEILL: If we can put it on screen there, it's 1111. Now, in that
15:05:36 25 documentation, it says "Roderick Patrick Harker, do solemnly and sincerely
26 declare that as liquidators of the company, I have sanctioned the under
27 mentioned share transfers" and he records them two of Renzenbrinck to Iris and
28 of Maskani and he further says that "I declare at the date hereof, Iris
29 Development Company Incorporated is the older of those shares."
15:06:07 30

15:06:07 1 Now, we see later in January when he reaffirms that that company is the holder
2 of the shares, it is in the context that this is not an expression of what was
3 to take place in futuro he is not saying that I'm sanctioning it and may happen
4 it at some future date. He says that in January that as of the 12th of May
15:06:39 5 1992, this company Iris was the holder of the shares. If it was the holders of
6 the majority of the shares, it was the owner of the Jackson Way lands in the
7 context of being the beneficial, the actual owner, the person who was entitled
8 to get whatever that company, those lands would realise on sale, for example,
9 would go not to the registered owner at that time, Paisley Park, it would go to
15:07:09 10 Iris.

11
12 Now, the principals have withdrawn their suggestion that they would transfer
13 their shareholdings to a Panama company. The principals are not there
14 identified but we can only assume from the fact that the transfer document at
15:07:30 15 paragraph H refers to Renzenbrinck and Maskani as being the majority
16 shareholders, that they are the principals involved here.

17
18 Now those companies had clearly, a year before disposed of their interest to
19 Iris. If they disposed of their interest to Iris, they were not in a position
15:07:54 20 to deal with the lands in any capacity unless and until Iris transferred the
21 shares back to them, number one, that would require to be sanctioned by the
22 liquidator, number two, and there would have to be, the liquidator would have
23 to operate on the basis of the sanction of the company that he could transfer
24 the shares to the -- sorry, he could distribute the land in specie to these,
15:08:25 25 the majority shareholders.

26
27 Now, all of that, one could reasonably respect, would be the subject of
28 documentation which would be forwarded to the conveyancing solicitor to allow
29 him to proceed on that basis and I think it is legitimate to explore with the
15:08:48 30 witness whether there was such documentation or whether in the circumstances

15:08:53 1 such documentation could have been generated if in fact Iris remained the owner
2 of the lands at the time.

3
4 That is as far as the examination of the witness went. It was to explore what
15:09:08 5 were apparent inconsistencies and obvious lack in the evidential chain which
6 led to the registration of Jackson Way ultimately as the registered legal owner
7 of the lands, although as Mr. Friel says, the registered legal ownership is in
8 itself just one of the aspects of the overall picture and of course the
9 Tribunal is concerned with the actuality, who is the owner of the land, who is
10 entitled to benefit from it.

11
12 My concern before lunch expressed to the Tribunal was that a hypothesis was
13 being advanced to the witness based on a premises that Mr. Bullock was a
14 director of this company, Iris, that firstly is something which would not
15:10:10 15 appear from any of the documentation to be the case given that documentation
16 circulated to the parties in the brief indicated that three other parties and
17 not Mr. Bullock were directors and therefore that was a concern that I had that
18 he would be invited to speculate on a situation where that speculation could be
19 ruled out in view of the actual documentation on file.

15:10:39 20
21 And secondly, that regard was not being had for the acknowledgements which were
22 made by Mr. Harker in the course of his communications with the witness where
23 he had outlined the ownership situation of the shares to Mr. Friel and in
24 particular, this letter in May of 1993 which seems to be, I suggest, running
15:11:15 25 counter to what had been previously indicated to the witness by Mr. Harker.

26
27 Mr. Harker, in fact, at no time offers in correspondence that there has been a
28 resumption of the interests of Maskani and Renzenbrinck by reason of a transfer
29 or disposition of the Iris shares to them. The only information that the
15:11:46 30 Tribunal has on file seems to suggest that the explanation which was offered to

15:11:53 1 Mr. Friel was that there never in fact had been a disposition of the
2 shareholding to the Panamanian company, that it had never gone beyond being a
3 suggestion, that it was a suggestion which was withdrawn. And if that is a
4 correct interpretation of the letter, the Tribunal is put on inquiry as to
15:12:17 5 whether that could be true, given the correspondence which pre-dated it and
6 given the statutory declarations which were sworn by Mr. Harker a year
7 beforehand which he acknowledged subsequently as being a disposition to Iris of
8 the entire shareholding of both Maskani and Renzenbrinck and that they were the
9 parties to whom the distribution in specie should be made.

15:12:45 10
11 So that is my submission.

12
13 MR. FINLAY: There's one point I wish to alert the Tribunal to. You don't have
14 to make any determination about it now, but it's critical that you are aware of
15:13:00 15 it now but because it's immensely revealing and it's this. It's a question of
16 law, that's why it's relevant now, not fact, it's a question of law. Central
17 to now -- it's clear -- central to Mr. O'Neill's analysis today and it's now
18 clear central to his approach on the 12th and 13th February is the following
19 legal assumption and that is that at any material time, at any point subsequent
15:13:41 20 to March 1992, that Iris was the beneficial owner of the lands. That is a
21 proposition of law. The first point I would like to that make that proposition
22 of law, it is a proposition of foreign law for which no authority whatever has
23 been advanced to the Tribunal.

24
15:14:12 25 It is not a proposition of Irish law and cannot be, because the transactions
26 relied on by Mr. O'Neill to assert that Iris was at any time a beneficial owner
27 of the Carrickmines lands, are transactions governed by a foreign law. It may
28 be the law of the Isle of Man, it may not. It is not the law of this country.
29 That's the first part. And you have no evidence before you of any relevant
15:14:45 30 foreign law which would support the proposition that at any stage, Iris was the

15:14:50 1 beneficial owner of the lands.
2
3 But if I just might, because of the somewhat informal way in which necessarily
4 Tribunal proceed, if I might make the following observation: I don't recollect
15:15:11 5 and I stand entirely subject to correction by any or all of the members of the
6 Tribunal in their great collective wisdom, I do not ever recollect it being
7 suggested in anything that I have come across that the owner of the shares in a
8 limited liability company is the beneficial owner of the assets of that
9 company. It's a proposition -- and I speak subject to great connection -- it's
15:15:50 10 a proposition that seems to me to run counter to the fundamental principles of
11 company law. It's not one that I recollect having seen advanced before under
12 Irish company law and I just mention that to the members of the Tribunal. It
13 might -- if my sense of that, if correct in any event may be of little
14 relevance because of the reason I have just mentioned, any suggestion that Iris
15:16:21 15 was ever the beneficial owner of these lands, is entirely dependent upon proof
16 of some relevant foreign law which has never been alluded to today.
17
18 And I mention that simply just to alert the Tribunal of the precariousness and
19 the dangers of territory into which Mr. O'Neill is inviting the Tribunal to
15:16:45 20 encroach. He has now acknowledged that the entire basis for his hypothesis, I
21 use the term advisedly, turns on a proposition or assumption that Iris, at a
22 point in time, became the beneficial owner of these lands and that's as I say a
23 legal proposition unsupported by any law of which I'm aware. I have gone to
24 some pains today as the Tribunal will have seen to bring to this Tribunal the
15:17:11 25 law, statute law, leading authorities.
26
27 What did not happen when Mr. Friel was being asked about the law was that any
28 legal authority was advanced to the Tribunal. I, in relation to the issues I
29 came to deal with today, I have done that or sought to do it, I may not have
15:17:32 30 done it very well, I have tried at least to alert the Tribunal to the relevant

15:17:36 1 statutory and other provisions and principles.

2

3 But once again, as happened on the 12th and 13th February, one sees here today

4 a reference to a purely legal proposition but not supported by any relevant

15:17:51 5 foreign law and I am merely alerting the Tribunal to the fundamental dangers of

6 proceeding on any assumption, any assumption that Iris could have been or might

7 have been or could ever have been the beneficial owner of the lands, whereas

8 Mr. O'Neill's proposition just now, his submission, doesn't proceed on that

9 possibility, it proceeds on it as a fact. If one looks back at what he has

15:18:19 10 just said, you will see that he has on several occasions referred to the fact,

11 the fact that Iris was the beneficial owners of the land. It's not a fact, my

12 Lord, it's a question of law.

13

14 CHAIRMAN: But Mr. Finlay, you are not I take it suggesting that the Tribunal

15:18:36 15 should ignore that the fact that apparently the shares were transferred to Iris

16 and may have been transferred back to Maskani and Renzenbrinck.

17

18 MR. FINLAY: No, I have dealt with or attempted to and was in the middle of

19 trying to deal with the transfer of shares. I am talking about an entirely

15:19:05 20 different matter, sir, and it's this: The transfer of the shares is one

21 matter. I say that in that regard, there may or may not, it's a matter for

22 the, perhaps for the Tribunal, perhaps not for the Tribunal, there may be a

23 missing document, there may be a missing evidence of the transfer back. I am

24 not talking about the transfer of shares at all. I am talking about something

15:19:32 25 fundamentally different.

26

27 Transfer or shares or no transfer of shares, does the owner of shares in a

28 limited liability company which owns an asset, does that owner of shares there

29 by as a matter of law become the beneficial owner of that asset? Now, in my

15:19:47 30 respectful submission, that's the point and there are two questions arising out

15:19:50 1 of that. First of all, it seems to me that in this case, which is the relevant
2 case for the Tribunal, that is essentially and only a matter of foreign law
3 because the law which governed the transaction in question is foreign law.
4

15:20:05 5 The transfer of the shareholding is a transfer of shares in foreign company,
6 probably Isle of Man and the arrangements or agreements come to the effect of
7 the declaration, the effect of the transfer is entirely a matter of foreign
8 law. That's the primary point I make. I make by way of observation in case it
9 may be of interest to the Tribunal. The observation that if we were in Ireland
10 for the purpose of all of this, I am not aware of any principle of company law
11 here which would say that the owner of shares in a limited liability company,
12 thereby because of that fact that they are now the owner of the shares becomes
13 and is the beneficial owner of --
14

15:20:52 15 JUDGE FAHERTY: Sorry Mr. Finlay, on that point. If you look at the two
16 documents, page 1111, which is the declaration sworn by Mr. Harker which, the
17 effect of which is to render Iris Developments as a point in time, in any event
18 the majority shareholder in Paisley Park, isn't that --
19

15:21:12 20 MR. FINLAY: That's indeed. Yes, indeed judge.
21

22 JUDGE FAHERTY: Now if we look at 1112, which is again sworn on the 12th of May
23 1992, now, my read of that and obviously I may well be incorrect but that
24 document will have to be effective after Mr. Harker swore 1111 and I say that
15:21:37 25 and again subject to any correction yourself or Mr. O'Neill or anybody might
26 say to me, because in that, there's no reference to Iris as a majority
27 shareholder. You see what I'm saying?
28

29 MR. FINLAY: Indeed.
30

15:21:53

15:21:53 1 JUDGE FAHERTY: So, it seems to me Mr. Harker even though in my brief one is
2 ahead of the other, that this document could only be effective if Mr. Harker is
3 making a distribution in specie of the lands, the interest in lands to Iris
4 Developments.

15:22:09 5
6 MR. FINLAY: Yes indeed.

7
8 JUDGE FAHERTY: After divesting or transferring the interests in Renzenbrinck
9 and Maskani to Iris Developments.

15:22:18 10
11 MR. FINLAY: That's, with respect, correct judge.

12
13 JUDGE FAHERTY: And that I want to ask you to address also what you say the law
14 is on this. If you take this document and I think in fairness to Mr. Friel, he
15 purported to answer one of your questions this morning but I don't think he
16 actually ever quite finished his answer.

17
18 MR. FINLAY: What was that question, can you recall?
19

15:22:40 20 JUDGE FAHERTY: If memory serves me correct, he was saying that he would be
21 concerned about the beneficial ownership because he purported as saying what if
22 Iris Developments sought to in some way to enforce this, any beneficial
23 interest they might have and what do you say is the status of this document
24 sworn again by Mr. Harker on the 12th of May in favour of Iris Developments
15:23:05 25 after he has confirmed on the same date, that Iris is now the holder of the
26 majority of shareholding and he is saying here that he has resolved to
27 distribute in specie the whole of the company's interests, that is Paisley
28 Park's interest, in Carrickmines to Iris.

29
15:23:26 30 MR. FINLAY: If you are asking me for my view of the status of the document.

15:23:30 1
2 JUDGE FAHERTY: In the light of the argument you are making and this is a
3 slightly different argument to the argument you were making in response to Mr.
4 O'Neill's latter observations.

15:23:39 5
6 MR. FINLAY: Obviously it's my personal view is it should be of very little
7 relevance to anybody, but in so far as it might be. My understanding of that
8 document is that it is simply a liquidator's resolution, a liquidator's
9 personal resolution to carry out a distribution in specie of assets of the
10 company or an asset of the company to the majority shareholder.

11
12 Now, that appears to be what the document is. Now the reason why I say that it
13 appears to be its status, it's relevant to what we have just been discussing is
14 this: With the very greatest of respect, in all of this, and the reason why I
15 mention my view with trepidation is that once again, the effect of this
16 document, the status or effect of this document, whatever it may be, is of
17 course exclusively a matter for construction under a foreign law. It may be
18 the law of the Isle of Man, it may not be. I don't know. But it's certainly
19 not -- we are talking about the construction of a legal document here. It's
15:24:28 20 not a matter for construction under any law of this country, particularly,
21 judge, as I say, the issue would appear to be this: Mr. O'Neill's very elegant
22 submissions proceed on the basis that following this document, following in the
23 sense of subsequent to this document, after this document came into existence,
24 Iris was the beneficial owner of the lands. Now, I have made an observation
15:25:31 25 about that already, two observations, but that is an important question.

26
27 If it were correct, if it were the case that this document does not create a
28 beneficial ownership in Iris of the land, as distinct from being the majority
29 shareholder in the company and a decision to distribute in specie, if that is
15:25:59 30 not the effect of all of this, then of course the basis of all of that

15:26:05 1 hypothesis falls away. But the answer to that question cannot be found in this
2 room today, can't be found from Mr. Friel, it can't be found from Mr.
3 O'Neill and it can't be found from me because as I say, it is a matter, it
4 would appear, of foreign law.

15:26:23 5
6 I think in this country, if, I think it occurs to me in this country by being
7 the owner of all the shares in a company and a decision of a liquidator's, if
8 you automatically became the beneficial owner, that might have immediate
9 consequences in terms of taxation matters, amongst others.

15:26:53 10
11 That's why I raise it as a question. There is a very important point by the
12 way and it's this. Mr. Friel when asked the question that you referred to,
13 judge, that might be have been issues about beneficial ownership, he mentioned
14 that in response to a question, there might have been some protest or claim by
15 Iris and it's relevant perhaps for the Tribunal to reflect on another question
16 which is if there had been, if there had been any question of a challenge to
17 beneficial ownership based on the hypothesis of Mr. O'Neill, it may and again
18 subject to matter of foreign law, it may be long statute barred.

15:27:09 19
20 And therefore that of course is something which should be borne in the back of
21 one's mind. If there were, in other words, anyone to come along to attempt to
22 displace the legal ownership of Jackson Way based on any of the documents, it
23 seems to me and again I speak subject to correction, that the time for so doing
24 is long past. And I am not suggesting there is anyone in that situation but it
25 seems to me, given the dates, that's a matter.

15:28:14 26
27 CHAIRMAN: Mr. Finlay, ultimately, I am sure you would accept this, ultimately
28 we have a legitimate interest to enquire as to who Iris is, who the beneficial
29 owner of Iris is, why they apparently went off the radar in the chain of
30 ownership. That's the --

15:28:34 30

15:28:34 1 MR. FINLAY: Indeed, but we are only having this discussion because I was
2 interrupted before lunch, otherwise we wouldn't be having it.
3
4 CHAIRMAN: Perhaps if we get back to.

15:28:44 5

6 Q 194 MR. FINLAY: That would be most helpful, thank you very much members of the
7 Tribunal. Mr. Friel, so if we can get back to July 1993 when you are preparing
8 the draft of the transfers of the 30th July, just taking up a point which was
9 mention in the recent discussion, you were, you received your instructions from
10 Mr. Harker, isn't that correct?

11 A That is correct, yes.

12 Q 195 And I think it's clear from the documents we have looked at, that your
13 instructions from Mr. Harker were to proceed on the basis that Renzenbrinck and
14 Maskani were the shareholders as of that time, isn't that correct?

15:29:08 15 A That is correct.

16 Q 196 And you proceeded on that basis?

17 A I did, yes.

18 Q 197 And in so doing from a conveyancing point of view, there was nothing there to
19 cause you concern, isn't that correct?

15:29:34 20 A Absolutely, yes.

21 Q 198 And as I say, just in that regard, was I correct in understanding you before
22 lunch to say that those recitals in any event, we are only talking about
23 recitals, we are not talking about the operative part, those recitals in any
24 event do not affect the transfer effected by the operative part of your deed,
15:30:03 25 isn't that correct?

26 A That is correct.

27 Q 199 And the Chairman pointed out very properly that you have essentially been
28 called to give evidence in your conveyancing capacity, isn't that correct?

29 A That is correct.

15:30:34 30 Q 200 That's why you are here. And you might just confirm that from the conveyancing

- 15:30:39 1 point of view, from the point of view of conveying the title from Paisley Park
2 to Jackson Way, there was nothing that you were aware of when you drafted the
3 deed and processed it through the land registry, which would interfere with the
4 transfer of the title from Paisley Park to Jackson Way, is that correct?
- 15:30:59 5 A That is correct.
- 6 Q 201 If we might, Mr. Friel, then move from that transfer for a moment to another
7 document and I apologise if I have got the chronology slightly out of sequence.
8 That's the -- that's a document generated in the context of application for
9 Land Commission consent, under Section 45 of the Land Act. You will recollect
10 perhaps that document being discussed in February?
- 11 A I do, yes. There were two separate ones.
- 12 Q 202 That's absolutely correct. And what I'm going to look at, if I may, with you
13 now, is the form, it's form NQ1 of the 1st July 1993. When I say that that's
14 its date, that's the date on which it was signed by Mr. Holland on behalf of
15 Jackson Way. In my copy, not having the brief reference on it, but I think
16 it's 1365, Chairman.
17 This is this is a form which needs to be filled out for Land Commission consent
18 where the vesting of an interest in land is to be in a non-qualified person, is
19 that correct?
- 15:33:47 20 A That's correct.
- 21 Q 203 And if we could just go to the second page of that form, which I think is on
22 screen, the first page, you see the section beginning with the word "Parties".
23 if we could have the next page of the form if that's possible. Page 2. Thank
24 you very much. "Parties" you see that section commencing "Parties"?
- 15:34:24 25 A I do.
- 26 Q 204 And it identifies the following "The present owner of the lands" and gives the
27 name Paisley Park and it's address and then "The person in whom the interest is
28 proposed to be vested" and at number 8 you have Jackson Way Properties Limited
29 and its address.
- 15:34:45 30 A Yes.

- 15:34:46 1 Q 205 And then there are provisions for information to be give at numbers 9 and 10,
2 you see that?
- 3 A Yes.
- 4 Q 206 Under the headings occupation and citizenship.
- 15:35:00 5 A Yes.
- 6 Q 207 But that is, those details under 9 and 10 are clarified by the narrative after
7 number 10 in the following terms "In respect of a body corporate, instead of
8 the particulars of 9 and 10, a copy of the Articles of Association should be
9 furnished and additional information as in 11 following, should be supplied
10 concerning the person having control of such body corporate".
11
12 The word "control" having the same meaning as is ascribed to it in Section
13 45(5)(b) of the Land Act 1965, see footnote and I think the reference to the
14 footnote is a reference to the box at the bottom of that page which sets out
15 the provisions of Section 45(5)(b).
- 15:35:44 16 A That's correct.
- 17 Q 208 I don't know if you at this remove can recall but you were asked questions
18 about this particular form during your evidence in February.
- 19 A Yes.
- 15:36:03 20 Q 209 And it turned on the, your evidence was concerned with the question of control,
21 you recollect that?
- 22 A I can't say --
- 23 Q 210 Very good, we'll come to that, I don't want to take you short in any way. But
24 if we might -- first of all, I would just like you to clarify for me, if you
25 wouldn't mind, before you were asked to give evidence in February in relation
26 to -- or rather to give your opinion in February in relation to this statutory
27 provision, had you any opportunity to look at any relevant case law or
28 statutory provisions affecting the section or any analysis of the section?
29 A Not really, no.
- 15:37:16 30 Q 211 And you will see that what's envisaged under number 11, which is the

- 15:37:42 1 information required to be given is information under three, sorry four
2 headings, you see that Mr. Friel?
- 3 A I do indeed.
- 4 Q 212 The name of the person, the address of the person, the occupation of the
15:37:57 5 person, and the citizenship of the person.
- 6 A Yes.
- 7 Q 213 You see that?
- 8 A I do, yes.
- 9 Q 214 And if we then look at the actual statutory provision which is at the bottom of
15:38:23 10 the page, which is as follows: "In paragraph (a) of this subsection 'control'
11 in relation to a body corporate means the power of a person to secure, that
12 means of the holding of shares or the possession of voting power in or in
13 relation to that or any other body corporate or by virtue of any powers
14 conferred by the Articles of Association or of a document regulating that of
15:39:01 15 any body corporate, that the affairs of the first-mentioned body corporate are
16 conducted in accordance with the wishes of that person."
17
- 18 So that's the definition of control for the purpose of information required in
19 this form, is that correct?
- 15:39:24 20 A Yes.
- 21 Q 215 And as is often the case, it's somewhat lengthy and rather cumbersome
22 definition but because you were asked about it in some detail in February, we
23 just might look at it again. You see that in that definition, Mr. Friel, the
24 overriding language at the beginning is the power of a person to secure, do you
15:40:10 25 see those words? Second line, "Control means the power of a person to
26 secure".?
- 27 A I do, yes.
- 28 Q 216 And would you agree that in its natural and ordinary meaning, the reference
29 there to a person is to a human person?
- 15:40:35 30 A Yes.

- 15:40:36 1 Q 217 And I think support for your view of that construction, Mr. Friel, can be found
2 within the form itself in addition to the statutory definition. If you look at
3 the particulars at 11, Mr. Friel, you see the name, the address and then the
4 occupation and the citizenship and of course neither of those pieces of
15:41:10 5 information would have any application if the person envisaged by the
6 definition was to be a corporate person, isn't that correct?
7 A That is correct.
- 8 Q 218 So, in order to complete this form, you need to identify a human person, not a
9 body corporate, who by one or other of the means described in the definition
15:42:06 10 has the power to secure that the affairs of the company are conducted in
11 accordance with the wishes of that person, isn't that correct?
12 A That is correct.
- 13 Q 219 And one of the means specified for that person is the holding of shares or the
14 possession of voting power in relation to the company in question, isn't that
15:42:38 15 correct?
16 A That is correct.
- 17 Q 220 And can you recall, Mr. Friel, the shareholding in Jackson Way?
18 A Isn't that as recited at H in the deed of transfer?
- 19 Q 221 In the shareholding in Jackson Way, if we could just look at that again now.
15:44:16 20 I'm talking, at the moment, about the shareholding in Jackson Way as distinct
21 from Paisley Park, Mr. Friel. We are concerned here --
22 A I beg your pardon.
- 23 Q 222 Not at all, it's a little confusing but for the first time now we have moved
24 away from Paisley Park, we are looking now at Jackson Way?
15:44:34 25 A Yes.
- 26 Q 223 And can you recollect or were you aware or are you aware that of the
27 shareholding at this relevant time, at this time in Jackson Way.
28 A I cannot recall, I'm afraid.
- 29 Q 224 Just want to suggest to you for the purpose of this discussion that the shares
15:45:00 30 at the time of this completion of this form, that the shares in Jackson Way

15:45:09 1 were held by Mr. Holland who completed this form. That he was the shareholder
2 in Jackson Way.

3 A He had control.

4 Q 225 Well, I was just going to come to that. I was just going to suggest to you
15:45:26 5 that was the case and that's why he filled out, he completed the form in that
6 way but as part of that, Mr. Friel, if you assume for the purpose of this
7 discussion that Mr. Holland was the shareholder, owned the shares in Jackson
8 Way at the time of this form and would you then agree that looking at the
9 definition --

15:45:58 10 A If I were to assume that, of course, yes.

11 Q 226 Sorry?

12 A If I were to assume that he was the shareholder, of course he would have
13 control.

14 Q 227 Yes. That's my point, that Mr. Jackson, that Mr. Holland is a human person,
15:46:14 15 not a body corporate as envisaged by the definition.

16 A Yes.

17 Q 228 And if he owned the shares and I merely ask you to assume it, you are not
18 committing yourself to anything by that assumption but assuming Mr. Holland did
19 own the shares in Jackson Way at the time, in your view he was the person who
15:46:33 20 control for the purpose of this definition?

21 A Oh yes, yes.

22 Q 229 And if that were the case, given the opinion you have just expressed, it would
23 be correct and appropriate for his name, address, occupation and citizenship,
24 to be inserted at number 11 on the form, isn't that correct?

15:47:04 25 A Oh absolutely, yes.

26 Q 230 I think, just to be fair to you, Mr. Friel, during your evidence during the
27 course of your evidence in February, you were asked about this as you recall,
28 you were asked about this definition and asked about Mr. Holland and you were
29 asked about a document which was put to you at that time by Mr. O'Neill. And
15:48:33 30 it was a document you may or may not recall referred to as a mandate or a

15:48:40 1 mandatory agreement, perhaps at this remove you don't recollect that?

2 A I'm afraid I don't, no.

3 Q 231 But whatever you said at that time about any such document, you are satisfied

4 today on the assumption that Mr. Holland was the owner of the shares in Jackson

15:49:05 5 Way that this form was properly and correctly filled out?

6 A On the assumption that he was the owner of the shares.

7 Q 232 Yes. And you are equally satisfied that the reference to a person in the

8 definition is for the reasons we discussed, a reference to a human person only?

9 A Yes.

15:49:22 10 Q 233 Isn't that correct?

11 A Yes, that is correct.

12 Q 234 The fifth document which Mr. O'Neill discussed with you in February was the

13 declaration of trust which we mentioned a little earlier, dated the 4th of

14 August 1993. I think it might be at page 1403 of the brief. You see that,

15:50:25 15 Mr. Friel?

16 A I do indeed, yes.

17 Q 235 I want to discuss that document with you very briefly in this context, I think

18 it's to confirm something you have already indicated in your evidence during

19 the course of the today and it's this: That declaration of trust for the

15:50:50 20 reasons we discussed already has no relevance to the registered title of

21 Jackson Way, isn't that correct?

22 A That is right.

23 Q 236 And does not affect the registered title in any way?

24 A That is right.

15:51:06 25 Q 237 So, if I might just then recap as it might be useful, on five of the documents

26 we have touched on during the day, Mr. Friel. You remember that the first one

27 was the transfer from Mr. Tracey to Paisley Park, you remember our discussions

28 about the consequences of the liquidation and the examination of the relevant

29 statutory provision and the issue of the sanction of the liquidator or the

15:52:22 30 company to the powers of the director being continued.

15:52:29 1 Can I take it that your evidence, your opinion today in relation to that
2 document is that given the case law, the liquidator was perfectly entitled, if
3 he so chose, to sanction the execution by the directors, including himself.
4 A From the case law, from the statute --

15:53:02 5 Q 238 From the statute?
6 A From the statute law, yes.
7 Q 239 And that if he did so sanction himself to do, you can see no difficulty arising
8 in relation to that transfer, isn't that correct?
9 A That is correct.

15:53:14 10 Q 240 And you are not aware of -- I don't wish to take you short in any way but
11 assuming that my statement of the law is correct, I think we saw that there was
12 no requirement in the legislation for his sanction to be in any particular form
13 or in writing, it just refers to the sanction of the liquidator?
14 A It does, that's correct.

15:53:44 15 Q 241 The second document that we looked at, Mr. Friel, was the declaration in
16 relation to a distribution in specie in 1993. And I think that you agreed with
17 me that that declaration was irrelevant for the purpose of affecting any
18 transfer of title?
19 A That is correct.

15:54:14 20 Q 242 Nothing happened as a consequence of that?
21 A That is correct.
22 Q 243 And that of course applies equally to the earlier declaration in 1992 in
23 relation to --
24 A Had no legal interest.

15:54:28 25 Q 244 No. Then in relation to the third document, which was the deed of transfer of
26 the 30th of July 1993, correct me if I have misunderstood your evidence, I
27 think we agreed that the recitals in that deed are irrelevant in terms of
28 affecting the transfer of the legal title from Paisley Park to Jackson Way,
29 isn't that correct?
15:55:07 30 A That is right.

15:55:08 1 Q 245 And do not affect the operative part of that deed which is paragraph 1 of the
2 end of --

3 A That is correct.

4 Q 246 -- page 2. In relation to the fourth document, which was the form NQ1, the
15:55:34 5 application for Section 45 consent. I understand it to be your opinion today
6 that assuming Mr. Holland to be the owner of the shares in Jackson Way and
7 given your interpretation, your view, your opinion as to the definition, the
8 meaning of the definition in terms of person, that Mr. Holland was the correct
9 person?

15:56:04 10 A On the assumption always that he was the owner of the of the shares.

11 Q 247 That he was the person in control for the purpose of the definition and he
12 therefore was the correct person to complete that form.

13 A Yes.

14 Q 248 And in relation to the fifth document, the declaration of trust, you have I
15:56:26 15 think confirmed that it was irrelevant to the transfer of title from Paisley
16 Park to Jackson Way?

17 A The registration of legal title.

18 Q 249 Yes, the registration of legal title on a transfer from Paisley Park?

19 A That is correct.

15:56:47 20 Q 250 Chairman, I think it's just five to four. There's another area which I wish to
21 explore with Mr. Friel, it's entirely separate from the areas we have discussed
22 and it will take a little time but it certainly wouldn't be finished in five
23 minutes and I wonder whether you would like me to commence or to defer until
24 tomorrow.

15:57:17 25

26 CHAIRMAN: Could you indicate, Mr. Finlay, approximately how long you might be
27 tomorrow?

28

29 MR. FINLAY: With great respect, I won't be any time tomorrow because I think
15:57:26 30 the arrangements are that other events are scheduled -- and other events are

15:57:33 1 scheduled for Thursday and we might, I think we are scheduled to resume on
2 Friday morning. That's certainly my understanding. Unless it's changed in the
3 last 24 hours or something.

4
15:57:44 5 CHAIRMAN: Well approximately how long?

6
7 MR. FINLAY: I would hope to finish in about an hour on Friday. That would be
8 my sincere hope.

9
15:57:54 10 MR. O'NEILL: I know that Mr. Friel has a concern about Friday because I being
11 a sole practitioner, he has I think matters to resolve before the commencement
12 of the vacation and I think perhaps --

13 A Thank you very much for mentioning that. That is true, your honour.

14
15:58:12 15 CHAIRMAN: Well, does that apply to every day this week or?

16 A I would be dishonest in saying no, I and I would appreciate the --

17
18 CHAIRMAN: In October?

19
15:58:27 20 MR. O'NEILL: I mean if it was only to be an hour, I think it would greatly
21 facilitate everybody if he was to continue for an hour this evening, I am
22 entirely in your hands.

23
24 CHAIRMAN: I have a meeting at half four.

15:58:42 25
26 MR. FINLAY: All I can say in relation to a suggestion of today, I have to
27 state my personal problem, I know that at this minute, there are certain
28 gentlemen arriving from London in relation to a case which starts tomorrow,
29 Chairman, who I'm due to meet about in three quarters of an hour.

15:59:05 30

15:59:05 1 CHAIRMAN: Well that seems to rule out the rest of the week for one reason or
2 another. So we might have to see you in a couple of months for an hour.
3 A I think I was supposed to come back in May, so the two months until now so I
4 have no objection to that.

15:59:21 5
6 CHAIRMAN: Well we will see if we can find a day in late September, early
7 October for to finish Mr. Friel.

8
9 MR. FINLAY: Indeed and with great respect, if I could possibly suggest early
10 October rather than late September.

11
12 CHAIRMAN: All right. Well we will see, we can organise something between the
13 solicitors. All right. Thank you.
14 A Thank you very much indeed.

16:00:11 15
16 **THE TRIBUNAL THEN ADJOURNED UNTIL WEDNESDAY,**
17 **28TH JULY 2004 AT 10.30 A.M:**
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